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Stephen C. Thaman

Saint Louis University School of Law

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The Prosecutor in Transnational Perspective

Erik Luna and Marianne L. Wade

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THE PENAL ORDER: PROSECUTORIAL SENTENCING AS A MODEL FOR CRIMINAL JUSTICE REFORM?

Stephen C. Thaman

I. Introduction

The full-blown trial with its due process guarantees is no longer affordable. With the rise in crime and the more cost- and labor-intensive procedures required by modern notions of due process, legislatures and courts have been giving priority to procedural economy and introducing forms of consensual and abbreviated criminal procedure to deal with overloaded dockets. In many of these procedures, it begins to look as if the prosecutor not only exercises his or her traditional charging power—which inevitably sets the parameters for sentencing—but, for all intents and purposes, bypasses the jurisdictional organ, the court, in determining the qualification of the criminal act and the appropriate punishment. In the “triumphal march of consensual procedural forms,”¹ the banner-carrier is the prosecutor, a “standing magistrate,” who today looms over his or her “sitting” colleague in the courts both in power and importance.²

“Consensual” procedural forms are an integral part of criminal procedure reform worldwide. They are aimed at avoiding an exhaustive and cumbersome preliminary

¹ Thomas Weigend, “Die Reform des Strafverfahrens. Europäische und deutsche Tendenzen und Probleme” [“The Reform of Criminal Proceedings: European and German Trends and Problems”], *Zeitschrift für die Gesamte Strafrechtswissenschaft* 104 (1992): 493.

² In France and the Netherlands, judges are referred to as “sitting magistrates” and prosecutors as “standing magistrates.” In the latter country, prosecutors are openly recognized as sentencers as well. Julia Fionda, *Public Prosecutors and Discretion: A Comparative Study* (Oxford: Clarendon Press, 1995), 208.

Investigation, the oral public trial with its due process guarantees, or both. In the traditionally inquisitorial civil law realm—most notably on the European continent and in Latin America—the preliminary investigation consumed the most resources and time. During this stage, an investigating magistrate or public prosecutor would prepare the centerpiece of criminal procedure, a comprehensive investigative dossier or file including all evidence that would eventually be admissible at the trial stage to prove guilt and impose sentences. In traditionally adversarial countries, such as the United States and the United Kingdom, it is the trial itself (usually by jury) that has become more costly and time-consuming, given that the pretrial investigation is usually informal, less exhaustive, and produces nothing like an inquisitorial dossier.

In the United States, the constitutionalization of the accused's trial rights and the recognition of prohibitions on the use of illegally gathered evidence have made it more difficult to convict a defendant based on pretrial confessions or written material gathered during the preliminary investigation. The process of selecting juries has also been complicated by laudable attempts to ensure that minorities finally get to participate as lay fact finders in criminal trials.³ Unlike "juries" in France, Portugal, Italy, Denmark, Japan, Kazakhstan, and Germany, the classic American jury deliberates alone without the participation of the bench, and its unpredictability serves as an inducement for the prosecution to find shortcuts to judgment that ensure a conviction while giving a discount on its substantive or punitive gravity.

As reforms aimed at simplifying or eliminating the trial are instituted, legal scholars bemoan the compromise of important principles of criminal procedure, the most important of which are the principle of material truth and the legality principle, which guarantee equal application of the law by requiring the prosecution of all provable criminal offenses and a rigorous legal evaluation of the proven facts following an oral and public trial.⁴ However, complaints also focus on the increasing elimination of the court—whether a jury court, mixed court, or purely professional court—as the determiner of guilt and assessor of punishment. Because there is no trial, there is little or no judicial control of this prosecutorial power. In some of the procedures, one can say that the prosecutor actually makes the guilt determination and imposes sentences as would a judge.

The penal order appears at first glance to be the consensual mode of criminal procedure that is most controlled by the prosecutor and conforms closest to the notion of prosecutorial judging and sentencing.⁵ The penal order procedure is usually available only

³ See, for example, *Batson v. Kentucky*, 476 U.S. 79 (1986).

⁴ Albin Eser, "Funktionswandel von Prozeßmaximen" ["Functional Change of Process Principles"], *Zeitschrift für die Gesamte Strafrechtswissenschaft* 104 (1992): 373; Luigi Ferrajoli, *Diritto e Ragione: Teoria del Garantismo Penale* [Right and Reason: Theory of Criminal Guarantees] (Rome: Laterza, 1998), 624–25, 773.

⁵ In 1987, the Council of Europe urged its member states to simplify their criminal procedures. One suggested means was the introduction of penal orders, which were called "out of court settlements." Council of Europe, Committee of Ministers, *Recommendation R(87) 18, Concerning the Simplification of Criminal Justice* (September 18, 1987).

in prosecutions for infractions and misdemeanors, and it involves the prosecutor sending the defendant a proposed resolution of the case that indicates the qualification of the crime and the proposed sentence, which normally may not include any deprivation of liberty. The law then gives the defendant a certain period of time to object to the order. If the penal order is not rejected, it becomes final. If the defendant voices his or her opposition to the penal order, then the case is set for trial according to the normal procedure or returned to the prosecutor. In Germany, penal orders constitute around two-thirds of all convictions.⁶ From 2004 through 2007, the percentage of all Croatian criminal cases resolved by penal orders fluctuated from 24 percent to 29.7 percent.⁷ Norway recorded 215,276 penal orders in 2001.⁸ From 2003 to 2008, the percentage of all Italian cases that went to judgment (i.e., not dismissed) that were resolved by penal order fluctuated from 8.8 percent in 2003 to a high of 12.2 percent in 2007.⁹

In this chapter, I will first trace the history of the penal order from its earliest roots through its consolidation as a normal alternative form of procedure in Germany. I will then compare the types of penal order procedures that can be found in modern codes of criminal procedure. Likewise, I will compare penal orders with other "consensual" procedural modes that also involve considerable prosecutorial influence in determination of the level of guilt and punishment: diversion, pleas and stipulations of guilt, and abbreviated trials based on the contents of the preliminary investigation dossier. Finally, I will explore whether the penal order, originally developed as a police measure to quickly punish minor infractions, could eventually become a model for the consensual resolution of all cases, regardless of their gravity—much as plea bargaining, originally used in minor cases involving violation of the liquor laws in the United States,¹⁰ has now supplanted the jury trial as the preferred procedure for resolving even the most serious cases.

⁶ Stephen C. Thaman, "A Typology of Consensual Criminal Procedures: An Historical and Comparative Perspective on the Theory and Practice of Avoiding the Full Criminal Trial," in *World Plea Bargaining: Consensual Procedures and the Avoidance of the Full Criminal Trial*, ed. Stephen C. Thaman (Durham, NC: Carolina Academic Press 2010), 341.

⁷ Davor Krapac, "Consensual Procedures and the Avoidance of the Full-Fledged Trial in the Republic of Croatia," in Thaman, *World Plea Bargaining*, 273.

⁸ Asbjørn Strandbakken, "Penal Orders, Victim-Offender Mediation and Confession-Triggered Summary Procedures in Norway," in Thaman, *World Plea Bargaining*, 253.

⁹ This should be compared with the number of guilty stipulations (*patteggiamenti*), which in the same time fluctuated from 15.6 percent in 2004 to a low of 13.5 percent in 2008. These statistics were provided by Dr. Emanuela Camerini, Ministero della Giustizia, Direzione Generale di Statistica. On the *patteggiamento*, see discussion in this chapter at III.A.1.b.

