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From the Legal Literature

Francesca Laguardia*

EXAMINING THE SPREAD OF PLEA BARGAINING

I. INTRODUCTION

For over forty years, plea bargaining's effects on incarceration and criminal procedure have been a central concern of criminal legal practitioners and academics.¹ Plea bargaining, and the vast power imbalances between prosecution and defense, have been vilified as a primary contributor to mass incarceration.² The combination of

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¹The literature on plea bargaining is too vast to list, but some representative articles include Albert Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 50 (1968); Albert Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975) [hereinafter, Alschuler, *Defense Attorney's Role*]; Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L. J. 1079, 2000 (1992); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992); Frank H. Easterbrook, *Plea Bargaining As Compromise*, 101 YALE L.J. 1969, 1978 (1992); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004); Gabriel J. Chin, *Do Procedural Claims Drive out Merits Claims in Plea Bargaining?: A Comment on the Work of the Late Professor William Stuntz*, 51 DUQ. L. REV. 767 (2013); Milton Heumann, *Plea Bargaining Revisited: Understandings of Negotiated Justice in the Twenty-First Century*, 49 CRIM. L. BULL. 1459 (2013); Daniel S. McConkie, *Structuring Pre-Plea Criminal Discovery*, 107 J. CRIM. L. & CRIMINOLOGY 1 (2017).

²Cynthia Alkon, *An Overlooked Key to Reversing Mass Incarceration: Reforming the Law to Reduce Prosecutorial Power in Plea Bargaining*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 191, 192 (2015); Brady Heiner, *The Procedural Entrapment of Mass Incarceration: Prosecution, Race, and the Unfinished Project of American Abolition*, PHIL. & SOC. CRITICISM 13 (2015); Alan J. Gocha, *The Sanitization of Violence: Exposing the Plea Bargain Regime As A Tool for Mass Injustice*, 8 GEO. J.L. & MOD. CRITICAL RACE PERSP. 307, 330 (2016); Douglas Savitsky, *The Problem with Plea Bargaining: Differential Subjective Decision Making as an Engine of Racial Disparity in the United States Prison System*, 43 (August 2009) (Ph.D. dissertation, Cornell University) (on file with Cornell University Library system); Albert W. Alschuler, *Plea Bargaining and Mass Incarceration*, 76 N.Y.U. ANN. SURV. AM. L. 205 (2021).

harsh criminal sentences,³ the “trial penalty” or “trial tax” whereby judges sentence defendants more harshly for taking their case to trial rather than pleading out,⁴ and prosecutors’ almost completely unchecked power to bring and dismiss charges⁵ creates severe imbalances that pressure defendants to plead guilty.⁶ Scholars have raised concerns that plea bargaining may particularly increase the likelihood that innocent defendants are convicted,⁷ although empirical data seems to suggest this concern may be overblown.⁸ Others have charged that it undermines democratic ideals by removing the public from the trial process,⁹ and that it actively hides government misconduct by reducing and/or “raising the bar” for litigation regard-

³Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 718 (2006).

⁴Nancy J. King, David A. Soule, Sara Steen, & Robert R. Weidner, *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 973–75 (2005); Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L.Q. 67 (2005); Jeffery T. Ulmer & Mindy S. Bradley, *Variation in Trial Penalties Among Serious Violent Offenses*, 44 CRIMINOLOGY 631 (2006); HUM. RTS. WATCH, AN OFFER YOU CAN’T REFUSE: HOW US FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY 102–12 (Dec. 2013), http://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0.pdf; Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant’s Dilemma: an Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 14 (2013); Doug Lieb, Note, *Vindicating Vindictiveness: Prosecutorial Discretion and Plea Bargaining, Past and Future*, 123 YALE L.J. 1014, 1051 (2014); J. Vincent Aprile II, *Judicial Imposition of the Trial Tax*, 29 CRIM. JUST. 30, 30 (2014); Nancy J. King, David A. Soule, Sara Steen, Robert R. Weidner, & Brian D. Johnson, *Trials and Tribulations: The Trial Tax and the Process of Punishment*, 48 CRIME & JUST. 313, 313 (2019); Walter I. Gonçalves, Jr., “How Much Time Am I Looking at?": Plea Bargains, Harsh Punishments, and Low Trial Rates in Southwest Border Districts, 59 AM. CRIM. L. REV. 293, 347 (2022).

