World Plea Bargaining

World Plea Bargaining

Consensual Procedures and the Avoidance of the Full Criminal Trial

Edited by

Stephen C. Thaman

Carolina Academic Press
Durham, North Carolina

Library of Congress Cataloging-in-Publication Data

World plea bargaining : consensual procedures and the avoidance of the full criminal trial / Stephen C. Thaman, ed.
p. cm.
Includes bibliographical references and index.
ISBN 978-1-59460-573-4 (alk. paper)
1. Plea bargaining. I. Thaman, Stephen, 1946- II. Title.

K5458.W67 2010
345'.072--dc22

2010015171

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

In Memory of My Mother and Dear Friend,

June Christie De Trey

Born, July 13, 1921, San Francisco, California
Died, August 29, 2008, Santa Rosa, California

Contents

Acknowledgments

I would like to thank Mirjan Damaška and Máximo Langer for graciously allowing me to republish their fine articles as chapters in this book. I would also like to acknowledge the excellent work of my research assistant, Joshua Walker, a second-year law student at Saint Louis University School of Law, who helped me proofread the contributions contained herein.

Introduction

Stephen C. Thaman

The "full-blown" trial with "all the guarantees"[1] is no longer affordable. With the rise in crime and the more cost-, and labor-intensive procedures required by modern notions of due process, legislatures and courts are gradually giving priority to the principle of procedural economy and introducing forms of consensual and abbreviated criminal procedure to deal with overloaded dockets. After decades of biting criticism of American plea bargaining as a form of "bargaining with justice,"[2] one cannot help but recognize a "triumphal march of consensual [and other less costly] procedural forms."[3]

"Consensual" procedural forms are an integral part of criminal procedure reform worldwide and are aimed at avoiding either an exhaustive and cumbersome preliminary investigation or the public, oral trial with its due process guarantees, or both. In the traditionally inquisitorial civil law realm (most notably on the European continent and in Latin America), the preliminary investigation conducted by investigating magistrate or public prosecutor, which required the preparation of a comprehensive investigative dossier or file including all evidence that would eventually be admissible at the trial stage to prove guilt, assess sentence and determine the merits of an attached civil suit, was the centerpiece of criminal procedure and required the most resources and

1. Art. 24 of the 1978 Spanish Constitution guarantees to those accused of crimes the right to a defense, to the assistance of counsel, as well as to "a public trial without undue delays and with *all the guarantees* …" (all translations into English in this Introduction and in Chapter 11, are by the author, unless otherwise indicated). Constitución española de 17 de diciembre de 1978 (BOE no. 311, Dec. 29, 1978 [RCL 1978, 2836]), text reprinted in Ley de Enjuiciamiento Criminal y otras normas procesales (Julio Muerza Esparza ed. 1998).

2. Cf. K.F. Schumann, Der Handel mit der Gerechtigkeit (1977).

3. Thomas Weigend, *Die Reform des Strafverfahrens. Europäische und deutsche Tendenzen und Probleme*, 104 Zeitschrift für die gesamte Strafrechtswissenschaft 486, 493 (1992).

time. In traditionally adversarial countries, such as the U.S., the U.K, or other members of the British Commonwealth, and to a lesser extent Scandinavia, where the police conduct comparatively swift and informal criminal investigations, it is the adversarial trial (usually by jury) which has become more costly and time-consuming. This is largely because the constitutionalization of the accused's due process rights has led to prohibitions on the use of illegally gathered evidence and increased difficulty in convicting a defendant based on pre-trial confessions or written material gathered during the preliminary investigation in violation of the right of confrontation. In the U.S., especially, the process of selecting juries has also been complicated by the laudable attempts to ensure that minorities finally get to sit on criminal juries.[4] The unpredictability of the classic jury, which unlike "juries" in France, Portugal, Italy, Denmark, Japan, Kazakhstan and Germany deliberate alone without the participation of the bench, also serves as an inducement for the prosecution to find short-cuts to judgment, which insure a conviction while giving a discount on its substantive or punitive gravity.[5]

As these reforms are instituted, one hears the complaints of legal scholars bemoaning the compromise of important principles of criminal procedure, the most import of which are the principle of material truth[6] and the legality principle, which require mandatory prosecution and a rigorous subsumption of the true facts to their statutory criminal elements, as a guarantee of the equal enforcement of the law in all similar cases.[7] These complaints are at their shrillest in relation to the introduction of plea bargaining at the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) and the International Criminal Court (ICC).[8] This dilemma of avoiding trials in the most serious cases imaginable, those of genocide, crimes against humanity

4. The most important case advancing this goal is Batson v. Kentucky, 476 U.S. 79 (1986).

5. Mirjan Damaška, *Negotiated Justice in International Criminal Courts*, originally published in 2 J. Int'l Crim. Just. 1018 (2004), reprinted *infra* as Chapter 2, at 81 (hereafter, Damaška, ch. 2).

6. On the notion that there is never only one truth, any one "answer forced by a legal system to a case" and that compromise and the finding even of a third way is possible in systems that have not undergone "hardening of the judicial arteries." Karl N. Llewellyn & E. Adamson Hoebel, The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence 305–06 (1992).

7. *See, inter alia,* Albin Eser, *Funktionswandel von Prozeßmaximen*, 104 Zeitschrift für die gesamte Strafrechtswissenschaft 361, 373 (1992); Luigi Ferrajoli, Diritto e ragione: teoria del garantismo penale 624–25, 773 (5th Ed. 1998).

8. For a critique of the plea bargaining provisions of ICTY rules, *see* Julian A. Cook, III, *Plea Bargaining at The Hague*, 30 Yale J. Int'l L. 473, 481–82 (2005).

and serious war crimes is brilliantly analyzed in Chapter 2 by Mirjan Damaška. In these high-profile courts, the issues at stake are, among others: (1) the economic interests of the international community which funds the courts; (2) the interests of victims and the international community in having the perpetrators of these horrendous crimes accept responsibility for their acts and express remorse; and (3) the interest of the international community, the parties to the conflict, and the victims, in having a full and accurate historical record of the atrocities caused by the conflicts.[9]

The bulk of the material in this book was first prepared for the XVII Congress of the International Academy of Comparative Law, which was held in Utrecht, The Netherlands, on July 16–22, 2006. I was the general rapporteur for the criminal procedure section and the topic was articulated as: "Plea Bargaining, Confession-Bargaining and the Consensual Resolution of Criminal Cases." I formulated an elaborate questionnaire for the country rapporteurs to use as an outline for their reports.[10] In the questionnaire, I asked the country rapporteurs to address the forms of consensual resolution of criminal cases applicable in their countries, such as diversion, penal orders, stipulations to the charges, plea or confession bargaining, etc., but also sought certain basic information about the relative complexity and formality of both the pretrial investigation and the trial. This is important, for the more complicated and formal the pretrial stage, the more necessary it will be to simplify or leapfrog this stage of the proceedings. The same holds true for the trial, and, in the case of jury trials, it is the relative unpredictability of the trier of fact (and guilt) which leads to an increased use of plea bargaining and other mechanisms to simplify or avoid the full-blown criminal trial. I was not able to use all of the country reports in this book for several reasons, whether due to language barriers (Italy and Spain), a conflict with a publication agreement elsewhere (Bulgaria), or just reasons of space, where countries with less developed procedural alternatives were left out (Brazil, South Africa).

