PLEA CONTRACTS IN WEST GERMANY

WILLIAM L. F. FELSTINER

Many routine criminal cases in central Europe are concluded by an abbreviated process known as the penal order. The penal order is a written proposal by the state to a defendant stipulating the crime committed and the penalty to be levied if the defendant does not object. This paper describes the West German version of the penal order and argues that it avoids some of the negative practices allegedly inherent in American plea bargaining.

Criminal justice systems in industrialized societies do not give the same consideration to all cases. Prosecutions may involve major transgressions of social order and may threaten serious consequences to the accused. They require a deliberate procedure that forces the state to demonstrate its allegations publicly pursuant to a set of rules whose rationale is protection against error, or at least that the accused be offered such a procedure. Where the alleged illegal behavior is less threatening, and the consequences of conviction less serious, neither the state nor the accused may wish to spend the time and resources required by the deliberate procedure or have any interest in exposing to public scrutiny the procedure they do employ. A process designed to ensure a fair trial in a homicide case may be slower and more rigorous than prosecutor, accused, or public consider warranted in a shoplifting case. Thus, the bulk of routine cases in industrialized societies is processed by some abbreviated treatment: prosecutorial fines in Scandinavia (Felstiner and Drew, 1978:8-10), guilty pleas in Anglo-American jurisdictions, and penal orders in several central European countries. This paper describes the West German version of the penal order. It explores the degree to which its use has avoided some of the negative practices allegedly inherent in plea bargaining in the United States namely, overcharging defendants, penalizing defendants who insist on going to trial, and manipulating jail time to persuade defendants to plead guilty. In conclusion, the paper distinguishes the

---

This research was conducted under grants 75-NI-99-0069 and 78-NI-AX-0049 from the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice. I very much appreciate the cooperation and counsel of Gunther Arzt, Erhard Blankenburg, Johannes Feest, Joachim Herrmann, Hans Kerner, and Karl Schumann in Germany, and Richard Abel, George Fletcher, John Langbein, and Jan Stepan in the U.S. The conclusions in the paper are mine alone.

https://doi.org/10.2307/3053256 Published online by Cambridge University Press

penal order from its American analogues and suggests a rationale for experimenting with penal orders in the United States.[1]

A West German penal order is a court order prepared by a prosecutor and signed by a judge. It describes the wrongful behavior of the defendant and the evidence gathered by the state and indicates the applicable provisions of the criminal code. It then specifies the punishment to be imposed upon the defendant. If the defendant does not object in writing or in person within one week, the order becomes effective and has the same status as a conviction after trial. If the defendant objects to the order, it is nullified and the case will go to trial. The prosecutor may not make a second attempt to dispose of a case by penal order. Since 1975, the penal order may not provide for imprisonment. The most common penalties are fines and suspensions of drivers' licenses.

Penal orders may be used only for crimes called *Vergehen*, the American equivalent of which is misdemeanors involving criminal intent or criminal negligence and felonies concerned with protecting property. *Vergehen* do not encompass petty traffic offenses or violations of business and health regulations (see Herrmann, 1974:481-84). Nevertheless, a wide range of crimes from shoplifting and speeding to car theft, embezzlement, and grand larceny may be the subject of penal orders.

The penal order was designed to handle the routine, unproblematic case. It is a cursory procedure, and is not to be used if either the person or the behavior involved appears to require individualized treatment. The penal order is therefore inappropriate if the file shows any doubt about the guilt of the defendant, or a record of repeated violations, or behavior growing out of a disturbed interpersonal relationship.

Penal orders are numerically important in criminal case dispositions in West Germany. In the 1960s more cases were disposed of by penal order than by trial (Stepan, 1973:198). Jescheck (1970:516) estimated that penal orders were used to process 70 percent of *all criminal matters* in which charges were filed. The importance of the penal order was unaffected by 1975 reforms which provided that such orders could no longer impose short prison sentences (Löwe-Rosenberg, 1978). But the

[1] This paper is based on interviews conducted by the author during field trips to West Germany in 1976 and 1978. Altogether, five weeks were spent interviewing respondents in five German cities—Bremen and Hamburg in the north, Erlangen and Augsburg in the south, and Berlin. Twenty-four prosecutors, judges, defense lawyers, sociologists of law, and law teachers were interviewed. Each interview lasted from one to three hours.

https://doi.org/10.2307/3053256 Published online by Cambridge University Press

number of penal orders was reduced by the 1969 decriminalization of many motor vehicle and administrative law violations. In 1976, after these revisions, the proportions of penal orders and trials in the lower criminal courts was roughly equal.[2]

The relative frequency with which penal orders are used in seven common crimes is indicated in the following table derived from a study of prosecutor-police relations in nontraffic cases by Blankenburg, Sessar, and Steffen (1978).

