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BARGAINED JUSTICE: THE RISE OF FALSE TESTIMONY FOR FALSE PLEAS

Andrew M. Pardieck, Vanessa A. Edkins & Lucian E. Dervan * **

ABSTRACT

In 1783, an English court wrote: "[A] confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it." Yet today over 97% of all convictions in the United States result from plea bargaining. In 2017, South Korea renewed a decades-old debate over whether to formally recognize plea bargaining, and, in 2018, Japan's new formal plea bargaining system took effect. The working assumption in each case is that, absent a threat of violence or mental coercion, innocent people do not plead guilty and plea bargaining efficiently renders justice. With the assistance of the Japan Foundation Center for Global Partnership and colleagues in Japan and South Korea, we conducted laboratory experiments to test those assumptions. Do

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the innocent plead guilty? Do the accused falsely implicate the innocent? If so, are additional safeguards necessary to minimize that risk? The data suggests that basic human tendencies, across cultures, run counter to the assumptions underlying plea bargaining. The data suggest that the innocent plead guilty, and that it happens at rates that should lead to a re-evaluation of the risks and benefits of plea bargaining, as practiced in the United States, in Japan, and under consideration in South Korea.

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I. INTRODUCTION

In 1783, an English court wrote: "[A] confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it."[1] About a hundred years later, the US Supreme Court said much the same: The "true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort."[2]

Yet today over 97% of all convictions in the United States result from plea bargaining.[3] Its dominance stems from a "compromise." In 1970, the United States Supreme Court prohibited pleas induced by threats of physical harm or mental coercion overbearing the will of the defendant, but authorized plea bargaining stopping short of that in order to increase efficiency and reduce the burden on an overburdened criminal legal system.[4] While the Supreme Court in 1970 envisioned plea bargaining as a means of increasing resources for the traditional trial, by 2012, the Court recognized that bargained justice had triumphed. "Criminal justice today is for the most part a system of pleas, not a system of trials."[5]

In Supreme Court jurisprudence, the working assumption underlying the compromise of 1970 is that, absent a threat of violence or mental coercion, a significant number of innocent people will not plead guilty.[6] Over the years, anecdotal evidence has challenged these assumptions. The Innocence Project has

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1. Rex v. Warickshall, 168 Eng. Rep. 234 (1783).
2. Wilson v. United States, 162 U.S. 613, 623 (1896).
3. *See Guilty Pleas and Trials by Types of Crime: Fiscal Year 2019*, U.S. SENT'G COMM'N, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/Table12.pdf [https://perma.cc/PJ86-4AZC] (last visited Nov. 21, 2020).
4. Brady v. United States, 397 U.S. 742, 752-58 (1970).
5. Lafler v. Cooper, 566 U.S. 133, 170 (2012) ("Criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.").
6. Lucian E. Dervan & Vanessa A. Edkins, Ph.D., *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 18-19 (2013).

documented some of these cases.[7] Scholars have examined exoneration data, and one 2005 study found twenty of 340 exonerees, six percent, had pled guilty.[8] More recently, the National Registry of Exonerations found the numbers of false pleas growing. For example, a 2015 study noted that in 2014 and 2015, ninety percent of known drug-case exonerations were based on false guilty pleas.[9] There are, however, obvious limitations to anecdotal evidence. And the exoneree studies are limited to a small subset of claims, many involving serious felonies for which there is available DNA evidence and the capacity to pursue exoneration.[10]

To fill this lacuna, there are now psychological plea bargaining studies conducted in laboratory settings that examine the likelihood that an innocent person will be "driven to false self-condemnation."[11] A study by two of the Authors of this Article, published in 2013, demonstrated that more than fifty percent of "innocent" participants were willing to plead guilty to something they did not do.[12] The results of this initial study brought to an end the longstanding debate regarding whether and to what extent innocents will falsely plead guilty. As the Innocence Project wrote in a US Supreme Court *amicus curiae* brief that discussed this research, "[i]nnocent defendants, like guilty defendants, plead guilty in exchange for lighter sentences because the benefits of doing so outweigh the costs of facing trial."[13]

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7. *See All Cases*, INNOCENCE PROJECT, https://www.innocenceproject.org/all-cases/ [https://perma.cc/5QXR-37KL] (last visited Aug. 15, 2018).

8. *See* Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524, 536 (2005). *See also* George C. Thomas III, *Two Windows into Innocence*, 7 OHIO ST. J. CRIM. L. 575, 577-78 (2010) ("McConville and Baldwin concluded that two percent of the guilty pleas were of doubtful validity. As there were roughly two million felony cases filed in 2006, if two percent result in conviction of an innocent defendant, 40,000 wrongful felony convictions occur per year.").

9. *Innocents Who Plead Guilty*, NAT'L REGISTRY OF EXONERATIONS 2 (Nov. 24, 2015), http://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf [https://perma.cc/D6HX-9TZZ].

10. Dervan & Edkins, *supra* note 6, at 21.

11. Dervan & Edkins, *supra* note 6, at 48 (citing Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978)).

12. Dervan & Edkins, *supra* note 6, at 28-33.

13. Brief of the Innocence Project as Amicus Curiae in Support of Petitioner at 9, Class v. United States, 138 S.Ct. 798 (2018); *see generally* Thea Johnson, *Fictional Pleas*, 94 INDIANA L.J. 855 (2019).

