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Torture and Plea Bargaining*

John H. Langbein†

In this essay I shall address the modern American system of plea bargaining from a perspective that must appear bizarre, although I hope to persuade you that it is illuminating. I am going to contrast plea bargaining with the medieval European law of torture. My thesis is that there are remarkable parallels in origin, in function, and even in specific points of doctrine, between the law of torture and the law of plea bargaining. I shall suggest that these parallels expose some important truths about how criminal justice systems respond when their trial procedures fall into deep disorder.

I. The Law of Torture[1]

For about half a millennium, from the middle of the thirteenth century to the middle of the eighteenth, a system of judicial torture lay at the heart of Continental criminal procedure. In our own day the very word "torture" is, gladly enough, a debased term. It has come to mean anything unpleasant, and we hear people speak of a tortured interpretation of a poem, or the torture of a dull dinner party. In discussions of contemporary criminal procedure we hear the word applied to describe illegal police practices or crowded prison conditions. But torture as the medieval European lawyers understood it had nothing to do with official misconduct or with criminal sanctions. Rather, the application of torture was a routine and judicially supervised feature of European criminal procedure. Under certain circumstances the law permitted the criminal courts to employ physical coercion against suspected criminals in order to induce them to confess. The law went to great lengths to limit this technique of extorting confessions to cases in which it was thought that the accused was highly likely to be guilty, and to surround the use of torture with other safeguards that I shall discuss shortly.

This astonishing body of law grew up on the Continent as an adjunct to the law of proof—what we would call the system of

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† Professor of Law, The University of Chicago.

[1] This section of this article is based upon and reproduces some language from J. Langbein, Torture and the Law of Proof: Europe and England in the Ancien Régime 1-16 (1977).

trial—in cases of serious crime (for which the sanction was either death or severe physical maiming[2]). The medieval law of proof was designed in the thirteenth century to replace an earlier system of proof, the ordeals, which the Roman Church effectively destroyed in the year 1215.[3] The ordeals purported to achieve absolute certainty in criminal adjudication through the happy expedient of having the judgments rendered by God, who could not err. The replacement system of the thirteenth century aspired to achieve the same level of safeguard—absolute certainty—for human adjudication.

Although human judges were to replace God in the judgment seat, they would be governed by a law of proof so objective that it would make that dramatic substitution unobjectionable—a law of proof that would *eliminate human discretion* from the determination of guilt or innocence. Accordingly, the Italian Glossators who designed the system developed and entrenched the rule that conviction had to be based upon the testimony of two unimpeachable eyewitnesses to the gravamen of the crime—evidence that was, in the famous phrase, "clear as the noonday sun." Without these two eyewitnesses, a criminal court could not convict an accused who contested the charges against him. Only if the accused *voluntarily* confessed the offense could the court convict him without the eyewitness testimony.

Another way to appreciate the purpose of these rules is to understand their corollary: conviction could not be based upon circumstantial evidence, because circumstantial evidence depends for its efficacy upon the subjective persuasion of the trier who decides whether to draw the inference of guilt from the evidence of circumstance. Thus, for example, it would not have mattered in this system that the suspect was seen running away from the murdered man's house and that the bloody dagger and the stolen loot were found in his possession. Since no eyewitness saw him actually plunge the weapon into the victim, the court could not convict him of the crime.

In the history of Western culture no legal system has ever made a more valiant effort to perfect its safeguards and thereby to exclude completely the possibility of mistaken conviction. But the Europeans learned in due course the inevitable lesson. They had set the level of safeguard too high. They had constructed a system of proof

[2] The use of imprisonment as a sanction for serious crime was a development of the Renaissance and later times. Langbein, *The Historical Origins of the Sanction of Imprisonment for Serious Crime*, 5 J. LEGAL STUD. 35 (1976), substantially reproduced in J. LANGBEIN, *supra* note 1, at 27-44, 151-64.

[3] J. LANGBEIN, *supra* note 1, at 5-7.

that could as a practical matter be effective only in cases involving overt crime or repentant criminals. Because society cannot long tolerate a legal system that lacks the capacity to convict unrepentant persons who commit clandestine crimes, something had to be done to extend the system to those cases. The two-eyewitness rule was hard to compromise or evade, but the confession rule seemed to invite the "subterfuge"[4] that in fact resulted. To go from accepting a voluntary confession to coercing a confession from someone against whom there was already strong suspicion was a step that began increasingly to be taken. The law of torture grew up to regulate this process of generating confessions.

The spirit of safeguard that had inspired the unworkable formal law of proof also permeated the subterfuge. The largest chapter of the European law of torture concerned the prerequisites for examination under torture. The European jurists devised what Anglo-American lawyers would today call a rule of probable cause, designed to assure that only persons highly likely to be guilty would be examined under torture. Thus, torture was permitted only when a so-called "half proof" had been established against the suspect. That meant either one eyewitness, or circumstantial evidence of sufficient gravity, according to a fairly elaborate tariff.[5] In the example where a suspect was caught with the dagger and the loot, each of those indicia would be a quarter proof. Together they cumulated to a half proof, which was sufficient to permit the authorities to dispatch the suspect for a session in the local torture chamber.

In this way the prohibition against using circumstantial evidence was overcome. The law of torture found a place for circumstantial evidence, but a nominally subsidiary place. Circumstantial evidence was not consulted directly on the ultimate question, guilt or innocence, but on a question of interlocutory procedure—whether or not to examine the accused under torture. Even there the law attempted to limit judicial discretion by promulgating predetermined, ostensibly objective criteria for evaluating the indicia and assigning them numerical values (quarter proofs, half proofs, and the like). Vast legal treatises were compiled on this jurisprudence of torture to guide the examining magistrate in determining whether there was probable cause for torture.[6]