TABLE 1

RELATIVE FREQUENCY WITH WHICH PENAL ORDERS WERE USED IN SEVEN COMMON CRIMES THROUGHOUT WEST GERMANY IN 1970

Crime	Percentage of cases disposed of by penal order
Simple theft	68
Sanitation law	65
Tax fraud	62
Embezzlement	41
Fraud	35
Serious theft	21
Auto theft	19

Although penal orders are used for many different crimes, Hans Kerner belives that in 1976 over half the orders concerned shoplifting, other minor theft (less than $100), or motor vehicle violations.

Investigations of *Vergehen* are usually opened and conducted by the police without prosecutorial supervision. The police will have decided on the charge—i.e., what it is they are investigating. They will write to the suspect asking him to come to the police office and give a statement. Most suspects do come, although their attendance cannot be compelled. The suspect will be told what he is alleged to have done and the legal consequences of such behavior.

When the investigation is as complete as the police believe appropriate, the file goes to the prosecutor. It contains the witnesses' statements, any experts' statements, the suspect's statement, and a case summary. It may include a record of prior convictions, but it is assumed that prosecutors routinely check a defendant's "legal history" after receipt of the police report. One should not be misled by the myth of the continental dossier. For these routine cases, the file amounts to no

[2] 431,000 penal orders and 423,000 indictments. Löwe-Rosenberg (1978) states that 56 percent of *Vergehen* prosecuted in Hesse in 1974 were handled by penal order (see also Goldstein and Marcus, 1977:267).

https://doi.org/10.2307/3053256 Published online by Cambridge University Press

more than two or three pages; it resembles an American police report and rap sheet, not a presentence report.

The prosecutor must then decide whether to ask the police to investigate further, dismiss the case because the evidence is insufficient, issue a penal order, or go to trial. The decisions to issue a penal order or go to trial require a similar—and minimal—amount of effort: the prosecutor mechanically crosses out sections and fills in blanks, completing the form in a matter of minutes. In most cases, moreover, the punishment to be set by the penal order is standardized within a prosecutorial district: so much alcohol in the blood leads to suspension of a driver's license for a given period; theft of an article of a certain value will lead to a day fine of so many days.

Since penal orders generally impose fines, it is necessary to understand the day fine system that was adapted by the West Germans from Swedish practice. To equalize the deterrent effect of fines across income groups, fines are fixed in units of days rather than by amount. The daily rate varies with income, from as little as DM2 to as much as DM10,000 per day ($1 and $5,000, in August 1978). In routine penal order cases, no explicit investigation of income is actually made. The defendant may have stated his income when he was questioned by the police, or the prosecutor may simply estimate it from the defendant's occupation, residential area, the property involved in the case, and, in small communities, from local knowledge. It appears that income estimates are likely to be more accurate for wage earners than for businessmen, professionals, or those who live on unearned income. Although a defendant will not know what income the prosecutor has attributed to him, he can compare his fine with that of others whose income he knows; if he concludes that the fine is excessive, his only recourse is to reject the penal order and go to trial. Although no formal restrictions exist, the proceedings at such a trial may in fact be limited to establishing the defendant's income.

If the prosecutor has decided to use a penal order, he sends the file to the judge. Although the prosecutor's review may be perfunctory, the penal order is a prosecutorial instrument, and judicial review tends to be even more cursory. A judge in Hamburg told me that he could review 70 *routine* cases in fifteen minutes (shoplifting, for instance, or riding a subway without a ticket), an average of one case every 13 seconds; more attention is obviously paid to unusual cases.[3] A judge

[3] A study conducted at the Max-Planck-Institut in Freiburg im Breisgau indicates that "suspects' social features (age, sex, social class) are of relatively

https://doi.org/10.2307/3053256 Published online by Cambridge University Press

will only deny a penal order if he finds something out of the ordinary—a psychologically disturbed defendant, a problem too complicated to be captured on paper, a difficult family situation, an offense with a history, or a defendant who appears to contest the facts. In 1976, the judicial denial rate was less than 1 percent. Judges may discuss the content of penal orders with prosecutors, but neither can force the other to issue a specific order. If the judge signs the penal order, it is mailed to the defendant. If the defendant rejects it, the case is set for trial a few weeks later. The trial prosecutor is unlikely to be the one who prepared the penal order. Frequently he will be an *Amtsanwalt* rather than a *Staatsanwalt*—that is, a paraprofessional bureaucrat with a law degree from a *Fachhochschule* (training school for civil servants), while the prosecutor who issued the penal order is generally a university-trained lawyer. However, the judge who signed the penal order is likely to be the trial judge.

