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A Comparison of Guilty Plea Procedure in the United States and Germany

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I. Introduction[1]

For a number of reasons plea bargaining has become a very important part of United States criminal procedure. One of the most important reasons is economics; it would be prohibitively expensive to hold a full-scale trial for all those charged with a crime.[2] Plea bargaining works because many defendants are willing to forego a criminal trial in exchange for a lesser sentence, and prosecutors are willing to offer a lesser sentence in order to secure a guilty plea while not expending as much time and effort as a trial would require.

In fact, plea bargaining has become such an effective tool that an estimated 90% of criminal defendants who are convicted are done so by their own guilty pleas.[3] In a study of United States District Courts and Michigan Circuit Courts, defendants who insist on a jury trial receive a sentence that is longer by an average of twelve to forty-four months.[4]

Thus far, plea bargaining has been instrumental in saving taxpayers' money and in cutting down on the backlog that is common in courts across the nation. However, there are serious criticisms of the system which will be discussed in this Comment. Perhaps plea bargaining is not the best way in which to dispose of cases in order to cut down on criminal trials. If it is an unfair system, then another system should be formulated to avoid formal trials in many cases.

Although it has a significant economic benefit, plea bargaining is not used universally. West Germany[5] is an example of a nation that does not use plea bargaining as it is known in the United States to convict criminals.[6] Rather, a system known as the prosecutorial penal order is used in Germany. For reasons to be discussed in this

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1. Gender-neutral pronouns are used whenever feasible in this Comment. Otherwise, the terms "he" and "she" are used without reference to a specific gender.

2. A detailed analysis of the economics of plea bargaining is found in Palmer, *An Economic Analysis of the Right to a Jury Trial*, 4 INT'L REV. OF L. & ECON. 26 (1984).

3. D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 (1966).

4. Palmer, *supra* note 2, at 51.

5. All law and policy of Germany discussed in this Comment is that of West Germany which existed prior to the unification of the two Germanies in October 1990.

6. *E.g.*, W. FELSTINER, EUROPEAN ALTERNATIVES TO CRIMINAL TRIALS AND THEIR APPLICABILITY IN THE UNITED STATES 19 (1979).

Comment, this system is arguably more fair and effective than the American system of plea bargaining.[7]

In this Comment, both plea bargaining and penal orders will be analyzed and compared in terms of effectiveness and fairness in order to determine the desirability and feasibility of incorporating penal orders or a similar procedure in the United States. In addition, both systems will be analyzed from a constitutional perspective.

II. Plea Bargaining in the United States

A. Mechanics of Plea Bargaining

United States law allows an "agreement" to be made between a prosecutor and a criminal defendant, without the court's involvement, whereby the prosecuting attorney will agree to move for dismissal of some of the charges or will make a recommendation for a lesser sentence in exchange for the defendant's guilty plea.[8] If the court, however, refuses to recognize such an agreement, the defendant will be able to rescind his plea and go to trial.[9] Withdrawn pleas and statements made by the defendant during plea bargaining sessions are inadmissible as evidence if a case does go to trial.[10]

A prosecutor most likely will not bargain with a defendant who is representing himself[11] for reasons of fairness, and because any agreement reached may not be upheld in court if it is unclear whether the defendant understood all of the implications of pleading guilty.

B. Cases in Which Plea Bargaining is Often Utilized

Plea bargaining is utilized in all types of criminal cases, from misdemeanors to capital crimes.[12] It is often agreed to when defendants have confessed to the crime, when they know the prosecutor has a strong case against them, and when they wish to avoid the publicity of a trial.[13] With the constitutional right to counsel during pretrial procedure,[14] the defendant with benefit of counsel will be able to make a reasonably knowledgeable choice as to whether entering into a plea agreement is in her best interests. The defendant's coun-

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7. *Id.*
8. FED. R. CRIM. P. 11(e).
9. *Id.*
10. FED. R. EVID. 411.
11. Note, *Guilty Plea Bargaining: Compromises By Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 904 (1964).
12. FED. R. CRIM. P. 11. There is no provision in the Rule which limits the use of plea bargaining to minor crimes.
13. *See* LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 539-40 (1970).
14. *See* Mempa v. Ray, 389 U.S. 128 (1967); Moore v. Michigan, 355 U.S. 155 (1967); and Townsend v. Burke, 334 U.S. 736 (1948).

sel accomplishes this by explaining the evidence and evaluating the defendant's chances of acquittal.

Certain cases are very good candidates for plea bargaining from the prosecutor's point of view. These include controversial cases that might involve racism or governmental officials.[15] A prosecutor also may wish to enter into plea negotiations when there is a weak case against the defendant as well as when there are constitutional problems with the arrest or search and seizure.[16] In these cases, a plea agreement would serve to convict a defendant who would prevail at trial.

The politics and the administrative pressure of the criminal justice system often drive prosecutors to seek as many convictions as possible, while using as few resources as possible. Through the use of plea bargaining, the number of convictions is greatly enhanced, and therefore, the prosecutors are more successful politically.[17]

C. *Enforcement of a Plea Agreement*

The Supreme Court has said that plea bargaining "is to be encouraged."[18] The Court concluded that in order for plea bargaining to remain effective, the promises of the prosecutor as accepted by the judge must be enforced.[19] The plea agreement is seen as a contract. If the prosecutor does not perform his promise, specific performance may be ordered, but only if it is found that the defendant pleaded guilty in direct reliance on the prosecutor's promises.[20]

If the prosecutor's promises were not treated as legally enforceable rights, plea bargaining would fail. Defendants would be hesitant to enter into a plea agreement if there was a possibility that a more severe penalty could be imposed.

