

Comparative Perspectives on Plea Bargaining in Germany and the U.S.A.

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This article provides a historical and a contextual understanding of plea bargaining in the U.S.A and Germany. The situation of plea bargaining in Germany is also examined in light of its European Convention on Human Rights obligations. A tentative definition of plea bargaining is proffered by the author to illustrate how the practice of plea bargaining has developed within the German and U.S.A context as both countries have considered the matter at a constitutional level. The development of plea bargaining is tracked by analysing both U.S. and German case law and the decisions handed down by the respective courts.

There are still reservations regarding the practice of plea bargaining and there remains wide spread concern over its application. Despite these reservations the practice of plea bargaining remains within the legal system and a way must be found which balances the tensions of the State and the individual freedoms. In order to maintain the basic and fundamental rights of the individual, Germany and the U.S.A have both developed creative interpretations of plea bargaining and these creative interpretive methods are discussed in light of the cases of the U.S.A. as well as the criminal statutory legislation and Constitutional Court decisions of Germany.

I. Plea bargaining

Plea bargaining, in its traditional sense, takes the form of an agreement between the prosecution and defence upon which the defendant admits their guilt in return for a reduction in their charge or sentence. This is generally known as prosecutorial plea bargaining. This form of plea bargaining can take place before the judge in their chambers with both the parties present. The judge will then indicate the probable charge in return for the guilty plead. This form of the plea bargain is characteristic of common law systems. The practice of conducting the plea bargain in the private chambers

of the judge runs counter to the concept of Article 6 of the European Convention on Human Rights (ECHR) which stipulates that justice should be administered in public save when it is not in the public interests. The European Court of Human Rights (ECtHR), through its own decisions, has interpreted that the requirement of publicity as including that all are subject to the rules of the trial which most importantly include that justice is to be done. Article 6 also interprets the right to justice as being protected when the decision is decided in public by stating that the ECHR has been held to apply to the sentencing stage of the trial.

The legal principles that justice should be public, transparent as well as “being seen to be done” provide the foundation upon which the ECtHR has based the principle of equality of arms. The ECtHR has developed, in conjunction with the topic of justice and equality of arms in their case law, the appearance test. This test seeks to ensure not only equality between the parties but that the general public maintain and have their faith restored in the mechanisms of the administration of justice. This is achieved through the transparency and publicity of the trial. Both of these fundamental principles are infringed when plea bargains are decided in the privacy of the judge’s chambers. Article 9 of the Union Internationale des Avocats International Charter of Legal Defence Rights states that judicial proceedings must be in public and “Every sentence passed in a criminal or civil matter must be made in public, except where the interests of minors are concerned or where the trial is concerned with matrimonial differences or the care of children.”¹

Plea bargaining can be used as a positive prosecution tool by which the trial can be speedily disposed where a favourable verdict can be secured and in this sense, the prosecutor is the sole holder and controller of the criminal procedure.² The process of the plea bargain can be divided into three phases. Firstly, the prosecutor induces the defendant into engaging in the plea bargain with an offer, typically in the form of a sentence reduction or charge. Secondly, the defendant then admits their guilt or confesses to the crime and this is followed by the waiver of their right to a fair trial.³ A consequence of these three phases is that the prosecutor does not have to prove guilt and this is highly important in cases where there is an unob-

¹ Constitutional Implication of Plea Bargaining by Peter Charleton SC and Paul Anthony McDermott BL <http://www.lawlibrary.ie/documents/publications/petercharleton.pdf> (accessed on the 22nd of July 2013)

² J. H. LANGBEIN, *Torture and Plea Bargaining*, *The University of Chicago Law Review* 46, No.1 Autumn, 1978.

³ *Ibid.*

tainable standard of “beyond all reasonable doubt”. This standard sometimes seems unobtainable because of factors such as the admissibility of evidence; reliability of witness and the vulnerability of the victim.

As a consequence of the use of plea bargaining, the jury trial, infamous in common law jurisdictions, is now making way for more efficient and cost effective courts. This shift in the administration of justice has repercussions which are felt most acutely by the socially and economically disenfranchised. Plea bargaining cannot be solely blamed for creating a rich/poor access to justice chasm rather it has publicly drawn attention to such schisms. Those unable to afford legal representation often fall foul of the law machine and in practices, such as plea bargaining, this reality is brought to the fore because the cost of justice becomes a price which defendants are unable to pay resulting in the denial of their constitutional right to a trial. This constitutional right to prosecution has presented problems in the German system where plea bargaining has been introduced.

In the U.S., the prosecution draw their authority from the Federal Rules of Criminal Procedure which enables them to ascertain the sentencing differentials. This information can be used by the prosecutor as a coercive force in the plea bargaining process. Despite this potential for coercive action, the U.S. system does provide guidelines for the court when it comes to accepting the defendant’s guilty plea. Federal Rule 11 (d) of the Rules of Criminal Procedure sets out that the Court cannot accept a guilty plea without first determining, in open court, from the defendant, “that the plea has been made voluntarily and was not the result of threats or of promises apart from a plea agreement.”⁴ This phraseology is important as it indicates that the principle of publicity is paramount to the guilty plea being accepted. The plea also has to be voluntary and can only be made because of promises, in the case of a plea bargain which indicate that the U.S. has attempted to legitimise a practice which is, in essence, in contravention of Federal Rule 11 (d). In Germany there is a similar requirement where the judge has to ascertain whether the truth of the matter has been ascertained.

Many problems remain regarding the application of plea bargaining despite attempts to legitimise and find loop holes. These problems include issues such as encouraging the defence counsel to persuade their clients to accept offers which may not be in their best interests. The practice of plea bargaining raises questions about ineffective assistance of counsel claims. This is discussed below in more detail. Defence counsel are typically underfunded and under resourced when compared the State and this places

⁴ FED. R. CRIM. P. 11 (d)

them at a significant disadvantage with plea bargaining as both sides are charged with ensuring that justice is served. A danger of the plea bargain is that there is no obligation placed upon the prosecution to document the offered plea bargains.

The benefits for the defendant in accepting a pleas bargain is that there is typically a significant reduction in penalty as well as an agreement over the terms of the confinement. For most defendants, a speedily disposed of the case is an addition attraction.

There still remain numerous pitfalls with adoption of the plea bargaining model despite positive attributes for both sides of the case. The biggest concern is that innocent defendants will plead guilty to a crime they did not commit and this admission of guilt results in the defendant waiving certain rights and privileges.

The most worrying pitfall is that the presumption of innocence is being eroded by the use of plea bargaining. John Langbein documents in "Torture and plea bargaining" how the development of torture as a means by which to garner confessions has paved the way for development of plea bargaining⁵. Langbein further argues that there are multiple flaws with plea bargaining. Langbein goes on to state that so long as we have a mechanism by which one can obtain an omission of guilt the need to overcome the presumption of innocence is redundant.

Langbein is a strong supporter of the sixth amendment right to a fair trial and for there always to be a trial. Lippke, however, concedes that in some circumstances the use of the plea bargaining mechanism does have benefits⁶ Lippke, unlike Langbein is of the opinion that there are elements of the plea bargain that are worth preserving.⁷ In addition to the admission of guilt and depending upon the severity of the crime, the offer of the reduction in sentence can actually be beneficial for the defendant. This action reduces the impact of the deterrence if the defendant knows that the possibility of a plea bargain will enable them to barter for a lesser sentence. In this way, it is not only the prosecution which can manipulate the system to their advantage. The English term plea bargain conjures up unhelpful imagery, in that it presupposes a relationship where both parties come to the table with something to offer. In reality, this is far from the truth as there is a very real bias towards the prosecution. The prosecution have all the resources of the State at their disposal.

⁵ LANGBEIN (as in n. 2)

⁶ R. L. LIPPKE, *The Ethics of Plea Bargaining* Oxford University Press, 2011, chap. Introduction

⁷ Ibid.

The defence is limited to the testimony of their client, any witnesses that may support their case and the disclosure of documents by the defendant. Defence lawyers have limited resources which normally results in any plea bargain being, rubber stamped or rejected. In very limited scenarios will the defendant be able to offer something that will help to mitigate their own case and actually bargain.

For plea bargaining to be fully embraced as part of the modern legal systems, it is necessary to remove issues of uncertainty regarding the sentencing brackets that are prevalent particularly in the United States of America. This is necessary to enable a defendant to make an informed decision concerning their acceptance of the plea bargain. Removing this cloak of uncertainty will keep the offer of a plea within reasonable parameters and remove undue pressure and coercion by the prosecutor. Additionally the defendant should not be allowed to manipulate the process by accepting or employing a strategic 'choice of the moment' tactic. Unfortunately, plea bargaining is invariably made up of tactics by both of the parties to the proceedings. This article will take into consideration the constitutional provisions of both the U.S.A. and Germany. It will be noted that in the case of Germany that the constitutional guarantees have presented a problem for the incorporation of plea bargaining. This is in part to do with the fact that fundamental rights are enshrined in constitutions. Germany's constitution protects individuals from arbitrary imprisonment by the State as does the U.S.A. Both countries ensure that ones liberty is protected by certain criminal justice safeguards.