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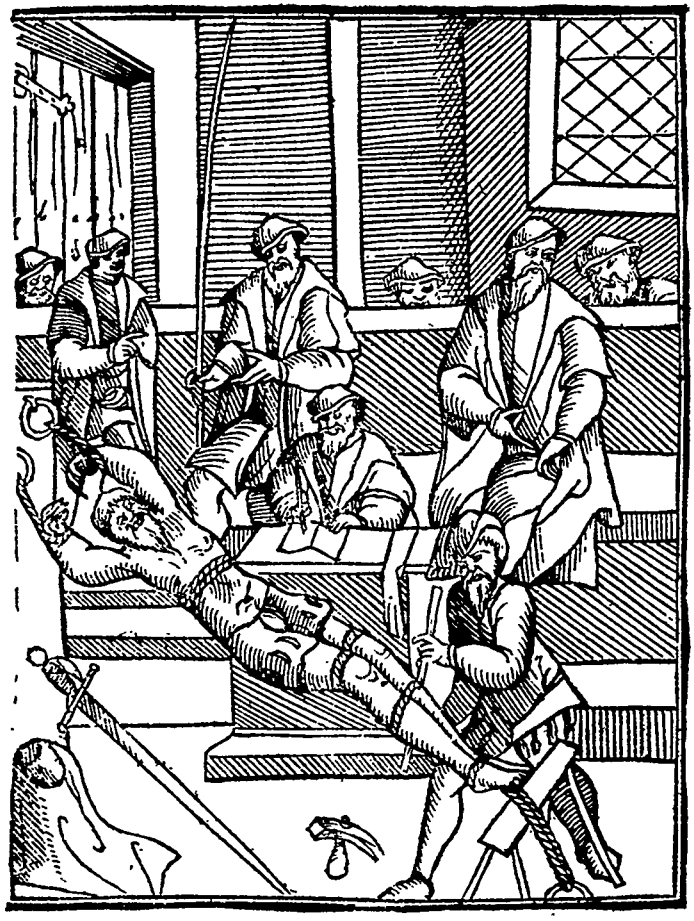
[4] Maitland's famous term, 2 F. POLLOCK & F.W. MAITLAND, THE HISTORY OF ENGLISH LAW 660 (2d ed. 1898).

[5] J. LANGBEIN, *supra* note 1, at 14.

[6] These works are canvassed in 1 & 2 P. FIORELLI, LA TORTURA GIUDIZIARIA NEL DIRITTO COMUNE (1953-54).

CAPVT XXXVIII.

De repetitione quæſtionis, ſiue torturæ.



This woodcut from a leading sixteenth-century European criminal procedure manual shows the accused being examined under torture in the presence of the court, clerk, and court functionaries. The illustration, from Joost Damhouder's *Praxis Rerum Criminalium* 91 (Antwerp ed. 1562), appears in chapter 38, which discusses the rules for repeating the infliction of torture on an accused who has previously resisted confession despite examination under torture. (Reproduced with permission from the rare book collection of The University of Chicago Law Library.)

In order to achieve a verbal or technical reconciliation with the requirement of the formal law of proof that the confession be voluntary, the medieval lawyers treated a confession extracted under torture as involuntary, hence ineffective, unless the accused repeated it free from torture at a hearing that was held a day or so later. Often enough the accused who had confessed under torture did recant when asked to confirm his confession. But seldom to avail: the examination under torture could thereupon be repeated. An accused who confessed under torture, recanted, and then found himself tortured anew, learned quickly enough that only a "voluntary" confession at the ratification hearing would save him from further agony in the torture chamber.[7]

Fortunately, more substantial safeguards were devised to govern the actual application of torture. These were rules designed to enhance the reliability of the resulting confession. Torture was not supposed to be used to elicit an abject, unsubstantiated confession of guilt. Rather, torture was supposed to be employed in such a way that the accused would disclose the factual detail of the crime—information which, in the words of a celebrated German statute, "no innocent person can know."[8] The examining magistrate was forbidden to engage in so-called suggestive questioning, in which the examiner supplied the accused with the detail he wanted to hear from him. Moreover, the information admitted under torture was supposed to be investigated and verified to the extent feasible. If the accused confessed to the slaying, he was supposed to be asked where he put the dagger. If he said he buried it under the old oak tree, the magistrate was supposed to send someone to dig it up.

Alas, these safeguards never proved adequate to overcome the basic flaw in the system. Because torture tests the capacity of the accused to endure pain rather than his veracity, the innocent might (as one sixteenth-century commentator put it) yield to "the pain and torment and confess things that they never did."[9] If the examining magistrate engaged in suggestive questioning, even accidentally, his lapse could not always be detected or prevented. If the accused knew something about the crime, but was still innocent of it, what he did know might be enough to give his confession verisimilitude.

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[7] J. LANGBEIN, *supra* note 1, at 15-16. An accused who resisted any confession under torture was supposed to be set free (subject to rules permitting further torture if new evidence was thereafter discovered); it was said that the accused had "purged" the incriminating evidence when he endured the torture without confession. *Id.* at 16.

[8] Constitutio Criminalis Carolina art. 54 (1532), *translated in* J. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE 282 (1974).

[9] J. DAMHOUDER, PRACTIQUE JUDICIAIRE ES CAUSES CRIMINELLES ch. 39, at 44 (Antwerp ed. 1564) (first edition published as PRAXIS RERUM CRIMINALIUM (Louvain 1554)).

In some jurisdictions the requirement of verification was not enforced, or was enforced indifferently.

These shortcomings in the law of torture were identified even in the Middle Ages and were the subject of emphatic complaint in Renaissance and early modern times. In the eighteenth century, as the law of torture was finally about to be abolished along with the system of proof that had required it, Beccaria and Voltaire became famous as critics of judicial torture, but they were latecomers to a critical legal literature nearly as old as the law of torture itself. Judicial torture survived the centuries not because its defects had been concealed, but in spite of their having been long revealed. The two-eyewitness rule had left European criminal procedure without a tolerable alternative. Having entrenched this unattainable level of safeguard in their formal trial procedure, the Europeans found themselves obliged to evade it through a subterfuge that they knew was defective. The coerced confession had to replace proof of guilt.

II. The Law of Plea Bargaining

I am now going to cross the centuries and cross the Atlantic in order to speak of the rise of plea bargaining in twentieth-century America.

The description of the European law of torture that I have just presented has been meant to stir among American readers an unpleasant sensation of the familiar. The parallels between the modern American plea bargaining system and the ancient system of judicial torture are many and chilling. I have lived with them for some years now, and the least that I hope to achieve in this essay is to unburden myself somewhat by sharing the disturbing vision that I think would come to any American who had spent time studying the European law of torture.

