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Craig M. Bradley  
*Indiana University School of Law*

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# Reforming the Criminal Trial<sup>†</sup>

CRAIG M. BRADLEY\*

As a prosecutor in Washington, D.C., trying numerous cases before a jury over a three-and-a-half-year period, I was often struck by how needlessly inefficient the jury trial frequently was. A small percentage of the time expended at a typical felony trial was devoted to presenting the testimony of the victim and the other witnesses. A much larger amount of time was used to pick the jury, argue to the jury, hold conferences out of the presence of the jury, instruct the jury, and wait for the jury to reach a verdict. At a time when criminal courts everywhere are overwhelmed with cases,<sup>1</sup> it is appropriate to examine whether this system can be streamlined.

In 1982, and again in 1992, I lived in Germany and studied the operation of the criminal justice system there. The German system has two features of interest to Americans.<sup>2</sup> First, cases are tried before a mixed panel of judges and laymen (three judges and two laymen in the most serious cases—a four-to-one vote is required for conviction). There is no “picking” of this panel by the lawyers. They simply show up and the trial begins. The panel is already familiar with the dossier of the case so that extended arguments are neither necessary nor allowed. A typical felony case is tried in two to three hours.

The second aspect of the German system is that plea bargaining, while no longer prohibited, is done much less frequently—about twenty to thirty percent of the time—and only rarely in cases “involving violent and other very serious crimes.”<sup>3</sup> Even if a bargain has been reached, and the defendant confesses during preliminary examination at the beginning of the trial, the

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\* Professor of Law, and Ira Batman Faculty Fellow, Indiana University School of Law-Bloomington. I would like to thank Professors Lynne Henderson and Alex Tanford and Judge John Bayly for their helpful comments on an earlier draft of this Essay and the Alexander von Humboldt Foundation, which supported my research in Germany in 1982 and 1992.

1. See, e.g., SPECIAL COMM. ON CRIMINAL JUSTICE IN A FREE SOCIETY, AM. BAR ASS'N, CRIMINAL JUSTICE IN CRISIS 40 (1988) [hereinafter CRIMINAL JUSTICE IN CRISIS] (referring to a “tidal wave of [criminal] cases that have flooded all agencies in the criminal justice system”) (quoting NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, ASSESSING CRIMINAL JUSTICE NEEDS (1984)).

2. For a detailed discussion of the German system, see John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. B. FOUND. RES. J. 195. See also Thomas Weigand, *Continental Cures for American Ailments: European Criminal Procedure as a Model for Law Reform*, in 2 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 381 (Norval Morris & Michael Tonry eds., 1980) (discussing the advantages of simplified procedures practiced in Europe); Richard S. Frase & Thomas Weigand, *How the Germans Do It—Comparisons with American Criminal Justice* (1992) (unpublished manuscript on file with author).

3. Joachim Herrmann, *Bargaining Justice—A Bargain for German Criminal Justice?*, 53 U. PITT. L. REV. 755 (1992).

prosecutor must be ready to offer such witnesses as the court deems necessary to support a finding of guilt. Thus, as Professor Hermann observes, in Germany "a confession does not replace a trial but rather causes a shorter trial."<sup>4</sup> This fact, plus section 153a of the German Code of Criminal Procedure, which allows the prosecutor to terminate the proceedings only when the defendant's guilt is "minor,"<sup>5</sup> keeps plea bargaining to a minimum in felony cases.<sup>6</sup> It is most commonly used in cases where the penalty is "a fine or no criminal sanction at all."<sup>7</sup>

One might well argue that the first aspect of the German system is not a satisfactory safeguard for civil liberties and lacks the democratic virtues of a jury trial.<sup>8</sup> However, the first aspect must be considered in concert with the second. In many American jurisdictions, as many as ninety percent of all cases are plea bargained.<sup>9</sup> Plea bargaining (as opposed to a plea to the indictment when the government's case is extremely strong) is a bad arrangement for both the state and the defendant. It forces the defendant to give up his rights to trial by jury, to object to illegal searches, to confront witnesses, and so on. It forces the state to convict the defendant on a charge that is less than the charge he deserves. The Katzenbach Commission declared in 1967 that "few practices in the system of criminal justice create a greater sense of unease and suspicion than the negotiated plea of guilty."<sup>10</sup> This sentiment was echoed recently in the American Bar Association report *Criminal Justice in Crisis*.<sup>11</sup>