The issue of false pleas by the innocent is not a phenomenon unique to the United States. Plea bargaining has spread around the world and become a predominant means of resolving criminal charges.[14] A 2017 report by Fair Trials documented not only the increasing use of plea bargaining globally, but also the manner in which bargains now dominate individual criminal legal systems once flush with trials. The report notes:

> In many parts of the world, trials are being replaced by legal regimes that encourage suspects to admit guilt and waive their right to a full trial. Of the 90 countries studied by Fair Trials and Freshfields, 66 now have these kinds of formal "trial waiver" systems in place. In 1990, the number was just 19. Once introduced, trial waivers can quickly dominate. In Georgia, for example, 12.7% of cases were resolved through its plea bargaining system in 2005, increasing massively to 87.8% of cases by 2012.[15]

This global rise in plea bargaining led us to expand our research to other countries, with a specific focus on a comparative analysis of plea bargaining and innocence in the United States, Japan, and South Korea.

Our findings were, on the one hand, expected. False pleas and the innocent defendant's dilemma are global phenomena. In this comparative research, however, we also collected new data that may surprise and should call into question the validity and the accuracy of the testimony by those accepting bargains.

Our data indicate that a significant number of individuals are not only willing to falsely plead guilty in return for a benefit, they are also willing to falsely testify against others in official proceedings to secure those advantages for themselves. This is the first time laboratory research has demonstrated the false plea phenomenon in different countries, cultures, and legal systems. It is also the first time laboratory research has documented the

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14. *See, e.g.*, *A Deal You Can't Refuse: The Troubling Spread of Plea Bargaining from America to the World*, ECONOMIST (Nov. 9, 2017), https://www.economist.com/news/international/21731159-tool-making-justice-swifter-too-often-snares-innocent-troubling-spread [https://permaa.cc/T3DM-DTH7].

15. *The Disappearing Trial Report: A Global Study into the Spread and Growth in Trial Waiver System*, FAIR TRIALS (Apr. 27, 2017), https://www.fairtrials.org/publication/disappearing-trial-report#countries-with-trial-waiver-systems [https://perma.cc/HZ28-8XRT].

phenomenon of false testimony in return for the benefits of a plea bargain.

For our comparative analysis, we selected three countries at different stages of their recognition of plea bargaining: Japan, South Korea, and the United States. In Japan, in May of 2016, the Diet passed an omnibus bill amending its Code of Criminal Procedure.[16] The bill provided for recording police interrogations for certain crimes, expanded wiretapping authority, expanded disclosure of evidence, and prosecutorial immunity.[17] For the first time, it also formally recognized plea bargaining in Japan.[18]

The Prime Minister's Cabinet dubbed the bill their "Strategy for Making Japan the Safest Country in the World."[19] The Ministry of Justice described the bill as creating a new criminal justice system fitting for the times—one that moves away from reliance on confession and employs a variety of evidence gathering techniques and a robust public trial process.[20] Commentators suggest the measures were an attempt "to revamp the nation's notoriously opaque judicial process."[21]

16. *See Keiji Soshou Hou nado ga Kaisei Saremashita*, NICHIBENREN 1 (June 2016), https://www.nichibenren.or.jp/library/ja/publication/booklet/data/keijisoshohoto_kaisei_02.pdf [https://perma.cc/2MSJ-PQVQ].

17. Tomohiro Osaki, *Diet passes legislation to revamp Japan's criminal justice system*, JAPAN TIMES (May 24, 2016), https://www.japantimes.co.jp/news/2016/05/24/national/diet-passes-legislation-revamp-japans-secretive-judicial-system/ [https://perma.cc/24EK-B9N4] (noting that recording will be limited to "grave" crimes including murder, arson, and kidnapping; crimes tried under the lay judge system, and cases specially investigated by prosecutors). Mark A. Levin, *Considering Japanese Criminal Justice from an Original Position*, *in* CRIME AND JUSTICE IN CONTEMPORARY JAPAN 175, 183 (Jianhong Liu & Setsuo Miyazawa eds., 2017) (scholars suggest the new rule will apply to only three percent of all cases).

18. Akira Gotou, *2015 Nen Keisou Kaisei Houan ni Okeru Kyougi/Goui Seidou*, 8 SOUGOU HOURITSU SHIEN RONSHUU 2-3 (2015), http://www.houterasu.or.jp/cont/100779662.pdf [https://perma.cc/W899-R4CN].

19. M. Hayashi, *Keiji Soshou Hou Kaisei, Nihonban 'Shihou Torihiki' to ha* (July 15, 2016), https://www.corporate-legal.jp/%E6%B3%95%E5%8B%99%E3%83%8B%E3%83%A5%E3%83%BC%E3%82%B9/%E6%B3%95%E5%8B%99%E3%82%B3%E3%83%A9%E3%83%A0/6767 [https://perma.cc/X7GS-2A6U]. *See* John O. Haley, *Public Prosecution in Japan*, OXFORD HANDBOOKS ONLINE (Dec. 2015) (no industrial democracy has a lower crime rate now).

20. MOJ, *Keiji Soshou Hou nado no Ichibu o Kaisei Suru Houritsuan no Gaiyou*, http://www.moj.go.jp/content/001149703.pdf [https://perma.cc/V5F9-G982] (last visited Dec. 19, 2020).

21. Osaki, *supra* note 17.

Much of the debate surrounding the bill centered on recording interrogations of the accused.[22] Critics have long argued that recording interrogations is necessary to stem the tide of false confessions that have arisen because of the grueling interrogations that Japanese police and prosecutors have traditionally pursued.[23] Recent events brought these concerns about Japan's "hostage justice" to an international stage with the arrest and 139-day detention of Carlos Ghosn, former CEO and chair of the board of Nissan Corporation.[24]

In the course of this debate over recording interrogations, prosecutors expressed concern that doing so would adversely affect information gathering, i.e. suspects would be less forthcoming with prosecutors.[25] In exchange for acquiescence to recording certain criminal interrogations, prosecutors sought formal recognition of means to encourage cooperation, i.e. prosecutorial immunity and plea bargaining.[26] The Ministry of Justice's Legislative Counsel, tasked in 2014 with drafting amendments to the Code of Criminal Procedure, did just that.[27] The omnibus reform bill codified, for the first time, a plea bargaining system.[28]

Japan's formal plea bargaining system took effect in June 2018,[29] and prosecutors entered their first formal plea bargain in July, with a Mitsubishi Hitachi Power Systems employee accused of

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22. *See* Yoshiaki Kai, *Kiki Kanri Nyu-su: Sihou Torihiki Seido no Dounyuu to Kigyou Hanzai no Sousa ni Ataeru Eikyou*, ANDERSON MORI & TOMOTSUNE, DISP. RESOL. GROUP NEWSL. 1 (May 2016).