By way of preface, let me set forth briefly some of the rudiments of our plea bargaining system. Plea bargaining occurs when the prosecutor induces a criminal accused to confess guilt and to waive his right to trial in exchange for a more lenient criminal sanction than would be imposed if the accused were adjudicated guilty following trial. The prosecutor offers leniency either directly, in the form of a charge reduction, or indirectly, through the connivance of the judge, in the form of a recommendation for reduced sentence that the judge will follow. In exchange for procuring this leniency for the accused, the prosecutor is relieved of the need to prove the accused's guilt, and the court is spared having to adjudicate it. The court condemns the accused on the basis of his confession, without independent adjudication.

Plea bargaining is, therefore, a nontrial procedure for convicting and condemning people accused of serious crime. If you turn to the American Constitution in search of authority for plea bargaining, you will look in vain. Instead, you will find—in no less hallowed a place than the Bill of Rights—an opposite guarantee, a guarantee of trial. The Sixth Amendment provides: "In *all* criminal prosecutions, the accused shall enjoy the right to . . . trial . . . by an impartial jury . . . ."[10]

In our day, jury trial continues to occupy its central place both in the formal law and in the mythology of the law. The constitutions have not changed, the courts pretend to enforce the defendant's right to jury trial, and the television transmits a steady flow of dramas in which a courtroom contest for the verdict of the jury leads inexorably to the disclosure of the true culprit. In truth, criminal jury trial has largely disappeared in America. The criminal justice system now disposes of virtually all cases of serious crime through plea bargaining. Depending on the jurisdiction, as many as 99 percent of all felony convictions are by plea.[11] This nontrial procedure has become the ordinary dispositive procedure of American law.

Why? Why has our formal system of proof and trial been set out of force? What has happened in the interval of less than two centuries between the constitutionalization of jury trial in 1791 and the present day to substitute this nontrial system for the trial procedure envisaged by the Framers? Scholars are only beginning to investigate the history of plea bargaining,[12] but enough is known to permit us to speak with some confidence about the broad outline. In the two centuries from the mid-eighteenth to the mid-twentieth, a vast transformation overcame the Anglo-American[13] institution of criminal jury trial, rendering it absolutely unworkable as an ordinary dispositive procedure and requiring the development of an alterna-

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[10] U.S. CONST. amend. VI (emphasis added).

[11] The figure of 99 percent is given for Detroit in J. BOND, PLEA BARGAINING AND GUILTY PLEAS 13 (1975). Professor Alschuler reports 95 percent for Houston in 1975. Alschuler, *The Trial Judge's Role in Plea Bargaining* (pt. I), 76 COLUM. L. REV. 1059, 1063 n.20 (1976). In New York in 1971, 97 percent of felony convictions were by plea. *See* VERA INSTITUTE OF JUSTICE, FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY'S COURTS 7 (1977). In a large statistical study of New York City felony data about to be published, Hans Zeisel computes that 98 percent of convictions were obtained by plea. H. ZEISEL, THE ANATOMY OF LAW ENFORCEMENT chs. 4, 12, 28 (1979) (forthcoming).

[12] *See* Alschuler, *Plea Bargaining and its History*, 13 LAW & SOC'Y REV. (1979) (forthcoming); Friedman, *Plea Bargaining in Historical Perspective*, *id.* (forthcoming); Langbein, *Understanding the Short History of Plea Bargaining*, *id.* (forthcoming).

[13] On the extent of plea bargaining in England, see Baldwin & McConville, *Sentencing Problems Raised by Guilty Pleas: An Analysis of Negotiated Pleas in the Birmingham Crown Court*, 41 MOD. L. REV. 544, 545 n.3 (1978).

tive procedure, which we now recognize to be the plea bargaining system.

In eighteenth-century England jury trial was still a *summary proceeding.*[14] In the Old Bailey in the 1730s we know that the court routinely processed between twelve and twenty jury trials for felony in a single day. A single jury would be impaneled and would hear evidence in numerous unrelated cases before retiring to formulate verdicts in all. Lawyers were not employed in the conduct of ordinary criminal trials, either for the prosecution or the defense. The trial judge called the witnesses (whom the local justice of the peace had bound over to appear), and the proceeding transpired as a relatively unstructured "altercation" between the witnesses and the accused.[15] In the 1790s, when the Americans were constitutionalizing English jury trial, it was still rapid and efficient. "The trial of Hardy for high treason in 1794 was the first that ever lasted more than one day, and the court seriously considered whether it had any power to adjourn . . . ."[16] By contrast, we may note that the trial of Patricia Hearst for bank robbery in 1976 lasted forty days[17] and that the average felony jury trial in Los Angeles in 1968 required 7.2 days of trial time.[18] In the eighteenth century the most characteristic (and time-consuming) features of modern jury trial, namely adversary procedure and the exclusionary rules of the law of criminal evidence, were still primitive and uncharacteristic. The accused's right to representation by retained counsel was not generalized to all felonies until the end of the eighteenth century in America and the nineteenth century in England.[19] Appellate review was very re-

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[14] *See generally* Langbein, *The Criminal Trial before the Lawyers,* 45 U. CHI. L. REV. 263 (1978).

[15] *See id.* at 272-84. The word "altercation" is the famous term of Sir Thomas Smith. T. SMITH, DE REPUBLICA ANGLORUM 80 (London 1583).

[16] MacKinnon, *The Law and the Lawyers,* in 2 JOHNSON'S ENGLAND 287, 307 (A.S. Turberville ed. 1933) (referring to Rex v. Hardy, 24 St. Tr. 199 (1794)).

[17] [1976] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ANN. REP. 335.

[18] The figure for Los Angeles appears in SAN FRANCISCO COMMITTEE ON CRIME, A REPORT ON THE CRIMINAL COURTS OF SAN FRANCISCO, PART I: THE SUPERIOR COURT BACKLOG—CONSEQUENCES AND REMEDIES 1 (1970). (I am grateful to Professor Albert W. Alschuler for the reference.) Of course, this figure must reflect the diversion of most easy cases into nonjury-trial channels such as plea bargaining, bench trial, and conditional nonprosecution. Reliable figures for New Jersey criminal trials conducted in 1976-77 (bench and jury) are less spectacular, although they hardly detract from the contrast with eighteenth-century trial duration figures. Only five percent of the trials lasted more than five days, whereas 49 percent lasted from one to three days, 35 percent less than a day, and 11 percent from three to five days. ADMINISTRATIVE DIRECTOR OF THE COURTS, STATE OF NEW JERSEY, ANN. REP. 1976-1977, at F-2 (1978). (I owe this reference to Professor Jerome Israel.)