¹⁰ George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* (Stanford, CA: Stanford University Press, 2003), 21–39.

II. History of the Penal Order

The penal order likely has its origins in the late Middle Ages in inquisitorial procedures in which a judge issued a mandate to punish minor crimes that were often within the jurisdiction of the police courts.¹¹ The modern penal order, however, dates to the police law of nineteenth century Prussia. During the Polish uprising of 1830 and 1831, the Prussian police needed a procedure to quickly dispose of minor criminal cases linked to political unrest. The procedure, called the "mandate procedure" or *Mandatsverfahren*, was finally codified in Prussian procedural law on July 17, 1846, for use in the Berlin police courts. On January 1, 1849, it was extended throughout Prussia to all proceedings before a single judge.¹²

The original Prussian *Mandatsverfahren* completely bypassed the judge and was a clear case of sentencing by the executive branch. The process was first used only for infractions (*Übertretungen*) that bore no possibility of deprivation of liberty, but then it was gradually extended to misdemeanors (*Vergehen*) and even felonies (*Verbrechen*), as long as the punishment imposed was no more than 150 Taler or police detention of up to six weeks (*Polizeigefängnis*). The accused could reject the proposed punishment before the police judge, but the police judge could not *sua sponte* reject the "mandate" and set the case for trial.¹³ The Prussian *Mandatsverfahren* was eventually adopted in nearly all the German States, and was incorporated into the Code of Criminal Procedure of the German Empire in 1877 as the penal order procedure, or *Strafbefehlsverfahren*. The penal order procedure was applicable to all misdemeanors before the small mixed court, with maximum penalties being a fine of 150 Reichsmark or up to six weeks' deprivation of liberty.¹⁴

During World War I, the penal order procedure was extended in Germany to all misdemeanors and to some war-related crimes that were punishable by up to a one-year deprivation of liberty. It was transformed from a police procedure to a normal alternative form of criminal procedure and was used in upwards of one-third of all cases. The defeat of Germany in World War I and the depression, unemployment, and civil strife that prevailed during the Weimar Republic led to a rise not only in petty criminality, but also terrorist crimes, thus overburdening the courts. This led to an increase in the possible term of imprisonment by penal order from six weeks to three months.¹⁵

¹¹ Giacomo Nicolucci, *Il Procedimento per Decreto Penale [The Criminal Procedure Decree]* (Milan: Giuffrè, 2008), 3. See also Alexander Vivell, *Die Strafbefehlsverfahren nach Eröffnung des Hauptverfahrens (§ 408a StPO): Eine kritische Untersuchung [The Penal Proceedings after Commencement of the Trial (Code of Criminal Procedure § 408a): A Critical Examination]* (Frankfurt: Peter Lang, 2006), 25.

¹² Vivell, *Die Strafbefehlsverfahren*, 26.

¹³ According to the Prussian Code of Criminal Procedure of 1852, only the prosecutor could change the terms of the order, and if the defendant refused the offer, a higher punishment could be imposed following the trial. *Ibid.*, 27–28.

¹⁴ *Ibid.*, 28–31.

¹⁵ *Ibid.*, 33–34.

Around this time, the penal order was also adopted outside of Germany. The 1908 Code of Criminal Procedure for Eritrea, then an Italian colony, included a penal order procedure, or *procedimento per decreto*, which included the possibility of a short-term deprivation of liberty. In 1909, a similar procedure was also used to punish petty criminality in Messina and Reggio Calabria, which arose in the chaos following a massive earthquake.¹⁶ The *procedimento per decreto* finally was introduced at the national level in Italy's 1930 Code of Criminal Procedure, where the *pretore*, the investigating magistrate, could issue the order and act as "prosecutor and judge" simultaneously.¹⁷

During the Third Reich, the possible punishment that could be imposed by penal order was raised to six months, and from 1930 to 1935, the procedure was used in around 77 percent of all cases.¹⁸ After the end of World War II, the penal order returned to its pre-Nazi form, but the maximum possible imprisonment differed depending on the zone of occupation: three months in the American and French Zones, and six months in the British and Soviet zones. With the unification of criminal procedure laws in the Federal Republic of Germany (West Germany), the limit of three months' deprivation was adopted, whereas the German Democratic Republic (East Germany) maintained the limit of three months' deprivation of liberty that had applied in the Soviet occupation zone.¹⁹

In the 1970s, the West German legislature amended the penal order provisions to eliminate the possibility of deprivation of liberty. The concern had been expressed that a judge—who did not have a chance to see and hear the defendant in an oral hearing, and who has before him a mere written file and the request of the prosecutor—should not be able to impose anything but a fine.²⁰ However, the punitive potential of the penal order was enhanced in 1993 by an amendment that allowed suspending a prison sentence of up to one year.²¹

In Italy, the *procedimento per decreto* took its place in the 1988 Code of Criminal Procedure along with a host of other alternative criminal procedure forms. Punishment was limited to a fine that could be reduced by up to one-half of what otherwise would have been the fine if the defendant had been convicted at trial.²² Although a prison sentence may not be suspended in Italy, the law does allow imposition of a prison sentence of up to six months if the defendant is able to pay the imposed fine but does not do so.²³ In 1972, the French introduced the penal order, or *ordonnance pénale*, in relation to infractions

¹⁶ Nicolucci, *Il Procedimento per Decreto Penale*, 2.

¹⁷ *Ibid.*, 23.

¹⁸ Vivell, *Die Strafbefehlsverfahren*, 36.

¹⁹ *Ibid.*, 37.

²⁰ *Ibid.*, 39.

²¹ *Ibid.*, 42–43.

²² Nicolucci, *Il Procedimento per Decreto Penale*, 4–5.

²³ *Ibid.*, 36.

contraventions), but in 2002 extended its scope to include lesser felonies (*délits*) subject to the correctional courts.²⁴

The penal order procedure appears to be spreading throughout Europe, with the procedure recently introduced in Croatia in 1998, for example, and in the Netherlands in 2006.²⁵ Moreover, Scotland has introduced a system of "fixed penalties," which operate in a similar manner to penal orders. They are used almost exclusively for road traffic offenses and can lead to a fine of up to 200 pounds in some cases. Although normally issued by the prosecutor, there is also a fixed penalty that can be directly issued by the police. The defendant has twenty-eight days to accept the fixed penalty; otherwise, the case will be set for trial.²⁶

III. The Modern Penal Order: What Distinguishes It from Other Modern Consensual Forms of Criminal Procedure?

The main characteristics of the penal order are: (1) it normally applies to less serious crimes, because as a rule no deprivation of liberty may be directly imposed;²⁷ (2) it is exclusively the prosecutor's prerogative to proceed by penal order; (3) there is no adversarial hearing or even a face-to-face meeting between prosecution and defense in court that precedes the imposition of a sentence if the defendant does not object to the penal order; (4) it is the prosecutor who decides the legal qualification of the crime and the amount of the sentence; and (5) the judge may not alter the terms of the penal order, but as with the defendant, must "take it or leave it."

