A Typology of Consensual Criminal Procedures: An Historical and Comparative Perspective on the Theory and Practice of Avoiding the Full Trial

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World Plea Bargaining

Consensual Procedures and the Avoidance of the Full Criminal Trial

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Chapter Eleven

A Typology of Consensual Criminal Procedures: An Historical and Comparative Perspective on the Theory and Practice of Avoiding the Full Criminal Trial

Stephen C. Thaman

I. Introduction: The Historical Roots of Procedural Diversity

A. The Historical Importance of Customary (Chthonic) Procedures: Emphasis on Victim-Offender Mediation

Throughout the history of criminal procedure there has been an ever present dialectic between two of the most important procedural forms which underlie modern abbreviated models of resolving criminal cases: the achievement of consensus between perpetrator and victim and the inducement of confessions. At the dawn of history, in customary (chthonic) communities,1 when a wrong was committed that today would be characterized as “criminal,” and the

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culprit was caught in the act, *in flagrante*, "hand-having" or "red-handed," the culprit was either summarily killed\(^2\) or, at best, hurriedly sentenced to death by an ad hoc court, where the victim or the victim's family might act as executioner.\(^3\) But in the absence of flagrancy, procedure was always accusatorial, with the victim, the victims' family or clan, or any other member of the community accusing the suspected culprit.\(^4\) The community then usually pressured the victim or the victim's family to negotiate with the culprit and his family or clan to resolve the case peaceably and avoid blood revenge and the prospect of a long-enduring feud.\(^5\) Compromise was much more important than accurately assessing comparative guilt or punishment.\(^6\) If families could not regulate the matter themselves, they would call on a mediator to resolve the dispute.\(^7\) Negotiation or mediation would usually end in the defendant and his family or clan paying compensation to the victim's family or clan. This payment, called *wergeld* or *composition* in Medieval chthonic Europe, took the form of money, livestock or other commodities.\(^8\) In this sense, guilt was collectively

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3. For such procedures in medieval Germany, see A. Esmein, *History of Continental Criminal Procedure with Special Reference to France* 302 (1913) and Weigend, *Deliktsoffer*, *supra* note 2, at 36–37.

4. At first anyone could accuse, but then accusation became a social function, falling to anyone in the aggrieved group. In the beginning, all criminal procedure was accusatorial. Esmein, *supra* note 3, at 3–4.

5. The first known Roman code, the "Twelve Tables," was explicitly aimed at avoiding private vengeance. VerSteeg, *supra* note 2, at 272. The avoidance of blood revenge or the *vendetta* was the *raison d'etre* for the entire early development of criminal law and procedure. Weigend, *Deliktsoffer*, *supra* note 2, at 13. The criminal law's aim is to impede arbitrary and uncontrolled violence in society in the form of crime and vendetta, which are both forms of self-help. It controls the former through its laws and the latter through its punishments. Luigi Ferrajoli, *Diritto e ragione: teoria del garantismo penale* 329 (5th Ed. 1998).

6. The spirit of compromise is "native to the human race." The "lay mind, especially when not involved in partisan emotion, has quick appreciation of effective compromise, and huge appreciation of the middle course which saves face on all hands." Karl N. Llewellyn & E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* 305 (1992).


8. Glenn, *supra* note 1, at 68. In Medieval Europe, *compositions* were allowed in cases of theft, seizure of land, violence, murder, illicit marriage and rape. Ian Wood, *Disputes in
felt by the family and thus induced the family to themselves deter crimes committed by their members. The harm caused by a crime was also perceived to be a harm to the group. The goal of chthonic procedures was always reconciliation and restoring the peace of the community and only incidentally, that of determining the truth. If at all possible, the entire community should try to achieve consensus in resolving the dispute. The culmination of the "procedure" was often a peace ceremony or feast.

The mediators were chiefs, elders, or just people who were respected as problem solvers, and their reputations and remuneration depended on their successful resolution of cases. Since the mediators had no enforcement power, they required consensus and community involvement to make sure the settlement was respected. Such mediation was often private, the mediator work-

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9. Glenn, supra note 1, at 68.
10. Id. at 68–69. Use of punishment or death penalties always risked stoking a feud. Diamond, supra note 2, at 293.
11. Id. at 185. On the early Mesopotamian citizen assemblies, which "functioned like a tribal gathering, reaching agreement by consensus under the guidance of the more influential, richer, and older members," see Versteeg, supra note 2, at 24.
12. In Africa, mediation was carried out by a village elder, or even "strong personalities or rich men of rank and intelligence and commanding personality." Diamond, supra note 2, at 238–41. In early European ecclesiastical law, out-of-court settlement or composition among the parties, sometimes with the use of boni homines was encouraged. Wood, supra note 8, at 9. On elders as mediators in early Jewish law, see Wesel, Geschichte, supra note 7, at 106–07.
13. In Germany, the mediator-judge, the Schultheiss, would help negotiate the wergeld or compensation and would get a cut of it, called the "peace money" (Friedensgeld). Weigend, Deliktsopfer, supra note 2, at 68–69.
14. In Homer's Iliad, it is groups of elders, rather than a king, who make judicial-like decisions: "The people were assembled in the marketplace, where a quarrel had arisen, and two men were disputing over the blood price for a man who had been killed. One man promised full restitution in a public statement, but the other refused and would accept nothing. Both made for an arbitrator, to have a decision, and the people were speaking up on either side, to help both men. But the heralds kept the people in hand, as meanwhile the elders were in session on benches of polished stone in the sacred circle and held in their voices. The two men rushed before these, and took turns speaking their cases, and between them lay on the ground two talents of gold, to be given to that judge who in this case spoke the straightest opinion." Versteeg, supra note 2, at 191.
15. Their resolution was akin to "moral suasion" rather than a judgment. Diamond, supra note 2, at 185.
ing with each side separately to reach a compromise. On the other hand, a type of mediation or arbitration would often be conducted publicly in front of the entire assembled community, or a group of elders or respected community members, who would hear the arguments of both sides and try to reach a compromise settlement. Such public decision making processes, which were common in chthonic societies, were the precursors in Europe of courts with juries and lay assessors or Schöffnen.

Criminal sanctions were mild, usually resulting in a fine or compensation, and due to the accusatorial nature of proceedings, following on complaint by the victim or the victim's family or clan, the procedures were virtually identical to those applicable to civil wrongs. Compensation was usually in a fixed number of cattle, or other livestock, or sometimes in trinkets or money, where it existed.


17. In Germanic lands, judicial power was exercised directly by the people who met in regularly held great popular courts in full assembly. Over time, however, it was only the most experienced and oldest men of the community, the Schöffnen, who took over the role of judges. Esmein, supra note 3, at 32. In Sumeria, as well as in ancient Jewish law, the entire male population would participate in such proceedings before the city gate. Wesel, supra note 7, at 107–08. Adjudication by people's assembly, or a collegium of elders are indicative of a transition from a clan structure to an early class society. A.V. Smirnov, Sotsial'nost' protsess 47(2001).

18. Courts in chthonic times were often presided by a tribal chief, a king or heads of local communities, but leading members of local families had a right and duty to serve as members of the court, and anyone present could participate. Diamond, supra note 2, at 273. These courts then gave way to trials by sworn neighbors in places as diverse as England and Ethiopia. Id. at 391. These early popular judges in European tribes decided both the identity of the culprit and his or her moral responsibility or guilt. Esmein, supra note 3, at 5.

19. Cesare Beccaria, Dei Delitti e Delle Pene 65 (4th ed Feltrinelli 1995). Diamond, supra note 2, at 228, for this reason characterizes homicide as a "civil" wrong in chthonic societies. On the lack of distinction between civil and criminal procedure in Medieval French law, Esmein, supra note 3, at 55. Codes provided for fixed amounts depending on the injury suffered by the victim, whether loss of life, a limb, a "smile-tooth," etc. Ferrajoli, supra note 5, at 449 (fn. 136).

20. On the use of cattle or goats. Diamond, supra note 2, at 228. On the usefulness of compensation in terms of livestock, because, quoting Tacitus, "enmities are very dangerous for a free people." 2 Montesquieu, De L'Esprit des Lois 152 (GF-Flammarion 1979).

21. Under the law of the Angles, schedules of payment in money existed, but one could replace it with livestock, wheat, furniture, arms, dogs, birds of prey and land if one lacked the money. Id. at 339–40. On the replacement of cattle by weapons among the Nuer, as a result of the decades-long civil war in Southern Sudan. http://en.wikipedia.org/wiki/Nuer.
There were few death penalties, because the loss of a member of the community was always the last resort, for the strength of chthonic communities, its ability to reproduce itself, was in numbers. A loss of an able-bodied person meant a loss of a protector against the communities’ enemies and a loss of productive capacity. The killing of the flagrant criminal caught in the act of committing a crime was, in one sense, more of a justified or excused killing than a punishment. For in Western law, a killing to stop the commission of a felony was traditionally justified, and a killing in rage after the commission of a felony would at least be excused, partially or completely, as having been committed in the heat of passion. Juries also would usually acquit those charged of homicide in such cases. Actual killing of “criminals” not caught in the act, was, oddly enough, not reserved for homicide, as it usually is today, but for witchcraft, incest and recidivist theft. If a “consensual” resolution could not be achieved, chthonic communities often resorted to irrational and sometimes painful forms of “trial,” which can be seen as the primordial precursors of modern procedural paradigms. A certain class or tribe bias can also be seen in these procedures. When the evidence was not clear, i.e., there was no flagrancy or not a sufficient number of witnesses, the suspect could utter a cleansing oath attesting to his innocence. An oath was seen as acceptable, because these peoples truly believed that someone who falsely swore would face eternal damnation.

Many communities required the defendant to summon a number of friends or tribe members (often in a multiple of twelve), so-called oath-helpers or compurgators, to swear to his honesty or uprightness. According to Monteseguev, Vol. II, supra note 20, at 234–35. Both accusatorial compensatory justice

22. Method of execution was usually by lynching, public stoning or drowning. DiamonD, supra note 2, at 228. A chthonic “three-strikes rule” could be found among the Creek Indians, who executed a thief following the third violation. Id. at 222.


24. In Tibet, the Dharma Protectors would severely punish a liar. French, supra note 23, at 133. In Europe, the oath of purgation became common with the diffusion of Roman law and the adoption of Christianity. Diamond, supra note 2, at 300.

25. The number of oath-helpers required in Saxon “wagers of law” rose from three, for minor crimes, to twelve for more serious ones. Repp, supra note 23, at 21, 38. Among the Riparian Franks and other Germanic tribes, the number of oath-helpers could rise to 72. Monteseguev, Vol. II, supra note 20, at 234–35. Both accusatorial compensatory justice
sequieu, this procedure was suited to simple people with a "certain moral candor." In some communities the swearing took on an adversarial tinge when the victim was also allowed to rebut the defendant's oath helpers with his own. These groups of sworn witnesses, who had to be unanimous in their assurance of the trustworthiness of accused or accuser, represented primordial forms of early unanimous trial juries, which were expected to have knowledge of the facts of the case, i.e., were still considered to be "witnesses." But this form of trial was only open to "honorable" or upstanding citizens, and not outsiders or the poor.

The latter would have to engage in the painful, and sometimes deadly divine ordeals. The ordeals usually consisted in holding or walking on hot metal, reaching one's hand into boiling water or oil, or being thrown into a cold body of water, and seem to me to be a primordial forms of inquisito-

and oath-taking were part of Bedouin customs, and were incorporated into early Muslim law. Vogler, supra note 16, at 106. The Reinigungseid in Germanic societies, which was often supported by oath helpers, went not to prove the facts of the case, but the credibility of the accused. Weigend, Deliktsopfer, supra note 2, at 34.


28. The precursor of Scandinavian juries, the thing, would meet in the open air at a sacred place, and had legislative and judicial functions, "more like the house of lords than the house of commons." Repp, supra note 23, at 45–47. On the importance of "rose gardens" in early Germanic societies as places of games (likely trials by battle, duels, perhaps ordeals) and places of legal decision-making. Kurt Ranke, Rosengarten, Recht und Totenkult 10 (1951). Early juries were a means to discover truth for the plaintiff, whereas the "wagers of law" were a means to disprove the falsehood of an accusation. The wagers of law had to be unanimous, whereas the early Scandinavian juries could decide by majority vote. Jurors had to be from the venue of the conflict, whereas "conjuratores" could be from anywhere. The unanimous English jury is probably a mixture of these two forms. Repp, supra note 23, at 136–45.

29. Ordeals were usually used in the absence of proof, but among some European tribes the ordeal was used to deter lying under oath. Diamond, supra note 2, at 228, 296. Ordeals were used almost everywhere, "from Iceland to Polynesia, from Japan to Africa." Robert Bartlett, Trial By Fire and Water 2 (1986). A possible exception was China. Diamond, supra note 2, at 228, 390.

30. Or, in Liberia, having a hot cutlass put on one's back to see if it scarred. Esther Warner, A Liberian Ordeal in Law and Warfare 271 (Paul Bohannon ed. 1967).

31. id. In Tibet, one used a hot stone, hot oil, hot muddy water or a hot iron. French, 131. The Germans and the Kikuyus in Kenya used both the hot iron and hot water. Diamond, supra note 2, at 270.

32. Id. at 300. On the Mesopotamian "divine river ordeal," see VerSteeg, supra note 2, at 66.
rial procedure, in an attempt to coerce from the body, rather than the conscience of the suspect, a sign of guilt (which was interpreted as coming from God). The ordeals were a form of popular spectacle which killed two birds with one stone: they provided diversion to the community in the form of witnessing a miracle, and resolved a dispute. Sometimes the ordeals were more akin to a pretrial death penalty, such as that of drinking a poisonous substance. In the ordeals and trial by battle we see early forms of Verdachtsstrafe, or punishment of the suspicious through the functioning of the procedure itself, regardless of whether they were in the end found to be innocent or guilty. In trial by cold water in Europe, curiously, the “innocent” probably suffered more during the procedure than the “guilty” though this was not the case in ancient Babylon. Thus, the thought of even having to go to “trial” in these times might have been more of a deterrent than any punishment that might result from a guilt-finding.

Trials by battle, duels, singing contests, or other quasi-adversarial procedures were also used to resolve unmediated disputes, and here one can see

33. MONTESEQUIEU, Vol. II, supra note 20, at 240, saw trials by ordeal and battle as being “more unreasonable than tyrannical.” For an opinion that the ordeals were “ac­cusatorial,” because after bringing suit the parties are just passive, waiting for the result. SMIRNOV, supra note 17, at 38.

34. And like all “show-trials,” they were likely pre-scripted, in the case of ordeals by the priest, who was often partial to one of the disputants either due to likely innocence, or to having received a bribe. REPP, supra note 23, at 14.

35. Such as the “sasswood” ordeal in Liberia, Warner, supra note 30, at 271. On the ordeal by poison in witchcraft cases. DIAMOND, supra note 2, at 298. On the death penalty as a continuation of the deadly ordeals, Ferrajoli, supra note 5, at 430 (fn. 83).

36. The “innocent” sank, whereas the “guilty” floated in Europe. BARTLETT, supra note 29, at 23. In Hammurabi’s Babylon, the innocent person floated, whereas the guilty sank.

37. In Europe, trial by battle was found in the early law codes of many Germanic peoples, BARTLETT, supra note 29, at 103. Among the Eskimo, this could be in the form of boxing, wrestling or head-butting. E. Adamson Hoebel, Song Duels Among the Eskimo, in LAW AND WARFARE, supra note 30, at 255–56. Cf. DIAMOND, supra note 2, at 193. Among the Ifugao in the Philippine highlands, wrestling was used in land disputes, with the borders being determined by where the winner overpowered the loser. R.F. Barton, Ifugao Law, in UNIVERSITY OF CALIFORNIA PUBLICATIONS IN AMERICAN ARCHAEOLOGY AND ETHNOLOGY, Vol. XV 97–99 (A.L. Kroeber ed. 1919).

38. In Tibet, singing duels, fights or even rolling the dice would be used by families of plaintiff and defendant to resolve a dispute, even before mediation would take place. These games of chance were accepted due to the belief that all results were anyway determined by karma and thus had approval of the gods. FRENCH, supra note 23, at 121, 130. In an interesting twist, many critics of jury trial now speak in terms of “rolling the dice” at jury trial,
the primitive beginnings of the role of a representative or attorney in the form of the “champions” who could be hired to pitch battle on the behalf of the parties. Trial by battle was usually not available for outsiders or commoners, who were forced to resort to the painful ordeals. The victim could also propose a duel to challenge the veracity of a cleansing oath or its supporting oath-helpers.

In these early forms of procedural diversity, “different strokes for different folks,” we find a reality that repeats itself throughout the history of criminal procedure: the existence of (at least) two parallel systems of justice, one for the “good guys” and one for the “bad” or the “enemy.” Enemy criminal law in chthonic times applied to outsiders, those who were not members of the tribe, or those who engaged in witchcraft. We will follow this phenomenon through the ages with procedures against “highwaymen” or robbers, with different procedures for the nobility and the peasant, rich and poor, for normal crimes and political crimes, so-called “organized crimes” and finally terrorist crimes. Punishments for commission of the same crime were different, depending on the class or caste to which one belonged. The seemingly new field of “enemy criminal law” has its roots deep in the foggy pre-history of procedural law. In modern times, we often see a favoring of white-collar defendants with their high-paid lawyers in the use of consensual proceedings which lead to mitigated sentences or diversion.

as an alternative to a predictable result following a plea bargain. On lampooning singing duels among the Eskimos, DIAMOND, supra note 2, at 193; Hoebel, supra note 37, at 256–60.

39. On the use of “champions” to represent one in a duel or battle, DIAMOND, supra note 2, at 306, or in singing contests. Hoebel, supra note 37, at 257. On the relation of sport with the resolution of proto-legal disputes, in general, see RANKE, supra note 28. On the role of the judge as a “second” in a trial by battle, ESMEIN, supra note 3, at 6. Treating trial by battle as a precursor of our modern adversarial system, seen as a “sporting theory of justice,” Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, Address delivered at annual convention of American Bar Association (1906), reprinted in ROSCOE POUND, ROSCOE POUND AND CRIMINAL JUSTICE 64 (Sheldon Glueck ed. 1965).

40. WEIGEND, DELIKTSTOPFER, supra note 2, at 35.

41. In Ancient India, a low caste sudra could have his tongue cut out, or have a red-hot nail or oil poured into his mouth, whereas a brahman would be punished by a fine. For adultery, sudras risked death, being devoured by dogs, burned to death on a red-hot iron bed, or in hot grass, but brahmans would only have their head shaved. 25 THE LAWS OF MANU 267–72, 359, 371–72, 377 (G. Buhler trans., Oxford 1886), available at http://www.sacred-texts.com/hin/manu/manu08.htm (The Manu Smriti). Even Beccaria noted the need for more painful punishments for the poor than the rich, FERRAJOLI, supra note 5, at 385–86, 443 n.118.

42. For instance, in the Netherlands, Brants, ch. 6, at 184.
Thus, to summarize (and engage in perhaps oversimplified generalizations), chthonic systems showed a clear preference for negotiation, mediation and resolution of non-flagrant criminal cases involving their own or neighboring kinfolk to avoid any ensuing violence, either in the form of imprisonment or killing of suspects, or in the form of blood-revenge or feud. Confessions were treated as mitigating and necessary to remove the ulcer or smell caused by the crime. Only when such compromise was not possible, did one resort to violence, in the forms of the ordeals, duels and battle.

B. Monarchic Centralization, Politicization of Criminal Law and Decline of Victim-Offender Mediation in Europe: Emphasis on Procedural Coercion of Confessions

As kings and other potentates began to consolidate their power over local kinship-based communities, and nations began to develop, the use of victim-offender mediation, oaths, duels, and trial by battle gradually vanished and the procedure became politicized with the state or the king becoming the “victim” of the wrongful act, which could now really be labeled as “criminal.” Communities no longer regulate themselves based on commonly accepted morals and law, as a system of state-domination separates itself from moral-

43. Among the Ifugao in the Philippine highlands, a confession made after accusations will lead to considerable mitigation, except in homicide and adultery cases, and a confession to theft may eliminate guilt if the suspect makes a payment of a large pig or chicken. Failure to confess results in an ordeal, and the loser will owe a pig. Barton, supra note 37, at 66. Among the Nuer, a fine of twice the blood-wealth was required for non-confessed homicide. P.P. Howell, A Manual of Nuer Law 59 (1954).

44. Among the Nuer in the Southern Sudan, existence of a blood-feud between two groups was thought to cause contamination between them, and failure to immediately confess would mean members of the groups, unaware of the contamination, would violate tabus, and any illnesses and death which occurred between crime and confession would be blamed on the culprit. Id. at 52–53, 206.

45. On this transition, Diamond, supra note 2, at 339; Wesel, supra note 7, at 54. One reason offered for this transition in Europe was that the Carolingian kings could not profit from crime through fines if the disputes were worked out privately. Weigend, Deliktsopfer, supra note 2, at 43–51. The victim only remained as a private plaintiff in the attached civil action. Victim-offender composition was only possible for the minor offenses which are, in many European jurisdictions, still subject to private prosecution. Esmein, supra note 3, at 218–19. On the notion that the solidarity of agnatic, segmentary societies was a hindrance to central domination. Wesel, supra note 7, at 54.
ity.\textsuperscript{46} Thus, what was originally a secret system of official investigation of victimless crimes against God in church law\textsuperscript{47} which was applied to crimes of \textit{lèse-majesté} and other crimes against the state by the secular authority (without a true victim-plaintiff there could be no accusatorial, adversarial trial!), was gradually applied to even customary crimes against the person or property. The victim gradually disappeared as a party in criminal procedure.\textsuperscript{48} For a time, on the European continent, two parallel procedures existed, the “ordinary” one with public trial for cases with a victim-accuser,\textsuperscript{49} and the “extraordinary,” much quicker, secret procedure, which permitted torture, for victimless crimes against the state or church or heinous crimes committed in secret for which there was no confession.\textsuperscript{50} The inquisitorial approach based its new and Draconian punishments on the more utilitarian notion of “upholding the law” whereas the customary adversarial approach saw punishment as satisfying the needs of the aggrieved party.\textsuperscript{51} The new inquisitorial method was also thought to be necessary for the new type of “professional” criminals, such as robbers and “highwaymen” who prowled the countryside picking on people.\textsuperscript{52} This was

\begin{itemize}
\item \textsuperscript{46} Id. at 59. Or one can see the customary morality-based self-organizing procedures as just a different kind of “law,” as “pre-state law.” Id., at 65–66.
\item \textsuperscript{47} According to Montesquieu, Vol. 1, supra note 20, at 330, things which “injure divinity” do not constitute material for crime, for there is no act, no “material for crime.” “All goes on inside of the person,” thus making the inquisition unnecessary, destroying the liberty of citizens. For actual secret criminal acts “one needs a secret judiciary; because the crimes which they punish, always profound, are formed in secrecy and in silence. This judiciary needs to have a general inquisition; because it does not need to stop the evils which it recognizes, but to prevent those which it does not know.” Id. at 137–38. According to Voltaire, L’Affaire Calas et Traité sur la Tolérance, in L’Affaire Calas et autres affaires 171 (Gallimard 1975)：“Wherever there is an established society, religion is necessary; the laws watch over the known crimes and the religion over the secret crimes.” On the secret victimless crime of heresy and how it required a new procedure. Vogler, supra note 16, at 25. The procedure in ecclesiastical courts for heresy and magic was the most “ferocious” and required the forced cooperation of the accused. Ferrajoli, supra note 5, at 577.
\item \textsuperscript{48} State policy in fighting crime needs to categorize crime according to distinct types and since the interests of victims and defendants are to minimize loss, maintain honor, and continue to function in the community, the state had to reduce the impact of victims to attain its goals. Weigend, Deliktsopfer, supra note 2, at 94.
\item \textsuperscript{49} In which, gradually, part of the composition or wergeld would go to the ruler in the form of a fine. Wesel, supra note 7, at 54.
\item \textsuperscript{50} Esmein, supra note 3, at 126–28, 146. Here we see a precursor of the confession-related procedural economy inherent in plea bargaining and other modern consensual procedural forms.
\item \textsuperscript{51} Id. at 13.
\item \textsuperscript{52} Weigend, Deliktsopfer, supra note 2, at 56.
\end{itemize}
an early example of separate procedure (and punishments) for the "good" citizens and the lawless outsiders. To the extent victims still remained as plaintiff-accuser in Medieval Europe, there existed an effective deterrent to them exercising these procedural rights. In many systems, if the defendant was acquitted, the victim was subject to the same punishments the law provided for the defendant upon conviction.53

The bodies of lay judges, elders, or witness-juries either became co-opted and integrated into a system under the control of royal judges, as in England or for a time under the rule of Charlemagne,54 or gradually disappeared, yielding to courts completely in the hands of a professional royal judiciary, as on the European continent.55 The English grand jury developed from an inquisitorial body of citizen-witnesses who were obliged to report back to the king about their own knowledge of unlawful events in their bailiwick.56 This institution likely developed from similar canon law inquisitorial bodies that were also used by the French and German kings.57 Perhaps the only residue of lay participation on the European continent remained in the figure of the civilian witness, the Schöffne whose only function was to witness official acts by the investigating judges. In the course of this politicization of criminal procedure, two different systems replaced the old chthonic procedures: trial by jury in the British Isles and inquisitorial trial by professional judge on the European continent.58

53. Id. at 86.
54. Charlemagne found the system of Schöffne already in existence when he assumed power and co-opted this old Germanic court form to his needs. The Schöffne decided both facts and guilt. ESMEIN, supra note 3, at 32.
55. The German Schöffengericht disappeared in the 1400s and the lay judges were glad of it. Id. at 303. A defendant could no longer rely on his friends as compurgators, unless they were actual eyewitnesses to the crime. WEIGEND, DELIKTSPFER, supra note 2, at 88.
56. The grand jury was no longer an institution of popular sovereignty, but "an oppressive exercise of the highest powers of government." JOHN HENRY DAWSON, A HISTORY OF LAY JUDGES 119 (1960).
57. Thus the "Inquisitio" in the Carolingian period soon merged in France with testimonial proof introduced in 1260: "Those people who are likely to know about the offense shall be summoned without delay, to the number of 24 at least, such as are not suspected (of bias) from like or dislike ... the most capable and the most honorable in the place where the offense was committed." This "jury de dénonciation" eventually gave rise to the English grand jury. ESMEIN, supra note 3, at 65–67, 323. A similar procedure in Germany was called the Rügeverfahren. A person thus charged could defend himself with a cleansing oath. WEIGEND, DELIKTSPFER, supra note 2, at 47–48.
58. On the gradual transition from private resolution of disputes with compensation, to the grand jury or Rügeverfahren, then to a judge-like figure, the Schultheiß, collecting a part of the fine on behalf of the state, and finally to the Inquisitionsverfahren, Id. 74.
The profound skepticism in relation to witness testimony, circumstantial evidence and the ability of men (i.e. judges) to judge other men, which can be found in ancient religious texts and made its way into the continental European procedure through the Catholic canon law, made it extremely difficult to prove guilt in criminal cases. Formal rules of evidence, preventing conviction in the absence of the testimony of at least two male, Christian eyewitnesses, etc., were perceived as a check against royal judges using their discretion to convict on less than clear evidence.

Continental procedure, without the inherent legitimation provided by judgment by the whole community, or at least upstanding witnesses or jurors, resorted to almost complete reliance on confessions to prove guilt. In essence, the procedure was designed to induce confessions of guilt, and impose punishment, instead of reconciliation of the parties and peace, as in chthonic times. Of course, if the suspect was captured in suspicious circumstances which were not sufficient under the formal rules of evidence to justify conviction, and refused to confess voluntarily, he or she would be subject to a variety of methods of torture, from the “mild” to the excruciatingly painful and even deadly. Suspects would also routinely be tortured to discover the names of accomplices.

59. The great Jewish sage Maimonides wrote that God had ordained: “that no punishment may be imposed unless there are witnesses who testify that they have clear and indubitable knowledge of the occurrence and it is impossible to explain the occurrence in any other way. If we do not impose punishment even on the basis of a very strong probability, the worst that can happen is that a transgressor will go free; but if we punish on the strength of probabilities and suppositions, it may be that one day we shall put an innocent person to death, and it is better and more desirable that a thousand guilty persons go free than that a single innocent person be put to death.” Quoted in Nagar v. State of Israel, 35(i) P.D. 113 (Ct. App. 1980), reprinted in MENACHEM ELON ET AL., JEWISH LAW (MISHPAT IVRI): CASES AND MATERIALS 201 (1999). The European Inquisitionsverfahren adopted the two-witness rule from Catholic canon law. WEIGEND, DELIKTSOPFER, supra note 2, at 89.

60. According to ESMEIN, supra note 3, at 61, it was nearly impossible to convict a suspect, not arrested in flagrante who denied guilt.

61. On the notion that the formal rules of evidence, despite their attempt to secure a more rational basis for conviction, were just as irrational as the early Medieval ordeals, FERRAJOLI, supra note 5, at 114.

62. Ancient Jewish law, as manifested in the Babylonian Talmud and texts of Maimonides, provided that “a person cannot make himself to be a wrongdoer.” ELON ET AL., supra note 59, at 203–06. On the other hand, as in inquisitorial Europe, Islamic law also relied heavily on confessions due to the practical impossibility of satisfying its witness requirements. VOGLER, supra note 16, at 114.

63. For example, to prove any fact, two eyewitnesses were needed: testis unus, testis nulus. Hearsay witnesses could never provide full proof. ESMEIN, supra note 3, at 259.
plices, a practice which is the precursor of modern “cooperation” agreements in connection with guilty plea arrangements.