As a result, this volume contains chapters dealing with countries which are central in the discussion of plea bargaining (United States) and confession-

9. *See also* Geert-Jan Alexander Knoops, Theory and Practice of International and Internationalized Criminal Proceedings 264 (2005).

10. The following reports were received for the Congress: Brazil (Ana Paula Zomer); Bulgaria (Jenia Iontscheva Turner); Croatia (Davor Krapac); Denmark (Rasmus Wandall); Germany (Karsten Altenhain); Italy (Marzia Ferraioli); Norway (Asbjørn Strandbakken); Netherlands (Chrisje Brants); Poland (Maria Rogacka-Rzewnicka); South Africa (Andrew Skeen); Scotland (Fiona Leverick); Spain (Carmen Samanes Ara) and United States (Jacqueline E. Ross).

bargaining (Germany), but others which focus on countries which are cautiously moving away from a strict legality principle without yet having made radical steps towards confession or plea bargaining (Croatia, Denmark, Norway, the Netherlands and Poland) and which have pretty much been under the radar in most discussions of the topic. To complete the country reports, Fiona Leverick's chapter on Scotland gives a glimpse into a system of guilty pleas which diverges both from the open plea bargaining approach of the United States and the approach of its United Kingdom neighbors England and Wales.

Regrettably we cannot offer in this volume country studies from four important European countries which have taken big steps in introducing consensual procedures into their neo-inquisitorial civil law systems: Italy, France, Spain and Russia. The same holds true for Latin America and the republics of the former Soviet Union, where a plethora of new codes of criminal procedure produced in the last two decades include consensual, abbreviated and plea bargaining procedures.

But this void will be partially filled by the inclusion as Chapter One in this book of Máximo Langer's excellent article, *From Legal Transplants to Legal Translations: The Globalization of Plea-Bargaining and the Americanization Thesis in Criminal Procedure*, which originally appeared in the Harvard International Law Journal.[11] In his chapter, Langer presents an analysis of German confession bargaining, the consensual procedures introduced in the 1988 Italian Code of Criminal Procedure, the Argentine abbreviated procedures of 1997, and the pre-2004 French consensual procedures. What makes his contribution even more important for the book, however, is the theoretical framework in which he carries on his analysis by referring to the adoption in civil law jurisdictions of types of plea bargaining not as "legal transplants,"[12] but as "legal translations," a metaphor which has already created a significant echo in comparative law scholarship. He also calls into question the extent to which this new trend can be seen as an "Americanization" of civil law procedural modes.

In my General Report for the XVII Congress of the International Academy of Comparative Law,[13] I also tried to fill the void left by the lack of reports from France, Latin America and the former Soviet republics by presenting in-

11. 45 Harvard Int'l L. J. 1–64 (2004). (Hereafter, Langer, ch. 1).

12. For the seminal work on "transplants," *see* Alan Watson, Legal Transplants. An Approach to Comparative Law (2nd ed. 1993).

13. Stephen C. Thaman, *Plea-Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases*, General Reports of the XVII Congress of the International Academy of Comparative Law 951–1011 (K. Boele Woelki & S. van Erp eds. 2007).

formation I had gleaned from my own research in the area. In Chapter 11 of this book, which will be a substantially revised version of that report, I will also discuss the new French system of guilty pleas introduced in 2004 as well as the Spanish and Italian systems which I have studied.[14]

It is also regrettable that this volume will not include any chapters dealing with Africa or Asia. As indicated above, the South Africa report is not being included,[15] and reports from Korea, Japan and China, which were expected for the Congress, never materialized. Thus, any inclusion of material from those important continents will be limited to fairly recent and very incomplete research I have undertaken in Asian law and customary or chthonic legal systems, the latter being mainly of historical interest in the development of criminal procedure in general, and consensual mechanisms in particular.[16]

The questionnaire I submitted to the country rapporteurs also asked them to discuss the amount of discretion prosecutors have in charging cases and dismissing charges once filed, for countries with wide prosecutorial discretion (often called the "opportunity principle" in civil law jurisdictions) such as the United States[17] would be thought to have less aversion to plea bargaining. But, as can be seen from the country studies, the correlation is not so simple. There exist common law countries with broad prosecutorial discretion such as Scotland and South Africa, not to speak of England and Wales, but which prohibit American-style plea bargaining in favor of giving more-or-less strict discounts on punishment for early guilty pleas.[18] On the other hand, continental European countries which expressly accept the "opportunity principle" are not necessarily more likely to recognize unlimited ability of prosecution and defense to negotiate charge and sentence.[19]

---

14. As to Spain and Italy, I will occasionally refer to the unpublished reports that Carmen Samanes Ara and Marzia Ferriaoli submitted for the XVII Congress.

15. When I refer to the country reports not included in this book, I will do so by referring to my references to them in Thaman, *Plea*-Bargaining, *supra* note 13.

16. On the "chthonic legal tradition," *see* in general, H. Patrick Glenn, Legal Traditions of the World 61–89 (3rd ed. 2007).

17. *See* Jacqueline E. Ross, *The Entrenched Position of Plea-Bargaining in the United States*, originally published in American Law in the 21st Century: U.S. National Reports to the XVII Congress of the International Academy of Comparative Law (John C. Reitz & David S. Clark eds. 2006), but now in Chapter 3 of this book (hereafter, Ross, ch. 3).

18. Fiona Leverick, *Plea-Bargaining in Scotland: the Rise of Managerialism and the Fall of Due Process*, *see* Chapter 4 of this book, at 145–46 (hereafter, Leverick, ch. 4). On South Africa, *see* Thaman, *Plea-Bargaining*, *supra* note 13, at 953.

19. Norway allows the prosecutor discretion not to charge if there are "weighty reasons" for such a decision. *See* Asbjørn Strandbakken, *Penal Orders, Victim-Offender Mediation and Con-*

While it is clear that countries which adhere to the principle of mandatory criminal prosecution, called the "legality principle" in Europe,[20] have been traditionally hostile to American-style plea bargaining, this has not prevented them from making exceptions to the principle for various reasons. Denmark and the Netherlands have implemented prosecutorial guidelines which will permit non-prosecution based on negative assessments of the prospect of obtaining a conviction.[21] More typically, there has been a loosening of the legality principle in the prosecution of less-serious crimes, thus opening the door to diversion procedures, penal orders and guilty pleas or stipulations.[22] Whenever there are diverse procedural mechanisms to resolve a criminal case, there is always the possibility that prosecution and defense will enter into negotiations or even "bargain" to have one of the simplified procedures used that will result in lesser sanctions than would result following conviction at a full-blown trial. While the legislation of most countries which recognize the legality principle does not allow for such "bargaining," scholars and practitioners have difficulty ruling it out. Indeed, in the Netherlands prosecutors openly bargain with defense lawyers in big white-collar or organized crime cases because they realize they are up against powerful adversaries.[23]

---

fession-Triggered Summary Procedures in Norway, *infra* Chapter 8, at 246 (hereafter, Strandbakken, ch. 8). While France has long recognized prosecutorial discretion in charging, *see* Jean Pradel, Procédure pénale 431 (9th ed. 1997), up until recently it provided the most limited opportunities for consensual resolution of cases short of trial. Richard Vogler, *Criminal Procedure in France*, *in* John Hatchard et al., Comparative Criminal Procedure 14, 84 (1996).