23. Hayashi, *supra* note 19.

24. *See,* e.g., Nicholas Johnson, *Ghosn, Yamashiro, and the United Nations — Japan's Coercive Police Practices in the International Spotlight*, 17 ASIA-PACIFIC J. 1 (Oct. 1, 2019), https://apjjf.org/-Nicholas-Johnson/5317/article.pdf [https://perma.cc/GFV9-7VHR]; Rupert Wingfield-Hayes, *Carlos Ghosn and Japan's 'hostage justice' system*, BBC NEWS (Dec. 31, 2019), https://www.bbc.com/news/world-asia-47113189.2019 [https://perma.cc/CD3D-X57R].

25. Gotou, *supra* note 18, at 4.

26. Gotou, *supra* note 18, at 4.

27. Osaki, *supra* note 17.

28. Gotou, *supra* note 18, at 4; Nichibenren, *Keiji Soshou nado no Ichibu wo Kaisei Suru Houritsuan Sangiin De Kakatsu*, 500 NICHIBENREN SHINBUN (2015), https://www.nichibenren.or.jp/document/newspaper/year/2015/500.html [https://perma.cc/UKS6-JPPL].

29. Nichibenren, *supra* note 16, at 1.

bribery.[30] In exchange for information regarding the employer's violation of Japan's antitrust law, the prosecutors agreed to forego indictment of the employee accused of bribery.[31] In November of the same year, prosecutors negotiated plea bargains with two Nissan employees in exchange for information that led to the arrest of Carlos Ghosn.[32]

Both plea bargains highlight an important difference between Japan's formal plea bargaining system and the system used in the United States. As discussed in Part II, Japan's plea bargaining system permits plea bargaining agreements only for certain types of crimes, and only in exchange for the accused providing information about a crime committed by a third party.[33] At the same time, there is evidence of widespread informal plea bargaining in Japan. Field research completed well before the amendments suggests ten to twenty percent of all cases are bargained, regardless of the crime, and regardless of whether the information relates to a third party.[34]

The Japanese Federation of Bar Associations released a statement following the amendments to Japan's Code of Criminal Procedure. It welcomed the introduction of videotaped interrogations, but warned that plea bargaining will result in false

30. *Thai bribery case leads to Japan's first plea bargain*, JAPAN TIMES (July 14, 2018), https://www.japantimes.co.jp/news/2018/07/14/national/crime-legal/case-concerning-bribery-thai-public-servant-japanese-prosecutors-reach-first-ever-plea-bargain-agreement/ [https://perma.cc/N5HW-8S5R].

31. *Id.* (Tokyo prosecutors agreed to forego indictment of an employee of Mitsubishi Hitachi Power Systems, Ltd. accused of bribing a Thai civil servant, in exchange for cooperation in the prosecutor's investigation of the employer).

32. *Two of Ghosn's Former Aides avoid indictment through plea bargain deal with Tokyo prosecutors*, JAPAN TIMES (May 10, 2019), https://www.japantimes.co.jp/news/2019/05/10/business/corporate-business/two-ghosns-former-aides-avoid-indictment-plea-bargain-deal-tokyo-prosecutors/ [https://perma.cc/L4X2-THZ6]; Magalena Osumi & Satoshi Sugiyama, *Victim of plea bargaining? Carlos Ghosn's arrest based on murky evidence, former prosecutor says*, JAPAN TIMES (Nov. 26, 2018), https://www.japantimes.co.jp/news/2018/11/26/national/crime-legal/victim-plea-bargaining-carlos-ghosns-arrest-based-murky-evidence-former-prosecutor-says/ [https://perma.cc/P5PY-PJ5Z].

33. KEIJI SOSHOUHOU [C. Crim. Pro.] 2018, arts. 350-2, 350-3 (Japan); Nichibenren, *supra* note 16, at 1.

34. David T. Johnson, *Plea Bargaining in Japan*, *in* THE JAPANESE ADVERSARY SYSTEM IN CONTEXT 140, 154-56 (Malcolm M. Feeley & Setsuo Miyazawa eds., 2002).

information and increased risk of false accusations.[35] As shown in Parts III and IV, those concerns are well-founded.

In 2008, South Korea's Supreme Prosecutor's Office reached a consensus that South Korea needed a plea bargaining system.[36] They formed a study group,[37] and the Ministry of Justice drafted legislation codifying a plea bargaining process.[38] Newspapers and commentators reported the imminent adoption of plea bargaining in South Korea.[39] But the legislation failed to pass.[40] The bill, introduced in 2010,[41] was opposed by South Korea's National Human Rights Commission, among others, and it failed to receive endorsement from members of the Prime Minister's Cabinet.[42]

The debate over the merits of plea bargaining, however, continued. In 2016, the Seoul Metropolitan Government announced plans to introduce an internal plea bargaining system in an effort to "promote whistle-blowing."[43] They intended to encourage city employees under investigation for corruption to reveal irregularities committed by others in return for reduced

35. Osaki, *supra* note 17.

36. *Prosecution Head Wants Plea Bargaining System*, KBS WORLD (Nov. 1, 2008), http://rki.kbs.co.kr/news_print.htm?lang=e&No=58755&Category=News [https://perma.cc/5NEZ-U4PL]; *Plea Bargaining System May be Introduced*, KBS WORLD (Oct. 14, 2008), http://world.kbs.co.kr/english/news/news_Dm_detail.htm?lang=e&id=Dm&No=58276¤t_page=1162 [https://perma.cc/4PVZ-NVKU].