American readers may suspect that in marginal cases any continuing relationship between prosecutors may lead them to favor penal orders rather than trials. In some courts, prosecutors alternate between making intake decisions and trying cases. A prosecutor who is doing the initial processing might therefore be expected to send as few cases as possible to trial to ensure similar consideration when the roles are reversed. But no one I asked about such exchanges acknowledged their existence, reaffirming Langbein and Weinreb's warning that in studying others' practices one should not be "guided by an *a priori* assumption that after all they cannot be very different [from our own]" (1978:1569).

The trial of cases in which penal orders have been rejected is not the long, meticulous affair celebrated in Sybille Bedford's case of Dr. Brach (1961:101-151). A judge I interviewed in Hamburg tried 224 *Vergehen* in 1977. These cases involve much less technical squabbling than an equivalent American trial, and are more like an American administrative proceeding than a court hearing. A West German trial is run by the judge, not by the prosecutor and defense counsel. What is more important, however, is that neither judge nor prosecutor prepares for the trial of *Vergehen*—they do not go over the case in advance with the police nor do they interview the witnesses. The point is that they have not, prior to trial, been put to any extra work by the defendant's rejection of the penal order.

little importance as far as the control functions of the police (and also of the judicial) authorities are concerned" (Steffen, 1976:5).

https://doi.org/10.2307/3053256 Published online by Cambridge University Press

But the trial, of course, takes time—the judge's, the prosecutor's, and probably that of the police. Ninety percent of those defendants who reject penal orders are eventually found guilty. The first important policy question, then, is whether or not defendants in West Germany are penalized for insisting upon a trial.[4]

In the United States, defendants who plead guilty are, in the aggregate, sentenced less severely than those who insist on trial (Whitman, 1967:1085). Favored treatment is said to be granted defendants who plead because they have saved the state the expense of a trial, because their plea is accepted as an act of repentance and a step toward rehabilitation, because the abbreviated version of the case history may be less offensive than the story that unfolds at a full trial, and because the judge may believe that the defendant who has pled not guilty has committed perjury in his defense (*Yale Law Journal*, 1956:209-21). At the time of trial, an American prosecutor may be reluctant to accept a plea that was offered to a defendant and rejected because he will already have lost one of the benefits to be gained from the earlier plea—the opportunity to avoid preparing for trial.

West German defendants are, I believe, not penalized for rejecting a penal order and insisting upon a trial.[5] That is what I was told by judges, prosecutors, and academics. It seems believable because the factors that motivate American officials do not exist, or occur only weakly, in Germany. First, the penal order is an open offer. The defendant can accept it at any time before trial simply by withdrawing his objection or paying the fine: even a failure to show up for the trial is treated as an acceptance. Once the trial has begun, the defendant—with the prosecutor's approval—can accept the penal order until final judgment is delivered. That approval is generally given. (A veteran prosecutor in Bremen told me that it is always given.)

[4] In the following discussion, defense counsel are omitted from the cast of actors because they are not involved in most penal order cases: legal insurance covers only "negligent" crimes and the stakes in a penal order case are generally less than the fee a lawyer would charge to contest the case or to arrange for a penal order. When lawyers are involved, their role is discussed.

[5] The discussion of this point in the literature is long on assertion and short on either data or analysis. Langbein and Weinreb (1978:1165) deny the existence of a penalty, citing an earlier statement of Langbein's (1974:456). Goldstein and Marcus (1978:1574-75) imply that defendants who reject penal orders may receive more severe sentences on that account alone, citing Bruns (1974). Bruns acknowledges that such a practice would be "unlawful," but relies on a comment made in 1952 to suggest that it occurs (1974:607). The point of view taken in this article rests on the interviews I conducted and what appears to me to be the logic of the situation.

https://doi.org/10.2307/3053256 Published online by Cambridge University Press

The defendant's original rejection has not caused any prosecutor any extra work up to the time of trial. The trial prosecutor is assigned to trials for that day no matter what happens. The defendant's late change of heart therefore does not require the prosecutor to do anything he would not have done otherwise nor to be anywhere he would not otherwise have been.

German legal ideology, moreover, is opposed to penalizing people for their own tactical mistakes. For instance a German defendant who appeals from a trial court decision and secures a new trial cannot end up with a sentence more severe than that originally imposed. German legal principles, then, suggest to prosecutors that it would be unfair to penalize a defendant for not accepting a penal order at an earlier stage. This attitude is so strong that one prosecutor, after eight years in the role, told me *wrongly* that even the judge could not sentence a defendant more harshly than the sentence offered in a rejected penal order.