20. The "legality principle" is, for instance, enshrined in Art. 112 of the Italian Constitution. Thaman, *Plea-Bargaining*, *supra* note 10, at 953. On the principle of legality in Germany, *see* Karsten Altenhain, *"Absprachen" and the Undermining of the Legality Principle in Germany*, *infra* ch. 5, at 159 (hereafter, Altenhain, ch. 5); for Denmark, *see* Rasmus Wandall, *Penal Orders, Confession-Triggered Summary Procedures and the Weakening of the Legality Principle in Denmark*, *infra* ch. 7, at 220 (hereafter, Wandall, ch. 7); for the Netherlands, *see* Chrisje Brants, *Consensual, Abbreviated and Simplified Procedures in the Netherlands*, *infra* ch. 6, at 192–93 (hereafter, Brants, ch. 6); for Croatia, *see* Davor Krapac, *Consensual Procedures and the Avoidance of the Full-Fledged Trial in the Republic of Croatia*, *infra* ch. 9, at 260 (Hereafter, Krapac, ch. 9); and for Poland, *see* Maria Rogacka-Rzewnicka, *Consensual and Abbreviated Procedures in Poland*, *infra* ch. 10, at 279 (hereafter Rogacka-Rzewnicka, ch. 10). *See* also CCP-Bulgaria §23(1). For all cites to criminal procedure codes I will use the formula CCP, followed by the country. Appendix I of this book will be a list of criminal procedure codes with the sources I have used.

21. *See* Wandall, ch. 7, at 222–23, 14–15; Brants, ch. 6, at 187.

22. *See* Rogacka-Rzewnicka, ch. 10, at 280; Krapac, ch. 9, at 260; Altenhain, ch. 5, at 158–59. *Langer* also sees a softening of the legality principle in the new codes of criminal procedure in Guatemala (1994), Costa Rica (1998) and Chile (2000–2003), *infra* ch. 1, at 36.

23. Brants, ch. 6, at 184.

Prosecutorial discretion not to charge is also limited in many countries by procedures which allow the aggrieved party (whether victim or relative of a deceased victim) to seek to compel the prosecutor to charge,[24] or even allow victims to bring the charges themselves as private prosecutors.[25] The most extensive use of private prosecution is in Spain, where the aggrieved party may file a separate accusatory pleading and prosecute any crime independent of the will of the public prosecutor in the case. This power may even extend in Spain to any citizen, who may bring charges as a "popular prosecutor" even when he or she has not been directly victimized by the crime.[26]

In many jurisdictions a judge will perform a screening function to weed out groundless charges presented by the public prosecutor, or even victims acting as private prosecutors.[27] The investigating magistrate traditionally carried out this function in inquisitorial systems,[28] but today countries coming out of this tradition have taken different approaches to screening the substance of the

---

24. The German *Klageerzwingungsverfahren* allows the aggrieved party to appeal to a judge to compel prosecution. Thaman, *Plea-Bargaining*, *supra* note 13, at 954. Cf. CCP-Bulgaria §243(3-9); CCP-Russia §125. *See* also the "Article 12 Procedure" in use in the Netherlands. Brants, ch. 6, at 195. In Poland the judge can compel the prosecutor to twice review the case and if he or she refuses to charge, the victim may proceed through private prosecution, Rogacka-Rzewnicka, ch. 10, at 286–87. In Scotland the victim has a theoretical right to compel the prosecution in serious "solemn" cases, but this remedy has only been granted twice in Scottish history. Though since 2005 the prosecutor must give the victim a written explanation why charges were not filed, there is no way to get a judge to compel charging. Leverick, ch. 4, at 131–132. In other countries the victim only has a right to appeal to a hierarchically superior prosecutor to protest a failure to charge. S*ee* Strandbakken, ch. 8, at 248 (Norway).

25. A complaint of the victim is required for public prosecution of certain minor offenses, and even rape in some countries. *See* Rogacka-Rzewnicka, ch. 10, at 282 (Poland). CCP-Bulgaria §80. It is required for the prosecution of statutory rape in the Netherlands. *See* Brants, ch. 6, at 194. Private prosecution without obligatory participation of the public prosecutor is typically allowed only for minor offenses. *See* Wandall, ch. 7, at 230 (Denmark); Krapac, ch. 9, at 264 (Croatia); Strandbakken, ch. 8, at 248 (In Norway, only for defamation). The victim may participate as an auxiliary prosecutor with full procedural rights alongside the public prosecutor in Poland, *see* Rogacka-Rzewnicka, ch. 10, at 286, in Germany, where the practice has been traditionally limited to rape cases. Stephen C. Thaman, Comparative Criminal Procedure 26 (2nd ed. 2008). Cf. CCP-Bulgaria §76.

26. On the Spanish private prosecution (*acusación particular*) and popular prosecution (*acusación popular*), *see* Thaman, Comparative Criminal Procedure, *supra* note 25, at 25–30.

27. No such judicial screening exists, however, in the Netherlands, Brants, ch. 6, at 192, or Scotland, Leverick, ch. 4, at 132.

28. On the French *juge d'instruction*'s ability to reject a victim's attempt to constitute himself as private prosecutor in the late 19th Century, *see* Thaman, Comparative Criminal Procedure, *supra* note 25, at 23–25.

charges emanating from the preliminary investigation. France allows the decision of the *juge d'instruction* to be reviewed by a three-judge *chambre de l'instruction*.[29] In Germany and Russia, it is the trial judge himself who reads the investigative dossier and decides whether there is sufficient evidence to proceed to trial, a procedural configuration which according to some seriously undermines the presumption of innocence, for in each of these systems the trial judge is usually a trier of the facts as well,[30] thus undermining the impartiality of the trial judge as trier of fact in these systems.[31] In Spain, on the other hand, the law leaves it to the trial judge to review the strength of the evidence under its normal procedure, but leaves the decision in the hands of the investigating magistrate for cases that proceed according to "abbreviated procedure" (cases punishable by less than 9 years deprivation of liberty) or in the new jury courts.[32]

The modern approach in law reform in the former inquisitorial legal sphere is to have an independent pretrial judge review the charges during a "preliminary hearing," a procedure modeled on that used in many U.S. jurisdictions.[33] Based on the U.S. model, the 1988 Italian Code of Criminal Procedure has created a "judge of the preliminary investigation" which reviews the substance of the prosecutor's proposed charges during the "preliminary hearing."[34]

---

29. CPP-France §§211, 212. A failure of the investigating judge to charge in Croatia may also be appealed to a three-judge panel. Krapac, ch. 9, at 269.

30. For Russia and many of the post-Soviet republics, *see* Stephen C. Thaman, *The Two Faces of Justice in the Post-Soviet Legal Sphere*: *Adversarial Procedure, Jury Trial, Plea-Bargaining and the Inquisitorial Legacy*, *in* Crime, Procedure and Evidence in Comparative and International Context: Essays in Honour of Professor Mirjan Damaška 99, 104 (John Jackson et al. eds. 2008). On Germany, *see* Thaman, Comparative Criminal Procedure, *supra* note 25, at 187.

31. As to whether Continental European systems take the presumption of innocence less seriously due to such arrangements, *see* Mirjan R. Damaška, *Models of Criminal Procedure*, *in* 51 Zbornik (collected Papers of Zagreb Law School) 477, 491 (2001).