II. The Development of Plea Bargaining in the United States of America

The U.S. model of plea bargaining is by far the most developed in the legal world and can take various forms each of which has importance for the outcome for the defendant. The plea bargain can be divided into two areas, concessions (consensual), and contractual⁸. The first requires that the defendant makes a nominal guilty plea in order to receive a concession from the prosecutor. This could mean that the defendant pleads guilty to some of the charges against him and the prosecution concedes to drop some of the other charges against them. The contractual aspect of the plea

⁸ D. ALGE, *Negotiated Plea Agreements in Cases of Serious and Complex Fraud in England and Wales: A New Conceptualisation of Plea Bargaining?*, Web JCLI 19 (1) 2013

bargain was established in the U.S. Supreme Court case of *Brady v. United States*⁹. The case of *Brady v. United States*¹⁰ granted the plea bargain a constitutional basis. Additionally, the Supreme Court established certain safeguards to protect against, the previously mentioned, infringements of the fundamental rights of the defendant. These safeguards include that the hearing must take place in open court and that the defendant must “intelligently” make the waiver of their right to a trial. Additionally, the court must be able to satisfy itself that the plea was made by the defendant “voluntarily and knowingly”. Despite these extensive safeguards there is a plethora of cases where the defendant has effectively been punished for wanting to exercise their right to a trial¹¹. The Supreme Court held that there is

“no element of punishment or retaliation so long as the accused is free to accept or reject the prosecution’s offer.”

Chief Judge William G. Young of the Federal District Court in Massachusetts has stated that there is,

“Evidence of sentencing disparity visited on those who exercise their Sixth Amendment right to trial by jury is today stark, brutal, and incontrovertible. Today, under the Sentencing Guidelines regime with its vast shift of power to the Executive, that disparity has widened to an incredible 500 percent. As a practical matter this means, as between two similarly situated defendants, that if the one who pleads and cooperates gets a four-year sentence, then the guideline sentence for the one who exercises his right to trial by jury and is convicted will be 20 years. Not surprisingly, such a disparity imposes an extraordinary burden on the free exercise of the right to an adjudication of guilt by one’s peers. Criminal trial rates in the United States and in this District are plummeting due to the simple fact that today we punish people—punish them severely—simply for going to trial. It is the sheerest sophistry to pretend otherwise.”

Attorney Timothy Sandfeur argues, in defense of plea bargaining, that the defendant has the right to make a contractual agreement with the State as in other free-trade situations. Plea bargaining, however, is more like forced association as the accused cannot simply walk away from the State when charged with a crime.¹² The prosecutor, when using the plea

⁹ 397 U.S. 742 (1970)

¹⁰ 397 U.S. 742 (1970)

¹¹ W. J. STUNTZ, *Bordenkircher v. Hayes: The Rise of Plea Bargaining and the Decline of the Rule of Law*, Harvard Public Law Working Paper No. 120 November 2005, p. 1.

¹² T. LYNCH, *The Case Against Plea Bargaining*, Regulation 26 2003

bargain, can either offer a change or reduction in the charge that means that the defendants plead guilty to a less serious crime than the original charge. Alternatively, they could opt for a variation in the count or sentence. Both of these would mean that the defendant pleads guilty to a subset of multiple original charges or in the latter case they plead guilty agreeing in advance to the given sentence. The prosecutor agrees to set out the facts upon which the sentence will be charged and the appearance of these facts can be negotiated as part of the bargaining process. It is clearly set out how these concessions will affect the defendant and how they are to be punished under the Sentencing Guidelines.

The U.S. Supreme Court acknowledged the existence of the plea bargain and its necessity in an overloaded system which it was serving to protect from complete collapse. The Supreme Court's vision for plea bargaining, as formulated in the *Brady v United States* decision, was as a tool to be used when and where there was substantial evidence which pointed towards the overwhelming guilt of the defendant. This was perceived as an opportunity to bargain which may provide them with the possibility to achieve a more favourable result. Plea bargaining was only ever meant to be used as a tool by the prosecution in those cases where the guilt of the defendant could be established with very convincing evidence. The increased use of plea bargaining has resulted in the need to test and ensure that the guilty plea had not come from coercion, misrepresentation of promises or bribes.¹³ More than 97% of convictions within the U.S. federal system have resulted from pleas of guilty showing that plea bargaining is the dominant process with the U.S. justice system¹⁴. The advent of sentencing guidelines have further helped to clarify reasonable expected sentencing. This has also further exacerbated the problem of plea bargaining. Sentencing guidelines enable the prosecutor to play with the sentencing differentials which are, "the differences between the sentence a defendant faces if he or she pleads guilty versus the sentence risked if he or she proceeds to trial and is convicted." The danger with this situation is that all of the cards are in the hands of the prosecution.

At the heart of the debate over the appropriateness of the practice of plea bargaining is the associated risks of bargaining away one's justice and that it is the innocent and not only the guilty who are being punished. There is an unhelpful prevalent myth that innocent people will not accept a plea bargain to plead guilty in return for a lesser penalty. It is perceived as

¹³ L. E. DERVAN and P. VANESSA A. EDKINS, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Project*, *The Journal of Criminal Law & Criminology* 103, No. 1 2013

¹⁴ *Ibid.*

not being possible to coerce someone who is innocent into pleading guilty. Much of the assertions placed forward as evidence are based on assumptions of how innocent people may behave in given circumstances. A study, conducted by the Innocence project into the effects of plea bargaining upon the innocent defendant, revealed that more than half of the participants were willing to falsely admit something in order to obtain some perceived benefit.¹⁵

In *Brady*, the Supreme Court made the observation that assumption that the defendant would have been able to make an informed plea of guilty because

*“pleas of guilty are voluntarily and intelligently made by competent defendants with adequate legal counsel and that there is nothing to question the accuracy and reliability of the defendants’ admissions that they committed the crimes with which they are charged.”*¹⁶ (emphasis own)

The Supreme Court has noted that a key element to the acceptance of a plea bargain being constitutional is the option as well as the possibility of the defendant accepting or rejecting the offer.

There have been several attempts at plotting the impact of plea bargains upon the criminal justice system and there are issues over the accuracy of studies when determining the effect innocence has on the choosing of a plea bargain. Dervan and Edkins approached this issue from a psychological background.¹⁷ Their study had students signed up for a fictional problem-solving assessment. Students were placed in a room with one other individual who unbeknown to them was working for the study. The students were told that conferring was forbidden on the second set of questions. The examiner left the room and the “confederate” (the insider) would ask the student for their answers. Those students who offered assistance were placed into the guilty category and the others innocent. The examiner returned after an allotted time, gathered the papers only to return stating that the marked papers showed that the students had cheated. The students were given an opportunity to confess their guilt. The consequences of the admission of guilt would be no compensation for their participation. However, if they did not plead guilty, they would have to appear before the Academic Review Board which would then rule on the matter after hearing both sides

¹⁵ DERVAN AND VANESSA A. EDKINS (as in n. 13)

¹⁶ *Ibid.*

¹⁷ *Ibid.*

arguments. An unsuccessful appearance before the board would result in the student losing their study compensation; their faculty adviser would be informed of the event and compulsory attendance to an ethics class. 56.4% (22 students) innocent students accepted the plea offer whereas the percentage of guilty students who accepted the offer was 89.2%.¹⁸

These results confirm that innocents confessed to the misconduct and guilty defendants are still more likely to plead guilty than innocent ones. The most striking result is that the innocent individuals were willing to admit guilt (falsely) irrespective of the leniency or harshness of the imposed sentence. This shows that there are individuals who will plead guilty simply because they want a quick and decisive conclusion to the whole process and as such defendants may be falsely condemning themselves on matters which have nothing to do with their factual guilt.¹⁹ The innocent defendant's behaviour was high risk-aversion and the statistical nature of the evidence resulted in the defendant choosing that route which gave the lowest personal penalty. This indicates that the defendant is most vulnerable at this stage of the justice process, even more than the police interrogation phase.

This study destroys the commonly held myth of the fact that only the guilty do plead bargaining. Extrapolating upon these findings to the legal context, these results show that the Brady decision has overstretched its remit. The use of plea bargaining is now being employed in scenarios where there is not overwhelming and compelling evidence of guilt against the defendant.

The lack of effective representation is most strongly felt at the lower courts levels where there is a tendency to encourage a plea, in order to avoid a lengthy trial. The right to representation is deemed as being imperative in those circumstances where the risk of the loss of liberty is at the highest.

The financing of legal representation is a large part of the problem. States can spin that legal counsel and representation is actually a hindrance to justice by enabling someone to arm themselves against the state and subsequent prosecution. Case funding in the U.S. is predominantly reserved to the remit of the state courts, whereas there has little concern over the federal courts' spending budget.

In 2004, the American Bar Association revealed that thousands of defendants pass through the criminal justice system without any contact with a legal professional²⁰. This was further reiterated by the Constitu-

¹⁸ DERVAN and VANESSA A. EDKINS (as in n. 13)

¹⁹ Ibid.

²⁰ "Half a century after landmark ruling, we need to ensure counsel for all." by Brian Gilmore, ADN.com, March 13, 2013, www.and.com/2013/03/13/2823264/half-a-century-after-land-

tion Project in 2009 which found that the situation had not changed in 5 years²¹. The current global financial crisis also does not help the situation as there has been a reduction and now limited funding available for indigent defendants counsel services.

*“The recent economic crisis has exacerbated the problem. In New Orleans last year, the chief public defender had to lay off a third of his staff. Hundreds of people languished in jail for months, waiting for a lawyer to be appointed. One man had been there two months for possessing a joint. Another man accused of burglary, sat in jail for more than a year while waiting for an attorney to be assigned to him.”*²²

There has been a movement to recognise that, once counsel has been appointed, there is an overriding duty for that counsel to be effective and not affect the overall fairness of the trial as noted in the plea bargaining cases of *Missouri v Frye*²³ and *Lafler v Cooper*²⁴. The ECtHR has adopted the same position with regards to the provision of a legal defence for the defendant as well as the right to a fair trial. This is to do, in some part, with the margin of appreciation. The U.S. has adopted what is called “the critical stage doctrine” which reasserts the fact that the Sixth Amendment right applies to all “critical stages” of the trial process to ensure that a trial is fair. For example, a lawyer should be provided at the interview stage and also in plea bargaining arrangements. It was considered to be naive to completely ignore that interviews and plea bargaining, which occur before the actual trial, have an overriding impact upon the overall fairness of the trial.