In practice, when a trial appears to be going less well than a defendant had expected, he offers to accept the penal order and the prosecutor lets him do so. Nobody worries about "instantaneous repentance," because Germans neither see nor rationalize repentance as a basis for a penal order. Their realism is refreshing. A German defendant considers himself an adversary of the state. He is expected to do whatever he can to better his position. He is not subject to jeopardy for perjury. He is not assumed to regret his behavior. Since German defendants who do not accept a penal order initially are not treated more harshly than those who do, German authorities do not have to endorse transparent rationalizations to justify preferential treatment for defendants who do not insist upon trials.

If defendants are unlikely to be sentenced more harshly after a trial, why do approximately 75 percent (charged with any crime in any court) accept the penal order? No direct research on this question has been conducted in Germany, but the people I interviewed suggested that:

(a) Defendants seek to avoid publicity. A penal order is private. Trials are open to the public and may be reported in the press.

(b) The self-image of the accused is involved. A proper German citizen is not a defendant in a criminal proceeding. The recipient of a penal order can avoid becoming a defendant in court by accepting the penal order.

https://doi.org/10.2307/3053256 Published online by Cambridge University Press

(c) The language of the penal order may sound imperative. The German word is *Strafbefehl* which literally means punishment *order*. Two informants suggested that *Strafbefehl* might sometimes be understood as an order rather than an offer. Hans Ziesel and John Langbein are skeptical. To the extent, however, that it *is* understood as an order, it may be coercive to a people who have a high respect for order.

(d) Acceptance of the penal order avoids the bother of a trial, the burden of court costs and, on occasion, a lawyer's fee.

(e) Some defendants are said to be intimidated by court proceedings and to accept a penal order to avoid the unfamiliar and troubling experience of a trial.

A second troublesome derivative of plea bargaining in America is the level of charges brought against defendants. Overcharging is used to coerce guilty pleas and undercharging to reward them. Both are objectionable. In West Germany these practices, especially overcharging, are less closely tied to the structure of the penal order system and occur less frequently.

The first difference is in the timing of charging decisions. In the United States, the decision to charge is frequently made before the investigation is complete (Alschuler, 1968:86). As a consequence, a charge that later proves to be too severe may originally have been appropriate, and can be used coercively without implying bad faith from the start. In Germany, on the other hand, the prosecutor does not bring an indictment or initiate a penal order until the investigation is complete. Accidental overcharging that can then be put to tactical use is unlikely to occur.

In general, the later the charging decision is made, the less need there will be for bargaining or compromise. This view is derived from the proposition that the more complete an investigation at the time of the charging decision, the stronger will be the prosecutor's case because a higher proportion of mistaken and weak cases will have been weeded out. Even a prosecutor who wants to get something from every defendant (see Alschuler, 1968:60) will thus have less need to bargain to achieve that goal. And the training, role, and rewards of German prosecutors do not require them to get something from every defendant. Langbein and Weinreb (1978:1562), for instance, argue that German prosecutors are as interested in dismissing bad cases as they are in prosecuting good ones. But even more important

https://doi.org/10.2307/3053256 Published online by Cambridge University Press

to the question of overcharging than the predisposition of prosecutors is the fact that the penal order, unlike the guilty plea, is restricted to *Vergehen*. As a consequence, a substantial overcharge—that is of a *Verbrechen*—would preclude rather than facilitate the use of a penal order.

If overcharging is a limited threat to the integrity of the penal order system, does the limitation to *Vergehen* tempt prosecutors confronted with high caseloads to downgrade offenses illegitimately from *Verbrechen* to *Vergehen*? Goldstein and Marcus (1977:272) allege that "to an American, it seems inevitable that prosecutors would often characterize major offenses as *Vergehen* in order to accomplish a variety of objectives." Insofar as one of these objectives is to make the abbreviated penal order treatment available, they are almost surely wrong. It is not just that a series of American observers (Langbein, myself, even Goldstein and Marcus), alert to the inclination of public officials to provide normative answers to provocative questions, have not found any prosecutors who would even admit having heard of such a practice. More important is an understanding of the gulf that generally separates *Verbrechen* from the kinds of *Vergehen* in which penal orders are employed. In a sense, there are three kinds of criminal offenses in Germany: serious crimes (*Verbrechen*) that are comparable to the more serious American felonies; petty crimes and some serious crimes against property committed by offenders without significant records who do not appear to require major social intervention (*Vergehen* eligible for penal orders); and *Vergehen* that involve defendants with several prior convictions, or whose guilt is problematic, or who are engaged in some sort of behavior in connection with the alleged crime that distinguishes their case from the routine. In other words, to transform a *Verbrechen* into a proper penal order case, a prosecutor would not only have to recharacterize the defendant's behavior as a minor rather than a serious crime, but would have to make the case appear to be a run-of-the-mill instance of that kind of charge.