32. For a discussion of the confusing state of affairs in Spain, *see* Jesús Fernández Entralgo, *El enjuiciamiento de la procedencia de la apertura del juicio oral en el procedimiento penal ante el tribunal del jurado*, *in* La Ley del Jurado: Problemas de aplicación práctica 203, 210–17 (Luis Aguiar de Luque & Luciano Varela Castro eds. 2004).

33. The preliminary hearing in the U.S. is a public adversarial hearing at which the prosecutor must present a *prima facie* case for the charging of a felony and the defense has a limited right to cross-examine and test this evidence. Wayne R. La Fave et al., Criminal Procedure 714–39 (4th ed. 2004). The U.S., of course, is the only country still using the highly secret, inquisitorial grand jury, a group of anywhere from 6 to 23 lay persons which screens prosecutorial charges without any defense participation. *Id.*, at 740–96.

34. CCP-Italy §§418–425. The adversarial "preliminary hearing" in Spanish jury cases, conducted, however, by the investigating magistrate, has its roots, according to some, in the

Once a case has been charged, the prosecutor will often require consent of a judge, usually the trial judge, in order to dismiss the charges, thus making free-wheeling plea-bargaining difficult after formal charge.[35] In some countries, if the victim has been constituted as private prosecutor, he or she may carry on the prosecution even where the public prosecutor has withdrawn the charges.[36]

An important factor in determining the effectiveness of consensual procedures is whether the trial judge has access to a sufficient repository of information to determine whether the defendant who is giving up his/her right to a trial "with all the guarantees" is actually guilty of the charges or not. The most comprehensive repository of evidence upon which to base such an evaluation would likely be the inquisitorial investigative dossier or file, which theoretically contained all admissible evidence, and whose contents, whether in the form of witness statements, reports of investigative acts, or expert reports, were all presumptively admissible at trial.[37] An exception, to some extent, existed for jury trials when they were prevalent on the European Continent.[38] In the context of consensual resolution of cases, however, a comprehensive investigative

---

American and the new Italian preliminary hearing. Jaime Vegas Torres, *Las actuaciones ante el Juzgado de Instrucción en el procedimiento para el juicio con jurado*, *in* La Ley del Jurado: Problemas de Aplicación Práctica, *supra* note 32, at 151.

35. This is true in: the Netherlands, Brants, ch. 6, at 196; Poland, Rogacka-Rzewnicka, ch. 9, at 282. Minor exceptions are allowed in some countries, such as Germany, for individual charges in multi-count pleadings or in cases subject to victim-offender conciliation and other narrow categories of offenses, Thaman, *Plea-Bargaining*, *supra* note 13, at 954–55. No judicial approval is necessary in Denmark for cases punishable by fines, or juvenile cases, Wandall, ch. 7, at 231. In Scotland, no decision of the public prosecutor to dismiss has ever been judicially reviewed, despite a theoretical possibility to do so. Leverick, ch. 4, at 132.

36. This is clearly the case in Spain, but *see also*, CCP-Bulgaria §78(2).

37. The CCP-Russia of 2001 did little to alter the purported comprehensive nature of the investigative file, at least in those serious cases where the full preliminary investigation is still applicable. Other post-Soviet countries still have stuck to the comprehensive dossier. Thaman, *Two Faces*, *supra* note 30, at 103–06. On the continued central position of the dossier in France, Spain, Germany and the Netherlands, *see* Thaman, Comparative Criminal Procedure, *supra* note 25, at 32–33.

38. *See* the decision of the French court of cassation of 1884 which allows reading of statements in non-jury, but not jury cases. Thaman, Comparative Criminal Procedure, *supra* note 25, at 125–26. A rather unusual exception to this notion that juries should hear only oral evidence exists in Brazil, where the entire investigative file is given to the jury when they retire to deliberate. CCP-Brazil §476. The author actually witnessed the last trials under a similar "written" jury system in Nicaragua in March of 2003, before a new oral jury system had taken effect.

dossier would naturally provide an excellent documentary basis for the finding of guilt in a case which did not go to trial.[39]

The informal police investigation,[40] which in the U.S. only produces isolated police reports and witness statements which are not always subject to full disclosure to the defense, would tend to be the least reliable source for assessing the factual basis for a guilty plea.[41]

The methodology and aims of the formal preliminary investigation have, however, been the subject of gradual reforms in the post-inquisitorial legal sphere. First, the inquisitorial preliminary investigation has been opened up to more defense participation in the form of the ability to make evidentiary motions before the chief investigator, whether it be investigating magistrate,[42] public prosecutor[43] or other official.[44] But in all of these countries it is still rare for the defense to actually carry on an independent investigation of the case. Any evidentiary desires on the part of the defense must usually be funneled through the official investigator.[45] The theory underlying this approach, was that a party's pretrial contact with a witness contaminated the witness, undermining his or her credibility.[46]

On the other hand, in Italy the defense has not only been given the right to conduct its own pretrial investigations,[47] but a chapter has been added to the

---

39. The file also allows the trial judge to take an active role in assessing whether there is a factual basis for the guilty plea. Langer, ch.1, at 20.

40. Which one finds in Denmark, Wandall, ch. 7, at 222, Norway, Strandbakken, ch. 8, at 245–46, and Scotland, Leverick, ch. 4, at 126.

41. *See* Thaman, *Plea-Bargaining*, *supra* note 13, at 955.

42. For Croatia, *see* Krapac, ch. 9, at 261; for the new procedure before the investigating magistrate in Spanish jury cases, *see* Thaman, Comparative Criminal Procedure, *supra* note 25, at 40–42. *See* also CPP-France §82-1.

43. *See* CCP-Germany §166(1). Even in non-jury cases in Spain the defense has a right to be present during the performance of all investigative acts unless exigent circumstances make this impossible. Thaman, Comparative Criminal Procedure, *supra* note 25, at 36–37.

44. In Russia, an investigator attached to the Ministry of the Interior heads the investigation, under supervision of the public prosecutor, and can hear motions of the defense. CCP-Russia §§46, 47, 86. In Norway, the defense must ask the police to question a witness, *see* Strandbakken, ch. 8, at 246.

45. While an increasing number of civil law countries tacitly allow defense investigations, the defense powers are not codified, *see* Wandall, ch. 7, at 223 (Denmark); Krapac, ch. 9, at 261 (Croatia), and when they are, they lack procedural clarification as to the rules to be followed or the admissibility of the evidence discovered. Strandbakken, ch. 8, at 246–47 (Norway).

46. *See* Brants, ch. 6, at 189.

47. As is typical in the U.S. and in other common law countries. *See* Leverick, ch. 4, at 127 (Scotland).

CCP to regulate defense investigations. The chapter provides for the preservation of the evidence gathered by the defense in a separate defense investigative file, which at the close of the pretrial stage is integrated with the prosecutorial file.[48]

Ironically, reforms which have sought to increase the orality and immediacy of trials in the post-inquisitorial world have also undermined the usefulness of the preliminary investigation dossier for providing a factual basis for guilt in the context of plea-bargaining. Italy was the first post-inquisitorial country to declare the *prima facie* inadmissibility of all the evidence contained in the preliminary investigation dossier at trial. Indeed, the new goal of the investigating official, the prosecutor, was only to gather enough evidence to justify charging the case, and not all the evidence that would then be admissible at trial on issues of guilt, punishment and the resolution of the civil suit, which was the case traditionally in inquisitorial countries. This reform was followed in the 1995 Spanish jury law and in several new Latin American codes of criminal procedure enacted in the last 20 years.[49] Clearly, if the preliminary investigation dossier does not contain "proof beyond a reasonable doubt" but only a *prima facie* case, it is a less reliable basis to justify a trial-less finding of guilt.