But, unlike in chthonic procedure, confessions did not necessarily mitigate. The remorseful confessor would be executed anyway, the only mitigation being the possibility of last rites being given by a priest. Thus, as with the chthonic ordeals, the suspicious were subject to the Verdachtsstrafe of torture regardless of whether they submitted, confessed and were found guilty, or resisted, and were sent into the limbo of the “not-convicted.” The theoreticians of this procedure tried to render these coerced confessions “voluntary” by requiring their repetition without coercion in court. Of course, if the defendant retracted the tortured confession, he would again be tortured. The convicted, many of whom were, of course, innocent, were then subjected to “cruel and unusual” punishments and death penalties. Unlike in chthonic communities, in the feu-

64. Id. at 380–82.
65. One can see a direct connection between the chthonic ordeals and the inquisitorial use of torture in Europe. Ordeals were often used in cases involving “secret” crimes for which there were no witnesses, such as witchcraft and adultery, but, as with inquisitorial procedure using torture, was gradually extended to other crimes. DIAMOND, supra note 2, at 298. Torture has been seen as both the judicialization of the ordeal, Vogler, supra note 16, at 25, or its “secular presentation.” SMIRNOV, supra note 17, at 33. See BECCARIA, supra note 19 at 62 (4th ed Feltrinelli 1995), for the view that: “This infamous crucible of truth is a still extant monument of the ancient and savage legislation, when the ordeals of fire and boiling water were called “judges of God.” On the relation of torture to ancient trial by battle, Foucault wrote: “between the judge who orders the quaestio and the suspect who is tortured there is a kind of chivalric combat” where the latter “wins if he holds on and loses is he confesses.” Cited in FERRAJOLI, supra note 5, at 167 (fn. 33).
66. Resistance to torture did not mean full acquittal, for the suspect would remain imprisoned in case future witnesses came forward to accuse, and this long imprisonment would be punishment “for the bad presumption.” ESMEIN, supra note 3, at 129–30. Thus, suspicion led to coercion of a confession in the old days, or to the initiation of plea bargain negotiations today. John H. Langbein, Torture and Plea Bargaining, 46 U. Chi. L. Rev. 3, 12–13 (1978).
67. BECCARIA, supra note 19, at 63. Langbein, Torture, supra note 66, at 14, compares this situation with the striving of American courts to show the “voluntariness” of plea bargains.
68. On the conviction of the innocent, BECCARIA, supra note 19, at 62. La Bruyere said: “Torture is a wonderful invention and may be counted upon to ruin an innocent person with a weak constitution and exonerate a guilty person born robust.” And further: “I might almost say in regard to myself, ‘I will not be a thief or a murderer’; but to say, ‘I shall not some day be punished as such,’ would be to speak very boldly.” ESMEIN, supra note 3, at 352, 380.
dal late medieval and Renaissance European states and mini-states, rulers (and their justice systems), treated the common people like lesser-creatures, not just serfs or slaves, but animals. The authority of the father over his strayed (black) sheep, included that of liquidation, something unthinkable in chthonic society.

With the creation of a large bureaucracy staffed by legally trained judges in charge of court procedure and with formal rules of evidence, Continental European law developed the notion of itself as a "science," yet the secret of its "science" was that it made it a neater tool of repression than the old popular based courts. Trials were secret and based entirely on written documents in the case dossier, which was pushed along from investigating magistrate to the review magistrates, the system being based on the higher court judges accepting the evidence gathered by the investigating judges on full faith and credit and not substituting their own analysis for that of the judge at the previous level. One could call the inquisitorial method administrative, rather than "judicial," if by the latter term one refers to litigation carried on in front of an impartial adjudicator. Ironically, only with the advent of writing, the printing press, and a class of learned officials, could the public oral trials of chthonic times be turned into a secret and insidious affair of state. A lasting product of European inquisitorial procedure was the creation of a state official, the procurateur

69. The "right solution" was based on "textual analysis and logical penetration of its meaning." Law "came increasingly to be regarded as a self-contained, or closed system—a "science." MIRJAN R. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY 31 (1986). This science "needed no illumination" because it was a science of text. NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT 48 (1995).

70. ESMEIN, supra note 3, at 8. According to Vogler, supra note 16, at 20, the "ideology and ruling dynamic of inquisitoriality is not law but rational deduction and forensic enquiry. in one sense, this neutrality has contributed to the longevity of inquisitorial method, making it a convenient vehicle for ideologies as diverse as the scholastic logic of the Roman-canon procedure, Islamic theology, the royal absolutism of the Code Louis, bourgeois individualism under the Napoleonic Code d’Instruction Criminelle and even Soviet "social defence." On the notion of the inquisitorial judge as the omniscient, omnipotent monarch in judicial form, WEIGEND, DELIKTSOPFER, supra note 2, at 91. On criminal procedure of this epoch as a "science of horrors," FERRAJOLI, supra note 5, at 578.

71. In reality, the transcript of interrogations passed along in the file was only a select summary, prepared by clerks "to their liking," and magistrates did not necessarily read the transcript or file due to the faith placed in the earlier judicial cogs in the machinery. ESMEIN, supra note 3, at 281. On how the inquisitorial appellate structures facilitated central control of the provincial court systems. VOGLER, supra note 16, at 31.

72. On the equation of state-dominated forms of justice with a bureaucratic-administrative tendency. Id. at 14.

or fiscal, as prosecutor of criminal cases on behalf of the crown or the state and the development of the principle of official prosecution, which has been adopted by nearly all systems regardless of their adversarial or inquisitorial form.\footnote{Smirnov, supra note 17, at 8.}

Things were different in Britain, but the procedure also worked to get criminal defendants to talk at their trials. The English kings made compromises with the chthonic institutions which existed in England in 1066, and imported chthonic Norman practices, which led to substantial differences with the system which developed on the European continent. Compared with the supposedly comprehensive investigation of the crime in continental jurisdictions, all that occurred in England was a cursory questioning by the justice of the peace of the suspect and the witnesses, victims or “bringers,” who arrested the suspect, theoretically for the purpose of determining whether to release the suspect on bail while awaiting jury trial. This is the early precursor of the pretrial interrogation of the suspect in Common Law jurisdictions\footnote{For a view that the interrogation by the justice of the peace was analogous to the compelling of testimony before Star Chamber, Esmein, supra note 3, at 341.} and, though the accused was not sworn and heard as a witness at trial, the justice of the peace could, and often did, read this declaration to the jury.\footnote{On the role of the justice of the peace in questioning the detained suspect, and in testifying at trial, John H. Langbein, The Origins of Adversary Criminal Trial 41–43 (2003).} Torture was a rarity in England, yet it is accepted that the justice of the peace used coercion or at least took advantage of the helplessness of the suspect to get him to talk.\footnote{Langbein, Origins, supra note 76, at 49–51.}

With the exception of torture, the pretrial situation of the suspect in England was just as horrible as on the continent.\footnote{Vo格尔, supra note 16, at 132–33.} Suspects who were not bailed (and all suspects of serious felonies were denied bail), waited anywhere from six months to a year for their trial in frightful dungeons where disease was rampant, and when they finally came to trial they were literally already on their deathbed, weak, and completely ignorant about the charges, which were only revealed to them at the start of trial. Like on the continent, they had no access to counsel and had to spontaneously react to the accusations of the victim or other witnesses at trial in order to avoid the equally horrible death penalties which awaited all convicted felons at the time.\footnote{Another aspect which remained from chthonic procedure, was the role of the victim as prosecutrix at trial and the
open confrontation of defendant and victim (or victim’s relatives) before the jury. This public altercation form of justice has ancient roots and still existed in this early form of English trial before the lawyers arrived.  

Thus, in a way, the procedure also compelled them to speak and John Langbein calls the jury trial of Old England, the “accused-speaks-trial” to describe this situation. Yet whatever the defendant said to the jury, whether in the form of denial, admission coupled with remorse, or admission with mitigating circumstances, could potentially lead to a mitigated sentence, and even to a non-appealable acquittal by the jury. This compromise with the chthonic past, the maintenance of the self-informing inquisitorial jury and its development into the trial jury, provided a way out for peons in the British Isles. Though no formal rules of evidence constrained the freedom of the jury to convict on the testimony of one eyewitness, or circumstantial evidence, as on the continent, the jury provided a space for discretion (or opportunity) which vanished on the other side of the English Channel with the elimination of popular judges. The jury gave popular legitimation to verdicts of guilt and innocence, which may have led to conviction of some innocent persons based on circumstantial evidence, but certainly no more than were convicted based on false tortured confessions ordered in the light of similar evidence on the continent.

While in England there appears to have been no “plea of guilty” in the early years of jury trial which would have led to dissolution of the jury and judicial pronouncement of sentence, the seeds of such an institution are seen to have existed in the proclamation of “benefits of clergy” which resulted in a suspect not being subject to the death penalty. Here we have another example of class justice, the other side of “enemy criminal law.” In an agreement between crown and clergy, it was agreed that all priests convicted in the secular courts would be turned over to the church for punishment, and the church was prohibited from imposing the death penalty. (Interestingly enough, the Church on the continent had no compunctions about turning over people they had convicted in their courts to be executed by secular authori-

80. Id. 47–51. Parallels can be seen in early French law, where the accused had to answer an oral accusation on the spot. Silence was tantamount to a confession. In “primitive systems of law” as in their later inquisitorial successors, the confession was the “queen of evidence” and the key to procedural economy. In the words of Beaumanoir: “This proof is certainly the best and clearest, and the least expensive of all.” Esmein, supra note 3, at 56–57.

81. Langbein, Origins, supra note 76, at 64.

82. Id. at 19. But for claims that guilty pleas following altered indictments led to benefits of clergy as early as 1587–1590, thus marking the beginning of “plea bargaining,” George Fisher, Plea Bargaining’s Triumph 243 (2004), citing J.S. Cockburn.
ties). Since priests were usually the only people with an education, who could read or write, benefit of clergy began to be given to anyone who could read and write, being thus transformed into a form of sentence bargaining for the educated, who were usually from the upper classes. In some senses this was almost like probation, for the person facing charges for a "clergyable offense," such as manslaughter rather than murder, who was indeed granted "clergy," would be branded, so that if the offense were committed again, the benefits would be denied.83

Thus, both in England and on the European continent, coercion was used to compel the defendant to co-operate in his own prosecution, and these systems replaced systems which tried to induce or coerce victim-offender mediation. In England it was the justice of the peace who interrogated the suspect and then could testify to the content of the suspect's statement at trial.84 It was the confession, of course, rather than a mere inducement to testify, which was the goal of procedure on the continent. Like the guilty plea, the confession has always been the quintessential vehicle for simplifying, expediting and abbreviating both the pretrial and trial phases of criminal procedure. With a confession, law enforcement organs need not gather further evidence, except for the minimal evidence needed to "corroborate" the confession.

Though the monarchies on both sides of the English Channel felt they needed disproportionately gruesome punishments to consolidate their domination, and deter crime,85 the more subtle approach of the Norman rulers of England in co-opting pre-existing chthonic structures and not over centralizing the administration of justice, led to the lion's share of decisions being made by non-professional justices of the peace and jurors on a local level. In England, where no appeals were allowed against the popular jury verdicts, the system functioned with just twelve royal judges at a time when the bureaucratic, stratified French system counted their royal judges in the thousands.

84. "The predicament of a passive and undefended accused faced with an all-powerful judicial inquisitor, differed little from that of his or her continental counterpart." Vogler, supra note 16, at 135.
85. This disproportionate deterrence was necessitated by the state's woeful inability to prevent and prosecute crime. Weigend, Deliktsopfer, supra note 2, at 65–66. On the "extraordinarily severe and horrible punishments," see Wesel, Geschicchte, supra note 7, at 54.
C. An Asian Detour: Official and Non-Official Systems of Dispute Resolution: Emphasis on Staying Out of Court

Although this book sadly lacks country studies dealing with consensual procedures in modern Asian and Islamic (or African) legal systems, a legal culture has developed in much of the East which is remarkably different from that which exists in the West. Whereas in the West, the state sees itself ideally as the guarantor of justice and resort to the judicial system is required to avoid resort to self-help in resolving disputes, in the East, there is a widely help presumption that one settles one's disputes out of court and that merely setting foot in a courtroom is already shameful, an unnecessary public laundering of one's sullied linens. Following this vein I would like to use Asia to show another way to avoid the full-blown criminal trial: that of staying out of court altogether, resolving the dispute using customary communal institutions or in parallel existing semi-chthonic ways, a procedure where there are no losers.

The earliest paradigm for this way of thinking comes from Ancient China. Of course, the Chinese emperors had at their disposal punishments as atrocious as those wielded by European autocrats, and pre-trial and trial procedures did not differ much from those used in inquisitorial Europe during its darkest ages, including the primacy of the confession, and the use of torture. But the rise

86. Reliance on out-of-court settlements, often mediated by a community elder who decides according to his cultivated ethical sense, is a Confucian legacy. It is considered to be speedier than in-court settlements, and allows both sides to forgo the possible loss of esteem associated with a negative court decision. R.P. Peerenboom, Law and Morality in Ancient China. The Silk Manuscripts of Huang-Lao 269 (1993). The Vietnamese have traditionally solved disputes locally, using the informal sanctions of lineages and villages, avoiding the national courts so as not to lose face and damage existing relationships. Even in Cochin-china (south Vietnam), where French influence was greatest, children were taught in school not to use the courts. The fact that in 1824 Vietnam only had 100 prisoners has been attributed to the avoidance of the normal courts. Penelope (Pip) Nicholson, Borrowing Court Systems. The Experience of Socialist Vietnam 222, 227-28 (2007).

87. In the Daoist tradition, the mediating sage "acts as a catalyst to bring about an order in which all benefit" in which "each thing finds its place." There are no "discarded people." Lao Zi's politics of harmony do not allow for utilitarian compromises where the well-being of one is sacrificed to the overall utility of the rest._peerenbohm, supra note 86, at 189.

88. On its importance in the legal codes of the Qin dynasty (221-207 BC) and codes of Tang (625 AD), see Vogler, supra note 16, at 93.

89. The Ch'ing Code authorized torture to extract confessions from suspects, but also to extract testimony from other witnesses. If the torturer acted according to statute, he was
of Confucianism provided an interesting twist to the Asian view of the role of state criminal punishment systems. According to Chinese lore, written codified criminal laws and punishments, *fa*, came from a barbarian people who used punishments instead of spiritual cultivation to rule their peoples. Any system that needed codified law was ruled by an ineffective emperor. According to Confucian and related thinking, the emperor should live an exemplary life by following the rituals and customs of proper living, *li*, a kind of "customary, uncodified law, internalized by individuals," in which case no laws would ever be needed. Indeed, laws were only a bad influence over men, for when they read them, they learned how to commit crimes and avoid responsibility. To the extent an unsuccessful victim-accuser in Asia would be subject to the same punishments which would have applied to the defendant, had he been convicted, this clearly gave an impetus to victims and defendants to settle out of court and avoid the potential harm that would beset the person who came out on the short end of the controversy.

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not responsible even if the victim died, but if he acted without statutory authorization, he would be decapitated himself. DERK BODDE & CLARENCE MORRIS, LAW IN IMPERIAL CHINA. EXEMPLIFIED BY 190 CH'ING DYNASTY CASES 97–98 (1973). On similarities between the hierarchical systems of authority in feudal Europe, China, and early Islamic empires, see VOGLER, supra note 16, at 19. On the single magistrate combining role of "detective, prosecutor, judge and jury, rolled into one." Id. at 92.

90. BODDE & MORRIS, supra note 89, at 13.

91. In its original sense, *li* referred to rituals required by upstanding citizens, but in its broader philosophical-political sense, it came to mean "a designation for all the institutions and relationships, both political and social, which make for harmonious living in a Confucian society." Id, at 19.

92. GLENN, supra note 1, at 313.

93. YONGPING LIU, ORIGINS OF CHINESE LAW. PENAL AND ADMINISTRATIVE LAW IN ITS EARLY DEVELOPMENT 97 (1998). For the idea that *li* is "justice without law," and *fa*, "law without justice," see GLENN, supra note 1, at 337. A similar anti-legal attitude can be found in Indian history and culture. WERNER MENSKI, COMPARATIVE LAW IN A GLOBAL CONTEXT. THE LEGAL SYSTEMS OF ASIA AND AFRICA 203 (2nd ed. 2007).

94. BODDE & MORRIS, supra note 89, at 16–17. In the words of Confucius, "the more laws (*fa*) and ordinances (*ling*) are promulgated, the more thieves and robbers there will be." Id. at 22. Confucius rejected codified and publicly promulgated laws because they tie the hands of those seeking to create new and mutually acceptable solutions to conflicts. PEERENBOHM, supra note 86, at 268.

95. On the use of customary procedure in China for this precise reason, see VOGLER, supra note 16, at 92.
Although Confucian rulers did eventually come to live with the bloody codes and their five punishments, the philosophy did serve to soften the impact of the otherwise cruel, arbitrary system. All death penalties went to the Emperor for review, though his method of review was not always without caprice. Massive amnesties would occur in the Spring, to appease for the death penalties imposed in the Fall and Winter, when leaves had to fall. But what remains of Confucian thought in this area is the notion that it is already a defeat, a shameful occurrence, if one has to avail oneself of the official justice system. Again, we see an inevitable result of a justice system which is punitive in its very functioning, where even entering the courthouse doors is Verdachtsstrafe. So, it is better to resolve the dispute out of court, using a parallel institution of victim-offender mediation, and applying a philosophy of flexible, consensual dispute resolution. The chthonic roots of Confucian thought are certainly evident here.

96. The “five punishments” were allegedly codified by the “barbarian” non-Chinese Miao people in the 23rd century BC. They originally consisted in tattooing, amputation of the nose, amputation of one or both feet, castration and death. Liu, supra note 93, at 114. By the Sui Code of the late 6th Century, the five punishments had been humanized to an extent, and included: (1) beating with light stick; (2) beating with heavy stick; (3) penal servitude; (4) exile for life; and (5) Death by strangulation, decapitation or slicing. Bodde & Morris, supra note 89, at 76–77. The punishments provided in §202 Code of Hammurabi are similar: 1) death (by drowning, burning, or impalement); (2) amputation of limb or appendage; (3) payment of compensation, multiple damages or fines; (4) banishment (5) public flogging. Versteeg, supra note 2, at 69–70. On the gradual transition from compensation to mutilation and exile as punishments, Diamond, supra note 2, at 318. For similar escalations in brutality in Ancient Egypt from the Old and Middle to the New Kingdoms, Versteeg, supra note 2, at 162–63. In Ancient India, the Laws of Manu name ten places on which punishment falls: the organ, the belly, the tongue, the two hands, the two feet, the eye, the nose, the two ears, and the whole body. Sec. VIII, 124–25, Laws of Manu, supra note 41. On crucifying, stoning to death and lashing in Islamic law, Vogler, supra note 16, at 106.

97. This “imitative naturalism,” quite different from Confucianism, finds distinct expression in the “Boshu,” Daoist manuscripts found in 1974. According to the Boshu, in spring and summer, when life forces of yang are in ascendancy, rulers should be generous in distributing society’s largesse and lenient in implementing punishments. In fall and winter, when yin forces of death reach their apex, rulers should strictly enforce laws and diligently carry out punishments and executions. Peer en bohm, supra note 86, at 1–2, 30.

98. In the words of Confucius: “In hearing cases I am as good as anyone else, but what is really needed is to bring about that there are no cases!” Bodde & Morris, supra note 89, at 21.

99. According to Glenn, supra note 1, at 313–14, “li may be flexibly interpreted, in a consensual manner, such that harmony in society is preserved through mutual reinforcement of norms rather than dispute over their content.”

100. In Ancient China, the Daoist or Confucian “sage” probably developed from a typical chthonic mediator. Armed with his knowledge of the rules of moral behavior, li, the sage
porary Asia, researchers have found that there still is a reluctance to bring disputes to court which is likely based in enduring Confucian tradition,101 coupled with a mistrust of judiciaries which are conceived as being corrupt and untrustworthy.102

This institutionalized mistrust of positive law as expressed in codes and state punishment systems is scarcely to be found in Western legal thought. The only procedural institution that seems to be designed to push criminal cases out of the state courts would be the provisions, found in many inquisitorial codes, which provide for punishment of the victim who unsuccessfully brings a criminal complaint.103 The victim's unwillingness to bring cases to court has everywhere, even in modern times, been evident in relation to rape cases. The procedure was traditionally additional punishment for the victim, who had to recount the degrading and humiliating act before unsympathetic male judges and juries.

In India and, in a similar way in the classic Tibetan legal tradition, one finds a preference for resolving disputes using customary, chthonic methods, despite the existence of imperial courts in ancient times, and a modern Westernized court system in India today.104 The ancient texts speak of legal procedures, and severe punishments, but also of a hierarchy of procedures which one should

would exercise his discretionary judgment (yi) to determine how best to restore harmony disrupted by a dispute, using “analogical projection,” or shu. The sage then relies on his de—moral credibility and respect gained from being a virtuous cultivated person—to inspire in people the willingness to pursue a harmonious resolution to the conflict. The sage's de is his storehouse of moral credit, earned over the years through repeated demonstration of wisdom and perceived excellence which he draws on in times of conflict. Pfreinbohm, supra note 86, at 173. The role of the Daoist-Confucian possessor of de is that of facilitator. He does not seek to force or compel others to obey, but to induce them to participate willingly. While the Confucian sage shares this goal, his approach differs slightly. Confucius places faith in ability to persuade through reasoned discussion, Laozi through the sage's character—his mysterious de. The Daoist sage practices the “teaching that uses no words,” leading by example and force of character rather than verbal instruction, for “one who knows does not speak; one who speaks does not know.” Id. at 186.

101. Confucius once said: “In hearing litigation I am much the same as anyone. If you insist on a difference, it is perhaps that I try to get the parties not to resort to litigation in the first place.” Id. at 130.

102. In socialist Vietnam, people avoid the courts because they are arbitrary and politically controlled. In rural areas, and among the poor, anywhere from 40–50% of the people in Vietnam do not even know a court system exists. Nicholson, supra note 86, at 228, 269–70. On a resurgence of Confucian values even in the People's Republic of China, see Glenn, supra note 1, at 333.

103. See Section IC, supra, text with note 53.

104. In Tibet, the goal of a legal proceeding was to calm the minds and relieve the anger of the disputants and then—through catharsis, expiation, restitution, and appeasement, to achieve consensus and rebalance the natural order. French, supra note 23, at 74.
first turn to, with the official courts being the last resort. The preference would be for a kind of “internal” settlement, which in India might have consisted in first trying to resolve the dispute through ancient Hindu methods of individual self-perfection. A similar preference existed in ancient Chinese law. An “internal” settlement could also consist of an agreement among the parties or even chthonic methods such as singing contests, oaths, ordeals or even games of chance. If this did not quell the dispute, then, the parties would resort to mediation. Only if these more informal methods did not bear fruit, would one resort to the court system. In Tibet, the court system consisted first, in a visit to the judge, and then, if that did not end the matter, in an incredibly complex and time-consuming 44-step procedure, which ended in a trial which was humiliating in itself for the defendant, who could be whipped both before and after testifying.

105. It is still in China commonplace, that when conflicts arise, one is well advised to begin with qing, appeal to the other’s feelings, emotions, sense of humanity, or common decency. Peerenbohm, supra note 86, at 268.

106. Depending on region, disputes could be settled in Tibet by means of discussion within families or relatives, negotiations and consultation conferences. French, supra note 23, at 121. On the use of chthonic-like duels and rolling the dice, see fn.38, supra. Ordeals could also be used within the trial as a means of establishing the truth. Id. at 129.

107. Mediation in Tibet involved use of a conciliator and often resulted in a written agreement. By using mediation, the parties saved face, reduced conflict, and the chthonic values of consensus and compromise were emphasized. No corporal punishment was used in mediation as it was in the regular court system. Id. at 122. On informal mediation, and negotiation within the parties’ socio-cultural spheres in India, see Meniski, supra note 93, at 218, 258.

108. In ancient China, if informal application of qing did not bear fruit, would one then turn to li: discursive reasoning, rational principles, logical arguments, and the like. If this too proved to be unsuccessful, one invoked the law, fa, as last resort. Peerenbohm, supra note 86, at 268.

109. A party would visit the judge and give him a gift, but it was not necessarily a bribe because the judge was not bound to act in favor of the “visitor.” French, supra note 23, at 123. Thus the “judge” could be seen as a figure similar to the chthonic mediator, who also made his living from the fees paid, and whose prosperity depended on his success in mediating disputes. Alternatively, he could be the precursor for the corrupt court system, which parties worldwide would also be wont to avoid at all costs.

110. Id. at 123–25, 322. Because most Tibetans felt the whipping administered to the defendant, even before conviction, was excessive, parties avoided the regular court system in criminal cases. Id. at 315–16. In inquisitorial Europe those hardy enough to withstand torture without confessing and to avoid conviction were nonetheless often beaten with rods. Esmein, supra note 3, at 130.
In India today one talks of “state legal systems” and “non-state legal systems” such as local caste or regional panchayats which resolve disputes in ways reminiscent of the old European popular courts. The emphasis, as in chthonic law, is on reconciliation, compromise, and restoring the peace of the community, and less on ascertaining truth and imposing punishment. When the Hindus invaded India from Central Asia, bringing their holy texts, the Vedas, they did not force the indigenous population to become Hindus, and thus left space for the maintenance of customary law. Some panchayats even induce parties to settle informally under their authority, rather than risk going before the “state legal system.”

In both Talmudic and Islamic doctrine, there is also a preference for out-of-court settlement of disputes. In many of its authoritative texts Talmudic law teaches that disputants should seek compromise, and that it is preferable for the judge to compromise, rather than to let the law “cut through the mountain,” thus creating a winner and a loser and causing the dispute to fester on. In Islamic law, as well, the doctrine provides that accuser and accused should try to resolve their dispute with a mufti out of court before resorting to qadi justice, which, though based on interpretation of the Qu’ran and other Islamic texts rather than on the pure goal of restoring the legal peace, nevertheless looks a lot like chthonic mediation. As in chthonic systems, the confession plays a mitigating role in traditional Islamic law, though, unlike in China and inquisitorial Europe, coercion of confessions was forbidden, and they could be retracted at any time with impunity.

111. India has, according to one writer, three types of “non-state legal systems:” caste-based, community-based, and innovative-reformist. These panchayats are normally composed of five individuals. Upendra Baxi, People’s Law in India—The Hindu Society, in ASIAN INDIGENOUS LAW: IN INTERACTION WITH RECEIVED LAW 216, 235–36 (Masaji Chiba Ed. 1986).

112. On how consensus in the panchayats may be manipulated by dominant groups, or even “pre-fabricated” or “contrived,” id. at 238.

113. The invitation to the People’s Court of Rangpur includes the following in its last paragraph: “You surely know ... that expensive and frequent visits to law courts are not in the interests of us poor farmers.” Id. at 239.

114. On Islamic law, see Menski, supra note 93, at 275.

115. Maimonides wrote that the judge: “must attempt in all his cases to have the parties compromise. If he can succeed in never deciding a case on the law, by always effecting a compromise, how praiseworthy is his accomplishment! If he is not able [to effect a compromise in a particular case], he must apply strict law.” Elon et al., supra note 59, at 362, 367.

116. On procedure before the qadi, including a kind of guilty plea or confession which will bring proceedings to an end, Vogler, supra note 16, at 110–12.

117. Muslim scholars claim that Islamic law was the first to recognize the presumption of innocence, the burden of proof on the accuser, and the first to prohibit torture and pre-trial detention. Id. at 114.
When Islam spread into Central Asia, the Indian subcontinent and Southeast Asia, shari’a and Islamic law did not necessarily permeate the entirety of the conquered realm, and this left room for local chthonic law to survive. Thus, in Muslim Indonesia and Malaysia, there still exists a parallel system of adat law which has as its goal reconciliation, and includes popular forms of justice reminiscent of chthonic legal systems. Adat law, admittedly, has little influence on resolution of any but the most minor “criminal” disputes. In their imperialist expansion, the British also left room for chthonic or indigenous law to function, at least in relation to indigenous peoples and their conflicts, as long as no British were involved.

Parallel “non-state” systems do not, as such, exist in most Western countries, yet one can see victim-offender mediation and some types of diversion, as variants of this notion of keeping otherwise criminal disputes out of the normal criminal justice system. In this respect, it is interesting to see the influence of Native American law on victim-offender mediation in Canada and the United States with the use of methods derived from indigenous “sentencing circles” and other such chthonic institutions. Of course, parallel systems based in chthonic customary Indian law also exist in some parts of Latin America, for instance, in Nicaragua, Bolivia and Colombia.

Chthonic law also survives in certain African tribes, and could be seen as an alternative “non-state” system in which the people can resolve their (criminal) disputes. Some African countries provide for assessors in criminal and non-criminal trials who are experts in customary law, when the disputes involve such issues. But the most interesting rebirth of chthonic traditions has been in the gacaca tribunals in Rwanda, which are being used to try the low-level genocidaires who cannot be accommodated by the International Criminal Tribunal for Rwanda, in Arusha, Tanzania, and the domestic Rwandan

118. In Indonesian adat law, physical sanction is replaced by private mediation and emphasis on “internal and external harmony, the reverse image of which is shame.” M.B. Hooker, Adat Law in Modern Indonesia 54 (1978).

119. In general, Vogler, supra note 16, at 256. As to India, see Menski, supra note 93, at 239–48.

120. Glenn, supra note 1, at 68–69.

121. On a visit to the Supreme Court of Nicaragua, in Managua, in the Spring of 2003, a judge told me of a murder case among the Miskito Indians on the Atlantic coast, where the wife of the victim pleaded to remove the case from the national courts, where a maximum prison sentence of 20 years was possible, and apply Miskito law, which would have the defendant work and support the victim and her family for the rest of his life, while remaining in freedom (with the condition that he never touch her!).
I will discuss *gacaca* in the context of the discussion of plea bargaining in the international criminal tribunals at the end of this chapter, for it opens up the fascinating question of whether early forms of chthonic dispute resolution may be appropriate for resolving disputes arising from widespread atrocities and crimes against humanity, an idea that ten or twenty years ago would have been unthinkable.123

The traditional Asian approach to dispute resolution contains within it, like the chthonic approach, a different notion of "truth" than one finds in the inquisitorial continental European tradition, or in the Anglo-American view that adversarial confrontation is the method of ascertaining the truth.124 Thus in many of these traditions, "truth" is equated with "peace" and the elimination of the anger and frustration caused by confrontation in a trial situation, which might lead to further violence or disputes in the future.125


One can really speak of two "Enlightenments," two periods of liberal establishment of human rights in criminal procedure. The first came with the bourgeois revolt against Europe's monarchies, which culminated in the American and French revolutions, and the second with the re-discovery of human rights following World War II which will be discussed in Section I.E of this chapter.

The model for criminal procedure for both America and France in the late 18th centuries, and for the rest of Europe in the 19th Century, was the new

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123. On the notion of history as a spiral, rather than a linear development, in the course of which old, seemingly "outdated" concepts emerge in new contexts and unexpectedly regain their old meaning. Weigend, Deliktsoffener, *supra* note 2, at 26.


125. This is clearly the Tibetan view where truth is viewed as consensus as to the facts, and where there are, in a sense, no final judgments, because if a dispute flares up in the future, it has not been resolved. French, *supra* note 23, at 137–38. Thus, even agreeing to the wrong facts would be preferable to a trial to ascertain the true facts, if the trial would jeopardize social peace. Here perhaps is a chthonic-Asian variation on plea bargains to fictitious lesser offenses to avoid trial.
“lawyerized” criminal trial which had developed in England in the mid 18th century. Though English law had, by and large, managed to avoid pre-trial torture as a means of inducing confessions, its pre-trial and jury trial system were implicitly designed to induce the accused “to speak” during the trial. From the 1720s to the 1760s, however, English law turned about-face from a “ringing endorsement” of confessions, to the opinion that confessions were the “weakest and most suspicious of evidence.” With the gradual admission of lawyers into felony cases in the 18th century, the procedure became adversarial and the right to silence became entrenched, thus giving substance to the presumption of innocence and the prosecutorial burden of proof beyond a reasonable doubt. Defendants began letting their lawyers talk for them at trial and guilty pleas also began to be accepted with tacit promises of mitigation accompanying them.