37. *Prosecution Head Wants Plea Bargaining System*, supra note 36.

38. *Justice Ministry to Introduce Plea Bargaining*, KBS WORLD (June 6, 2010), http://world.kbs.co.kr/english/news/news_Po_detail.htm?lang=e&id=Po&No=73110¤t_page=7 [https://perma.cc/LX9C-PLNS].

39. Kim Rahn, *Plea bargain to be adopted next year*, KOREA TIMES (Dec. 21, 2010), https://www.koreatimes.co.kr/www/nation/2020/11/113_78399.html [https://perma.cc/8UT5-VT8U]. *See also* Ryan Y. Park, *The Globalizing Jury Trial: Lessons and Insights from Korea*, 58 AM. J. COMP. L. 525, 551 (2010).

40. Park Si-soo, *Plea bargaining Plan put on Hold*, KOREA TIMES (May 3, 2011), https://www.koreatimes.co.kr/www/nation/2020/08/113_86372.html [https://perma.cc/2AYD-HJKW].

41. Rahn, *supra* note 39.

42. Si-soo, *supra* note 40.

43. *Seoul Seeks to Promote Whistle-blowing with System Similar to Plea Bargaining*, KBS WORLD (Oct. 13, 2016), http://rki.kbs.co.kr/news_print.htm?lang=e&No=122472&Category=News [https://perma.cc/6EW9-H4ZG].

punishment.[44] South Korea has struggled with corruption,[45] and the goal was to effectuate the anti-bribery legislation passed in 2014.[46] City officials sought "corruption-free officialdom by strengthening the self-purification capacity through self-control, responsibility, communication and cooperation."[47]

In December of 2017, the Supreme Prosecutor's Office began another push to amend the Criminal Procedure Act to formally recognize plea bargaining.[48] News reports suggest that increased concern about conviction rates and difficulties in obtaining convictions in recent high-profile corruption cases prompted the effort.[49] In 2018, those efforts confronted an "extraordinary public outcry" over informal plea bargaining following a murder in an internet café and concern about increasing rates of violent crime.[50] The debate over codification of plea bargaining in South Korea continues, but, even without it, there is widespread, and controversial, informal plea bargaining in South Korea.[51]

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44. *Id.*

45. David T. Johnson, *The Prosecution of Corruption in South Korea*, *in* LEGAL REFORM IN KOREA 47 (Tom Ginsberg ed. 2004) (stating that "South Korea is corrupt," and elsewhere describing "endemic corruption scandals in Korea"). Tom Ginsberg, *The politics of legal reform in Korea*, *in* LEGAL REFORM IN KOREA (Tom Ginsberg ed. 2004). Both are statements that remain true today, though less so. In 2001, Transparency International ranked South Korea 42nd out of 91 countries in its 2001 Corruption Perceptions Index. *Id.* at 47. In 2017, South Korea ranked 54th out of 183. By comparison, the United States ranked 21st and Japan 23rd. *See* Transparency Int'l, *Corruption Perceptions Index 2017: Global Scores*, https://www.transparency.org/news/feature/corruption_perceptions_index_2017#table [https://perma.cc/Q3QD-SZU7] (last visited Dec. 19, 2020).

46. *Seoul Seeks to Promote Whistle-blowing with System Similar to Plea Bargaining*, KBS WORLD (Oct. 13, 2016), http://world.kbs.co.kr/service/news_view.htm?lang=e&Seq_Code=122472 (referencing the Park Won-Soon Act).

47. *See Seoul Seeks to Promote Whistle-blowing with System Similar to Plea Bargaining*, KBS WORLD (Oct. 13, 2016), http://world.kbs.co.kr/service/news_view.htm?lang=e&Seq_Code=122472 [https://perma.cc/N4TD-7HGD].

48. Lee Kyung-min, *Prosecutors float Idea of adopting plea bargaining*, KOREA TIMES (Dec. 7, 2017), https://www.koreatimes.co.kr/www/nation/2020/06/356_240577.html [https://perma.cc/P33G-HPKA].

49. *Id.*

50. Kim Yoo-sin & Lee Ha-yeon, *Korean police reveal suspect's identity in brutal murder case*, PULSE (Oct. 22, 2018), https://m.pulsenews.co.kr/view.php?year=2018&no=657849 [https://perma.cc/8TTR-WDPN].

51. Re-Seop Park, *The Current Debate about Plea Bargaining in Korea*, 4 (2017) (on file with authors) [hereinafter Park Paper]; Roh Myeong Seon, *Sae-lo-un jin-sul-jeung-geo hwag-bo-bang-an-e gwan-han gae-jeong* (Amendment on Expansion of Evidence), at 15.

South Korea and Japan have stepped down a path well-worn in the United States. Their prosecutors engage in *de facto* plea bargaining, and they seek or sought formal authority to do so. This debate over codification of plea bargaining and the widespread use of informal plea bargaining raise new questions about the fundamental fairness of plea bargaining in South Korea and Japan, just as in the United States.

With formal or informal plea bargaining, do the innocent plead guilty? Do the accused falsely implicate the innocent to secure their own bargains? Do the accused behave similarly in South Korea, Japan, and the United States when analyzing the risks and benefits of a guilty plea? If so, what additional safeguards are necessary to minimize that risk? These questions, important in their own right, also offer a point of comparison. What do the answers tell us about the role and rule of law in these different countries, cultures, and legal systems? With the assistance of the Japan Foundation Center for Global Partnership, as well as colleagues in each location, we engaged in psychological studies in Japan, South Korea and the United States to explore these questions.