On the other hand, the more comprehensive and two-sided the pretrial investigation and the more adversarial the taking of evidence in the pretrial stages, the more the consensual modes of trial, whether in the form of guilty pleas, stipulations or abbreviated trials, will be able to make claims of truth-approximation. This theoretical approach has adherents in Germany, who have called for a return to the inquisitorial paradigm in which the preliminary investigation was the most important stage in the criminal process. But the twist, according to these scholars, was to combine a comprehensive pretrial collection of evidence with the protection of the defense's right to subject it to adversarial testing. The result would be to put consensual resolutions of cases on firm footing and, if consensus is not achieved, the trial itself could be streamlined due to the pretrial preservation of crucial sources of evidence realized by the

48. *See* CCP-Italy §§391(bis) et seq. For commentary, *see* Nicola Triggiani, *La L. 7 diciembre 2000 N. 397 ("Disposizioni in materia di indagini difensive"): Prime riflessioni*, Cassazione Penale, 2001, Nos. 7–8, #1120, at 2272–91.

49. On the Italian reform and its reflection in the Spanish jury law, *see* Stephen C. Thaman, *Spain Returns to Trial by Jury*, 22 Hastings Int'l & Comp. L. Rev. 241, 281–82 (1998). On the reduction in the importance of the investigative file in the new codes of criminal procedure in Argentina (Federal and Buenos Aires), Guatemala, Paraguay, Venezuela, and Chile, *see* Langer, ch. 1, at 37.

granting of adversarial confrontation rights.[50] There is, however, a real danger if consensual, or other alternative procedures lead to a skipping of both a formal preliminary investigation and a formal trial, for it will then be extremely difficult for the sentencing judge to ascertain whether there is a factual basis for a finding of guilt.[51]

Certain procedural mechanisms not necessarily related to the giving of consent by the defendant can, however, achieve the same end of skipping the formal preliminary investigation, or avoiding a full trial with all the guarantees. Typical among these are expedited trials, where the defendant is arrested *in flagrante* or the evidence is otherwise clear due to an unequivocal confession or other manifest proof, where the prosecutor without consent of the defendant can immediately send the case to the trial court.[52] Where the evidence is

---

50. Weigend, *supra* note 3, at 506 et seq.; Jürgen Wolter, Aspekte einer Strafprozessreform bis 2007 79–91 (1991).

51. Critics in countries in transition from an inquisitorial to an adversarial form of procedure feel it is more important to leap over or simplify the cumbersome, pedantic preliminary investigation with its long periods of pretrial detention, and maintain a full adversarial trial. After all, the state's incapacity to bring defendants to trial in a reasonable time is the reason for long periods of pretrial detention, and yet the state uses this reason for "compelling" defendants to accept judgment without trial through its "consensual" procedures. G. E. Córdoba, *El juicio abreviado en el Código Procesal Penal de la Nación*, *in* El Procedimiento Abreviado 241–45 (Julio.B.J. Maier & Alberto Bovino eds. 2001).

52. Such procedures were used for thieves already in Ancient Greece. Russ VerSteeg, Law in the Ancient World 247 (2002). On the French *comparution immédiate* and *convocation par procès-verbal*, *see* CCP-France §§393–397-6, and discussion in Pradel, *supra* note 19, at 452–55. On the German *beschleunigtes Verfahren*, *see* CCP-Germany §§417–420. In Italy, the public prosecutor may skip the preliminary investigation and the preliminary hearing in flagrant cases by choosing *giudizio direttissimo* or in cases involving otherwise clear evidence by choosing the procedure of *giudizio immediato*, which can result in the setting of the trial within 15 days. *See* Stephen C. Thaman, *Gerechtigkeit und Verfahrensvielfalt: Logik der beschleunigten, konsensuellen und vereinfachten Strafprozessmodelle*, *in* Recht—Gesellschaft—Kommunikation: Festschrift für Klaus F. Röhl 307–09 (Stefan Machura & Stefan Ulbrich eds. 2003). In Portugal, trial must be set within 48 hours following a flagrant arrest in cases punishable by less than three years imprisonment. Jorge De Figueiredo Dias, *Die Reform des Strafverfahrens in Portugal* 104 Zeitschrift für die gesamte Strafrechtswissenschaft 448, 454–55 (1992). For similar procedures, *see* CCP-Bulgaria §§356, 362 (summary and immediate procedures). Venezuela has introduced a similar provision which applies to flagrant crimes, but also to crimes punishable by a fine, or less than four years deprivation of liberty. CPP-Venezuela §§372–73. *See* also the procedure for "clear crimes, uncovered in the moment of their commission," CCP-Moldova §513(1), which requires the police to submit a report of the crime to the prosecutor within 12 hours and for the prosecutor, if she believes a crime has been committed, to refer the case to the court, which must then hear it within five days. CCP-Moldova §§515–18. Cf. CCP-Belarus

actually overwhelming, of course, there is a good chance that many cases that could follow such expedited procedures, will not end up in full-blown formal trials, but in consensual resolution of one kind or the other.[53] Finally, in relation to misdemeanors or less-serious felonies many countries provide for a more expeditious police or prosecution investigation of the case, in lieu of the full-blown preliminary investigation, or a complete skipping of the preliminary investigation or preliminary hearing, which could be an incentive for a prosecutor to undercharge a case to gain the obvious savings of time and investigative resources.

Practices like *correctionnalisation* in France and Belgium,[54] allow prosecutors to manipulate the charges so as to avoid the jurisdiction of courts which involve lay participation, which invariably are more time-consuming, expensive and often require more attentive and skillful intervention by not only prosecutor and defense but also the trial judge. It is thus important to know whether a country has lay courts to determine whether there are incentives to avoid such courts in the interests of procedural economy.

Of course, the classic terrain of the jury is that of the countries of the common law, which traditionally had a jury of twelve persons, presided over by a single professional judge.[55] Since the defendant has a constitutional right to trial by jury in the U.S. if more than six months deprivation of liberty would

---

§§ 452–59, which provides in clear cases where the suspect does not deny responsibility, for submission of the case to the prosecutor within ten days, whereupon the case must be submitted to the judge who must set trial within five days. Expedited procedures for flagrant cases are not used in Paraguay, because prosecutors cannot break the habit of conducting the exhaustive preliminary investigation in every case, even though all evidence is theoretically ready to be produced at trial immediately after arrest. Cristián Riego, *Informe Comparativo Proyecto "Seguimiento de los Procesos de Reforma Judicial en América Latina"*, Centro de Estudios de Justicia de las Américas (CEJA) 56, *available at* http://www.cejamericas.org/doc/proyectos/inf_comp.pdf.

53. Thus, the new Spanish *juicios rápidos* provide for trials within 15 days of arrest in flagrant cases, but also ample opportunity to enter a type of guilty-plea, or *conformidad*, at the arraignment stage. CCP-Spain §§ 795, 801, 802.