The subsequent cases of *Frye* and *Lafler* cemented the influence of the plea bargain and that its effectiveness will be dependent upon the legal counsel provided to the defendant during their plea bargain decision making process. The Sixth Amendment has been found to be applicable to all of the critical stages of the trial²⁵.

mark.html (accessed on the 26th of March 2013)

²¹ “Half a century after landmark ruling, we need to ensure counsel for all.” by Brian Gilmore, ADN.com, MArch 13, 2013, www.and.com/2013/03/13/2823264/half-a-century-after-landmark.html (accessed on the 26th of March 2013)

²² “Indigent clients suffer as public defenders struggle to keep up with caseloads.” by Karen Houppert, The Washington Post, 26th of March 2013. (accessed on the 26th of March 2013).

²³ No. 10-444 (U.S. Mar. 21, 2012)

²⁴ No. 10-209 (U.S. Mar. 21, 2012)

²⁵ *Montejo v. Louisiana*, 556 U. S. 778, 786

2.1 Missouri v. Frye (No. 10-444 (U.S. Mar. 21, 2012))

The case of Frye concerned the issue that the defendant was not informed of the prosecutor's plea bargain. Frye appealed against his conviction and "brought an ineffective assistance of counsel claim on the basis that his trial counsel's failure to convey the plea offers to him was a violation of his Sixth Amendment right to counsel."

The court investigated whether lapsed plea offers are part of the the two stage Strickland requirement of deficient performance and it held in this case that:

"[t]he reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages."²⁶

The court, from the Frye case, resulted in following test²⁷ for showing ineffective assistance of counsel from a lapsed or rejected plea offer. The defendant must show the following:

1. a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel
2. a reasonable probability the plea would have been entered without the prosecution cancelling it or the trial court refusing to accept it if they had the authority to exercise that discretion under state law

and

3. a reasonable probability that the end result of the criminal process would have been more favourable by reason of a plea to a lesser charge or a sentence of less prison time²⁸

²⁶ C. DUROCHER, "Are We Closer to Fulfilling Gideon's Promise? The Effects of the Supreme Court's "Right-to-Counsel Term"", Issue Brief American Constitution Society for Law and Policy 7 January 2013

²⁷ Ibid.

²⁸ Ibid.

The U.S. Supreme Court upheld the Missouri court decision that the counsel's failure, to inform Frye of the plea bargain before it expired, fell below the objective reasonableness standard. However, the Missouri Court failed to show that possibility of the the prosecution acceptance of the plea bargain and the adherence of the Court to the deal. This was pertinent as Frye was found to be driving without a licence one week before the trial, and this violation would have been taken into consideration with all of his offences. The U.S. Supreme Court therefore postulated that the plea bargain would have been rejected by both sides . As such, the Supreme Court stated that these were matter that the Missouri appellate court would have to initially rule upon.

“This application of Strickland to uncommunicated, lapsed pleas does not alter Hill’s standard, which requires a defendant complaining that ineffective assistance led him to accept a plea offer instead of going to trial to show ‘a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.’”²⁹

Justice Kennedy, in section B of the judgment, finds it necessary to mention that the question of ineffective legal assistance. He goes on to define the duty as well as responsibilities of the defense counsel but then concludes that this scope is not needed in this particular judgment.

Great scope as well as discretion is given, to how a defense lawyer can prepare their case and strategy. This is comparable to Europe and the ECtHR. It is rare that the Courts will directly chastise the practice of a counsel. The U.S. Supreme Court recognised that plea bargaining has become a central facet of the American criminal system and it would be remiss if a defence attorney did not consider and approach their client with the terms of any plea bargain. Based upon this reasoning, the judges determined that a defence attorney would not be working to the best of their professional capabilities and would not be in keeping with the spirit of the Sixth Amendment requirement of effective counsel. In order to ensure that the defendant is informed of the plea bargain, the American Bar Association has established standards which both the prosecution and the defence should follow. These standards require the registration of the presence, or lack, of a plea bargain agreement before any plea is entered. This ensures that the defendant is made aware of the fact before any proceedings have commence.

²⁹ 566 U. S. (2012)

“The American Bar Association recommends defense counsel ‘promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney,’ ABA Standards for Criminal Justice, Pleas of Guilty 14–3.2 (a) (3d ed. 1999), and this standard has been adopted by numerous state and federal courts over the last 30 years.”

The dissenting judgment of Justice Scalia as mentioned in Lafler (2.2 page 16) focused on the fairness of the trial. In this particular case, he asserted that the defendant recognised his guilt as well as the fairness of the proceedings. The central point of dissenting Justice Scalia’s judgment was that,

“counsel’s mistake did not deprive Frye of any substantive or procedural right; only of the opportunity to accept a plea bargain to which he had no entitlement in the first place.”

Justice Scalia maintains that his colleagues have misapplied the rule in Strickland as the matter is about whether or not the ineffective legal assistance received has deprived the defendant of the right to a fair trial as well as some procedural and substantive duties. The Justice takes issues with the point that defence counsel have their own personal style when it comes to plea bargaining and that it will not do to simply say that, “it will not be so clear that counsel’s plea-bargaining skills, which must now meet a constitutional minimum, are adequate.”

Additionally,

“if an attorney’s ‘personal style’ is to establish a reputation as a hard bargainer by, for example, advising clients to proceed to trial rather than accept anything but the most favourable plea offers? It seems inconceivable that a lawyer could compromise his client’s constitutional rights so that he can secure better deals for other clients in the future; does a hard-bargaining ‘personal style’ now violate the Sixth Amendment? The Court ignores such difficulties, however, since ‘[t]his case presents neither the necessity nor the occasion to define the duties of defense counsel in those respects.’ Ante, at 8. Perhaps not. But it does present the necessity of confronting the serious difficulties that will be created by constitutionalization of the plea-bargaining process. It will not do simply to announce that they will be solved in the sweet-by-and-by.”

Justice Scalia agrees as well as accepts that the counsel's advice was inadequate but he does not agree with the Court's new interpretation of prejudice. He states that it is unwise to constitutionalise the practice of plea bargaining because he rather critically states that it would involve the very unwise practice of looking into the "crystal ball" of the past so as to postulate the long chain of possible acceptance events which would be need from the defendant, Missouri state prosecution and Judge, with each link affect the next decision. Also, would the appeal court process have accepted a withdrawal of the plea bargain by the prosecution. Justice Scalia asserts the fact that Frye was arrested one week before the trial for driving without a licence as evidence that it was probably very highly likely that the prosecution would have withdrawn their plea bargain and that the appellate court would have accepted this withdrawal. Justice Scalia predicted that after the handing down of this decision of the constitutionality of plea bargaining that there would be a whole host of new cases which would be addressing this topic.

The reasoning for his dissent was that it was inconsistent with the Sixth Amendment which assures the guarantee of the right to a fair trial. This does not apply to a plea bargaining process and also that the decision was inconsistent with the previous precedent's of the court concerning this matter.

"Whatever the "boundaries" ultimately devised (if that were possible), a vast amount of discretion will still remain, and it is extraordinary to make a defendant's constitutional rights depend upon a series of retrospective mind-readings as to how that discretion, in prosecutors and trial judges, would have been exercised."

What is more worrying about this judgment is that Justice Scalia seems to be at odds with the general principle of a plea bargain as being promoted as part of the US justice system. His attitude and mannerism suggest that he sees plea bargaining as a slight addition not a core part of the process.

2.2 Lafler v. Cooper (No. 10-209 (U.S. Mar. 21, 2012))

The cases of Lafler and Frye (2.1, page13) are often referred to as companion cases as they were both handed down on the same day by the court as well addressing very similar issues. This case was especially noteworthy

because it enabled the U.S. Supreme Court to review as well as declare a new doctrine on habeas review.

The Court found that Cooper's lawyer had been deficient under the first prong of the Strickland test. This is a hard test to satisfy as there is a heavy emphasis upon the lawyer's strategic decisions and tactics. The Lafler case decision

*"appears to have loosened the "contrary to" standard a notch for future cases, encouraging petitioners to argue that the state court never applied the correct federal precedent (even when that precedent is cited or described), instead of arguing that the court's application of federal law was unreasonable."*³⁰

The dissenting judges stated that the Strickland test was not satisfied as Cooper had "knowingly" and "voluntarily" rejected two plea offers and chosen to go to trial. This was the reason for the rejection of the appeal by the Michigan Court of Appeals. The question before the U.S. Supreme Court was whether the advice of the counsel had fallen below the standard of acceptability as set out in the Sixth and Fourteenth Amendment. The U.S. Supreme Court, applying Strickland, found that there had been deficient legal performance as the legal counsel had informed the respondent of "an incorrect legal rule".

The Courts stated that

"defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process. During plea negotiations defendants are 'entitled to the effective assistance of competent counsel.'"

The Court agreed that the respondent's counsel was deficient when the respondent was advised to reject the plea bargain. However, the point of contention before the Court was how to apply the Strickland test of prejudice where a rejection of a guilty plea offer is the result of ineffective legal assistance. The court was divided 5-4. In order to satisfy the Strickland prejudice test, the respondent must show the following,

"that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different."

³⁰ N. J. KING, *Lafler v. Cooper and AEDPA*, Yale L.J. Online 122 (2012)

This case is different from Hill as the ineffective legal assistance resulted in the rejection of a plea bargain. In determining what the scope of the application of the Sixth Amendment is,

“[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”

The question before the court relates to the pre-trial processes and the Court found that the same standards of fairness and reliability apply to the plea bargaining stage as well. The intended essence of the habeas corpus application is to protect against those incidents where the state criminal justice system does not behave in the way that it should.³¹

The Court found that the respondent had shown that but for the deficient performance of the legal counsel he would have pleaded guilty, and received a lesser sentence. The solution in this situation was found to be that the State should re-offer the plea agreement. If the defendant accepted it, the discretion of the Court would determine whether to vacate the convictions and re sentence according to the terms of the bargain or to leave the original trial conviction and sentence in tact and undisturbed.

