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TO PLEA OR NOT TO PLEA: THE BENEFITS OF ESTABLISHING AN INSTITUTIONALIZED PLEA BARGAINING SYSTEM IN JAPAN

Priyanka Prakash[†]

Abstract: Plea bargaining, the practice that permits the prosecution and defense to negotiate reduced charges or a lighter sentence in exchange for the defendant's guilty plea, is a bedrock component of the criminal justice system in many nations. The Japanese legal community, however, has resisted introducing plea bargaining into Japan's legal system. From 2001 to 2004, the Japanese legislature passed over twenty reform laws to prepare the country's criminal justice system for the demands of the twenty-first century, but provisions for plea bargaining were conspicuously absent from the reform package. This is largely because the Japanese legal community views plea bargaining as antithetical to the Japanese justice system's core values: obtaining the truth, encouraging the defendant's remorse and rehabilitation, and protecting victims' interests. Resistance to plea bargaining in Japan takes on heightened significance in light of increasing pressures on the nation's legal system to expedite criminal proceedings. Currently, there are "tacit" informal types of plea bargaining that Japanese prosecutors use to simplify trial procedures. This comment argues that tacit bargaining is an inadequate substitute for formal institutionalized plea bargaining. While tacit bargaining may relieve burdens on congested Japanese criminal courts, tacit bargains are unenforceable, leaving the defendant without a remedy in the event the prosecution breaches the informal agreement. The use of tacit bargaining is also concerning in regards to defendants' rights because it sustains coercive aspects of the Japanese justice system and leads to uninformed, involuntary confessions. In order to address Japan's cultural aversions to plea bargaining, this comment examines the use of plea bargaining in international criminal tribunals. These tribunals can serve as models for Japan because they have demonstrated that plea bargaining can aid rather than undermine the goals of the Japanese justice system.

I. INTRODUCTION

"The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged."—Chief Justice Burger, speaking for the United States Supreme Court.¹

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¹ Santobello v. New York, 404 U.S. 257, 260 (1971).

“[P]revailing legal sensibility recoil[s] at the thought that criminal justice could be a matter to be negotiated rather than imposed.”—Mirjan Damaška.²

Plea bargaining is simultaneously one of the most frequently used practices in criminal justice systems around the globe and one of the most controversial practices.³ At its core, plea bargaining is a negotiation process between the prosecution and defense.⁴ It permits the defendant to admit incriminating facts or to plead guilty to one or more criminal charges in exchange for the prosecutor’s suspension of prosecution for other charges (charge bargaining) or recommendation of a lighter sentence (sentence bargaining).⁵ The practice is voluntary; criminal defendants must choose whether to waive their constitutional right to a jury trial and forgo the safeguards that a trial provides.⁶ On the one hand, plea bargaining is considered vital for sustaining overburdened trial courts and prosecutorial staffs.⁷ On the other hand, some believe that plea bargaining treats guilty defendants too leniently and undermines the truth finding function of trial by pressuring innocent defendants into accepting a bargain.⁸

The latter theory prevails in Japan, which lacks a formal plea bargaining system and whose legal community has long resisted adoption of such a system.⁹ Following a nationwide economic downturn in the 1990s, the Japanese government instituted a series of legal reforms proposed by the Justice System Reform Council (“JSRC”) to strengthen the foundations of the country’s legal and administrative apparatuses for the twenty-first century.¹⁰ The JSRC specifically refused to recommend a system of plea

² Mirjan Damaška, *Negotiated Justice in International Criminal Courts*, 2 J. INT’L CRIM. JUST. 1018, 1022 (2004).

³ George Fisher, *Plea Bargaining’s Triumph*, 109 YALE L.J. 857, 859 (2000).

⁴ Anna Petrig, *Negotiated Justice and the Goals of International Criminal Tribunals*, 8 CHI.-KENT J. INT’L & COMP. L. 1, 4-5 (2008).

⁵ *Id.*

⁶ See *Santobello*, 404 U.S. at 260; Timothy Sandefur, *In Defense of Plea Bargaining*, REGULATION, Fall 2003, at 29, available at <http://www.cato.org/pubs/regulation/regv26n3/v26n3-8.pdf>.

⁷ Fisher, *supra* note 3, at 867 (stating that plea bargaining “deliver[s] marvelously efficient relief from a suffocating workload [for judges and prosecutors]”).

⁸ See Roland Acevedo, Note, *Is a Ban on Plea Bargaining an Abuse of Discretion? A Bronx County, New York Case Study*, 64 FORDHAM L. REV. 987, 992, 999-1000 (1995).

⁹ See Jean Choi Desombre, *Comparing the Notions of the Japanese and the U.S. Criminal Justice System: An Examination of Pretrial Rights of the Criminally Accused in Japan and the United States*, 14 UCLA PAC. BASIN L.J. 103, 124 (1995) (observing that truth-seeking and accuracy are central goals of the Japanese criminal justice system and that these goals would be undermined if innocent defendants pled guilty).

¹⁰ See THE JUSTICE SYSTEM REFORM COUNCIL, RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY intro. (2001),

bargaining, stating that it was important to develop efficient trial procedures but that there were “problems” associated with giving criminal defendants the choice to avoid trial.¹¹ Accordingly, plea bargaining provisions were not among the reform laws passed by the Japanese legislature.¹² In addition, Japanese legal professionals believe that plea bargaining is incompatible with the pursuit of justice within the Japanese system,¹³ which emphasizes truth seeking, the defendant’s remorse and rehabilitation, and the protection of victims’ interests.¹⁴ The rejection of plea bargaining by the JSRC, the Japanese legislature, and Japanese legal professionals assumes new urgency in light of rising pressures on the country’s criminal justice system to increase efficiency since the early 1990s.¹⁵

Despite their resistance to institutionalized plea bargaining, key players in the Japanese legal system have sanctioned alternative kinds of bargaining in response to the demand for efficiency.¹⁶ The main response has been a system of “tacit” bargaining, in which there is an implicit, often unspoken, exchange of the defendant’s confession for lesser charges or recommendation of a more lenient sentence by the prosecutor.¹⁷ When defendants confess pursuant to a tacit bargain, they are usually convicted under expedited trial procedures.¹⁸ Since some semblance of trial is preserved and prosecutors are not obligated to adhere to implicit bargains,

http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html (citing Law Concerning Establishment of the Justice System Reform Council, art. 2, para. 1); Tom Ginsburg & Glenn Hoetker, *The Unreluctant Litigant? An Empirical Analysis of Japan’s Turn to Litigation*, 35 J. LEGAL STUD. 31, 36 (2006).

¹¹ THE JUSTICE SYSTEM REFORM COUNCIL, *supra* note 10, at ch. II, pt. 2 § (1)(6).

¹² See Daniel H. Foote, *Justice System Reform in Japan*, at 11-13, <http://www.reds.msh-paris.fr/communication/docs/foote.pdf> (listing the major reforms that the Japanese legislature made, of which plea bargaining is not one).

¹³ See David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* 411, 416-17 (Jun. 7, 1996) (unpublished Ph.D. dissertation, University of California at Berkeley) (on file with UMI Dissertation Services).

¹⁴ See Desombre, *supra* note 9, at 124 (noting the truth-seeking component of the Japanese justice system); Ingram Weber, *The New Japanese Jury System: Empowering the Public, Preserving Continental Justice*, 4 E. ASIA L. REV. 125, 146-47 (2009) (noting the Japanese justice system’s commitment to the goals of rehabilitation and remorse); Arne F. Soldwedel, *Testing Japan’s Convictions: The Lay Judge System and the Rights of Criminal Defendants*, 41 VAND. J. TRANSNAT’L L. 1417, 1458-59 (2008) (noting that, as crimes have increased, the Japanese justice system has become increasingly focused on protecting victims’ rights rather than the rights of the accused).

¹⁵ See J. Sean Curtin, *In Japan, the Crime Rate Also Rises*, ASIA TIMES ONLINE, (Aug. 28, 2004), <http://www.atimes.com/atimes/Japan/FH28Dh01.html> (describing rising crime rate in Japan) (last visited April 25, 2011); JAPANESE MINISTRY OF JUSTICE, WHITE PAPER ON CRIME tbl. 2-3-1-1 (2006) [hereinafter 2006 WHITE PAPER ON CRIME], available at http://hokusyo1.moj.go.jp/en/55/nfm/n_55_2_2_3_1_1.html (showing decreasing number of trials in Japan since mid 1990s).

¹⁶ See JENIA I. TURNER, PLEA BARGAINING ACROSS BORDERS 173-74 (Hiram E. Chodosh ed., 2009).

¹⁷ *Id.* at 192.