D. *The Constitutionality of Plea Bargaining*

The Supreme Court has held that a plea agreement between a prosecutor and a criminal defendant is constitutional.[21] The Court

15. An example of a politically beneficial plea bargain from the prosecutor's point of view is found in the events surrounding the resignation of Vice President Agnew. J. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY 97, n.5 (1977).

16. "[I]n general, the guilty plea cures all constitutional defects relating to trial rights . . . . However, the plea of guilty does not waive constitutional violations not associated with the criminal trial rights, such as civil rights suits." Therefore, while the trial rights may be waived, the defendant may still be able to file a civil rights suit for violations of civil rights. S. SINGER, CONSTITUTIONAL CRIMINAL PROCEDURE HANDBOOK 652 (1986).

17. *See* Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387, 1388 (1970).

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

19. *Id.*

20. Mabry v. Johnson, 467 U.S. 504 (1984).

21. North Carolina v. Alford, 400 U.S. 25 (1970); Santobello v. New York, 404 U.S. 257; and Brady v. U.S., 307 U.S. 742 (1969).

has decided that, even though a plea of guilty was entered into to avoid the possibility of the death penalty, as long as the plea was made by a defendant who was fully aware of the direct consequences, it would be valid.[22]

In addition, the Supreme Court has held that even though a defendant may seriously believe in her own innocence, a judge may accept a plea of guilty as long as the facts on the record support the guilt of the defendant. The judge must ascertain that the defendant knowingly and voluntarily entered into a plea agreement, even if the reason for the plea was that the defendant knew there was a good chance of being convicted of a more serious crime or being given a more severe sentence after trial.[23] The court also has held that the Fourteenth Amendment does not ban states from accepting pleas to lesser included offenses without proving all the elements of the original crime with which the defendant is charged.[24]

There are requirements, however, that accompany plea agreement validity. One of these is the right to effective assistance of counsel.[25] Defendant's counsel has no right to waive her client's constitutional trial rights without the consent of the defendant.[26] In addition, consent to the guilty plea may not be presumed on a silent record because the defendant, by pleading guilty, is surrendering important and fundamental constitutional rights.[27] Therefore, the record must illustrate that the defendant understood the consequences of pleading guilty and that the plea was a voluntary one.[28]

The Federal Rules of Criminal Procedure require that the court must ascertain whether the defendant understands: (a) the nature of the charge to which the defendant is pleading guilty to and the possible penalties, (b) the right to counsel, (c) rights to a fair trial and confrontation, and (d) a waiver of her right to a trial is assumed by the defendant's actions.[29]

The Supreme Court admits that plea bargaining is necessary for the smooth running of the criminal justice system, and therefore, is reluctant to find it unconstitutional.[30] However, the aforementioned standards must be upheld in order for a plea agreement to be considered valid because they promote fairness and due process. Even with

22. Brady v. U.S., 307 U.S. 742, 749-55, (1969).
23. North Carolina v. Alford, 400 U.S. 25, 37-38, (1970).
24. *Id.* at 39.
25. The right to effective assistance of counsel is guaranteed in the Sixth Amendment, and applies to the states through the Fourteenth Amendment. The standard was stated as whether the attorney rendered advice that "was within the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, 397 U.S. 759, 770-71, (1970).
26. Brookhart v. Janis, 384 U.S. 1, 8 (1966).
27. Boykin v. Alabama, 395 U.S. 238, 243 (1969).
28. *Id.* at 238.
29. FED. R. CRIM. P. 11(c).
30. Santobello v. New York, 404 U.S. 257, 262-63 (1971).

these safeguards, plea bargaining has been met with serious criticism.[31]

III. Perceived Problems with Plea Bargaining

While there are many benefits that arise from the use of plea bargaining, it is a far from perfect system. Most of its defects stem from a lack of fairness, which could possibly be remedied by the implementation of alternative methods that are used in other nations which promote both efficiency and fairness.

A. Coercion

Although the courts have held that plea bargaining is generally not coercive,[32] there are those who criticize the system because a plea taken to avoid being convicted of a more serious crime cannot be considered completely voluntary.[33]

While a defendant may be accorded the due process and constitutional rights she is entitled to, she may still fear being charged with the maximum possible violation. In this sense, factors other than the lack of constitutional protection may affect the defendant's decision to plead guilty. For example, a defendant with a family to support who can be assured a penalty of only a fine if she pleads guilty, as opposed to a jail sentence if she goes to trial and is convicted, will likely choose the former in order to continue to support her family and protect her freedom.

This may be seen as both beneficial and detrimental to the defendant. It could be beneficial because the defendant now has the opportunity to avoid a jail sentence and the hassle of trial. However, it also could be detrimental in that it makes the defendant fear trial and its consequences. In this sense, the right to a fair trial could be seen as weakened.[34]

In plea bargaining, defendants are punished for taking advantage of their inalienable rights[35] because, in the interest of efficiency,

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31. These criticisms will be taken up in the Section IV.

32. Rogers v. Wainright, 394 F.2d 492 (5th Cir. 1968).

33. Kuh, Book Review, 82 HARV. L. REV. 497, 500 (1969).

> The meaning of 'voluntary' is always strained when the plea is taken to avoid the risk of being convicted of a more serious crime; the plea is truly no more voluntary than is the choice of the rock to hit the whirlpool.