In determining how the penal order compares with other consensual procedures in relation to the prosecutor's power to decide guilt and impose sentence, it is important to determine: (1) whether the defense has any input into the qualification of the crime or the assessment of punishment; (2) what constitutes the factual basis upon which the judgment following a penal order or other consensual procedure is based; (3) what is the nature of the judicial control, if any, over the procedure; and (4) whether the resolution

²⁴ Frédéric Desportes and Laurence Lazerges-Cousquer, *Traité de Procédure Pénale [Treaty of Criminal Procedure]* (Paris: Economica, 2009), 761.

²⁵ Krapac, "Consensual Procedures in Croatia," in Thaman, *World Plea Bargaining*, 272; Chrisje Brants, "Consensual, Abbreviated and Simplified Procedures in the Netherlands," in Thaman, *World Plea Bargaining*, 206–10.

²⁶ Fiona Leverick, "Plea Bargaining in Scotland: The Rise of Managerialism and the Fall of Due Process," in Thaman, *World Plea Bargaining*, 140–41. For a discussion of fixed penalties in England and Wales, see Chris Lewis, "The Evolving Role of the English Crown Prosecution Service," in Section III of the present volume. Fixed penalties in Great Britain appear similar to the way that police issue traffic violations in the United States, where one is given a certain amount of time to pay the fine (sometimes characterized as "bail") or the case is set for trial.

²⁷ This is true, for instance, in Chile, Denmark, Estonia, France, Lithuania, the Netherlands, and Scotland. Thaman, "Typology of Criminal Procedures," 339. An exception is the penal order provisions in the new Swiss Code of Criminal Procedure, which allow imposition of a punishment of up to six months deprivation of liberty. See *Strafprozessordnung [StPO] [Code of Criminal Procedure] § 352(1)(d)* (Switz.).

achieved by penal order (or other procedure) amounts to a judgment of guilt and whether it must be reasoned, as would a judgment after a full trial.

A. INFLUENCE OF THE DEFENSE, THROUGH BARGAINING, TO AFFECT THE DECISION TO PROCEED BY PENAL ORDER OR OTHER CONSENSUAL PROCEDURES

1. Bringing the Charge within the Statutory Limits for the Procedure

a. *Choice between Penal Order or Diversion*

Prosecutorial "sentencing" in the form of a penal order was originally only possible in the form of a fine, normally the most severe punishment allowed for an infraction. However, as many countries have decriminalized infractions and classified them as administrative violations, penal orders are now increasingly available in relation to misdemeanors²⁸ or lesser felonies where it would otherwise be possible to impose a punishment of deprivation of liberty.²⁹ Many countries that include the penal order in their procedural arsenal will also allow for conditional dismissals, called "diversion" in the United States, for some of the same minor offenses.³⁰ In cases of diversion, it is also normally the prosecutor who determines whether diversion will be appropriate, as well as what conditions must be fulfilled for the offender to be entitled to a dismissal of the charges.

The "measures" imposed on suspects who are diverted are often similar to the punishments received following a conviction by penal order, which has led critics to impugn diversion as a procedure whereby an executive official can punish the merely suspicious and bypass the jurisdictional work of the courts. Typical conditions attached to diversion orders are restitution, payment of money to a public institution, fines, community service work, and drug or alcohol treatment.³¹ Thus, when the prosecutor chooses to proceed

²⁸ What may be termed misdemeanors (*Vergehen*) in Germany, for instance, might include many offenses which would qualify as felonies in the United States, such as most drug offenses, environmental crimes, and theft and white-collar crimes, regardless of the financial loss. Marcus Dirk Dubber, "American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure," *Stanford Law Review* 49 (1997): 559.

²⁹ In the Netherlands, the crime could be punishable by up to six years, Brants, "Consensual, Abbreviated and Simplified Procedures," 204, 209; in Croatia, by up to five years, Krapac, "Consensual Procedures in Croatia," 272; and, in Norway, it could be applied in cases of burglary and theft. Strandbakken, "Penal Orders in Norway," 252. In Germany, it applies to crimes tried in the municipal courts (*Amtsgerichte*) either by a single judge or a small mixed court, where the crimes are punishable by no more than two years' deprivation of liberty. Vivell, *Die Strafbefehlsverfahren*, 59–60. In Poland, "conviction without trial" may apply to offenses punishable by up to ten years. Maria Rogacka-Rzewnicka, "Consensual and Summary Procedures in Poland," in Thaman, *World Plea Bargaining*, 292.

³⁰ Diversion applies to crimes punishable by only sixty days' deprivation of liberty in Scotland; misdemeanors punishable by up to two years in Germany; and crimes punishable by no more than three years in Croatia, Bulgaria, Poland and Chile, up to five years in France, and up to six years in the Netherlands. In both Denmark and Norway, diversion is technically applicable to all crimes. Thaman, "Typology of Criminal Procedures," 332.

³¹ *Ibid.*, 333. The sanctions imposed pursuant to the Dutch *transactie* (diversion) are equivalent to "criminal" sanctions as interpreted by the European Court of Human Rights in *Öztürk v. Federal Republic of Germany*, App. No. 8544/79, 6 Eur. H.R. Rep. 409, 423–24 (1984). Brants, "Consensual, Abbreviated and Simplified Procedures," 204.

by penal order, he or she is often decreeing a criminal conviction and punishment in a case where a dismissal or administrative violation would also be theoretically appropriate. In Germany, the prosecutor might even have to justify choosing a penal order in lieu of diversion in cases involving first offenders where diversion is considered to be the preferred path.³² In the Netherlands, the penal order has been recently introduced in order to toughen the traditionally lenient Dutch approach to crime in which diversion (*transactie*) had been the preferred procedure of prosecutors.³³

Whether the prosecutor chooses to proceed by diversion or penal order, the court will have little or no influence in the measures or punishments imposed and, in the case of the penal order, the qualification of the charge. In general, the defendant would prefer diversion over a penal order, but he or she would likely prefer a penal order over a normal criminal prosecution, which could bring with it a sentence involving a deprivation of liberty. In white-collar prosecutions, the defendant would also prefer diversion, or even a penal order, because there is no public trial or appearance in court, and thus no bad publicity.³⁴

For the defense to have any influence over the prosecutor's choice, discussions or "bargaining" must occur before the prosecutor's charging decision. In the case of penal orders, the defendant only has a relatively short time to decide whether to object to the proposed resolution of the case before the penal order becomes final,³⁵ thus making pre-charge discussions more important. Even though most codes do not expressly allow bargaining between defense and prosecution with respect to the issuance of penal orders, it has been recognized that such bargaining takes place, or at least cannot be excluded.³⁶ Indeed, amendments to the German penal order procedures have made it possible for the prosecutor to issue a penal order after a trial has already commenced; this has been criticized as opening a wide door for plea and sentence bargaining in cases that were floundering in the trial court.³⁷

The ability of the defense to affect prosecutorial decision making in relation to penal orders or diversion is impeded, however, by the fact that many defendants have no right to court-appointed lawyer. Indigent defendants in some jurisdictions may not be assigned

³² This has led to a decrease in the number of penal orders in Germany. Vivell, *Die Strafbefehlsverfahren*, 72.

³³ Brants, "Consensual, Abbreviated and Simplified Procedures," in Thaman, *World Plea Bargaining*, 206–12. The "fiscal fine" was introduced in Scotland for a similar reason. Fionda, *Public Prosecutors and Discretion*, 190.

³⁴ See generally Brants, "Consensual, Abbreviated and Simplified Procedures," 205–06. On deferred prosecutions and diversion for white-collar defendants in the United States, see generally Rachel Delaney, "Congressional Legislation: The Next Step for Corporate Deferred Prosecution Agreements," *Marquette Law Review* 93 (2009): 875–905.