Justice Scalia issued a rather scathing dissenting opinion stating that the Supreme Court had opened up plea bargaining as a whole new area of constitutional law. The Judge raises the interesting questions of whether or not it is constitutionally acceptable to make no plea offer at all, even though its case is weak - thereby excluding the defendant from the “criminal justice system”? He cynically states that the Court has erred in considering the respondent’s claim because,

“the Court nonetheless concludes that Cooper is entitled to some sort of habeas corpus relief (perhaps) because his attorney’s allegedly incompetent advice regarding a plea offer caused him to receive a full and fair trial.”

In his dissenting opinion, the Justice sets out that the the right to effective legal counsel originates from of United States v. Wade where it was held that

³¹ K. NANCY J, Laffer v. Cooper and AEDPA, YALE L.J. ONLINE 29 122 2012

*“any stage of the prosecution formal or informal, in court or out, where counsel’s absence might derogate from the accused’s right to a fair trial.”*³²

The dissenting Judges’ problem was that Cooper had received a fair and just trial. He was accordingly convicted and sentenced freely so accordingly there had been no constitutional infringements in their opinions. They held the view that this decision worked to open up an unsafe interpretation of the effective assistance of counsel clause found in the Sixth Amendment and as such, the verdict which was reached in the case of Cooper was an unsound constitutionally interpretation of the principle.

Another point of contention between the majority ruling and the dissenting judges was the appropriate remedy which should be offered in a case where it is deemed a defendant, with ineffective counsel, went to trial and received a longer sentence than if the plea bargain was accepted. The dissenting judges were of the view that if the trial was a fair and just, then the results should not be changed as it could make a complete up a mockery of the justice system. However, the majority judges stated that the case should be sent back to the trial judges to rule, within their discretion, as to whether they would apply the plea bargain terms or to stick with the original trial result.

The positive attribute about the decisions in both Lafler and Frye cases is that it establishes an onus upon the defence lawyer to take serious consideration of as well as diligence when dealing with plea bargains being offered by the prosecution in a particular case.

The significant legal outcome from both Lafler and Frye cases is that the criminal courts have openly stated that plea bargaining is part of the integrated process of U.S. criminal justice system. The courts call for its official recognition so that it can be regulated, assured and the quality of the counsel representation monitored.

However, the legacy of Strickland remains despite the progress that was made in the both Lafler and Frye cases. The courts still give a wide deference to the counsel and find it hard to assert that the counsel had acted in a completely unreasonable way as such the Strickland test will only allow for the kind of remedy that both Lafler and Frye provide if it is completely egregious behaviour as well as failures.³³

³² United States v. Wade, 388 U. S. 218, 226 (1967)

³³ DUROCHER (as in n. 32), p. 7.

2.3 Burt v. Titlow (12-414 U.S. 6th Cir. OT 2013)

Vonlee Nicole Titlow, a transgender individual, helped her aunt Billie Rogers murder her Uncle. Titlow's guilty plea bargain would reduced her sentence to manslaughter with a corresponding imprisonment between 7-15 years. She would have to submit to a lie detector test; give evidence against Billie Rogers and and not challenge the prosecutor's sentencing range on appeal³⁴. The Court accepted the plea agreement.

Whilst Titlow was in jail in between hearings, she spoke with the sheriff's deputy who advised her that she should not plead guilty if she believed that she was innocent and then referred her to another lawyer. Titlow subsequently discharged her initial lawyer and took on Frederick Toca. At the hearing, Titlow confirmed that she was freely and voluntarily withdrawing her plea; that she understood the withdrawal of her plea reinstated the first-degree murder charge and she would be subjected to the possibility, if found guilty, of life imprisonment. Titlow was sentenced to 20-40 years in prison following trial.

Her case raises several ineffective assistance of counsel claims and prosecutorial misconduct claim. The United States Court of Appeals for the Sixth Circuit held that the Michigan Court of Appeals had erred when they had rejected Titlow's claim for ineffective assistance of counsel with relation to advice received concerning the plea bargain.

The Sixth Circuit appeals Court also deemed that it was reasonable to conclude that the second lawyer was at fault. They had failed to investigate adequately the case before advising to withdraw the plea and this advice resulted in a longer sentence instead of the 7-15 years imprisonment agreed in the plea bargain³⁵. Toca's failures to obtain the relevant case information constituted a sizeable impact upon her plea negotiations and these research omissions did not come from a safe professional judgment or a strategic choice. The Appeals Court also took into consideration that Titlow did originally intend to accept the plea. The conclusion of the Appeal Court was that Titlo's Sixth Amendment rights were violated by receiving Toca's ineffective legal counsel. The Appeals Court ultimately held that the district court's judgment should be reversed and they should conditionally grant the petition for a writ of habeas corpus, giving the State 90 days to re-offer Titlow the original plea offer or release her.

³⁴ <http://lawyersusaonline.com/wp-files/pdfs-5/burt-v-titlow.pdf> (accessed on the 20th of October 2014)

³⁵ <http://lawyersusaonline.com/wp-files/pdfs-5/burt-v-titlow.pdf> (accessed on the 20th of October 2014)

This case shows the predicament which Justice Scalia warned would occur in the Frye and Lafler dissenting judgments. The case was decided by the Supreme Court on November 5th 2013. This case raised three general plea bargaining related issues. The first was whether the Sixth Circuit failed to give appropriate deference to a Michigan state court under Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) in holding that defense counsel was constitutionally ineffective for allowing respondent to maintain his claim of innocence; a related point was whether a convicted defendant's subjective testimony that he would have accepted a plea but for ineffective assistance, is, standing alone, sufficient to demonstrate a reasonable probability that defendant would have accepted the plea. The Court then considered the issue whether Lafler v. Cooper always requires a state trial court to resentence a defendant who shows a reasonable probability that he would have accepted a plea offer but for ineffective assistance, and to do so in such a way as to "remedy" the violation of the defendant's constitutional right."³⁶

The central issue for the U.S. Supreme Court in this case is to determine the weighting which the ineffective legal counsel had upon Titlow's acceptance of the plea bargain. Is it really appropriate for the U.S. Supreme Court, in their judgments concerning ineffective assistance of counsel, to be creating solutions and thus more work for an overburdened defence system? It was hoped that the case of Titlow would bring some answers to further define the effective assistance of counsel question in plea bargaining cases but rather stated that "federal habeas law and Strickland v. Washington do not permit federal judges to so casually second-guess the decisions of their state-court colleagues."³⁷

It is recognised that the facts of the Titlow case were somewhat convoluted and did not help the Supreme Court in taking advantage of the opportunity to clarify this area of the law.³⁸

Unfortunately this most recent decision of the U.S. Supreme Court does not leave those unsure of their role in the plea bargaining process with further clarification of how they ought to be conducting themselves.

³⁶ <http://www.scotusblog.com/case-files/cases/burt-v-titlow/> (accessed on the 26th of July 2014)

³⁷ Sherry L. Burt, Warden, Petitioner v. Vonlee Nicole Titlow on Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit [November 5th, 2013] No. 12-414 Supreme Court of the United States.

³⁸ Rory Little, A messy follow-up to Lafler and Frye: Can "fun" facts produce "good" law?, SCOTUSblog (Oct. 7, 2013, 10:12 AM), <http://www.scotusblog.com/2013/10/a-messy-follow-up-to-lafler-and-frye-can-fun-facts-produce-good-law/> (last accessed on the 19th of October 2014)

The mantle is now for the taking and further clarification in this area of the law now relies upon those bringing appeal in whose cases are more straightforward and less wrapped up in a procedural quagmire.³⁹

2.4 Summary of US cases

The cases of *Lafler* and *Frye* show that the right to counsel derived from the Sixth Amendment, guaranteeing the right to a fair trial, is now includes the plea bargaining process. Paradoxically there is no constitutional guarantee that a defendant will be offered a plea bargain. Rather the only guarantee is that the constitution will protect the regulation and fairness of the initiated process. The court in *Lafler* established that the determining factor in whether a trial is fair or not will be determined by the effectiveness of the legal assistance. The scope of the application of the Sixth Amendment to plea bargains (expired and rejected) was a contentious point between the minority and majority judges in *Frye* and *Lafler*.

There was agreement between the justices that the Sixth Amendment extends to the plea bargaining process and that entering a plea deal does constitute a “critical stage” of the criminal proceedings. The justices parted company on the objective of the plea bargain as the minority judges asserted that the U.S. Supreme Court should have never extended protection to include rejected plea offers. Their reasoning for this position was that the right to a fair trial should be the goal. In reaching their decision, the justices determined that there is a general duty imposed upon lawyers by the Court to inform their clients of favourable plea offers. Additionally, there is a right to a lawyer at all stages of the criminal proceedings. The majority judges found that the Sixth Amendment guarantee extends to stages where the defendant relies upon their lawyer’s counsel and seeks their advice on certain matters.