54. Thaman, Comparative Criminal Procedure, *supra* note 25, at 147. On Belgium, *see* Christine van den Wyngaert, *Belgium*, *in* Criminal Procedure Systems in the European Community 11 (Christine van den Wyngaert ed. 1993).

55. An exception, here, is Scotland, with its jury of 15 presided over by a professional judge for "solemn" offenses tried in the High Court and punishable by life imprisonment. Leverick, ch. 4, at 135 Today in the U.S. a jury of six, presided over by one judge has been accepted by the U.S. Supreme Court. Williams v. Florida, 399 U.S. 78 (1970). In at least fourteen states juries of six or eight hear misdemeanors, and in Florida, all juries are of six except for capital murder cases. Thomas L. Steffen, *"Truth as Second Fiddle: Reevaluating the Place of Truth in the Adversarial Trial Ensemble*, 1988 Utah L. Rev. 799, 809.

be possible upon conviction,[56] there is little leeway for prosecutors to "undercharge" to avoid the possibility of jury trial. The situation is a bit more complex, however, in England and Wales, where twelve-person juries in the High Court hear serious felonies ("indictable cases") and courts usually composed of three lay magistrates hear lesser crimes in the Magistrates Courts, and are only allowed to impose sentences of deprivation of liberty of up to six months. In England and Wales, prosecutors at times manipulate charges to avoid the jury court.[57] The defendant is statistically more likely to achieve an acquittal in the jury court, than in the Magistrates Court.[58] There are also intermediate types of crime, so-called "either-way" offenses, which may be tried in the Magistrates Court (with a six-month maximum of jail time, or 12 months for two "either-way" crimes), or in the jury court, if the defendant or the Magistrates move to have it tried there.[59]

There has also been a marked tendency in the new European jury systems of Russia and Spain for prosecutors to manipulate charges to avoid the jurisdiction of these courts.[60] The same is true, of course in the U.S. and other countries with jury systems. Plea bargaining in U.S., and the use of guilty pleas and other consensual procedures have greatly contributed to the massive avoidance of the more costly jury procedures.[61]

---

56. Baldwin v. New York, 399 U.S. 66 (1970).

57. *See* Thaman, Comparative Criminal procedure, *supra* note 25, at 148–49.

58. During 1993–94, juries in the High Court acquitted 43% of the time and 23% of cases in the Magistrate's court ended in acquittal. Stephen Seabrooke & John Sprack, Criminal Evidence and Procedure: The Statutory Framework 206 (1996). Earlier statistics showed 57% acquittals in the High Court and 30% in the Magistrates Courts. The Royal Commission on Criminal Justice. Report 86 (Viscount Runciman of Doxford ed. 1993), hereafter RCCJ (1993).

59. Seabrooke & Sprack, *supra* note 58, at 206; Michael Zander, *England and Wales Report*, *in* Lay Participation in the Criminal Trial in the XXIst Century, 72 Revue Internationale de Droit Pénal 121 (2001).

60. *See* Stephen C. Thaman, *The Nullification of the Russian Jury: Lessons for Jury-Inspired Reform in Eurasia and Beyond*, 40 Cornell Int'l L. J. 355, 367 (2007). On Spain, *see* Juan-Luis Gómez Colomer & Jose-Luis Gonzalez Cussac, Comentarios a la Ley del Jurado 207 (Juan Montero Aroca & Juan-Luis Gómez Colomer eds. 1999), discussing the avoidance of jury trials through the use of *conformidad* stipulations especially in non-homicide cases.

61. Other than in Spain and Russia, the only other non-common law European countries with a classic jury (where lay judges do not deliberate together with the professional members of the bench), are Belgium, Austria, Norway, and the Canton of Geneva in Switzerland. In Latin America, however, Nicaragua has a jury of five presided over by one professional judge (CCP-Nicaragua §297), Panama a jury of seven, presided by one professional

All of the other countries covered in this book, with the exception of the Netherlands,[62] use mixed courts for more serious cases and, even though mixed courts do not demonstrate the independence and unpredictability of classic jury courts,[63] there is still an incentive in most of these jurisdictions to avoid the mixed lay courts by resorting to consensual procedural mechanisms.[64]

While the manipulation of charges does not normally require the consent of the defendant,[65] it may be preceded by informal discussions or negotiations between defense and prosecution and thus take on some of the trappings of plea bargaining.[66] In countries like the U.S. and Russia, where the right to trial by jury belongs to the accused and is not exclusively the right of the people to participate in the administration of justice,[67] the waiver of the right to jury trial could be the subject of negotiations or could be coerced, subtly or not, by manipulative investigators, prosecutors or even court-appointed defense

---

judge. (Judicial Code-Panama §2332); Brazil a jury of seven, presided over by one professional judge for crimes against life only (CCP-Brazil §§406–497), and El Salvador a five-person jury with one professional judge. *See* Stephen C. Thaman, *Latin America's First Modern System of Lay Participation: The Reform of Inquisitorial Justice in Venezuela*, *in* Strafrecht, Strafprozessrecht und Menschenrechte. Festschrift für Stefan Trechsel zum 65. Geburtstag 766 (Andreas Donatsch et al. eds. 2002).

62. The Netherlands has been historically skeptical of lay participation. It has neither a jury nor a mixed court and uses three-judge panels for more serious cases and single judges for the less serious. Brants, ch. 6, at 1201.

63. Thaman, *Nullification*, *supra* note 60, at 426–27.

64. Thus, although collaborative lay courts constitute the usual courts of first instance in Germany, legislation expanding the jurisdiction of single-judge courts and the use of diversion, penal orders and confession-bargaining which excludes the lay assessors, have led to only around 12% of German cases being charged in courts which include lay participation and only around 5.4% actually decided with the participation of lay judges. Markus Dirk Dubber, *American Plea Bargains, German Lay Judges and the Crisis of Criminal Procedure*, 49 Stan. L. Rev. 547, 559–62 (1997).

65. In Scotland the public prosecutor has almost complete freedom to choose whether trial will be in the High Court with jury, by "solemn" (full-blown) procedure in the Sheriff's Court (one professional judge, with punishment not exceeding five years) or by summary procedure in the Sheriff's (three month maximum deprivation of liberty) or peace courts (the latter with lay justices and maximum punishment of 60 days). This situation would be "unthinkable" in England and Wales, or in the U.S. where the defendant controls whether the trial be by jury or judge (or lay magistrates). Leverick, ch. 4, at 137–38.

66. Manipulative charging to influence the composition of the trial court is forbidden and may be nullified by the court in: Croatia, Krapac, ch. 9, at 264; Norway, Strandbakken, ch. 8, at 251. It is possible that it occurs in Denmark and could escape judicial control. Wandall, ch. 7, at 235–36.

67. *See* Stephen C. Thaman, *Europe's New Jury Systems: the Cases of Spain and Russia*, *in* World Jury Systems 326 (Neil Vidmar ed. 2000).

lawyers,[68] or by, for instance, a system of punishing more leniently following a court trial than a jury trial.[69]

Finally, I believe it is important to recognize that recognitions of guilt in the form of confessions have been the great simplifier of criminal procedure throughout its often ignominious history. Even where defendants were not allowed to jurisdictionally will the end of criminal proceedings by entering a plea of guilty, they were regularly either tortured or otherwise compelled, threatened, induced, or inveigled to produce a confession, which served traditionally as the "queen of evidence" upon which professional judges, juries or mixed courts would determine the guilt of the accused.[70] It was the great simplifier even of the formal, exhaustive preliminary investigation of classic inquisitorial stamp and justified the cessation of further evidence gathering, and the ultimate simplification of the oral trial in the mixed, post-reform inquisitorial systems.