⁵Lynch, *supra* note 1, at 2124; Bennett L. Gershman, *Prosecutorial Decision-making and Discretion in the Charging Function*, 62 HASTINGS L.J. 1259, 1260 (2011).

⁶Jonathan A. Rapping, *Who’s Guarding the Henhouse? How the American Prosecutor Came to Devour Those He is Sworn to Protect*, 51 WASHBURN L.J. 513, 545 (2012); Alkon, *supra* note 2, at 196.

⁷Albert Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 ALB. L. REV. 919 (2016); Donald Dripps, *Guilt, Innocence, and Due Process of Plea Bargaining* 57 WM. & MARY L. REV. 1343 (2016).

⁸See Dervan & Edkins, *supra* note 4 (finding no drop in diagnosticity of guilty verdicts associated with plea bargaining); see also Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 74 (2008). Garret notes that in 96% of cases of wrongful conviction, defendants had been found guilty at trial. These numbers suggest that innocent defendants do choose to proceed to trial far more often than to plead guilty, as they stand in such contrast with the trend in criminal justice overall, wherein more than 90% of cases are resolved in plea bargains.

⁹Daniel S. McConkie, Jr., *Plea Bargaining for the People*, 104 MARQ. L. REV. 1031, 1034–35 (2021).

ing violations of constitutional criminal procedure.¹⁰ While some few commentators have defended plea bargaining as necessary and as an opportunity for lenience in a harsh system,¹¹ the vast majority of scholarship on plea bargaining has been negative, suggesting it may be at the root of some of the worst aspects of the United States' criminal justice system.

Given all these criticisms, and their prominence in criminal justice literature, it is somewhat shocking that some countries, where plea bargaining was not the norm, have recently authorized the use of plea bargaining in their criminal justice systems.¹² These developments offer an opportunity to examine plea bargaining from a different angle; in particular, to watch and determine whether plea bargaining necessarily results in the types of problems found in our own system, or if some other aspect of the system might be to blame. The two articles discussed below offer an examination of countries' introduction of plea bargaining, and the ways their system has welcomed and responded to this change thus far.

II. JOHN H. LANGBEIN, *THE TURN TO CONFESSION BARGAINING IN GERMAN CRIMINAL PROCEDURE: CAUSES AND COMPARISONS WITH AMERICAN PLEA BARGAINING*, 70 AM. J. COMP. L. 139 (2022).¹³

In *The Turn to Confession Bargaining*, John Langbein traces the German introduction of a system similar to plea bargaining.¹⁴ Langbein is an interesting commentator, as his past work on plea bargaining has situated it in the context of torture, as part of an

¹⁰See, e.g., William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 33, 34 (1997) ("Plea bargaining used to reduce constitutional criminal procedure claims, including against police, raise the bar for raising those claims. The plea bargaining literature contains some anecdotal evidence that prosecutors behave in precisely this fashion.") (citing MILTON HEUMANN, *PLEA BARGAINING* 122–26 (1978)); see also JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL*, 223 (1975) (describing police awareness that repercussions from misconduct will likely be avoided through a plea); J.A. Gilboy, *Guilty Plea Negotiations and the Exclusionary Rule of Evidence: A Case Study of Chicago Narcotics Courts*, 67 J. CRIM. L. & CRIMINOLOGY 89, 93–95 (1976).

¹¹See, e.g., Chin, *supra* note 1, at 767; Frank Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUDS. 289, 289 (1983); Scott & Stuntz, *supra* note 1, at 1909.