¹⁸ *Id.* at 184-91.

tacit bargaining's "unspoken exchange[s] of concessions" is more acceptable to the Japanese legal community than institutionalized plea bargaining.¹⁹ Nonetheless, some view tacit bargaining as the "functional analogue" of formal, American-style plea bargaining.²⁰

This comment argues that the confession-reliant tacit bargaining now practiced in Japan is an ineffective substitute for a system of institutionalized plea bargaining. Institutionalized plea bargaining achieves the ultimate efficiency goal of avoiding trial in two ways: it creates binding, enforceable bargains,²¹ and it yields benefits to both the defense and prosecution through negotiation.²² In contrast, tacit bargains are nonnegotiable and nonbinding,²³ and reinforce aspects of the Japanese justice system that favor prosecutorial power. This is problematic in view of the Japanese government's goal of creating a more liberal justice system for the twenty-first century with renewed focus on defendants' rights.²⁴ Furthermore, this comment argues that, contrary to beliefs among Japanese legal professionals, institutionalized plea bargaining would comport with the values of the Japanese justice system that emphasize truth-seeking, the defendant's remorse and rehabilitation, and protection of victims' interests. In this regard, international criminal tribunals can serve as models for Japan because they utilize plea bargaining in ways that respect those objectives.

Part II of this comment describes the increasing burdens on the Japanese criminal justice system and the tacit varieties of plea bargaining that have developed in response. Part III argues that tacit bargaining cannot substitute for a more formalized system of plea bargaining. Tacit bargaining

¹⁹ *Id.* at 191.

²⁰ See Soldwedel, *supra* note 14, at 1434; J. Mark Ramseyer & Eric B. Rasmusen, *Why Is the Japanese Conviction Rate So High?*, 30 J. LEGAL STUD. 53, 57 (2001).

²¹ See Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 773 (2001).

²² See Didrick Castberg, *Prosecutorial Independence in Japan*, 16 UCLA PAC. BASIN L.J. 38, 67-68 (1997) (noting that one feature of formal American-style plea bargaining is an offer and exchange of specific benefits to both parties). Standard-form plea bargaining, in which a defendant's guilty plea is accompanied by standardized charge reductions or reductions in the prosecutor's recommended length of sentence, renders negotiation more of a theoretical possibility than the norm in many jurisdictions in the United States. See, e.g., Margareth Etienne & Jennifer K. Robbennolt, Comment, *Apologies and Plea Bargaining*, 91 MARQ. L. REV. 295, 311 (2007) (analogizing plea bargaining to an "assembly line model of case processing in which prosecutors . . . assign a preliminary plea offer to each case"). However, the laws of most jurisdictions leave the parties significant room for negotiation at the margins that take into account the unique circumstances of each case. *Id.* at 312 ("Many plea agreements fall somewhere on the spectrum that runs from supermarket bargaining to protracted bargaining.").

²³ TURNER, *supra* note 16, at 192.

²⁴ THE JUSTICE SYSTEM REFORM COUNCIL, THE POINTS AT ISSUE IN THE JUSTICE REFORM pt. I(1) (2001), http://www.kantei.go.jp/foreign/policy/sihou/singikai/991221_e.html (noting that JSRC is charged with proposing reforms that recognize "plural viewpoints" of the justice system and that promote "fundamental human rights").

exploits existing vulnerabilities in the Japanese justice system and often leads to uninformed, involuntary confessions. The nonbinding, nonnegotiable nature of tacit bargains also limits their effectiveness. In contrast, a system of institutionalized plea bargaining would provide some protection for defendants' rights. It would also level the playing field between the defense and prosecution by yielding enforceable plea agreements through a negotiated exchange of benefits. Finally, Part IV posits that international criminal tribunals can serve as exemplars for Japan because they have used plea bargaining systematically and transparently in ways that incorporate the goals of the Japanese justice system.

II. INCREASING PRESSURE TO QUICKLY DISPOSE OF CRIMINAL CASES HAS LED JAPANESE PROSECUTORS TO USE TACIT BARGAINING

Efficiency is the most often cited reason for the existence of plea bargaining,²⁵ and recent trends highlight the demand for efficiency in Japan. Japan has been characterized as a "paradise lost" because of its once low crime rates compared to other industrialized nations, followed by a gradual increase in crime and decline in the public's sense of security in the past two decades.²⁶ During the 1960s through the 1980s, when the crime rates of most industrialized countries increased, Japan's crime rate fell.²⁷ However, this pattern reversed during the 1990s and the first decade of this century, as Japan experienced an economic downturn.²⁸ Japan's increasing crime rate has translated into a decreasing number of cases tried and prosecuted in the country,²⁹ signaling that the current system is in need of a safety valve. Prosecutors have used tacit bargaining and the expedited trial procedures that follow to address the burdens on the system, but tacit bargaining is not an ideal solution to the problem of efficiency.

²⁵ Cynthia Alkon, *Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems?*, 19 *TRANSNAT'L L. & CONTEMP. PROBS.* 355, 392 (2010).

²⁶ Dag Leonardsen, *Crime in Japan: Paradise Lost?*, 7 *J. SCANDINAVIAN STUD. IN CRIMINOLOGY & CRIME PREVENTION* 185, 185-86 (2006).

²⁷ See Curtin, *supra* note 15.

²⁸ *Id.*; see also Leonardsen, *supra* note 26, at 185 (concluding that the 1990s economic slump explains the rise in crime in Japan).

²⁹ See 2006 WHITE PAPER ON CRIME, *supra* note 15, at tbl. 2-3-1-1.

A. *Japan Is Experiencing an Upswing in Crime Rates and a Shortage of Prosecutorial Resources*

The increase in crime in Japan from the 1990s to the present has been significant. One writer places the increase in the overall crime rate from 1994 to 2004 at approximately 150%.³⁰ The Japanese Ministry of Justice issued a White Paper on Crime in 2002 that showed a steady increase in the number of reported crimes since 1990.³¹ There was an accompanying decrease in the clearance rate, the rate at which suspects are released from police custody or cleared of charges, for alleged violations of the Japanese Penal Code.³² Although recently issued White Papers indicate a decline in crime since 2003, crime is still high by historical standards³³ and not all types of crime have decreased in frequency.³⁴ Specifically, less serious nonviolent crimes, such as car thefts and burglaries, have seen the greatest rate increases in the past two decades.³⁵ The increase in crime in Japan, particularly less serious crime, supports the argument in favor of plea bargaining because prosecutors are under pressure to dispose of each case quickly and turn their attention to other crimes.³⁶ Less serious crimes are particularly amenable to plea bargaining because prosecutors may consider the seriousness of an offense and public response to a plea bargain when deciding whether to enter into plea discussions.³⁷

Although Japan's rising crime rate and decreasing clearance rate demand more prosecutorial resources to keep the public safe, prosecutors' offices remain "[c]hronically understaffed."³⁸ In 2006, according to United Nations estimates, there were fewer than two prosecutors in Japan for every

³⁰ Curtin, *supra* note 15. *But see* David T. Johnson, *Crime and Punishment in Contemporary Japan*, 36 CRIME & JUST. 371, 376-78 (2007) (arguing that the perception of a rise in crime has been fueled by changes in police crime reporting practices).

³¹ JAPANESE MINISTRY OF JUSTICE, WHITE PAPER ON CRIME fig. 1-1-1-6 (2002), available at http://hokusyo1.moj.go.jp/en/47/nfm/n_47_2_1_1_1_2.html (click link to "preface" in the index to see summary of report or click on links to individual sections).

³² *Id.* at fig. 1-1-1-1.

³³ *See* Leonardsen, *supra* note 26; 2006 WHITE PAPER ON CRIME, *supra* note 15, at pt. 1, ch. 1, § 1.1.

³⁴ *Japan's Crime Rate Soars*, BBC NEWS, Aug. 3, 2001, available at <http://news.bbc.co.uk/2/hi/asia-pacific/1472175.stm>.

³⁵ *Id.*

³⁶ *See* TURNER, *supra* note 16, at 174.

³⁷ Rebecca Hollander-Blumoff, *Getting to "Guilty": Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115, 131 (1997) (asserting that less serious and less visible crimes are most amenable to plea bargaining because prosecutors can avoid the public perception that they are being soft on crime by making a plea agreement).

³⁸ Ramseyer & Rasmusen, *supra* note 20, at 54.

100,000 people.³⁹ Although the Japanese government plans to bring the number of lawyers nationwide up to at least 50,000 by 2018 with changes to bar admission rules made in 2002,⁴⁰ the number of attorneys will remain low by international standards.⁴¹ Moreover, there is no guarantee that a sizable share of the new lawyers will choose to work as criminal lawyers when more attractive career paths are available.⁴² In addition to the small number of prosecutors, the number of trials has decreased quite steadily from 1996 to 2005.⁴³ The fact that the number of trials cannot keep pace with the country's crime rate shows that prosecutors need the kind of safety valve provided by plea bargaining. The Japanese legislature's introduction of a jury requirement for serious criminal cases beginning in 2009 has placed further limits on prosecutorial resources.⁴⁴ The jury trial requirement impacts roughly 3% of criminal cases each year and is a reality that prosecutors must confront by conserving resources whenever possible.⁴⁵

The public mood in Japan is not impervious to the nation's increasing crime rate. The sense of security that Japanese citizens once felt has gradually eroded, to the point that people fear for their personal safety.⁴⁶ The fear signals that "something new is happening in a society renowned for its peacefulness and high level of social integration."⁴⁷ The public is distrustful of the ability of government authorities to clamp down on increasing crime rates.⁴⁸ Perhaps these trends in the public mood indicate

³⁹ U.N. Office on Drugs & Crime, Questionnaire for the Tenth U.N. Survey of Crime Trends and Operations of Criminal Justice Systems, covering the period 2005-2006, at 956, http://www.unodc.org/documents/data-and-analysis/All_countries.pdf (listing 1.95 prosecutors in Japan per 100,000 people).