On the European continent, the Enlightenment brought with it the abolition of torture, and the gradual introduction of a public trial before jury in most European countries over the course of the 19th Century. The early revolutionary period coincided with a profound distrust of professional judges and their ability to justly decide cases. Despite the mistrust of judges, however, the preliminary investigation remained in the hands of an investigating magistrate, was secret, and the defendant had little chance to influence the decision-making process. This form of procedure, with an oral trial, but secret inquisitorial preliminary investigation, has been called the “mixed” form, as it includes both adversarial and inquisitorial aspects. In the continental

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126. LANGEIN, ORIGINS, supra note 76, at 233.

127. For an opinion that the privilege against self-incrimination was only officially recognized in England around 1898, Id. at 280. But on a law of 1848 implementing the right to silence along with cautions, see Vogler, supra note 16, at 147.

128. On the view that the constitution of the defendant as a “rights-bearing actor” was related to the creation of a capitalistic free labor market, and the “lawyerization” of the trial as an opening of the feudal court hierarchy to market forces in the times of capitalistic industrialization, Id. at 144. Ferrajoli, supra note 5, at 117, finds the roots of the classical accusatorial trial, presumption of innocence, burden of proof, confrontation, exclusion of unreliable evidence and an adversarial trial before an impartial judge in the old Roman tradition of disputatio, which he claims was never eliminated in England.


130. Esmein, supra note 2, at 3. On the oral trial of this epoch as a mere “repetition,” or “mis-en-scène” of the preliminary investigation, Ferrajoli, supra note 5, at 578.
European version of jury trial which existed in most countries in the 19th and early 20th centuries, a special verdict consisting of a list of questions addressed to elements of the charged crimes and possible defenses, still made it incumbent on the judge to interpret the verdict and issue a reasoned judgment. By and large, with few exceptions, the notion of pleading guilty and moving directly to the imposition of punishment was anathema on the European continent and in the Latin American systems which never even incorporated the liberal changes triggered by the French revolution. Quick trials without preliminary investigations, however, were allowed in cases involving flagrant arrests even in the 19th Century.

Confessions were still facilitated by the expansive use of pretrial detention of defendants, and criminal codes which accorded statutory mitigation to confessing and remorseful defendants. In trials on the European continent, whether before a purely professional bench or a mixed court, defendants nearly always testified because the non-bifurcated form of trial did not provide for a separate sentencing stage which would allow a defendant who chose to remain silent at trial to provide evidence of mitigation during sentence.

Jury trials on the European continent also, at times, took on an “accused-speaks”-character, to use Langbein’s phrase. In Russia, the defendant often confessed in the hopes that the jury would accept this remorse as sufficient indication of the non-dangerousness of the defendant and would acquit him to save him from the pains of Siberian hard labor (juries had been eliminated for death penalty cases, which were heard by military courts). This could be a residue of chthonic, communal notions of the healing character of a confession, which came out in the use of popular juries in 19th Century Russia.

131. The Spanish conformidad, see infra, Section II.b, was introduced in the 19th century and §681 of the Russian code of criminal procedure in force from 1864, until 1917, also allowed for an admission of guilt. S. Militsin. Sdelki o priznanii viny: vozmozhno li rossiyskii variant?, 12 Rossiyskaia yustitsia 41 (1999).

132. E.żmein, supra note 3, at 544–45.

133. On pretrial detention as a sanction imposed due to suspicion. Ferrajoli, supra note 5, at 336. Carrara called pretrial detention “masked torture,” a non-violent way to coerce a confession. Id. at 562–66.


136. In Tibet, judges would also punish a thief, for instance, more severely for lying during the criminal procedure than for the theft itself. French, supra note 23, at 317.
Thus, as guilty pleas began to be accepted in England and the U.S. in the 19th century, plea bargaining was not yet as necessary on procedural economy grounds, because trials were still relatively rapid. Whereas a jury in the “accused-speaks” trial in England sometimes heard 10 cases a day before retiring to deliberate on all of them simultaneously, even the “lawyerized” trials of the 19th century were quite rapid. However, there is evidence that judges would sentence in a milder fashion upon acceptance of a guilty plea, then after a jury verdict of guilt. In California in the early 1900s, for instance, a court could finish four or five jury trials in one day. Trials in inquisitorial systems were also speedy affairs, whether conducted in one session (as in Spain) or in installment fashion as in Germany. The procedural inducement of admissions of guilt during the preliminary investigation or at trial worked the same way as guilty pleas, and, indeed, these procedural arrangements have been equated with plea bargaining by some authors.

It is important to stress, however, that it is normally not legislators or legal scholars who pioneer methods of eliminating or simplifying the trial with all its guarantees in smoke-filled parliamentary caucus rooms or in ivy-covered halls. It is the everyday players in the criminal justice system—prosecutors, defense lawyers, and judges—who engage in informal negotiations, create shortcuts, and find loopholes to make their jobs easier. This is clearly how plea bargaining began in the U.S. in the early 19th Century, if not earlier, and this is how German “confession bargaining” developed in post-War Germany.

However, the liberal advances made on the European continent in the 19th Century did not become firmly rooted. Political instability led in most countries to lurches back and forth from liberal constitutional monarchy to reactionary authoritarianism, with the rules for juries, if not the existence of the institution itself, changing with each change of regime.

137. FISHER, supra note 82, at 159.
138. The increase in plea bargaining in the early 20th Century cannot necessarily be explained by the complicated nature of the criminal trial, but rather by an increase in the civil caseload. Id. at 121–23.
139. On the “piecemeal” or “installment” approach to criminal trials, especially in Germany, see DAMAŠKA, FACES, supra note 69, at 52.
141. “Plea bargaining was manifestly the work of those courtroom actors who stood to gain from it.” FISHER, supra note 82, at 2.
142. The authors of the 1995 jury law in Spain noted in its “explanation of reasons” attached to the law, that the jury appeared and disappeared with each lurch from liberal to conservative regime. Stephen C. Thaman, Spain Returns to Trial by Jury, 21 HASTINGS INT’L & COMP. L. REV. 241, 246 (1998).
lightenment developments as a recognition on the European continent of the injustices of its inquisitorial procedure and the relative humanity of adversarial English jury trial. However, the inability of the European systems to successfully move away from its inquisitorial juridical culture was due in part to political instability, and the eventual victory of non-democratic politics and culture in the first half of the 20th Century. In 1924, in Weimar Germany, the economic depression set the stage for using the pretext of procedural economy to convert the jury court into an expanded mixed court and for introducing a kind of simplified consensual procedure akin to diversion, which still exists today and constitutes one of the first inroads into the legality principle otherwise hailed as a bulwark of German criminal procedure.

The fascist and totalitarian regimes of the European continent not only abolished jury trial in favor of trial by mixed courts or purely professional panels, but they also used expedited and abbreviated forms of justice, which, while often relating to minor charges, also included the brutal troikas and commissions in the Soviet Union, where suspects were often executed without ever knowing the charges, ever talking to a lawyer, or even having a trial. The grim memory of these procedures was often used as an argument against introducing plea bargaining and other abbreviated forms in the ex-Socialist world. Some of these alternate forms technically “de-criminalized” the offense by taking it out of the regular court system, or constituted a parallel “revolutionary” coercive system of re-education that actually largely replaced the state-court system.

143. One could truly say that the criminal procedures and punishments applied by the state to individuals charged with crime caused more pain and injustice than the totality of the crimes to which they were allegedly responding. Ferrajoli, supra note 5, at 339, 382.


145. In Poland, “special commissions” applying a simplified procedure, were introduced to deal with parasitism and economic sabotage after 1949. Vogler, supra note 16, at 89. On the use of “comrades' courts” under Khrushchev in the Soviet Union, I. L. Petrukhin, Opravdatel'nyy prigovor i pravo na reabilitatsiu 43–45 (2009).


147. China’s “mass-line” emphasized popular participation and mediation, a kind of “revolutionary” preference of li over fa, which, however often ended in compelled self-criticism and humiliation before large audiences, which was damaging for the suspect. Vogler, supra note 16, at 263–64.

With the defeat of Fascism in 1945, the end of Franco’s dictatorship in Spain in 1978, and the collapse of Soviet and Latin American military dictatorships in 1989–91, a new Enlightenment has led to a raft of new constitutions and codes of criminal procedure with a progressive panoply of procedural rights for defendants. There is a notable trend to eliminate the inquisitorial figure of the investigating magistrate and to make the preliminary investigation a more adversarial procedure by allowing defense participation in the gathering of evidence and the pretrial questioning of witnesses. The introduction of, and, or recognition of exclusionary rules have helped to limit excesses of law enforcement officials in violating constitutional rights in order to ascertain the truth.

Following the lead of the U.S. Supreme Court in its 1966 decision in *Miranda v. Arizona*, most European and Latin American countries require interrogators to advise a criminal suspect of the right to silence and the right to talk to a lawyer before they are questioned, and a failure to do so often results in a prohibition on the use of the ensuing statements.

There is also a renewed interest in lay participation in the criminal trial, with Russia and Spain reintroducing trial by jury, and Latin American states

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148. The investigating magistrate was eliminated in Germany in 1974, in Italy in 1988, and in several Latin American countries in the 1990s. On a new attempt in 2009 by President Sarkozy to eliminate the investigating magistrate in France, see Alain Salles, *Les avocats réclament plus de garanties quand disparaîtra le juge d'instruction*, *Le Monde* (Paris), Mar. 24, 2009, at 12.


151. A big exception here is France, which since 1993 has been vacillating between recognizing the right to silence, requiring admonitions, and eliminating the notorious garde à vue, and maintaining a counsel-free police interrogation in classic inquisitorial style. Vogler, supra note 16, at 163–64. On the spread of Miranda, see Stephen C. Thaman, *Miranda in Comparative Law*, 45 St. Louis U. L. J. 581 (2001).

making the first moves in a century towards involving citizens in the administration of justice.\textsuperscript{153}

In the U.S., the human rights revolution of the 1960s, spearheaded by the decisions of the Warren Court, finally succeeded in extending the protection of the American Bill of Rights to the entire population, and in guaranteeing equal protection of the laws for African Americans and other minorities. But the irony of these “revolutions” and these improvements in the protection of the suspect-defendant in the criminal trial, which were so long in coming, is that the states who recognize them are not willing or able to pay for the more complicated and protective procedures which the respect for these human rights necessitate.\textsuperscript{154}

In the U.S., plea bargaining accounts for more than 95\% of all criminal judgments,\textsuperscript{155} with the percentage gradually growing, albeit in fits and starts, since the end of World War II.\textsuperscript{156} Thus, ironically, the conquests of the Warren court in the area of the rights of the defendant to participate fully and equally in the adversarial trial by jury have been substantially negated by what is a coercive system of plea bargaining, where threats of Draconian punishments, and high mandatory minimum punishments successfully compel nearly all defendants, whether guilty or not, to plead guilty.\textsuperscript{157} In my opinion, American plea bargaining is, in essence, an inquisitorial mode of case-resolution,\textsuperscript{158}

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  \item \textsuperscript{154} For an opinion that the activation of the right to counsel and the development of restrictive rules of evidence constituted the first steps towards making English-style jury trial unworkable without a guilty plea system, see John H. Langbein, \textit{Torture and Plea Bargaining}, 46 U. Chi. L. Rev. 3,11 (1978). See also Damaška, ch. 2, at 84–86.
  \item \textsuperscript{155} Ross, ch. 3, at 107.
  \item \textsuperscript{156} The guilty plea rate in federal courts was around 90\% in 1949–51, but fell to 79\% around 1980, only to rise up to 94\% by the end of the 20th Century. \textit{Fisher, supra} note 82, at 222–23.
  \item \textsuperscript{157} On how increasingly harsh sentences over the last 20 years, coupled with steep discounts during plea bargaining, have made the U.S. system coercive. Jenia Iontcheva Turner, \textit{Judicial Participation in Plea Negotiations: A Comparative View}, 54 \textit{AM. J. COMP. L.} 199, 202–04 (2006). One can truly ask, whether the disproportionate punishments inflicted by the U.S. criminal justice system, such as possible life imprisonment for recidivist thieves or even first-time drug dealers, bring with them a higher social cost than the crimes they are meant to deter. \textit{Ferrajoli, supra} note 5, at 338.
  \item \textsuperscript{158} Smirnov, \textit{supra} note 17, at 9, argues that the classic inquisitorial system, reflective of authoritarian socio-political tendencies, has largely died, but “the inquisitorial element, if fragmentary” exists in open or hidden form in all forms of criminal procedure,
\end{itemize}
based on inducing confessions and it plays a larger role in American criminal justice than the adversarial foundations which are its pride. Spain and Russia, with their new jury systems, are also now expanding the use of consensual means for avoiding jury trials and their unpredictable results, even though the right to appeal acquittals in both countries gives the judiciary another way to nullify verdicts with which it does not agree. 159 In Germany, the growing cleverness of lawyers in using the complicated German procedure of evidence motions, challenge of judges, etc., to draw out trials and make prosecutors and judges work longer hours, has led to an increasing use of informal confession bargaining to achieve procedural economy. 160 In Italy, the 1988 code of criminal procedure which was meant to move Italy towards an adversary trial and included the radical steps of eliminating the investigating magistrate, declaring the contents of the preliminary hearing dossier to be inadmissible in court, providing for a seemingly strong exclusionary rule and allowing parallel defense investigations, also included the largest assortment of alternative procedures for avoiding these expanded due process protections, including, ironically, one which allows the defendant to agree to having a written inquisitorial trial! 161

In the wave of criminal procedure reform triggered by the collapse of the Soviet Union and the withering away of Latin American dictatorships in the 1990s, formerly inquisitorial systems moved nearly unanimously to systems based in adversarial procedure, the oral, public trial, strong exclusionary rules, and, to some extent, the use of lay judges. 162 The irony of this development,
is that, with the greater ability of the defense to achieve an acquittal, or make the criminal procedure more lengthy and cumbersome, the more the system turns, informally or formally, to trial-shortening guilty pleas, confession-bargaining or other consensual procedural modes. This is the irony of the era of human rights, that the expansion thereof is coupled with procedural incentives to waive these newly won rights.\textsuperscript{163}

To fully understand the workings of modern plea and confession bargaining one must explore their interrelation with the substantive criminal punishment schemes existing in the respective countries. I am firmly convinced, for instance, that American plea bargaining is coercive. Because of the threat of death and life imprisonment for many offenses, as well as the very high mandatory minimum sentences, prosecutors have the ability to determine the outcome of a case through the power to charge high and then make an offer the defendant cannot refuse.

Since the beginning of plea bargaining in the U.S. prosecutors have taken advantage of mandatory minimum sentences in such diverse areas as enforcement of the liquor laws and homicide, to improvise their first strategies of plea bargaining.\textsuperscript{164} The development of the institution of probation was also a boon to plea bargaining, for it gave prosecutors and judges the option of lenience not often provided in the indeterminate sentencing schemes which were popular in the U.S. in the late 19th and 20th Centuries.\textsuperscript{165} Finally, when states instituted schemes which provided several "degrees" of guilt for crimes such as murder, burglary, robbery, etc., this gave prosecutors handy tools for charge-bargaining unavailable when the trial was an all-or-nothing affair.\textsuperscript{166} It is beyond the scope of this chapter and the knowledge of the author, however, to explore how the punishment types and ranges dovetail with the new types of

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\footnotesize{\textsuperscript{163} On how the elimination of the prohibition on the defendant testifying in his own behalf in the mid-19th Century, when coupled with the rule allowing impeachment with prior convictions, and a judicial practice of aggravating sentences due to "perjury" if the defendant denied guilt and was convicted, led to a jump in the amount of defendants who chose to plea bargain rather than accept their newly won right. \textit{Fisher}, supra note 82, at 104–10.}

\footnotesize{\textsuperscript{164} \textit{Id.} at 38.}

\footnotesize{\textsuperscript{165} \textit{Id.} at 83–89. The indeterminate sentencing movement began in 1870. \textit{Id.} at 127.}

\footnotesize{\textsuperscript{166} As early as the 1820s, New York divided its crimes into several degrees and this led to a higher amount of charge bargaining than in Massachusetts or California, which did not have such schemes. \textit{Id.} at 169–70.}
consensual and abbreviated procedural forms and to what extent they affect the voluntariness of the defendant’s choice to utilize these forms. But what seems to be clear in the U.S., is that plea bargaining developed in the 19th Century as a mechanism to, at least in murder cases, avoid the Draconian mandatory death penalties without risking a trial,\textsuperscript{167} and to give the defendant a chance of probation rather than risking the waters of the indeterminate punishment system.\textsuperscript{168} In the late 20th century, on the other hand, plea bargaining became the catalyst for the enactment of Draconian punishment schemes which would force a waiver of jury trial in favor of a guilty plea in all types of cases.

The triumph of procedural economy over the intuitive determination of raw facts by juries or the tutored decisions of professional judges, and the preference for the “uncluttered” presentation of stipulated facts which is indicative of plea bargaining, is perhaps the best reflection of the “rise of ‘economic’ theories of jurisprudence, which “displace empirical interest from the ragged history of issues to the calculable consequences of their resolution.”\textsuperscript{169} The character and efficacy of these alternative modes of resolving the criminal trial are the subject of the concluding chapter of this book.

\textbf{F. Conclusion}

In order to understand the reality of plea bargaining and other forms of consensual resolution of criminal cases, one must engage, in the words of Clifford Geertz, in “an exercise in intercultural translation.”\textsuperscript{170} I have tried to do this by probing the history of consensual and alternative forms of criminal procedure around the world. Thus, with Geertz, I can only emphasize that “legal pluralism is not a passing aberration but a central feature of the modern scene” which exists because of, and despite the “historical tenacity of legal

\textsuperscript{167} Guilty pleas resolved only around 10\% of homicide cases in the 1840s in Massachusetts and 17\% in the 1850s. In the 1830s there were more than three times as many acquittals or hung juries in capital cases than convictions and almost twice as many in the 1840s. But this changed in the latter part of the 19th Century, with the introduction of a difference between first and second degree murder, when between 35–61\% of all homicide cases were the subject of plea bargaining. \textit{Id.} at 102.

\textsuperscript{168} As late as the 1970s under California’s indeterminate sentencing scheme, the vast majority of felons received probation, and at most a county jail sentence of no more than one year, and few went to prison. One study showed that in Los Angeles at this time, only 6\% of felons went to prison. \textit{Id.} at 193.

\textsuperscript{169} Clifford Geertz, \textit{Local Knowledge. Further Essays in Interpretive Anthropology} 218 (1983).

\textsuperscript{170} \textit{Id.} at 232.
II. Alternatives to the Full-Blown Trial in Modern Penal Systems

A. Consensual Procedures Resulting in Dismissal with Conditions

1. Diversion

As early as the 16th Century, Dutch prosecutors used to openly pocket a payment from rich adulterers and johns, which was called a *compositie*, in exchange for having the charges dropped. Prosecutors in the U.S. in the 19th century developed, along with plea bargaining, procedures whereby they would accept a defendant’s admission of guilt to a minor offense (in Massachusetts it was often a violation of the liquor laws), would require the defendant to pay the court costs, but would then dismiss or “nol pros” the case after the lapse of a certain period of time if the defendant did not fall back into his lawless ways. Another early improvised procedure was called “on-file” plea bargaining, whereby a case would be continued indefinitely, though not dismissed, if the defendant paid the court costs and refrained from further law violations. This was a time a judge could only pass sentence when “requested” to do so by the prosecutor. This was not yet “diversion,” or, what in some places is called “pretrial probation,” because a plea of guilty was required. What resulted was a type of “informal probation” without court supervision which paved the way to the country’s first probation laws, which were introduced in Massachusetts informally in 1841, to be codified in 1878.

To lessen the burden on the criminal courts, the legislator in many civil-law jurisdictions, which were otherwise bound by the legality principle, introduced procedures similar to what is often called “diversion” in the U.S. In

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171. Id.
172. Dubber, supra note 144, at 595.
173. Fisher, supra note 82, at 64—65.
174. Id. at 66—73.
175. Id. at 81.
176. Id. at 67—71, 83—85.
177. I will not go into the wide variety of diversion programs that have been implemented in the U.S. A good example, however, are the diversion programs for drug users,
1987, the Committee of Ministers of the Council of Europe specifically recommended that countries should give prosecutors discretion to “waive or discontinue criminal proceedings” coupled either with a warning, or the attachment of certain conditions such as “rules of conduct, the payment of moneys, compensation of the victim, or probation.”

Diversion in Europe and other civil-law countries will normally be applicable only in relation to less serious crimes. But what are termed “misdemeanors” in Europe, may include some quite serious crimes, which are treated as felonies in the U.S.

which condition a dismissal of drug-related crimes on the offender entering a drug treatment program. 178 such programs were introduced in the 1960s. For a theoretical discussion of the efficacy of such programs, see Rekha Mirchandani, Beyond Therapy: Problem-Solving Courts and the Deliberative Democratic State, 33 LAW AND SOCIAL INQUIRY 853, 873 (2008). Diversion was introduced in Norway in 1887, Strandbakken, ch. 8, at 256, in Denmark in 1932, Wandall, ch. 7, at 238, and in Germany in 1974, Altenhain, cited in Thaman, Plea-Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases, in GENERAL REPORTS OF THE XVIIIth CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW, 964 (K. Boele Woelki & S. Van Erp eds. 2007). The composition pénale, a type of diversion, was introduced in France in 1999, Langer, ch. 1, at 74. Both diversion and the use of “fiscal fines” were introduced in Scotland in 1988, Leverick, ch. 4, at 138–44.


179. Thus, diversion applies to: misdemeanors in Germany, Altenhain, ch. 5, at 158; crimes punishable by up to six years imprisonment in the Netherlands, Brants, ch. 6, at 204; crimes punishable by up to three years for adults and five for juveniles in Croatia, Krapac, ch. 9, at 264–65; intentional crimes punishable by less than three years and non-intentional crimes punishable by less than five years in Bulgaria, §§375–78 CCP-Bulgaria, referring to §78a of the Bulgarian Criminal Code; crimes punishable by up to three years in Chile (§237(a) CCP-Chile). See also §63 CCP-Nicaragua and §415(3)(1) CCP-Latvia (negligent or less serious crimes) and §510 CCP-Moldova (slight or midlevel crimes which are not of significant danger to the community. In both Denmark and Norway, diversion is technically applicable to all crimes, but is used primarily in Denmark in juvenile cases punishable by fines, Wandall, ch. 7, at 238. In Norway it has twice been used in homicide cases involving euthanasia, Strandbakken, ch. 8, at 253–54. In France, the composition pénale may be applied in any case punishable by less than five years imprisonment, Claire Saas, De la composition pénale au plaider-couplable: le pouvoir de sanction du procureur, REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 827, 832 (2004).

180. In Germany, this might include lesser crimes against the person (such as battery), most drug offenses, environmental crimes, theft and white-collar crimes, regardless of the financial loss. Dubber, supra note 144, at 559.
Prosecution is usually suspended for a period of time\(^{181}\) and certain conditions are imposed on the defendant, which, if fulfilled, will result in a dismissal of the case and the absence of any conviction. Typical conditions are restitution,\(^{182}\) payment of money to a public institution,\(^{183}\) fines,\(^{184}\) community service work,\(^{185}\) drug or alcohol treatment,\(^{186}\) making support payments,\(^{187}\) etc.\(^{188}\) Abstention from further criminal conduct is, of course, always a condition for obtaining a dismissal following a grant of diversion.\(^{189}\)

In some countries, diversion is only available to those with no criminal record.\(^{190}\)

Naturally, the defendant must agree to fulfill the conditions and this opens a space for bargaining between prosecution and defense both as to the appropriateness of the diversion, the length of time it will extend, and the conditions it will be subject to.\(^{191}\) In Germany, defendants will also bargain with the prosecutor to reduce a felony to a misdemeanor so a diversion order will be possible, and this has led to its application in what were originally serious white

\(^{181}\) No more than one year in §511(1) CCP-Moldova, no more than six months in France, Saas, supra note 179, at 829, and from no less to two months to no more than three years in §64(para.2) CCP-Nicaragua. Suspension may be from one to three years according to §237(b)(para.3) CCP-Chile.

\(^{182}\) Brants, ch. 6, at 203 (Netherlands); Strandbakken, ch. 8, at 253 (Norway); Krapac, ch. 9, at 265 (Croatia). See also §63(para.2) CCP-Nicaragua; §238(e) CCP-Chile; §510(2)(5) CCP-Moldova; §202(1) CCP-Estonia; as to France, see Saas, supra note 179, at 829.

\(^{183}\) Krapac, ch. 9, at 265 (Croatia).

\(^{184}\) Brants, ch. 6, at 203 (up to 350 Euros in the Netherlands); Saas, supra note 179, at 830 (France). In Scotland, “fiscal fines” were originally limited to 25 pounds, though they may now reach 300 pounds, Leverick, ch. 4, at 138–39.

\(^{185}\) Brants, ch. 6, at 205 (Netherlands); Krapac, ch. 9, at 265 (Croatia); §65(4) CCP-Nicaragua. French legislation limits the amount of community service work to 60 hours to be completed within 6 months, Saas, supra note 129, at 830.

\(^{186}\) Brants, ch. 6, at 205 (Netherlands); Krapac, ch. 9, at 265 (Croatia); §65(9) CCP-Nicaragua.

\(^{187}\) Krapac, ch. 9, at 265 (Croatia)

\(^{188}\) In the Soviet Union, cases involving minor misdemeanors were dismissed and referred to “comrade’s courts” for informal administrative resolution. §51 CCP-RSFSR.

\(^{189}\) For example, in Danish “youth contracts,” Wandall, ch. 7, at 239. Cf. §511(1)(3) CCP-Moldova.

\(^{190}\) Cf. §237(b) CCP-Chile.

\(^{191}\) Altenhain, ch. 5, at 158; While bargaining is not officially allowed in the Netherlands, Croatia, Krapac, ch. 9, at 265, or Scotland, Leverick, ch. 4, at 143, it sometimes occurs in the Netherlands in cases involving white collar defendants who have powerful lawyers representing them. Brants, ch. 6, at 205–06. On the “room for bargaining” in relation to the French composition pénale, see Langer, ch. 1, at 74.
collar offenses. Occasionally, other limitations are placed on which cases shall be subject to diversion. For instance in Croatia it is restricted to cases where there is little public interest in pursuing the prosecution. Germany restricts diversion to cases where there is a borderline question of guilt, but in other countries the defendant must explicitly confess guilt for the procedure to apply.

Conditional dismissals (diversion) have been criticized in those countries where the victim has been given no chance to veto the decision not to pursue a conviction. Furthermore, the institution has been labeled as a variant of Verdachtsstrafe in that sanctions are imposed without a finding of guilt, and that the finding is made by a prosecutor and not a judge. At times undue pressure is put on the defendant to accept the conditions, thus tending to violate the prohibition against coercing admissions of guilt. In Germany, for instance, the prosecutor often responds to the defendant's request for discovery of the investigation file, with an offer that he pay a fine consisting in his annual salary for one year or the case will be charged, thus inducing him to accept before he or the judge even know the factual base of the would-be charge.

195. In Denmark the defendant must confess unconditionally and the confession must be corroborated, Wandall, ch. 7, at 238. Confessions of guilt are required in §63 CCP-Nicaragua, §21 CCP-Paraguay, §510(1) CCP-Moldova, and in France, Langer, ch. 1, at 76.
196. Wandall, ch. 7, at 239; Brants, ch. 6, at 203; Strandbakken, ch. 8, at 254, Saas, supra note 179, at 840 (France). The victim does have a veto right in Croatia, Krapac, ch. 9, at 265.
197. A dismissal per §153 CCP-Germany leads to a “hypothetical evaluation of guilt” whereas §153a CCP-Germany requires determination of slight to middle-level guilt due to the imposition of sanctions. It has been criticized as the imposition of punishment, in the form of “conditions,” based on mere suspicion. Altenhain, cited in Thaman, Plea-Bargaining, supra note 177, at 966.
198. The European Court of Human Rights (hereafter ECHR) has also made this criticism in the Case of Oztürk v. Germany (Feb. 21, 1984), see Brants, ch. 6, at 204. The French injonction pénale was introduced by a law of December 22, 1994, but was declared unconstitutional by the Conseil constitutionnel on February 2, 1995, on the basis that the prosecution was essentially issuing a judgment, confusing the roles of prosecution and judgment. JEAN PRADEL, PROCÉDURE PÉNALE 204 (9th ed. 1997).
It has furthermore been contended that the procedure violates the principle of a public trial, thus allowing rich defendants to secretly buy their way out of criminal liability and thus avoid prejudicial limelight.201 In Scotland, the procedure has been characterized as *de facto* decriminalization which eliminates blameworthiness in favor of payment of a "tax" on erstwhile criminal activity.202

Nevertheless, a relatively large amount of cases are resolved using diversion procedures in a number of countries, thus helping to unburden the courts.203 On the other hand, for any consensual procedures to work which involve the exercise of discretion by the public prosecutor, there must be a willingness among prosecutors to experiment with the new procedures. In Chile, the public prosecutor's office has undermined the efficacy of diversion by requiring prosecutors to complete the preliminary investigation before deciding whether to divert, thus eliminating the gains in procedural economy the procedure is aimed to achieve.204

2. Victim-Offender Conciliation/Mediation

The movement for restorative justice has played a major role in the increasing popularity of victim-offender mediation or conciliation as an alternative to criminal prosecution.205 The roots of this procedure can be found in an-

201. Cf. Barbara Huber, *Criminal Procedure in Germany*, in Richard Hatchard et al., *Comparative Criminal Procedure* 167 (1996). For this reason, the Netherlands has moved to replace its diversion procedure with penal orders. Brants, ch. 6, at 206-07.


203. In Germany, 15–20% of all cases in the last 20 years, Altenhain, cited in Thaman, *Plea-Bargaining*, supra note 177, at 966, and perhaps up to 80% of cases in courts which specialize in white-collar economic crimes. Dubber, *supra* note 144, at 559. In Denmark, diversion accounts for 7–11% of all dismissals from 1995–2002, Wandall, ch.7, at 238. While the procedure was used only 219 times in Norway in 2001, Strandbakken, ch. 8, at 254, it was used almost exclusively in relation to juveniles in Croatia, where such dismissals constituted from 59% to 87% of all dismissals, Krapac, ch. 9, at 266. In Scotland, informal diversion was used in around 3–4% of cases in 2006–08, and "fiscal fines," another type of diversion, in 6% of cases from April 2006 through March 2008. Leverick, ch. 4, at 130. In France, only .17% of cases were resolved by diversion in 2001. Langer, ch. 1, at 78. In Paraguay, the prosecutor simply refuses to charge in around 55% of the cases, and, of the 45% charged, 39.59% are resolved short of trial. 29% of those resolved short of trial are resolved through diversion. Cristian Riego, *Informe Comparativo Proyecto “Seguimiento de los Procesos de Reforma Judicial en América Latina”*, 3 Revista Sistemas Judiciales 12, available at http://www.cejamericas.org/doc/proyectos/inf_comp.pdf.