The U.S. Supreme Court's approval of plea bargaining in the 1971 case of *Santobello v. New York*<sup>12</sup> was based largely on the pragmatic concern that the criminal justice system could not afford to accord every defendant his constitutional rights, rather than on a claim that such a practice was inherently desirable. By constructing a more efficient trial system, the Germans have

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4. *Id.* at 763. "[I]n simple cases, [however], an extensive and credible confession can make it unnecessary to hear additional witnesses." Frase & Weigend, *supra* note 2, at 37 n.169 and cases cited therein.

5. Strafprozeßordnung § 153a. For an English translation, see THE GERMAN CODE OF CRIMINAL PROCEDURE 88 (American Series of Foreign Penal Codes No. 10) (Horst Niebler trans., 1965).

6. However, even in felony cases, plea bargaining is not unknown, at least where a fine is the appropriate penalty. Herrmann, *supra* note 3, at 758.

7. *Id.* at 756.

8. The Germans do not think so. They adopted a jury trial requirement in 1877 and abandoned it in 1924. Langbein, *supra* note 2, at 198.

9. YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 17 (7th ed. 1990).

10. CRIMINAL JUSTICE IN CRISIS, *supra* note 1, at 67 n.78 (citing PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE TASK FORCE ON THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967)).

11. *Id.* at 40-41.

12. 404 U.S. 257 (1971).

been able to require a trial for every defendant who is charged. Even if one concedes (as I do not) that the German trial is, say, only eighty percent as "good" as the full-fledged American jury trial, it could be utilized by three times as many defendants if it only takes one-third as long as an American trial, and would thus seem to be a better system.

It is not necessary, however, to abandon the traditional jury in order to improve and speed up the American criminal trial substantially. The rest of this Essay is devoted to proposing ways in which the jury trial, as it is practiced in most states, could be modified, consistently with constitutional proscriptions, to render it more efficient. In turn, this would allow other states to follow Alaska's lead in forbidding plea bargaining,<sup>13</sup> or perhaps in limiting guilty pleas, as the Germans have done.

Frequently, the most tedious part of a case is choosing the jury. Lawyers correctly believe that one can begin the persuasion process during the voir dire, and perhaps use the voir dire to ascertain which jurors are likely to be favorable and which unfavorable to the case, though this latter exercise is fraught with obvious peril. It is not unusual for an entire day to be lost in choosing the jury, and the process can drag on for weeks as the William Kennedy Smith trial recently illustrated.<sup>14</sup> Lawyer-conducted voir dire and peremptory challenges should be eliminated. If the parties are required to go to trial with the jury that shows up, subject only to a few, brief inquiries by the trial judge as to possible sources of bias, justice will be as well served as it is now, and much more swiftly.

Rule 24(a) of the Federal Rules of Criminal Procedure provides that the court *may* conduct the voir dire.<sup>15</sup> This should be made mandatory. In the run-of-the-mill case, two questions would suffice: "Do any of you have personal knowledge of the participants or events of this case?" and "Is there any reason why any of you cannot render a fair and impartial verdict in this case?" Of course, the judge, at the attorneys' suggestion, could ask further questions as necessitated by a particular case, and certain types of cases, such as death penalty cases, would always require a more searching inquiry. Preliminary screening of the jurors could even be performed by the jury commissioner before the jurors reach the courtroom.

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13. Michael J. Rubinstein & Teresa J. White, *Plea Bargaining: Can Alaska Live Without It?*, 62 JUDICATURE 266 (1979).