⁴⁰ *Reforms in Japan Expected to Bring Influx of Lawyers, Lawsuits*, INSURANCE JOURNAL (Aug. 21, 2006), <http://www.insurancejournal.com/news/international/2006/08/21/71561.htm> (last visited April 25, 2011); *Number of Lawyers in Japan to Top 30,000 Soon*, JAPAN TODAY, Dec. 22, 2010.

⁴¹ The United States had more than four times as many prosecutors as Japan (8.84) for every 100,000 people in 2005, while still using plea bargaining on a regular basis to keep the court system running efficiently. U.N. Office on Drugs & Crime, *supra* note 39, at 2290.

⁴² *Reforms in Japan Expected to Bring Influx of Lawyers, Lawsuits*, *supra* note 40 (remarking that "[d]efense lawyers are widely perceived as protectors of the public's enemies and are often poorly paid").

⁴³ See 2006 WHITE PAPER ON CRIME, *supra* note 15, at tbl. 2-3-1-1 (tracking a relatively steady decline from 1996 to 2005 in the number of defendants that are finally judged by trials).

⁴⁴ See Matthew J. Wilson, *U.S. Legal Education Methods and Ideals: Application to the Japanese and Korean Systems*, 18 CARDOZO J. INT'L & COMP. L. 295, 334 (2010) (explaining that Japanese courts had to appoint defense attorneys in 6730 cases that were filed in the month following implementation of the new jury trial system).

⁴⁵ Matthew Wilson, *The Dawn of Criminal Jury Trials in Japan: Success on the Horizon?*, 24 WIS. INT'L L.J. 835, 844-45 (2007) (listing types of cases in which new mixed jury system is required and calculating that 3.2% of cases would have been subject to the requirement in 2005).

⁴⁶ See Leonardsen, *supra* note 26, at 186 (describing fear that Japanese parents and teachers have about youth and a rising preoccupation with media coverage of crime).

⁴⁷ *Id.* at 187.

⁴⁸ See Curtin, *supra* note 15 (finding that public confidence in the police has hit a record low).

that the Japanese citizenry is ready for the government to try more efficient methods of prosecuting crime and getting criminals off the streets. Indeed, one of the findings of the JSRC was that the public doubted the government's ability to quickly try and sentence criminal defendants.⁴⁹ Plea bargaining could be an effective tool in the government's arsenal for achieving speedier criminal justice.

B. Japanese Prosecutors Have Used Tacit Bargaining in Response to the Pressures to Expedite Criminal Proceedings

The trends noted above illustrate that efficiency is now a core concern of the Japanese criminal justice system, creating the need for a system of plea bargaining. Japanese prosecutors, encouraged by trial courts, have responded to the demand for efficiency by using various forms of informal tacit bargaining.⁵⁰ In her survey of plea bargaining systems across the globe, Jenia Turner identifies three types of tacit bargaining that are used in Japan: 1) an informal offer of summary prosecution and a monetary fine rather than a custodial sentence, in exchange for a confession; 2) an informal offer of suspended prosecution or recommendation of a lenient sentence, in exchange for a confession; and 3) an unspoken exchange of a lighter sentence for confession and cooperation with the court.⁵¹

Summary prosecution, in which no formal trial occurs, is the primary mode of resolution used in minor criminal cases and traffic offenses.⁵² More serious cases, however, must be resolved by a full-scale trial or by the expedited trials allowed by the second and third type of tacit bargains.⁵³ All three categories of tacit bargaining identified by Turner rest on the defendant's confession.⁵⁴ The implicit bargain (i.e. the promise of a more lenient sentence or of suspended prosecution) is offered in exchange for the defendant's confession, and this exchange of benefits occurs during pretrial interrogation before the defendant is formally charged and pleads in court.⁵⁵ As one writer explains,

In Japan, there is no guilty plea as such, as the accused can only admit or deny the facts as set forth in the indictment. And by

⁴⁹ THE JUSTICE SYSTEM REFORM COUNCIL, *supra* note 10, at ch. II, pt. 2, § 1.

⁵⁰ TURNER, *supra* note 16, at 174, 191.

⁵¹ *Id.* at 189, 191.

⁵² See 2006 WHITE PAPER ON CRIME, *supra* note 15, at tbl. 2-3-1-3; Johnson, *supra* note 13, at 414.

⁵³ TURNER, *supra* note 16, at 191.

⁵⁴ *Id.*

⁵⁵ *Id.*

the time the indictment is filed, the defendant has generally given a statement in which he or she confesses or admits to most of the facts charged. Thus the defendant in Japan has little with which to bargain.⁵⁶

In contrast, in the Anglo-American system, the bargain is offered in exchange for the defendant's guilty plea, and the terms of the bargain are reduced to writing before the defendant appears in court. The system of confession-dependent tacit bargaining and the system of plea-dependent institutionalized bargaining differ in important respects.

C. *Japanese Prosecutors Rely on Tacit Bargaining Because of Cultural Aversion to Institutionalized Plea Bargaining*

Tacit bargaining can be viewed as a way of getting around the ingrained cultural aversion to "explicit" plea bargaining within the Japanese legal community.⁵⁷ Japan's cultural distaste for plea bargaining stems from the fact that the country's justice system is not centered on defendants' rights, or what some scholars call "procedural justice."⁵⁸ Rather, it focuses on achieving the "just result," or what some scholars call "substantive justice."⁵⁹ There are three goals of the Japanese justice system that lead the way to the "just result": seeking a truthful account of events, exacting remorse from defendants while attempting to rehabilitate them, and protecting victims.⁶⁰ Many Japanese legal professionals believe that plea bargaining interferes with these goals because "the advance promise of leniency" pressures innocent defendants to plead guilty and induces guilty defendants to distort the truth.⁶¹ They believe that the pressure to falsify undermines the search for truth.⁶² They also believe that, whereas a confession reveals the motives behind a defendant's crime, a guilty plea precludes a sincere apology from the defendant, diminishes the prospects for genuine rehabilitation, and interferes with the victim's healing process.⁶³

⁵⁶ Castberg, *supra* note 22, at 68.

⁵⁷ See TURNER, *supra* note 16, at 191, 195.

⁵⁸ Desombre, *supra* note 9, at 103; Soldwedel, *supra* note 14, at 1430.

⁵⁹ *Id.*

⁶⁰ See Desombre, *supra* note 9, at 124 (noting the truth-seeking component of the Japanese justice system); Weber, *supra* note 14, at 146-47 (noting the Japanese justice system's commitment to the goals of rehabilitation and remorse); Soldwedel, *supra* note 14, at 1458-59 (noting that, as crimes have increased, the Japanese justice system has become increasingly focused on protecting victims' rights rather than the rights of the accused).

⁶¹ Desombre, *supra* note 9, at 124.

⁶² *Id.*

⁶³ Weber, *supra* note 14, at 146-47.

To get around cultural obstacles to institutionalized plea bargaining, Japanese legal professionals use tacit bargaining. However, tacit bargaining is concerning in regards to defendants' rights, as covered in Part III. The use of plea bargaining in international criminal tribunals, as covered in Part IV, indicates that institutionalized plea bargaining may actually be a better fit for the values of the Japanese justice system.

III. THE NONBINDING, COERCIVE NATURE OF TACIT BARGAINS MAKE THEM INADEQUATE SUBSTITUTES FOR FORMAL PLEA AGREEMENTS

Formal institutionalized plea bargaining has been the object of much criticism,⁶⁴ raising the question of whether Japan would be better served by continuing to use the tacit bargaining system that preserves at least some semblance of trial procedures.⁶⁵ There is voluminous literature that criticizes the quality of justice that results from institutionalized plea bargaining.⁶⁶ A common thread in this literature is that plea bargaining subverts the integrity of the judicial system because the defendant gives up the safeguards of trial, such as judicial neutrality and the public forum.⁶⁷ Plea bargaining is also criticized for its coerciveness; it pressures defendants into waiving their right to a trial and punishes defendants who insist on trial with harsher sentences.⁶⁸ Finally, some believe that plea bargaining pressures innocent defendants who don't want to accept the risks associated with trial into pleading guilty, thereby undermining the truth finding function of trial.⁶⁹ The main response to these arguments usually hinges on the sheer necessity of plea bargaining in overburdened criminal justice systems.⁷⁰

⁶⁴ See Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 4 n.13 (2002) (listing several articles that are critical of plea bargaining).

⁶⁵ Summary prosecution, often used to resolve minor crimes, avoids trial, but the types of tacit bargaining generally used to resolve more serious cases preserve an expedited form of trial. See TURNER, *supra* note 16, at 191; Johnson, *supra* note 13, at 414.