[19] U.S. CONST. amend. VI (1791); 6 & 7 Will. IV, ch. 114 (1836). For the American colonies, see the valuable compilation in the appendix to Note, *An Historical Argument for*

stricted into the twentieth century; counsel for indigent accused was not required until the middle of this century. The practices that so protract modern American jury trial—extended voir dire, exclusionary rules and other evidentiary barriers, motions designed to provoke and preserve issues for appeal, maneuvers and speeches of counsel—all are late growths in the long history of common law criminal procedure.[20]

Nobody should be surprised that jury trial has undergone great changes over the last two centuries. It desperately needed reform. The level of safeguard against mistaken conviction was in several respects below what civilized peoples now require. What we will not understand until there has been research directed to the question is why the pressure for greater safeguard led in the Anglo-American procedure to the law of evidence and the lawyerization of the trial, reforms that ultimately destroyed the system in the sense that they made jury trial so complicated and time-consuming that they rendered it unworkable as the routine dispositive procedure.[21] Similar pressures for safeguard were being felt on the Continent in the same period, but they led to reforms in nonadversarial procedure that preserved the institution of trial.[22]

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the Right to Counsel During Police Interrogation, 73 YALE L.J. 1000, 1055-57 (1964).

[20] The latter portion of this paragraph is derived from Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 445-46 (1974).

[21] In isolating the transformation of jury trial as the root cause of plea bargaining, we do not mean to imply that this procedural development is the sole cause of a practice so complex. When the history of plea bargaining is ultimately written, there will certainly be other chapters. In particular, it will be necessary to investigate the influence of the rise of professional policing and prosecution and the accompanying changes in the levels of crime reporting and detection; changes in the social composition of victim and offender groups; changes in the rates and types of crime; and the intellectual influence of the marketplace model in an age when laissez faire was not an epithet. However, these other phenomena were largely experienced in Continental countries that did not turn to plea bargaining. Anyone looking beyond the uniquely Anglo-American procedural development that we have emphasized needs to explain why plea bargaining has characterized lands with such disparate social composition as the United States and England, but not Germany, France, or the other major European states.

In the middle of the 19th century, when German criminal procedure was being given its modern shape, German scholars routinely studied English procedure as a reform model. They found much to admire and to borrow (including the principle of lay participation in adjudication and the requirement that trials be conducted orally and in public), but they were unanimous in rejecting the guilty plea. It was wrong for a court to sentence on "mere confession" without satisfying itself of the guilt of the accused. *See, e.g.*, von Arnold, *Geständniss statt des Verdicts*, 7 GERICHTSSAAL pt. 1, 265, 275 (1855); Walther, *Ueber die processualische Wirkung des Geständnisses im Schwurgerichtsverfahren*, 1851 ARCHIV DES CRIMINALRECHTS (Neue Folge) 225; *Das Schwurgericht: Geständniss und Verdikt und Kollision zwischen beiden*, 18 GOLTDAMMERS ARCHIV 530 (1870).

[22] This paragraph (with note 21) is derived from Langbein, *supra* note 12.

III. The Parallels

Let me now turn to my main theme—the parallels in function and doctrine between the medieval European system of judicial torture and our plea bargaining system. The starting point, which will be obvious from what I have thus far said, is that each of these substitute procedural systems arose in response to the breakdown of the formal system of trial that it subverted. Both the medieval European law of proof and the modern Anglo-American law of jury trial set out to safeguard the accused by circumscribing the discretion of the trier in criminal adjudication. The medieval Europeans were trying to eliminate the discretion of the professional judge by requiring him to adhere to objective criteria of proof. The Anglo-American trial system has been caught up over the last two centuries in an effort to protect the accused against the dangers of the jury system, in which laymen ignorant of the law return a one- or two-word verdict that they do not explain or justify. Each system found itself unable to recant directly on the unrealistic level of safeguard to which it had committed itself, and each then concentrated on inducing the accused to tender a confession that would waive his right to the safeguards.

The European law of torture preserved the medieval law of proof undisturbed for those easy cases in which there were two eyewitnesses or voluntary confession. But in the more difficult cases (where, I might add, safeguard was more important), the law of torture worked an absolutely fundamental change within the system of proof: it largely *eliminated the adjudicative function.* Once probable cause had been determined, the accused was made to concede his guilt rather than his accusers to prove it.

In twentieth-century America we have duplicated the central experience of medieval European criminal procedure: we have moved from an adjudicatory to a concessionary system. We coerce the accused against whom we find probable cause to confess his guilt. To be sure, our means are much politer; we use no rack, no thumbscrew, no Spanish boot to mash his legs. But like the Europeans of distant centuries who did employ those machines, we make it terribly costly for an accused to claim his right to the constitutional safeguard of trial. We threaten him with a materially increased sanction if he avails himself of his right and is thereafter convicted. This sentencing differential is what makes plea bargaining coercive. There is, of course, a difference[23] between having your

[23] This difference is related to differences in the sanctions that characterize the medieval and the modern worlds. The law of torture served legal systems whose only sanctions for

limbs crushed if you refuse to confess, or suffering some extra years of imprisonment if you refuse to confess, but the difference is of degree, not kind. Plea bargaining, like torture, is coercive.[24] Like the

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serious crime were severe physical maiming and death. The torture victim was coerced into a confession that condemned him to the most severe of punishments, whereas the plea bargain rewards the accused with a lesser sanction, typically some form of imprisonment, in exchange for his confession. Obviously, the greater the severity of the sanction that the accused's confession will bring down upon himself, the greater the coercion that must be brought to bear upon him to wring out the confession. Plea bargaining is as coercive as it has to be for the modern system of sanctions.