Part II of this paper offers a comparative analysis of the historical and legal framework for plea bargaining in the United States, Japan, and South Korea. Part III discusses the new laboratory studies conducted in each country to analyze false plea rates and test the effectiveness of procedural safeguards to reduce the chance of false pleas. Part III also discusses our findings regarding the rates of false testimony for false pleas. The Article concludes with observations about the data obtained in each study.

In short, basic human tendencies documented in each country run counter to the basic assumptions underlying plea bargaining and innocence. South Korea, Japan, and the United States each have an innocence problem. This research suggests that the risk of the innocent pleading guilty and falsely implicating others is real and that it is a global phenomenon—one that transcends borders and legal systems. As jurisdictions across the globe increasing rely on bargained justice, the question becomes what do we do next?

II. HISTORICAL & LEGAL FRAMEWORK—A COMPARATIVE ANALYSIS

A. United States

Plea bargaining hasn't always dominated the criminal legal system in the United States.[52] Plea bargaining issues rose to the fore after the American Civil War, and, in each case, the appellate courts summarily rejected these bargains.[53] The US Supreme Court did the same in 1896 in *Wilson v. United States* stating, without equivocation, that the "true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort."[54]

1. Informal plea bargaining

That is not to say that plea bargaining didn't happen. It did, in the shadows, and often as a tool of corruption.[55] In the early 1900s, defense attorneys in New York City would "stand . . . in front of the Night Court and dicker away sentences . . . $300 for ten days, $200 for twenty days, $150 for thirty days."[56] In Chicago, "fixers" negotiated bargains between the government and the defense. Those "leaches" facilitating the plea bargain were a "serious indictment against our system of criminal administration."[57]

During that same period, however, over-criminalization forced plea bargaining out of the shadows. "As the number of criminal statutes—and, as a result, criminal defendants—swelled, court systems became overwhelmed."[58] And prosecutors turned to plea bargaining.[59] The start of Prohibition in 1919 only

52. Mark H. Haller, *Plea Bargaining: The Nineteenth Century Context*, 13 LAW & SOC'Y REV. 273, 273 (1979) ("[Alschuler and Friedman] agree that plea bargaining was probably nonexistent before 1800, began to appear during the early or mid-nineteenth century, and became institutionalized as a standard feature of American urban criminal courts in the last third of the nineteenth century.").

53. Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 19-24 (1979).

54. Wilson v. United States, 162 U.S. 613, 623 (1896).

55. Alschuler, *supra* note 53, at 24.

56. *Id.*

57. *Id.* at 25.

58. Dervan & Edkins, *supra* note 6, at 9.

59. *Id.*

exacerbated the problem. By 1925, approximately ninety percent of criminal convictions resulted from guilty pleas.[60] Yet, the Supreme Court remained skeptical. In 1936, they found a guilty plea unconstitutional because of the inducements made to obtain it.[61]

2. Formal plea bargaining

Nonetheless, plea bargaining continued. And by 1967, even the American Bar Association (the "ABA") acknowledged its benefits.[62] They noted that plea bargaining allows for the resolution of cases without a trial, which conserves necessary resources. It also serves the interest of the defendants. "[T]he limited use of the trial process for those cases in which the defendant has grounds for contesting the matter of guilt aids in preserving the meaningfulness of the presumption of innocence."[63]

Three years later, the Supreme Court agreed. In *Brady v. United States*, "the Court acknowledged the necessity of [plea bargaining] to protect crowded courts from collapse."[64] The court decided that certain types of plea bargains would be acceptable:

> [A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).[65]

As long as the plea was "voluntarily and intelligently made by competent defendants with adequate advice of counsel," and not induced by "actual or threatened physical harm or by mental

60. *Id.* at 10.
61. Walker v. Johnston, 312 U.S. 275 (1941).
62. Dervan & Edkins, *supra* note 6, at 11.
63. *See* A.B.A., PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 2 (1968).
64. Brady v. United States, 397 U.S. 742, 752-58 (1970); Dervan & Edkins, *supra* note 6, at 12.
65. *Id.* at 755 (quoting Shelton v. United States, 242 F.2d 101, 115 (5th Cir. 1957) (Tuttle, J., dissenting)).

coercion overbearing the will of the defendant," the plea bargain would stand.[66]

Brady brought plea bargaining out of the shadows,[67] and, for much of the past decade, approximately ninety-seven percent of all criminal cases have been resolved by guilty pleas.[68] The Federal Rules of Criminal Procedure now recognize that a prosecutor, in return for a guilty plea, can agree to:

- not bring additional charges, or move to dismiss charges already filed;
- recommend, or agree not to oppose, the defendant's request that a particular sentence or sentencing range is appropriate, or that a particular provision of the sentencing guidelines does or does not apply;
- agree that a particular sentence or sentencing range is appropriate, or that a particular sentencing guideline does or does not apply.[69]

These agreements have been categorized as: (1) open pleas; (2) charge bargains; (3) sentence bargains; (4) binding pleas.[70]

"An open plea is an agreement which leaves the sentence entirely to the Judge's discretion, without any limitations or the dismissal of any charges."[71] With a charge bargain, a prosecutor and defendant engage in negotiations in which the defendant offers to plead guilty to a particular charge in exchange for the prosecutor dismissing or not filing a particular charge.[72] In contrast, sentence bargains describe agreements where the defendant agrees to plead guilty to a particular charge in exchange

66. *Id.* at 750, 758; Dervan & Edkins, *supra* note 6, at 13.

67. Dervan & Edkins, *supra* note 6, at 14.

68. *See Sourcebook Archives*, U.S. Sentencing Comm'n, https://www.ussc.gov/research/sourcebook/archive (last visited Dec. 16, 2020).