There are, of course, circumstances in which such a recharacterization may be a matter of a minor evidentiary shift. Joachim Herrmann pointed out to me that in Germany if a person grabbed a woman's purse, the charge would be a *Verbrechen* (robbery) if force had been applied against her person, but a *Vergehen* (simple theft) if the force had been applied against her purse. Nevertheless, a transformation is unlikely, even where it turns on such a slight adjustment in evidence, because the file containing the evidence (of force against the

https://doi.org/10.2307/3053256 Published online by Cambridge University Press

person) is prepared by the police and will be transmitted in its entirety from the prosecutor to the judge. To reduce the charge, the prosecutor would be required to secure evidence independently of the police investigation, a procedure that is possible but highly unusual (see Steffen, 1976:5-6), or he would have to charge an offense not justified by the evidence in the file and risk the embarrassment of having his charge corrected by the judge.

But if penal orders are not the *result* of overcharges, they may *be* overcharges. An explanation of this reversal requires a detour into the recent history of German criminal procedure. The 1975 revision of the Code of Criminal Procedure added Section 153(a), a controversial grant of power to prosecutors to dismiss misdemeanor charges against defendants in cases of slight guilt, where the crime has little public significance and the defendant is willing to make restitution and a stipulated contribution to a charity or the state.

A Section 153(a) dismissal is more favorable to a defendant than a penal order. It is not a criminal conviction, it is not centrally recorded, and it does not jeopardize public employment. Because Section 153(a) results in a *dismissal*, it is much easier for the defendant to rationalize that he was innocent and paid to avoid the inconvenience of a prosecution, even though prosecutors are not to use Section 153(a) unless they are satisfied of the defendant's complicity.

Many German scholars feared that Section 153(a) would become a middle class avenue of escape—defendants with substantial resources would bargain for Section 153(a) dismissals with offers of significant contributions to charities favored by prosecutors and judges. An empirical investigation recently completed by Decker (n.d.) in Munich and Augsburg suggests that these concerns are needless and that the provision has, in fact, been domesticated to German bureaucratic practices. In those cities, Section 153(a) is used for *all* cases of first-time shoplifting, riding buses without tickets, practicing driving without a license, and driving a motorcycle without insurance. Decker's study does indicate, however, that Munich prosecutors use penal orders to secure agreements by defendants to Section 153(a) payments, especially in hit-and-run accidents that do not involve personal injury. In these cases, prosecutors first issue a penal order. Most defendants in these cases have lawyers provided by law defense insurance. The lawyers know that their clients will be offered a Section 153(a) dismissal if they reject the penal order, and the prosecutors know that the

https://doi.org/10.2307/3053256 Published online by Cambridge University Press

defendants will make the payment when relieved from the threat of the more disadvantageous penal order. The necessary link in this coercive chain is the defense lawyers' knowledge. Defendants in shoplifting cases, which account for 80 to 90 percent of Section 153(a) cases in Munich, are generally unrepresented; in those cases prosecutors do not bargain for a Section 153(a) payment by beginning with a penal order.

The treatment of weak cases may place prosecutor and defendant in a predicament similar to that posed by exaggerated charges. In the United States, there is some warrant for the proposition that the weaker the case, the less likely that a trial will result (see Alschuler, 1968:58). Because the prosecutor wants to secure the conviction of a high proportion of defendants, the weak case will lead to a generous offer; because no defendant can be certain of the outcome of a trial, any defendant is tempted to accept the prosecutor's "generous" treatment. The influence of a weak case on the use of a penal order is unclear, and may be mixed. The general belief is that the behavior of German prosecutors is opposite to that of their American counterparts—the stronger the case, the more likely the use of the penal order. In the first place, this is the answer required by German legal ideology. The penal order is to be used when the defendant either admits his guilt or it is clear—for instance, because his behavior was observed by the police. The single most common factor disqualifying a case for penal order treatment—a defendant who denies complicity—is almost always present in a weak case. From a practical standpoint, moreover, a penal order is pointless in the case of an adamant defendant: denying guilt, he will reject the penal order.

The prosecutors and judges I interviewed said they used the penal order only in strong cases, and the defense lawyers I talked with agreed. A penal order, they claimed, might be used to save investigatory resources when the prosecutor knew he could prove his case if required to do so, but it would not be used to impose a penalty where conviction at trial was problematic. Restraint in using a penal order in a weak case is reinforced by the lawyers' fee structure. Defendants charged with *Vergehen* pay the lawyer's fee if they lose, but the state pays the lawyer if they win. Because a penal order is a loss, it may be rejected in a weak case since a successful defense will shift the lawyer's fee to the state.