¹²Laura Ervo, *Plea Bargaining Changing Nordic Criminal Procedure: Sweden and Finland As Examples*, 90 IUS GENTIUM 255 (2021); John H. Langbein, *The Turn to Confession Bargaining in German Criminal Procedure: Causes and Comparisons with American Plea Bargaining*, 70 AM. J. COMP. L. 139 (2022).

¹³Langbein, *supra* note 12, at 139.

¹⁴Langbein, *supra* note 12, at 139.

argument that it is inherently coercive.¹⁵ In fact, in 1979 Langbein explored Germany's *lack* of plea bargaining, in an effort to show that such a system was possible.¹⁶ It is unsurprising, then, that Langbein considers Germany's new system to be "troubling."¹⁷ He describes the new system as "exhibit[ing] eerie parallels to what we call plea bargaining in American procedure."¹⁸ But it is important to note that the process still bears several important distinctions.¹⁹

Unlike American plea bargaining, which occurs through an informal pre-trial negotiation between prosecutor and defense attorney, German confession bargaining is conducted between the judge and the defendant.²⁰ While American prosecutors have complete discretion to dismiss charges, the German system obligates a prosecutor to bring a case to trial once a formal complaint has been brought and the court has determined that there is probable cause to bring the case.²¹ The defendant need not enter any plea, and there is no pretrial stage at which the defendant pleads guilty or not guilty.²² Even at the trial phase, before the judge, the confessing defendant in Germany will not enter a "plea."²³ Instead, the confession is used to abbreviate the trial, as little more is needed to prove a defendant's guilt once he or she has confessed.²⁴

In German trials, the judge already takes an investigative role, reading all aspects of evidence collected by the prosecutor and then uses the trial to conduct further investigation into witnesses and evidence (it should be noted that the defense also has access to this evidence).²⁵ The trial is structured by the judge, and consists of that oral testimony which is necessary to address the areas where the

¹⁵ John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 3 (1978). For another comparison of plea bargaining to torture see Dripps, *supra* note 7, at 1343–45.

¹⁶ John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204 (1979). In fact, Langbein was incorrect in this assertion, and has now discovered that confession bargaining was likely occurring throughout the 1970s and accounted for as much as 30% of criminal trials in German courts in the 1990s. These confessions were completely informal, however, and unrecorded. Langbein, *supra* note 12, at 142.

¹⁷ Langbein, *supra* note 12, at 139.

¹⁸ Langbein, *supra* note 12, at 140.

¹⁹ Langbein, *supra* note 12, at 140.

²⁰ Langbein, *supra* note 12, at 141.

²¹ Langbein, *supra* note 12, at 140.

²² Langbein, *supra* note 12, at 140.

²³ Langbein, *supra* note 12, at 140.

²⁴ Langbein, *supra* note 12, at 140.

²⁵ Langbein, *supra* note 12, at 144–45.

judge desires clarity.²⁶ The defendant's confession, when it occurs, is then a part of this presentation of evidence. In the case of confession bargaining, the defense counsel and the judge discuss reduced sentences as incentive, and thereby significantly reduce the length of the trial.²⁷

Langbein expresses several concerns about this process. First, as his prior writings have suggested, Langbein finds sentence bargaining to be inherently coercive,²⁸ and because of its coercive nature, it is detrimental to the reliability of confessions and accuracy in criminal trials.²⁹ Langbein's support for this argument largely originates in studies of American plea bargaining, but he cites, as well, a German study that found a large number of German defense attorneys who doubted the confessions of their clients.³⁰ Further, the informal process associated with confession bargaining violates German criminal law principles prioritizing testimony and cross examination occurring in view of the public.³¹ According to Langbein, centuries of German procedure moved away from purely inquisitorial practices and towards more public checks on government investigation, and this movement happened in response to abuses.³² The adoption of confession bargaining seems a step backwards, undermining these centuries of development.³³

In response, one must note (as Langbein acknowledges) that Langbein's 1979 claim that plea bargaining did not exist in German criminal procedure was, largely, incorrect.³⁴ Instead, confession bargaining was already ongoing in the 1970s, but without any formal record of its existence.³⁵ Its use increased since that time, leading to a 1997 high court case accepting the practice as reconcilable with German criminal law principles, provided the confession was corroborated and the final bargain occurred in open court, at trial.³⁶ These caveats are small protection, as Langbein points out, given that the court will have already determined that there was probable cause for the trial (which likely necessitates that some corroboration of the confession exists), and that the bargaining can begin

²⁶Langbein, *supra* note 12, at 145.