204. Id. at 15.

cient customary law where the families or clans of victims and victimizers would arrange for a composition, wergild, i.e., some kind of compensation, often accompanied by feasts or other rituals of conciliation.\textsuperscript{206} There is also evidence that in 18th Century England, when, due to the absence of a public prosecutor, victims had to pay for the prosecution of crimes and juries often acquitted, that victims would not infrequently agree not to prosecute in exchange for a payment of money from the offender.\textsuperscript{207}

Today, the procedure is often an obligatory first step in cases prosecuted privately by complaint of the aggrieved party, typically misdemeanor offenses such as battery, infliction of minor injuries, defamation, vandalism, etc.\textsuperscript{208} The procedure was included in the criminal procedure codes of the Soviet Union and is still popular in many of the former Soviet republics,\textsuperscript{209} where there is even talk of the "right" of the defendant to conciliate with the victim.\textsuperscript{210}

The procedure exists since 1930 in Italy. Marzia Ferraioli, cited in supra note 177, at 966. It was introduced in 1991 in Norway, Strandbakken, ch. 8, at 255, in 1994 in Germany, but procedural mechanisms to implement it were not introduced until 1999, Altenhain, cited in Thaman, Plea-Bargaining, supra note 177, at 966. It was introduced experimentally in Denmark in three jurisdictions in 1994, Wandall, ch. 7, at 239. In Scotland, charity-administered conciliation programs were introduced on an experimental basis in Aberdeen, Edinburgh and Motherwell in 1988. Leverick, ch. 4, at 143.

206. In general, see I.A., supra. Damaška, ch. 2, at 83, believes the early medieval legal process constituted "the common stem of Western procedural culture" and a vehicle for the settlement of disputes and the prevention of endemic violence.\textsuperscript{207}

208. For Germany, see Altenhain, cited in Thaman, Plea-Bargaining, supra note 177, at 967. See also Brants, ch. 6, at 213 (Netherlands); Krapac, ch. 9, at 274 (Croatia); Strandbakken, ch. 8, at 254 (Norway); Rogacka-Rzewnicka, ch. 10, at 289–91, 19 (Poland). Cf. §24(11)(4)(3) CCP-Bulgaria; §311, 424 CCP-Paraguay. Italy's entire system of peace courts is aimed at promoting conciliation. Ferraioli, cited in Thaman, Plea Bargaining, supra note 177, at 367. In Nicaragua, "mediation," aimed at conciliation and restitution is possible in cases of misdemeanors, negligent or unintentional crimes, property crimes among family members involving violence or intimidation, and crimes with minor punishments. §56 CCP-Nicaragua. §241(para.2) CCP-Chile makes "reparatory agreements" (acuerdos reparatorios) an option only in cases of minor injuries or negligent crimes. In §84(para.5)(2) CCP-Uzbekistan, the procedure is limited to first-offenders who do not represent "great social danger" or perpetrators of less serious crimes who have made restitution, showed "active remorse," or helped solve the crime. Pursuant to §25 CCP-Russia it is applied to crimes of slight or mid-level gravity.


210. Eg. §66(1)(17) CCP-Latvia.
Only if the case cannot be settled through conciliation will the criminal procedure continue along its normal path. The result is a dismissal once conciliation has been achieved.\textsuperscript{211} Since many of these minor crimes may be subject to diversion proceedings there may be an intertwining of these procedures.\textsuperscript{212} Victim-offender mediation is usually limited to minor offenses, for there is a real possibility that influential or even potentially dangerous defendants could coerce conciliation in cases involving robberies or rapes, for instance, and avoid criminal responsibility.\textsuperscript{213}

Victim-Offender mediation requires active participation of both parties and should not be confused with procedures which result in dismissal after the payment of restitution without any face-to-face interaction between offender and victim.\textsuperscript{214} As a result, a type of bargaining is necessary in such cases,\textsuperscript{215} or, better said, is part and parcel of the conciliation process in determining its plausibility and the terms which will ensure its success.\textsuperscript{216} Bargaining as to restitution in cases without a private victim, such as tax cases, is also commonplace.\textsuperscript{217} In some countries, neutral mediators are used,\textsuperscript{218} whereas in others probation of-

\textsuperscript{211} E.g. §84(para.4) CCP-Uzbekistan; §242 CCP-Chile.
\textsuperscript{212} For Germany, see Altenhain, cited in Thaman, Plea-Bargaining, supra note 177, at 967. Pursuant to §57(4) CCP-Nicaragua, “mediation” leads to a suspension of the case pending restitution and other conditions, much as is the case with diversion. Many U.S. victim-offender mediation programs are part of broader state diversion programs. Umbreit et al., supra note 205, at 282–90.
\textsuperscript{213} This has apparently been a problem in relation to agreements to repair harm and indemnify between defendants and victims pursuant to §421 CCP-Venezuela. María Esther Guía T., La Victimina del Delito en el Proceso Penal, in CÓDIGO ÓRGANICO PROCESAL PENAL: COMENTADO CON 7 MONOGRAFIAS 129 (Magaly Vásquez González ed. 1998).
\textsuperscript{214} Provisions allowing dismissal or mitigation to be triggered by restitution may be applicable to more serious offenses, like sexual offenses, whereas victim-offender conciliation (mediation) would not. Altenhain, cited in Thaman, Plea-Bargaining, supra note 177, at 968. All forms of victim-offender mediation in the U.S. revolve around face-to-face confrontations with help of one or more mediators. Umbreit et al., supra note 205, at 269.
\textsuperscript{215} Altenhain, cited in Thaman, Plea-Bargaining, supra note 177, at 968.
\textsuperscript{216} In Croatia, where conciliation is not regulated, bargaining is well possible, Krpac, ch. 9, at 274. The amount of restitution is bargained in Italy. See Ferraioli, cited in Thaman, Plea Bargaining, supra note 177, at 968.
\textsuperscript{217} In Germany it has been questioned whether restitution should suffice to trigger a dismissal in cases involving the rich, because no considerable personal efforts or sacrifice is involved. Some voices claim that such defendants should also make a large symbolic payment to the state coffers. Altenhain, cited in Thaman, Plea-Bargaining, supra note 177, at 968.
\textsuperscript{218} In Poland, the parties are required to select a person or institution in which they have confidence, Rogacka-Rzewnicka, ch. 10, at 289. §57(para.1) CCP-Nicaragua allows
ficers may take on the role. In Russia it has been held that the court must entertain a motion to dismiss on the part of the aggrieved party where complete restitution has been made, the defendant has little or no criminal record, and has expressed remorse.

As in the case of diversion and penal orders, some critics in Germany find that victim-offender conciliation provisions, when conditioned on an admission of guilt by the defendant, violate the privilege against self-incrimination by compelling this admission. Others, a distinct minority, maintain that victim-offender mediation might violate equal protection if not applied to crimes where society is the victim.

The frequency of victim-offender mediation (conciliation) varies from country to country. In the U.S., seven States have a comprehensive statutory framework for victim-offender mediation (conciliation) and an additional seven have the principle separately codified if not elaborated in a detailed manner. An additional nine States mention victim-offender mediation as an option among other procedural devices and a further seven States encourage restorative justice approaches to criminal procedure without expressly mentioning "mediation" to be conducted before a lawyer, notary, public defender or a rural "facilitator of justice." §424 CCP-Paraguay envisions the use of a "friendly compromiser."

219. On the involvement of probation officers, see §381 CCP-Latvia.


221. In Germany a confession is required in cases involving violence and sexual assault, Altenhain, cited in Thaman, Plea-Bargaining, supra note 177, at 968.

222. Id.

223. Such as with offenses of tax fraud, "complete intoxication," etc. Id. at 967.

224. In Germany, it was little used in the early years, but this is beginning to change. Id. at 968. It has also only been used sparingly in Poland, Rogacka-Rzewnicka, ch. 10, at 289–90. In Denmark, in one period, 1432 cases were referred for conciliation, but only 357 made it to a mediator, with 150 of those being successfully mediated, Wandall, ch. 7, at 239–40. In Norway, mediation was used only 20 times in 2004, Strandbakken, ch. 8, at 255. In Scotland in 2007–08, victim-offender conciliation was undertaken with 573 victims and 461 accused and in 1,232 cases was successful in 87% of those cases where both victim and defendant participated. Leverick, ch. 4, at 144. In 2008 in Russia, for instance, 1,124,000 cases were filed in the country’s criminal courts and of the 309,900 dismissals, 233,000 were due to victim-offender conciliation. This was a fall, however, from the 270,000 dismissals for this reason in 2007. Sudebnym department pri Verkhovnom Sude Rossiy skoy Federatsii. Obzor deiatel’nosti federal’nykh sudov obschestvennogo yurisdiktsii i mirovykh sudey v 2008 godu. http://www.cdep.ru/statistics.asp?search_fm=auto=1&dept_id=8. In Paraguay, 39.59% of charged cases are resolved without a formal trial. 26% of these are resolved with victim-offender mediation. Riego, Informe, supra note 203, at 41.
victim-offender mediation. While in 21 states there is no mention of mediation, this does not mean that local municipalities or counties have not instituted programs, and virtually every state has some type of program in this area.\textsuperscript{225}

In Chile, the public prosecutor's office has burdened the procedure with regulations, such as requiring a special report in each case from regional victim-assistance units, and has also refused to involve its office in the mediation process.\textsuperscript{226}

B. Consensual Procedures Resulting in a Skipping of the Preliminary Investigation and Trial

1. Penal Orders

The penal order,\textsuperscript{227} which appears to have originated in Germany,\textsuperscript{228} applies normally in less serious criminal cases punishable by fine only,\textsuperscript{229} or at most by

\begin{itemize}
\item \textsuperscript{225} Umbreit et al., \textit{supra} note 205, at 291–97.
\item \textsuperscript{226} Riego, \textit{Informe}, \textit{supra} note 203, at 14–15.
\item \textsuperscript{227} COE, Simplification (1987), \textit{supra} note 178, at §IIb, appears to refer to penal orders as "out of court settlements."
\item \textsuperscript{228} The institution goes back to 1877 and is based on a previous Prussian model in 1846. \textit{See} ALEXANDER VIVELL, \textit{Die Strafbefehlsverfahren nach Eröffnung des Hauptverfahrens} 25–31 (2006). Although the penal order remained in force in Alsace-Lorraine when it returned to French rule after the two world wars, the penal order was only introduced in the rest of France in 1972. \textit{Pradel, supra} note 198, at 682. It exists in Italy since 1930, GIACOMO NICOLUCCI, \textit{IL PROCEDIMENTO PER DECRETO PENALE} 1 (2008).
\item \textsuperscript{229} Wandall, ch. 7, 236 (Denmark); Brants, ch. 6, 209 (Netherlands); Leverick, ch. 4, at 138 (Scotland); §§495, 495-1, 524 CCP (France); §251(1) CCP-Estonia; §425(1) CCP-Lithuania; §392 CCP-Chile (procedimiento monitorio). Cf. Christian Riego, \textit{El procedimiento abreviado en Chile}, in \textit{EL PROCEDIMIENTO ABREVIADO} 472 (Julio B.J. Maier & Alberto Bovino eds. 2001). In France, the procedure applies to all misdemeanors (contraventions), but only if a fine is the only punishment sought. Even confiscation of a driver's license is not possible, despite the fact that the procedure is often used in cases of driving without a license or insurance. §§524(1), 525(2) CCP-France. \textit{Pradel, supra} note 198, at 682. In Germany, imprisonment of up to one year may be suspended in cases involving penal orders, Altenhain, ch. 5, 158. In Italy, a period of deprivation of liberty may also be suspended. §§459(1), 460(2) CCP-Italy. In many countries, the crime itself could be punishable by imprisonment, but a penal order is only possible if the prosecutor is requesting only a fine. In the Netherlands, the crime could be punishable by up to six years, Brants, ch. 6, at 201, 211, in Croatia, by up to five years, Krapac, ch. 9, at 272, and in Norway, it could be applied in cases of burglary and theft. Strandbakken, ch. 8, at 252.
\end{itemize}
short periods of deprivation of liberty. Some codes provide for a statutory discount in the punishment.

Typically, the public prosecutor submits to the defendant, in writing, a suggested charge and punishment, and the defendant is given a short period of time to accept or reject the proposal. If the defendant rejects the proposal, the case will be tried according to normal trial procedure. In some countries, the defendant's silence or failure to respond will constitute acceptance of the penal order. In most countries, however, the judge maintains the power to reject the penal order if he/she believes it is unsupported by the evidence or otherwise thinks the case should proceed to a normal trial. The aggrieved party also occasionally has the power to block a penal order. In some jurisdictions a penal order will not be acceptable unless the defendant confesses or the state of the evidence clearly shows guilt, as would be the case with flagrant offenses.

230. In Poland, "conviction without trial" may apply to offenses punishable by up to ten years, Rogacka-Rzewnicka, ch. 10, at 292. In the Swiss Canton of Zürich, a penal order can result in punishment of up to a year deprivation of liberty. Hans-Heinrich Jescheck, Grundgedanken der neuen italienischen Strafprozeßordnung in rechtsvergleichender Sicht, in Strafgerichtigkeit: Festschrift für Arthur Kaufmann zum 70. Geburtstag 670 (Fritjof Haft et al. eds. 1993).

231. Cf. §459(2) CCP-Italy, which allows for a reduction of ½ for what would have been the appropriate fine.

232. Seven days in CCP §§427, 429 CCP-Lithuania; eight days in Croatia, Krapac, ch. 8, at 272; three to ten days in Norway, Strandbakken, ch. 8, at 252–53; ten days in §254(6) CCP-Estonia; two weeks in §410(1) CCP-Germany, and the Netherlands, Brants, ch. 6, at 209; 15 days in §461(1) CCP-Italy; 28 days in §392(c) CCP-Chile, Riego, El procedimiento, supra note 229, at 472; and 30 days per §527 CCP-France for infractions and §495-3 CCP-France for more serious crimes.

233. See Vivell, supra note 228, at 95–96.

234. §527(para.4) CCP-France.

235. Krapac, ch. 8, at 272–73 (Croatia); §459(3) CCP-Italy; §253(3) CCP-Estonia; §525(3) CCP-France, Pradel, supra note 198, at 682. In Germany, the judge may do this if there is no "probable cause" of the guilt of the defendant or he disagrees with the punishment proposed §§408(2,3) CCP-Germany. The judge has no power to reject the penal order, however, in Norway, Strandbakken, ch. 8, at 253 or pursuant to §427 CCP-Lithuania.

236. According to §459(1) CCP-Italy and §§524(para.3), 528-2 (para.3) CCP-France, the victim's consent is needed if she has been constituted as a private prosecutor. Cf. Pradel, supra note 198, at 683.

237. Wandall, ch. 7, at 236 (Denmark). In the Argentine province of Neuquen, the preliminary investigation may be eliminated and the prosecutor can proceed per penal order in cases of flagrant offenses. Gustavo Vitale, El proceso penal abreviado con especial referencia a Neuquén, in El procedimiento abreviado, supra note 229, at 366.
Even though most codes do not expressly allow bargaining between defense and prosecution with respect to the issuance of penal orders, it has been recognized that such bargaining clearly takes place, or at least cannot be excluded. While the judgment in most countries amounts to a finding of guilt, it is usually of a skeletal variety due to the lack of a formal investigation of the case. In some countries, however, the finding is more one of confirmed suspicion, a finding of "probable cause," (i.e. Verdachtsstrafe), rather than one of guilt.

Penal orders have greatly reduced the caseload of the courts in some countries. Nonetheless, they continue to arouse criticism for a number of reasons. First, the defendant usually has no right to be heard in court. Second, it is the prosecutor who essentially imposes judgment without trial, with little opportunity for the defendant to be heard. For instance, the prosecutor may suggest a particular level of fine to the defendant if he/she agrees not to object to the penal order. In some cases, the prosecutor may even suggest a particular level of fine to the defendant if he/she agrees not to object to the penal order. In other cases, the prosecutor may even suggest a particular level of fine to the defendant if he/she agrees not to object to the penal order. In still other cases, the prosecutor may even suggest a particular level of fine to the defendant if he/she agrees not to object to the penal order.

238. Such as in Germany, Altenhain, ch. 5, at 157–58; Huber, supra note 201, at 160. For instance, the prosecutor may suggest a particular level of fine to the defendant if he/she agrees not to object to the penal order. Dubber, supra note 144, at 560.

239. Wandall, ch. 7, at 237 (Denmark); Brants, ch. 6, at 211 (especially in cases involving powerful defendants in the Netherlands); Strandbakken, ch. 8, at 253 (Norway); and Italy. Ferraioli, cited in Thaman, Plea Bargaining, supra note 177, at 970.

240. Vivell, supra note 228, at 92 (Germany) §460(2) CCP-Italy ("decree of conviction").

241. In Croatia the judgment is based on the police report and the court's satisfaction that the fine or measure is correctly imposed. Krapac, ch. 9, at 273. No reasons are provided for the judgment in France. Pradel, supra note 198, at 683.

242. Some critics in Germany believe the finding is really only one of probable cause, Huber, supra note 201, at 158. Thus, in Italy, a conviction by penal order is not admissible in a civil or administrative action against the defendant. §460(5) CCP-Italy (the same is usually true for a nolo contendere plea in the U.S.).

243. Penal orders constitute 2/3 of all convictions in Germany, cited in Thaman, Plea Bargaining, supra note 177, at 970. Few French defendants reject the prosecutor's proposed penal order, Pradel, supra note 198, at 683, whereas in the mid 1990s, around 22% of German defendants did so. Dubber, supra note 144, at 562. From 2004 through 2007, the percentage of all Croatian criminal cases resolved by penal orders, fluctuated from 24% to 29.7%. Krapac, ch. 9, at 273. Norway recorded 215,276 penal orders in 2001. Strandbakken, ch. 8, at 253 On the other hand, "fixed penalty" cases in Scotland amount to only 3–8% of all cases. Leverick, ch. 4, at 130. In the first half of 1991 in Italy, the municipal courts (pretore) issued 59,710 penal orders and only had 9,022 trials. Jescheck, supra note 230, at 670.

244. Thus, arguably, violating notions of due process, Altenhain, cited in Thaman, Plea Bargaining, supra note 177, at 970. On the completely written nature of the proceedings and its violation of the rights of publicity, confrontation of witnesses, a reasoned judgment, see, Pradel, supra note 198, at 683–84.

245. Thus violating the separation of powers. Altenhain, cited in Thaman, Plea Bargaining, supra note 177, at 970–71; Brants, ch. 6, at 210–11 (Netherlands).
tle or no judicial control and sometimes no express finding of guilt. Third, fears have been expressed that a defendant, who might not be represented by counsel, will agree to the penal order without sufficient knowledge of the circumstances. Fourth, concerns about equal protection have been expressed, due to differences in the treatment of like offenses in different judicial districts. Finally, it has also been suggested, that if penal orders apply only to offenses for which the maximum punishment is a fine, then these offenses should be decriminalized and converted into administrative violations.

On the other hand, the penal order has won praise because it has significantly contributed to unburdening the courts of minor offenses and does preserve the defendant’s right to reject the offer and demand a full-blown trial. Despite the fact that penal orders have been around for over 100 years, many countries have only recently turned to them in pursuit of procedural economy.

2. Pleas of Guilty and Nolo Contendere as Substitutes for the Criminal Trial


It is unclear when in the history of the Anglo-American criminal trial that a plea of guilty began to lead inexorably to the waiver of the right to have a jury decide the issue of guilt. The procedure likely had its roots in the 19th

246. Altenhain, cited in Thaman, Plea Bargaining, supra note 177, at 971. For a view characterizing the prosecutor, due to his/her ability to basically impose punishment, as a “lower court of justice” with the courts then constituting the higher instances for appeal, Julia Fonda, Public Prosecutors and Discretion. A Comparative Study 2 (1995).

247. Brants, ch. 6, at 211–12 (Netherlands).

248. Wandall, ch. 7, at 237 (Denmark).

249. Ferraioli, supra 5, at 416.

250. Krapac, ch. 9, at 272 (Croatia); Ferraioli, cited in Thaman, Plea Bargaining, supra note 177, at 971.

251. Penal orders were introduced in the Netherlands in 2008 in order to more expeditiously exact fines when there has been a violation of a diversion order. Brants, ch. 6, at 206–10. They were introduced in Croatia in 1998, Krapac, ch. 9, at 272.

252. J.S. Cockburn claims that plea bargaining began in 1587–1590 associated with amended pleadings and benefit of clergy, Fisher, supra note 82, at 243 (fn. 1). But when trials in England and Wales took little time and one jury could handle several in one day, trial judges discouraged defendants from pleading guilty and encouraged them to take their chance with the jury. Langbein, Origins, supra note 76, at 19. Guilty pleas were also discouraged in late 18th Century America, and one trial court, as late as the 1890s could still handle as many as six trials a day. Albert W. Alschuler & Andrew G.
Century, but once it was accepted that a guilty plea could lead directly to sentence, the procedure gradually began to replace the full-blown trial by jury. George Fisher, in his study of the 19th Century practices of Middlesex County in Massachusetts, uncovered the use of nolo contendere pleas as early as 1804 in relation to liquor offenses, and, already in the 1840s, found that guilty pleas to manslaughter were being accepted to avoid capital murder charges. By the beginning of the 20th Century, 50% of all cases were settled by guilty pleas in the U.S., with the percentage rising to 80% in the 1960s and reaching 93–95% today.

When judges are not involved in plea bargaining, as appears to have been the case in early times, then the sentencing scheme had to give the prosecutor the possibility of affecting punishment through manipulation of the charges, either before or after bargaining with the defendant. Thus there was little plea bargaining in the 19th Century because only in select areas did charging have any significant effect on the punishment that the judge would impose.

While guilty pleas were accepted in the 19th Century as a trial-ending procedural mechanism, it was only in the mid-20th Century that it began to be recognized that guilty pleas were often preceded by full-fledged bargaining by prosecutor, defendant, and sometimes the judge over the charge and the parameters of the resultant punishment. The U.S. Supreme Court finally recognized the fact of such bargaining and even put its stamp of approval on it, claiming it did not violate any important principles of criminal procedure as long as the defendant made a knowing and voluntary plea and properly waived his right to remain silent, to confront and cross-examine the witnesses, and his right to trial by jury. The “knowledge” requirement was held to mean that he must know the character of the charges and the consequences of his plea as well, i.e., the range of possible punishment and sometimes even collateral measures that might be applied upon the finding of guilt.

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254. But by 1900 in Middlesex County, Massachusetts, the rate had already reached 87%. Id. at 113.


256. Fisher, supra note 82, at 44–51.


Eventually, plea-bargaining and guilty pleas were regulated by statutes which cover, *inter alia*, the procedure for obtaining pleas, the rights of the defendant, such as the right to counsel, as well as the types of rights a defendant can be induced to waive upon entering into a “plea agreement,” as the resulting contract has been named in the U.S. federal system. All terms must be put on the record today in most U.S. jurisdictions.259

What is common in all U.S. jurisdictions is that plea bargaining applies to any and all kinds of cases, from minor infractions, up to capital murder cases.260 This differentiates American plea bargaining from the systems adopted in most other countries. Another important factor is that the large differences between minimum and maximum punishments in many U.S. jurisdictions means that the “offer” of the public prosecutor is inherently coercive.261 The U.S. Supreme Court has ruled that it does not violate due process for a prosecutor to offer a defendant to either admit guilt and spend five years in prison, or insist on a jury trial, where, if he is convicted, the public prosecutor will ask for life imprisonment.262 Critics have claimed that only with a reduction in the Draconian length of prison sentences in the U.S. will plea bargaining’s hold on criminal procedure be loosened.263

It is finally crucial for the success of plea bargaining in the U.S. that those defendants who insist on a jury trial be sentenced in a significantly harsher manner, if convicted, than if they choose to plead guilty. Thus, real complicity of trial judges in the functioning of a smooth plea bargaining system is required.264

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259. The main federal statute is Fed. R. Crim. P. 11.

260. Guilty pleas to capital murder were already accepted in early 19th Century Massachusetts, and some of these cases actually led to the imposition of the death penalty. Fisher, *supra* note 81, at 91.

261. Many critics point to the huge differences between punishments in America and Europe to stress this aspect of American plea bargaining. Damaška, ch. 2, at 91. Hans Zeisel once surmised that each month of a European sentence would translate into a year’s deprivation of liberty in the U.S. Langbein, *Torture*, *supra* note 154, at 16. Dubber, *supra* note 144, at 596–97, has noted that while all defendants convicted of felonies in the U.S. federal courts receive prison sentences (40% of which were suspended as a condition of probation), no federal felon received a fine as the primary sentence, whereas in Germany 80% of all punishments are fines, and only 5% of those convicted are sentenced to deprivation of liberty.


264. In the 19th Century, there is evidence that judges sentenced the same, whether the defendant pleaded guilty or was convicted at trial. However, by the 20th Century investigations have shown that a defendant losing at trial would get two or three times longer a sentence than if she agreed to a plea bargain. Fisher, *supra* note 82, at 111–13.
b. The Gradual but Reluctant Acceptance of Guilty-Plea Mechanisms in Civil Law Jurisdictions

In the civil-law world, defendants were not normally allowed to enter a guilty plea which allowed the court to immediately move to judgment without further evidence-taking. It did not matter if the trial was before a jury, mixed court, or one or more professional judges. To allow the defendant to dispose, himself, of the issue of guilt was seen to violate many important trial rights, among them, the presumption of innocence and the principle that only a judge may render judgment based on evidence presented at the trial.\(^{265}\) This view still holds sway in many countries.\(^{266}\) Despite judicial ideology which is hostile to the idea of negotiated justice, it is my opinion that the nature of the criminal process invariably leads to informal “deals” between prosecution and defense, with frequent participation of the judge. We will later discuss how German _Absprachen_ developed from such an informal practice. Russian lawyers and prosecutors also now admit that, going as far back as Soviet times, cases were dismissed if the suspect agreed to work for the police, and criminal charges were reduced to administrative offenses following negotiations.\(^{267}\)

An exception among civil law countries was Spain, where as early as the mid-19th century a defendant was allowed to terminate the taking of evidence and cause the trial to move to the imposition of punishment by expressing his conformity (_conformidad_) with the pleadings of the prosecution parties.\(^{268}\) This tradition has continued in an uninterrupted fashion to this day and has served as a model for some Latin American countries in the development of guilty-plea mechanisms.\(^{269}\)

\(^{265}\) The Italian _patteggiamento_, discussed infra, does not involve any admission of guilt for the Italian legislator felt this would violate the presumption of innocence. Pizzi & Marafioti, _supra_ note 161, at 23; Jescheck, _supra_ note 230, at 671.

\(^{266}\) Altenhain, ch. 5, at 159 (Germany); Wandall, ch. 7, at 232 (Denmark).

\(^{267}\) Militsin, _supra_ note 131, at 41-42.

\(^{268}\) Though the procedure was codified in §655 CCP-Spain, enacted in 1882, there is evidence that the procedure was introduced as early as 1848. NICOLÁS RODRÍGUEZ GARCÍA, _EL CONSENSO EN EL PROCESO PENAL ESPAÑOL_ 78 (1997).

\(^{269}\) The Spanish _conformidad_ was the model for the _juicio abreviado_ (“abbreviated trial”) provided for in §435 CCP-Argentina (Federal). Alberto Bovino, _Procedimiento abreviado y juicio por jurados_, in _EL PROCEDIMIENTO ABREVIADO_, _supra_ note 229, at 65–66. A similar procedure was introduced in 1994 in the CCP of the Argentine Province of Tierra del Fuego under the name of “omission of the trial” (_omisión del debate_), Eugenio C. Sarrabayrouse, _La omisión del debate en el Código Procesal Penal de Tierra del Fuego. Su régimen legal y aplicación práctica_, in _EL PROCEDIMIENTO ABREVIADO_, _supra_ note 229, at 300–02. §415
Otherwise, the first modern breaks in the wall erected in the civil law world against guilty pleas came with recommendations by the Council of Europe to introduce guilty pleas and trial-simplifying procedures in 1987 and then with the introduction in the CCP-Italy of 1988 of the “application for punishment upon request of the parties,” commonly called the patteggiamento or “deal.” The patteggiamento, which originally provided for up to a one-third discount on punishment and was limited to crimes punishable by no more than three years deprivation of liberty, has become one of the most influential models for guilty plea mechanisms subsequently introduced in Europe, the former Soviet republics, and some Latin American countries.

Finally, a more wide-open negotiation of guilty pleas has been adopted in some countries based on the classic American model and often as the result of American influence in the legislative process in those countries.

c. The Contract Theory of Plea Bargaining

In the U.S., plea bargaining has been justified on the theory that it is a “contract” between two equal bargaining partners that must be upheld, as would an ordinary contract in the commercial realm. If the prosecutor reneges on

CCP-Córdoba (Argentina) provides for an “abbreviated trial” avoiding any taking of evidence if the defendant confesses, and the punishment may be no higher than that requested by the public prosecutor. Similar provisions can be found in other Argentine provinces: § 392 CCP-Chaco; § 367 CCP-Chubut, § 435 CCP-Corrientes; § 415 CCP-Entre Ríos; § 377 CCP-La Pampa; § 373 CCP-Neuquén § 414 CCP-Salta; §§ 499, 506 CCP-Formosa. David Mangiagcio & Carlos Parma, Juicio abreviado argentino 95 (2004). The conformidad was also clearly the model for many of the “abbreviated procedures” introduced in other parts of Latin America in the last decade or so. See, for instance, § 373 CCP-Bolivia (1999); § 406 CCP-Chile (2000). The possibility of entering a “guilty plea” was broached in § 35 of the Model Code of Criminal Procedure for the Commonwealth of Independent States (MCCP-CIS) which was influential in many of the new post-Soviet CCPs.

270. The Committee of Ministers was careful, cautioning: “wherever constitutional and legal traditions so allow.” COE. Simplication, (1987), supra note 178, at § III.A.7.

271. A similar procedure was introduced in Croatia in 2002, Krapac, ch. 9, at 275.

272. I drafted a chapter on consensual procedures for the official working group that was drafting the CCP-Russia, which was eventually passed in 2001. The legislator finally adopted a procedure which I had modeled on the Italian patteggiamento. Rekomendatsii parlamentskikh slushaniy "O khode podgotovki proekt Ugolovno-protsessual'nogo kodeksa Rossisskoy Federatsii po problemam, kasaiushchimsia sokrashchennykh predvaritel'nykh slushaniy i form sudoproizvodstva). Jan. 16, 2001 (copy on file with author).