Id.

34. Note, *supra* note 17, at 1388-89. "Indeed, the primary purpose of plea bargaining is to assure that the jury trial system established by the Constitution is seldom utilized." *Id.*

35. Kuh, *supra* note 33 at 501.

> [I]t may be extraordinarily costly for a person to exercise constitutional rights. Calling a lighter sentence a reward for a guilty plea still punishes the person who undergoes trial and is found guilty because a harsher sentence may be imposed.

Id.

the criminal justice system rewards those who are willing to give up those inalienable rights.[36] Therefore, coercion is a part of the plea bargaining process. Even though it is not unconstitutional as per Supreme Court holdings, this shows that the method is an imperfect one and could use modification.

B. Possibility of an Involuntary Plea

While the defendant's plea must be a voluntary one,[37] there is still the possibility that due to the defendant's ignorance and fear a plea of guilty will be involuntarily made.[38] It is quite possible that a defendant may plead guilty without understanding the charge he was pleading guilty to and its consequences.[39] In fact in one instance, a defendant unwittingly pleaded guilty to a crime with which he was not even charged because he had thought his lawyer had made a deal for him.[40]

This reveals another weakness in the plea bargaining system—the fact that the defendant is willing to plead guilty on counsel's advice without understanding either the charge or the consequences. In addition, an overburdened public defender may find herself encouraging guilty pleas in order to save time and money.

C. The Innocent Defendant and the Guilty Plea

There is a great temptation for a defendant to enter into plea negotiations whether guilty or not. Since defendants fear trial and the more severe punishment associated with it, even an innocent defendant may plead guilty rather than risk the outcome of trial. This was the situation in *North Carolina v. Alford*.[41] Since there was strong evidence against the defendant, his attorney recommended a guilty plea because the death penalty was a possible sentence if he was convicted after trial. Although he disclaimed his guilt, the trial court accepted the plea after hearing some damaging evidence from witnesses. The court of appeals held that the plea was involuntary because it was made in order to avoid the death penalty. However,

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See also SINGER, *supra* note 13, at 641.

36. Corbitt v. N.J., 439 U.S. 212 (1978).

37. As required by Brookhart v. Janis, 384 U.S. 1 (1966), and Boykin v. Alabama, 395 U.S. 238 (1969).

38. The *Boykin* doctrine has been weakened by the *Lonberger* rule. Marshall v. Lonberger, 459 U.S. 422 (1983).

39. As Justice Brennan points out in his dissent to the five-four ruling in Marshall v. Lonberger, 459 U.S. 439-47 (1983).

40. The defendant being arraigned was to be charged with grand theft. His name was called before his attorney arrived, and he was then charged with rape, to which he pleaded guilty. In fact, there was another individual with the same name being arraigned at the time who was being charged with rape. Los Angeles Daily Journal, May 12, 1964, p.1, col. 1.

41. North Carolina v. Alford, 400 U.S. 25 (1970).

the Supreme Court reversed on the grounds that when the record strongly supports guilt and the defendant intelligently decides that it is in his best interests to plead guilty, the plea bargain is valid and the sentence will be upheld.[42]

Since a prosecutor is likely to bargain when the case against a defendant is weak, an innocent defendant may be offered a plea that she will be afraid to refuse.[43] In these instances, it is quite possible that an innocent defendant will accept the bargain because she does not want to face the possibility of a more severe sentence.[44] The prosecutor thereby gains a conviction, even if it is only to a minor offense, and the defendant although possibly innocent gets a lesser sentence, sometimes amounting to only probation.[45] One criticism of this practice is that the sentencing decisions made by the prosecutor have no relation to the "goals" of criminal punishment, but rather are made in the interest of securing a greater number of convictions.[46]

In a system which rewards those who choose to forego a criminal trial, there is a great danger in reducing punishments so drastically that defendants feel that they cannot intelligently refuse a prosecutor's offer of a reduced charge and/or a lesser sentence. A serious question of fairness exists; there is certainly the need for modification of the American system of plea bargaining in order to improve the degree of fairness accorded to defendants who are innocent.

D. Bargaining Over Major Charges

Yet another criticism of plea bargaining is that it allows accused people to avoid the punishment that they deserve if in fact they are guilty.[47] In the eyes of the public, a defendant accused of a heinous crime who receives a lesser sentence is taking advantage of our criminal justice system. However, this criticism may be answered by the reality that after trial, a guilty defendant may receive a less severe sentence than possible, or because of procedural problems, may even escape conviction all together.[48] In addition, the prosecutor does take into account many factors before entering into an agreement, such as the nature of the crime and the defendant's

42. *Id.* at 37-38.

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

44. *Id.*

45. *Id.*

46. *Id.* at 60-61.

47. Hyman, *Bargaining and Criminal Justice*, 33 RUTGERS L. REV. 3, 110-12 (1980) *citing* Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 581 (1977).

48. Hyman, *Bargaining and Criminal Justice*, 33 RUTGERS L. REV. 3, 11-12 (1980).

character.[49] Still, inherent in plea bargaining is the view that prosecutors are making deals with murderers and rapists, and thus, those convicted are not receiving the punishment they deserve.