On the other hand, there is some evidence that German legal actors do not always follow German legal ideology. The proportion of penal orders rejected has been climbing for more

https://doi.org/10.2307/3053256 Published online by Cambridge University Press

than ten years. So has the proportion of defendants charged with *Vergehen* who employ lawyers. Several people I interviewed attributed the increase in the rejection rate to the increased use of lawyers. The notion is that lawyers can spot weak cases more readily than can lay defendants, and as the presence of lawyers increases, more weak cases are identified and more penal orders are rejected. This rationale suggests that the questionable cases have been included in the penal order set all along, to save the trouble of a trial or of completing an investigation.

This argument would be more persuasive were there not alternative explanations for the correlation between the rejection rate and the use of lawyers. Lawyers receive higher fees for rejecting penal orders and going to trial. In addition, a higher proportion of penal order cases may be complex as a result of the transfer of most traffic cases to the administrative system in 1969. Complex cases both require lawyers and provide grounds for rejecting penal orders.

Karl Schumann's aggregate data (1977:207) also appear inconsistent with the legal ideology: cities with a high ratio of penal orders to trials have higher rates of penal order rejections. The increase in the rejection rate suggests that cities in which penal orders represent a higher proportion of criminal cases are including the cases of defendants less willing to accept the order, and one reason may be the strength of the prosecutor's case. The evidence of deviation from the ideology is sketchy, however, and may point to only occasional lapses rather than the entrenched pattern in weak cases that is criticized in American practice.

Another way of comparing the degree of coercion under guilty plea and penal order systems is to analyze the role of jail sentences. Avoiding jail or minimizing jail time is the defendant's primary objective in American plea bargaining. A German penal order is a guarantee against incarceration. Are innocent defendants coerced by the threat of jail—however remote—into accepting a penal order? The answer appears to be that they are not, and they are not because of the German attitude toward short jail sentences.

German legal commentary and German law are antagonistic to short sentences in the belief that they neither rehabilitate nor deter; that they rather infect with criminality those who serve them. Since 1969 the Penal Code has prohibited prison sentences of less than six months except in highly unusual cases. Incarceration for a *Vergehen* for more than six months is

https://doi.org/10.2307/3053256 Published online by Cambridge University Press

generally limited to repeat offenders. As a consequence, a penal order is almost out of the question for the kinds of defendants threatened with jail, and a jail sentence is equally improbable in the routine cases in which penal orders are used. There is such a gulf between the two kinds of treatments that the defendant offered a penal order almost certainly knows that jail is not a possibility. Every person I interviewed in West Germany agreed on this point.

In this discussion of penal orders and charging practices, penalization, and jail sentences, I have skirted around the issue of bargaining in the administration of the penal order system. It is a hard subject to approach through interviews, particularly for a foreigner. Because bargaining is not supposed to take place in West German criminal practice, it is difficult to know how much answers are shaded and how much self-deception occurs. With those reservations, I offer the following observations:

1. Whatever negotiation does take place is more apt to be initiated by defense lawyers than by defendants. Any acknowledgement that it may occur seems to crop up in the kinds of cases where lawyers are regularly involved: tax cases in which penal orders may be substantial, loss of license in motor vehicle cases where insurance provides a lawyer, and cases related to businesses that have employed lawyers for other purposes. That negotiations may be lawyer-specific is a testament to the force of the ideology, to the need to bargain without appearing to do so, which naturally requires an insider's grasp of ritual.

2. Bargaining about criminal justice is distasteful to West Germans. When Section 153(a) was adopted, fears were widespread that the country had opted for an offensive American practice. Middle class defendants would get off the hook in exchange for substantial charitable contributions (Herrmann, 1974:493). There is no evidence that this has taken place. Decker's study (n.d.) indicates that Section 153(a) has been routinized and is administered bureaucratically. The bureaucratic response to a system that left the door wide open to bargaining reflects continuity with a past composed, for the most part, of a mass procedure administered without much intervention by the defendant or his agents.

3. In the United States we tend to negotiate ambiguous and difficult cases. The Germans try these cases. They want to try them because they are difficult; we want to negotiate them because they are difficult to try.

4. There is not much to be gained by bargaining. If jail is

https://doi.org/10.2307/3053256 Published online by Cambridge University Press

a possibility, then a penal order is out of the question. The defendant's view of a "fair" fine can be transmitted to the prosecutor, but the amount of fines is rarely open to wide prosecutorial discretion. The prosecutor may occasionally reduce the fine slightly to induce acceptance of the penal order and save some investigatory effort. But these cases are rare and the stakes are small. Traffic cases, in which loss of license is a possibility, may be a situation where bargaining could achieve important gains. But both the prosecutors and defense lawyers I interviewed stated that in drunken driving cases, at least, the penalty followed automatically from the level of alcohol detected in the defendant's blood.

5. Styles of negotiation are a construct of culture. American lawyers offer and counteroffer. German lawyers hint, suggest, and consider. There are no outright offers and the number of rounds is very limited. How close the different styles are in function is problematic. Given similar stakes, I would predict that similar tasks would be accomplished, but the stakes in Germany are much lower.