²⁷Langbein, *supra* note 12, at 141.

²⁸Langbein, *supra* note 12, at 147.

²⁹Langbein, *supra* note 12, at 146.

³⁰Langbein, *supra* note 12, at 146.

³¹Langbein, *supra* note 12, at 147.

³²Langbein, *supra* note 12, at 160–1.

³³Langbein, *supra* note 12, at 160–1.

³⁴Langbein, *supra* note 12, at 142.

³⁵Langbein, *supra* note 12, at 142.

³⁶Langbein, *supra* note 12, at 152–4.

informally, out of the hearing of the public.³⁷ The step to acceptance of confession bargaining occurred in 2009, when the German legislature amended its criminal code to codify the practice.³⁸

This process has not gone unnoticed in Germany, and Langbein reports that German scholars decry the development as “a radical break from the theoretical foundations of criminal procedure” and a “most severe crisis.”³⁹ But these complaints are, perhaps, weakened by the fact that confession bargaining has existed in Germany for such a large period of time.⁴⁰ It remains to be seen whether the practice will take over German criminal justice to the extent that it has become dominant in the United States.

III. LAURA ERVO, *PLEA BARGAINING CHANGING NORDIC CRIMINAL PROCEDURE: SWEDEN AND FINLAND AS EXAMPLES*, 90 IUS GENTIUM 255 (2021).⁴¹

Laura Ervo uses Sweden and Finland to explore the use of plea bargaining in Nordic criminal justice systems.⁴² She states that plea bargaining has been available in Finland since 2015, making it possible not only to resolve trials, but to resolve investigations as well.⁴³ Legislation governing confessions and pleas offer several safeguards that will be largely familiar to American lawyers, including a responsibility for the court to ensure that the plea is voluntary and intentional, and to resolve any ambiguities in the parties’ statements.⁴⁴

Fascinatingly, Ervo connects this development to a move away from truth-finding, and towards (instead) the real feelings of the parties.⁴⁵ Rather than fairness being achieved when guilty people are punished and innocent people go free, fairness is believed to be established when parties are satisfied that the procedure was fair.⁴⁶ This has moved criminal procedure away from strict procedural fairness and towards communication and negotiation between judges and parties.⁴⁷ Even more, Ervo suggests that the search for ac-

³⁷ Langbein, *supra* note 12, at 152–5.

³⁸ Langbein, *supra* note 12, at 155–6.

³⁹ Langbein, *supra* note 12, at 143.

⁴⁰ Langbein, *supra* note 12, at 142.

⁴¹ Ervo, *supra* note 12, at 255.

⁴² Ervo, *supra* note 12, at 255.

⁴³ Ervo, *supra* note 12, at 257.

⁴⁴ Ervo, *supra* note 12, at 258.

⁴⁵ Ervo, *supra* note 12, at 260–65.

⁴⁶ Ervo, *supra* note 12, at 261.

⁴⁷ Ervo, *supra* note 12, at 261–62.

curacy and absolute truth has been associated with totalitarianism.⁴⁸ She states “In the modern society, [truth] has been linked with overly strong police power, lack of human rights, torture and so on . . . which is anything else but idealistic.”⁴⁹

Ervo links this development to increased interest in conflict resolution, mediation, increased private decision-making power, and protection of the fundamental rights of citizens.⁵⁰ It is a testament to the effects of cultural differences on criminal procedure that the “fundamental rights of citizens” do not appear to include truth or accuracy in criminal judgments. An increase in plea bargaining, Ervo argues, should be seen as an increase in party autonomy and a move away from complete authority of the judiciary towards authority of parties in the proceedings.⁵¹