273. See the procedures for Nicaragua, Venezuela, Estonia, Latvia, Lithuania, Moldova and Georgia, addressed infra.
the offer, the defendant can withdraw his plea or plead for specific enforcement of the terms.\textsuperscript{274} If the defendant breaches, she may be prosecuted on the dismissed charges, held to the guilty plea, and even be sentenced to a more severe punishment.\textsuperscript{275} Judge Easterbrook invokes models of contract law and characterizes plea bargaining as a “voluntary transaction which maximizes the welfare of both parties.” The defendant is spared anxiety and the costs of litigation and the prosecutor frees up resources to pursue other criminals. He argues against judicial oversight for “if a third party must approve the settlement, settlements and their savings become less frequent.”\textsuperscript{276}

American plea bargaining is generally viewed to be an outgrowth of the adversarial system of justice,\textsuperscript{277} where the search for truth is not an explicit goal of the proceedings,\textsuperscript{278} and trial judges have no prior knowledge of the facts of the case to guide any search for truth due to the absence of a comprehensive investigate dossier.\textsuperscript{279}

d. The Scope of the Application of Guilty Plea-Nolo Contendere Mechanisms

In the U.S., a guilty plea may be accepted in relation to any charge, even the most serious: no further evidence will be taken, and the case will move to the sentencing phase and the imposition of punishment.\textsuperscript{280} This is usu-

\textsuperscript{274} Santobello v. New York, 404 U.S. 257, 261 (1971). The government may be in breach of the contract if it breaks its promise not to oppose the defendant’s request for a certain punishment, for instance, by attempting to prove aggravating circumstances, United States v. Taylor, 77 F.3d 368 (11th Cir. 1996), or by submitting a victim impact statement, United States v. Johnson, 187 F.3d 1129 (9th Cir. 1999). For a discussion, see Ross, ch. 3, at 113. For a position strongly in support of the contract theory, see Frank H. Easterbrook, Plea Bargaining as Compromise, 101 YALE L. J. 1969, 1975 (1992).

\textsuperscript{275} United States v. Holbrook, 368 F.3d 415 (4th Cir. 2004); United States v. Cimino, 381 F.3d 124 (2nd Cir. 2004). Ross, ch. 3, at 113–14.

\textsuperscript{276} Id., at 18–19.

\textsuperscript{277} Langer, ch. 1, at 8–9, sees plea bargaining as a “text” that has been translated from one “language,” that of the U.S. adversarial system, into another, that of the inquisitorial systems of Germany, Italy, Argentina and France.

\textsuperscript{278} “The adversarial conception of truth is more relative and consensual: if the parties come to an agreement as to the facts of the case, through plea agreements or stipulations, it is less important to determine what events actually occurred.” Langer, ch. 1, at 14.

\textsuperscript{279} Ross, ch. 3, at 107.

\textsuperscript{280} This should be distinguished from a procedure where the defendant may admit guilt, thus shortening the trial, or even allowing for a trial before a professional bench, rather than one with lay participation. See Strandbakken, ch. 8, at 255 (Norway).
ally the model applied in countries of the common law, but it has made its way into some of the new criminal procedure codes in the civil law world.

The consensual procedures in the civil law realm are, however, normally not applicable in prosecutions for serious or especially grave offenses. The Spanish conformidad is applicable, in its traditional form, to crimes in which the prosecuting parties plead for imposition of a punishment which does not exceed six years deprivation of liberty. The six-year period has been limited to serious and especially grave offenses in some countries of the civil law world. For example, in §73 CCP-Bolivia, in the “agreements” provided for in §§539–43 CCP-Latvia (2005), or in §675 CCP-Georgia (2004 Amendments), see Jason D. Reichelt, A Hobson’s Experiment: Plea Bargaining in the Republic of Georgia, 11 J. EAST EUROPEAN L. 159, 168 (2004). In Costa Rica, a conformidad-type procedure with a substantial reduction in punishment applies to all charges. In Spain, the conformidad procedure is limited to cases punishable by no more than six years imprisonment. In practice, however, the courts uniformly limit its application to six years. Nicolaus González-Cuéllar Serrano, La conformidad en el proceso abreviado y el llamado “juicio rápido”, LA LEY, No. 5895, Nov. 18, 2003, 1, 3. In a 2002 Spanish law which introduced “expedited trials” (juicios rápidos), a defendant may express his/her conformidad in any case where the public prosecutor is requesting a sentence of three years or less, although the amount of actual prison time is limited to two years, as defendant gets a one-third reduction in these cases, making the procedure look more like the Italian patteggiamento. §§800(1), 801(1) CCP-Spain.

281. Cf. Leverick, ch. 4, at 144 (Scotland).

282. There appear to be no limits to the types of cases which may result in a guilty plea in §373 CCP-Bolivia, in the “agreements” provided for in §§539–43 CCP-Latvia (2005), or in §675 CCP-Georgia (2004 Amendments), see Jason D. Reichelt, A Hobson’s Experiment: Plea Bargaining in the Republic of Georgia, 11 J. EAST EUROPEAN L. 159, 168 (2004). In Costa Rica, a conformidad-type procedure with a substantial reduction in punishment applies to all charges. Javier Llobet Rodriguez, Procedimiento abreviado en Costa Rica, pre­sunción de inocencia y derecho de abstención de declarar, in EL PROCEDIMIENTO ABREVI­ADO, supra note 229, at 446. In §403 CCP-Honduras, the “abbreviated procedure” applies to all crimes as long as the accused has no criminal record. The “agreement” (acuerdo) in §61 para. 1) CCP-Nicaragua appears to be very similar to the U.S. plea bargain, as it allows free negotiation of the charges in all types of cases. The “procedure for admitting the facts” in §376 CCP-Venezuela is applicable to all cases, though the discount one receives differs depending on the seriousness of the offense. According to §415 CCP-Córdoba (Argentina) and §§510–511 CCP-San Juan (Argentina), the only limit to punishment is that requested by the public prosecutor in the pleadings. MANGIAFICO & PARMA, supra note 269, at 95, 153.

283. Per §239 CCP-Estonia, they may not apply to first degree offenses punishable by a minimum of four years or maximum of life imprisonment. According to §504(2) CCP-Moldova they apply to all but “especially serious” crimes. For a cautious acceptance of consensual procedures for less-serious crimes. Klaus Tiedemann, 13 Thesen zu einem modernen menschenrechtsorientierten Strafprozeß, ZEITSCHRIFT FÜR RECHTSPOLITIK 107, 108–09 (1992).

284. §655 CCP-Spain definitely limits conformidad to six years in normal prosecutions, but the provisions in Spain’s “abbreviated trial” (procedimiento abreviado), which were introduced in 1988, are confusing and have been interpreted by some to extend conformidad to cases punishable by nine, or even twelve years. VÍCENTE GIMENO SENDRA ET AL., DERE­CHO PROCESAL PENAL 335 (1996). In practice, however, the courts uniformly limit its application to six years. Nicolaus González-Cuéllar Serrano, La conformidad en el proceso abreviado y el llamado “juicio rápido”, LA LEY, No. 5895, Nov. 18, 2003, 1, 3. In a 2002 Spanish law which introduced “expedited trials” (juicios rápidos), a defendant may express his/her conformidad in any case where the public prosecutor is requesting a sentence of three years or less, although the amount of actual prison time is limited to two years, as defendant gets a one-third reduction in these cases, making the procedure look more like the Italian patteggiamento. §§800(1), 801(1) CCP-Spain.
adopted in some Argentine provinces. Conformidad-type procedures exist, however, both where punishments may exceed six years, or with even stricter limitations than the original Spanish variant. In some Latin American jurisdictions the parties may agree to a disposition as to the facts and the sentence in minor cases and the judge may not sentence in excess of the agreed-upon limit.

Although the Italian patteggiamento was originally limited to crimes punishable by no more than three years, the legislator extended its scope in 2003 to crimes punishable by up to five years. This tendency to expand the ap-

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285. Such as in the Federal Argentine CCP, Bovino, supra note 269, at 65, as well as in the CCP-Chaco (Argentina) and CCP-Misiones (Argentina). MANGIAFICO & PARMA, supra note 269, at 144, 150.

286. For instance, up to seven years in Cuba. Carlos Loarca & Mariano Bertelotti, El procedimiento abreviado en Guatemala, in EL PROCEDIMIENTO ABREVIADO, supra note 229, at 413. Procedures similar to conformidad apply to crimes punishable by up to eight years in the CCP of Buenos Aires, and to all crimes in the CCP of the Argentine province of Córdoba, Gabriela E. Córdoba, El juicio abreviado en el Código Procesal Penal de la Nación, in EL PROCEDIMIENTO ABREVIADO, supra note 229, at 249.

287. The Model CCP for Ibero-America originally called for limiting such procedures to crimes punishable by no more than two years, Bovino, supra note 269, at 65. The CCP-Chubut (Argentina), limits the "abbreviated procedure" to crimes punishable by two years, and any jail time must be suspended. MANGIAFICO & PARMA, supra note 269, at 152–53. Three year lids apply in the CCP-Tierra del Fuego (Argentina), Sarrabayrouse, supra note 269, at 302, as well as in the "omission of trial" in Santa Cruz (Argentina), and the "acuerdo" in Neuquén (Argentina). MANGIAFICO & PARMA, supra note 269, at 146, 150. The Portuguese processo sumarissimo provides for acceptance of a punishment of no more than six months without trial. Jescheck, supra note 230, at 675.

288. According to §§ 503–04 CCP-Neuquen (Argentina), the limit is two years and the judge in his/her judgment must accept the facts as agreed upon by the parties. Vitale, supra note 237, at 367. The Chilean "abbreviated procedure" applies, in the manner of a Spanish conformidad, if the public and private prosecutors in their accusatory pleadings request a punishment of deprivation of liberty which does not exceed five years, even though the maximum punishment for the crime could be higher. Riego, supra note 229, at 457–58.

289. §444(1) CCP-Italy. Langer, Ch.1, at 63. In reality, under the original version of the patteggiamento, the court could substitute a fine for imprisonment, and could sentence to no more than two years deprivation of liberty after having reduced the penalty by one-third. The current version allows deprivation of liberty of up to five years after the one-third reduction, and therefore would be applicable to crimes with a substantially higher punishment. The French reconnaissance préalable de culpabilité (preliminary recognition of guilt) is also applicable to crimes punishable by no more than five years deprivation of liberty. §495-7 CCP-France. Pursuant to §420(1) CCP-Paraguay, the "abbreviated procedure" has a similar five year maximum, Loarca & Bertelotti, supra note 286, at 413. The Guatemalan "abbreviated procedure" was originally applicable to crimes punishable by a maximum of two years, but
plicability of the consensual procedures in civil law jurisdictions extends to Russia, where the provision, modeled on the Italian *patteggiamento*, was applicable to crimes punishable by no more than three years upon first reading in the State Duma, was raised to five years upon passage of the CCP-Russia in 2001, and expanded to ten years by amendment to the code in 2003.290

e. Statutory Discounts or Free Bargaining between Prosecution and Defense?

Statutory discounts for defendants who admit guilt are unknown in the U.S. Of course, there must be some incentive to plead guilty and waive the right to a full trial, whether by jury, mixed court, or even a court composed of professional judges or lay magistrates, and a guilty plea is usually considered to be a mitigating factor which will lead to a lesser sentence than if one were convicted at trial. While under the U.S. federal sentencing guidelines a plea of guilty is supposed to result in a one-third discount in sentence, the actual discount is really more like two-thirds, which can make the procedure inherently coercive.291 While it is prohibited in England and Wales for a defendant to bargain with the judge for a discount in the event of a guilty plea, discussions between prosecution and defense often lead to a dismissal of charges before the entry of a guilty plea.292 It is generally accepted that English magistrates and crown courts will grant around a 1/3 discount to anyone who enters a timely guilty plea, though this is nowhere codified and is not binding.293 Although there is no codified discount in Scotland, the High Court has ruled that the discount must be at least 1/3 upon a timely entry has now been extended to those punishable by up to five years. §464 CCP-Guatemala, *Id.* at 413–14.

290. §314 CCP-Russia. *See* Thaman, *Two Faces*, *supra* note 162, at 110. Croatia’s guilty-plea procedure also applies to crimes punishable by up to ten years. Krapac, ch. 9, at 275.

291. In the U.S. there is often a huge differential between the likely sentence after a jury verdict and the public prosecutor’s offer in plea negotiations. Cf. Ross, ch. 3, at 108. Although the U.S. Sentencing Guidelines purportedly provide for a 1/3 discount following a plea of guilty, the discount in practice amounts to around 2/3, with the average sentence following a guilty plea being 54.7 months deprivation of liberty, in comparison to 153.7 months after trial. Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 205 (2006).


293. For an estimate that the discount is from 25–30%, see *THE ROYAL COMMISSION ON CRIMINAL JUSTICE ¶41* (Viscount Runcimal of Doxford ed. 2003).
of a guilty plea.\textsuperscript{294} In Scandinavia, the discounts appear to be informally recognized, rather than codified.\textsuperscript{295}

It was with the introduction of the Italian \textit{patteggiamento} in 1988 that lawmakers began granting a codified sentence discount in exchange for a waiver of the full trial with all its guarantees and an agreement not to contest the charges. In those countries, which, following Italy, have introduced similar procedures, the great majority have stuck with a one-third discount of the punishment the judge would otherwise have imposed, taking into consideration the gravity of the offense and the personal characteristics of the offender.\textsuperscript{296} Although there was no statutory discount connected with the original Spanish \textit{conformidad}, the version applicable in the new \textit{juicios rápidos} has been modeled on the \textit{patteggiamento} and provides a 1/3 discount in punishment, from a maximum of three years to two.\textsuperscript{297}

In Croatia, however, the sentence imposed may not exceed one-third of the maximum sentence, resulting in a 2/3 discount.\textsuperscript{298} In Costa Rica, when the defendant accepts the maximum charges presented by the prosecuting parties (including the aggrieved party) in a \textit{conformidad}-like procedure, he or she may not be sentenced to more than 1/3 of the statutory minimum required for the off-

\textsuperscript{294}. See Leverick, ch. 4, at 146, who also asserts that some judges start from a higher maximum sentence so as to avoid the necessity of a real 1/3 discount. Due to the vast judicial sentencing discretion in Scotland it is impossible to know whether the defendant actually gets a 1/3 discount.

\textsuperscript{295}. A confession or admission of guilt will substantially mitigate in Denmark, Wandall, ch. 7, at 241–44, and usually lead to a 1/3 discount in Norway. Strandbakken, ch. 8, at 2575.

\textsuperscript{296}. Under the terms of §444(1) CCP-Italy, a judge could, by taking into account mitigating circumstances, decide that the appropriate sentence was 7.5 years, and then reduce by 1/3 to get to the maximum allowable five years. §37 CCP-Colombia allows a defendant to get a 1/3 discount on an “anticipated judgment” (\textit{sentencia anticipada}) if she agrees to the charges before the preliminary investigation is complete, but the discount falls to 1/6 if she makes this decision in the trial court. Oscar Julián Guerrero Perralta, \textit{Colombia}, in \textit{Las Reformas Procesales Penales en América Latina} 197, 234 (Julio B.J. Maier et al. eds. 2000). According to §440(1) CCP-Lithuania, if a defendant subject to expedited proceedings agrees to admit guilt, the court may not sentence him to more than 2/3 of the maximum punishment and may sentence to 1/3 less than the minimum required sentence.

\textsuperscript{297}. The procedure for \textit{juicios rápidos} applies to flagrant crimes punishable by no more than five years’ imprisonment. §§795, 801(1-2) CCP-Spain. Cf. González-Cuéllar Serrano, supra note 284, at 1.

\textsuperscript{298}. Krapac, ch. 9, at 275. According to §376 CCP-Venezuela, the general discount in cases of \textit{admisión de los hechos} is from one-third to one-half the sentence which would otherwise be imposed. However, the discount is limited to one-third in relation to crimes of violence punishable in excess of eight years’ imprisonment.
fense.\textsuperscript{299} The "abbreviated procedure" introduced in El Salvador in 1998 applies to cases punishable by no more than three years deprivation of liberty, and the criminal code in such cases requires a sentence not including deprivation of liberty in cases where the punishment would have been from six months to one year, and allows the judge to suspend jail sentences in cases punishable by from one to three years.\textsuperscript{300} In a similar way, the French guilty plea introduced in 2004, while applying to cases punishable by up to five years deprivation of liberty, allows, upon a "recognition of guilt," a prison sentence of no more than one year, and no more than one-half of the length of what the defendant would otherwise have received, and this prison sentence may be suspended.\textsuperscript{301} A one-fourth discount is given according to the Honduran "abbreviated procedure."\textsuperscript{302}

In the Estonian "settlement proceedings" the prosecutor, defendant and victim enter into a settlement agreement after free negotiations which must then be accepted by the judge in its entirety, or rejected, whereupon the case must be tried according to the normal procedures.\textsuperscript{303} In Colombia, an audiencia especial (special hearing) may be convoked at which prosecution and defense may explicitly plea bargain, i.e., negotiate the elements of the charged crime and the level of defendant's participation.\textsuperscript{304}

Some of the recently enacted consensual procedures link plea or sentence bargaining to what in the U.S. is called a "cooperation agreement." Conditions are thereby attached to the "deal" that require the defendant to aid in the prosecution of others by testifying, providing information, etc.\textsuperscript{305} Similar provisions

\begin{itemize}
\item \textsuperscript{299} §§373–75 CCP-Costa Rica. \textit{See} Llobet Rodríguez, \textit{supra} note 282, at 434.
\item \textsuperscript{300} §§379–89 CCP-El Salvador. Edgardo Amaya Cóbar, \textit{El procedimiento abreviado en el proceso penal de El Salvador}, in \textit{El procedimiento abreviado}, \textit{supra} note 229, at 402–03. The "abbreviated procedure" in Guatemala also allows for suspension of the imposition of prison sentences for up to three years and the commutation of sentences for up to five years. Loarca & Bertelotti, \textit{supra} note 286, at 413.
\item \textsuperscript{301} §495-8 CCP-France.
\item \textsuperscript{302} §404(para.4) CCP-Honduras.
\item \textsuperscript{303} §248 CCP-Estonia. The settlement includes an agreement as to the charges, the punishment and the amount, if any, of compensation or damages awarded to the aggrieved party or civil complainant. §245 CCP-Estonia. The Nicaraguan "acuerdo" also allows unrestricted bargaining between the parties. §61(para.1) CCP-Nicaragua.
\item \textsuperscript{304} As of 2000, however, the procedure was seldom used. Guerrero Perralta, \textit{supra} note 296, at 235–36. Pursuant to the "acuerdo" in §503 CCP-Neuquén (Argentina), defense and prosecution can negotiate charge and punishment, as long as the latter does not exceed three years. Mangiafico & Parma, \textit{supra} note 269, at 150.
\item \textsuperscript{305} \textit{See} §5K1.1 U.S. Sentencing Guidelines, which provides for so-called "downward departures" for cooperation with the U.S. federal authorities, which can lead to a sentence below the statutory minimum per 18 U.S.C §3553(3). The federal prosecutor thus has vir-
have been introduced in Latin America\textsuperscript{306} and in some of the former Soviet republics.\textsuperscript{307} In Latvia, the 2005 CCP recognizes a defense “right to cooperate” with law enforcement officials as a basis for its cooperation agreements\textsuperscript{308} which can lead to dismissal of the charges in all but the most serious cases as long as the defendant has aided in solving a crime more serious than the one he or she was charged with.\textsuperscript{309}

In the U.S. there are often no promises as to the extent charges will be dismissed or sentence reduced, until the defendant actually “cooperates” and the prosecution has positively assessed the quality of such cooperation. This model appears to have also been adopted in Moldova, where no actual “plea bargain” is entered into and a formal sentencing hearing is conducted before the actual sentence is determined.\textsuperscript{310} The new Russian provisions also appear to follow the U.S. model in some respects.

\begin{itemize}
\item Chapter LXIV of the CCP-Georgia, signed into law on February 13, 2004, introduces a “plea agreement” designed to substitute for the full criminal trial. §679-1(1) CCP-Georgia. The “plea agreement” appears to be primarily introduced to effectuate co-operation of the defendant in the prosecution of serious crimes, and especially public corruption. §679-1(2) CCP-Georgia. In exchange, the prosecutor will ask for a reduced sentence or even, in the case of exceptional aid in solving serious cases, be able to dismiss the prosecution. §§679-1(5,9) CCP-Georgia. If the testimony or other co-operation proffered by the defendant is deemed to be unreliable or fails to prove guilt in the trial against the third party, the plea agreement shall be null and void. §679-1(8) CCP-Georgia. According to §210 CCP-Lithuania, the preliminary investigation may be suspended in cases of suspects who help in the detection of the activities of a “criminal association” after the suspect has confessed to such participation. However, if the suspect refuses to give evidence in the case of a member of such association, the proceedings may be re-opened. §505(1)(1) CCP-Moldova advises the prosecutor, when engaging in settlement discussions with the defendant, to take into account “the desire of the accused/defendant to aid in the realization of the criminal prosecution or in the accusation of other persons.”
\item The “right to cooperate” can be expressed in: (1) choosing a simpler type of procedure; (2) influencing the conduct of the procedure; or (3) uncovering criminal acts committed by other persons. §§22, 66(1)(2) CCP-Latvia. §§64(2)(8,9,10,21) CCP-Moldova also recognizes the defendant’s “right” to admit the charge and conclude an agreement to plead guilty, to agree to special procedures and to reconcile with the victim.
\item Although the “agreement to admit guilt” is called a “deal between the public prosecutor and the accused … who gave his agreement to admit his guilt along with a shorten-
On June 9, 2009, Chapter 40.1 was added to the Russian CCP to provide for a “special procedure for adopting a judicial decision by conclusion of a pre-trial agreement of cooperation.” The procedure begins with the prosecutor acting in a kind of judicial capacity. The accused brings a motion to enter into a cooperation agreement through the criminal investigator, at any time before the conclusion of the preliminary investigation. If the investigator opposes the motion, the accused may appeal to the prosecutor.\textsuperscript{311} If the prosecutor agrees to the procedure, he invites the defense and the investigator to a meeting and they create an agreement, the most important part of which is the description of the “acts the accused or defendant promises to perform in order to fulfill the duties indicated in the pretrial agreement on cooperation.”\textsuperscript{312} At the conclusion of the preliminary investigation, if an accusatory pleading against the defendant is forthcoming, the prosecutor prepares a special written motion for application of the “special procedure” which contains the following: the character and extent of the acts of defendant in solving the crime, identifying suspects, uncovering fruits of the crime and its importance of the fruits for the investigation; the crimes which were uncovered and eventually charged as a result of the acts of the defendant; the extent of danger threatening the life of the defendant or his relatives as a result of his cooperation; and the completeness and credibility of the information provided by defendant in fulfilling his agreement obligations.\textsuperscript{313}

The motion goes to the judge, who may accept it, if she feels the conditions have been met, the agreement was free and voluntary, and the information defendant gave was not exclusively related to his own case.\textsuperscript{314} The judge weighs the aggravating and mitigating circumstances and may sentence to below the minimum sentence provided for the offense, may suspend sentence, or suspend the imposition of the punishment.\textsuperscript{315} The judge may not sentence higher than one-half of the maximum punishment.\textsuperscript{316}

\footnotesize
\begin{itemize}
\item \textsuperscript{311} §317.1 CCP-Russia.
\item \textsuperscript{312} §317.3 CCP-Russia.
\item \textsuperscript{313} §317.5 CCP-Russia.
\item \textsuperscript{314} §317.6 CCP-Russia.
\item \textsuperscript{315} §317.7(5) CCP-Russia.
\end{itemize}
Cooperation agreements have been criticized as benefitting exclusively the “gravely guilty,” who have important information about serious crimes to peddle, whereas the marginally guilty, bereft of such knowledge, are doubly punished. Cooperation agreements existed sub rosa in Russia before the recent codification and were known even in Soviet times. Thus, again, spontaneous “arrangements” could be made even in the systems most ideologically wedded to the principle of legality, as long as they remained secret and were ignored in the routinized judgment reasons announced by the court.

f. Must the Defendant Admit Guilt?

The Anglo-American guilty plea was originally based on the assumption that the defendant would admit the charges contained in the accusatory pleading, but over the years U.S. judges have also allowed the defendant to accept a plea bargain with the entry of a plea of nolo contendere, i.e., to not contest the charges. Such pleas do not require an explicit admission of the facts underlying the accusatory pleading, and cannot be used as evidence of guilt in a civil action. Some U.S. judges, however, will not accept a plea unless the defendant explicitly admits guilt. Furthermore, some U.S. judges will even accept a “guilty plea” in cases where the defendant actually denies guilt of the charged offense. This practice was upheld by the U.S. Supreme Court as long as the judge makes sure there was a factual basis for the finding of guilt.

The Spanish procedure of conformidad is somewhat like a U.S. plea of nolo contendere for it does not require an explicit admission of guilt, but is tantamount to an expression that the defendant has no objection to, that is, agrees

317. Ferrajoli, supra note 5, at 625.
320. Fed. R. Crim. P. 11(f) allows each judge to decide whether he/she will require an admission of guilt. Ross, ch. 3, at 109.
with the validity of the charges.\textsuperscript{322} The Italian \textit{applicazione della pena sulla richiesta delle parte} (application of punishment upon request of the parties) also is considered to be, not an admission of guilt, but a "request for punishment."\textsuperscript{323} Some of the procedures modeled on the Italian \textit{patteggiamento} also do not require any admission of guilt. An example of this is the Russian procedure for "agreement with the charges."\textsuperscript{324} Occasionally one finds a consensual procedure patterned on U.S. plea bargaining that does not require an admission of guilt.\textsuperscript{325} On the other hand, an unconditional admission of guilt is a prerequisite for the application of guilty-plea-like procedures in a number of jurisdictions.\textsuperscript{326}

\textsuperscript{322} Although §406 CCP-Chile has adopted the language of the Spanish procedure, there is a dispute in the literature as to whether the \textit{conformidad} is tantamount to a confession of guilt. Riego, \textit{supra} note 229, at 462. An admission of guilt is neither required in Costa Rica, Llobet Rodríguez, \textit{supra} note 282, at 440, nor in El Salvador, Amaya Cóbar, \textit{supra} note 300, at 404. The same is true in many Argentine jurisdictions: the federal system, Chaco, Mendoza, Missiones, and San Juan provinces. Mangiafico \& Parma, \textit{supra} note 269, at 80, 144, 151, 153, 174–75. The Council of Europe Recommendations in 1987 require the defendant to utter a "positive response to the charges against him," which is sufficiently vague to include a \textit{conformidad}-type admission. COE, Simplification (1987), \textit{supra} note 178, at §III.A.8(ii).


\textsuperscript{324} Chapter 40, §§314–17 CCP-Russia. "Agreement of the accused with the accusatory pleading." Some lower courts in Russia, however, maintain that the defendant must admit to all the allegations in the accusatory pleading. Pomorski, \textit{supra} note 146, at 138. In Croatia, the defendant may not present evidence of innocence after requesting punishment in order to try to achieve an acquittal, unless this evidence was newly discovered. Krapac, ch. 9, at 276.


\textsuperscript{326} Wandall, ch. 7, at 240–41 (Denmark); §382(4) CCP-Bulgaria; §373 CCP-Bolivia; §§403(2), (3)(a) CCP-Honduras; §420(2) CCP-Paraguay; §376 CCP-Venezuela ("admission of the facts"); §495–7 CCP-France ("admits the acts"); §679–3(2) CCP-Georgia. It is one of the circumstances that must be taken into consideration by the prosecutor when accepting a plea according to §505(1)(4) CCP-Moldova. If an "agreement" is concluded during the trial in Latvia, the defendant must completely admit guilt. §544(2)(3) CCP-Latvia. Pursuant to the Argentine federal CCP, the defendant must agree that the act charged is true and that he was the perpetrator. Bovino, \textit{supra} note 269, at 66. Bovino sees this as being tantamount to a confession. Córdoba, \textit{supra} note 286, at 242. For the "abbreviated
g. Procedural Aspects: Stage of Proceedings, Veto by Judge, Prosecutor, or Aggrieved Party, Exclusion of Statements Made during Unsuccessful Negotiations

Procedural economy is maximized, of course, the earlier in the proceedings the defendant agrees to resolve the case consensually without a trial. On the other hand, without a minimum of investigative activity, there may be insufficient evidence for a judge to be able to assure a factual foundation for the judgment.327 In the U.S., guilty pleas may be entered any time from the first appearance in court to the stage of jury deliberations after all evidence has been taken and closing arguments of the parties have been made.328 In England and Wales, on the other hand, efforts have been made to prohibit, or at least lessen the discount on punishment, for pleas made in the trial court, not to speak of after the trial has begun.329 In international criminal proceedings a guilty plea may be proffered at initial appearance, during pretrial proceedings, or during trial.330

While many of the Argentine "abbreviated trials" may be initiated during the preliminary investigation, thus yielding real economic benefits in limiting the preliminary investigation and eliminating the trial, in some jurisdictions...
tactical or theoretical considerations have hindered the early use of the procedures. Thus, in the federal Argentine system, lawyers refuse to move for the procedure at the pretrial stage, because they think they can be more successful in negotiating a lesser sentence with the prosecutors at the trial stage.\textsuperscript{331} In the province of Córdoba, on the other hand, it is the pretrial judges who do not want to mix their control functions with those of rendering judgment.\textsuperscript{332} In some Argentine provinces, however, the procedure is only available in the trial court before the case is sent out for trial.\textsuperscript{333}

While the Spanish \textit{conformidad} may be effectuated during the preliminary investigation, or at its termination,\textsuperscript{334} many of the new European procedures, beginning with the Italian \textit{patteggiamento}, provide that the procedure will take place during the preliminary hearing before the pretrial judge, in Italy, the \textit{giudice dell'udienza preliminare},\textsuperscript{335} after the preliminary investigation has been completed.\textsuperscript{336} The procedures in Italy, as elsewhere, may also be implemented

\begin{itemize}
\item \textsuperscript{331} Mangiafico & Parma, \textit{supra} note 269, at 74–75. There has been criticism, for instance, that the defendant can wait until the day before trial to request the “abbreviated trial.” \textit{Id.} at 130. In Italy, many lawyers wait to the last possible time, just before opening statements at trial, to agree to the \textit{patteggiamento}, thus defeating the gains in procedural economy. Susanne Hein, \textit{Landesbericht Italien, in Die Beweisaufnahme im Strafverfahrensrecht des Auslands} 165 (Walter Perron ed. 1995).
\item \textsuperscript{332} The pretrial judges prefer the “abbreviated trial” to be initiated in the trial court, after the investigation is complete. Riego, \textit{Informe, supra} note 203, at 26.
\item \textsuperscript{333} Cf. §512 CCP-San Juan (Argentina), Mangiafico & Parma, \textit{supra} note 269, at 154.
\item \textsuperscript{334} In Croatia, requests for punishment may only be made before the completion of the preliminary investigation. Krapac, ch. 9, at 275. In the Argentine federal CCP, the \textit{juicio abreviado} may be triggered by the accused’s \textit{conformidad} at any time up to the setting of trial. Córdoba, \textit{supra} note 286, at 231. In El Salvador, the “abbreviated procedure” must be commenced before the preliminary hearing, Amaya Cóbar, \textit{supra} note 300, at 403. According to §403(1) CCP-Honduras, the “abbreviated procedure” must be initiated before the case is set for trial.
\item \textsuperscript{335} A preliminary hearing presided over by the investigating magistrate was introduced in the 1995 Spanish Jury Law and some courts, as well as the office of the public prosecutor, believe that a \textit{conformidad} in a jury case should be reached during the preliminary hearing, rather than after jury selection, as the law provides. Jaime Vegas Torres, \textit{Las actuaciones ante el Juzgado de Instrucción en el procedimiento para el juicio con jurado, in La Ley del Jurado: Problemas de Aplicación Práctica} 148–49, 157 (Luis Aguiar de Luque & Luciano Varela Castro eds. 2004). In Costa Rica the motion for application of the \textit{procedimiento abreviado} is made before the pretrial judge during the preliminary hearing and sentencing is before the trial judge. Llobet Rodríguez, \textit{supra} note 282, at 440.
\item \textsuperscript{336} The request for a \textit{conformidad}-like “abbreviated trial” is also made after the conclusion of the preliminary investigation in §373 CCP-Bolivia. On the other hand, §406
when the case is transferred to the trial court, at the beginning of trial or at times during the actual trial.