⁶⁶ See generally Combs, *supra* note 64.

⁶⁷ See Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 40-41 (1983); Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1368-69 (2003).

⁶⁸ See, e.g., Timothy Lynch, *The Case Against Plea Bargaining*, 26 REGULATION 24, 27 (2003), available at <http://www.cato.org/pubs/regulation/regv26n3/v26n3-7.pdf>; *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (Blackmun, J., dissenting); Desombre, *supra* note 9, at 119.

⁶⁹ See Douglas D. Guidorizzi, Comment, *Should We Really "Ban" Plea Bargaining? The Core Concerns of Plea Bargaining's Critics*, 47 EMORY L.J. 753, 768 (1998); Michael W. Smith, *Making the Innocent Guilty: Plea Bargaining and the False Plea Convictions of the Innocent*, 46(5) CRIM. LAW BULLETIN ART 4, 14 (2010).

⁷⁰ See, e.g., *Santobello v. New York*, 404 U.S. 257, 260 (1971) ("If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.").

Plea bargaining is viewed as an essential time saver⁷¹ because it shortcuts complicated trial procedures while still affording defendants some measure of choice in deciding whether to “sell” [their] right to trial.”⁷²

The increasing crime rates and shortage of prosecutorial resources in Japan highlight the necessity for a plea bargaining system in the country.⁷³ Thus, while it is beyond the scope of this comment to embark on an in-depth analysis of the advantages and disadvantages of plea bargaining, this comment does adopt the stance that plea bargaining, for all its flaws, is a valuable feature in overburdened court systems. Furthermore, this comment argues that, compared to institutionalized plea bargaining, the problems associated with tacit plea bargaining are more numerous and more restrictive of defendants’ rights.

At about the same time that crime started increasing in Japan in the 1990s, the country’s legal system also began undergoing a major transition, formally shifting from an inquisitorial system to an adversarial system.⁷⁴ Many of the reform laws passed by the Japanese legislature following the JSRC recommendations were intended to introduce an adversarial component into Japan’s criminal justice system.⁷⁵ However, vestiges of the old inquisitorial system remain.⁷⁶ The principle aim of the Japanese justice system is still “to achieve the just result, not the just process,” so that “if the accused is indeed guilty, the Japanese system is driven to find him guilty even if his rights are violated in the process of determining his guilt.”⁷⁷ Tacit plea bargaining, which rests on obtaining confessions, reinforces coercive institutional structures and relationships within the Japanese system in a way that is concerning for the rights of criminal defendants. Institutionalized plea bargaining would result in fewer uninformed, involuntary confessions in Japan. A system of formal plea agreements would also introduce more balance into Japan’s criminal justice process and into the relationships of key players in the Japanese legal system. It would do so by fostering binding

⁷¹ Fisher, *supra* note 3, at 1070.

⁷² Sandefur, *supra* note 6.

⁷³ See *supra* Part II.

⁷⁴ Tom Ginsburg, *Review: Untitled*, 30 J. JAPANESE STUD. 572, 573 (2004) (reviewing THE JAPANESE ADVERSARY SYSTEM IN CONTEXT: CONTROVERSIES AND COMPARISONS (Malcolm M. Feeley & Setsuo Miyazawa eds., 2002)).

⁷⁵ See Foote, *supra* note 12, at 11-12 (describing reform laws, such as the strengthening of public defender agencies and introduction of ADR mechanisms, that have attempted to equalize the power of the defense and prosecution).

⁷⁶ See Ginsburg, *supra* note 74, at 573 (noting that many authors have concluded that Japan has not met its stated objective of fully transitioning to an adversarial system).

⁷⁷ Desombre, *supra* note 9, at 103.

plea agreements through a negotiated exchange of benefits and setting up structures that are protective of defendants' rights.

A. *Tacit Bargaining Depends on Confessions Obtained Under Coercive Conditions Where the Defendant's Access to Counsel Is Restricted*

Despite Japan's transition to a primarily adversarial legal system, the balance of power is still skewed in the prosecution's favor, particularly during the pretrial stage. Prosecutors focus on obtaining confessions prior to trial,⁷⁸ and tacit bargaining relies on the defendant's confession. Accordingly, the practice of tacit bargaining exploits the coercive conditions that exist at the pretrial stage due to the lack of procedural safeguards in the Japanese justice system. Confessions are considered to be the "king of evidence"⁷⁹ and form the basis for a conviction in over 90% of criminal cases in Japan,⁸⁰ so the connection between tacit bargaining and coercive institutional structures raises concern in many cases. American-style institutionalized plea bargaining can help equalize the power of the defense and prosecution by affording defendants greater institutional safeguards when they decide whether to accept a plea agreement.

1. *Confessions Are Often Obtained in Japan Under Coercive Conditions*

Coercive interrogation practices are linked to the high frequency of confessions in Japan.⁸¹ There is a 93% confession rate⁸² and a conviction rate over 99% in Japan.⁸³ In addition to virtually ensuring conviction at trial, confessions are viewed as "a first step on the road to rehabilitation,"⁸⁴ an important goal of the country's justice system. In fact, confession takes precedence in criminal prosecutions over other important factual and legal issues that should be examined to preserve the presumption of innocence,

⁷⁸ Matthew J. Wilson, *Japan's New Criminal Jury Trial System: In Need of More Transparency, More Access, and More Time*, 33 *FORDHAM INT'L L.J.* 487, 504-05 (2010).

⁷⁹ Norimitsu Onishi, *Pressed by Police, Even Innocent Confess in Japan*, *N.Y. TIMES*, May 11, 2007, at A1 (quoting Japanese attorney and former judge Kenzo Akiyama).

⁸⁰ Wilson, *supra* note 78, at 508-09.

⁸¹ Ginsburg, *supra* note 74, at 574 (acknowledging that "the frequency of confession is no doubt tied to interrogation practices").

⁸² See Ramseyer & Rasmusen, *supra* note 20, at 57.

⁸³ Wilson, *supra* note 78, at 508. Note that the confession and conviction rates can differ because the Japanese Constitution requires independent evidentiary corroboration of a defendant's confession in order to convict. See *KENPŌ* [CONSTITUTION], art. 38, para. 3 (Japan).

⁸⁴ Erik D. Herber, *Japanese Sentencing Practices: Creating an Opportunity for Formal "Paternalism,"* 2 *INT'L J. CRIMINOLOGY & SOC. THEORY* 303, 306 (2009), available at <http://pi.library.yorku.ca/ojs/index.php/ijest/article/viewFile/23406/21602>.

such as analysis of forensic evidence.⁸⁵ In light of the importance of confession to the legal system, there is a great deal of pressure on police and prosecutors to obtain confessions from defendants.⁸⁶ While there are analogous pressures to obtain guilty pleas in the Anglo-American system, the pressures used to secure confessions are more acute in Japan for two reasons. First, Japanese prosecutors have greater discretion than their American counterparts during the pretrial interrogation period.⁸⁷ Second, a defendant's access to counsel is restricted during the pretrial period in Japan, making interrogation a more isolating, coercive experience in Japan than in the American system.⁸⁸

Japanese police and prosecutors employ a variety of methods to extract confessions within the coercive interrogation environment.⁸⁹ Once arrested, defendants can be held in police custody for up to twenty-three days and questioned during that period before they are indicted.⁹⁰ This period can be extended with court approval when the suspect faces charges for multiple crimes,⁹¹ which is often true in cases that are amenable to bargaining.⁹² Article 198(1) of the Japanese Code of Criminal Procedure places suspects under a duty to appear at interrogation,⁹³ and although suspects may refuse to answer questions, they cannot cut off questioning and are therefore susceptible to coercive interrogation techniques.⁹⁴ Authorities may resort to threats or psychological torture to extract a confession from an

⁸⁵ Stephan Landsman & Jing Zhang, *A Tale of Two Juries: Lay Participation Comes to Japanese and Chinese Courts*, 25 UCLA PAC. BASIN L.J. 179, 184 (2008).

⁸⁶ See John O. Haley, *A Spiral of Success: Community Support is Key to Restorative Justice in Japan*, 38 ECOLOGY JUST. 2, 2 (1994), available at <http://www.context.org/ICLIB/IC38/Haley.htm>.

⁸⁷ *Id.* (noting that "discretionary powers . . . make official restorative measures possible.").

⁸⁸ See Wilson, *supra* note 78, at 505; but see JAPAN FED'N OF BAR ASS'NS, JAPAN FEDERATION OF BAR ASSOCIATIONS UPDATE REPORT IN RESPONSE TO THE LIST OF ISSUES TO BE TAKEN UP IN CONNECTION WITH THE CONSIDERATION OF THE FIFTH PERIODIC REPORT OF JAPAN 11 (2008), available at http://www2.ohchr.org/english/bodies/hrc/docs/ngos/JFBA_Japan94.pdf [hereinafter "JAPAN FED'N OF BAR ASS'NS"]; JAPAN MINISTRY OF JUSTICE, IMPLEMENTATION OF COMPREHENSIVE LEGAL SUPPORT BY THE JAPAN LEGAL SUPPORT CENTER (2006), available at <http://www.moj.go.jp/ENGLISH/issues/issues02.html> (describing 2004 Comprehensive Legal Support Law that has expanded pre-trial access to counsel for defendants in some types of criminal cases since 2006).