[24] Defenders of plea bargaining sometimes try to minimize the force of this point with a reductio-ad-absurdum argument: granted that plea bargaining is coercive, so is virtually every exercise of criminal jurisdiction, since few criminal defendants are genuine volunteers. I think that the answer to this argument is straightforward. The accused is made a criminal defendant against his wishes, but not contrary to his rights. The Constitution does not grant citizens any immunity from criminal prosecution, but it does grant them the safeguard of trial. Coercion authorized by law is different from coercion meant to overcome the guarantees of law. Coercing people to stand trial is different from coercing them to waive trial and to bring upon themselves sanctions that should only be imposed after impartial adjudication.

Sometimes, as I have mentioned in the text, a rather opposite argument is made in behalf of plea bargaining—not that everything is coercive, but that a mere sentencing differential is not serious enough to be reckoned as coercion. One can test this point simply by imagining a differential so great (*e.g.*, death versus a fifty-cent fine) that any reasonable defendant would waive even the strongest defenses. Like torture, the sentencing differential in plea bargaining elicits confessions of guilt that would not be freely tendered. It is, therefore, coercive in the same sense as torture, although not in the same degree.

The question whether significant numbers of innocent people do plead guilty is not, of course, susceptible to empirical testing. It is known that many of those who plead guilty claim that they are innocent. *See* A. BLUMBERG, CRIMINAL JUSTICE 89-92 (1970). *See also* text at note 29 *infra* (discussing *North Carolina v. Alford*). Alschuler thinks that "the greatest pressures to plead are brought to bear on defendants who may be innocent." Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60 (1968). See *id.* at 59-62 for evidence that the threatened "sentence differential between guilty-plea and trial defendants increases in direct proportion to the likelihood of acquittal." *Id.* at 60. Alschuler reports one case that resembles the hypothetical choice between death penalty and fifty-cent fine:

> San Francisco defense attorney Benjamin M. Davis recently represented a man charged with kidnapping and forcible rape. The defendant was innocent, Davis says, and after investigating the case Davis was confident of an acquittal. The prosecutor, who seems to have shared the defense attorney's opinion on this point, offered to permit a guilty plea to simple battery. Conviction on this charge would not have led to a greater sentence than thirty days' imprisonment, and there was every likelihood that the defendant would be granted probation. When Davis informed his client of this offer, he emphasized that conviction at trial seemed highly improbable. The defendant's reply was simple: "I can't take the chance."

Id. at 61.

I do not think that great numbers of American defendants plead guilty to offenses committed by strangers. (The law of torture was also not supposed to apply in circumstances where the accused could explain away the evidence that might otherwise have given cause to examine him under torture. *See* J. LANGBEIN, *supra* note 8, at 183.) I do believe that plea bargaining is used to coerce the waiver of tenable defenses, as in Attorney Davis's example, *supra*, or when the offense has a complicated conceptual basis, as in tax and other white collar crimes.

The objection is sometimes voiced that if an accused is innocent, it stands to reason that

medieval Europeans, the Americans are now operating a procedural system that engages in condemnation without adjudication.[25] The maxim of the medieval Glossators, no longer applicable to European[26] law, now aptly describes American law: *confessio est regina probationum,* confession is the queen of proof.

I have said that European law attempted to devise safeguards for the use of torture that proved illusory; these measures bear an eerie resemblance to the supposed safeguards of the American law of plea bargaining. Foremost among the illusory safeguards of both systems is the doctrinal preoccupation with characterizing the induced waivers as voluntary. The Europeans made the torture victim repeat his confession "voluntarily," but under the threat of being tortured anew if he recanted. The American counterpart is Rule 11(d) of the Federal Rules of Criminal Procedure, which forbids the court from accepting a guilty plea without first "addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises *apart from a plea agreement.*"[27] Of course, the plea agreement is the *source* of the coercion and already embodies the involuntariness.

The architects of the European law of torture sought to enhance the reliability of a torture-induced confession with other safeguards designed to substantiate its factual basis. We have said that they required a probable cause determination for investigation under torture and that they directed the court to take steps to verify the accuracy of the confession by investigating some of its detail. We have explained why these measures were inadequate to protect many innocent suspects from torture, confession, and condemnation. Probable cause is not the same as guilt, and verification, even

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he will press his defense at trial; if an innocent accused does plead guilty, he must necessarily be calculating that there is a significant probability that the trier will fail to recognize his innocence despite the great safeguards of trial designed to prevent such error. If trials were perfectly accurate, plea bargaining would be perfectly accurate, since no innocent person would have an incentive to accuse himself. Ironically, therefore, anyone who would denigrate plea bargaining because it infringes the right to trial must also assume that the trial itself is to some extent recognized to be mistake-prone. The response, of course, is that paradox is not contradiction. So long as human judgment is fallible, no workable trial procedure can do more than minimize error. The social cost of a rule of absolute certainty—massive release of the culpable—would be intolerable. This was the lesson of the medieval European law, and it explains why the standard of our law is not "beyond doubt" but "beyond reasonable doubt."

[25] "A plea of guilty . . . is itself a conviction . . . . More is not required; the court has nothing to do but give judgment and sentence." Kercheval v. United States, 274 U.S. 220, 223 (1927).

[26] *See* Casper & Zeisel, *Lay Judges in the German Criminal Courts*, 1 J. LEGAL STUD. 135, 146-47 (1972).

[27] FED. R. CRIM. P. 11(d) (emphasis added).

if undertaken in good faith, could easily fail as a safeguard, either because the matters confessed were not susceptible of physical or testimonial corroboration, or because the accused might know enough about the crime to lend verisimilitude to his confession even though he was not in fact the culprit.