Despite these arguments, however, which Ervo suggests apply in Sweden as well as in Finland,⁵² legislation to allow for plea bargaining has been expressly rejected in Sweden.⁵³ Ervo reports that the use of “crown witnesses” (by her description, essentially cooperating witnesses who have been offered a reduction in sentence in exchange for their cooperation) is currently under debate.⁵⁴ Swedish opinion appears to be generally opposed to the practice, but a high court case allowing for the possibility has opened the door, arguably permitting broader developments in plea bargaining as well.⁵⁵ Ervo maintains that the criminal procedure paradigms in both countries appear to be changing.⁵⁶

Ervo suggests that the loosening of opinion towards plea bargaining may be affected not only by the general social beliefs and trends outlined above, but also by strict concerns of economy and efficiency.⁵⁷ She notes that Finland, which has been more welcoming to plea bargaining, has had a less stable economy than has Sweden.⁵⁸ Moreover, the interest in economy and resource allocation was directly acknowledged by Finnish legislators when determin-

⁴⁸Ervo, *supra* note 12, at 262.

⁴⁹Ervo, *supra* note 12, at 262.

⁵⁰Ervo, *supra* note 12, at 263.

⁵¹Ervo, *supra* note 12, at 264–65.

⁵²Ervo, *supra* note 12, at 262, 263.

⁵³Ervo, *supra* note 12, at 258.

⁵⁴Ervo, *supra* note 12, at 258.

⁵⁵Ervo, *supra* note 12, at 258–60.

⁵⁶Ervo, *supra* note 12, at 266.

⁵⁷Ervo, *supra* note 12, at 266.

⁵⁸Ervo, *supra* note 12, at 266.

ing whether to adopt the practice.⁵⁹ In contrast, Sweden has fewer financial concerns, but more significant pragmatic concerns regarding the use of inducing cooperation through plea bargaining.⁶⁰ This is particularly evident in Sweden's recent struggles with confronting and prosecuting organized crime.⁶¹

IV. CONCLUSION: SIMILARITIES IN VALUES LEADING TO ACCEPTANCE OF PLEA BARGAINING

In focusing on practical concerns, both of resource allocation and of pursuing certain types of criminal activities, Ervo offers a similar outline of the path to the use of plea bargaining that is offered in Langbein's description of Germany. Langbein states that it is likely that Germany's acceptance of confession bargaining was spurred, in large part, by the prevalence of narcotics and white collar prosecutions.⁶² These investigations, he notes, require increased time and resources on the part of all parties to the litigation.⁶³ Moreover, they lead to an influx of defendants in the criminal justice system who have the money to pay for expensive attorneys; attorneys who will bring every challenge not only to the evidence presented by the prosecution but to the legitimacy of the judge as well.⁶⁴ This means that all parties benefit from the plea.⁶⁵ As Langbein notes, this reflects precisely the statements of American scholars evaluating the spread of plea bargaining in American criminal courts.⁶⁶

What is fascinating and, as Langbein states, troubling, is the seeming agreement and acceptance that abandonment of truth is perhaps one necessary aspect of accepting a system of plea bargaining. If this insight remains consistent in the international context, it will certainly be an important addition to our own scholarship on plea bargaining in the United States.

⁵⁹Ervo, *supra* note 12, at 266.

⁶⁰Ervo, *supra* note 12, at 266.

⁶¹Ervo, *supra* note 12, at 266.

⁶²Langbein, *supra* note 12, at 148.

⁶³Langbein, *supra* note 12, at 148–49.

⁶⁴Langbein, *supra* note 12, at 149–50.

⁶⁵Langbein, *supra* note 12, at 149–50.

⁶⁶Langbein, *supra* note 12, at 151 (citing Albert Alschuler, *The Trial Judge's Role in Plea Bargaining*, 76 COLUM. L. REV. 1059 (1976); Alschuler, *The Defense Attorney's Role*, *supra* note 1, at 1179; GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 6–11 (2003)).