In the preceding analysis, the need for a system whereby criminal trials can be avoided in a majority of instances has been demonstrated. The American use of plea bargaining has prevailed for many years. However, as has also been demonstrated, there are questions as to the fairness of the system, cost-efficient though it may be. Plea bargaining is not the only way, however, to convict defendants in a less formal setting than in a full trial. In fact, in individual cases, the system in Germany may be considered comparable to plea bargaining in efficiency, as well as being more fair to the accused.

IV. Penal Orders (*Strafbefehl*)

A. Crimes Which May be Disposed of Through Penal Orders

In Germany, there is a system whereby the defendant may choose to plead guilty to an offense and to agree to a sentence recommended by the prosecutor.[50] In Germany, penal orders

49. *Id.* at 12.

50. The procedure for penal orders is set forth in STRAFPROZESSORDNUNG [StPO], §§ 407-412 (W. Ger.), which, in pertinent part read:

PROCEDURE IN THE CASE OF PENAL ORDERS

§ 407 Permissibility

I.In case of petty offenses and minor crimes the punishment may be imposed by written penal order of the magistrate . . . . if the prosecution so moves in writing.

II.By a penal order no punishment other than a fine . . . can be imposed; the penal order may also provide for confiscation, if called for, for the right to abate an unlawful condition, or for publication of the decision. (footnote omitted)

III.Measures of prevention and reform may not be imposed by a penal order.

IV.[T]he motion for issuance of a penal order is to be treated like the filing of the charge sheet . . . . The previous hearing of the accused by the court . . . . is not necessary.

§ 408 Motion

I.The motion shall be directed toward a specific punishment. The magistrate shall comply with it, unless there are doubts as to the propriety of the issuance of the penal order.

II.The magistrate shall schedule the main trial, if he hesitates to decide without main trial. The same applies if the magistrate wants to impose a punishment other than the punishment moved for, or if he wants to deviate from the motion of the prosecution in his decision concerning suspension of punishment during probation, and if the prosecution insists on its motion.

§ 409 Contents of the Penal Order, Period for Raising Objection

I.Besides fixing the punishment the penal order shall specify the punishable act, the criminal law applied and the proofs; and it shall also be stated therein that the penal order becomes capable of execution unless the accused raises an objection with the Magistrate's Court, in writing or orally, to be recorded by the court's office within one week after service.

II.The penal order is also communicated to the legal representative of the defendant.

§410 Finality

A penal order against which an objection has not been timely raised, obtains the

(*Strafbefehl*) are used only in instances of minor crimes such as misdemeanors.[51] In addition, only crimes carrying relatively light sentences are eligible for disposition by penal order.[52] Since 1975 penal orders may not impose jail sentences.[53]

The typical crimes that may be considered for penal orders are serious automobile offenses, forgery, embezzlement, fraud, receiving stolen property, and shoplifting.[54] In addition, the German prosecutor usually seeks a penal order when there is strong evidence against the defendant or the defendant has confessed to the crime.[55]

B. Mechanics of the Penal Order

The procedure used in drawing up a penal order is really quite simple. When a prosecutor receives a file from the police regarding a crime, the prosecutor may decide either to move for a trial or to move for the issuance of a penal order.[56] The prosecutor then drafts a penal order, and theoretically, the judge reviews the police file and issues an order that is her own.[57] Usually, the judge will not change the prosecutor's proposed order regarding the charge and the punishment, and therefore, the order issued by the court is the same as that requested by the prosecutor.[58]

Finally, the defendant is notified of both the penal order and the proposed penalty and is given a deadline by which she must respond before the order becomes final.[59] If the defendant objects to the penal order, then a formal trial is scheduled.[60]

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effect of a final judgment.

§ 411 Main Trial in Case of Objection
I.If a timely objection is raised, a main trial will be held unless the prosecution, prior to its commencement, drops the charge or unless the objection is withdrawn.
II.At the main trial the defendant may be represented by defense counsel who has been furnished with written power of attorney.
III.In passing judgment the court is not bound by the decision pronounced in the penal order.

§ 412 Dismissing Objection
I.If the defendant fails to appear at the main trial without sufficient excuse and if he is also not represented by defense counsel, his objection is dismissed by judgment without reception of evidence.
II.A defendant who was granted reinstatement to the prior state of affairs because he failed to raise his objection in time, cannot against claim such reinstatement with respect to the judgment.

51. J. LANGBEIN, *supra* note 15, at 96.
52. *See* STPO § 407 (II).
53. W. FELSTINER, *supra* note 6, at 19.
54. *Id.*
55. *Id.*
56. J. LANGBEIN, *supra* note 15, at 96.
57. *Id.*
58. *Id.*
59. STPO §§§ 409, 410, 411.
60. STPO § 411.

If the judge does not agree with the prosecutor's proposed penal order, then she will order a formal trial.[61] In any case in which the penal order is rejected by either the judge or the accused, the procedure of trial continues on as if no penal order was ever issued.[62]

Once the defendant fails to respond within the time period allowed, usually one week, the order becomes final and any punishment is regarded as a criminal sanction.[63] This could involve the payment of money, revocation of a driver's license, or the confiscation of stolen property.[64]

C. *Benefits of the Penal Order*

Penal orders allow prosecutors to dispose of many misdemeanors quickly and efficiently. Reports have shown that approximately 70% of cases in which penal orders are filed are disposed of through this method.[65]

German prosecutors decide to use penal orders for many of the same reasons American prosecutors enter into plea bargaining. German prosecutors want to increase the number of convictions and at the same time avoid the cost and time of trial, especially when there is a strong case against a defendant.[66]

In this sense, penal orders are beneficial to the court system because trials may be avoided while offenders are still being punished. Some of the goals of punishment are achieved through the order which is in proportion to the severity of the crime. Also, it is beneficial to defendants who are in the public eye, such as politicians and businessmen, who may wish to avoid the publicity and potential embarrassment of trial. This procedure is ideal for those who wish to honestly and quietly pay the penalty for their crime while saving themselves the time and hassle of the formal trial process.