The American law of plea bargaining has pursued a similar chimera: the requirement of "adequate factual basis for the plea." Federal Rule 11(f) provides that "the court should not enter judgment upon [a guilty] plea without making such inquiry as shall satisfy it that there is a factual basis for the plea."[28] As with the tortured confession, so with the negotiated plea: any case that has resisted dismissal for want of probable cause at the preliminary hearing will rest upon enough inculpating evidence to cast suspicion upon the accused. The function of trial, which plea bargaining eliminates, is to require the court to adjudicate whether the facts proven support an inference of guilt beyond a reasonable doubt. Consider, however, the case of *North Carolina v. Alford,*[29] decided in this decade, in which the U.S. Supreme Court found it permissible to condemn without trial a defendant who had told the sentencing court: "I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man . . . . I just pleaded guilty because they said if I didn't they would gas me for it . . . . I'm not guilty but I plead guilty."[30] I invite you to compare Alford's statement with the explanation of one Johannes Julius, seventeenth-century burgomaster of Bamberg, who wrote from his dungeon cell where he was awaiting execution, in order to tell his daughter why he had confessed to witchcraft "for which I must die. It is all falsehood and invention, so help me God . . . . They never cease to torture until one says something."[31]

The tortured confession is, of course, markedly less reliable than the negotiated plea, because the degree of coercion is greater. An accused is more likely to bear false witness against himself in order to escape further hours on the rack than to avoid risking a longer prison term. But the resulting moral quandary is the same.[32]

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[28] *Id.* 11(f).

[29] 400 U.S. 25 (1970).

[30] *Id.* at 28 n.2.

[31] *Quoted in* H.R. TREVOR-ROPER, THE EUROPEAN WITCH-CRAZE OF THE 16TH AND 17TH CENTURIES 84 (1969) (Pelican ed.).

[32] Some of those who have favored me with prepublication critiques of this paper have resisted this point—largely, I think, because they do not give adequate weight to the seriousness with which the law of torture undertook to separate the guilty from the innocent. My critics suggest that plea bargaining is in theory meant to have a differential impact upon the guilty and the innocent, whereas torture was not. They contend that the plea bargaining

Judge Levin of Michigan was speaking of the negotiated guilty plea, but he could as well have been describing the tortured confession when he said, "there is no way of knowing whether a particular guilty plea was given because the accused believed he was guilty, or because of the promised concession."[33] Beccaria might as well have been speaking of the coercion of plea bargaining when he said of the violence of torture that it "confounds and obliterates those minute differences between things which enable us at times to know truth from falsehood."[34] The doctrine of adequate factual basis for the plea is no better substitute for proof beyond reasonable doubt than was the analogous doctrine in the law of torture.

The factual unreliability of the negotiated plea has further consequences, quite apart from the increased danger of condemning an innocent man. In the plea bargaining that takes the form of charge bargaining (as opposed to sentence bargaining), the culprit is convicted not for what he did, but for something less opprobrious. When people who have murdered are said to be convicted of wounding, or when those caught stealing are nominally convicted of attempt or possession, cynicism about the processes of criminal justice is inevitably reinforced.[35] This wilful mislabelling plays havoc with

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system means to tell the accused, "Don't put us to the trouble of a trial unless you are really innocent," whereas the law of torture gave the same message to both the innocent and the guilty, "Confess or the pain will continue."

I think that both branches of the argument are mistaken. I have already pointed out, *supra* note 24, that plea bargaining can and does induce innocent defendants to convict themselves. As for the law of torture, I should reiterate that the safeguards discussed above, *see* text at notes 6-9 *supra*, were designed for the sole purpose of separating the innocent from the guilty, and the law of torture made express provision for releasing those who did not confess under torture. *See* J. LANGBEIN, *supra* note 1, at 16, 151 n.55. I am very willing to concede that the safeguards of the law of torture were even less effective than those of plea bargaining, but as I have said in the text, the difference is one of degree and not kind.

[33] People v. Byrd, 12 Mich. App. 186, 206-07, 162 N.W.2d 777, 787 (1968) (Levin, J., concurring) (italics deleted).

[34] Beccaria, *Of Crimes and Punishment* (1st ed. 1764) (J. Grigson trans.), *reprinted in preface to* A. MANZONI, THE COLUMN OF INFAMY 33 (1964).

[35] *See, e.g.*, Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROB. 155, 158-59 (1964) (child molestation cases resulting in no serious harm to the victim regularly reduced to the charge of loitering around a schoolyard, even if the offense was committed nowhere near a schoolyard). (I owe this reference to Profesor Richard Lempert.)

The sentences prescribed by statute in the United States are markedly more severe than for comparable offenses in European states. In the words of Judge Frankel, ours is "a nation where prison sentences of extravagant length are more common than they are almost anywhere else." United States v. Bergman, 416 F. Supp. 496, 502 (S.D.N.Y. 1976). I know of no study of the point, but I would be surprised if Hans Zeisel were far wrong in his suggestion that each month of imprisonment in Continental sentences corresponds to a year in the United States. Zeisel, *Die Rolle der Geschworenen in den USA*, 21 ÖSTERREICHISCHE JURISTENZEITUNG 121, 123 (1966). The severity of our prescribed sentences contributes to the

our crime statistics, which explains in part why Americans—uniquely among Western peoples—attach so much importance to arrest records rather than to records of conviction. I think that the unreliability of the plea, the mislabelling of the offense, and the underlying want of adjudication all combine to weaken the moral force of the criminal law, and to increase the public's unease about the administration of criminal justice. The case of James Earl Ray is perhaps the best example of public dissatisfaction over the intrinsic failure of the plea bargaining system to establish the facts about crime and guilt in the forum of a public trial.[36] It is interesting to remember that in Europe in the age of Beccaria and Voltaire, the want of adjudication and the unreliability of the law of torture had bred a strangely similar cynicism towards that criminal justice system.

Our law of plea bargaining has not only recapitulated much of the doctrinal folly of the law of torture, complete with the pathetic

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plea bargaining system by expanding the potential differential between sentence following trial and sentence pursuant to plea bargain.

In the nineteenth and twentieth centuries, when the Europeans were ameliorating their sentences, we were not. It is tempting to wonder whether the requirements of the plea bargaining system have been somewhat responsible.

Of course, plea bargaining is not responsible for all of the downcharging and resultant mislabelling in which modern American prosecutors engage. If the prosecutor views the statutorily prescribed minimum sentence for an offense as too severe, he can downcharge without exacting a concessionary quid pro quo from the accused.

[36] Of course, not every trial resolves the question of guilt of innocence to public satisfaction. The Sacco-Vanzetti and the Rosenberg cases continue to be relitigated in the forum of popular opinion. However, plea bargaining leaves the public with what I believe to be a more pronounced sense of unease about the justness of results, by avoiding the open ventilation of evidence that characterizes public trial. Just this concern appears to have motivated the government in the plea-bargained bribery case of Vice-President Agnew to take such extraordinary steps to assure the disclosure of the substance of the prosecution case. *See* N.Y. Times, Oct. 11, 1973, § 1, at 35-38.