6. To Germans who understand the American terminology, bargaining implies both reciprocal concessions from prosecutor and defendant and the probability of a series of offers and counter offers. Initial positions tends to be exaggerated in anticipation of further negotiations. Such behavior does not occur in either the straightforward handling of penal orders or in dickering over a penal order. It is for this reason that I have coined the term "plea contracts" for the title of this paper. The prosecutor (and judge) make an offer (see Jeschek, 1970:514). If the defendant accepts it, both sides are spared a trial. The defendant may be making a concession: he does not require the state to prove his guilt in court. Although it would be possible to say that the state also has made a concession—it does not insist that the defendant be tried in open court and it tells the defendant in advance what the penalty will be—state officials do not regard these events as benefits granted to a cooperative defendant but rather as the process to which qualifying defendants are entitled under routine practice. When a defense lawyer suggests that his client would probably accept a penal order that stipulated a fine at a certain level, he is not making an opening offer in a predictable series, nor is he threatening any dilatory or obstructionist tactics if a different order is made. He is merely signaling what his client believes would be a tolerable outcome of the proceedings.

Because of these differences between penal order and plea

https://doi.org/10.2307/3053256 Published online by Cambridge University Press

bargaining practice, the American traffic ticket has been called the "real parallel" to the penal order (Langbein, 1974:457, see also Stepan, 1973:198). But the traffic ticket does not seem to be a close fit either. In the first place, penal orders are used for offenses that are much more serious and complicated than traffic violations, including a considerable amount of predatory commercial practice. A ticket for embezzlement or tax fraud might be as shocking to American consciences as negotiations in a homicide case are to German sensibilities. For this reason it was suggested at the conference that bail forfeitures, which some American states permit for a few petty crimes in lieu of trial or plea, are a closer analogue to the penal order. But penal orders are more deliberate and more judicious than both traffic tickets and bail forfeitures. A penal order is preceded by a police investigation in which the accused is invited to provide his version of the incident to someone other than the officer who apprehended him. That version is recorded and transmitted to both prosecutor and judge. Unlike American ticketing or bail forfeitures, the penal order process provides for review of the police file, if quickly, by two officials who do not see themselves as adversaries of the defendant.

There is, of course, no reason why the penal order should have a "real" American parallel. It is a creature of a different legal ideology, history, and practice. Yet it ought not to be ignored on that account, especially in light of Feeley's (1979) recent analysis of a lower criminal court in New Haven, Connecticut. Two themes in Feeley's book argue for consideration of the penal order in this country. One is that the punishment for those accused of minor crimes is more the pretrial process—the difficulties encountered in dealing with police, bail, prosecutors, and pretrial court appearances—than the sentence levied by the judge. The other is that defendants are routinely persuaded by their lawyers or by prosecutors that the disposition offered by the prosecution is a specially negotiated discount, even though the offer actually reflects only the concessions ordinarily made in such cases. Punishment by process afflicts the innocent as well as the guilty. Its severity, moreover, is related less to the crime, the criminal, or the context than to the needs of the court as reflected in its patterns of personal interrelations. False bargains are a form of coercion that deprives defendants of the chance to make informed choices about their pleas.

Feeley makes a strong argument that these objectionable practices spring from attempts to provide due process and a

https://doi.org/10.2307/3053256 Published online by Cambridge University Press

fair result, as well as from ambition, greed, and laziness. It would be foolish to suggest that a little bit of German procedure can set straight such a complicated social apparatus.[6] Any reform imposes costs and reform of lower court criminal procedure will inevitably be subject to the same pressures that created the existing dilemmas. Nevertheless, I will briefly suggest the consequences of trying to reduce both the defendant's pretrial costs and the incidence of false bargains by introducing penal orders in a court like that in New Haven. At first glance, the prescription appears to be well suited to the illness. Although bail costs would be unaffected, court appearances would be eliminated and lawyers' fees cut drastically. If a penal order constituted an outstanding offer as in Germany, the decision to accept it or go to trial would not be influenced by irrelevant "theoretical exposure"—the maximum penalty for all charges levied against the defendant.

Yet the use of penal orders would pose problems in courts of the New Haven type. The practice would be inconsistent with rehabilitative alternatives unless these outcomes could be incorporated in the orders. Penal orders reflect a view of facts as fixed through investigation rather than constructed through argumentation, and thus they tend to rely more heavily on a written record than is congenial to American practice. Unless data were collected about the defendant different from those compiled in Germany, penal orders would not provide the prosecutor with the character information that New Haven judges demand in fixing sentences. More significantly, the penal order would eliminate the influence of defense counsel in establishing the "worth of the case." To the extent that American prosecutors are more partisan than their German counterparts, the influence of defense counsel is an essential counterweight. Yet if counsel were reinvolved in negotiations over the content of penal orders, these negotiations would reintroduce some of the costs, and perhaps some of the false data, that the penal order was intended to eliminate.