One can characterize systems in which a confessing defendant can achieve earlier release from pretrial detention,[71] mitigated charges,[72] or a promise of a

---

68. Thaman, *Nullification*, *supra* note 60, at 369–70, describing this situation in the new Russian jury trials.

69. For a discussion of the court trial system in the city of Philadelphia, *see* Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 Harv. L. Rev. 3–22 (1978).

70. *See* Thaman, *Gerechtigkeit und Verfahrensvielfalt*, *supra* note 52, at 309. Damaška notes that the authorized use of coercion made it unnecessary for continental European officials to have to make concessions to defendants to get them to admit guilt. ch. 2, at 85. For the argument that plea bargaining replaced torture as the quintessential vehicle for coercing confessions of guilt, *see* John H. Langbein, *Torture and Plea Bargaining*, 46 U. Chi. L. Rev. 3–22 (1978).

71. In the Netherlands, police sometimes make promises of early release to induce confessions, but this is technically illegal. Brants, ch. 6, at 192. While it is illegal in Germany to offer release from pretrial detention as a condition for confessing, practitioners concede that it is commonly done. Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 Am. J. Comp. L. 199, 224 (2006). On the common practice in Japan of releasing a person from pretrial detention following a confession, *see* David T. Johnson, *Plea Bargaining in Japan, in* The Japanese Adversary System in Context 146–47 (Malcolm M. Feeley & Setsuo Miyazawa eds. 2002).

72. Altenhain, ch. 5, at 159, admits that confessions are bargained for in exchange for instituting diversion procedures or proceeding by way of penal order in Germany. Wandall, ch. 7, at 227–28, also recognizes that pretrial confession bargaining exists in exchange for limiting the charges, asking for less punishment, etc., but that it is very controversial. It is supported by some in the literature, but strongly opposed by others who find it violates the principles of legality and material truth as well as the prohibition of coerced confessions.

mitigated punishment,[73] as plea bargaining systems, despite the protestations of the system's theoreticians who continue to proclaim adherence to the principles of legality and material truth and are openly hostile to American-style plea bargaining.[74] Nowadays, the guilty plea and the confession should be treated in a procedurally similar fashion and there are some indications of a move in this direction. Although nearly all systems allow police to interrogate suspects even before the formal preliminary investigation has been initiated,[75] some even statutorily allotting them a certain number of hours or days for this purpose,[76] most now recognize that a suspect should not be interrogated unless he or she has been advised of the right to counsel and to silence, and has waived those rights.[77] Violations of the so-called *Miranda* rights will lead in some countries to inadmissibility of the statements subsequently obtained,[78] while

73. In Norway, police may tell a suspect that the penal code permits a one-third reduction in sentence if he confesses, Strandbakken, Chapter 8, at 248. On the other hand, any promise to release from detention or to mitigate the charges or punishment upon a confession is illegal in Croatia, Krapac, ch. 9, at 263.

74. In Japan, penal orders exist for minor criminality, a simple non-adversary trial for defendants who confess (92% of all cases between 1987 and 1992) and an adversarial trial with more severe punishment when one is convicted. Johnson, *supra* note 71, at 142–45, calls this a system of "plea bargaining." *See also* Turner, *supra* note 71, at 217, who openly calls the German system of *Absprachen* "plea bargaining."

75. In some Latin American countries, such as Paraguay, police are prohibited from interrogating suspects altogether. Even though police in Paraguay continue to interrogate and characterize the statements as "spontaneous," the provision has led to a reduction in police abuse. Riego, *Informe*, *supra* note 52, at 41.

76. Three to six days in the Netherlands, Brants, ch. 6, at 189–90, twenty hours in France (CCP-France §63), and a minimum of forty-eight hours in Japan. Kuk Cho, *The Japanese "Prosecutorial Justice" and Its Limited Exclusionary Rule*, 12 Colum. J. Asian L. 39, 54 (1998). In some systems a space for interrogation is illegally created by arresting a suspect under the pretext of an administrative violation and then questioning about a suspected crime. On the use of this practice in Japan, *Id.*, at 55–56, and Russia, *see* Human Rights Watch, Confessions at Any Cost: Police Torture in Russia 7 (1999).

77. *See* Miranda v. Arizona, 384 U.S. 436 (1966). See Wandall, ch. 7, at 224–25 (Denmark); Brants, ch. 6, at 190–91 (Netherlands); Krapac, ch. 9, at 262 (Croatia); Strandbakken, ch. 8, at 247 (Norway). *See* also CCP-Bulgaria §319(3)(6). While in most countries the defendant must also be advised of the right to appointed counsel, Krapac, ch. 9, at 262. On the international spread of *Miranda* warnings, *see* Stephen C. Thaman, *Miranda in Comparative Law*, 45 St. Louis U. L. Rev. 581–624 (2001).

78. This was, of course, the upshot of the *Miranda* decision in the U.S. This is also true in Denmark, if the suspect is not advised of the right to silence, Wandall, ch. 7, at 225, and in the Netherlands as long as the suspicion in relation to the person questioned had crystallized enough for him to be a suspect rather than a "witness." Brants, ch. 6, at 191. *See also* Krapac, ch. 9, at 262. In Italy, inadmissibility extends even to spontaneous statements made in the absence of counsel. CCP-Italy §350(7).

in others, this is not necessarily the case.[79] The prohibition on use of such evidence may be extended to evidence indirectly discovered through the illegal interrogation as well, the so-called "fruits of the poisonous tree," such as physical evidence of crime, identity of witnesses, or subsequent legal statements that come on the heels of inadmissible statements.[80] The doctrine of "fruits of the poisonous tree," however, is not recognized in many countries.[81]

So-called *Miranda* rights are less effective in their protection of criminal suspects in those countries in which the suspect is permitted to waive the right to counsel and speak to the interrogator before he or she has actually had a chance to talk with a lawyer.[82] Other countries, however, require that defendant actually meet with a lawyer before the interrogation commences. In Denmark the defendant has a right to have counsel present at the interrogation, but may waive the right.[83] In Germany, the Netherlands, Norway and Scotland, however, presence of counsel during the interrogation may be denied by the interrogating official.[84]

---

79. *See* Strandbakken, ch. 8, at 247–48. In Germany, the statement is *prima facie* inadmissible, but if the seriousness of the crime outweighs the seriousness of the *Miranda*-violation, the evidence may be usable. *See* Thaman, Comparative Criminal Procedure, *supra* note 25, at 110–14. In Scotland, a strict exclusionary rule has given way to a more flexible "case-by-case" approach based in the discretion of the trial judge. Leverick, ch. 4, at 128–29.