The public's hostility to plea bargaining should suggest why some of my colleagues in the law-and-economics fraternity are mistaken in their complacent assimilation of plea bargaining to the model of the negotiated settlement of civil disputes. However great the operational similarity, there is a profound difference in purpose between civil and criminal sanctions. Henry Hart was surely correct that "[t]he core of the difference" between a confined mental patient and an imprisoned convict is "that the patient has not incurred the moral condemnation of his community, whereas the convict has." Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 406 (1958). The moral force of the criminal sanction depends for part of its efficacy on the sanction having been imposed after rational inquiry into the facts, culminating in an adjudication of guilt. To assert the equivalency of waiver and adjudication is to overlook the distinctive characteristic of the criminal law.

It is for the same reason that the sentence differentials required by plea bargaining are so repugnant to any tenable theory of sentencing. Nothing in the theory of deterrence, reformation, or retribution justifies the enormous differentials needed to sustain plea bargaining. Those differentials exist without a moral basis. On their extent, *see, e.g.*, H. ZEISEL, *supra* note 11; Alschuler, *supra* note 11, at 1082-87.

safeguards of voluntariness and factual basis that I have just discussed, but it has also repeated the main institutional blunder of the law of torture. Plea bargaining concentrates effective control of criminal procedure in the hands of a single officer. Our formal law of trial envisages a division of responsibility. We expect the prosecutor to make the charging decision, the judge and especially the jury to adjudicate, and the judge to set the sentence. Plea bargaining merges these accusatory, determinative, and sanctional phases of the procedure in the hands of the prosecutor. Students of the history of the law of torture are reminded that the great psychological fallacy of the European inquisitorial procedure of that time was that it concentrated in the investigating magistrate the powers of accusation, investigation, torture, and condemnation. The single inquisitor who wielded those powers needed to have what one recent historian has called "superhuman capabilities [in order to] . . . keep himself in his decisional function free from the predisposing influences of his own instigating and investigating activity."[37]

The dominant version of American plea bargaining makes similar demands: it requires the prosecutor to usurp the determinative and sentencing functions, hence to make himself judge in his own cause. I cannot emphasize too strongly how dangerous this concentration of prosecutorial power can be. The modern public prosecutor commands the vast resources of the state for gathering and generating accusing evidence. We allowed him this power in large part because the criminal trial interposed the safeguard of adjudication against the danger that he might bring those resources to bear against an innocent citizen—whether on account of honest error, arbitrariness, or worse.[38] But the plea bargaining system has largely dissolved that safeguard.

While on the subject of institutional factors, I have one last comparison to advance. The point has been made, most recently by the Attorney-General of Alaska,[39] that preparing and taking cases to trial is much harder work than plea bargaining—for police, prosecutors, judges, and defense counsel. In short, convenience—or

[37] 1 E. SCHMIDT, LEHRKOMMENTAR ZUR STRAFPROZESSORDNUNG UND ZUM GERICHTSVERFASSUNGSGESETZ 197 (2d ed. 1964).

[38] One need not necessarily accept Jimmy Hoffa's view that Robert Kennedy was conducting a personal and political vendetta against him in order to appreciate the danger that he might have been. The power to prosecute as we know it contains within itself the power to persecute. Hoffa contended "that special investigators from the Justice Dept. and hundreds of agents from the Federal Bureau of Investigation were used to satisfy 'a personal hate' of Robert Kennedy." BUS. WEEK, Feb. 13, 1965, at 48.

[39] Gross, *Plea Bargaining: The Alaska Experience*, 13 LAW & SOC'Y REV. (1979) (forthcoming).

worse, sloth—is a factor that sustains plea bargaining. We suppose that this factor had a little to do with torture as well. As someone in India remarked to Sir James Fitzjames Stephen in 1872 about the proclivity of the native policemen for torturing suspects, "It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence."[40] If we were to generalize about this point, we might say that concessionary criminal procedural systems like the plea bargaining system and the system of judicial torture may develop their own bureaucracies and constituencies. Here as elsewhere the old adage may apply that if necessity is the mother of invention, laziness is the father.

IV. The Jurisprudence of Concessionary Criminal Procedure

Having developed these parallels between torture and plea bargaining, I want to draw some conclusions about what I regard as the lessons of the exercise. The most important is this: a legal system will do almost anything, tolerate almost anything, before it will admit the need for reform in its system of proof and trial. The law of torture endured for half a millennium although its dangers and defects had been understood virtually from the outset; and plea bargaining lives on although its evils are quite familiar to us all. What makes such shoddy subterfuges so tenacious is that they shield their legal systems from having to face up to the fact of breakdown in the formal law of proof and trial.

Why is it so hard for a legal system to reform a decadent system of proof? I think that there are two main reasons. One is in a sense practical: nothing is quite so imbedded in a legal system as the procedures for proof and trial, because most of what a legal system does is to decide matters of proof—what we call fact-finding. (Was the traffic light green or red, was this accused the man who fired the shot or robbed the bank?) Blackstone emphasized this point in speaking of civil litigation, and it is even more true of criminal litigation. He said: "experience will abundantly shew, that above a hundred of our lawsuits arise from disputed facts, for one where the law is doubted of."[41] Every institution of the legal system is geared to the system of proof; forthright reconstruction would disturb, at one level or another, virtually every vested interest.

The inertia, the resistance to change that is associated with

[40] 1 J.F. Stephen, A History of the Criminal Law of England 442 n.1 (1883). Stephen's forceful quotation has been cited for this point elsewhere; McNabb v. United States, 318 U.S. 332, 344 n.8 (1943); J. Langbein, *supra* note 1, at 147 n.14; Alschuler, *supra* note 11, at 1103 n.137.