Nevertheless, lower American criminal courts are hardly a

---

[6] In addition, differences between German and American substantive criminal law may affect the operation of the penal order in an American context. For instance, German law is more explicit about the consequences of excuses than American criminal law. Faced with a case involving an excuse, German authorities may have less leeway than an American prosecutor and defense counsel and, therefore, less need to negotiate the effect of the excuse. It is possible, then, that substitution of a penal order for plea negotiation may make it more difficult to adjust sentences to particular circumstances. Experimentation with the penal order in an American jurisdiction should therefore be preceded by a comparative study that would enable reform efforts to take substantive law differences into account.

https://doi.org/10.2307/3053256 Published online by Cambridge University Press

triumph of social engineering: they are messy and could profit from fresh ideas. Where these courts use orthodox plea bargaining, an experiment with the penal order system may serve to avoid trials without the coercion involved in overcharging and sentence penalties. Where these courts do not engage in open bargaining over pleas, but rather punish by process and by providing the defendant with false information, it may be equally appropriate to experiment with penal orders as a way to shortcut the punishing process and eliminate the need for deception.

REFERENCES

ALSCHULER, Albert W. (1968) "The Prosecutor's Role in Plea Bargaining," 36 *University of Chicago Law Review* 50.

——— (1975) "The Defense Attorney's Role in Plea Bargaining," 84 *Yale Law Journal* 1179.

BEDFORD, Sybille (1961) *The Faces of Justice.* New York: Simon & Schuster.

BLANKENBURG, Erhard, Klaus SESSAR and Wiebke STEFFEN (1978) *Staatsanwaltschaft im Prozess Socialer Kontrolle.* Berlin: Duncker & Humblot.

BRUNS, Hans-Jürgen (1974) *Strafzumessungsrecht* (2d ed.). Köln: Carl Heymanns.

DECKER, Gerhard (n.d.) *Die Einstellung des Ermittlungsverfahrens unter Auflagen gem. § 153a StPO in der Praxis der Staatsanwaltschaft.* Doctoral Dissertion, Faculty of Law, Universität Augsburg.

FEELEY, Malcolm (1979) *The Process is the Punishment: Handling Cases in a Lower Criminal Court.* New York: Russell Sage Foundation.

FELSTINER, William L. F. and Ann B. DREW (1978) *European Alternatives to Criminal Trials and Their Applicability in the United States.* Washington, D.C.: Government Printing Office.

GOLDSTEIN, Abraham S. and Marvin MARCUS (1977) "The Myth of Judicial Supervision in Three 'Inquisitorial' Systems: France, Italy and Germany," 87 *Yale Law Journal* 240.

——— (1978) "Comment on *Continental Criminal Procedure*," 87 *Yale Law Journal* 1570.

HERRMANN, Joachim (1974) "The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany," 41 *University of Chicago Law Review* 468.

JESCHEK, Hans-Heinrich (1970) "The Discretionary Powers of the Prosecuting Attorney in West Germany," 18 *American Journal of Comparative Law* 508.

LANGBEIN, John H. (1974) "Controlling Prosecutorial Discretion in Germany," 41 *University of Chicago Law Review* 439.

LANGBEIN, John H. and Lloyd WEINREB (1978) "Continental Criminal Procedure: 'Myth' and Reality," 87 *Yale Law Journal* 1549.

LÖWE-ROSENBERG, R. (1978) *Die Strafprozessordnung und das Gerichtsverfassungsgesetz* (vol. 4, 23rd ed.). Berlin: de Gruyter.

SCHUMANN, Karl F. (1977) *Der Handel mit Gerechtigkeit.* Frankfurt am Main: Suhrkamp.

STEFFEN, Wiebke (1976) "Analysis of Police Investigative Activities from the Viewpoint of the Later Criminal Trial." Presented at the International Seminar on Police Research at Leuven, Belgium.

STEPAN, Jan (1973) "Possible Lessons from Continental Criminal Procedure" in Simon Rottenberg (ed.) *The Economics of Crime and Punishment.* Washington, D.C.: American Enterprise Institute for Public Policy Research.

WHITMAN, Peter A. (1967) "Recent Developments—Judicial Plea Bargaining," 19 *Stanford Law Review* 1082.

YALE LAW JOURNAL (1956) "Comment: The Influence of the Defendant's Plea on Judicial Determination of Sentence," 66 *Yale Law Journal* 204.

https://doi.org/10.2307/3053256 Published online by Cambridge University Press