Since the prosecutor is required to prosecute any individuals responsible for activities that are punishable by law,[67] the penal order is an indispensable tool. Without such a tool, the backlog of cases in the German criminal courts could be impossible to handle.

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61. StPO § 408.
62. J. LANGBEIN, *supra* note 15, at 96-97.
63. *Id.*
64. *Id.*
65. W. FELSTINER, *supra* note 6, at 20.
66. "[T]he penal order procedure . . . spares everyone the inconvenience of a trial for open-and-shut cases." J. LANGBEIN, *supra* note 15, at 98.
67. Jescheck, *The Discretionary Powers of the Prosecuting Attorney in West Germany*, 18 AM. J. COMP. L. 508, 509 (1970), *citing* StPO § 151, which provides that the prosecutor is obliged to take action against any criminal activities.

V. Comparison of the Two Systems

A. Similarities

Both plea bargaining and the use of the penal order have a common objective: in the interest of convenience to both the accused and the court system, the speedy disposal of cases that lend themselves to an informal determination of guilt.[68] In both of these systems, the prosecutor plays a major role. While final acceptance of both the plea bargain and the penal order rests with a judge, in both instances, the prosecutor decides which cases she wishes to try, and in which cases to bargain or to issue a penal order. In addition, in both systems the prosecutors play a large role in the determination of the sentence.[69] Penal orders and negotiated plea agreements also have other similarities: in both situations, prosecutors ask defendants to waive all possible defenses and to consent to the punishment prescribed by the prosecution.[70]

The penal order has been compared to the procedure for issuing traffic tickets in the United States.[71] While it is true that upon issuance of a traffic citation an offender has the choice of either paying the fine or appearing in court, the procedure is not really parallel. In penal order procedure the prosecution is involved, while in a traffic offense the fine is actually determined by the discretion of the police officer.[72]

B. Differences

Inherent in these two systems are three major differences, in the next section the advantages and disadvantages of each section over the other will be discussed. One of the major differences between these two systems is that German penal orders are entered into only in the case of minor offenses, while in the United States prosecutors plea bargains are entered into for crimes of minor to a very serious nature.[73] In this sense, plea bargaining is much more expansive system than penal order procedure.

The second major difference between these two systems is that while "bargaining" is a major element of the American system, in theory it is not an element in the prosecutor's decision to move for a

68. Assuming that informal assessment of the guilt or innocence of a defendant without trial can ever be fair.

69. *See generally* Jescheck, *supra* note 67, and LaFave, *supra* note 13.

70. J. LANGBEIN, *supra* note 15, at 96 (fn. 4).

71. J. LANGBEIN, *supra* note 15, at 97.

72. While there are statutorily determined fines for traffic offenses, in reality the police officer has the discretion whether to fine the offender for the full offense, a lesser offense, or no offense at all.

73. See generally J. LANGBEIN, *supra* note 15, and W. FELSTINER, *supra* note 6, at Jescheck, *supra* note 67.

penal order and the accompanying punishment.[74] In fact, the German theory of criminal sanctions is opposed to the idea of bargaining. It has even been compared to "horse trading" because it appears unfair to the defendant, the public interest, or both.[75]

However, "bargaining" for penal orders does seem to be surfacing in the German prosecutor's office.[76] One study in which German governmental officials, legal scholars, and sociologists were interviewed indicated the possibility of bargaining for penal orders. Evidence of this is the high proportion of white collar crimes that conclude in a penal order, as well as the publication in a professional practice manual that defendants attorneys may initiate the discussion of a penal order.[77]

The third major difference between the United States and German systems is that if a German defendant refuses the penal order, his insistence on a trial does not carry the possibility of a stiffer sentence.[78] In actuality, the prosecutor is not barred from requesting a stiffer sentence at trial than that requested in the penal order.[79] Practically, however, this usually does not happen because in requesting the court to impose punishment, the prosecutor must substantiate that request with evidence, and there is usually not a great difference between the evidence used to substantiate the penalty in a penal order and the evidence used by the prosecutor at trial.[80]

This is perhaps the greatest difference between the two systems because it seems that one of the American prosecutor's best bargaining points is the fact that she has the power to reduce the sentence in exchange for a guilty plea. This ability makes plea bargaining beneficial to the defendant. Without the additional bonus of a lesser sentence, there is actually little reason that a defendant would be willing to enter into a plea agreement, except to avoid publicity.

VI. The Possible Benefits of Incorporating Penal Orders into American Criminal Procedure

While plea bargaining is virtually an institution in American criminal justice, perhaps it should be modified. One possibility is to incorporate the use of a system similar to penal orders in certain cases.[81] In this section, penal orders will be analyzed to discover

74. *Id.*
75. J. LANGBEIN, *supra* note 15, at 97-98.
76. W. FELSTINER, *supra* note 6, at 19.
77. *Id.*
78. J. LANGBEIN, *supra* note 15, at 98.
79. *Id., citing* STPO § 411 (III).
80. J. LANGBEIN, *supra* note 15, at 98.
81. Some additional alternatives to plea bargaining are discussed in Comment, *Constitutional Alternatives to Plea Bargaining: An New Waive*, 132 U. PA. L. REV. 327 (1984).

whether they might solve some of the current problems with plea bargaining which were discussed in Section III.