In light of the U.S. Supreme Court’s decisions the appropriate position was established that problematic cases are to be remanded and for the State to re-offer the plea deal to the client. The trial court then can use its discretion to determine whether to apply the plea bargain and any subsequent re sentencing. Additionally the court should focus on whether a fair trial would cure “the particular errors at issue.”⁴⁰

³⁹ The Latest Supreme Court Case on Plea Bargaining, or Not, by Cynthis Alkon, November 9, 2013, <http://www.indisputably.org/?p=5185> (last accessed in the 20th of October 2014)

⁴⁰ C. S. MCKAY, RECENT DECISION CONSTITUTIONAL LAW—THE PLEABARGAINING PROCESS—MR. COUNSEL, PLEASE BARGAIN EFFECTIVELY FOR

Justice Scalia in his dissenting opinion was particularly wary of opening up a new area of law. This could create a floodgate of cases where defendants could, using this newly founded constitutional right, challenge their convictions despite having a fair trial. His main objection was not to create a forum and overburdened the courts with unmerited litigation based upon the fact that a defendant did not like the result that they were handed. Justice Scalia was correct in his summation that the *Lafleur* decision would provide an opportunity for a series of cases, including *Titlow*, to be reopened and re-examined on the basis of plea bargains and fair trial requirements.

The U.S. Supreme Court, has extended the right to legal counsel to the pre-trial arena where the client relies upon the legal counsel of their lawyer. The reasoning of the U.S. Supreme Court was that even though one may be awarded a fair trial, the pre-trial procedural infringements as well as prejudices that one has suffered will invariably and inevitable damage the ability of the trial to be fair. This reasoning has resulted in a recognition of the overlap between effective defence questions with the practice of plea bargaining.

The ECtHR has already recognised the importance of both the right to access and effective counsel in the case of *Salduz v. Turkey*⁴¹.

The decision in *Lafleur* and the pending one in *Titlow* have the potential to create a safety valve for those who received below par legal advice. This is a result of the undeniable fact that the defence lawyer is overburdened and under financed. The inevitable consequence of this situation is that the defence lawyer does not always have the ability to do their job effectively. The Supreme Court has found a creative way in which to regain some ground from their decision in *Brady* and has created a constitutional means by which to redress those who fall through the justice gap.

2.5 *Germany*

The case of plea bargaining in Germany is distinct from that of the U.S.A. in that the introduction of Germany's plea bargaining into its legal system was done through the back door in the 1980s. German bargains are known as *Absprachen*, they concern confessions and do not replace the trial but

YOUR CLIENT'S SIXTH AMENDMENT RIGHTS, OTHERWISE THE TRIAL COURT WILL BE FORCED TO REOFFER THE PLEA DEAL AND THEN EXERCISE DISCRETION IN RESENTENCING, *Mississippi Law Journal* 82:3 2013

⁴¹ Application no 36391/02, 27 November 2008

generally shortens them. Unlike in the U.S.A., where the prosecutor has vast discretion not to charge, the German procedure of *Klageerzwingungsverfahren* allows the aggrieved person or party to appeal to the judge to compel the prosecutor to pursue the case. The judge is the key player in the plea bargains as they are the final decision-maker. It is then the trial judge then who decides based upon the evidence in front of them in the case docket whether there is enough evidence to proceed to trial. This procedure though seriously undermines the principle of the presumption of innocence. The reason for this is that the trial judge is the same person who then is usually the trier of the facts. This then creates an impossible situation whereby the defendant cannot be afforded a fair trial as the judge cannot possibly be impartial in these situations. As Germany has sought to bring about reforms which might increase the immediacy and orality of the trial (as in the U.S.A) they have lost the benefits somewhat of the investigation dossier which is particularly useful for determining the guilt in the context of the plea bargain. In Germany there have been calls to move back to this practice of pre-trial investigation which involves gathering a pre-trial dossier. The argument for returning to this model is that the dossier then would be open to the defendant to test its validity and if a consensus is reached then a plea will be determined. In the case that a consensus could not be reached then it would proceed to a streamlined trial however this also presents its own whole host of problems in that if the pre-trial investigative dossier is skipped then the trial judge would have a very difficult time knowing what to base his finding of guilt upon. The German system has particular problems with the practice of *Absprachen* because the German criminal system is centred around the obtaining of a confession and with a plea you do not necessarily achieve a confession. The question of what to base a finding of guilt is a central problem for the German system. The problem originates from the fact that the finding of guilt has traditionally been built upon a confession and the finding of the substantive truth. The practice *Absprachen* now challenges this traditionally held ideal. There were three court cases in Germany which instigated the formal role of plea bargaining in the German system making it recognised by the German Criminal Legal System.⁴² The introduction of these informal negotiations follows the same reasons that have been cited in other jurisdictions which include some form of plea bargaining. Namely that it helps to ease an ever increasing case load as well as financial con-

⁴² BVerfG Judgment of 27th of January 1987 and BGHSt 43, 195 (F.R.G.) and BGH Judgment of June 10, 1998

straints and the influence of the prosecutors office. After much dispute in Germany over the informal practice of plea bargaining, the German Federal Parliament passed legislation which now regulates the agreement and makes them part of a formal procedure known as Gesetz zur Regelung der Verständigung im Strafverfahren.⁴³ The move to regulate the practice was that it recognised that informal agreements which encouraged a confession of some kind were becoming increasingly popular within the German process. It was in light of the fact that these informal agreements were becoming so key to the criminal procedure that the German Federal Parliament acted. Despite the fact that the German criminal trial is concerned with ascertaining the 'material truth' or 'substantive truth'.

As with all countries which have adopted the plea bargain, the practice has been perceived as an alternative response to a way of dealing with the ever increasing case load of the courts as well the paperwork. Simultaneously, the way in which offences are being charged became more complicated and much more difficult to prove.

The complex German criminal procedure, with its manifold procedural safeguards is not equipped to deal with the new requirement of substantive law.⁴⁴

In the 80s where it is generally agreed that some form of plea bargaining was creeping onto the scene in Germany, an individual using the pseudonym Detlef Deal stated that this widespread practice had turned the formal trial into nothing more than a theatre, "where the participants pretend to contribute to the finding of a sentence, which in reality has been agreed upon by all parties."⁴⁵ It is this very farcical act of theatre that the German criminal justice system has trouble reconciling with the judge's role for investigating the substantive truth because by its very nature the plea bargain is not concerned with this but rather two things, firstly, the quick and short disposal of the case and secondly that the defendant confess. They are not concerned with whether that confession be made by a contrite heart.

The German system is interesting to observe because the criminal procedure does not recognise guilty pleas. As such the use of informal negotiations are linked to those procedures which provide the prosecutor with some already preexisting negotiating powers (this is evident in section 407 which gives the prosecutor the power to request an order impos-

⁴³ R. E. RAUXLOH, Formalisation of Plea Bargaining in Germany - Will the New Legislation Be Able to Square the Circle?, *Fordham International Law Journal* 34 2010, p. 1.

⁴⁴ RAUXLOH (as in n. 49), p. 3.

⁴⁵ *Ibid.*

ing punishment from the judge if there is sufficient suspicion if this is not appealed against by the accused then it remains instated and the accused will receive either a fine or probation (this is set out in sections 407-412 of the Strafprozessordnung).⁴⁶ The benefit of this method is that there is no full trial (this is the closest it comes to a guilty plea which is used in the common law trials.) This use of a penal order is very popular as the defence and the prosecution agree upon the details with the judge. Approximately 35% of cases are dealt with by this kind of an order.

There are several provisions within the German Criminal Code which allow for the prosecution to deal with a case before the trial. In section 153 the prosecutor is given the possibility to dismiss the case on the grounds of insignificance so long as the court agrees with this assessment as well as the request. This provision is an exception to the principle of compulsory prosecution.⁴⁷ Section 153a was proposed by the judiciary (in 1974) as a way by which to fight non petty crimes. This tool allows the prosecutor to refrain from using all or some of the charges against the suspect but they can only make use of this option if the defendant agrees to make some kind of a payment to a charity. This provision was hugely criticised at the time as it was viewed as a mechanism by which to introduce the American version of “plea bargaining” into the German system and seen as buying off the defendant. However, section 153a was not a new creation in that the principle had already existed in the German law it was just the German legislator incorporating it. As with most plea bargaining mechanisms section 153a has been used far to liberally and is used frequently for the basis of informal settlements.

“Especially during the preliminary investigation, it is common for the courtroom actors to agree that the investigation will cease if the accused pays a fine.”⁴⁸

Section 153 can be used both for the advantage and disadvantage of the defendant. The disadvantages are obvious in that it violates their right when there is insufficient suspicion of a criminal act, and the presumption of innocence. This would mean that there would be no prosecution at all. The advantages for the defendant is that the case is often redefined in order for it to be able to meet the requirements of section 153a. In

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ RAUXLOH (as in n. 49).

these kinds of circumstances an application occurs where the evidence is complicated and overburdened. This provision allows the prosecution the opportunity to combine an offer for settling with a warning that this is the last chance for settling. In this way the prosecutor can indicate that, “a refusal to accept an agreement could lead to a higher sentence recommendation.” This approach is obviously unfair (and very similar to that adopted in the United States of America) approach of punishing the defendant for objecting to the negotiations. But it is very difficult to ascertain whether the final sentence would be anyway so it is difficult to directly link the higher sentence to the rejection of the defendant to negotiate. Rauxloh states that the use of section 153a works well in those situations where the parties know each other well. As there is more likely to be a higher level of trust that the informal negotiations and plea bargaining will be employed successfully.

Ultimately a remorseful confession will have the affect of reducing the sentence but it is the remorse element which the court views highly. In Germany the need for the confession is connected closely with the sentence reduction and not the need for showing remorse. Schünemann states that the confession depends upon an offer therefore there is no room for a remorseful confession to be made.⁴⁹ Additionally, the Federal High Court of Justice has held that a confession is a mitigating factor. However, there are critics of this process which declare that it undermines the principle of substantive truth as well as the presumption of innocence. This practice is in conflict with Article 103 (2) of the German Constitution as well as §261 of the Code of Criminal Procedure where it enshrines the principles that the defendant may not be convicted by a court where there is doubt about their guilt because as we have seen innocent defendants sometimes confess when they have nothing to confess.⁵⁰ There are risks that juvenile defendant will accept the offers and the upper or middle classes who are in the financial position to be able to pay the fine imposed. These offers are also favoured by defence lawyers where the possibility of a conviction is very high.