In countries in which the composition of the courts varies depending on the seriousness of the charge, it is generally more likely that guilty pleas will be forthcoming in courts dealing with low- and mid-level offenses, than in the upper-level courts reserved for more serious offenses, which often have lay participation. This is because the guilty-plea mechanisms in Europe usually don’t apply to the most serious offenses. The Spanish jury law of 1995, however, contains a controversial section which only allows a *conformidad* after the jury has been selected and the evidence heard, effectively eliminating any benefits of procedural economy. Yet the overwhelming number of consensual resolutions of jury cases have nonetheless taken place during the prelim-

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CCP-Chile provides that an “abbreviated trial” may be requested during a pretrial hearing in the trial court.

337. The procedure takes place in the trial court if the case is tried by a single judge. Under a previous version of the law, in cases where the prosecutor or judge of the investigation vetoed the request for punishment (which is no longer possible), the trial judge could nevertheless grant the one-third discount following trial. *Stephen C. Thaman, Comparative Criminal Procedure. A Casebook Approach* 167 (2nd ed. 2008); Thaman, *Plea-Bargaining*, supra note 177, at 981–82. In several Argentine jurisdictions, *inter alia*, in the federal code and in §413(3) CCP-Chaco (Argentina), a motion for an “abbreviated trial” may be made any time up to sending the case out to a trial court. *Mangiafico & Parma, supra* note 269, at 71, 144.

338. In Spain, a *conformidad* may be effectuated as late as the pretrial hearing in the trial court or even the interrogation of the defendant, which normally occurs at the beginning of the taking of the evidence. Samanes Ara, cited in Thaman, *Plea-Bargaining*, supra note 177, at 982.

339. §384(1) CCP-Bulgaria. The fact that the Venezuelan procedure for “admission of the facts” can take place during the trial has been criticized on grounds of procedural economy. *Eric Lorenzo Pérez Sarmiento, Comentarios al Código Orgánico Procesal Penal* 420 (3d. ed. 2000). While the Spanish jury law provides for settlement by *conformidad* only after the jury has been selected and the evidence adduced, the prevailing view in the literature, and among the courts, is that the provisions for *conformidad* applicable to normal trials, or “abbreviated trials” is applicable in supplementary fashion in the jury courts. In practice, nearly all *conformidad* agreements are thus reached during the preliminary investigation or at the preliminary hearing. Juan-Salvador Salom Escriva, *Audiencia Preliminar, Arts. 30–35 LOTI, Comentarios a la Ley del Jurado* 569–605 (Juan Montero Aroca & Juan-Luis Gómez Colomer eds. 1999).

340. §50 LOTI-Spain. An earlier Spanish jury law of 1872 also provided for *conformidad* after selection of the jury, but the 1888 jury law, which was in force until the victory of General Franco in the civil war, had eliminated this seeming anomaly. Julio-Javier Muerza Esparza, *Art. 50, Disolución del Jurado por conformidad de las partes*, in *Comentarios, supra* note 339, at 719–20. Since the Spanish jury law does not allow the dossier of the prelimi-
inary investigation or preliminary hearing, with judges applying the law for normal and abbreviated trials despite the more particular provisions in the jury law. Since most cases before the Spanish jury courts are homicides punishable by more than six years deprivation of liberty, *conformidades* have been mainly reached in cases involving lesser offenses subject to the jury law, such as threats, trespasses, failing to render aid, or setting forest fires. In a few cases, however, jury courts have accepted a *conformidad* in relation to an insane defendant, who, while not facing any jail time, would be subject to preventive detention in a mental institution for potentially longer than the six-year cap for the *conformidad* procedure.

The judge plays an active role in some U.S. jurisdictions and in some of the guilty-plea systems in other countries, and may reject a proposed settlement and set the case for a full-blown trial. In the *conformidad*-like procedure of
the Argentine federal CCP, the judge may reject the "abbreviated trial" due to insufficient knowledge of the facts of the case or because the legal qualification of the offense does not correspond to the facts. Where the judge possesses veto power, however, the decision is usually based on a pre-evaluation of the evidence which should, theoretically, make that judge biased if he or she were to act as trier of fact at the trial. The prosecutor or defense may appeal the judge's veto to a higher court in some countries. In some jurisdictions, however, the judge plays no role in plea bargaining, which takes place exclusively between the public prosecutor and the defendant.

The aggrieved party has no procedural role in most countries which allow defendants to admit or stipulate to guilt and move directly to the sentencing phase, though his or her position on the case may affect the decision of the public prosecutor. The civil action for damages is also not included in the consensual pro-

345. §431bis CCP-Argentina (Federal). Langer, ch. 1, at 69; Judicial veto is allowed in all Argentine provinces, based on similar reasons. Sarrabayrouse, supra note 269, at 310.

346. If the judge thinks the punishment is too lenient, then he/she would be biased against the defendant and if he thinks an acquittal should be forthcoming, he is then biased against the prosecution. Vitale, supra note 237, at 376–78. This is a possible problem in Guatemala, where the code is unclear as to whether the same judge who rejects a consensual resolution will ultimately try the case. Loarca & Bertelotti, supra note 286, at 429. In Connecticut, judges participate in the plea negotiations, but may not sit at trial if a guilty plea is not forthcoming. Turner, supra note 291, at 248.

347. Such as in Croatia, Krapac, ch. 9, at 275.

348. In Scotland, the court may not refuse to accept a plea and may only ask the prosecutor to reconsider. The imposition of punishment, however, which is not subject to bargaining, is completely up to the judge. Prosecutor and defense, following recent reforms, may also agree on a narrative of the offense for purposes of fixing the limits of aggravation and mitigation. Leverick, ch. 4, at 144–46. In the U.S. the judge is prohibited from taking part in plea negotiations in the federal courts, Fed. R. Crim. P. 11(c)(1), available at http://www.uscourts.gov/rules/crim2007.pdf, and in several states, including Missouri, yet may exercise his/her discretion and refuse to accept a plea. Turner, supra note 291, at 199. Cf. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 1037–39 (5th ed. 2009).

349. Leverick, ch. 4, at 146–47 (Scotland). In only seven U.S. states does the victim have a right to participate in plea bargaining proceedings. Ross, ch. 3, at 108 n. 2. In Connecticut, a victim’s advocate may participate if the case involves serious injuries or heavy losses. Turner, supra note 291, at 262. The victim has no role in the abbreviated procedures in the Argentine provinces of Buenos Aires, Formosa, nor in the Argentine federal courts. MANGIAPICCO & PARMA, supra note 269, at 104.

350. In El Salvador the judge must hear the position of the victim, but may order the "abbreviated procedure" over her objection. Amaya Cóbar, supra note 300, at 404. The aggrieved party has a right to be heard in France, which means that they seldom will! Saas, supra note 179, at 840. The opinion of the victim is heard, inter alia, in the Argentine
cedures in most of these jurisdictions. In Russia, however, for a defendant to concede guilt and avail himself of the special procedure (and discounted sentence), he/she must agree to satisfy the civil action. In a minority of jurisdictions, however, the approval of the aggrieved party is required before the consensual procedures may be applied. Some German theorists, though in principle against plea bargaining, have nevertheless articulated a positive role for consensual procedures, but only if the victim plays an active role. They see this as a step towards the reprivatization of the criminal trial and its restructuring as a model of conflict resolution, in lieu of it being merely a vehicle for the one-sided ascertain-ment of the truth, i.e. “as a more humane procedural model of the future.”

While the right to counsel may be waived in the U.S. and plea bargains accepted in the absence of counsel, appointment of counsel is mandatory in most jurisdictions in order to even initiate settlement discussions and some

provinces of Chaco, Tucumán and Missiones. Mangiafico & Parma, supra note 239, at 145, 149, 151.

351. Such as in the federal Argentine code, Id. at 72. In some Argentine provinces, however, defendant and victim may agree to include it as part of the judgment. Id. at 92, 149, 152, 154. In the province of Buenos Aires, however, the civil party can be included in the abbreviated trial and the judge can order conciliation measures and decide the civil action as well. Id. at 92.

352. Pomorski, supra note 146, at 137–38.

353. See Rogacka-Rzewnicka, ch. 10, at 291 (Poland), in relation to “stipulation to the charges.” Victims have a veto also pursuant to §314(1) CCP-Russia, §373 CCP-Bolivia, §239(2)(4) CCP-Estonia. Under the Spanish conformidad procedures the defendant must stipulate to the truth of the accusatory pleading, whether that of the public prosecutor, the private prosecutor (victim), or the popular prosecutor, whichever seeks the most serious charges and the highest punishment. Similarly, in Chile, if the victim charges a more serious crime that carries with it a punishment that exceeds five years, the procedimiento abreviado will not apply. §408 CCP-Chile. The victim must also agree to the conformidad-like proceedings in the Argentine provinces of Tierra del Fuego, Sarrabayrouse, supra note 269, at 301, Córdoba, Mendoza, and Santa Cruz. Mangiafico & Parma, supra note 269, at 103, 118, 146.


355. In Iowa v. Tovar, 541 U.S. 77 (2004), the U.S. Supreme Court held that counsel may be waived without the necessity of advising the defendant that the waiver may leave him ignorant of viable defenses and deprive him of the opportunity to obtain useful legal advice about the wisdom of pleading guilty. Ross, ch. 3, at 118. The high court has even validated waivers of the right to counsel and pleas of guilty by arguably schizophrenic defendants charged with capital murder! Godinez v. Moran, 509 U.S. 389 (1993).

356. §384(2) CCP-Bulgaria; §506(3)(1-2) CCP-Moldova; §83(2) CCP-Latvia.
civil law jurisdictions require that the defendant have full discovery of the entire contents of the investigative file before negotiations take place.\textsuperscript{357} In the U.S. the defendant must explicitly be advised of his or her right to remain silent, to confront and cross-examine the witnesses against him, and the right to jury trial\textsuperscript{358} and must waive these rights on the record in open court for the guilty plea to be accepted.

In proceedings before the International Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), four basic requirements are required for a plea to be accepted.\textsuperscript{359} The plea must be made voluntarily in full cognizance of the nature of the charge and its consequences. It must be informed, not only in relation to the recognition of guilt, but also in relation to the implications of a guilty plea in the context of defense strategy. It must be unequivocal\textsuperscript{360} and there must be a factual basis for the plea.\textsuperscript{361}

In the U.S. and in some other countries the prosecution may not use any statements made by the defendant during discussions aimed at arriving at a consensual disposition of the case if the negotiations break down or the deal is rejected by the judge and the case goes to trial.\textsuperscript{362}

h. Does Charge or Sentence Bargaining Precede the Application of the Procedure?

As the term “plea bargaining” in the U.S. indicates, intensive bargaining and negotiations between the public prosecutor and the defense, and sometimes even

\begin{footnotesize}
\begin{enumerate}
\item This is not true in the U.S. where the prosecutor need not reveal exculpatory evidence prior to a plea and such hiding of evidence does not undermine the “knowing” nature of the plea. United States v. Ruiz, 536 U.S. 622 (2002). Ross, ch. 3, at 110.
\item Ross, ch. 3, at 110-11.
\item These requirements are listed in Rule 62bis of the ICTY RPE. IT/32/Rev. 40, July 12, 2007.
\item Rule 62bis(iii) ICTY Rules of Procedure and Evidence (hereafter RPE). In the Erde-movic case in the ICTY the defendant pleaded guilty, but said that he had acted under superior orders and duress. Since this could have constituted a defense, the appeals chamber refused to accept the plea and ordered trial pursuant to the normal procedures. KNOOPS, supra note 330, at 259-60.
\item Rule 62bis(iv) ICTY RPE. Cf. Rule 11(b)(3) Fed. R. Crim. P. which requires a “factual basis” for a plea in the U.S. federal courts.
\end{enumerate}
\end{footnotesize}
the judge,\textsuperscript{363} in relation to both the charges and the punishment, usually precedes the defendant's guilty plea.\textsuperscript{364} Judicial participation in the bargaining is frowned upon in many U.S. jurisdictions\textsuperscript{365} because it is feared that it will compromise the judge's impartiality and may put too much pressure on defendants to deal.\textsuperscript{366} This is especially the case when the bargaining judge will also be the trial judge.\textsuperscript{367} On the other hand, Jenia Iontscheva Turner makes a convincing argument that:

"a judge's early input into plea negotiations can render final disposition more accurate and procedurally just. Judges can provide a neutral assessment of the merits of the case and prod defense attorney or prosecutor to accept a fairer resolution. They can offer a more accurate estimate of expected post-plea and post-trial sentences, and make it more transparent and more acceptable to public."\textsuperscript{368}

In the United Kingdom, on the contrary, the existence of bargaining is generally denied. There, one allegedly pleads guilty only in expectation of a mitigated sentence.\textsuperscript{369}

\textsuperscript{363} Judges routinely participated in plea bargaining in Alameda, California, from 1976-1987 when I was an assistant public defender there, though it appears that the practice is now being discouraged. Turner, \textit{supra} note 291, at 202. It has been maintained, that sentences are usually lower when the defendant has a chance to bargain with both prosecutor and judge, than when only the prosecutor may participate. Fisher, \textit{supra} note 82, at 221.

\textsuperscript{364} For a fine history of this practice, see Fisher, \textit{supra} note 82. In Scotland there is informal bargaining as to charge and even as to the narrative relating to the charge in the accusatory pleading so as to further restrict the judge's discretion in assessing aggravating and mitigating circumstances. Leverick, ch. 4, at 145-46.

\textsuperscript{365} Judges are not supposed to engage in bargaining in the U.S. federal system and in many states, among them Missouri. At least nine other states also prohibit judicial involvement and follow the 1968 American Bar Association Standards of Criminal Justice which depict the judge's role as one of "passive verifier." Turner, \textit{supra} note 291, at 202.

\textsuperscript{366} \textit{Id.} at 199.

\textsuperscript{367} In Connecticut, the presiding judge of the court is directly involved in plea bargaining, but if a guilty plea is not forthcoming, then another judge will be assigned to conduct the trial. \textit{Id.} at 247-48.

\textsuperscript{368} \textit{Id.} at 200.

\textsuperscript{369} Hatchard, \textit{supra} note 321, at 220. But see Anderson Ralph Coward [1980] 70 Cr. App. R. 70, 72-76, for a case in which the court criticizes the fact that in London the parties often try to get the judge to commit to a particular sentence, but that the practice is limited to exceptional circumstances.
In most of the new systems that have sprouted up in civil law jurisdictions there is no specific mention of bargaining. Instead, as we have seen, many of the new codes provide for a codified discount to which the defendant is entitled upon agreeing to consensual resolution of the case. Sometimes a sentence is suggested, making the procedures similar to the penal order. However, this is also indirectly the case with the Spanish conformidad, where the scope of the prosecuting parties' pleadings determines whether a resolution will be forthcoming.\(^{370}\)

Bargaining between the prosecutor and defense, however, likely occurs in many of these systems, especially in relation to the punishment requested by the public prosecutor, as this triggers the applicability of the procedure in systems with conformidad-like procedural set-ups.\(^{371}\) This practice was clearly evident in the first year of modern Spanish jury trials, when prosecutors lowered the punishment requested in their accusatory pleadings in non-homicide cases to reach a conformidad.\(^{372}\) Though "charge bargaining" is officially frowned upon in consensual proceedings in most civil law countries,\(^{373}\) commentators grudgingly admit that it nevertheless takes place.\(^{374}\) In systems where the aggrieved party may veto the application of the new procedure, such as in Russia, this opens up the possibility of the defense negotiating with the victim to

\(^{370}\) See also §495-8 CCP-France, where the public prosecutor makes a public recommendation of a sentence at the time of the guilty plea.

\(^{371}\) As to the existence of bargaining prior to the agreement to a conformidad in Spain, Gimeno Sendra et al., supra note 284, at 336; Rodríguez García, supra note 268, at 84–85 (calling this bargaining a "virus"). As to Italy, see Ferraioli, cited in Thaman, Plea-Bargaining, supra note 177, at 984. As to the possibility of bargaining in Chile, see Riego, supra note 229, at 463–64. On negotiations with the trial prosecutor to lower the requested punishment in the Argentine federal courts, but insisting there is no bargaining as to charge, Mangiafico & Parma, supra note 269, at 46, 74–75. In the Argentine province of Córdoba, prosecutors are governed by a strict legality principle and may not dismiss charges, so bargaining is limited to reducing the requested punishment and inducing the waiver of the full trial. Riego, Informe, supra note 203, at 25.

\(^{372}\) Thaman, Spain Returns, supra note 142, at 312–13. On how the legislator envisioned bargaining when the conformidad was extended to the abbreviated trial and the jury trial. Aguilera Morales, supra note 341, at 3. In Italy, the sentence requested is also a product of bargaining between the parties. Ferraioli, cited in Thaman, Plea-Bargaining, supra note 177, at 985.

\(^{373}\) As to Russia, see Pomorski, supra note 146, at 139–40.

\(^{374}\) In the Argentine province of Mendoza, however, prosecutors will negotiate and reduce the charges if the defendant accepts the "abbreviated trial" procedure. Mangiafico & Parma, supra note 269, at 123. Defendant and prosecutor can negotiate the charge, and a sentence which does exceed three years, pursuant to §503 CCP-Neuquén (Argentina), Id. at 150. Negotiations are also allowed in the ICTY and the ICTR.
obtain his or her consent.\textsuperscript{375} A handful of countries, however, have introduced procedures that clearly allow bargaining between prosecution and defense before "plea agreements" are reached.\textsuperscript{376}

i. Role of the Judge: May the Judge Acquit, Impose a Lesser Sentence, Find Guilt of a Lesser-Included Offense?

In the U.S., if a judge accepts an explicit plea bargain, the bargained-for punishment must be imposed.\textsuperscript{377} A recognized exception to this rule is, however, when new evidence comes to the attention of the judge before sentencing which indicates that the agreed-upon charge or punishment does not reflect the facts of the case or the relative guilt of the defendant.\textsuperscript{378} Then the judge must normally allow the defendant to withdraw his or her plea of guilty. In the U.S. federal system and in some states, the only promise that may be made to the defendant is that the prosecution will not oppose his or her request for a specific punishment and in such cases the judge may sentence higher than the punishment the prosecution has promised not to oppose. At other times, the punishment depends on the specific terms of the plea agreement and is often dependent on the defendant testifying truthfully in another case or otherwise aiding with the prosecution of a more serious case. The decision as to whether the defendant has sufficiently cooperated with the prosecution in the federal system, so as to merit a "downward departure" in terms of the U.S. Sentencing Guidelines, is exclusively that of the prosecutor. If the prosecutor asserts that this has not been done, then the judge may impose any sentence within the sentencing parameters.\textsuperscript{379}

In December 2001, Rule 62 ter of the ICTY RPE was adopted which provides that prosecution and defense may bargain to amend the indictment or to recommend a specific sentence or sentencing range. The prosecutor may also

\textsuperscript{375} Pomorski, \textit{supra} note 146, at 139. The power of the aggrieved party in charge bargaining is strengthened by the power given him/her by § 125 CCP-Russia to appeal prosecutorial decisions to dismiss charges and compel the case to be brought to trial. \textit{Id.} at 143.

\textsuperscript{376} The Estonian "settlement agreements" are a good example, Sillaots, \textit{supra} note 325, at 117.

\textsuperscript{377} Some courts, however, say the judge is never bound if, during sentencing proceedings, she thinks that the bargained punishment does not reflect the seriousness of the criminal conduct, but others say lenience is not a sufficient ground for rejection of a plea agreement. Ross, ch. 3, at 1109.

\textsuperscript{378} If the plea agreement calls for dismissal of charges, a federal court may defer its decision to accept or reject the bargain until the judge has seen a presentence report and formed an opinion about the gravity of the underlying conduct. \textit{Id.}

\textsuperscript{379} \textit{Fisher}, \textit{supra} note 82, at 217–19.
agree not to oppose a request by the accused to be sentenced within a particular range. The plea agreement must normally be disclosed in open court, but the trial judge is not bound by the parties’ agreement.\textsuperscript{380}

In the case of the Spanish \textit{conformidad} and many of the other modern guilty-plea-like procedures, the judge may actually acquit the defendant if he or she finds in the investigative dossier substantive or procedural reasons for doing so.\textsuperscript{381} On the other hand, the Russian Supreme Court has specifically ruled that a judge may not acquit pursuant to the “special procedure” but must refuse to apply it in cases where there is a doubt as to guilt, thus allowing the case to proceed under the normal procedure.\textsuperscript{382}

\textbf{j. Judgment: Must the Judge Give Reasons? Does It Amount to a Judgment of Guilt?}

In the Common Law tradition, judges generally do not have to give reasons for the judgments they issue, even if the judge is sitting alone as trier of fact without a jury.\textsuperscript{383} Juries do not have to give reasons in Common Law coun-

\footnotesize{380. KNOOPS, \textit{supra} note 330, at 262. In Prosecutor v. Nikolic (Judgment on Sentencing Appeal, Feb. 4, 2005, Case No. IT-94-2-1, para. 89), the Appeals Chamber emphasized that the Trial Chambers should give due consideration to the recommendation of the parties and, should the sentence diverge substantially from the recommendation, give reasons for the departure. \textit{Id.}

381. This is also true in relation to the Italian \textit{patteggiamento}. Thaman, \textit{Spain Returns, supra} note 142, at 311. In the ICTY/R, an admission of guilt also does not obligate the court to convict. KNOOPS, \textit{supra} note 330, at 263. Judicial acquittal is also possible in, \textit{inter alia}, the Argentine federal system, and the provinces of Tierra del Fuego, Sarrabayrouse, \textit{supra} note 269, at 302, Mendoza, Santa Cruz, and Buenos Aires, MANGIAFICO \& PARMA, \textit{supra} note 269, at 89, 128, 147, 157. The same is true in Chile, Riego, \textit{supra} note 229, at 404–05. In Guatemalan “abbreviated trials” rough statistics have shown that judges returned 203 convictions and three acquittals in Guatemala City in 1996, 174 convictions and 10 acquittals in 1997, and 130 convictions and 9 acquittals in 1998. Loarca \& Bertelotti, \textit{supra} note 286, at 424. §542(1)(1) CCP-Latvia allows the judge in the consensual procedure to dismiss the case if there are procedural impediments to conviction.


383. An exception can be found in Northern Ireland, where special legislation abolished trial by jury for terrorism cases and the single judge court must give reasons for its judgments. On the so-called “Diplock courts,” see JOHN JACKSON \& SEAN DORAN, JUDGE WITHOUT JURY: DIPLOCK TRIALS IN THE ADVERSARY SYSTEM (1995).}
tries\textsuperscript{384} and judges, when accepting a guilty plea, do not need to write a reasoned judgment. The guilty plea is itself sufficient in order to render judgment. Upon accepting a plea, however, the judge in the U.S. must be convinced that there is a “factual basis for the plea.”\textsuperscript{385} When this requirement is taken seriously,\textsuperscript{386} which is not always the case, the recitation of the “factual” basis may simply be that the prosecutor asserts, that he or she would have proved the contents of the indictment.\textsuperscript{387}

Most modern European or Latin American guilty-plea-like arrangements require some kind of judicial activity which is similar to that which a judge must perform after a full-blown trial, usually consisting in giving reasons to justify the finding of guilt and the imposition of a particular sentence.\textsuperscript{388} With the Italian \textit{patteggiamento}, the procedure for writing the judgment (which is

\textsuperscript{384} On the duty of the Spanish jury to give “succinct reasons” for their verdicts, see Thaman, \textit{Spain Returns}, supra note 142, at 364–76. It is also still too early to assess the impact of a decision of the European Court of Human Rights which found that a jury verdict in a high-profile Belgian murder case violated the right to a fair trial because the jury did not explain why it convicted the defendant of murdering a Belgian government minister. Taxquet v. Belgium (Jan. 13, 2009), available at http://echr.coe.int/tk. The case will be reheard in plenary session in the near future.

\textsuperscript{385} Fed. R. Crim. P. 11(b)(3). Ross, ch. 3, at 109. Cf. Rule 62 bis(iv), ICTY RPE. In a similar way, for a Polish judge to agree to a “stipulation to the charges,” the circumstances of the commission of the crime must be “beyond doubt.” Rogacka-Rzewnicka, ch. 10, at 291.

\textsuperscript{386} Some U.S. courts have said that the government need not demonstrate strong evidence of guilt in setting out the factual basis where there is otherwise adequate evidence to support the government’s allegations. Ross, ch. 3, at 112. This low standard can lead to “both inaccurate and unfair” results. Turner, supra note 291, at 213.

\textsuperscript{387} For an opinion that the procedure announcing the plea and the factual basis is often a “carefully rehearsed charade during which the participants merely enact a script that was carefully crafted in the backroom of the prosecutor’s office.” Dubber, supra note 144, at 552.

\textsuperscript{388} The requirements are identical in Chile, whether after a full or an abbreviated trial, except that in the latter there is a stipulation as to the facts. Riego, supra note 229, at 460. §509 CCP-Moldova indicates a similar approach. In Latvia, the procedure is still called a “trial” and the judgment must include an appraisal of the legal justification for the agreement and the measure of punishment. If the judge has a doubt as to guilt, he must reject the “agreement.” §543 CCP-Latvia. In France the judge must justify (\textit{homologuer}) the judgment as to the charge based usually in the admission of the defendant, and as to the sentence, based in the characteristics of the defendant. The judgment has the same effect as a normal judgment of guilt. §§495-9, 495-11 CCP-France. In accordance with a decision of the French Constitutional Council, the judge should verify: “the reality of the acts, their legal qualification and the appropriateness of the punishment.” One commentator has called this a \textit{boîteuse} (wobbly) intervention of the judge. Saas, supra note 179, at 841.
not one of guilt, but tantamount thereto) is much simpler than that required following a normal trial and focuses mainly on appraising the congruity of the sentence with the facts of the case. The Italian Constitutional Court rejected a challenge to the procedure based on its purported lack of a "judgment." It emphasized that a judgment after trial must contain a "concise exposition of the reasons in fact and law upon which the decision is based," but that the judgment following a patteggiamento was "obviously minimized," need only consist in "excluding the existence within the contents of the file of elements which negate responsibility or punishability," i.e., making sure the defendant was not innocent.389 A lesser version of a reasoned judgment is allowed in other countries as well.390

On the other hand, it appears that in Estonia the judge is limited to either accepting or rejecting the "settlement," and if it is accepted, there is, in lieu of a formal judgment, merely an affirmation of the terms of the agreement, including the charge, the punishment and the damages awarded to the aggrieved party.391

In some jurisdictions, however, the requirement of a reasoned judgment is no different for guilty pleas or "abbreviated trials" than for the full trial with all the guarantees.392

390. In Croatia, the court need only state "the circumstances that were taken into consideration in imposing punishment" and base the "judgment" on the facts in the investigative dossier, Krapac, ch. 9, at 276. Pursuant to §787(2) CCP-Spain, the court in accepting a conformidad must verify that the legal qualification of the crime is correct, the punishment justified, and that the defendant's decision was made freely and knowingly. The Council of Europe recommended that, where a written judgment is necessary, it should mention only the "grounds, the decision as to guilt, and where applicable, the penalty and any compensation for injured parties." COE, Simplification (1987), supra note 178, at §IIIc.4.  
391. §249 CCP-Estonia.  
392. This is true in several Argentine provinces, one being Neuquén. Mangiafico & Parma, supra note 269, at 150. For a decision reversing a judgment of conviction following a conformidad in Spain in which the trial judge sought to corroborate the defendant's confession with confessions of his codefendants given in other trials, and in which the reporting judge, Perfecto Andres Ibáñez, equated the procedure with the use of coerced confessions as the regina probatorum during the inquisition, see STS 193/2008, April 30, 2008, available at http://sentencias.juridicas.com/index.php.
k. Limits on the Right to Appeal

In some countries the defendant has no right to appeal the results of a consensual procedure if the judgment is not more severe than that which was promised in the bargain, or by statute.\textsuperscript{393} In others, the right to appeal is sacrosanct, even when consensual proceedings are used.\textsuperscript{394} There are differences, however, as to the scope of the right to appeal in cassation. Whereas some jurisdictions do not allow appeal in cassation to challenge the reasons given for the factual findings following guilty-plea-like procedures,\textsuperscript{395} this is clearly allowed in Spain after a judgment per \textit{conformidad}.\textsuperscript{396} The Italian \textit{patteggiamento} originally did not provide for any appeal, but the Italian Constitutional Court found that the lack of judicial review violated the presumption of innocence by not allowing review of whether the punishment was proportional to the guilt of the defendant.\textsuperscript{397}

In the U.S., a plea bargain, otherwise attractive to the defendant, may include as a condition thereof, waiver of the right to appeal\textsuperscript{398} or to take other post-conviction action such as a writ of \textit{habeas corpus}.\textsuperscript{399} In other countries

\begin{footnotesize}
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\item J. De Figueiredo Dias, \textit{Die Reform des Strafverfahrens in Portugal} 104 \textit{Zeitschrift für die gesamte Strafrechtswissenschaft} 448, 454–55 (1992). In Spain, the judge accepting a \textit{conformidad} will inquire as to whether the parties intend to appeal. Appeal is only possible if the deal was violated or if consent was not voluntary. § 787(6-7) CCP-Spain. In Italy, a \textit{patteggiamento} cannot be appealed, but may be reviewed in cassation based on an allegation that the defendant did not actually waive important procedural rights. Ferraioli, cited in Thaman, \textit{Plea-Bargaining}, supra note 177, 988.
\item In Scotland, the defendant may always appeal, but may not move to withdraw her plea. Leverick, ch. 4, at 147. Appeal in cassation is allowed on the same terms as after a normal trial in many of the Argentine codes, including the CCP-Argentina (Federal), Córdoba, supra note 286, at 232, and, \textit{inter alia}, the codes of the provinces of Chaco, Misiones, San Juan, and Buenos Aires. Mangiafico & Parma, supra note 269, at 145, 152, 154, 157. Cassation is also possible under Chile’s “abbreviated procedure,” where appeal is considered to be more important in such cases due to the weakness of the factual foundation for a finding of guilt. Riego, supra note 229, at 460–61. An appeal in cassation is permitted pursuant to §542(2) CCP-Latvia.
\item Such as in the Argentine province of Córdoba. Mangiafico & Parma, at 163.
\item See the reversal on appeal in Spain in STS 193/2008, April 30, 2008, of a judgment following a \textit{conformidad}. Supra note 392.
\item Pizzi & Marafioti, supra note 161, at 34.
\item Some courts have held that after a guilty plea, a defendant may not litigate the voluntariness of a confession given to the police, McMann v. Richardson, 397 U.S. 759 (1970), or whether the proceedings should have been barred by double jeopardy, United States v. Broce, 488 U.S. 563 (1989). Ross, ch. 3, at 111.
\item Although in the U.S. a \textit{habeas corpus} action based on incompetence of counsel may never be waived as a part of a plea bargain. \textit{Id}.
\end{enumerate}
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such waivers are expressly prohibited until after the defendant has actually been sentenced. In the U.S., a guilty plea coupled with dismissal of charges and sentence discounts may be withdrawn before it is accepted by the judge and even after acceptance if the judge has not yet pronounced sentence. After sentence, withdrawal of a plea usually requires the defendant to show that a “manifest injustice” will occur.