³⁵ The period is seven days in Lithuania, eight days in Croatia, three to ten days in Norway, ten days in Estonia, two weeks in Germany and the Netherlands, fifteen days in Italy, twenty-eight days in Chile, and thirty days in France. Thaman, "Typology of Criminal Procedures," 340. The new Swiss Code of Criminal Procedure sets a period of ten days. StPO § 354(a) (Switz.).

³⁶ See Thaman, "Typology of Criminal Procedures," 341.

³⁷ Vivell, *Die Strafbefehlsverfahren*, 226–27.

counsel because no judgment that includes deprivation of liberty may be imposed.³⁸ This has been criticized in the literature because a defendant might accept the penal order without sufficient knowledge of the circumstances.³⁹ An unrepresented defendant would also not be able to effectively use the bargaining possibilities inherent in the procedure. When discussions do take place between prosecution and defense before the penal order decision, the unilateral character of the prosecutorial act and the potentially coercive take-it-or-leave-it nature of the penal order are ameliorated, and the procedure comes to look more like traditional American plea bargaining.

Few French defendants reject the prosecutor's proposed penal order,⁴⁰ which leads one to wonder if this is because of the genuinely mild sanctions offered or because the accused accepts the penal order without counsel and is thus oblivious as to whether it is in his or her own best interest. In comparison, the rejection rate in Germany in the mid-1990s was around 22 percent.⁴¹ Regardless, today's penal order has a much broader reach. The procedure is not limited to flagrant crimes and often gives considerable time for the prosecution and defense to talk before the prosecutor issues the penal order. In Italy, for instance, the prosecutor can use the full six months allotted for the preliminary investigation before electing the penal order procedure.⁴² In Germany, the issuance of the penal order presumes a completed preliminary investigation.⁴³ The defendant will thus normally know that he or she is the subject of an ongoing investigation, and the defense would have the opportunity to contact the prosecutor and negotiate the terms of a penal order, including the charged offense, or even a more desirable diversion order.

b. Pre-Charge Bargaining in Relation to Guilty Pleas and Stipulations

Because pleas of guilty or stipulations to the charges⁴⁴ in the civil law realm are usually limited to misdemeanors and mid-level felonies,⁴⁵ the availability of the procedures is also conditioned by the initial charging decision of the prosecutor. As with penal orders, then, any defense influence must occur before charging—although with codified plea bargaining, appointment of counsel is mandatory in most jurisdictions before settlement discussions may be initiated.⁴⁶

One of the oldest continental European guilty-plea mechanisms is the Spanish *conformidad*, which permits the defendant to stipulate to the veracity of the charges if

³⁸ In Germany, appointment of counsel is only required if the prosecutor wants to suspend a prison sentence of up to one year. Strafprozessordnung [StPO] [Code of Criminal Procedure] § 407(3) (Ger.).

³⁹ Brants, "Consensual, Abbreviated and Simplified Procedures," 211–12.

⁴⁰ Jean Pradel, *Manuel de procédure pénale [Handbook of Criminal Procedure]* (Paris: Cujas, 2006), 683.

⁴¹ Dubber, "American Plea Bargains," 562.

⁴² Nicolucci, *Il Procedimento per Decreto Penale*, 67.

⁴³ Vivell, *Die Strafbefehlsverfahren*, 71.

⁴⁴ Some provisions require a plea of guilty, others only a type of stipulation to the correctness of the charges, similar to an American plea of *nolo contendere*. Thaman, "Typology of Criminal Procedures," 355–56.

⁴⁵ *Ibid.*, 347–50.

⁴⁶ *Ibid.*, 362.

the prosecuting parties⁴⁷ request a punishment that does not include a prison sentence of more than six years.⁴⁸ Unlike the penal order, however, the defendant is presented with the accusatory pleadings in open court and is represented by counsel when he or she decides whether to “conform” to the pleadings. If one of the prosecuting parties requests a sentence exceeding six years, the case must go to trial. This has opened the door in Spain to pre-charge bargaining between the defense and public prosecutor⁴⁹—and at least theoretically, with private or popular prosecutors as well.⁵⁰

Similar to the *conformidad* are the consensual procedures modeled on the Italian application for punishment upon request of the parties,” nicknamed the *patteggiamento* or “deal,” which was introduced in Italy’s 1988 Code of Criminal Procedure. These procedures usually apply only to misdemeanors or lesser felonies that are punishable by terms of imprisonment falling under a certain threshold, and the defendant accrues the benefit of what in most systems is a one-third discount in punishment if the procedure is chosen.⁵¹ Again, if the defendant is going to influence the selection of this procedure, the initial charge must be below the statutory limitations, which means discussions and bargaining must take place before charging. In Italy, once a *patteggiamento* is possible—that is, the charge is within the statutory limits—then it is the choice of the defendant, and not the prosecutor, as to whether this procedure will be used. This is starkly different from the penal order procedure, which only the prosecutor can bring into motion. In systems where the aggrieved party may veto the application of the new procedure, such as in Russia, this opens up the possibility of the defense negotiating with the victim to obtain his or her consent.⁵²

Because a guilty plea in the common-law world, and in a few civil-law jurisdictions, may be accepted in relation to any charge,⁵³ the kind of pre-charge negotiations that one

⁴⁷ In Spain, the aggrieved party may file charges as a private prosecutor, and any citizen or interest group may also constitute themselves as “popular prosecutors.” Therefore, the accusatory pleadings of private or popular prosecutors must also not request more than six years’ deprivation of liberty.

⁴⁸ A provision for “conformidad” was also included in 2002 legislation that introduced the “expedited trial” (*juicio rápido*). There, a *conformidad* is possible if the public prosecutor requests a sentence of three years or less, and the sentence will be reduced by one-third. The Spanish *conformidad* has been a model for new consensual procedures adopted in Argentina and other countries. Thaman, “Typology of Criminal Procedures,” 345, 348–49.

⁴⁹ On the existence of such bargaining in Spain and some Latin American countries with *conformidad*-like procedures. *Ibid.*, 365.

⁵⁰ Popular prosecutors are an old Roman procedure usually utilized by interest groups; a women’s group might become adjoined to a rape case, for instance, or an environmental interest group might become adjoined to an environmental crime case. See Stephen Thaman, *Comparative Criminal Procedure: A Casebook Approach* (Durham, NC: Carolina Academic Press, 2002), 28–30.

⁵¹ See Thaman, “Typology of Criminal Procedures,” 346, 351–52.

⁵² Stanislaw Pomorski, “Modern Russian Criminal Procedure: The Adversarial Principle and Guilty Plea,” *Criminal Law Forum* 17 (2006): 139. The power of the aggrieved party in charge bargaining is strengthened by the power to appeal prosecutorial decisions to dismiss charges and compel the case to be brought. *Ibid.*, 143.