A. Coercion

Coercion does not exist in the use of penal orders because the defendant does not risk a more severe sentence by insisting on a trial.[82] In this sense, a defendant has something to gain by agreeing to a penal order, but nothing to lose if she decides to take advantage of her right to trial and to require the prosecution to prove its prima facie case. This is arguably more fair to the defendant than plea bargaining because the prosecution is not able to coerce the defendant into agreeing to a guilty plea for fear of the consequences of trial.

In addition, if penal orders were to be used in the United States, there would be less ability on the part of the prosecutor to railroad a defendant into pleading guilty when the evidence against her is weak but the punishment is severe, or when there are constitutional problems with the arrest, search, or seizure.[83] Therefore, the use of penal orders in the American system could reduce a major source of the unfairness in plea bargaining—the coercion of the defendant into pleading guilty.[84]

B. Possibility of an Involuntary Plea

Since the entire penal order process takes place in writing[85] and with the benefit of counsel, it appears that any decision to accept a penal order is a voluntary one. When the defendant can actually read the order itself, it is clear that she has actual notice of the crime to which she is pleading guilty. Also, she is availed of the right of competent counsel.[86] This is much less confusing than bargaining and having to plead guilty at a hearing, which can bring about unintended results.[87]

These safeguards are necessary to keep penal orders fair to the defendant. If penal orders were to be used in the American system the right to effective counsel would be highly relevant. The defendant, in most cases, would need to consult an attorney in order to effectively assess the charge against her and the possibilities of pre-

82. W. FELSTINER, *supra* note 6, at 20.

83. Although the defendant is waiving constitutional rights by agreeing to the penal order, he is not being coerced into selling his rights for a lesser sentence. SINGER, *supra* note 16, at 652.

84. *See generally* J. LANGBEIN, *supra* note 15, at 96-98.

85. W. FELSTINER, *supra* note 6, at 19.

86. StPO, § 141.

87. The court may require the defendant to appear, however, the procedure in writing promotes clarity. StPO § 236.

vailing at trial. Since the defendant would retain these rights under the United States Constitution, penal orders would be an appropriate way to attain guilty pleas at a lesser cost than trial, with the assurance that these pleas are made voluntarily.

C. *Plea Bargaining by an Innocent Defendant*

A defendant who is innocent may feel the necessity of pleading guilty in order to avoid the dire consequences of losing in a trial situation. Since, in Germany, penal orders must request the appropriate punishment for the crime, and that punishment is the same as that which is requested at trial,[88] an innocent defendant does not feel the need to agree to a penal order to get a lesser sentence. She can require the prosecution to prove the case against her.

This would be an improvement over the American system because innocent defendants would not have to fear the consequences of trial. While an innocent defendant could, in fact, face a finding of guilt after trial, the punishment will be no more severe than that contemplated in the penal order.[89] Again, penal orders seem to add a degree of fairness to the system of an informal assessment of guilt, especially in the instance of an innocent defendant.

D. *Major Crimes*

The German system does not allow the use of the penal order in the instance of felonies. The reasoning behind this is that in serious cases, the Germans do not believe that a defendant can assess her own guilt without a trial.[90] Therefore, the element of bargaining with murderers, rapists, and drug dealers would be removed if penal orders in their purest form were to be used in the United States and the prohibition on penal orders in the case of felonies also was transferred over to the American system.[91] In fact, this procedure would only be used in the case of misdemeanors if the German model were to be followed strictly.

The use of penal orders could be beneficial in the sense that it cuts down on the "bad press" that plea bargaining receives because of the willingness to deal with those accused of major crimes. If this element were to be removed from current criminal procedure, the public's view of the criminal justice system may be improved. Fairness to defendants charged with major crimes may also improve

88. W. FELSTINER, *supra* note 6, at 20-21.
89. J. LANGBEIN, *supra* note 15, at 98.
90. W. FELSTINER, *supra* note 6, at 21.
91. The problem here is that without using this system in the case of felonies, the cost and efficiency of penal orders would not be as great as plea bargaining. This problem will be discussed in greater detail, *infra*, in section VII(B).

since they would not have to make the difficult decision of whether to choose a bargain which, in some cases, could mean life in prison as opposed to the result after trial, which could be either acquittal or the death penalty.

VII. How to Incorporate Penal Orders into the American System

There is, of course, great difficulty when modifying any legal procedure in order to make improvements. When suggesting either the incorporation of penal orders into the American system or the complete replacement of plea bargaining with penal orders, several problems must be addressed.

It would be completely impractical to expect that plea bargaining, as used in all of the different jurisdictions in the United States, could realistically be replaced by penal orders. In effect, this would require an across-the-board revolution in the theory and procedure in every prosecutor's and defense counsel's office in the country. Rather, advice from the German system should be heeded, and practical manners to incorporate the other systems should be studied.[92]

A. Should the Use of Penal Orders Include Felony Cases?

It has been suggested that for penal orders to work effectively in the United States, they would have to be expanded for use in all criminal cases, not just misdemeanors.[93] This would solve one problem—that of the diminished cost-effectiveness of using penal orders only in the instances of misdemeanors.