1. Criticism in the Literature

Consensual procedures are still generally criticized in civil law countries for violating the legality principle by not requiring an actual trial and a clear finding of guilt. Related to these concerns is clearly the fact that a negotiated or consensual resolution of the charge violates the principle of material truth, which can only be achieved by a full trial and assessment of all the facts of the case. Thus, while the traditional form of conformidad which

400. This is the case in Denmark, except for minor cases with punishment of less than 20 daily rates or 3000 Kroner, which are not subject to appeal anyway. Sometimes the prosecutor will bargain to dismiss other cases if the defendant does not appeal, but this practice is viewed as highly questionable. Wandall, ch. 7, at 243.


402. For instance, if there is a “fair and just reason.” Fed. R. Crim. P. 11(d)(2). Examples are a witness's credible recanting of testimony, the discovery of potentially exculpatory evidence, United States v. Ruiz, 229 F.3d 1240 (9th Cir. 2000), or an intervening court decision that might entitle the defendant to a dismissal. United States v. Ortega-Ascanio, 376 F.3d 879 (9th Cir. 2004). Cf. Ross, ch. 3, at 112–13.


404. Some Argentine critics interpret the constitutional right to a previous trial before imposition of sentence as being non-waivable, and requiring, theoretically, a jury trial (the constitutional right to jury trial in Argentina, included in the constitution since 1857, has still not been implemented with legislation). Bovino, supra note 269, at 67. Cf. Córdoba, supra note 286, at 236–37. Others, like Gustavo Bruzzone, however, believe the right can be waived like other important constitutional rights. Id. at 237. For a view that the relative disappearance of lay participation in both the U.S., due to plea bargaining, and Germany, due to confession bargaining, expansion of the jurisdiction of the single judge courts and the use of diversion and penal orders, has led to a deficit in legitimation of the justice systems in both countries. Dubber, supra note 144, at 553, 601.

405. Eser, supra note 354, at 373. The Estonian “settlement proceedings” have been criticized because the bargaining is conducted before the defendant agrees to the stipulation. If there is a full confession, which need not be the case, the punishment has been set before the full facts of the case have been laid out. Sillaots, supra note 325, at 120–21.

406. In contrasting “material truth” with “consensual truth,” see Mangiafico & Parma, supra note 269, at 25, 32.
has been in the CCP-Spain since 1882 has never been seen to violate the principle of legality, the variation added in 1988 in the provisions dealing with "abbreviated procedure" tends to encourage prosecutorial tinkering with the charges and negotiations between the parties, and thus has been seen to undermine the principle of material truth. It is also axiomatic in civil law systems that it is the court which must decide guilt, and not the parties amongst themselves through negotiations. Some critics dismiss the reforms in the emerging democracies in the erstwhile Soviet republics as being aimed at pleasing foreign donors or experts. Ferrajoli goes the furthest in claiming that the patteggiamento and similar procedures lead to the "inevitable corruption of jurisdiction, police-state contamination of procedure, the style of evidence and the trial and the consequential loss of political or external legitimacy of the judicial power." In short, they are "the most perverse innovation of the new regime which contradicts the whole panoply of penal and procedural rights" and in essence constitute a return to "inquisitorial incommunicado interrogation of the suspect by police and prosecutor which, coupled with new consensual forms, will constitute the entire trial like in old inquisitorial times."

In many continental European countries with an inquisitorial tradition in which the investigating official, the juge d'instruction, was originally also the sentencing official, the legislator has striven to ensure that the judge who presides over the consensual resolution of the case is neither the investigating magistrate nor, of course, the ultimate trial judge. In 1988, the Spanish Constitutional Court found an early version of "abbreviated trial" to be unconstitutional, because the investigating magistrate acted as trial judge in the abbreviated procedure. The new conformidad provisions relating to expedited trials (juicios rápidos), in which an investigating magistrate presides over arraignment, formulation of charges and possible conformidad, usually in flagrant cases, has

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408. The Argentine civil code clearly allows bargaining as to civil damages, but prohibits it as to determination of the charge and criminal sentence. Mangiafico & Parma, supra note 269, at 31.
409. Such concerns were voiced in Russia. Pomorski, supra note 146, at 136, where a foreign expert, this writer, helped draft the new provisions!
410. Ferrajoli, supra note 5, at 625, 637, 773.
411. Gimeno Sendra et al., supra note 284, at 765–66. The French injonction pénale was invalidated in 1994 by the Conseil constitutionnel for similar reasons. Pradel, supra note 198, at 204.
also been criticized because the role of sentencing and investigating judge have been combined.412

In Italy, the roles of two pretrial judges have been differentiated, so as not to confuse the roles of the judge who exercises control over the preliminary investigation, the giudice delle indagine preliminarii, with those of the giudice del’udienza preliminaria, who supervises the alternative procedures, including the patteggiamento.413

It is also a common criticism of nearly all consensual procedures that they concentrate too much power in the hands of the prosecutor. In those countries where it is the prosecutorial charging decision which determines whether the alternate procedures will be applicable, i.e., whether the prosecutor charges a crime with a maximum sentence below the statutory limit, or requests a sentence below the limit, the prosecutor may effectively engineer the avoidance of the trial with all the guarantees.414 Some critics see such a prosecutorial role as inherently coercive,415 while others believe it opens up the possibility of unequal treatment of otherwise similar cases in different courts due to the different approaches of prosecutors or judges.416 Critics also claim these consensual procedures violate the right to a defense, the presumption of innocence, and the right to personal liberty for similar reasons. A common claim, especially in the U.S., is that plea bargaining leads to disproportionate lenience in sentencing in relation to the seriousness of the crime.417 The lack of traditional rea-

412. Proponents of the new law note, however, that the juez instructor has not yet performed any investigative functions when these cases come before her in the municipal investigative courts immediately after arrest. González-Cuéllar Serrano, supra note 284, at 2. Similar criticism has been aimed at the El Salvadoran “abbreviated procedure” Amaya Cóbar, supra note 300, at 405, and the “abbreviated trial” in Mendoza (Argentina), because it may be carried out by the investigating magistrate (Mendoza is moving, however, to phase out the investigating magistrate). MANGIAFICO & PARMA, supra note 269, at 119, 126.


414. This is true with the Spanish conformidad as with its Argentine offspring. Bovino, supra note 269, at 66.

415. In Scotland, critics feel that plea bargaining induces the innocent to forego a trial and punishes those who are convicted after trial. Leverick, ch. 4, at 151. Cf. Córdoba, supra note 286, at 250.

416. In the U.S., prosecutors may reward defendants, whose lawyers are generally compliant in encouraging plea bargains or to ensure future compliance, or may refuse otherwise justifiable bargains to please victims or the police. Ross, Chapter 3, at 16.

417. On the opinion that it is “irrational” to reduce otherwise appropriate sentences just to save court time. Id. In Scotland the High Court has set aside some judgments on the grounds of excessive lenience of the sentence, sometimes because the plea was entered late
sons for the judgment and the limited appellate possibilities have also been subject to criticism. On the other hand, the procedural economy gained by such mechanisms has often been considered to be more important than the procedural deficits on the other side.

In the U.S., the great disparities between minimum and maximum punishments and the limited sentencing discretion enjoyed by judges in the federal system, and in some states, due to the presence of sentencing guidelines, have led to criticism that it is the prosecutor, rather than the court, who determines the charge and the sentence. A recurrent criticism is that it is the innocent themselves that are most coerced into entering pleas, because the prosecutor who is confronted with a weak case (due to innocence), will agree upon a plea to a minimal or token punishment, thus making the differential between minimum and maximum punishments so much the greater. Even if the defendant is guilty, the Draconian sentences constitute such a pressure to plead guilty that John Langbein has compared American plea bargaining with the use of torture to extract confessions in continental European inquisitorial systems up through the 18th Century. According to Dubber, the

418. Wandall, ch. 7, at 243 (Denmark). In Argentina, the conformidad-type procedures have been criticized for justifying mitigation in the procedural behavior of the defendant, rather than in the facts relating to the crime or the personal characteristics of the defendant. Córdoba, supra note 286, at 247.

419. Krapac, ch. 9, at 277 (Croatia). In Scotland, the High Court has given its stamp of approval for plea bargaining based on reasons of procedural economy and has stressed that it raises public confidence in the court system when only the most serious or the most disputed cases are brought to a full-blown trial. Leverick, ch. 4, at 151. In Costa Rica, judges and prosecutors are satisfied with the new abbreviated procedure due to the savings in time and resources. Llobet Rodríguez, supra note 282, at 435.


421. Damaska, ch. 2, at 92; Langbein, Torture and Plea Bargaining, supra note 154, at 13; Dubber, supra note 144, at 600. As to the harsh sentences and steep discounts in the U.S. federal system which could induce an innocent to plead guilty. Turner, supra note 291, at 204–05.

422. See in general, Langbein, Torture and Plea Bargaining, supra note 154. Both are methods to bypass the evidentiary demands of the procedure, whether it be those of the formal rules of evidence derived from Canon law or the complicated evidentiary rules of American procedure. Both systems are and were equally ineffective in ensuring reliability of the “coerced” admissions and have aroused cynicism about the way the criminal law was ad-
guilty plea is a "barndoor exception" to due process, inasmuch as the courts do not treat pleas as confessions and do not even accord them the woefully insufficient protection against involuntariness that exists for confessions. In Russia, with its recent history of using torture to exact confessions, concern was expressed that police would just coerce admissions under plea-bargain-type procedures as they typically had done during interrogations.

The nearly uncontrolled prosecutorial discretion in the U.S., coupled with sprawling untheoretical penal codes containing multiple offenses with nearly identical elements, also enable the public prosecutor to "overcharge" cases in order to pressure the defendant to plead guilty in exchange for dismissing charges. When the inherently coercive nature of the American plea bargain is coupled with the weak provisions for determining a factual base for the guilt-finding, one has a recipe for injustice.

In some jurisdictions, however, the judge also plays a major role in encouraging the time-saving procedural devices. As will be discussed, infra, this is especially true with the German practice of Absprachen, in which judges are major actors in the negotiations, but the Absprache is not a trial-ending "deal," for the court must still consider other evidence and render judgment. In the Argentine province of Córdoba, however, the judge maintains a classical inquisitorial role during the trial, marshalling the evidence, examining the witnesses, etc., and

ministered. Ross, ch. 3, at 116. On the other hand, Stuntz and Scott claim that the wide margins between maximum and minimum sentences do not necessarily compel pleas, for such a claim would punish the lenience offered by prosecutors in such cases. Id. at 119–20.

423. Dubber, supra note 144, at 597.

424. See V. Makhov & M. Peshkov, Sdelka o priznanii viny, 7 Rossiyskaya Yustitsiia 17 (1998), who also note that defendants who confess often get longer sentences than those who do not, for the universally poor quality of the Russian criminal investigation leads judges to sentence more leniently if there is no confession to convince them of the truth of the charges. Id. at 17–18.

425. Ross, ch. 3, at 119. Stuntz and Scott admit, however, that if plea bargaining were disallowed and all cases went to trial, overcharging would stop. Id. at 10. According to Damaska, however, overcharging compels the American defendant to "spend his bargaining chips to reduce charges down to the level that was the prosecutor's desideratum all along." Damaška, ch. 2, at 91. On how plea bargaining coerces confessions. Mangiafico & Parma, supra note 269, at 33–34.

426. To reduce such injustice, Dubber, supra note 144, at 553, suggests reforms designed to increase judicial oversight and to seriously reduce criminal penalties.

has been accused of actually coercing confessions to trigger the "abbreviated trial." 428

Furthermore, U.S. plea bargaining has been criticized because it encourages deception, gamesmanship and outright dishonesty in the relations between prosecution and defense. 429 Illegal searches and interrogation methods are directly or indirectly encouraged by the prevalence of plea bargaining, because the violations will never be litigated in court, or the right to litigate them will be waived as part of the plea bargain. 430

It has been further alleged that it is the incredibly complicated, time-and-resource-consuming American jury trial that has led to such a steady growth of plea bargaining. Some voices have thus called for simplification of the jury trial, or more use of court trials, 431 or even the introduction of the mixed court, in order to extend more trials to more people. 432

On the other hand, there are voices in the literature who feel that there will be even more convictions of the innocent if cases were tried with less guarantees for the defense, regardless if it was before professional judges, mixed courts, or even juries. 433

m. Benefits in Procedural Economy: Extent of the Usage of Guilty Plea Mechanisms

No civil law country has even come close to the benefits in procedural economy enjoyed by the U.S. 434 with its system of wide-open plea bargaining, where

428. Mangiafico & Parma, supra note 269, at 103. As to the critique that plea bargaining violates the privilege against self-incrimination. Eser, supra note 354, at 373.
430. Id. at 117. For instance, litigation of the issue of a compelled confession, McMann v. Richardson, 397 U.S. 759 (1970), or an illegally constituted grand jury, Tollett v. Henderson, 411 U.S. 258 (1973) are foreclosed by a guilty plea. In the federal system, to be sure to preserve the right to litigate a pretrial issue, such as an illegal search or seizure, one must preserve this right upon pleading guilty, but this requires the prosecutor's permission. Rule 11(a)(2), Fed. R. Crim. P.
432. See Dubber, supra note 144, at 566, commenting on John Langbein's preference for mixed courts over juries, yet eventually disproving the notion that many more German trials are conducted with lay participation than they are in the U.S.
433. Ross, ch. 3, at 117.
434. This is likely because it is cheaper to run an inquisitorial system. See Tiedemann, supra note 283, at 108-09.
around 95% of all cases are resolved by a guilty plea.435 An equally high percentage of cases are resolved by guilty plea in Scotland,436 with a substantially lower, but still significant amount being registered in England and Wales as well.437

In Spain, the percentage of cases resolved through a conformidad was estimated at between 15% and 30% in the mid 1990s.438 But since Spain introduced juicios rápidos (expedited trials) in flagrant cases, which include a liberal variant of the conformidad procedure, around half of all Spanish cases now end in a conformidad.439 In the Spanish jury courts, a substantial number of cases are resolved by way of conformidad clearly to avoid the more costly and complicated procedure required in those cases.440 In Italy, between 17 and 21% of cases in the misdemeanor courts were resolved by patteggiamento in the years 1990–1998, with the figure rising to from 34 to 42% in the mid-level trial courts.441 This is far

435. Ross, ch. 3, at 107. The guilty plea rate in the federal courts in 1984, when the U.S. Sentencing Guidelines were introduced, was 84%, but it had risen to 94% by the end of the century. Fisher, supra note 82, at 222. In 2001, over 96% of federal cases ended in plea bargains. Eric Lichtblau, Ashcroft Limiting Prosecutors' Use of Plea Bargains, N.Y. Times, Sept. 23, 2003, at A1, A25.

436. In 2007 and 2008, 97% of all district court cases (excluding dismissals) were resolved with guilty pleas in Scotland, with the number dropping to 93% in the Sheriff’s court “summary” proceedings and 83% in the Sheriff’s court “solemn” proceedings. In the jury courts, however, only 59% plead guilty. Leverick, ch. 4, at 147.

437. Between 1992 and 1995, 81% of cases in the magistrates’ courts were resolved with guilty pleas, with the percentage falling to 77% in the crown (jury) courts. Hatchard, supra note 321, at 219. The percentages seem to be rising, as it was reported in 1999 that 70% of all crown court and 90% of all magistrates’ court cases ended in guilty pleas. Zander, supra note 329, at 133.

438. Gimeno Sendra et al., supra note 284, at 330.


440. For instance, in the Madrid Provincial Court from 1996 through 2002, 132 of 250 cases (41.2%) were resolved through conformidad. Sánchez-Covisa Villa, supra note 341, at 985.

441. Langer, ch. 1, at 67.
below the 80% envisioned by the drafters of the CCP-Italy of 1988 and its relative ineffectiveness has been attributed to the "inertia" of the procedural actors.\textsuperscript{442}

In the republics of the former Soviet Union, the use of guilty-plea procedures appears to be growing. By 2002, 59.8% of all cases in Estonia were being resolved by using the "simplified proceedings" which were in force from 1996 until 2004.\textsuperscript{443} The use of the Russian consensual procedure has also grown exponentially since it was introduced in mid-2002 and has "taken root." It was applied in .9% of all criminal cases in 2002, rising to 14.3% in 2003 and 2004.\textsuperscript{444} In 2005, the procedure was used in 37.5% of peace court (misdemeanor) cases, 30% of district court cases (mid-level felonies) and 2.4% of cases in the upper-level serious felony and jury courts.\textsuperscript{445} By 2007, the procedure was being used in 31.5% of all peace court cases, 48% of district court cases and 6.4% of the cases in the upper-level felony courts. In 2008, the procedure had expanded to 42.5% of all peace court cases, 50% of all district court cases, and 9% of all upper-level felony courts.\textsuperscript{446} A similar growth can be noted in Moldova, where plea bargaining resolved around 8.6% of cases in 2004, 35% in 2005 and 49% in 2006.\textsuperscript{447}

In Russia, the plea-bargain-type procedure has been used to resolve over half of all environmental crime, bribery and firearm cases and a large number of drug and theft cases as well.\textsuperscript{448} Recent polls have also shown that Russia's

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443. Sillaots, supra note 325, at 115–16.
444. Pomorski, supra note 146, at 144.
447. Statistics of the Procurator General of the Republic of Moldova, conveyed to the author by Alla Panici per e-mail.
448. In 2006, the district courts resolved 54.5% of environmental crimes cases, 52.7% of illegal firearms cases, 50.5% of bribery cases, 44.7% of conversion and misappropriation cases, 13.8% of larcenies, and 42.2% of drug cases without trial under the new procedures. In the same year, justices of the peace resolved 66.1% of drug cases, 62.3% of environmental crimes cases, 62.2% of firearms cases, 56.7% of larceny cases and 55.1% of embezzlement cases using the consensual procedure. Pavel Reznikov, Plea Bargaining in Russia? No Contest. Special Procedures for Rendering a Judgment When A Defendant Agrees with the Charges Against Him, Memorandum to Justice Thomas Dooley of the Vermont Supreme Court, Sept. 15, 2007, at 3 (copy on file with author).
}
"special procedure" is wildly popular among judges, prosecutors, and slightly less so among lawyers.449

The success of the different kinds of Latin American "abbreviated trials" varies from country to country. In Guatemala, around 25% of all convictions were achieved via the "abbreviated procedure" from 1996 through 1998.450 In the first half of 2000, 22% of misdemeanors and 52% of felonies were resolved in the Argentine province of Buenos Aires by using its abbreviated procedure.451 In the main trial court in the Argentine province of Tierra del Fuego, there were 55 regular trials and 52 conformidad-type procedures over a three-year period.452 In the Argentine province of Córdoba, of those cases which reach the trial court, anywhere from 50–60% are resolved by a confession and the "abbreviated procedure."453 Although the Chilean "simplified trial" is, like the Spanish juicio rápido, designed to expedite proceedings in less serious cases (punishable by fine only or by no more than 540 days deprivation of liberty), the procedure nearly guarantees that only a fine will be imposed and clearly envisions that the defendant resolve the case through a conformidad without requiring any evidence be taken. One study has shown that this expedited procedure, handled by the judge of the investigation, almost completely displaced the full trial "with all the guarantees" before a three-judge panel provided in the new accusatorial CCP-Chile.454 On the other hand, the Chilean "abbreviated trial," similar to the Spanish conformidad has been hindered by the judges who have insisted that prosecutors present a complete investigative file to them before they will agree to accept the procedure, thus negating the hoped-for economic benefits.455 In Paraguay, as in Chile, the number of abbreviated trials outnumbers those "with all the guarantees."456

449. In a poll of 119 judges, 130 prosecutors and 94 defense lawyers, all prosecutors, 98% of judges and 85% of lawyers supported the new procedures. Apparently all practitioners in the territory of Karelia also supported them. Id. at 5.
450. Loarca & Bertelotti, supra note 286, at 423.
452. Yet the conformidad-like procedures resulted in a surprising number of acquittals. For instance, of those who went to trial, 67.02% were convicted and 32.98% acquitted, whereas 81.69% were convicted and 16.9% acquitted following a conformidad. In the lower correctional courts, however, nearly all the cases resolved without trial ended in convictions. Sarrabayrouse, supra note 269, at 307.
453. Riego, Informe, supra note 203, at 26, puts the figure at 60% and MANGIAFICO & PARMA, supra note 269, at 104–05, 107, at 49–50%.
454. In September 2001, there were only 22 full trials before three judges and over 80 "simplified trials." Riego, Informe, supra note 203, at 12.
455. Id. at 15.
456. Prosecutors dismiss 55% of all cases, and 39.59% of all others are resolved without trial, 12% of these through the "abbreviated procedure." For example, in the capital,
Consensual procedural mechanisms have, on the other hand, not been successful in significantly unburdening the courts in countries where defendants feel they can get better results by demanding a conventional trial and either relying on the lenient sentencing practice of the courts,\textsuperscript{457} or their successful manipulation of the procedural guarantees.\textsuperscript{458} Plea bargaining has also been an utter disaster in the Republic of Georgia, where it has been used by the Saakashvili government after the so-called “Rose Revolution” to target members of the ancien regime on corruption charges, only to dismiss in exchange for payments of a huge amount of money to the government. A condition of many of these “plea bargains” was the abandonment of allegations of torture or other unlawful coercion during the preliminary investigation.\textsuperscript{459}

C. Simplified and Abbreviated Trial Proceedings

1. Abbreviated Trial Procedures Not Involving Admissions or Stipulations of Guilt

a. Statutorily Regulated Trials Based on the Investigative Dossier

The chief goal of the CCP-Italy of 1988 was to move from a classic continental European mode of trial, with an active truth-seeking “inquisitorial” judge with full knowledge of the contents of the comprehensive investigative dossier, to an oral and adversary trial similar to that in the U.S. (but without a jury). A

Asunción, 1,360 cases were charged in 2001 and only 40 went to trial. 50 were resolved by abbreviated procedure. Id. at 38,41.

\textsuperscript{457} In Croatia, there were only two “requests for rendering judgment” yearly in 2004 and 2005, and though the total rose to 22 in 2007, the unwillingness of defendants to avail themselves of this procedure is likely due to a mild criminal sentencing policy, where 67.48\% of all sentences are suspended and those prison sentences imposed are often within ½ of the upper limit, thus making the consensual procedures irrelevant. Krapac, ch. 9, at 276. Only 1\% of cases were concluded using the “abbreviated procedure” in El Salvador in the year following its introduction, while victim-offender conciliation led to the resolution of 31.77\% of cases during the same period. Amaya Cóbar, supra note 300, at 408–09.

\textsuperscript{458} There is some indication that the lack of a groundswell in the use of the new consensual procedures in Italy is due to the fact that the courts have difficulty in getting defendants to trial within the time limits prescribed by the CCP and many defendants hold out for a dismissal on such grounds. Pizzi & Montagna, supra note 413, at 445. Cf. Hein, supra note 331, at 158 (lawyers rely on expectations of exceeding time limits or possible amnesties.)

\textsuperscript{459} Reichelt, supra note 282, at 170–77, 180–81, 185. Cf. Thaman, Two Faces, supra note 162, at 111–12.
radical departure in the 1988 code was a strict prohibition on the use at trial of
evidence from the dossier of the preliminary investigation which allowed few ex­
ceptions. But the same code introduced a number of alternative procedures,
the most well-known of which is the patteggiamento which we have discussed
in detail, supra. But the code also introduced the “abbreviated trial” or giudizio
abbreviato, which ironically allows the defendant to choose to be tried by the
judge of the investigation on the basis of the written evidence in the preliminary
investigation dossier in classic inquisitorial style. The inducement to select
the old-fashioned written trial is a discount of one-third on what otherwise
would have been the sentence, had the defendant gone to trial, and a reduction
to thirty years imprisonment were life imprisonment to have been the appro­
priate punishment. The punishment following an abbreviated trial in the
court of appeal, however, can be freely negotiated between the parties.

Since amendments to the law in 1999, the defendant may now compel trial
by the abbreviated procedure, even if the public prosecutor and the judge op­
pose the petition. In addition to basing the judgment on the contents of the
dossier of the preliminary investigation, the defendant in the giudizio abbrevi­
ato, since 1999, may request to be interrogated, and may even ask the judge to
call additional witnesses or adduce other types of evidence. If the judge, how­
ever, determines that this would defeat the goal of procedural economy under­
lying the abbreviated procedure, she may insist that the case follow the normal
procedure. Once the judge allows the defendant, however, to offer additional
evidence, the prosecutor may offer rebuttal evidence and the judge, in the end,
may sua sponte order the taking of even further evidence. This active role has
been criticized in Italy as transforming the role of the new pretrial judge, the
giudice delle indagine preliminarii into a new form of investigating magistrate.

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460. An interesting ancient precursor of this procedure is that developed in the Parisian
abbey courts around 1300, where the accused could “accept the inquest,” that is, stipulate
to the results of the examination conducted by an investigating magistrate, which had the
advantage of allowing the accused to avoid being tortured. Dawson, supra note 56, at 51.
461. §§ 438(1), 442(1-2) CCP-Italy
462. Id. at 993–94; Thaman, Comparative Criminal Procedure, supra note 355, at
167–68. In cases where additional evidence is proffered, the procedure begins to look like
an old-fashioned inquisitorial trial, such as in the Netherlands, where most of the evidence
is merely read to the trial court, with only selected witnesses being occasionally called to tes­
tify. Ingrid Van de Reyt, Niederlande, in Beweisaufnahme, supra note 331, at 299–300.
464. Alessandro Vitale, Nullità assoluta e inutilizzabilità delle prove nel ‘nuovo’ giudizio
The victim is also prohibited from suggesting the taking of new evidence, which may also be a reason why defendants might prefer the abbreviated trial.\textsuperscript{465}

In Bulgaria, the judge may sentence below the statutory minimum if the defendant, public prosecutor, and aggrieved party agree that the trial be based on the contents of the investigative file and agree to curtail the questioning of witnesses and experts.\textsuperscript{466} Similar procedures have also been introduced in some Latin American jurisdictions\textsuperscript{467} and in the former Soviet republics on the Baltic Sea.\textsuperscript{468}

b. Statutorily Regulated Simplifications of the Taking of Evidence

Amendments to the 1988 CCP-Italy allow prosecution and defense to stipulate to include any and all documents contained in the preliminary investigation dossier in the "trial dossier," which contains the only documents which can be admissible at trial.\textsuperscript{469} The code originally limited the contents of the trial dossier to the charging documents and certain other documents of acts which could not be reproduced at trial. An example of the latter would be pretrial depositions conducted in an adversary fashion, which guarantee the confrontation rights of the defendant.\textsuperscript{470}

While there are no statutory sentence discounts coupled with such stipulations, bargaining could certainly take place in relation to the proposed stipulations, which, by replacing oral testimony would expedite the trial process.


\textsuperscript{466} The defendant is also encouraged to confess along with the stipulation to the facts of the case and the agreement of public prosecutor and aggrieved party is required, thus distinguishing the procedure from the Italian \textit{giudizio abbreviato}. §§371–372 CCP-Bulgaria.

\textsuperscript{467} In §§500–501 CCP-Neuquen (Argentina), the public prosecutor, defense counsel and the complaining witness can request that the trial be based on the contents of the preliminary investigation file. The trial then consists in the parties indicating the evidence which supports their positions. The defendant may request to be heard. The judge then decides the guilt question. There is, however, no statutory reduction of the punishment. Vitale, \textit{supra} note 237, at 366–67.

\textsuperscript{468} In Estonia, a "trial on the file" is possible in all cases except those punishable by life imprisonment. §233 CCP-Estonia. The accused may ask to be interrogated, §237(5) CCP-Estonia, and may be acquitted by the judge. If convicted, he gets a mandatory one-third reduction in what otherwise would have been the appropriate sentence. §238 CCP-Estonia. In Latvia, the accused may "agree not to require the taking of evidence during trial." §71(6) CCP-Latvia.

\textsuperscript{469} §431(2) CCP-Italy.