⁵³ Seemingly unrestricted plea bargaining has been introduced in Bolivia, Costa Rica, Georgia, Honduras, Latvia, Nicaragua, and Venezuela, as well as in the Argentine provinces of Córdoba and San Juan. Thaman, “Typology of Criminal Procedures,” 348.

finds in continental European systems is largely irrelevant. Although a plea offer by a prosecutor in the United States could have a "take-it-or-leave-it" quality like that of a penal order, American plea bargaining virtually presumes a defendant who has already been charged and arraigned in court and is represented by counsel. Negotiations are always possible. Yet, the extremely long prison sentences possible in the United States, and the substantial gap between minimum and maximum punishments, make the "offer" of the American prosecutor inherently coercive. Ironically, there could be more prosecutorial sentencing with less defense input in America's wide-open plea bargain system—with its strict mandatory minimum sentences, possibility of life sentences for recidivists, and rigid and punitive sentencing guidelines—than in the "take-it-or-leave-it" form of the penal order indictment-judgment, with its tacit allowance of pre-charge bargaining, issued by European prosecutors. In the United States, the limited possibilities for judicial control of plea bargaining further strengthen the prosecutor's ability to determine charge and sentence unilaterally.

B. THE FACTUAL BASIS OF THE PENAL ORDER

If a prosecutor can essentially impose guilt and sentence without trial, then the legitimacy of such an arrangement depends on whether there is an ascertainable factual basis for criminal liability separate from the defendant's acceptance of the penal order or the guilty plea offer. This could be supplied by a complete antecedent preliminary investigation where the defense has access to the results, or by a confirmed arrest in flagrante, but not necessarily by a mere stipulation or plea of guilty or even by a detailed confession of the defendant, unless it could be corroborated by other evidence.

1. Importance of a Confession, an Admission of Guilt, or an Arrest in Flagrante

A confession of guilt is usually not required for the prosecutor to proceed by penal order.⁵⁴ Because there is no court hearing in penal order cases, there can be no guilty plea as such. The absence of such an adversary stage of the penal order procedure has been criticized.⁵⁵ In some jurisdictions, however, a confession is a prerequisite for suspending prosecution and proceeding by diversion.⁵⁶ Of course, the fact of a confession, even in the absence of illegal coercion, is no guarantee that there is a factual basis for the guilt of defendant.⁵⁷ One also cannot rely on a plea of guilty, much less a stipulation or plea of *nolo contendere*, to supply what would otherwise be an absent factual basis for a guilty judgment arrived at without any trial or testing of the prosecution's evidence.

⁵⁴ An exception is the Danish penal order procedure. *Ibid.*, 340.

⁵⁵ *Ibid.*, 341; Nicolucci, *Il Procedimento per Decreto Penale*, 117–23, 144–45.

⁵⁶ This is true in Denmark, France, Moldova, Nicaragua, and Paraguay. Thaman, "Typology of Criminal Procedures," 334.

⁵⁷ See Robert P. Mosteller, "Failures of the Prosecutor's Duty to 'Do Justice' in Extraordinary and Ordinary Miscarriages of Justice," in Section V of the present volume.

In a substantial number of countries, an unconditional admission of guilt is a prerequisite for the application of guilty plea-like procedures.⁵⁸ However, the Spanish procedure of *conformidad* and the Italian *patteggiamento* are both somewhat akin to the US plea of *nolo contendere*, for they do not require an explicit admission of guilt. They are tantamount to an expression that the defendant has no objection to—that is, he or she agrees with—the validity of the charges.⁵⁹ American judges may even accept a guilty plea in cases where the defendant actually denies guilt of the charged offense.⁶⁰ Thus, the defendant's choice to accept a penal order, or to plead or stipulate to the charges, can only realistically be interpreted as a desire to receive a mitigated sentence or to avoid the public glare of a full trial, and not a basis in itself for a guilty judgment. Even in the United States something more is required: a "factual basis" independent of the guilty plea.⁶¹

An arrest in flagrante might be deemed to be a sufficient basis for a consensual resolution of a case that avoids a full preliminary investigation; indeed, it might be a weightier basis for skipping a trial than an admission of guilt. Penal orders developed from police law in Prussia and were probably seldom based on more than a police report of a flagrant arrest. The penal order in Italy's 1930 Code of Criminal Procedure did not require any factual foundation for issuance, until a decision of the Italian Constitutional Court in 1966 made an interrogation of the defendant a prerequisite for its application.⁶² In many jurisdictions, the prosecutor may leapfrog over the preliminary investigation and set trial within a couple of weeks in cases where the defendant was arrested in the act of committing a crime.⁶³ Of course, once the preliminary investigation has been skipped, and where the evidence is really clear, the defendant would usually prefer a consensual resolution with a statutory discount or a penal order without any deprivation of liberty.

2. The Importance of a Full Preliminary Investigation

In Germany, the penal order may theoretically only be issued after a full preliminary investigation has been completed and the prosecutor has determined that there is

⁵⁸ This is true in Denmark, Poland, Bulgaria, Bolivia, Honduras, Paraguay, Venezuela, France, Georgia, Latvia, and in some Argentine provinces. Thaman, "Typology of Criminal Procedures," 356–57.

⁵⁹ Thaman, *Comparative Criminal Procedure*, 165. The same approach is taken in relation to *conformidad*-like procedures in Costa Rica and in many Argentine provinces. There is a dispute in Chile, however, as to whether the *conformidad* is tantamount to a confession of guilt. The same ambiguity exists in relation to the quality of the stipulation in the Russian procedure based on the *patteggiamento*. Thaman, "Typology of Criminal Procedures," 356.

⁶⁰ See *North Carolina v. Alford*, 400 U.S. 25 (1970). Estonian "settlement proceedings," similar to US plea bargaining, do not require an explicit admission of guilt. Thaman, "Typology of Criminal Procedures," 356.

⁶¹ See, for example, Fed. R. Crim. P. Rule 11(b)(3).

⁶² Stefano Ruggieri, *Il Procedimento per Decreto Penale: Dalla Logica dell'accertamento Sommario alla Dogmatica del Giudizio* [*The Criminal Procedure Decree: Summary of Investigation by the Dogmatic Logic of Judgment*] (Turin: G. Giappichelli, 2008), 6–7.

⁶³ See Thaman, *Comparative Criminal Procedure*, 43–44.

"sufficient cause" to charge.⁶⁴ The defendant then has the right to full discovery of the entirety of the preliminary investigation dossier, which would enable him or her to carefully evaluate the strength of the prosecutor's case before deciding whether to accept the penal order.⁶⁵ Although the final act of the preliminary investigation in Germany envisions the interrogation of the accused by the judge of the investigation, the defendant may opt to remain silent, and no interrogation is required for the prosecutor to pursue a penal order.⁶⁶ As mentioned earlier, the Italian prosecutor may use the full six months allowed for the preliminary investigation before deciding to proceed by penal order.⁶⁷ But under the new Italian penal order procedure, the preliminary investigation has been substantially abbreviated, which means that a penal order might be issued in a case where further investigation might have resulted in a failure to charge or a dismissal.⁶⁸ Indeed, prosecutors have been known to issue penal orders based only on the report of a crime, without conducting any official investigation into the reliability of the accusation.⁶⁹

By and large, the guilty plea-stipulation systems in Europe only come into play after the completion of the preliminary investigation, which will at least ensure a plausible basis for the judge to determine whether the defendant is actually guilty, and of what offense. In common-law jurisdictions, however, the unlimited discretion given to prosecutors as to whether and how to prosecute a case, and the lack of a formal preliminary investigation, means that the assessment of a "factual basis" for a guilty plea (or, in Scotland, a "fixed penalty") will be extremely difficult. The requirement of a factual basis for a guilty plea in the United States might simply consist of the prosecutor's assertion on the record that he or she would have proved the allegations in the accusatory pleading.⁷⁰ Undoubtedly, the record of a full preliminary investigation provides a superior foundation for determining a factual basis of guilt than a confession, a guilty plea-stipulation, or an informal police investigation summarized in a

⁶⁴ In Germany "sufficient cause" (*hinreichender Anlass*) means that a trial will not add anything to the clarification of the facts of the case. Vivell, *Die Strafbefehlsverfahren*, 76.