69. FED. R. CRIM. P. 11. These three types of plea bargains are often referred to in the cases and the literature as "Type A," "Type B," and "Type C" agreements. 1A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE SUPPLEMENTAL SERVICE § 181 (5th ed. 2020).

70. Lucian E. Dervan, *Arriving at a System of Pleas: The History and State of Plea Bargaining*, *in* A SYSTEM OF PLEAS 12-13 (Vanessa A. Edkins & Allison D. Redlich eds., 2018).

71. Williams v. State, 51 N.E.3d 1205, 1209 (Ind. Ct. App. 2016).

72. 16A WILLIAM ANDREW KERR, INDIANA PRACTICE SERIES, CRIMINAL PROCEDURE § 13.3 (2020) (charge bargains may also include a defendant's agreement to "plead guilty to an offense included within a charged offense in exchange for the prosecutor's agreement not to pursue the greater offense.").

for a promise by the prosecutor regarding the sentence to be imposed. The prosecutor may promise to recommend that the trial court impose a specific sentence (a "specific sentence bargain") or the prosecutor may offer to remain silent and make no recommendation regarding the sentence, leaving it to the discretion of the court (a "non-specific sentence bargain").[73]

Finally, the plea may be binding or non-binding. With a non-binding plea, the court retains the discretion to accept or reject the recommendations of the parties contained in the plea agreement.[74] While judges in the non-binding plea context often embrace the recommendations to encourage the practice of plea bargaining, they are not required to do so.[75] In contrast, binding plea agreements include a "specific sentence or sentencing range" and, if the plea is accepted by the court, the court must impose the agreed upon terms.[76] Binding pleas are less common and often disfavored by judges who believe such agreements infringe on the court's sentencing authority.[77]

A prosecutor's influence over sentencing recommendations and charge selections empowers them to create sentencing differentials, i.e. "the difference between the sentence a defendant faces when pleading guilty versus the sentence risked if he or she proceeds to trial and is convicted."[78] Observers recognize that if the "deal is good enough, it is rational to refuse to roll the dice, regardless of whether one believes the evidence establishes guilt beyond a reasonable doubt, and regardless of whether one is factually innocent."[79]

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73. *Id. See, e.g.*, St. Clair v. Indiana, 901 N.E.2d 490, 493-94 (Ind. 2009) (holding if a plea agreement contains a provision that the prosecutor will "recommend" a specific sentence for the court to impose in exchange for the defendant's guilty plea, the plea agreement is a "specific sentence bargain" that is binding on the court and the parties unless there are circumstances demonstrating that the parties intended the agreement to be an open plea agreement).

74. *See* FED. R. CRIM. P. 11(c)(1)(c). *See also* Dervan, *supra* note 70, at 12-13.

75. Dervan, *supra* note 70, at 12.

76. Wes R. Porter, *The Pendulum in Federal Sentencing Can Also Swing Toward Predictability: A Renewed Role for Binding Plea Agreements Post*-Booker, 37 WM. MITCHELL L. REV. 469, 472-75 (2011).

77. *Id.* at 485.

78. Dervan & Edkins, *supra* note 6, at 14.

79. Russell D. Covey, *Longitudinal Guilt: Repeat Offenders, Plea Bargaining, and the Variable Standard of Proof*, 63 FLA. L. REV. 431, 450 (2011).

B. Japan

1. Informal plea bargaining

Even before Japan's reform of its Code of Criminal Procedure, scholars suggested informal plea bargaining was part and parcel of the criminal legal system.[80] Some have estimated approximately ten to twenty percent of all criminal cases are disposed of through plea bargaining.[81] Some have argued plea bargaining is even more common in Japan than the United States.[82] In either case, the plea bargaining they describe is not a plea bargain narrowly defined where a prosecutor encourages the accused to confess guilt and waive his right to trial in exchange for leniency. Instead, scholars recognize plea bargaining in Japan to occur where (1) defendants have a choice between simple procedures and complicated procedures; and (2) there is systemic pressure for police and prosecutors to encourage defendants to "cooperate" by choosing the simple model.[83]

Japan has long met both requirements for plea bargaining. Its Code of Criminal Procedure offers both simple and complex modes of case processing. Under standards set by the procuracy, the police need not, and routinely do not, report those they have found committing "minor" offenses (*bizai shobun*).[84] "Minor" is defined broadly to include otherwise serious offenses such as assault, theft, fraud, and gambling.[85]

Separately, Japanese prosecutors have "unrestricted authority" to and routinely do suspend the prosecution (*kiso yūyo shobun*) of suspects that they have determined are guilty.[86] They

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80. Gotou, *supra* note 18, at 2; David T. Johnson, *Plea Bargaining*, *supra* note 34, at 143.

81. David T. Johnson, *Plea Bargaining*, *supra* note 34, at 155.

82. J. Mark Ramseyer & Eric B. Rasmusen, *Why Is the Japanese Conviction Rate So High?*, 30 J. LEGAL STUD. 53, 57 (2001); David T. Johnson, *Plea Bargaining*, *supra* note 34, at 140.