[41] 3 W. Blackstone, Commentaries on the Laws of England *330 (1768).

such deep-seated interests, is inevitably reinforced by the powerful ideological component that underlies a system of proof and trial. Adjudication, especially criminal adjudication, involves a profound intrusion into the lives of affected citizens. Consequently, in any society the adjudicative power must be rested on a theoretical basis that makes it palatable to the populace. Because the theory of proof purports to govern and explain the application of the adjudicative power, it plays a central role in legitimating the entire legal system. The medieval European law of proof assured people that the legal system would achieve certainty. The Anglo-American jury system invoked the inscrutable wisdom of the folk to justify its results.[42] Each of these theories was ultimately untenable—the European theory virtually from its inception, the Anglo-American theory after a centuries-long transformation of jury procedure. Yet the ideological importance of these theories prevented either legal system from recanting upon them. For example, I have elsewhere pointed out how in the nineteenth century the ideological attachment to the jury retarded experimentation with juryless trial—that is, what we now call bench trial—while the plea bargaining system of juryless nontrial procedure was taking shape out of public sight.[43] Like the medieval European lawyers before us, we have been unable to admit that our theory of proof has resulted in a level of procedural complexity and safeguard that renders our trial procedure unworkable in all but exceptional cases. We have responded to the breakdown of our formal system of proof by taking steps to perpetuate the ideology of the failed system, steps that closely resemble those taken by the architects of the law of torture. Like the medieval Europeans, we have preserved an unworkable trial procedure in form, we have devised a substitute nontrial procedure to subvert the formal procedure, and we have arranged to place defendants under fierce pressure to "choose" the substitute.

That this script could have been played out in a pair of legal cultures so remote from each other in time and place invites some suggestions about the adaptive processes of criminal procedural systems. First, there are intrinsic limits to the level of complexity and safeguard that even a civilized people can tolerate. If those limits are exceeded and the repressive capacity of the criminal justice system is thereby endangered, the system will respond by developing subterfuges that overcome the formal law. But subterfuges are intrinsically overbroad, precisely because they are not framed in a

[42] *See* T.F.T. PLUCKNETT, EDWARD I AND CRIMINAL LAW 74-75 (1960).

[43] Langbein, *supra* note 12.

careful, explicit, and principled manner directed to achieving a proper balance between repression and safeguard. The upshot is that the criminal justice system is saddled with a lower level of safeguard than it could and would have achieved if it had not pretended to retain the unworkable formal system.

The medieval Europeans insisted on two eyewitnesses and wound up with a law of torture that allowed condemnation with no witnesses at all. American plea bargaining, in like fashion, sacrifices just those values that the unworkable system of adversary jury trial is meant to serve: lay participation in criminal adjudication, the presumption of innocence, the prosecutorial burden of proof beyond reasonable doubt, the right to confront and cross-examine accusers, the privilege against self-incrimination. Especially in its handling of the privilege against self-incrimination does American criminal procedure reach the outer bounds of incoherence. In cases like *Griffin v. California*[44] we have exaggerated the privilege to senseless lengths in formal doctrine, while in the plea bargaining system—which is our routine procedure for processing cases of serious crime—we have eliminated practically every trace of the privilege.

Furthermore, the sacrifice of our fundamental values through plea bargaining is needless. In its sad plea bargaining opinions of the 1970s, the Supreme Court has effectively admitted that for reasons of expediency American criminal justice cannot honor its promise of routine adversary criminal trial,[45] but the Court has simply assumed that the present nontrial plea bargaining procedure is the inevitable alternative. There is, however, a middle path between the impossible system of routine adversary jury trial and the disgraceful nontrial system of plea bargaining. That path is a streamlined nonadversarial trial procedure.

The contemporary nonadversarial criminal justice systems of countries like West Germany have long demonstrated that advanced industrial societies can institute efficient criminal procedures that nevertheless provide for lay participation and for full adjudication in every case of serious crime. I have described the German system in detail elsewhere,[46] and I have made no secret of my admiration for the brilliant balance that it strikes between safeguard and procedural effectiveness. Not the least of its achieve-

[44] 380 U.S. 609 (1965).

[45] In Santobello v. New York, 404 U.S. 257 (1971), Chief Justice Burger explained that plea bargaining "is to be encouraged" because "[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." *Id.* at 260.

[46] *See generally* J. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY (1977).

ments is that in cases of serious crime it functions with no plea bargaining whatsoever.[47] Confessions are still tendered in many cases (41 percent in one sample[48]), but they are not and cannot be bargained for; nor does a confession excuse the trial court from hearing sufficient evidence for conviction on what amounts to a beyond-reasonable-doubt standard of proof.[49] In a trial procedure shorn of all the excesses of adversary procedure and the law of evidence, the time difference between trial without confession and trial with confession is not all that great.[50] Because an accused will be put to trial whether he confesses or not, he cannot inflict significant costs upon the prosecution by contesting an overwhelming case. Confessions are tendered at trial not because they are rewarded, but because there is no advantage to be wrung from the procedural system by withholding them.

I hope that over the coming decades we who still live under criminal justice systems that engage in condemnation without adjudication will face up to the failure of adversary criminal procedure. I believe that we will find in modern Continental criminal procedure an irresistible model for reform. That, however, is a theme about which I can say no more if I am to remain within the proper sphere of the Crosskey Lecture in Legal History.

Thus, I am brought to conclude with a paradox. Today in lands where the law of torture once governed, peoples who live in contentment with their criminal justice systems look out across the sea in disbelief[51] to the spectacle of plea bargaining in America, while American tourists come by the thousands each year to gawk in disbelief at the decaying torture chambers of medieval castles.

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[47] For recent discussion see Langbein & Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549, 1561-65 (1978). For the observation that modern Continental nonadversarial procedure confers more safeguards upon the accused than does American plea bargaining, see Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 552 (1973).

[48] Casper & Zeisel, *supra* note 26, at 146-47, 150-51.

[49] *See* J. LANGBEIN, *supra* note 46, at 66-67, 73-74.

[50] *See id.* at 77; Casper & Zeisel, *supra* note 26, at 150.

[51] *See* Langbein, *supra* note 20, at 457 n.44 (1974):

> Plea bargaining is all but incomprehensible to the Germans, whose ordinary dispositive procedure is workable without such evasions. In the German press the judicial procedure surrounding the resignation of Vice President Agnew was viewed with the sort of wonder normally inspired by reports of the customs of primitive tribes. "The resignation occurred as part of a 'cow-trade,' as it can only in the United States be imagined." Badische Zeitung, Oct. 12, 1973, at 3, col. 2.