Since most prosecutors, in order to convict a defendant for a misdemeanor, first charge the defendant with a felony, the penal order procedure actually might never be used in the United States, even where it might be effective.[94] Also, since many American felonies are German misdemeanors, the limitation to misdemeanors in the United States might be an artificial one in that it would be used in less instances than it is in Germany.[95]

Thus, it seems impractical to restrict the use of the penal order to misdemeanors in the American system. Theoretically, penal orders could be used in cases ranging from the most minor misdemeanor to the most serious felony. For example, a defendant charged

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92. W. FELSTINER, *supra* note 6, at 21-22.

93. [I]t would not make sense to restrict penal orders to misdemeanors. One of the keys to American plea bargaining is the ambiguity of suspect behavior; invariant conduct can be characterized as a serious felony or a trivial misdemeanor, depending on such unobservable phenomena as intent.

Id.

94. *Id.* at 21.

95. *Id.* at 19.

with murder in the second degree who has confessed to the crime may be willing to sign a penal order and to dispense with the trial. Of course, in such a case it would be necessary for a defendant to have all of the due process requirements that he would have received had the case gone to trial,[96] to assure that fairness and due process standards are met.

B. Can Penal Orders be as Effective as Plea Bargaining?

While plea bargaining may have many valid criticisms, it has proved to be quite effective because the prosecutor has a very powerful bargaining chip—the offer of a lesser charge and/or sentence in exchange for the guilty plea. One apparent problem in the German penal order system is that without the incentive of a lesser punishment, the defendant will not, in many cases, plead guilty.[97]

In the American system, the accused is accustomed to receiving a "deal."[98] She will plead guilty as a part of a contract, for which the consideration is the prosecutor's agreement to charge with a lesser offense or to recommend a lesser sentence. As has been discussed, penal orders are arguably more fair than plea bargaining. Perhaps sacrificing a few guilty pleas for an increased standard of fairness might be a wise policy choice.[99] The acknowledged problems, however, most likely will mean that penal orders will not enjoy popularity as a feasible trial avoidance procedure. Therefore, it may be possible to incorporate penal orders in some areas of criminal law, perhaps as a step prior to entering into plea negotiations. For instance, a prosecutor might draw up a penal order which accurately reflects the charge that should be brought against the defendant and a recommendation regarding the sentence. At this early stage, the defendant could sign the order and be done with the charge. However, if plea bargaining were to follow rejected penal orders, again the problem of incentives arises. There would be little benefit, aside from a more expedient and less public process to the defendant, if she had the option to bargain after refusing to agree to the order.

Therefore, it is difficult to strike the proper balance between plea bargaining and penal orders. If such a balance could be struck, perhaps the American plea bargaining system and criminal justice would become fair to the accused.

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96. These are his Fifth Amendment right against self-incrimination and Sixth Amendment rights to effective assistance of counsel and jury trial.

97. W. FELSTINER, *supra* note 6, at 21.

98. *See* Comment, *Constitutional Constraints on Prosecutorial Discretion in Plea Bargaining*, 17 HOUSTON L. REV. 753, 755 (1980).

99. *Id.*

C. *Can Penal Orders be Constitutional?*

An important concern when attempting to change criminal procedural policy is whether that change in policy will be constitutional; that is, whether it holds up under somewhat rigorous due process requirements. Probably the most important due process standard in regard to penal orders is the guarantee of effective assistance of counsel. The use of penal orders, however, can be consistent with this guarantee.[100] There is no reason that a defendant could not be entitled to defense counsel during penal order procedure. In fact, penal orders can make the defense counsel's job easier, since there are fewer stages of bargaining to go through and since the entire procedure takes place in writing.

In addition, the right to a jury trial[101] must stay firmly in place for penal orders to be constitutional. The accused must know that if she does not accept the penal order, she has the right to a trial by her peers. If this right were not securely in place in the case of penal orders, then the problem of coercion would reemerge; that is, if a defendant does not understand the consequences of not signing the penal order, she will be coerced into signing the order.

The right against self-incrimination[102] also must be accorded to the defendant when she is faced with a penal order. The defendant must understand that she is not required to sign the penal order even if she is guilty of the crime because the Constitution contains a provision against self-incrimination.[103]

The possible danger in the use of the penal order is that the defendant may not understand that she does have the right to withhold her admission of guilt. In this sense, the three guarantees of right to jury trial, right to effective counsel, and right against self-incrimination all come together. The defendant needs to understand all the due process provisions which she may be relinquishing by entering a plea of guilty.[104]

One additional possible problem is that of adequate notice. In Germany, the defendant usually has only one week to object to the penal order before it becomes final.[105] This appears to be quite a short period of time in comparison to American standards.

To be fair to the defendant, there should probably be a longer

100. The right to counsel is guaranteed by the Sixth Amendment.

101. Duncan v. Louisiana, 391 U.S. 145 (1968) held that the 6th and 14th Amendments guarantee the right to jury trial to criminal defendants in the state courts because it is fundamental to the American scheme of justice.

102. As guaranteed by the Fifth Amendment.

103. *Id.*

104. However, these same assurances are equally necessary in plea bargaining as they would be in penal orders.

105. STPO §§ 409 and 410 state that penal orders become final if no objection is made within one week.

period of time between the issuance of the penal order and the time at which it becomes final. Perhaps it would be wise to modify the German procedure by requiring the accused to act in some way in regards to the order; that is, the defendant should either accept or reject the order in writing instead of the order becoming final after the mere passage of time. This would assure the courts that the defendant had adequate notice of the order.