⁸⁹ Wilson, *supra* note 78, at 509.

⁹⁰ Robert M. Bloom, *Jury Trials in Japan 27* (Boston College Law School Faculty Papers, Working Paper No. 41, 2005), available at <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1041&context=lsfp>.

⁹¹ Wilson, *supra* note 78, at 504 n.116.

⁹² Craig Albee, Note, *Multiple Punishment in Wisconsin and the Wolske Decision: Is it Desirable to Permit Two Homicide Convictions For Causing a Single Death?*, 1990 WIS. L. REV. 553, 572 (1990) (noting that "a defendant facing the prospect of conviction on a number of charges is more likely to be compelled to plead guilty for plea bargaining purposes, regardless of his actual guilt").

⁹³ See KEISOHŌ [C. CRIM. PRO.] art. 198, para. 1 (Japan).

⁹⁴ See Desombre, *supra* note 9, at 109-10.

uncooperative defendant.⁹⁵ Such abuses occur despite constitutional prohibitions against compelled testimony.⁹⁶ In the infamous 1991 wrongful conviction case of Toshikazu Sugaya, who was charged with kidnapping and murdering a four-year-old girl but ultimately acquitted after spending seventeen years in jail, interrogators questioned Sugaya for thirteen consecutive hours without access to counsel.⁹⁷ The public rarely learns of such interrogation abuses because interrogations occur *incommunicado*; they are not fully recorded, and prosecutors sometimes cherry pick which portions of recordings to make available to the court.⁹⁸

While the American system is not immune from these kinds of abuses, the kind of institutionalized plea bargaining that is prevalent in America could reduce the coerciveness of Japan's pretrial processes. Japanese authorities implicitly recognize this, citing the lack of a formal plea bargaining as a justification for their use of harsh interrogation methods.⁹⁹ Because plea bargaining, unlike most forms of tacit bargaining, eliminates the trial stage, the main event of the criminal justice process in a plea bargaining system is the process of pretrial plea negotiations.¹⁰⁰ Both parties bring all their bargaining chips to the plea discussions and must abide by the plea agreement that is reached; as discussed in greater detail below, the defendant can withdraw a guilty plea if the prosecutor reneges on the deal.¹⁰¹ The binding nature of the plea agreement gives the prosecutor incentive to engage defense counsel at each step of the negotiations and develop a mutually amicable agreement. This kind of negotiating environment facilitates "openness and candor"¹⁰² between the parties during the bargaining process. It can permit more transparent negotiations and yield fairer deals that will withstand the test of time.

In contrast, in Japan's tacit bargaining system, prosecutors often do not deal with defense counsel prior to trial. Rather, they interrogate the unrepresented defendant alone, setting up a one-sided situation where prosecutors are prone to use coercive techniques to secure confessions. One of these techniques may be to offer a tacit bargain but leave little or no room

⁹⁵ Wilson, *supra* note 78, at 509.

⁹⁶ KENPŌ [CONSTITUTION], art. 38, para. 2 (Japan).

⁹⁷ See Martin Fackler, *Falsely Convicted, Freed and No Longer Quiet*, N. Y. TIMES, Aug. 13, 2010.

⁹⁸ See *Prosecutors to Partially Record Interrogations*, JAPAN TODAY, Dec. 8, 2010, <http://www.japantoday.com/category/crime/view/prosecutors-to-partially-record-interrogations> (last visited April 27, 2011).

⁹⁹ Wilson, *supra* note 78, at 509.

¹⁰⁰ Adam Robison, Comment, *Waiver of Plea Agreement Statements: A Glimmer of Hope to Limit Plea Statement Usage to Impeachment*, 46 S. TEX. L. REV. 661, 671 (2005).

¹⁰¹ Damaška, *supra* note 2, at 1027.

¹⁰² Robison, *supra* note 100.

for negotiation or modifications to the initial offer. With the full force of the prosecutorial system bearing down upon them, Japanese defendants may confess because they feel like they have “little with which to bargain.”¹⁰³ The lack of access to defense counsel for many Japanese defendants means that there is no one to counterbalance the prosecutor’s apparent power during the tacit bargaining stage. In sum, in contrast to their American counterparts, Japanese prosecutors in the tacit bargaining system work within an isolating, coercive environment where defendants are likely to confess even if doing so is against their best interests.

2. *Access to Counsel Prior to Confession Is Restricted in the Japanese Justice System*

In Japan, parties usually agree to tacit bargains during interrogation without the presence of defense counsel.¹⁰⁴ In most cases, the exchange of the tacit bargain for the defendant’s confession occurs prior to pleading guilty or not guilty.¹⁰⁵ When defendants gain access to counsel after indictment, they may recant their confessions and plead not guilty, but this does not prevent the courts from using the original confession as incriminating evidence.¹⁰⁶ Thus, tacit bargains, once struck during the interrogation period, can do real damage to a defendant’s case, and it is important for a defendant to consult with counsel before confessing. Until recent amendments to Japan’s Criminal Procedure Code in 2004,¹⁰⁷ a suspect had no right to request the presence of an attorney during the pre-indictment interrogation period or to stop the interrogation midway to consult with an attorney.¹⁰⁸

In 2004, the Japanese legislature amended the Code of Criminal Procedure to provide access to state-appointed counsel for indigent defendants before indictment.¹⁰⁹ The amendment went into effect in two phases.¹¹⁰ In the first phase, effective in October 2006, the new system of state-appointed counsel was extended to cases that are punishable by death

¹⁰³ Castberg, *supra* note 22.

¹⁰⁴ See Wilson, *supra* note 78, at 505 (noting that traditionally, state-appointed counsel has been unavailable to defendants until after indictment).

¹⁰⁵ TURNER, *supra* note 16, at 192.

¹⁰⁶ See Wilson, *supra* note 78, at 500 (explaining that Toshikazu Sugaya, in his 1991 murder trial, recanted his confession after gaining access to counsel because the confession was given under the duress, but the trial court proceeded to convict him based on his confession).

¹⁰⁷ See JAPAN FED’N OF BAR ASS’NS, *supra* note 88; KEISOHŌ [C. CRIM. PRO.] arts. 32, 36 (Japan).

¹⁰⁸ Wilson, *supra* note 78, at 505.

¹⁰⁹ See JAPAN FED’N OF BAR ASS’NS, *supra* note 88; KEISOHŌ [C. CRIM. PRO.] art. 32 (Japan).

¹¹⁰ JAPAN FED’N OF BAR ASS’NS, *supra* note 88.

or by life imprisonment or a minimum term of not less than one year.¹¹¹ In 2009, the system was extended also to any crimes that have a maximum term of more than three years.¹¹²

Yet, even these amendments do not ensure that every defendant has access to counsel prior to confession. The Japanese Ministry of Foreign Affairs claims that the system covers 80% of criminal cases.¹¹³ This leaves out the other 20% of cases, which are usually minor crimes that may be most amenable to plea bargaining.¹¹⁴ Accordingly, the Japan Federation of Bar Associations (JFBA) has declared that the new system is “far from international standards.”¹¹⁵ Despite the 2004 amendment, under Article 39(3) of the Code of Criminal Procedure, the prosecutor still retains discretion to determine the time, duration, and location of suspect-counsel meetings prior to indictment.¹¹⁶ These restrictions on the availability of counsel set up a situation where the defendant may not fully appreciate the benefits and drawbacks of confession or of accepting a tacit offer of leniency from the prosecutor.

Because the Japanese Constitution, like the United States Constitution, guarantees criminal defendants the right to a trial,¹¹⁷ a formal waiver of this constitutional right through plea bargaining would likely require special safeguards, particularly the right to counsel. In Japan, with the exception of traffic infractions and other minor offenses, trial is preserved when the defendant confesses to a crime pursuant to a tacit bargain.¹¹⁸ In the American system, when a defendant chooses to plead guilty and forego a trial, the defendant’s rights are protected by a plea colloquy or hearing.¹¹⁹ The United States Supreme Court has explained that “[t]he purpose of a plea colloquy is to protect the defendant from an unintelligent or involuntary plea.”¹²⁰ During a colloquy, the trial court must explain to defendants that they have the right to a jury trial and the right against self-incrimination at the trial and are foregoing those rights by

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ MINISTRY OF FOREIGN AFFAIRS OF JAPAN, NATIONAL REPORT BY JAPAN FOR THE UNIVERSAL PERIODIC REVIEW 8 (2008), available at <http://www.mofa.go.jp/policy/human/report0803.pdf>.

¹¹⁴ See Hollander-Blumoff, *supra* note 37.

¹¹⁵ JAPAN FED’N OF BAR ASS’NS, *supra* note 88.