\textsuperscript{470} Amodio & Selvaggi, \textit{supra} note 161, at 1217.
Spain introduced an abbreviated trial procedure in 1988 which applies to cases in which no more than nine years of prison could be imposed. Pursuant to this procedure, the preliminary investigation is streamlined and the public prosecutor, rather than the investigating magistrate assumes the initiative in gathering the evidence. The trial procedure has also been streamlined. The defendant does not necessarily have any role in selecting this procedure and no statutory discounts are involved.471

c. Non-Statutorily Regulated Simplification of the Taking of Evidence

While most Absprachen in Germany involve agreements reached between prosecutor, defense and court with respect to the defendant's giving of an in-court confession,472 they will not infrequently involve negotiations to shorten the trial by not calling certain witnesses, by withdrawing motions for the taking of further evidence, etc.473

In the Argentine province of Córdoba, practitioners have developed what they call the "short trial" (juicio breve) in which the parties stipulate to the introduction of undisputed evidence to expedite the trial. This is done in cases where there is no dispute as to the facts, but there exists no confession to trigger the "abbreviated procedure."474

2. Inducing and Bargaining for Confessions to Expedite and Simplify the Trial

a. Introduction

Throughout the history of criminal procedure, the confession has always been the main simplifier and expediter of criminal proceedings. When the defendant has confessed, the preliminary investigation may be curtailed or terminated. Similarly, when the defendant admits the charges at trial, the taking of evidence may be simplified, even to the extent that the case may move directly to closing arguments of the parties and the deliberation of the court.475

471. §§ 757-789 CCP-Spain.
472. See Altenhain, ch. 5, and Section C.2.d, infra.
473. Huber, supra note 201, at 160.
475. A study in 1972 by Caspar and Zeisel found that it took half as long to try a case where the defendant had confessed than where a confession was lacking. Even more time may be saved, today, due to the more complicated nature of trials. Herrmann, supra note 192, at 763.
b. The Pre-Trial Confession as Trigger for Expedited or Simplified Proceedings

Many of the expedited trial procedures used in Europe and Latin America allow for a skipping of the preliminary investigation and the setting of a trial within a short period of time if the defendant has given a credible confession to the police or the investigating officer during the pretrial stage. In Norway, a credible pretrial confession will lead to the case being tried by a single professional judge, rather than a mixed court or a jury. In Denmark, a confession will trigger a summary trial without the necessity of filing an accusatory pleading.

In Japan, a suspect who confesses will normally be released from pretrial detention and, following a substantially simpler trial, will usually be sentenced to either credit for time served in pretrial detention, or a substantially more mitigated punishment than she would otherwise have gotten had she remained silent and fought the charges. This arrangement has led some critics to characterize the Japanese system as one of “plea bargaining,” although the Japanese themselves, like continental Europeans in days past, condemn the American practice as antithetical to its system’s principles.

In the Argentine province of Córdoba, a defendant who has been arrested in flagrante or has given a full confession, can request an “abbreviated trial” without there being a full preliminary investigation. This appears to apply to all crimes, yet the benefit for the defendant appears to be the fact that he/she may get probation, and, upon successful completion thereof, have the case dismissed.

476. Such as the Italian giudizio immediato, or the German beschleunigtes Verfahren. Thaman, Comparative Criminal Procedure, supra note 335, at 43-44.
477. §§388, 395 CCP-Chile provides for a “simplified trial” (procedimiento simplificado) when the maximum punishment does not exceed 540 days of deprivation of liberty. In such cases, the judge of the investigation (juez de garantías) may impose punishment. Like the new Spanish juicios rápidos, the Chilean procedure seeks to induce an early conformidad. The procedure tries to link this with an early acuerdo reparatorio, which is a type of victim-offender conciliation. §241 CCP-Chile. Riego, supra note 229, at 470-71. In some countries, expedited trial procedures are used if the crime is of slight importance and no pretrial detention is involved. This is the case pursuant to §§497-500 CCP-Neuquén (Argentina), as long as there is no objection from the public prosecutor, victim or the defense, and the case is not complicated. Vitale, supra note 337, at 366.
478. This procedure is only applicable if the maximum punishment is less than ten years. The public prosecutor must consent, in which case no formal accusatory pleading is filed and there will be virtually no further taking of evidence. Strandbakken, ch. 8, at 255-56.
479. Wandall, ch. 7, at 240-41.
480. Johnson, supra note 140, at 142-45.
481. § 359 CCP-Córdoba (Argentina) is virtually identical with § 359 CCP-Mendoza (Argentina). Mangiafico & Parma, supra note 269, at 108-09.
c. Confessions at Trial as Trigger of Expedited and Simplified Proceedings

In many civil law jurisdictions the trial commences with the reading of the accusatory pleading and the questioning of the defendant as to whether he or she wishes to admit the charges. As was seen above in relation to the Spanish conformidad, applicable to crimes in which no more than six years deprivation of liberty has been requested, the defendant will then be immediately sentenced upon his expression of “conformity” with the charges.\footnote{482} In some countries, statutory provisions allow for either a greatly truncated taking of evidence,\footnote{483} or even, at times, transition directly to closing statements and deliberation of the court.\footnote{484} In some countries with similar arrange-

\footnote{482} An admission of the charges is also possible pursuant to § 363(1) CCP-Kazakhstan, where such “abbreviated proceedings” apply only in relation to crimes of slight or mid-level seriousness. § 406(1), (2)(1) CCP-Turkmenistan, would apply a similar arrangement only to crimes of slight seriousness, whereas in Lithuania, only major crimes are excluded. § 269(1) CCP-Lithuania.

483. In the Netherlands, a confession does not necessarily lead to a truncation of the evidence-taking, but in practice little corroboration is needed for a conviction (finding the body of the murder victim would be sufficient. Brants, Chapter 6, at 315–316. According to § 271 CCP-Nicaragua, the judge may suspend the trial for five days following a spontaneous admission of the charges at trial for the taking of evidence, or may set the case over for sentencing within 15 days without continuing with the trial. Both § 363(3) CCP-Kazakhstan and § 406(2) CCP-Turkmenistan provide for a questioning of the defendant and the aggrieved party, followed by arguments of the parties and the rendering of judgment. § 269(1) CCP-Lithuania provides for a thorough examination of the defendant as to the veracity of her confession, but she must agree to waive the oral taking of other evidence. The evidence in the dossier of the preliminary investigation, however, is then read in court. § 287(1) CCP-Lithuania. This model was also followed in Estonian “simplified proceedings” prior to the enactment of the 2004 CCP. Sillaots, at 117–18.

484. §§ 371(2), 372(4) CCP-Bulgaria. In Denmark, the defendant must not only admit the acts underlying the charge, but the actual crime charged. Then the case proceeds immediately to sentence without any taking of evidence. Both prosecutor and defense must consent to this procedure, which has been in force since 1919. Vandall, ch. 7, at 232. A similar provision was introduced in the 1993 Russian jury law, but was seldom used and disappeared in the 2001 CCP-Russia. Stephen C. Thaman, The Resurrection of Trial by Jury in Russia, 16 STANFORD J. INT’L L. 61, 103–04 (1995). This procedure, however, found its way into § 326(1) CCP-Belarus. § 408 CCP-Argentina (Federal), provides for a procedure called omisión de pruebas (omission of evidence), whereby a full confession leads directly to closing argument, provided that the public prosecutor, the aggrieved party, defense counsel and the judge agree. Similar provisions can be found in the CCPs of other Argentine provinces, such as La Pampa, Salta, Mendoza, San Juan, Santiago del Estero and La Rioja.
ments, the ensuing judgment does not require reasons either for its factual or legal underpinnings.\textsuperscript{485} Finally, in a third group of countries, the court may acquit if, despite the confession, it determines the evidence of guilt to be insufficient.\textsuperscript{486}

The provisions in the Rome Statute for the International Criminal Court for "proceedings on an admission of guilt" seem to clearly fit into this category of procedural arrangements, rather than that of an American-style guilty plea. As in Spain and many continental European countries, the defendant is asked at the beginning of the trial whether he pleads, guilty or not guilty.\textsuperscript{487} If he makes an admission of guilt, the trial court makes a preliminary ruling on whether it was made knowingly and voluntarily.\textsuperscript{488} Only then does the court evaluate whether there is a factual basis for the admission by reviewing the evidence in the indictment and any other evidence offered by prosecution or defense, including witness testimony.\textsuperscript{489} If the court is not convinced that the admission or confession is credible, it may either order the case to proceed to full trial or ask prosecution or defense to provide further evidence to buttress its credibility.\textsuperscript{490} The ICC procedure shares some characteristics with an American-style guilty plea, however, in that it clearly foresees that there will be bargaining,\textsuperscript{491} and prohibits the use of the admission or confession in the event that it is not accepted by the court.\textsuperscript{492}

Sarrabayrouse, \textit{supra} note 269, at 303–04. A similar procedure was also included in the now obsolete CCP-Costa Rica of 1973, Llobet Rodríguez, \textit{supra} note 282, at 436, and in §2243 Judicial Code-Panama.

\textsuperscript{485} Brants, ch. 6, at 214 (Netherlands).

\textsuperscript{486} §372(4) CCP-Bulgaria specifically says, "in cases where it finds the confessions supported by the evidence ..." thus leaving open the possibility of acquittal. Clearly the closely related Spanish \textit{conformidad}, though not technically a confession, also allows the court to acquit.


\textsuperscript{488} §65(1)(a-b) ICC.

\textsuperscript{489} §65(1)(c) ICC. The statute seems to allow the court to acquit, by indicating that it "may" convict based on the confession. §65(2) ICC.

\textsuperscript{490} §§65(3-4) ICC.

\textsuperscript{491} §65(5) ICC provides that any "discussions between the Prosecutor and the defense regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court."

\textsuperscript{492} §65(4)(b) ICC.
d. Outright Bargaining for Confessions in the Trial Court

In many judicial systems, trial judges have exerted direct or indirect pressure on criminal defendants to admit their guilt so as to simplify the trial. Implicit in such pressure is a guarantee or promise that the defendant will receive a mitigated sentence.493 Already in 1960, in a decision of the German Supreme Court, the defendant claimed the judge coerced him into giving an in-court confession by promising a mitigated sentence, and then reneged on the promise. In those days, the court decided the issue in the context of a provision of the CCP-Germany which prevented involuntary confessions.494

It was only in 1982, however, that a German lawyer495 revealed to the general legal community what had been going on for years in the German criminal trial courts: the fact that in many cases, judges, prosecutors and defense counsel were negotiating the confessions of defendants in exchange for a guaranteed mitigated punishment, so as to simplify and expedite the criminal trial.496 While Deal maintained that the practice began with narcotics cases, its primary use was in cases of economic and environmental crime, where the complicated nature of the cases, the voluminous files, and the multiplicity of charges that

493. Although no bargaining apparently takes place in the Netherlands, there is an implicit recognition that a mitigated sentence will result from a confession and Dutch judges have great discretion in all cases to mitigate, down to as low as a two Euro fine. Brants, ch. 6, at 214. In earlier German jurisprudence, a confession was an accepted mitigating factor as long as it was motivated by remorse and inner acceptance of guilt. Under the modern practice of Absprachen, however, this is no longer the case. Altenhain, ch. 5, at 168.

494. BGHSt 14, 189, 190 (1960), cited in Stephen C. Thaman, Gerechtigkeit und Verfahrensvielfalt: Logik der beschleunigten, konsensuellen und vereinfachten Strafprozessmodelle, in RECHT—GESELLSCHAFT—KOMMUNIKATION: FESTSCHRIFT FÜR KLAUS F. RÖHL 310–11 (Stefan Machura & Stefan Ulbrich eds. 2003). Although the U.S. accepts guilty pleas based on a promise of mitigated punishment, inducing a confession by offering a mitigated punishment would probably render it involuntary and in violation of the 14th Amendment. Dubber, supra note 144, at 597.

495. Writing under the pseudonym “Detlev Deal aus Mauscheilhausen” in DER STRAFVERTEIDIGER (1982), at 545. Cf. in Thaman, Plea-Bargaining, supra note 177, at 998; Herrmann, supra note 192, at 756.

496. Altenhain, ch. 5, at 161–62. Even legal scholars who claimed expertise in German criminal procedure were completely unaware of what was going on in the German courtrooms. See John H. Langbein, Land Without Plea Bargaining: How the Germans Do It, 78 Mich. L. Rev. 204 (1979). As to whether such dealing has always existed, or only cropped up after 1970, see Altenhain, cited in Thaman, Plea-Bargaining, supra note 177, at 998. On American professors’ “discovery” of American plea bargaining in the 1920s and 1930s after it had been in existence for nearly 100 years, Fisher, supra note 82, at 6.
could be filed, made them the most likely candidate for trial-simplifying bar-
gaining. Secrecy was required, inasmuch as the practice of negotiating pun-
ishments seemed to clearly violate the principle of official investigation of
criminal cases. Much as was the case in the U.S., the practice was finally chal-
ently before the higher courts, and the German Supreme Court eventually is-
sued a number of rulings approving confession bargaining, provided that certain
minimal procedural guarantees were met. Although the Supreme Court rul-
ings generally deal with in-court bargaining in which the judge takes part, de-
fense counsel will often bargain with the prosecutor before trial, offering the
defendant’s in-court confession in exchange for the dropping or reducing of
charges.

The main German Supreme Court decision in this respect was that of Au-
gust 28, 1997, in which a kind of rulebook for confession bargaining was
laid out. The court stated, that for a deal or Absprache to be accepted, the court
may indicate a maximum sentence lower than the maximum sentence pro-
vided by law, but may not fix the precise punishment to be imposed, and, in-
deed, must advise the defendant that it might exceed the indicated punishment
if new facts arise that were not known to the court at the time of the negotia-
tions. Although the discussions may occur off the record and even outside
of court, they must be publicly announced in court and put on the record.
The results of the negotiations must be communicated, of course, to the de-
fendant, who seldom directly takes part in the negotiations, and to the lay as-

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497. Since such crimes did not have a traditional victim, they were treated as less-seri-
ous and thus more suitable for the under-the-table procedures. Altenhain, cited in Thaman,
Plea-Bargaining, supra note 177, at 998.
498. Id., at 998–99.
499. Herrmann, supra note 192, at 764; Huber, supra note 201, at 160.
500. BGHSt 43, 195 (1997). Altenhain, Ch, 5, at 166. For an English translation of the
decision, see Thaman, Comparative Criminal Procedure, supra note 335, at 145–50.
501. Research has shown that, despite the Supreme Court’s assertions, the maximum
indicated sentence is never exceeded, with the actual sentence always being identical thereto,
or at most three or four months less. This makes the German procedure quite similar to Amer-
502. I was told by Judge Christoph Rennig, of the Oberlandesgericht in Frankfurt, that
much of the negotiations traditionally took place when the judge, prosecutor and defense
counsel took breaks in the trial to smoke. Non-smoking judges and parties were generally
less involved in such bargaining, which, ironically often took place in connection with en-
vironmental crimes (in smoke-filled rooms)!
503. Investigations have shown, however, that the deal is often not put on the record,
or is only briefly noted, because trial judges are fearful if they put too many details on the
record, they will be reversed on appeal. Altenhain, ch. 5, at 164, 166–67.
sensors, who are also seldom directly involved. Although the aggrieved party has full participatory rights as "collateral complainant" (Nebenklägerin) during the trial in certain cases, especially those of sexual violence, and should be included in the Absprache-negotiations, this often does not happen. The collateral complainant may appeal the "deal" but may not do so on the grounds of an inappropriate punishment, the most likely ground she would allege. The punishment imposed in the end must still be proportionate to the defendant's guilt and there may be no charge-bargaining: the charge must represent the actual level of defendant's guilt. The defendant may not be subject to any explicit or implicit coercion to make a judicial confession, for this would result in a violation of the privilege against self-incrimination or the right to human dignity. Although defendants want to know the minimum and maximum sentence, the prevailing view is that the judge should not announce this. It is, however, clear, that the announcement of a too-wide gap between maximum sentence and sentence offered by the trial judge, a typical practice in the U.S., will result in the agreement being nullified as being coercive.

504. Altenhain, ch. 5, at 167. While the principle of publicity of trials requires the inclusion of the lay assessors, they have not been included in the majority of cases, Dubber, supra note 144, at 583, and this has not yet led to any reversals of judgments following an Absprache. Altenhain, ch. 5, at 167–68.


506. Aggrieved parties who do not constitute themselves as collateral complainants have no right to appeal. No Absprache, however, has been overturned upon appeal of a collateral complainant. Id.

507. Altenhain, ch. 5, at 164.

508. Id., at 173. The German Constitutional Court found that Absprachen were not clearly unconstitutional, but held that the principle of legal evaluation of the facts and the appropriate punishment cannot be thrown completely open to bargaining, BVerfG NSrz 1987, at 419, Altenhain, cited in Thaman, Plea-Bargaining, supra note 177, at 1000. There have been cases, however, in which an "especially serious" crime has been reclassified as one of normal gravity, or a normal crime, as one of lesser gravity. Although there has been no evidence of overcharging, as occurs in the U.S., there has been some evidence of adding numerous lesser offenses, which are related to the more serious offense, which will then be dismissed during negotiations. Id.. Before a case gets to the trial court, however, defense counsel and prosecutors will negotiate to drop charges in the event of a defendant's confession. Huber, supra note 201, at 160.

509. The judge may offer a lower sentence, but it may not be disproportionate to his or her guilt. The courts are split as to whether the judge may actually indicate the approximate sentence he/she will impose. Altenhain, ch. 5, at 169. The German Supreme Court has also ruled that release from pretrial detention is not supposed to be a condition of the deal, but practitioners indicate that such promises are often made. Turner, supra note 291, at 224.

510. One court found that a gap consisting in a six or seven year maximum and a two year suspended sentence if the defendant confessed, was coercive, and invalidated the con-
The defendant may not be forced to waive the right to appeal during the negotiations, as may be done in the U.S. This is a ticklish point and many cases have been reversed on appeal on this ground.\textsuperscript{511} Judge and prosecutor are, of course, eager for a waiver, but they must not insist on it until after judgment is pronounced and must then hope that defense counsel will be a good sport and convince the defendant not to appeal.\textsuperscript{512} Seven days after pronouncement of judgment, the case becomes final if no appeal is entered. The formal written judgment may then be more skeletal, for there will then be no appeal.\textsuperscript{513} Once a "deal" is appealed, it is more likely to be reversed because the evidence in the record will inevitably be thinner than after a full trial.

Normally the trial judge must be convinced of the credibility of the confession and should and does engage in questioning or taking of supplementary evidence to achieve this conviction.\textsuperscript{514} While judgments based on Absprachen have been reversed because the confession was merely a procedural act which did not reveal sufficient factual underpinnings for a finding of guilt,\textsuperscript{515} in other decisions courts have accepted confessions as the basis for guilt-findings and mitigated sentences when the so-called confession has been as bereft of details about actual guilt as is an American plea of guilty.\textsuperscript{516}
In cases involving economic crimes, the bargaining for confessions sometimes begins during the preliminary investigation, when discussions related to diversion or penal orders might be broached. During pretrial negotiations only prosecution and defense are involved. The parties will also “feel each other out” during the preliminary hearing. If a deal is reached pretrial, there is great pressure on the trial judge, who always plays a major role in negotiations in the trial court, to accept the deal.517

Outright confession bargaining undoubtedly exists in many countries with civil-law-inspired procedural rules.518 Although its existence is officially denied in the literature in Austria, practitioners there insist that Absprachen take place and are part of daily court procedure.519 In Switzerland, the same denials in most of the cantons have been gradually replaced by tacit admissions by the high courts that the practice does exist.520

e. Criticism of the Confession-Based Procedures

As might be expected, practitioners in Germany have praised the practice of Absprachen on grounds of procedural economy, while the academic community has been overwhelmingly critical due to the perceived violations of the right to a fair trial, equal protection of the laws, the presumption of innocence, the principle of official investigation, and the principle that only judges may impose judgment on the basis of evidence presented at trial.521

Opponents have also stressed the fact that German doctrine is antithetical to bargaining and that the procedures have no basis in the codified law. The argument is, that judges may not assess the evidence or assess punishment before having heard the evidence, but proponents of confession bargaining em-

517. But most discussions take place in the trial court when defense counsel has more complete discovery of the state’s case. Altenhain, ch. 5, at 160. For a recent comparative analysis of the impact of the participation of the German judge in confession bargaining, compared to the regime of judicial involvement in several U.S. states, see Turner, supra note 291, at 217–55.


519. EMANUEL JAGGI, DIE PROTOTYPISCHE ABSPRACHE 3 (2006).

520. Only three Swiss cantons, Tessin, Basel-Land and Zug, have explicit provisions for procedures similar to Absprachen. Id. at 7–9.

521. Altenhain, ch. 5, at 162–64. Already in 1990, the congress of German lawyers (Juristentag) voted to support the continued use of Absprachen. Huber, supra note 201, at 159. An empirical study in 1989 showed that only about 2% of judges and prosecutors were for outlawing the practice. Herrmann, supra note 192, at 766.
phasize that trial judges do this all the time when they read the file and pre-evaluate the facts before trial in deciding whether to impose pretrial detention or hold the defendant to answer at trial. The German Supreme Court has also held that the bargaining opened up by the introduction in 1974 of diversion proceedings, and the allowance of discretion (opportunity) in relation to minor offenses, in its day condemned as a kind of Verdachtsstrafe or punishment based upon suspicion, introduced an exception to the legality principle, thus permitting bargaining in more serious cases. As is the case in the U.S., the active participation of the judge in German Absprachen could seriously disadvantage a defendant who goes to trial in the court of the same judge. In Germany, of course, the trial judge is always a trier of the facts, whether in a mixed court or sitting alone. Thus, in Germany, the defendant does not have an independent jury to turn to, as in the U.S., in case he opts out of the bargain.

Despite the opposition of most of the academic community, the German Parliament finally acted, and in July 2009, codified the practice of Absprachen.

f. Statistics Relating to the Use of Confession-Based Procedures

In the late 1990s, from 30–50% of German cases were resolved through use of Absprachen. Whereas the great majority of the cases resolved through Absprachen still involve white-collar crimes, and “deals” are attempted in all such cases, the practice has been extended to all types of cases, including homicides.

In Denmark in 2007, 8% of all cases were handled as summary trials following a credible confession by the defendant. By 2002, 59.8% of all cases in Esto-

523. Opponents such as Weigend and Schünemann still maintain this view. Id.
524. Altenhain, ch. 5, at 164.
525. Dubber, supra note 144, at 558. Dubber mentions a case in which the three professional judges, who were sitting with two lay assessors on a mixed court, arranged a meeting with defendant and counsel to encourage a confession, despite the fact that the defendant had persistently maintained his innocence. Id. at 560.
526. Most originally preferred that “deals” be legislatively prohibited. Their fall-back position was, however, that the rules enunciated in the 1997 Supreme Court decision be codified. A minority of academicians, however, favored a new code of criminal procedure with more adversarial principles, so that one does not have an open conflict between inquisitorial principles and bargained settlement of cases. Altenhain, ch. 5, at 176–78.
527. See §§257b, 257c CCP-Germany, supra, at 181.
528. Huber, supra note 201, at 159–60; Turner, supra note 291, at 234.
530. Wandall, ch. 7, at 232.
nia were handled with a confession and reduced punishment under the procedure for “simplified trial,” which functioned from 1996 until 2004.531

D. Conclusion

It is clear that consensual procedures which lead to a truncation or elimination of phases of criminal procedure—whether it be the preliminary investigation, the preliminary hearing, or most importantly, the trial itself—are here to stay. Already in 1987, the Committee of Ministers of the Council of Europe issued a recommendation, encouraging its member countries to enact legislation which would speed up the resolution of cases in which there was no dispute as to guilt, while maintaining the "full trial" for those which were in dispute.532

Most practitioners welcome them due to their effects on procedural economy,533 whereas academicians tend to be skeptical, highlighting the violation of important principles of criminal procedure, the pressure such procedures place on defendants, the sacrifices in the area of truth-ascertainment, and the exclusion of victims in most systems.534

The challenge for legislators, and for courts where the legislator is unwilling to act, is to find the right balance between the different forms of criminal procedure available for the trial of the various types of criminal cases which come before the courts, and, above all, to make sure that none of the forms presents a substantial risk that innocent persons will be convicted of crimes. To do this, safeguards must be in place to ensure that convictions are based on procedures which adequately allow the courts to assess the credibility and strength of the evidence. The new, alternative forms must also offer a sufficient incentive to the parties to avoid the normal full-blown procedures.

In Germany, reformers have suggested enacting a new code of criminal procedure which would have different procedures for those who contest guilt and those who accept it. The constitution will support both procedures, for, Germany is not only a rule-of-law state which insists on due process and judicial determinations of guilt after trial, but also a social state, which should

531. Sillaots, supra note 325, at 115–16.
533. Krapac, ch. 9, at 277. It has been calculated for the years 2005–06 in Scotland that a plea in the High Court costs 348 pounds, whereas a full trial is estimated at 17,492 pounds. The respective sums in Sheriff’s solemn procedures are 129 pounds for an early plea and 6,720 pounds for a trial; in Sheriff’s summary proceedings an early plea costs 179 pounds and a trial 1,576 pounds. Leverick, ch. 4, at 150.
534. Krapac, ch. 9, at 277. On their being repugnant to the principles and traditions of German criminal procedure, see in general, Herrmann, supra note 192.
have as its aim compromise and avoidance of social conflict, and this tenet would support negotiated justice.\textsuperscript{535} These reformers have agreed that the old values, the search for truth and equal justice for all (through the legality principle) are no longer attainable (if they ever were) and that the notions of fairness and consensus should replace them, co-operation instead of confrontation.\textsuperscript{536}

German academicians, who are in principle opposed to \textit{Absprachen}, have proposed a system patterned on the penal order, which could be applied to all crimes across the board, but only after a fully adversarial preliminary investigation in which the right of the defendant to confront and cross-examine the witnesses would be protected to the greatest extent possible, and where the prosecutor, at the end of the investigation, would propose a resolution of the case which could be accepted or rejected by the defendant. If rejected, the bulk of the evidence gathered during the preliminary investigation would be admissible in case of the unavailability of witnesses, and would, in any event, provide a good foundation for a judge to write a reasoned judgment justifying the guilt-finding and punishment.\textsuperscript{537} The defendant would then be punished by no more than the punishment suggested by the public prosecutor in the proposed resolution of the case, thus avoiding any problems of \textit{reformatio in peius}.\textsuperscript{538}

Even more radical is the view of German restorative justice scholars, such as Klaus Luderssen who see plea bargaining as a harbinger of a progressive new reprivatization of the criminal law, in which negotiations between victim or state and defendant will take place as they often do in tort suits, and where the defendant will actually freely apply the criminal sanction to himself as a result of his or her discourse with the victim. If plea bargaining could be rid of its coercive aspects, Dubber sees such a procedural form as actually more legitimate in a democracy of theoretically autonomous persons, than jury trial.\textsuperscript{539}


\textsuperscript{536} Weigend, \textit{Reform}, \textit{supra} note 354, at 496.

\textsuperscript{537} Weigend, \textit{Reform}, \textit{supra} note 354, at 506–11.

\textsuperscript{538} This last provision has been criticized due to fears that a lid on the punishment will lead fewer accuseds to accept the prosecutor’s offer. Altenhain, cited in Thaman, \textit{Plea-Bargaining}, \textit{supra} note 177, at 1004.

\textsuperscript{539} Dubber, \textit{supra} note 144, at 604. See also, \textit{Smirnov}, \textit{supra} note 17, at 10–11, who views such a mediatory procedure as being the optimal form of resolution of criminal law conflicts.
In the last analysis, one can pose a question which will sound heretical in the countries of the civil law: if one wishes to resolve the overwhelming bulk of cases consensually and provides adequate incentives for guilty defendants to renounce their right to a trial with all the guarantees, shouldn’t one offer those few persons who wish to gamble and have a full adversarial trial, the chance of having it before a court where the outcome is not, more or less, set in stone at the outset, that is, before a classic jury court, where the triers of fact and guilt have no previous knowledge of the case or the pre-trial negotiations, and can look at the facts through the non-bureaucratized \(^{540}\) eyes of lay persons. It is, of course, only with such a court that the defense has a real “trump card” to play in the negotiations with court or prosecutor.\(^{541}\)

But having a jury court as the final arbiter of guilt or innocence is meaningless, if the system of consensual resolution of cases is more a child of the inquisitorial practice of coercing confessions, rather than an adversarial agreement between two more or less equal opponents, as was the Medieval practice of negotiating a \textit{wergeld} or \textit{composition} between victim-accuser and offender. American plea bargaining, and any other system which makes the “deal” so tantalizing that going to trial becomes a risky endeavor, unfortunately smacks more of inquisitorial coercion of confessions than a contract between equals.

Furthermore, no system which allows consensual resolution of cases which could involve deprivation of liberty—in which there is always an element of coerciveness—should allow the defendant to impose upon himself a conviction and punishment without there being an effective way for the judge to verify that the admission of guilt is supported by the facts. Where expedited or simplified proceedings dispense with a thorough preliminary investigation, and consensual plea practices dispense with the trial, there is little evidence to be used by the trial judge in corroborating the defendants confession or plea.\(^{542}\)

The U.S. procedure for assuring a factual basis for a guilty plea is woefully in-

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540. For an opinion that he was a better judge when he was young, inexperienced, and not yet “bureaucratized,” see the interview with the young “star” investigating magistrate of Spain’s National Court: Rosa Montero, \textit{Fernando Grande-Marlaska: En el ojo del huracán}, \textit{El País semanal}, June 11, 2006, 10, 12.

541. For a similar suggestion, see Bernd Schünemann, \textit{Reflexionen über die Zukunft des deutschen Strafverfahrens}, in \textit{Strafrecht, Unternehmensrecht, Anwaltsrecht. Festschrift für Gerd Pfeiffer} 482 (Otto Friedrich Freiherr von Gamm et al. eds. 1988)

542. A problem arose in Spain when jury trials were introduced in 1995. The Spanish jury law explicitly banned the preliminary investigation dossier from the courtroom, yet allowed defendants to agree to the charges through \textit{conformidad} in the trial court after the selection of the jury. The intermediate appellate court in Las Palmas addressed this issue, and held that the judge should decide the case based on the entire investigation file and not
adequate, and Mirjan Damaška is thus correct, when commenting on the practice of plea bargaining in the international criminal tribunals, when he suggests that the procedure in such weighty cases should look more like a German Ab­sprache, where the judge must still render judgment and provide reasons, and where the admission of guilt looks more like a detailed confession, than the perfunctory American style guilty plea.543

Finally, regarding the wide-spread use of diversion, victim-offender conciliation, penal orders and abbreviated or simplified procedures for minor crimes, often punishable only by a fine, legislators should seriously consider the road of decriminalization. This would solve many of the doctrinal problems raised by the elimination of the trial and the pressure to admit responsibility if one could re-label the violations as administrative rather than criminal.544

the quite limited evidence included in the “trial file.” Salom Escrivá, Audiencia Preliminar, supra note 339, at 582.

543. Damaška, ch. 2, at 104–06.

544. Ferrajoli, supra note 5, at 416. Of course, the Eur. Ct. HR has applied many of the same protections granted to criminal defendants to persons charged with administrative offenses if the sanction is criminal in nature, even if it only provides for a sanction of a fine. Stefan Trechsel, Human Rights and Criminal Procedure 18–30 (2005). Recommending decriminalization, see §IIA, COE, Simplification (1987), supra note 178.
Appendix

Codes of Criminal Procedure


GEORGIA. Chapter LXIX, amending the Georgian Code of Criminal Procedure, signed into law Feb. 13, 2004 by President Mikheil Saakashvili.


RUSSIA. UGOLOVNO-PROTSESSUAL’NYY KODEKS RossiYSKOY FEDERATSII (contents up to March 5, 2009) 47 (Prospekt: Moscow 2009).