⁶⁵ However, the German prosecutor often responds to the defendant's request for discovery with an offer of diversion and payment of a fine, for instance, thereby inducing him to accept before he could have counsel appointed and without knowing the factual basis of the would-be charge. Hans Dahs, "Absprachen im Strafprozess-Wirksamkeit eines Rechtsmittelverzichts" ["Agreements in the Criminal Procedure-Effectiveness of a Waiver of Appeal"], *Neue Zeitschrift für Strafrecht* 10 (2005): 581. Presumably, the same could happen when the prosecutor decides to proceed by penal order.

⁶⁶ StPO §§ 158, 170(1) (Ger.); Vivell, *Die Strafbefehlsverfahren*, 72-74.

⁶⁷ Nicolucci, *Il Procedimento per Decreto Penale*, 65-66.

⁶⁸ *Ibid.*, 27-29. Since the promulgation of the 1988 Italian Code of Criminal Procedure, the preliminary investigation is no longer designed to accumulate all of the evidence that will be admissible at trial, but only that necessary to determine whether there is probable cause to charge. Thaman, *Comparative Criminal Procedure*, 41-42.

⁶⁹ In such a case, when asked to accept or reject the penal order, the judge would have only a police report, the defendant's birth certificate, and information about the person of the defendant. Thaman, *Comparative Criminal Procedure*, 67-68.

⁷⁰ Dubber, "American Plea Bargains," 552.

report. Still, the preliminary investigation record is only a written documentation of what others have seen and heard; procedurally, it is only sufficient to charge a defendant, not to prove his guilt "beyond a reasonable doubt."

C. CONTROL POWERS OF THE JUDGE

1. Judicial Power to Veto the Penal Order or Other Consensual Procedure

Although the penal order developed from a unilateral decree of the police or prosecutor in Prussia, in most countries today the judge maintains the power to reject the penal order if he or she deems it unsupported by the evidence or thinks the case should proceed to trial.⁷¹ In Germany, the judge must determine that there is a "probability of conviction" in order to accept the penal order, and he or she must reject it if it is clearly obvious that the evidence in the file is insufficient to justify guilt.⁷² The judge may issue the penal order or, in the alternative, either set the case for trial or return the case to the prosecutor for further investigation or dismissal.⁷³ In some systems, however, the prosecutor may completely bypass the court for all practical purposes. This is the case in Norway, Lithuania, and Scotland (with fixed penalties), and it appears to be the situation in the Netherlands, too.⁷⁴ Regardless, the judge may not change the terms of the penal order. By issuing the order, the prosecutor is performing a quasi-judicial function by determining the charge for which the defendant will be convicted and the punishment. If the penal order is accepted, as it usually is, then the accusatory pleading becomes the judgment—this is its dual nature.⁷⁵ When the prosecutor's charge and requested punishment is converted into a binding judgment of guilt, prosecutorial sentencing is an undeniable reality.

If the defendant rejects a judicially approved penal order, a problem arises when the penal order judge becomes the trial judge. Because the judge has already determined that there is a "probability of conviction," one would think that the judge would be disqualified from sitting at trial; after all, he or she has already prejudged the facts of the case. But German law does not prevent the trial judge from making pretrial assessments of the weight of the evidence.⁷⁶ In Italy, however, it is the judge of the preliminary hearing who

⁷¹ This is the case in Croatia, Italy, Estonia, France, and Germany. Thaman, "Typology of Criminal Procedures," 340.

⁷² Vivell, *Die Strafbefehlsverfahren*, 87.

⁷³ In practice, the judge seldom rejects a penal order without setting trial. Mark Geis, *Überzeugung beim Strafbefehlserlaß?* (Frankfurt: Peter Lang, 2000), 27.

⁷⁴ Thaman, "Typology of Criminal Procedures," 340; Brants, "Consensual, Abbreviated and Simplified Procedures," 211.

⁷⁵ Vivell, *Die Strafbefehlsverfahren*, 81, 83.

⁷⁶ Geis, *Überzeugung beim Strafbefehlserlaß*, 48–49.

approves penal orders, and if the defendant does not accept it, another judge will always be the trial judge.⁷⁷

In the United States, judicial participation in plea bargaining is frowned upon in many jurisdictions because it is feared that it will compromise the judge's impartiality and put too much pressure on defendants to deal.⁷⁸ This is especially the case when the bargaining judge acts as trial judge. Moreover, the charging power and the power to dismiss are generally comfortably in the hands of the American prosecutor. In the United States, if a judge accepts a negotiated plea and punishment, the bargained-for punishment must be imposed. In some countries, however, the judge plays an active role in the guilty plea systems and may reject a proposed settlement and set the case for a full-blown trial.⁷⁹ This involvement may make sense, as Jenia Iontcheva Turner has argued convincingly:

[A] judge's early input into plea negotiations can render final disposition more accurate and procedurally just. Judges can provide a neutral assessment of the merits of the case and prod [the] defense attorney or prosecutor to accept a fairer resolution. They can offer a more accurate estimate of expected post-plea and post-trial sentences, and make it more transparent and more acceptable to the public.⁸⁰

2. Judicial Role in Assessing Guilt

The Italian "abbreviated trial" is really a mini-trial in which the judge has complete control over the question of guilt. Similar procedures have also been introduced in parts of Latin America and in the former Soviet Baltic republics.⁸¹ To the extent that the judge in penal order procedures actually has an investigative dossier upon which to assess the sufficiency of the evidence, the procedure is similar to a "trial on the file." The difference, of course, is that the judge may not acquit, but may only reject the penal order and return the case to the investigating magistrate.

In the case of the Spanish *conformidad* and some other procedures based on acceptance of the pleadings, the judge may actually acquit the defendant if there are substantive or procedural reasons in the investigative dossier for doing so.⁸² In Russia, however, the Supreme Court has ruled that a judge may only refuse to apply the "special procedure,"

⁷⁷ Thaman, "Typology of Criminal Procedures," 373; William T. Pizzi and Mariangela Montagna, "The Battle to Establish an Adversarial Trial System in Italy," *Michigan Journal of International Law* 25 (2004): 436.

⁷⁸ See generally Jenia Iontcheva Turner, "Judicial Participation in Plea Negotiations: A Comparative View," *American Journal of Comparative Law* 54 (2006): 199-267.

⁷⁹ This is true with the *conformidad* in Spain, and similar procedures in some Argentine provinces, as well as with the consensual procedures in Bulgaria, Guatemala, Bolivia, Chile, Estonia, France, Georgia, Latvia, and Moldova. Thaman, "Typology of Criminal Procedures," 360-61.

⁸⁰ Turner, "Judicial Participation in Plea Negotiations," 200.

⁸¹ Thaman, "Typology of Criminal Procedures," 382.