83. David T. Johnson, *Plea Bargaining*, *supra* note 34, at 142.

84. Haley, *supra* note 19, at 2.

85. *Id.* In 2012, Japanese police did not report 31.6 percent of those they had evidence to charge. *Id.*

86. *Id.* In 2012, of the 1.4 million persons police reported to the prosecutors, prosecutors suspended prosecution for the majority, 55.5 percent, of those deemed to have committed a crime.

do so based on Article 248 of Japan's Code of Criminal Procedure: "[w]here prosecution is deemed unnecessary owing to the character, age, and environment of the offender, the gravity of the offense, and the circumstances or situation after the offense, prosecution need not be instituted."[87] Japanese law scholars describe the discretion of prosecutors to indict, or not, as "almost unbounded."[88]

If the prosecutor does indict, Japan, like other civil law systems, requires a trial.[89] No person may be convicted of a criminal offense without judicial fact-finding and proof of guilt in addition to any confession or no-contest plea.[90] Yet, prosecutors may seek to have minor offenses, often criminal traffic violations, tried via summary procedure, where guilt is determined *in camera* by a judge.[91] In other cases, where the defendant confesses, public trials may be streamlined, and most evidence written and introduced in the form of a dossier prepared by the police and prosecutors.[92]

Finally, where guilt is contested, there is a public trial with witnesses called and evidence presented to the trier of fact.[93] For serious crimes after 2009, that may involve presenting evidence to a lay judge panel (*saiban-in*).[94] For those indicted who go to trial, the conviction rate is high, 99.5%.[95]

At the same time, Japanese prosecutors "lack the time to prosecute any but a small fraction of suspects forwarded by the police."[96] And Japanese prosecutors "face particularly stark

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87. *Code of Criminal Procedure (Part I and Part II): Law No. 131 of July 10, 1948*, JAPANESE LAW TRANSLATION, http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=%E5%88%91%E4%BA%8B%E8%A8%B4%E8%A8%9F%E6%B3%95&x=0&y=0&ia=03&ph=&ky=&page=1 [https://perma.cc/Y9UW-9C9X] (last visited Dec. 19, 2020).

88. Haley, *supra* note 19, at 3.

89. *Id.*

90. *Id.*

91. David T. Johnson, *Plea Bargaining*, *supra* note 34, at 142-43; Haley, *supra* note 19, at 10.

92. David T. Johnson, *Plea Bargaining*, *supra* note 34, at 142-43.

93. *Id.* at 143.

94. Haley, *supra* note 19, at 3. Lay judges participate in all cases punishable by death or imprisonment for an indefinite period, as well as intentional offenses causing the death of a victim, such as homicide, robbery, and arson.

95. *Id.*

96. Ramseyer & Rasumsen, *supra* note 82, at 54.

incentives to win cases."[97] They are part of a national bureaucracy, where ability is measured by win rates and conviction rates, and, according to some observers, "losing a case is a sure path to demotion."[98] The pressure to convict is great. The potential cost of taking a case to trial is great.

Because summary procedures and uncontested trials present less risk and impose less of a burden, prosecutors create incentives for defendants to choose those procedures.[99] Interviews show that prosecutors may suggest to suspects that confessions will be rewarded with a suspended prosecution or reduced sentence recommendation.[100] They may promise summary prosecution in exchange for cooperation, or assure suspects they will leave the suspects' spouses or bosses alone if they provide information.[101] There are reported cases of prosecutors offering complete immunity from prosecution to a defendant in exchange for information regarding other defendants.[102]

In short, even before Japan's adoption of its plea bargaining system, Japan had charge and sentence plea bargaining, and immunity agreements just like those found in the United States. Even before Japan's adoption of its plea bargaining system, field research showed that defendants' confessions and cooperation were rewarded with lenient treatment.[103] And for those who refuse to cooperate? The "denial tariff" (*hininryo*) and sentencing differentials await.[104]

At the same time, there are important differences between plea bargaining in Japan and the United States.[105] One journalist covering Japan's procuracy described it as follows:

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97. *Id.* at 61.

98. *Id.* While the internal pressure may be great, the Japanese procuracy, as an institution, is remarkable for its independence "from external pressures, especially political intervention." Haley, *supra* note 19, at 5.

99. David T. Johnson, *Plea Bargaining*, *supra* note 34, at 140-47.

100. *Id.* at 144-47.

101. *Id.* at 146.

102. *Id.*

103. *Id.* at 145-47.

104. *Id.* at 146. In Japan, they call the harsher sentence sought to punish an uncooperative defendant a denial tariff (*hininryo*). *Id.* at 144.

105. *Id.* at 148.

> Plea bargaining in Japan is usually tacit (*anmoku*) and indirect (*kansetsu teki*). In the US it is explicit (*meikaku*). This is the main difference. We don't make written records of it. Our prosecutors communicate with suspects by [subtle communication] (*haragei*).[106]

This "subtle communication" comes at a cost. There is the loss of trust that arises when the law deviates from practice. Perhaps more important, informal plea bargaining precludes formal protection for the defendants. Defendants cannot challenge prosecutors for reneging on deals, when the deal is implied and unwritten.[107] And defendants have little means to evaluate the fairness of the deal when similar cases go unrecorded. That lack of transparency enables corruption, or at least favoritism.

> It is widely believed that "old-boy prosecutors" [who retire from the procuracy and] who become defense attorneys ("old-boy" lawyers) have an especially big influence on their former colleagues . . . Since prosecutors are more likely to trust former judges and prosecutors to keep their promises, they are more likely to enter into agreements with them.[108]

There is arguably a need to make transparent, and hence fairer, the *de facto* plea bargaining that some describe as inevitable.[109]

Prosecutors in Japan, however, offered a different argument for legalizing plea bargaining. With increasing rights consciousness, and more adversarial defense lawyering, confessions have become increasingly difficult to obtain.[110] By granting prosecutors the explicit authority to bargain, especially when soliciting information about bigger offenses and offenders, prosecutors will be able to bring to justice those who are often

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106. *Id.* at 152-53 (the literal translation is "belly art"). Professor Johnson reached a similar conclusion: "Plea bargaining is also more often tacit and implicit in Japan than in the United States. A deal is not recorded in writing, of course, because doing so would document an illegal act. Moreover, most offers are made and most deals are struck indirectly, through innuendo and inference more than through clearly articulated negotiations." *Id.* at 157.

107. *Id.* at 163.