¹¹⁶ Desombre, *supra* note 9, at 113; KEISOHŌ [C. CRIM. PRO.] art. 39, para. 3 (Japan).

¹¹⁷ Compare U.S. CONST., amend. VI, with KENPŌ [CONSTITUTION], art. 37 (Japan).

¹¹⁸ Johnson, *supra* note 13, at 414 (writing that traffic infractions and minor offenses are handled by summary procedure without a trial).

¹¹⁹ Mitchell v. United States, 526 U.S. 314, 323 (1999).

¹²⁰ *Id.* at 322.

pleading guilty.¹²¹ Defendants have the right to be represented by counsel during the plea hearing.¹²² Thus, even for defendants who make incriminating statements during pretrial interrogation, the plea colloquy gives those defendants a second chance to weigh their options and decide whether to plead guilty after consultation with counsel.

There is no analogue to the plea colloquy in the Japanese system since defendants charged with serious crimes must go through the motions of a trial even after confessing pursuant to a tacit bargain.¹²³ If Japan were to adopt a system of institutionalized plea bargaining, in which bargaining shortcuts the trial stage of a case, it is likely that some analogue to the plea colloquy would be necessary to formalize and regularize guilty pleas. Accordingly, Japanese defendants would have access to counsel at their plea hearing before waiving the right to trial. In turn, increased access to defense counsel in Japan's criminal justice system would result in fewer involuntary and uninformed admissions of guilt as a basis of conviction.

B. Tacit Bargaining Reinforces Close Judge-Prosecutor Relationships and a Deferential Culture Among Defense Attorneys in Japan

Part I of this comment described the relatively small number of lawyers in Japan compared to the United States.¹²⁴ The small size of the Japanese bar and the country's rising crime rates highlight the need for plea bargaining as a tool of efficiency.¹²⁵ More important than the number of attorneys in Japan, however, are the relationships among legal professionals. These relationships suggest that institutionalized plea bargaining is a better fit for Japan than tacit plea bargaining.

Because of prosecutorial privileges before and during trial, there exists a deferential and cooperative culture among Japanese defense attorneys.¹²⁶ Before trial, defense lawyers often do not even recommend that their clients exercise their right to silence.¹²⁷ In spite of the new system of state-appointed counsel prior to indictment, defense attorneys are already accustomed to deferring to the investigative practices of police and

¹²¹ *Id.* at 323.

¹²² *Hill v. Lockhart*, 474 U.S. 52, 56 (1985).

¹²³ *Johnson*, *supra* note 13, at 414 (distinguishing between contested and uncontested forms of trial in Japan).

¹²⁴ *See supra* Part I.

¹²⁵ *See id.*

¹²⁶ *Johnson*, *supra* note 13, at 214.

¹²⁷ *Id.*

prosecutors.¹²⁸ Because of their traditional deferential relationship with prosecutors, defense attorneys often advise their clients to confess.¹²⁹ The fact that tacit bargains are nonnegotiable and unenforceable reinforces this deferential culture because the defense has little power at the bargaining table and may see no other choice but to accept the prosecutor's offer.

During trial, the prosecution retains its advantage because any evidence obtained during interrogation, including a confession, becomes part of the dossier that is presented to the trial court.¹³⁰ A dossier is a written account of the evidence drafted by the prosecutor.¹³¹ A dossier is not an objective account of the evidence but a summary of the evidence obtained during pretrial investigation written from the prosecutor's perspective. Nonetheless, judges are quick to use the dossier both in evaluating the defendant's guilt and in sentencing.¹³² Defense attorneys rarely object to dossier evidence at trial because reliance on the dossier is a "custom based on years of tradition."¹³³ Courts have come to depend so much on the dossier that one former judge had this to say:

[I]n their current state, criminal trials—and in particular the fact-finding that lies at the heart of trials—are conducted in closed rooms by the investigators, and the proceedings in open court are merely a formal ceremony. In a word, [reliance on the dossier] is the turning of public trials into an empty shell.¹³⁴

The reliance on the dossier stems from the deep relationship of trust between the judge and the prosecutor, a vestige of the old inquisitorial system.¹³⁵ Although the introduction of jury trials since 2009 has reduced reliance on dossier evidence,¹³⁶ the jury requirement does not extend to the large majority of cases.¹³⁷ Moreover, the introduction of jury trials does not impact pretrial interrogation practices. Ultimately, therefore, defense attorneys and their clients occupy a weaker position relative to the

¹²⁸ See *id.* at 214, 217.

¹²⁹ *Id.*

¹³⁰ Susan Maslen, *Japan & The Rule of Law*, 16 UCLA PAC. BASIN L.J. 281, 290 (1998).

¹³¹ *Id.*

¹³² *Id.*

¹³³ See *id.* (stating that trial by dossier is an "acceptable phenomenon" among key players in the justice system).

¹³⁴ *Id.* (quoting Takeo Ishimatsu, *Are Criminal Defendants in Japan Truly Receiving Trial by Judge?*, 22 UNIV. OF TŌKYŌ: AN ANNUAL 143, 143 (1989)).

¹³⁵ Ginsburg, *supra* note 74, at 573.

¹³⁶ Takashi Maruta, *The Criminal Jury Trial in Imperial Japan and the Contemporary Argument for Its Reintroduction*, 72 INT'L REV. PENAL L. 216, 224 (2001).

¹³⁷ See Wilson, *supra* note 45 (calculating that the jury requirement would only impact about 3% of criminal cases in Japan each year).

prosecution. Institutionalized plea bargaining could introduce more balance between the parties by yielding a negotiated exchange of benefits and binding, enforceable plea agreements. In such a system, defense attorneys would form one-half of the negotiation process, on an equal ground with the other half, the prosecutor. Emphasizing the importance of defense counsel to the plea bargaining process, a former American judge has called the defense attorney the “‘equalizer’ in the bargaining process.”¹³⁸ In a system of formal plea agreements, defense attorneys would need to take responsibility for the bargains that will determine the evolution of their clients’ cases.

1. *Tacit Bargains Lack Formal Enforcement Mechanisms If the Prosecutor Breaches and Are Not Formed by a Negotiated Exchange of Benefits*

The usefulness of tacit bargains for relieving burdens on Japan’s court system is diminished by the fact that such bargains are nonbinding and unenforceable if the prosecutor breaches the agreement. Japanese prosecutors may suspend prosecution on a particular charge, may recommend a lenient sentence, and may do something else that is the subject of an implicit bargain, but they need not do so.¹³⁹ The tacit agreement does not appear on the record.¹⁴⁰ This leaves the defendant without a legal remedy if the prosecutor reneges on the implicit deal.¹⁴¹ In contrast, a formal plea bargain is a written agreement signed by both parties and is enforceable as a contract once approved by the court.¹⁴²

The written record of the plea agreement is useful if the prosecutor reneges on the deal, prompting the defendant to seek enforcement of the agreement.¹⁴³ American courts apply principles of contract law to the

¹³⁸ Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 YALE L.J. 1179, 1179 (1975) (quoting Judge J. Skelly Wright in *The New Role of Defense Counsel Under Escobedo and Miranda*, 52 A.B.A. J. 1117, 1120 (1966)).

¹³⁹ TURNER, *supra* note 16, at 191-92.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 192.

¹⁴² See *United States v. A-Abras Inc.*, 185 F.3d 26, 29 (2d Cir. 1999) (noting that the parties used a written plea agreement); *United States v. Johnston*, 199 F.3d 1015, 1020 (9th Cir. 1999) (stating that “plea agreements are typically construed according to the principles of contract law”); *Pannarale v. State*, 638 N.E.2d 1247, 1248 (Ind. 1994) (noting that pleas are “contractual in nature, binding the defendant, the state and the trial court”).

¹⁴³ Colquitt, *supra* note 21, at 747 (stating that a written plea agreement is useful in the event of an appeal or other type of collateral proceeding).

enforcement of plea agreements.¹⁴⁴ For example, in an appropriate case, the defendant may be entitled to specific performance of the plea agreement.¹⁴⁵ Conversely, prosecutors in Japan are keenly aware that they can change their minds about tacit bargains.¹⁴⁶ While it is true that prosecutors normally abide by the terms of tacit agreements to encourage other defendants to confess in the future,¹⁴⁷ the lack of a record and enforcement remedies leave the prosecutor with discretion as to whether to honor the agreement. This creates a scenario that is very different from formal plea bargaining: “defendants are not bargaining—instead, they are essentially throwing themselves at the mercy of the authorities, who ultimately decide whether to honor [the] ‘deal.’”¹⁴⁸ Even though prosecutors in the Japanese system usually honor informal deals because of the impact of repudiation on future cases, individual defendants may hesitate to confess and enter into implicit deals in the absence of formal enforcement mechanisms. This could lead to fewer tacit agreements, undermining the ultimate goal of bargaining, which is to reduce burdens on trial courts.