⁸² This is true in relation to the Italian *patteggiamento*, and the consensual procedures of some Argentine provinces, Chile, El Salvador, Guatemala, and Latvia. *Ibid.*, 367.

rather than acquit the defendant, in cases where there is a doubt as to guilt.⁸³ In Italy, the judge may dismiss a case based upon a determination that the punishable act was not committed, the defendant did not commit it, or the act committed does not constitute the offense. But if the judge thinks the evidence is “insufficient” or “contradictory,” the case must be returned to the prosecutor.⁸⁴

3. The Nature of the Judgment

a. *Is There a Finding of Guilt?*

In most countries with penal orders, the court pronounces a judgment that includes a finding of guilt.⁸⁵ Up until 1987, the German penal order was characterized as having the “effect of a final judgment,”⁸⁶ but scholars disputed whether the imposition of punishment was really a judgment of guilt or instead a type of confirmation of probable cause. To put it more pejoratively, some depicted the penal order as allowing punishment based on mere suspicion (*Verdachtsstrafe*).⁸⁷ The code does not explain what degree of proof is required for the judge to issue a penal order, but phrases the burden in the negative: “If the judge deems the accused not to be sufficiently suspicious he should reject the issuance of a penal order.”⁸⁸ The burden of proof (*hinreichend verdächtig*) is the same required for the prosecutor to charge, yet not enough to convict beyond a reasonable doubt. “Sufficient suspicion” has been described as a state of evidence that gives rise to a “probability of conviction.”⁸⁹

With amendments to the code in 1987, the penal order judgment now is “the same as a final judgment.”⁹⁰ But if the penal order still functions simultaneously as both charging document and judgment, the judge is faced with the perplexing task of making a finding of probable cause and proof beyond a reasonable doubt based on the same state of the evidence.⁹¹ Again, the German Code of Criminal Procedure states that the judge is to reject the penal order if sufficient suspicion is lacking in the preliminary investigation dossier, which is the same standard for refusing to set trial under the normal procedure. But the judge can also refuse the penal order and set trial if he disagrees with the legal qualification of the defendant’s acts or the proposed sentence, or if he “has doubts that he can make the appropriate decision without hearing the evidence at trial.”⁹² But if the

⁸³ Postanovlenie No. 1, Plenuma Verkhovnogo Suda Rossiyskoy Federatsii [Plenum of the Supreme Court of the Russian Federation] (March 5, 2004), in *Biulletin Verkhovnoga suda Rossiyskoy federatsii*, no. 8 (August 24, 2004).

⁸⁴ Nicolucci, *Il Procedimento per Decreto Penale*, 77.

⁸⁵ This is true in, inter alia, Germany, Scotland, and Italy. Thaman, “Typology of Criminal Procedures,” 341.

⁸⁶ Geis, *Überzeugung beim Strafbefehlserlaß*, 24–25.

⁸⁷ Vivell, *Die Strafbefehlsverfahren*, 46–47.

⁸⁸ StPO § 408(2) (Ger.).

⁸⁹ Geis, *Überzeugung beim Strafbefehlserlaß*, 24–25.

⁹⁰ *Ibid.*, 40 (referring to StPO § 410(3) (Ger.)).

⁹¹ *Ibid.*, 27.

⁹² StPO § 408(3) (Ger.).

judge issues the penal order based on sufficient suspicion and the defendant does not object, the judge must then decide whether the evidence persuades him beyond a reasonable doubt.⁹³

In Germany, the judge's inner conviction, based on "free evaluation of the evidence," must be gained in an "oral and immediate trial"⁹⁴ and not merely on the written documents contained in the dossier of the preliminary investigation. For this reason, Mark Geis contends that the guilt-finding in a penal order judgment is not based on the same type of free evaluation of the evidence required in a normal trial. He posits a system with two different procedural models: (1) a full oral trial in which the judge assesses guilt beyond a reasonable doubt based on free evaluation of the evidence for cases in which the goal of punishment is retribution and general deterrence (protection of future victims); and (2) a procedure without a trial based on an "ascription of guilt" in which free evaluation of the evidence is not fully possible, the consent of the defendant is necessary, and the goal of the procedure is rehabilitation and resocialization of the defendant.⁹⁵ In a similar vein, Stefano Ruggeri suggests that the judgment issuing from a penal order in Italy reflects a "quasi-intuitive" or "impressionistic" sense of justice, based on a "verisimilitude" of penal responsibility.⁹⁶

b. Must Reasons Be Given for the Guilt-Finding?

In the common-law tradition, judges generally do not have to give reasons for the judgments they issue, even if the judge is sitting alone as trier of fact without a jury. Moreover, judges in common-law countries do not need to write a reasoned judgment when accepting a guilty plea. The guilty plea is itself sufficient in order to render judgment. By contrast, civil-law jurisdictions generally require that judicial decisions be accompanied by reasons, which is especially true for judgments of criminal convictions.⁹⁷ In some countries, such as France, exception is made for judgments that result from penal orders.⁹⁸ But even where judgment reasons are required for penal orders, they are usually of a skeletal variety, especially in those jurisdictions that do not require a full preliminary investigation.⁹⁹ Indeed, according to one critic, the judge issuing a penal order in Italy lacks sufficient material to actually articulate the type of judgment reasons required by the Italian code.¹⁰⁰

Most modern European or Latin American guilty plea-like arrangements require that judges give reasons to justify the finding of guilt and the imposition of a particular

⁹³ Geis, *Überzeugung beim Strafbefehlsersatz*, 37.

⁹⁴ *Ibid.*, 94.

⁹⁵ *Ibid.*, 215-16.

⁹⁶ Ruggeri, *Logica dell'accertamento Sommario*, 13.

⁹⁷ Section 267 of the German Code of Criminal Procedure requires reasons for judgments in all criminal courts. In France, reasons are only required for nonjury courts. Pradel, *Manuel de procédure pénale*, 679.

⁹⁸ *Ibid.*, 683.

⁹⁹ In Croatia, for instance, the judgment is based on the police report and the court's satisfaction that the fine was correctly imposed. Krapac, "Consensual Procedures in Croatia," 273.

¹⁰⁰ Nicolucci, *Il Procedimento per Decreto Penale*, 54.

sentence.¹⁰¹ With the Italian *patteggiamento*, the judgment reasons are much simpler than those required following a normal trial and focus mainly on appraising the congruity of the sentence with the facts of the case. The Italian Constitutional Court rejected a challenge to the procedure based on its lack of a clear judgment of guilt. The Court emphasized that a judgment after trial must contain a "concise exposition of the reasons in fact and law upon which the decision is based," but that the judgment following a *patteggiamento* was "obviously minimized" and need only consist of "excluding the existence within the contents of the file of elements which negate responsibility or punishability," in other words, making sure the defendant was not innocent.¹⁰² A lesser version of a reasoned judgment is allowed in other countries as well.¹⁰³

IV. Conclusion: Can the Penal Order Be a Model for General Criminal Justice Reform?

Since the Enlightenment and the rebellion against written inquisitorial procedure, one of the most unshakeable principles of criminal procedure is that the guilt or innocence of the accused must be litigated in a public oral trial before the trier of fact, in which the defendant has the right to present evidence and challenge the evidence presented by the state. Yet the grand march of consensual procedures has now made the full trial seem a relic of the past, the glamorous public costume of a system that increasingly works in the dark, fashioning judgments that are bereft of the trappings of due process. The most "inquisitorial" of all of these consensual procedural forms is the penal order, where the same executive official can investigate the case, draft the accusatory pleading, and determine guilt, while scarcely even invoking the jurisdiction of the judicial branch. The penal order seems to be prosecutorial sentencing par excellence, acceded to only because of the relatively minor punishments that can be applied.