This is an especially important consideration if penal orders were to be expanded to include more serious crimes. A week is too short of a period of time to decide whether or not to plead guilty to a murder charge. Perhaps, when serious crimes are involved, a longer period of time, such as a month to sixty days, would be adequate for a defendant to confer with her attorney and to decide whether or not to sign the penal order and accept the punishment that goes along with it.[106]

D. Which System is More Constitutional?

The ultimate question presented is which of these two procedures is more constitutional—the American system of plea bargaining or the German procedure of the penal order. It is difficult for Americans to comprehend that a system developed and used in another nation might fit the American notions of fairness to the accused better than a system developed and even praised in the United States.

As has been discussed on numerous occasions, the courts have declared plea bargaining to be constitutional, while acknowledging its coercive flaws.[107] However, it would be difficult to analyze a German law not in effect in the United States under the same standards that the court did in the case of plea bargaining.[108]

Therefore, let us look at a hypothetical situation in which a crime is committed, a penal order agreed to, and that penal order is contested by the defendant. First, the defendant would have little or no grounds on which she could contest the order. Once a defendant pleads guilty, she waives all defenses which challenge the validity of the arrest or the search and seizure.[109] This analysis is the same for both penal orders and plea bargaining. Therefore, there is no step forward or backward in regards to constitutionality when analyzing the penal order.

The defendant might wish to argue that she had been appointed

106. Assuring the matter is concluded in a quick manner is also necessary in order to comply with the Sixth Amendment right to a speedy trial.

107. *See supra* text accompanying notes 30-36.

108. *See supra* text accompanying note 18.

109. *See* Mempa v. Ray, 389 U.S. 128 (1967); Moore v. Michigan, 355 U.S. 155 (1967); and Townsend v. Burke, 344 U.S. 736 (1948).

incompetent counsel.[110] In the case of the penal order, in which everything is in writing and clearly set forth, the courts' review of the effectiveness of counsel would be facilitated. This would be easier for the court to review than the lengthy plea negotiations process. Fraud could be determined much more easily in the penal order system than in the system which consists of endless conferences and "deals" which often have a political undertone.

While the use of penal orders would not make criminal justice pure and free of politics, it could at least force everything to be "on the record." There would be less room for political motives to influence the way that punishment is meted out and more room for fairness to the defendant, and thus, to the community as a whole.

The defendant might also want to argue that, by asking her to sign the penal order, the prosecutor is violating her right against self-incrimination. However, if the proper safeguards are in place, a defendant will be informed that she need not sign the order, and that the decision to acquiesce to a penal order is purely a voluntary one. This would be at least as constitutional as plea bargaining. In both scenarios the defendant is waiving a fundamental right, but in the case of the penal order, she has a written promise[111] as to what the punishment will be; whereas in plea bargaining, the defendant decides to plead guilty prior to knowing for sure what the consequences in terms of punishment will be.

The defendant cannot contest the penal order by saying that she was coerced into agreeing to it[112] because the defendant does not risk more severe punishment by insisting that a trial take place. In this sense, the penal order is more constitutional because the defendants trial rights[113] are not for sale to the prosecution in exchange for a lesser sentence. Rather, there is a decision made voluntarily by the prosecutor and the defendant to dispose of the charge quickly and quietly.

In adhering to the penal order, the defendant unquestionably gives up the right to be faced by her accuser,[114] as well as the right to jury trial.[115] These are just things that the defendant gives up when she agrees to plead guilty without trial, and these things apply

110. This violates his Sixth Amendment rights.

111. "[T]he court may not heed the prosecutor's appeal for lenient treatment of the accused." Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204, 206 (1956) (footnote omitted). *But see* Mabry, Commissioner, Arkansas Dept. of Correction v. Johnson 467 U.S. 504 (1984) (when a defendant pleads guilty in reliance on a prosecutor's promise, the bargain will be enforced).

112. These are guaranteed by the Sixth and Fourteenth Amendments.

113. U.S. CONST. Amends. VI and XIV.

114. *Id.* For discussion of the effect of the plea bargaining on the right to trial. *See supra* text accompanying notes 34-36.

115. *Id.*

in the same way to both penal orders and plea bargaining.

Therefore, the above analysis shows that in no sense can the penal order be seen as lacking in due process standards, considering that plea bargaining is constitutional. For, if one looks at what the Court is willing to allow the prosecution to offer to the defendant in order to persuade defendant to waive her rights, it is evident that penal orders fall within the limitations drawn by the Supreme Court.

VIII. Conclusion

Admittedly, the penal order is not the miracle cure for the abuses of plea bargaining. Most importantly, penal orders would lack the ability to unclog the United States court systems, which by now, could not survive were it nor for the release valve of plea bargaining.

The reason that the penal order would not be as successful as plea bargaining is that the penal order lacks the element of the bargain. A defendant will not be willing to forego rights without consideration from the prosecution. However, if the penal order is a more fair way to dispose of cases than its counterpart plea bargaining, perhaps the United States should pay the price of a more expensive criminal justice system. The factors in such a decision are to be weighed to determine which is more important, efficiency or fairness. Finally, some guidance can be found in studying the criminal procedure of other nations because it points out the weaknesses of the American system and suggests ways in which it might be improved.

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