The prosecutor’s ability to renege on an informal deal makes the terms and finality of the deal less predictable than is the case with institutionalized plea bargaining. Tacit bargains benefit the prosecution by triggering less time-consuming court proceedings, and they benefit the defendant by saving time, litigation costs, and perhaps a harsher sentence or heightened charges.¹⁴⁹ Japanese prosecutors, however, have less flexibility in negotiating tacit bargains than their counterparts in a formal plea bargaining system. For example, they usually cannot offer the defendant more than predetermined, standard sentence reductions as a “reward” for confession.¹⁵⁰ In contrast, prosecutors engaged in formal plea bargaining can generally consider all of the mitigating circumstances of a case and develop an

¹⁴⁴ See *id.* at 772; *United States v. Johnston*, 199 F.3d 1015, 1020 (9th Cir. 1999) (stating that “plea agreements are typically construed according to the principles of contract law”); *Pannarale v. State*, 638 N.E.2d 1247, 1248 (Ind. 1994) (noting that pleas are “contractual in nature, binding the defendant, the state and the trial court”).

¹⁴⁵ See *United States v. Floyd*, 1 F.3d 867, 869, 871 (9th Cir. 1993).

¹⁴⁶ TURNER, *supra* note 16, at 192.

¹⁴⁷ Ramseyer & Rasmusen, *supra* note 20, at 55-56.

¹⁴⁸ See TURNER, *supra* note 16, at 192.

¹⁴⁹ See *id.* at 185, 191; Ramseyer & Rasmusen, *supra* note 20, at 56. Ramseyer & Rasmusen argue that abbreviated trial procedures following confession reduce a defendant’s litigation costs. However, nearly two thirds of criminal defendants in Japan are represented for free by state-appointed counsel, so they do not experience this financial benefit. See also David T. Johnson, *Early Returns from Japan’s New Criminal Trials*, 36(3) ASIA-PAC. J.: JAPAN FOCUS (2009), available at http://www.japanfocus.org/-David_T_Johnson/3212 (“Defense Lawyers” section).

¹⁵⁰ Alkon, *supra* note 25, at 358.

appropriate deal.¹⁵¹ Thus, tacit bargaining is not a negotiation similar to the kind that occurs in American-style plea bargaining, where the prosecutor comes to the bargaining table with flexibility and a range of benefits to offer.¹⁵² The benefits afforded by tacit plea bargaining are much narrower and less predictable.

IV. THE USE OF FORMAL PLEA BARGAINING IN INTERNATIONAL CRIMINAL TRIBUNALS ADDRESSES JAPAN'S CULTURAL AVERSION TO PLEA BARGAINING

In spite of the tacit negotiations that are common within the Japanese criminal justice system, there is an enduring cultural distaste for plea bargaining among Japanese legal professionals, so much so that the practice is referred to as "evil."¹⁵³ Therefore, any argument that Japan should adopt a system of institutionalized plea bargaining must address the deep-rooted cultural aversion to the practice. As discussed above, many Japanese legal professionals believe that plea bargaining is incompatible with the central values of the Japanese justice system: seeking the truth, ensuring the defendant's remorse and rehabilitation, and protecting victims' interests. The use of plea bargaining in international criminal tribunals is important in this regard because these tribunals share the goals of the Japanese justice system and have used plea bargaining in ways that respect these goals.

International criminal tribunals have reconciled competing cultural viewpoints on plea bargaining and pragmatically opted for an open, systematic use of the practice in order to manage increasing case loads and complex cases.¹⁵⁴ The International Criminal Court ("ICC") and the International Criminal Tribunal for the Former Yugoslavia ("ICTY") are among the international tribunals that permit plea bargaining.¹⁵⁵ The use of plea bargaining in international tribunals is particularly controversial because of the serious nature of the crimes involved, the duty of international courts to prosecute these crimes and issue proportionate

¹⁵¹ See, e.g., OR. REV. STAT. § 135.415 (1973) (providing nonexclusive factors that prosecutor may consider when deciding whether to engage in plea discussions); WASH. REV. CODE § 13.40.077(8)(b) (1997) (same); COLO. REV. STAT. § 16-7-301(2) (1975) (allowing district attorneys to make a wide variety of plea agreements); FED. R. CRIM. P. 11(c) (stating broadly that prosecutor and defense counsel "may discuss and reach a plea agreement").

¹⁵² Castberg, *supra* note 22.

¹⁵³ Akinori Uesugi, *How Japan is Tackling Enforcement Activities Against Cartels*, 13 GEO. MASON L. REV. 349, 362 (2005).

¹⁵⁴ Michael P. Scharf, *Plea-Bargaining and International Tribunals*, 2 J. INT'L CRIM. JUST. 1070, 1070 (2004).

¹⁵⁵ TURNER, *supra* note 16, at 214.

sentences, and the need to create a sufficient historical record of cases for posterity.¹⁵⁶ Because of the unique functions of international courts and the serious nature of international crimes, the goals that are central to the Japanese justice system are also central to international courts.¹⁵⁷ International tribunals have managed to reconcile plea bargaining with the important objectives of truth seeking, the defendant's remorse and rehabilitation, and victim protection.

A. *International Tribunals Have Used Procedural Rules to Reconcile Plea Bargaining and the Pursuit of Truth*

As with Japanese courts, truth seeking is a priority of international criminal tribunals because of the tribunals' duty to develop an accurate historical record of cases for the future and see to it that "less information is lost in the catacombs of the past."¹⁵⁸ Full-blown trials yield a record of the facts of a case through evidentiary production and witness testimony, and there is concern that plea bargaining hinders the truth-finding function by shortcutting this process.¹⁵⁹ The ICTY case of *Prosecutor v. Plavšić*, relating to the conflict in Bosnia during the 1990s, is one of the first international plea-bargained cases and provides an example of how plea bargaining may actually *aid* the truth-finding function of courts.¹⁶⁰

The defendant in that case, Biljana Plavšić, was the president of Republika Srpska during the Bosnian conflict.¹⁶¹ In 2001, she voluntarily surrendered to the ICTY and was charged with two counts of genocide and complicity in genocide and six counts of crimes against humanity.¹⁶² In exchange for a plea of guilty to persecution (one count among the charges for crimes against humanity), the prosecutor agreed to drop the other charges and recommend a light sentence.¹⁶³ The court approved the agreement, and Plavšić was eventually sentenced to just eleven years in a "posh" Swedish

¹⁵⁶ See Scharf, *supra* note 154, at 1070, 1075.

¹⁵⁷ TURNER, *supra* note 16, at 214 (noting the goal of international courts to create a truthful historical record, and the large number of victims involved in international crimes); Damaška, *supra* note 2, at 1037-38 (noting ICTY's goal of inducing remorse in defendants who plead guilty).

¹⁵⁸ Damaška, *supra* note 2, at 1037.

¹⁵⁹ Scharf, *supra* note 154, at 1078.

¹⁶⁰ *Prosecutor v. Plavšić*, Case No. IT-00-39&40/1-S, Sentencing Judgment, Feb. 27, 2003, available at http://www.icty.org/x/file/Legal%20Library/jud_supplement/supp40-e/plavsic.htm.

¹⁶¹ Scharf, *supra* note 154, at 1071.

¹⁶² *Id.*; Sentencing Judgment, ICTY Trial Chambers, http://www.icty.org/x/file/Legal%20Library/jud_supplement/supp40-e/plavsic.htm.

¹⁶³ Scharf, *supra* note 154, at 1071.

prison complex.¹⁶⁴ Significantly, along with her guilty plea, Plavšić was required by the ICTY Trial Chamber to provide a five-page statement in which she detailed the circumstances of her crime of persecution.¹⁶⁵ The prosecution and defense teams agreed that Plavšić's statement would quell revisionist accounts of the crime, aiding the Trial Chamber's truth-finding function.¹⁶⁶ Both sides also defended the plea bargain by noting that a trial would be followed by debate about the accuracy and quality of evidence presented, but debate is minimal when the defendant details the circumstances of the crime.¹⁶⁷

Beyond the statement requirement, other procedural rules of international criminal tribunals also tailor plea bargaining to suit the truth-finding function of the tribunals. For example, the ICC's Rules of Procedure and Evidence provide that the court may order a "more complete presentation of the alleged facts" if it believes that the "interests of justice require it."¹⁶⁸ This language is broad enough to give the court discretion to reject a plea bargain if it believes that the record indicates that the defendant is actually innocent or that the crime is one for which a full trial is necessary to build an accurate historical record. Article 65 of the statute creating the ICC also notes that the "admission of guilt [must be] supported by the facts of the case."¹⁶⁹ This case-by-case approach to plea bargaining allows the international courts to reconcile the practice with its duty to discover the truth. Japan can adapt institutionalized plea bargaining to the truth-seeking goal of its justice system by adopting similar methods: requiring defendants to make detailed statements accompanying their guilty pleas and adopting procedural rules that grant the court discretion in determining whether to approve a plea agreement.

B. Self-Condemnatory Plea Bargaining Mechanisms Will Promote Defendants' Remorse and Rehabilitation

Given the serious nature of the crimes that come before them, international criminal tribunals have had to reconcile plea bargaining with the goals of encouraging remorseful behavior from the defendant and promoting the defendant's rehabilitation, objectives that the Japanese value

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1079.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Rules of Procedure and Evidence of the International Criminal Court, ICC-ASP/1/3 24 (2002), Rule 69.