A very obvious similarity between the German and the American system is that section 153a allows the prosecution to make the offer for settling with a warning that if the defendant turns it down they will not be able to settle at a later stage in the proceedings. In this way the prosecutor can indicate that, “a refusal to accept an agreement could lead to a

⁴⁹ Ibid.

⁵⁰ Ibid.

higher sentence recommendation.”⁵¹ This is not a fair approach to punish the defendant for objecting to the negotiation. But, it is very difficult to ascertain whether or not the final sentence would be anyway so there is no way of knowing if the higher sentence was a direct result of the rejection of the informal negotiation.

As mentioned above the German system focuses on the judge determining the substantive/material truth however the practice of informal negotiations bypasses this. This requirement upon the judge means that they must then examine all of the necessary evidence at the trial this requirement is part of the inquisitorial principle. This principle means that the judge must consider all of the surrounding relevant evidence and not only just that which the two opposing parties are presenting. The plea bargain is completely at odds with this process because by its very nature it shortens the process and requires less evidence to be examined. There are two central objections to the introduction of informal negotiations into the German system the first is the slim confession and the second is the waiver of the right to appeal. A slim confession provides the defendant with the ability to conform but not introduce any new evidence. This mechanism protects the defendant from having to introduce any new facts which could result in a harsher conviction being brought upon them. This practice runs contrary to the theory that a confession of any sort ought to reveal the material truth and also it goes against the argument that a confession deserves a sentence reduction as it aids with fact finding is no longer applicable. The danger of the slim confession is that even though the prosecutor can make an offer the court is not generally bound by this agreement. As such the court is entitled to determine

“if the evidence during the hearing shows that an act has to be evaluated on the higher charge the court has to convict accordingly. If however the court accepts a slim confession without further investigation it will not have any indication that a higher charge might be appropriate.”⁵²

Also another issue is the requirement of the principle of individual guilt.⁵³ The principle states that “only the offender’s blameworthiness - and not any arrangement among the parties or with the court - shall be the basis

⁵¹ RAUXLOH (as in n. 49).

⁵² Ibid., p. 14.

⁵³ section 46 of the German Penal Code

of the sentence.”⁵⁴ So in light of this the concept of offering a mitigated sentence in return for the defendant’s negotiated confession it is doubtful that it will be possible to continue this practice in light of section 46 of the German Penal Code. Also, according to section 46, such a confession might indicate remorse but a negotiated confession is all about the rational calculation of the options and is therefore, based upon regret or the willingness to reform one’s behaviour.⁵⁵

As is the case with both the U.S. and Germany there has been much debate about the legality of plea bargains/negotiated settlements. One major concern from critics is the element of coercion as well as the revocation of the defendant’s fundamental rights. The German Penal code as well as the German Constitution protect the fundamental rights of the individual which are sometimes questionable infringed when a plea or informal settlement is reached between the parties in a particular case.⁵⁶ As with the U.S. there exist safeguards to protect against arbitrary conviction. In this way negotiated agreements conflict with article 103 (1) of the German Basic Law because they affect the right of the accused to be heard as well as participate in the trial. In Germany before 1982 no one had questioned of the legality of the negotiated settlements. Debate then ensued (which followed similar issues as in the U.S.) raising issues that the practice was illegal because it was not included in the Criminal Procedure Code and it did not expressly include them so they must be illegal. However this very same point was used by proponents stating that just because the practice was not expressly mentioned does not mean it is illegal. It was section 136a that caused the catalyst for the debate in that the Federal High Court of Justice and the Federal Constitutional Court (hereinafter referred to as the FCC) as they were both forced to consider the question of its legality in particular the principle of freedom from coercion. The landmark decision of BGHSt NStZ 1987, 419 the FCC considered the legality of discussions that had been made between the parties where they discuss the case are not forbidden so “long as the law was respected.” There was held to be no violation in this particular case as the final sentence which was received,

⁵⁴ V.J. CARDUCK, *Quo Vadis, German Criminal Justice System? The Future of Plea Bargaining in Germany*, Warwick School of Law Research Paper No. 2013-17 (Special Plea Bargaining Edition) 2013, p. 14.

⁵⁵ *Ibid.*

⁵⁶ these include but are not limited to the following: presumption of innocence, the right to a fair trial, the right to a lawful judge, the right to a judicial hearing, the principle of a public trial, the principle of substantive truth and court investigation, the principles of immediacy and orality, the privilege against self-incrimination, the compulsory prosecution, the duty of presence of accuse and the prohibition of waiver pressure.

“was commensurate with the offender’s guilt.” As such the free choice of the defendant had not been violated.⁵⁷ The German FCC established a set of rules which were to be followed in the case of informal negotiations. By setting out these limitations upon the process the FCC seemed to be indirectly accepting their validity. This decision was then followed in 1998⁵⁸ where the Fourth Senate of the Federal High Court of Justice stated that informal settlements are not prohibited so long as they remain with certain specified parameters. This case established that discussions held in the preparation stage are allowed so long as they can be revealed in the main trial. The trial court still had to investigate and find the objective truth and had to figure out the credibility of the confession. Since this case it has been recognised by the courts that informal negotiations are part of the German criminal justice system. Despite this fact the decision did not provide clarity on the matter of waiver of appeal being valid and the issue was brought before the Joint Senate of the Federal High Court of Justice in 2004. The court stated that if a judgment was based upon a waiver of the defendant it would only be valid if the defendant was informed of the fact that they are not bound by any promises to waive the right to appeal made previously as part of the agreement, the so-called ‘qualified information’.⁵⁹

As a culmination of the incoherent case law and the decision of the Joint Senate of the Federal High Court of Justice the Plea Bargaining Act 2009⁶⁰ was introduced as a means by which to codify and also regulate the practice.⁶¹ Up until this point judges had attempted to avoid stating point blank when and where they would deem a negotiated informal settlement to infringe upon the German law. After the Joint Senate issued their statement that plea bargaining was indeed legitimate within certain limits they then requested that the German legislature step in because the “judicial limits of lawmaking had been reached.”⁶² Section 257c was introduced into the German criminal procedure which allows for as well as regulates agreements without infringing the German Criminal Procedure. This new provision means that an agreement becomes valid when “the court announces the possible context of the agreement and both prosecution and defence consent.”⁶³ Importantly, section 160b allows for the communication be-

⁵⁷ RAUXLOH (as in n. 49).

⁵⁸ BGHSt NJW1998, 86

⁵⁹ RAUXLOH (as in n. 49).

⁶⁰ Entwurf eines Gesetzes zur Regelung der Verständigung im Strafverfahren, BT-Drucks 16/12310

⁶¹ CARDUCK (as in n. 60).

⁶² Ibid.

⁶³ RAUXLOH (as in n. 49), p. 20.

tween both the prosecution and the defence before the trial so long as the communication “is suitable to further the proceedings.” These provisions both seek to reconcile the practice of informal settlements with the German procedure of searching for the substantive truth. An important step of moving plea bargaining practices out of the shadows and into the formalisation mode was the new requirement in section 273 (1(a)) that all negotiations made before the trial need to be recorded even the fact if they do not take place. Section 257c (4) tries to protect the rights of the defendant to a fair trial by stating that unless new facts emerge the trial is to proceed and is bound by the initial prognosis of punishment. This seeks to provide some security as well as certainty for the defendant in terms of what the defendant can expect from the outcome. It is only if the defendant does not waive their right to appeal that there will be any formal control of the informal negotiations.⁶⁴

The new law has two parts which are of importance. The second part of the act deals with the importance of the waiver of the appeal in § 35a, 302 (1) which states that a waiver of appeal cannot form any part of the agreement. A waiver would only be valid if it can be demonstrated that the defendant has received qualified information about it. This means that, “the court has to explain to the defendant that if his waiver was part of the deal they are not bound by it.” This only becomes valid if the defendant sticks to it after being informed by the court. But there are problems with this system as well because of the applicable time limits. So if the defendant declares a waiver then changes their mind and then claims that they did not receive the qualified information they can only do this within the ordinary time limits for appeals which is one week after the pronouncement of the judgment. It was ruled that this could not be extended because it would place them at a better position than defendants who had not accepted or participated in the settlement. In light of the attempts to formalise a form of plea bargaining within the German criminal justice system Regina Rauxloh remains dubious as to whether or not the new legislation will help to lift a practice out of informality into the realm of the formal and whether or not formalisation will actually help the process at all.⁶⁵

Unfortunately, the plea bargaining act was not all that had been hoped for. The Act failed to aid with the much needed clarification of the law. As such the FCC was requested to review the law enacted in 2009 and its constitutionality. The FCC decision found the new law to be not

⁶⁴ Ibid.

⁶⁵ RAUXLOH (as in n. 49).

yet unconstitutional. The FCC decision permitted the legislature to regulate plea bargaining. In addition to finding the new law not yet unconstitutional the FCC also stated that: “The Court also called upon public prosecutors, as guardians of the law, to monitor negotiation practices.”

The move to make the prosecutor the “watchdog” of the procedure was not the wisest decision as the prosecutor is generally concerned with the success of deals so this does not help the constitutionality of the legal arrangement.⁶⁶ The judgment of the FCC shows that there is awareness of the plea bargaining by the FCC allowing the legislature to regulate plea bargaining. The judgment failed to address the elephant in the room of whether the practice of informal settlements is compatible with the inquisitorial principle. There was no detailed analysis of the compatibility question as was there no regard for the issues of lack of efficiency and practicability. Even though the court recognises that one of the main reasons for prosecutors not keeping within the bounds of the law is because of the “lack of practicability”.