14. See Christine Stapleton, *Smith Jury Pick a Game of Chance*, ATLANTA CONST., Oct. 27, 1991, at A3.

15. FED. R. CRIM. P. 24(a).

In the 1988 case of *Ross v. Oklahoma*,<sup>16</sup> the Supreme Court made it clear that "peremptory challenges are not of constitutional dimension."<sup>17</sup> Peremptory challenges are largely a matter of wild guesses about how jurors will decide the case based upon their answers to one or two questions in the voir dire. Studies have shown that these guesses are as likely to be wrong as they are to be right.<sup>18</sup> To the extent that they are not wild guesses, they are worse: an exercise in "cooking" the jury to be more favorable to the view of the attorney exercising the challenge.

In *Batson v. Kentucky*,<sup>19</sup> the Supreme Court struck down the prosecutor's use of peremptory challenges to strike members of the defendant's race from the jury. Obviously, the prosecutor was doing this in order to end up with a jury that might be less sympathetic to the defendant. Prosecutors routinely challenge anyone with a word like "social" in their job title, such as social workers or sociologists.<sup>20</sup> The theory is that such jurors are more likely to feel that people who commit crimes are not really to blame for them—the blame is society's. In the same way, defense attorneys are likely to strike people who are themselves, or who have close relatives, involved with law enforcement. Even if peremptory challenges served their apparent function of eliminating people on the far ends of the political spectrum from the jury, it does not seem that this is a necessary or desirable goal, and it tends to interfere with the "fair cross-section" requirement as defined by the Supreme Court.<sup>21</sup> The elimination of jurors at the far ends of the political spectrum is especially unnecessary if, as discussed below, non-unanimous verdicts are allowed.

Peremptory challenges can give the prosecutor a particularly unfair advantage where, as is common, the same jury venire staffs all of the petit juries for an extended period of time. Toward the end of that period, the prosecutor's office begins to develop a "track record" of conviction- or acquittal-prone jurors. The prosecutor will then use this information either to strike the latter, or to strike "neutrals" in order to impanel the former.<sup>22</sup>

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16. 487 U.S. 81 (1988).

17. *Id.* at 88.

18. E.g., Hans Zeisel & Shari Seidman-Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 528 (1978) ("[V]oir dire . . . did not provide sufficient information for attorneys to identify prejudiced jurors.").

19. 476 U.S. 79 (1986).

20. At least this was the practice of prosecutors in Washington, D.C., when I was an assistant United States attorney.

21. See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

22. See *Hamer v. United States*, 259 F.2d 274 (9th Cir. 1958) (discussing use of the "jury book" and rejecting defense attorney's request for access to it); see also KAMISAR ET AL., *supra* note 9, at 1299-1332.

Since all defendants are not represented by a single office, it is impossible for defense attorneys to develop a similar "jury book." In *Batson*, Justice Marshall urged that peremptory challenges be banned.<sup>23</sup> Since they are sometimes exercised unfairly, and, even when they are not, they are a waste of time, I agree.

The next big time-waster is attorney arguments. Most attorneys seem to believe that "longer is better." While everyone else in the courtroom nods off, attorneys ramble through every aspect of the case and the judge's instructions. Whatever else *L.A. Law* may have done for the legal profession, it has illustrated what I have believed for years: that the essence of the argument to the jury in most cases can be captured in a very few minutes. Limiting opening statements to five minutes and closing to ten is more than enough in the simplest cases, such as a one- or two- witness armed robbery of a convenience store, and would allow the jury to convene to decide the case while the evidence was still fresh in their minds.<sup>24</sup> Given the attention span of the average juror, shorter arguments would likely be more effective than long ones.<sup>25</sup>

By the same token, many jury instructions are unnecessary and incomprehensible to the average juror. In most cases, little more is required beyond listing the elements of each offense, stressing that the prosecution must prove each element beyond a reasonable doubt, making some attempt at explaining what "reasonable doubt" is, and enjoining the jury to decide the case on the law and facts as adduced in court.