¹⁶⁹ Rome Statute of the International Criminal Court, art. 65(1)(c), July 1, 2002, 2187 U.N.T.S. 3.

very much.¹⁷⁰ As with the truth seeking objective, international tribunals have utilized plea bargaining in ways that respect the goals of remorse and rehabilitation, and Japan can learn from this example.

The ICTY Trial Chamber has adopted a practice that one scholar calls “negotiated self-condemnation” to advance the goals of remorse and rehabilitation.¹⁷¹ Under this practice, the Trial Chamber judge pauses after reading aloud each charge that the prosecutor is pursuing and asks the defendant if the charge is correct; the defendant must acknowledge the accuracy of each charge to move forward with the plea agreement.¹⁷² The ICTY judges also encourage the defendant to apologize profusely in the statement accompanying the guilty plea.¹⁷³ These self-condemnatory mechanisms rest on the defendant’s acknowledgment of past mistakes and thus can be viewed as a court-led expression of remorse and a step towards rehabilitation.

Remorse and rehabilitation also enter more informally into the Trial Chamber’s calculus when it decides whether to approve or reject a plea agreement.¹⁷⁴ In *Plavšić*, for example, the Trial Chamber made it clear that it approved the plea bargain in part because the defendant contributed to reestablishing peace and order in the very communities in Bosnia that she had ravaged during her reign as president.¹⁷⁵ In other words, signs of the defendant’s remorse and rehabilitation made *Plavšić* an appropriate case for “negotiated justice” rather than “imposed justice.”¹⁷⁶

C. Courts Can Adopt Victim-Friendly Elements in Plea Bargaining

International criminal tribunals initially faced criticism for permitting plea bargaining because international crimes often have hundreds or thousands of victims who want to see the defendant brought to justice.¹⁷⁷ In 1994, for example, ICTY judges rejected a proposal from the U.S. government to permit plea bargaining as a way of obtaining testimony from

¹⁷⁰ See Weber, *supra* note 14.

¹⁷¹ Damaška, *supra* note 2, at 1037-38.

¹⁷² *Id.* at 1038.

¹⁷³ *Id.*

¹⁷⁴ See Matthew M. DeFrank, Comment, *ICTY Provisional Release: Current Practice, a Dissenting Voice, and the Case for a Rule Change*, 80 TEX. L. REV. 1429, 1432 (2002) (pointing out that the ICTY Trial Chamber considers the defendant’s voluntary surrender in determining whether to approve a plea agreement).

¹⁷⁵ See Nancy Amoury Combs, *Prosecutor v. Plavšić*, 97 AM. J. INT’L L. 929, 932 (2003) (noting that the court viewed *Plavšić’s* post-conflict conduct as a “mitigating factor” during the sentencing stage).

¹⁷⁶ Damaška, *supra* note 2, at 1032.

¹⁷⁷ See Scharf, *supra* note 154, at 1071.

defendants about higher-level suspects.¹⁷⁸ Judge Cassese, the former ICTY President, said for the court,

[W]e always have to keep in mind that this Tribunal is not a municipal criminal court but one that is charged with the task of trying persons accused of the gravest possible of all crimes. The persons appearing before us will be charged with genocide, torture, murder, sexual assault, wanton destruction, persecution and other inhumane acts. After due reflection, we have decided that no one should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be.¹⁷⁹

Despite this initially clear rejection of plea bargaining, the ICTY reversed course seven years later when Judge Gabrielle Kirk McDonald of the United States replaced Judge Cassese of Italy as president of the tribunal.¹⁸⁰

The transition to plea bargaining at the ICTY was marked by a new understanding of plea bargaining as a method of *helping* victims of serious crimes and members of communities where the crimes occurred.¹⁸¹ Thus, in *Plavšić*, the defense and prosecution agreed that the defendant's guilty plea represented "a significant effort toward the advancement of reconciliation."¹⁸² In her statement, Plavšić spoke directly to the victims of her crime: "[My guilty plea] will, I hope, help the Muslim, Croat, and even Serb innocent victims not to be overtaken with bitterness"¹⁸³

The *Plavšić* case can be instructive for Japan because it suggests that institutionalized plea bargaining is not necessarily antithetical to a justice system that focuses on victims' concerns. Quite the opposite, plea bargaining can actually further the interests of victims. Since the defendant admits to certain charges when accepting a plea bargain, the plea can facilitate the processes of bringing together conflict-ridden communities and moving past the crime.¹⁸⁴ It also spares the victim the emotional pain, danger, or embarrassment of having to publicly recount the circumstances of a crime by testifying at trial.¹⁸⁵

¹⁷⁸ *Id.* at 1073.

¹⁷⁹ *Id.* (quoting Antonio Cassese, Statement by the President Made at a Briefing to Members of Diplomatic Missions (Feb. 11, 1994)).

¹⁸⁰ *Id.*

¹⁸¹ TURNER, *supra* note 16, at 245.

¹⁸² Prosecutor v. Plavšić, Case No. IT-00-39&40/1-S, Transcript, at 416 (Dec. 16, 2002).

¹⁸³ *Id.* at 520-22, 562-66.

¹⁸⁴ See Scharf, *supra* note 154, at 1071.

¹⁸⁵ See Colin P.A. Jones, . . . *And Justice for All: Two, Will Japan's Lay Judges See Through the Lack of Transparency?* (Jan. 14, 2010), <http://www.fccj.or.jp/node/5315>.

Japan can also emulate international tribunals by adopting a system of plea bargaining that contains victim-friendly procedural elements. For example, ICTY procedural rules prohibit equivocal plea bargains, in which the defendant pleads guilty but supplements the plea with a legal defense of his actions.¹⁸⁶ That is, the defendant must make a clear choice to provide the victim with closure in one of two ways: either proceed with trial or fully admit guilt with respect to a particular charge. The ICC's Rules of Procedure and Evidence require the court to notify victims of a prosecutor's decision not to prosecute the defendant for certain charges.¹⁸⁷ Victims must have an opportunity to respond to such prosecutorial decisions and to otherwise participate in the court proceedings.¹⁸⁸ The court has discretion to obtain victims' views on "any issue,"¹⁸⁹ which is broad enough to cover the court's decision to approve or reject a proposed plea bargain. Finally, the ICC is specifically authorized to order a "more complete presentation of the alleged facts" if it believes that doing so is necessary to advance the victims' interests.¹⁹⁰ This means that the court can proceed to a full trial to protect victims in appropriate cases. By incorporating these kinds of provisions into its own plea bargaining system, Japan can ensure that victims play a role in evaluating the fairness of plea bargains.

V. CONCLUSION

The mantra of those who support the practice of plea bargaining is simplicity, simplicity, simplicity.¹⁹¹ For all its flaws, plea bargaining simplifies the administration of criminal justice and eases burdens on court systems. The rising crime rate in Japan, the shortage of prosecutorial resources, and the public's loss of confidence in prosecuting authorities demonstrate the need for simplicity in Japan's criminal justice system.

Tacit bargaining is a poor solution to the goal of simplicity. Because tacit bargains are nonnegotiable and rely on a defendant's confession, they reinforce weaknesses of the Japanese justice system, particularly the coercive pretrial interrogation environment and restrictions on a defendant's access to counsel. More generally, tacit bargains exploit the deferential culture among Japanese defense attorneys. In addition, tacit bargains are

¹⁸⁶ Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, IT/32/Rev. 44 (2009), Rule 62(iii); TURNER, *supra* note 16, at 242.

¹⁸⁷ Rules of Procedure and Evidence of the International Criminal Court, ICC-ASP/1/3 24 (2002), Rule 92.

¹⁸⁸ *Id.* at Rule 89.

¹⁸⁹ *Id.* at Rule 93.

¹⁹⁰ *Id.* at Rule 69.

¹⁹¹ Alschuler, *supra* note 138, at 1277.

nonbinding, leaving the defendant without a remedy if the court rejects the prosecutor's recommendation of leniency or the prosecutor breaches the agreement.

Formal plea bargaining succeeds where tacit bargaining fails by equalizing power between the defense and prosecution. Because plea bargaining involves the full scope of negotiation, it invites active participation from defense counsel. Moreover, the defendant can withdraw his guilty plea if the court rejects the plea agreement and can seek enforcement of the agreement if the prosecutor breaches. Because of these features of institutionalized plea bargaining, the adoption of such a system in Japan would help make the nation's justice system friendlier to the procedural rights of defendants.

Finally, a look at the systematic use of plea bargaining in international criminal tribunals addresses culturally-based criticisms of the practice in Japan. International criminal tribunals, primarily through procedural rules on the implementation of plea bargaining, have used plea bargaining in ways that are sensitive to the goals of the Japanese justice system. Japan could benefit from this example. The Japanese legal community should be more pragmatic about the need for simplified criminal justice procedures and adopt a system of institutionalized plea bargaining.