In response to this dismissal and missed opportunity of the FCC Carduck suggest that there are only four alternatives left open with regards to the integration of the plea bargaining model into the German system. The first is that the status quo could be maintained, secondly, criminalise informal deals that do not conform with the law. The reasoning behind this would be that it would have a deterrent effect. However, in practice it would be not workable as it would depend upon colleagues reporting on each other and it would add to the already overburdened case load of the court. The third option would be to abolish plea bargaining altogether delete it from the CCP and argue for the implementation of the traditional inquisitorial procedure as it has been working fine. The problem with this option is that it would just push the practice further underground. Finally, the fourth option would be for a reformed version of plea bargaining as well as an adversarial element to the German CPP.

This would require a complete overhaul of the system.⁶⁷

The other alternative is the waiver in proceedings which means that the defendant generally gives up some of their procedural rights. This could be that the defendant agrees not to challenge the admission of certain evidence. The most common waiver though is that of the right to appeal. There are normally three reasons why the defendant will waive their right to appeal, they are happy with the agreed outcome, reluctant to

⁶⁶ CARDUCK (as in n. 60), p. 29.

⁶⁷ CARDUCK (as in n. 60).

spend more money and time on the process or the defence counsel fails to inform their client about the legal remedies against settlement or even that an negotiated settlement has taken place between the two opposing counsel. This last one is the most serious and has parallels with the U.S. cases of ineffective assistance of counsel.

Germany's history of the development of plea bargaining is chequered with severe debates amongst the judiciary, legislators and the academics. It was recognised that the practice of informal settlements developed because it was seen that the German criminal justice system was too complicated and congested to navigate. So in order to help keep the criminal justice system running the lawyers began engaging with these informal settlements. Regina Rauxloh states that the unpredictability of the legislation is a reason for the development of the informal negotiations as a means by which to establish some security in the outcome for the defendant.⁶⁸ Within this debate in Germany (which is still ongoing) several academics have voiced their opinions. One supporter of the informal negotiations, Hermann, argues that more justice is achieved through using them because when all parties are involved in the working towards an agreed outcome the defendant is more likely to be successfully rehabilitated as they accept the sentence.⁶⁹ This concept that the defendant accepts the sentence as Hermann suggest embodies the overall problems with the system. This supposed acceptance raises questions relating to whether the acceptance was genuine and effective (a very similar problem to the U.S. problem of ascertaining whether the assistance gives rise to a claim of ineffective assistance of counsel), how involved is the defendant actually in the overall negotiation of the agreement? The picture painted by Hermann places too much power with the defendant which is unrealistic as the criminal law is not set up to look out for the interests of the defendant but that of the victim.

There have been several problems identified within the German system. There have been two main problems identified that of the conflict between practitioners claiming that it is a necessary mechanism by which to conduct informal procedures and the academics who point out that it is not compatible with the German Criminal Code. In fact there is a third problem and that is of whose task is it to bridge the chasm between the informal procedure system and the formal process? This question has been left unanswered by both the legislator and the courts leaving it up to the practitioners to forge the path ahead. Where two systems of law develop

⁶⁸ RAUXLOH (as in n. 49).

⁶⁹ Ibid.

side by side (which is easier to do in the context of the common law where the judges are expected as well as allowed to develop the law) questions arise as to who is allowed to pick which system to follow. The answer is that it is always the defendant who gets to choose between the safeguards and the sanction reduction. The reality is very far from the theoretical. There are two main problems with this theoretical idea of the “choice” being vested in the defendant. The first group of problems are that the defendant does not have enough information to make a rational decision. Defendants generally lack insight into the court procedures, they have no access to the prosecution file and as such they are not in a position where they can evaluate the strength of the prosecution case against them. This places the defendant in a position where they are dependant upon the lawyer’s decision. The problem with this power balance is that the lawyer is sometimes serving their own interests. The second group of problems with this myth of “choice” on the part of the defendant is that the informal procedure silences the public as well as the victim. Additionally there is no audience at trial so the prosecution are not representing the interests of the public but their own i.e. serving themselves.

Within both the adversarial and inquisitorial systems the method of selection of cases deemed worthy of a trial by the legal profession are the same. There are no real guidelines for selection rather it is done at random, where the emphasis is placed more upon the defendant than the interests of the public. However, it is these very traditional fair trial principles which are having to make way for the redefining of a fair trial and sentencing for this new wave of “process economy”^{70, 71} Carduck observes that one of the reasons that the German system has had such difficulty introducing a plea bargaining model is because of the inquisitorial structure of the German system. The reasons for this are more to do with legal culture rather than a demarcation of being either in the adversarial or inquisitorial camp. Because of the judge having a central role this has a knock on effect on the impartiality of the judge. Because the court is no longer neutral and is pursuing their own interests which places an emphasis upon the defendant to accept the offer the court proposed. The judge has a massive discretion in choosing which cases to pursue and which ones are “suitable cases”. There is also no specified penalty range which can be offered. Hence a huge penalty gap between the sentence after the trial and the sentence offered to the defendant in case of a confession. Also there is no mandatory requirement

⁷⁰ RAUXLOH (as in n. 49).

⁷¹ Prozessökonomie

that the defence participate in the case which further serves to weaken the position of the defendant. What is really worrying is that the court is not bound by the negotiated agreement. So the defendant could well shoot themselves in the foot by offering their confession if the court determines in line with section 257c (4) CCP that if, “legally or factually significant circumstances have been overlooked or have arisen and the court therefore becomes convinced that the prospective sentencing range is no longer appropriate to the gravity of the offender of guilt.”

Also if the defendant acts in a way which is inconsistent with the agreement it can be revoked however on the basis of what kind of behaviour is not specified. Problems arise if the defendant then appears before the same judge to whom they confessed. The judge then must remain neutral but it is hard to still maintain the presumption of innocence if you have already heard the confession of the defendant.⁷² Herein lies the biggest distinction between the Anglo-American system and the German. In the Anglo-American an admission of guilt or confession is required. Whereas in the German the confession should be an integral part of the defendant's conduct at trial but does not require a confession rather it was the substantial confession previously as set out in section 244 (2) of the CPP.

One of the main criticisms of the German legislation is that it is very ambitious as it aims to take the practice of plea bargaining so that it can profit from the informal procedure while still maintaining the main principles of the formal criminal trial. The legislation fails to cover those informal negotiations which take place before the main trial. Another problem is that of the confession (is not sufficient to automatically establish the defendant's guilt). The court is still expected to study the dossier carefully to make sure that there are no factual or legal obstacles to the agreed outcome. This has created a paradox for the courts because the purpose of the Act was to shorten the proceedings rather than to lengthen but if the judge still has to examine the confession it is questionable how much shorter the proceedings will be in reality. The result is that the courts will be placed in a position where they will have to disregard the Federal High Court of Justice and the extension of the use of informal negotiations. This practice just goes to further demonstrate the ever widening gap between the substantive criminal law which is used to solve social problems and the fact that the expectation as well as the demands upon the criminal procedure and the role of punishment have well and truly shifted from what they used to be. The problem that the German system faces with this transplant of informal

⁷² CARDUCK (as in n. 60).

negotiations is that the criminal justice system is predominantly concerned with finding the truth of the confession. Up until now,

*“the essential question is how the authenticity of the confession can be tested.”*⁷³

Both Rauxloh and Carduck identify that the confession of the defendant is a critical element to the German negotiated settlements. Carduck raises the question of the infringement of article 3 (1) of the German Basic Law’s principle of “equality before the law”.⁷⁴ Carduck’s argument asserts that this principle is also being infringed because a distinction is being made at law between those defendants who want a trial (being treated less fairly) and those who enter into negotiations. The only real difference between them is that one makes the right not to self incriminate. Also the defendant who wants to and remains silent until a plea bargaining opportunity presents itself is in a much better position than the one who confesses at the very beginning of the interrogation.⁷⁵

The law is far from the reality of the practice. This position was further supported by an empirical study which was conducted in 2012 where it was observed that both the judiciary and the lawyers disregard the application of the letter of the law altogether. The results were shocking. In blatant disregard of the law 35% of the judiciary confronted the defendant with a sentencing alternative whether they wanted a trial or not and 28% accepted a waiver of appeal contrary to section 302 (1) of the CPP.⁷⁶ The informal negotiation presents changes to the goal posts in this area of the law however the German criminal justice system has not been able to shift gear in the same direction yet.

Bussmann made the following remarks reflecting on the practice of informal agreements within the German system:

“Through giving up the punitive, repressive paradigm in favour of an economic paradigm and abandonment of hierarchical, authoritarian form of interaction in favour of process, criminal procedures become increasingly

⁷³ RAUXLOH (as in n. 49).

⁷⁴ CARDUCK (as in n. 60), p. 16.

⁷⁵ Ibid.

⁷⁶ Ibid.

similar to administrative law procedures, solving conflicts of interests [...] by negotiation."⁷⁷

The German system can be split into two parts the search for consent or the truth.⁷⁸ Reformers in Germany have been pushing for the consent principle as opposed to truth and justice. The consent principle stipulates that, "the consent of the prosecution and the defence provides a sufficient basis for the court's decision; if the parties have agreed on a disposition, the court can ratify that agreement without examining its basis. The court would then be relegated to the role of a notary public with very limited supervisory functions."⁷⁹ This shift in approach would no longer require a confession. The criticism of this approach are that it turns the criminal process into one of finding an acceptable resolution which is then determined between the prosecutor and the defence.⁸⁰ This situation is unacceptable in that truth and consent are then lending legitimacy to criminal judgments. It is of course naive to presume that the truth can always be achieved but this is not a reason not to pursue it. As Sisyluss states we must make our best effort even if we cannot succeed.⁸¹

III. More pitfalls than benefits

This paper has provided an in depth discussion of the key tensions which arise when plea bargaining is used in the justice process in both the U.S.A. and Germany.