Finally, trial judges should require attorneys, particularly prosecutors, to justify the calling of each witness, since it is not uncommon, though not always good strategy, for attorneys to call multiple witnesses to testify to the same thing. Since the typical defense case is brief, and since the defendant has a right to compulsory process and ought not to be left with the feeling that he has not been allowed a full defense, limitations on the calling of defense witnesses should be undertaken with care. Limiting each side's case

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23. *Batson*, 476 U.S. at 107 (Marshall, J., concurring).

24. The Supreme Court approved, in dictum, time limits on closing arguments in *Herring v. New York*, 422 U.S. 853, 862-63 (1975) (holding that closing argument by defendant's attorney may not be forbidden altogether). See also Michael R. Flaherty, Annotation, *Propriety of Trial Court Order Limiting Time for Opening or Closing Argument in Criminal Cases—State Cases*, 71 A.L.R.4TH 200, 209 (1989) (discussing various time limits on attorney arguments and noting that "it is generally recognized that courts may limit the time consumed by counsel in final argument"). But see *Stockton v. Florida*, 544 So. 2d 1006 (Fla. 1989) (reversing conviction because 30-minute time limit on closing arguments in a murder case with 15 witnesses was unreasonable).

25. See, e.g., Daniel G. Linz & Steven Penrod, *Increasing Attorney Persuasiveness in the Courtroom*, 8 LAW & PSYCHOL. REV. 1, 28-29 (1984) (finding longer, more complex arguments less persuasive).

to a set time period, such as two hours in the simplest cases, and leaving it to the attorneys to decide which witnesses to call is another possible approach.

Jury deliberations can be accelerated by allowing non-unanimous verdicts and juries of less than twelve members. Both of these devices have been approved by the Supreme Court.<sup>26</sup> While the Court has never declared what the "bottom line" is in this regard, it has upheld a nine-to-three verdict,<sup>27</sup> but indicated that a guilty verdict by a bare majority would probably not be sufficient.<sup>28</sup> A five-to-one verdict has also been struck down,<sup>29</sup> but a unanimous verdict by a six member jury has been upheld.<sup>30</sup> A consideration of all of the cases leads me to the conclusion that a six-to-two vote is the minimum combination of smaller size and non-unanimity that the Court's cases would allow. While this reform would be less important than the others, because the judge and lawyers can move on to other business while the jury deliberates, it would nonetheless yield three significant advantages. First, reducing the size of juries and the time each juror spends per case would reduce juror costs to the system and the time required to empanel the jury. More importantly, smaller, non-unanimous juries would be much less likely to hang—a very wasteful result since it means that a trial that may have lasted for weeks must be done over. Finally, as noted above, allowing non-unanimous verdicts makes a detailed voir dire less necessary.<sup>31</sup>

All of these suggestions are offered in the name of efficiency—it is better to provide a more efficient trial to more defendants, even if that proceeding might not develop all issues as fully as the traditional trial. However, in my view, following these suggestions would also improve the *quality* of trials. Given the realities of short juror attention spans that shorten even more as a long trial drones on, a trial that moves swiftly from voir dire to verdict would be a marked improvement in both fairness and efficiency over the current, tedious system. If shorter trials would mean that plea bargaining could be eliminated or reduced (because more court time would be available for trials), the net gain to the system of justice would be even greater.

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26. *Williams v. Florida*, 399 U.S. 78 (1970) (upholding a six member jury); *Apodaca v. Oregon*, 406 U.S. 404 (1972) (upholding a non-unanimous verdict).

27. *Johnson v. Louisiana*, 406 U.S. 356 (1972).

28. In *Johnson*, the Court indicated that a "substantial majority" of the vote was required for conviction. *Id.* at 362.

29. *Burch v. Louisiana*, 441 U.S. 130 (1979).

30. *Williams*, 399 U.S. 78.

31. For "[a]rguments pro and con on the effectiveness of a jury of six compared to a jury of twelve," see *Colgrove v. Battin*, 413 U.S. 149, 159 n.15 (1973) (concluding that a jury of six was adequate). But see Michael J. Saks, *Ignorance of Science Is No Excuse*, TRIAL, Nov.-Dec. 1974, at 18 (criticizing the *Colgrove* Court's conclusion).