80. In the U.S., the doctrine of "fruits of the poisonous tree" only finds weak application in relation to violations of *Miranda* rights. United States v. Patane, 542 U.S. 630 (2004) (no exclusion of a gun found as a result of *Miranda*-defective confession); Missouri v. Seibert, 542 U.S. 600 (2004) (exclusion of valid statement coming on heels of *Miranda*-defective statement). In Germany, an otherwise legal statement taken on the heels of an invalid one will be suppressed unless the suspect is told the earlier one was in violation of the law. Altenhain, cited in Thaman, *Plea-Bargaining*, *supra* note 13, at 961. Spanish law explicitly provides for suppression of evidence "indirectly" discovered as a violation of fundamental rights. Law on the Judicial Power (Spain) §11.1, discussed in Thaman, Comparative Criminal Procedure, *supra* note 25, at 118–19. *In general, see* Stephen C. Thaman, *Wahrheit oder Rechtsstaatlichkeit? Die Verwertung von verfassungswidrig erlangten Beweisgegenständen im Strafverfahren*, *in* Menschengerechtes Strafrecht. Festschrift für Albin Eser zum 70. Geburtstag 1049–52 (Jörg Arnold et al. eds. 2005).

81. In Denmark, the contents of illegal interrogations may be used to further the investigation, Wandall, ch. 7, at 225–26. In other countries admissibility of "fruits" is within the sound discretion of the judge. Brants, ch. 6, at 191 (Netherlands); Strandbakken, ch. 8, at 247–48 (Norway). In Italy, the doctrine of fruits of the poisonous tree is not recognized in relation to statements taken in violation of the admonition requirement. Rachel Van Cleave, *Italy*, *in* Criminal Procedure. A Worldwide Study 264 (Craig M. Bradley ed. 1999).

82. This is of course permitted in the *Miranda* decision.

83. Wandall, ch. 7, at 224.

84. Brants, ch. 6, at 190; Strandbakken, ch. 8, at 247; Leverick, ch. 4, at 128. The U.S. Supreme Court also recently ruled that the right to counsel part of *Miranda* warnings need

The preferred position is to require counsel to be present during any interrogation,[85] just as counsel is required for all consensual procedures designed to elicit procedure-ending or procedure-simplifying admissions or stipulations.

My concluding chapter will modestly attempt to place the various forms of "procedural economy" used nowadays, such as diversion, victim-offender conciliation or mediation, penal orders, guilty pleas or stipulations, or even "trials on the file" with statutory or anticipated discounts, and wide-open plea or confession bargaining, into historical and comparative perspective.

The use of different procedures for different types of cases — "different strokes for different folks" — whether based on the seriousness of the threatened punishment, the flagrancy of the criminal conduct, the lack of controversy as to the facts, or the "otherness" of the suspect, etc. — should not necessarily mean that there will be more "truth" or more "justice" for those who are tried "with all the guarantees" than those who proceed to procedural resolution in swifter, less complicated ways.[86]

In Medieval Europe and elsewhere there was a diversity of procedures, ranging from *compositions* to duels, ordeals, the use of compurgators or oath-helpers, or groups of decision makers such as juries or *Schöffen*, depending on the particularities of the case.[87] In the 16th Century, the old Germanic *Schöffengericht* continued to exist alongside the new inquisitorial procedures in the famous German code, the *Carolina*.[88] Written witness statements could be used in French correctional courts, staffed by professional judges, but not in its jury courts in the 19th Century.[89]

Expedited, consensual and simplified forms also existed in the ancient and pre-modern world. I will discuss the prevalence of summary justice for those caught in the act of committing crimes, and the seemingly mild consensual working out of compensation between culprit and victim in non-flagrant cases based only on suspicion. Quite likely all systems of resolving conflicts that we

---

not specify that one has a right to have counsel present during the interrogation. Florida v. Powell, 130 S.Ct. 1195 (2010).

85. Such as in Croatia, *see* Krapac, ch. 9, at 262, *in* Italy (CCP-Italy §350(2)) and Russia (CCP-Russia §75(2)(1)). In Russia and Italy, no statement may be used if the defendant was interrogated without counsel being present, unless the defendant consents to its use. For a discussion, *see* Thaman, Comparative Criminal Procedure, *supra* note 25, at 85–89.

86. *See* Thaman, *Gerechtigkeit und Verfahrensvielfalt*, *supra* note 52, at 317.

87. John Henry Dawson, A History of Lay Judges 121 (1960).

88. Gustav Radbruch, *Zur Einführung in die Carolina*, *in* Die peinliche Gerichtsordnung Kaiser Karls V. von 1532 21 (Gustav Radbruch ed. 1975).

89. *See* Thaman, Comparative Criminal Procedure, *supra* note 25, at 125–26.

would today characterize as "criminal" involved procedures which are analogous to the three main modes of criminal procedure: accusatorial-adversarial procedures, inquisitorial-investigative procedures, and accusatorial-consensual procedures.

In this regard it is important to realize that no country has only an adversarial, inquisitorial or communitarian system of criminal justice. All these traditions have existed, and continue to exist in all countries in varying degrees as lateral or subsidiary traditions.[90] Plea bargaining *à l'américaine* is thus not only a result of the accusatorial-adversarial nature of the American trial ethic which allows the *disponibilité* of the charges, but also of more communitarian notions of compromise and restoring the judicial peace. More importantly, it must also be emphasized that plea bargaining is just as much an offshoot of the *Inquisitionsprozess* with its stress on inducing admissions of guilt by using pressure, inducements, promises of leniency, if not outright torture. This will become increasingly evident when one looks at the inherent coercive nature of modern-day American plea bargaining.

It also should be kept in mind that the official paradigms of a system of criminal justice unceasingly trumpeted by its ideologues, the university professors, are not always the paradigms that dominate in the workaday world of the courts in the interactions of police, prosecutors, judges and defense lawyers. In this respect, it is interesting to look at ancient Chinese law, which was heavily influenced by Confucianism, which recognized a formal legal system with formal law, or *fa*, and an informal way of working things out according to custom and ritual, or *li*, which expressly envisioned *staying out of court at all costs*. The notion that even getting yourself into court, airing your laundry publicly, constituted shame, is a constant undercurrent of both Hindu and Chinese Law and this, also, is a customary aspect of consensual procedural mechanisms.

While virtually none of the procedural mechanisms discussed in this book will allow the participants to not enter the courthouse, they do invoke the idea of discussions in the corridors, on smoking breaks,[91] keeping important facts out of the official record, of not wanting to risk the "full-blown" public court procedure. And a conclusion one can draw from the history of out-of-court settlements, is that criminal procedure, especially in its infancy, was such a brutal, painful and arbitrary spectacle, that whether you were guilty or innocent,

---

90. Glenn, *supra* note 16, at 347–48.

91. I thank my friend *Christoph Rennig*, Judge of the Oberlandesgericht in Frankfurt, for the insight, that in Germany it was the courts in which judges (and prosecutors, or lawyers) smoked, therefore necessitating the calling of more frequent recesses, where trial-ending confession or evidence bargaining was more prevalent.

it was horrible to be caught in its tentacles. The ordeals, judicially-authorized tortures, endless pretrial detention, were really "punishments based on suspicion" or *Verdachtsstrafen*, and it was irrelevant whether the court actually convicted or acquitted in the end. Avoiding any kind of criminal procedure could only be a blessing, for victims as well, who could be challenged to duels, or even subjected to the punishment they sought against the alleged culprit, if the latter were acquitted.[92]

92. Thaman, Comparative Criminal Procedure, *supra* note 25, at 27. On the ability to challenge victims and witnesses to duels in medieval French courts. Dawson, *supra* note 87, at 47.