It has been illustrated, particularly in the case of the U.S., that plea bargaining and the access to effective legal counsel have become truly intertwined with respect to ensuring a fair trial. The U.S. has focused upon

⁷⁷ K.-D. BUSSMANN, Die Entdeckung der Informalität: Über Aushandlungen in Strafverfahren und ihre juristische Konstruktion (Baden Baden: Nomos Verlagsgesellschaft) Nomos; 1991, p. 27.

⁷⁸ T. WEIGEND, Is the Criminal Process About Truth? German Perspective, Harvard Law Journal of Law and Public Policy 26 Winter 2003

Idem, Crime, Procedure and Evidence in a Comparative and International Context Essays in honour of Professor Mirjan Damaska Hart Publishing, 2008, chap. The Decay of the Inquisitorial Ideal: Plea Bargaining Invades German Criminal Procedure

⁷⁹ WEIGEND, Crime, Procedure and Evidence in a Comparative and International Context Essays in honour of Professor Mirjan Damaska (as in n. 85), p. 56.

⁸⁰ E. WESSLAU, Konsensprinzip als Leitidee des Strafverfahrens, Neue Juristische Wochenschrift 1 2007

⁸¹ WEIGEND, Crime, Procedure and Evidence in a Comparative and International Context Essays in honour of Professor Mirjan Damaska (as in n. 85), p. 60.

fairness in plea bargaining by considering whether the defendant had adequate legal advice when they considered accepting the plea bargain. The utmost concern in the European context is ensuring that the procedural elements are fair. The role of the lawyer in the plea bargaining process is a concept which is becoming more important in Europe. The slow increase in lawyers present at the pre-trial investigative stage, when the plea bargaining occurs take place, has happened as a result of ECtHR judgments. The benefits of the plea bargain are as the ECtHR describes them to be the benefits of speedy adjudication of criminal cases which results in the workload of both the prosecutors and courts being less. Additionally, it is a very successful tool which can be used to combat corruption and organised crime and also help to reduce the number of prison sentences.

Unfortunately the benefits do little to counter the pitfalls which are experienced in a plea bargain. The U.S. sentencing guidelines allow for more room for arguing for a sentence reduction. The U.S. has the most developed system of plea bargaining. The original purpose and intention of plea bargaining has morphed from its conception in the case of *Brady v. United States*. It was originally intended as a mechanism to be used when an individual, who has overwhelming evidence of guilt against them, to plead guilty and to be afforded the opportunity to “bargain” something out of the situation. The practice has since, in the U.S. become so far removed from this original position that many critics now argue that the practice is employed rather as a deterrent to deny people their right to a fair trial. This is done by imposing upon them a harsher penalty than the one received under the terms of the plea and a more severe sentence than reasonable in the circumstances. The prevalent myth that those who are innocent do not plead guilty has been challenged by several studies most notably that of Dervan and Edkins. Their study indicated that the innocent do plead guilty because they do not want to face jail time. In this case the defendant would rather admit guilt than risk being sent down. Ineffective assistance of counsel cases have led the U.S. Supreme Court to decide that the Sixth Amendment assures both the right to legal counsel as well as the right to a jury trial. The U.S. Supreme Court has now extended the right to effective legal assistance to the pre-trial phase including the plea bargaining process. In addition to this, if the defendant rejected the plea offer on the basis of ineffective legal counsel then the defendant may have recourse to have their case reopened and the plea re-offered to them.

The European development of plea bargaining has developed in a multifaceted way which is highly dependant upon the studied country. Both of the countries examined require that the defendant must, to some

extent, either admit guilt, confess or waive their right to a trial in order to receive the benefit of the plea. This practice does raise questions about the sanctity of the presumption of innocence as well as the fact that once one admits guilt to a crime should it be possible for that individual to later upon appeal revoke their admission of guilt on the premises that it was achieved through coercion of the plea bargain? This is a question that the U.S. Supreme Court Justices are currently grappling with. The other issue is that of the victims, how do they achieve closure for the harms that they have suffered? Also, it makes a mockery of a system where it is intended to deliver justice but how can it be justice when it can be traded and given away in order to produce a result.

There are undeniable benefits of plea bargaining, it reduces costs, brings cases to a speedy conclusion, reduces the backlog of cases and helps to bring those guilty of crimes to justice. In both America and Germany, the drive for adopting plea bargaining was the increase in efficiency and effectiveness of the Judiciary. Despite these benefits, the elephant in the room still remains. What happens to those who are innocent of the crime(s) with which they are charged? We trust in a system which protects the innocent and punishes the guilty. The criminal justice system is reliant upon people having faith in the system that is why it is essential for trials to be transparent and public. People need to know what happens in courts. When the innocent are punished for exercising their fundamental right to a trial it does beg the question of who the criminal justice system serves. Have we sold out true justice for the cheap convenient fast-food of plea bargaining?

The practice of plea bargaining is here to stay and there is no indication that either the U.S.A. or Germany have plans to reduce its use within their systems. Both countries have stated that the reason for the use of plea bargaining was to ensure a more expedient and efficient criminal justice system. It is also evident from the cases analysed that plea bargaining is not exempt from abuse. It can often be manipulated to serve the interests of the criminal. The criminal defendant can bargain for their justice reinforcing the standpoint of this thesis that the rich can buy their justice. Alternatively, the prosecutor can use it as a tool to intimidate, bully and coerce the defendant into giving them the desired result. Plea bargaining's strengths and weaknesses are well known and it would be acceptable to presume that solutions to these problems would be easy to identify and rectify. This is not the case. Both Germany and the U.S.A. have a need to introduce safeguards to protect the rights of the defendant. Suggestions for the improvement of the plea bargaining system have been made in both countries. Prosecutors, across the board should be encouraged to keep a record of all

of the negotiations between the prosecutor and defendant. This record will ensure the terms of the agreement and would prevent deviation without the express agreement of both of the parties. This recording of the pre-trial negotiations must be accessible and a copy given to the court so that the judge can also ascertain that both sides willingly entered into the bargain. This requirement for the recording of plea bargains will only be effective if there are no procedural irregularities which form barriers to its realisation. As mentioned above in the case of Germany, critics have been pushing for more involvement of the pre-trial investigative dossier to help the trial judge to determine the issue of guilt. This will require reforms in the legal culture of the practice of plea bargaining. The attitude of “take it or leave it” plea bargains creates an atmosphere of coercion. Too often the cases analysed were littered with instances of the defendant being detained; in deliberately stressful conditions; not being informed of the plea bargain on offer; lack of understanding of the other viable alternative options available to them or because of the lack of sentencing guidelines a real uncertainty as to the maximum imposable sentence. The prosecutor should not be allowed to threaten the defendant with charges which are unsupported by *prima facie* evidence. It is this last issue of unsupported *prima facie* evidence that in the German context has caused the most uncomfortable problems because the system has traditionally been built up upon the pursuit of the material truth. The practice of plea bargaining does not allow the defendant to assess the value of the evidence against them and to mount a counter argument. This is counter to the fairness requirement of the right to a fair trial in that it has been established by the case law of the ECtHR that there is no safeguard if there is only a mere possibility to consult the documents. In this instance, there is not even a mere possibility to consult the documents containing the evidence. The opinion of the ECtHR is of particular importance for Germany as they are a member state of the European Union and a signatory to the ECHR. As such Germany must take into consideration the rulings as well as the principles established by the ECtHR. The fairness of the trial will be assessed by taking into consideration the proceedings in their entirety. The ECtHR has stressed the importance of appearance in the administration of justice. It is important that the fairness of the proceedings is apparent. This element is currently not observed in plea bargaining as the bargain process itself is not open to scrutiny. Additionally, the ECtHR holds the principle of adversariality in high regard and in order to abide by this principle the member states must ensure that there is an opportunity for both parties to have knowledge of and comment on all of the evidence with a view to influencing the ECtHR's decision. The

parties must be provided with a realistic opportunity of challenging the evidence in satisfactory conditions. In order to abide by this requirement of the ECtHR proceedings should be documented. As the fairness of the proceedings are assessed in their entirety an isolated irregularity may not be sufficient to render the proceedings as a whole unfair. All of these aspects serve to create an intimidating environment in which the defendant must make a decision this is often not helped by the lack of willingness on the part of both the defendant and the prosecution to go to trial. In the midst of this the above coercive techniques erode the presumption of equality of arms principle. Germany may soon have to take into consideration initiatives of the Council of Europe (CoE) such as the proposed directive on the presumption of innocence which are welcomed.

In both the U.S.A. and Germany the defendant, as part of accepting the plea bargain, was required to revoke their right to appeal. This practice removes the possibility of judicial supervision of the fairness of the plea bargain. The requirement of waiving the right to appeal is also in part to do with the presumption of innocence. Once the defendant has pleaded guilty in relation to the charges against them it becomes very difficult to then perform the psychological gymnastics required to then ignore the fact that they are appealing against their admission of guilt. Irrespective of this awkward positioning the right to appeal should not be used as a bartering chip. The significance of the right to appeal should not be underestimated. This works to reinforce the importance of safeguards being set in place so as to chart the process of the plea bargain from its inception to its acceptance.

The critics of the Absprachen system in Germany have cited that the reason for bringing back the inquisitorial investigative dossier is because of the need to ensure that the charges against the defendant are well founded. It is necessary to re-evaluate the current mechanisms in place which allow the defendant to waive their right to appeal. The unfettered discretion of the prosecution needs to be curbed. The current tide of the erosion of the presumption of innocence and equality of arms need to be brought back from the brink of destruction.