In turn, the *patteggiamento* and similar procedures have been criticized for leading to the "inevitable corruption of jurisdiction, police-state contamination of procedure, the style of evidence and the trial and the consequential loss of political or external legitimacy of the judicial power." In short, they are "the most perverse innovation of the new regime which contradicts the whole panoply of penal and procedural rights" and in essence constitute a return to "inquisitorial incommunicado interrogation of the suspect by police and prosecutor which, coupled with new consensual forms, will constitute the entire trial like in old inquisitorial times."¹⁰⁴

¹⁰¹ Thaman, "Typology of Criminal Procedures," 368-69.

¹⁰² Dec. No. 313 (July 3, 1990), English translation in Thaman, *Comparative Criminal Procedure*, 159-61.

¹⁰³ In Croatia, the court need only state "the circumstances that were taken into consideration in imposing punishment" and base the "judgment" on the facts in the investigative dossier. Krapac, "Consensual Procedures in Croatia," 276.

¹⁰⁴ Ferrajoli, *Diritto e Ragione*, 625, 637, 773.

Although a similar disdain for German confession bargaining, or *Absprachen*, and other consensual forms was quite apparent from the time the practice was revealed in the 1980s,¹⁰⁵ many of the same critics have begun to find a silver lining in the doctrinal cloud of procedural economy. They have suggested enacting a new code of criminal procedure that would provide for different procedures for those who contest guilt and those who accept it.¹⁰⁶ Under the constitutional rubric of "rule-of-law-state," those who deny guilt would be able to demand a trial with all due process guarantees. But Germany's constitutional status as a "social state" would also tolerate a procedure that aims for compromise and avoidance of social conflict, thereby supporting negotiated justice.¹⁰⁷ These reformers have agreed that the old values such as the search for truth and the legality principle are no longer attainable (if they ever were), and that they should be replaced by notions of fairness and consensus, cooperation instead of confrontation.¹⁰⁸ In a similar way, Geis has sought to justify the reduced due process guarantees by claiming that the prosecutor who seeks a penal order is renouncing the retributive goal of criminal procedure in favor of one of resocialization "with a breath of repression." The goal of the procedure would no longer be retributive or deterrent, based on, respectively, protecting the interests of the victim or the interests of future victims. Instead, it would be aimed at reintegrating the defendant into society. Punishments would be seen as "wake-up calls" (*Denkzettelstrafen*) and would be based on a lesser level of factual underpinnings than retributive procedures that require a full trial.¹⁰⁹

The attempted justification of criminal convictions based on less than proof beyond a reasonable doubt is certainly radical. But it pales in comparison to the idea that the penal order—a procedure without any adversarial oral trial, where the only confrontation with the evidence is in the preliminary investigation—could be a model for a new criminal procedure applicable to all offenses, felonies as well as misdemeanors and infractions. According to this concept, the preliminary investigation would again become the centerpiece of criminal procedure, as it was in the dark inquisitorial times. Instead of being a secret procedure, however, where an inquisitor coerces confessions and pedantically assembles evidence in a written dossier, it would become an adversarial mini-trial in itself,

¹⁰⁵ See generally Karsten Altenhain, "Absprachen in German Criminal Trials," in Thaman, *World Plea Bargaining*.

¹⁰⁶ Thomas Weigend, "Unverzichtbares im Strafverfahrensrecht" ["Indispensable in the Criminal Law"], *Zeitschrift für die gesamte Strafrechtswissenschaft* 113 (2001): 274.

¹⁰⁷ Claus Roxin, "Über die Reform des deutschen Strafprozessrechts" ["On the Reform of German Criminal Procedure Law"], in *Wie würden Sie entscheiden? Festschrift für Gerd Jauch zum 65. Geburtstag*, ed. Gerd Jauch and Bernhard Töpfer (Munich: C. H. Beck, 1990), 190, 195.

¹⁰⁸ Weigend, "Die Reform des Strafverfahrens," 496; Jürgen Wolter, *Aspekte einer Strafprozessreform bis 2007* [*Aspects of Criminal Procedure Reform to 2007*] (Munich: C. H. Beck, 1991), 19–21; Weigend, "Unverzichtbares im Strafverfahrensrecht," 277–78; Bernd Schünemann, "Reflexionen über die Zukunft des deutschen Strafverfahrens" ["Reflections on the Future of German Criminal Law"], in *Strafrecht, Unternehmensrecht, Anwaltsrecht Festschrift für Gerd Pfeiffer*, ed. Otto Friedrich Freiherr von Gamm et al. (Cologne: Heymanns, 1988), 481.

¹⁰⁹ Geis, *Überzeugung beim Strafbefehlserlaß*, 215–16.

in which the defense would have a chance to cross-examine state witnesses and experts, make evidence motions, and thus acquire full disclosure of the strengths and weaknesses of the state's case. The evidence gathering would be in front of a preliminary investigation judge—not the inquisitorial investigating magistrate or prosecutor—who would decide issues affecting the constitutional rights of the defendant and preside over the preservation of evidence, ensuring the defendant's right to confront witnesses and question them in a sort of pretrial deposition.

At the close of this cloistered adversarial mini-trial, the prosecutor would assess the evidence and propose a judgment in the form of a penal order, including a description of the acts imputed to the defendant, their legal qualification, and the punishment he or she thinks the defendant legally deserves. Here, the prosecutor becomes the "lower court of justice" in all cases,¹¹⁰ not just the misdemeanors and infractions to which penal orders are usually limited. The defendant could still reject the penal order and appeal to the "higher" normal courts and request a full trial, but many of the objections to the penal order procedure will have been answered. There will have been a full preliminary investigation before a judge and thus a factual basis for the penal order. There would be no duplication of the taking of evidence, as the defendant's confrontation rights were guaranteed by the adversarial nature of the pretrial questioning.¹¹¹ It has also been suggested that defense participation in an adversarial preliminary investigation would induce confessions of guilt and a quicker road to rehabilitation.¹¹²

The idea of using a type of penal order procedure in all cases, following an adversarial preliminary examination in the form of a mini-trial before a neutral judge, was the subject of heated debate at the 2004 meeting of the German Lawyer's Association.¹¹³ The final decision will probably have to await the promulgation of a new German Code of Criminal Procedure to replace the current one, which dates from 1877.¹¹⁴ But whenever it comes, the decision could have repercussions across Europe and, indeed, around the globe.

¹¹⁰ Fionda, *Public Prosecutors and Discretion*, 1–2.

¹¹¹ Weigend, "Die Reform des Strafverfahrens," 506–11; Wolter, *Aspekte einer Strafprozessreform bis 2007*, 79–91; Weigend, "Unverzichtbares im Strafverfahrensrecht," 281–83.

¹¹² Roxin, "Über die Reform des deutschen Strafprozeßrechts," 197.

¹¹³ Helmut Satzger, *Chancen und Risiken einer Reform des strafrechtlichen Ermittlungsverfahrens: Gutachten C für den 65. Deutschen Juristentag [Opportunities and Risks of Reform of the Criminal Investigation: Report for German Lawyers]* (Munich: C. H. Beck, 2004).

¹¹⁴ See Altenhain, "Absprachen in German Criminal Trials," 176–78.