108. *Id.* at 154.

109. Ryan Y. Park, *supra* note 39, at 579 (in countries without formal plea bargaining, substitute mechanisms for pre-trial settlement developed "out of necessity.").

110. Johnson, *Plea Bargaining*, *supra* note 34, at 163.

more difficult to charge and to convict—"corrupt officials and other white-collar offenders."[111]

At the same time, scholars have suggested that there are features of the criminal legal system in Japan that may help to ensure that confessions induced through plea bargains rest on an adequate factual basis.[112] Except for summary procedure cases, there is no condemnation without adjudication. All serious cases get tried in a court of law.[113]

One might question the extent of judicial review in an uncontested trial, but the mechanism for an independent review exists and there is motive to do so, at least initially. The idea of "trading justice" (*shihou torihiki*) is "appalling" to many Japanese, antithetical to the criminal justice system's "pursuit of truth" (*jittai teki shinjitsu shugi*).[114] Plea bargains may, as a result, be subject to closer review by the courts.[115]

They may also be subject to closer review by the prosecutor's office. "[B]efore indicting a suspect, front-line prosecutors must obtain the approval of one or more of their superiors. This system of hierarchical review (*kessai*) requires the charging prosecutor to justify his or her findings of fact and selection of charges."[116] This internal review at the prosecutor's office seeks to ensure that cases have been "thoroughly investigated, analyzed, and discussed."[117]

111. *Id.*

112. *Id.* at 158.

113. *Id.*

114. *Id.* at 141; KEIJI SOSHOUHOU [C. Crim. Pro.] 2018, art. 1 (Japan). Scholars interpret art. 1 of the Code as seeking to "reveal the truth of the case" and codifying the "doctrine of substantial justice" (*jittai teki shinjitsu shugi*), which suggests that resolution of the case must be based on a finding of the facts that is as close as possible to the truth of the matter. *See, e.g.*, KEIJI SOSHOUHOU 29 (Sanshusha ed., 2008); Miyaki, *Dai 3 Kou Keiji Soshou no Mokuteki*, OWC, https://ocw.nagoya-u.jp/files/359/miyaki3.pdf [https://perma.cc/AZG6-A3EV] (last visited Nov. 18, 2020).

115. David T. Johnson, *Plea Bargaining*, *supra* note 34, at 141; KEIJI SOSHOUHOU [C. Crim. Pro.] 2018, art. 1(Japan). *See* Haley, *supra* note 19, at 7 ("Public confidence in the criminal justice system in Japan is almost unrivaled . . . . Ensuring that trust by 'realizing justice' (*seigi no jitsugen*) is an overarching aim.").

116. David T. Johnson, *Plea Bargaining*, *supra* note 34, at 158.

117. *Id.*

2. Formal Plea Bargaining

Against this backdrop, Japan amended its Code of Criminal Procedure, effective June 1, 2018. In the section on district court proceedings, the code now includes a chapter titled, not "plea bargaining" (*shihou torihiki*), but "Cooperation in Gathering Evidence and Other Matters & Agreements Regarding Prosecution."[118] In it, the Code sets out a formal mechanism for negotiating, memorializing, and enforcing certain plea bargain agreements.

Section 1 addresses procedures for negotiating agreements between the prosecutor and accused.[119] Section 2 establishes special rules for trial procedures relating to bargained pleas.[120] Section 3 addresses procedures for ending the agreement,[121] and Section 4 sets out procedures for ensuring performance of the agreement.[122]

The code recognizes plea bargaining agreements for enumerated crimes, entered into with the consent of the accused's attorney, where a prosecutor agrees not to indict or to indict only on certain charges, in exchange for the accused providing information about specified crimes committed by a third party.[123]

a. The Parties to the Bargain

Prosecutors, prosecutorial staff (*kensatsu jimukan*), and members of the national police (*shihou keisatsu shokunin*) are authorized to enter into plea bargaining agreements.[124] They must negotiate a three-way agreement between the prosecutor, accused or defendant, and the defense attorney.[125] As an exception, parts of the agreement may be negotiated solely with defense counsel if all parties consent.[126]

118. KEIJI SOSHOUHOU [C. Crim. Pro.] 2018, pt. II, ch. IV (Japan).
119. *Id.* arts. 350-2, 350-3.
120. *Id.* arts. 350-4-7, 350-11.
121. *Id.* art. 350-12.
122. *Id.* arts. 350-13, 350-141515.
123. *Id.* arts. 350-2, 350-3; Nichibenren, *supra* note 16, at 3.
124. KEIJI SOSHOUHOU [C. CRIM. PRO.] 2018, art. 350-2(1) (Japan).
125. *Id.* art. 350-4; Nichibenren, *supra* note 16, at 3.
126. KEIJI SOSHOUHOU [C. Crim. Pro.] 2018, art. 350-4 (Japan).

The role of defense counsel in plea bargaining came late to the legislation. Debate in the Diet resulted in an amendment to the original bill requiring the agreement of defense counsel to ensure the transparency and reliability of the plea bargaining process.[127] The language in the statute makes defense counsel an indispensable part of the process; "[i]n order to reach an agreement, an attorney *must* consent."[128] The agreement must be reduced to writing, making clear the substance of the agreement, and it must be signed by the prosecutor, accused, and the accused's attorney.[129]

b. The Scope of the Bargain

Plea bargaining agreements are possible only in cases involving an accused or defendant providing information about another case under investigation involving certain crimes.[130] The bill provides an exclusive list of designated economic crimes that affect the public fisc; drug and weapons crimes; and crimes that interfere with the execution of public duties, including bribery, fraud, embezzlement, tax evasion, antitrust law violations, and securities law violations.[131] Each is considered relatively difficult to detect or prosecute.

With organized crime, low-level members are routinely prosecuted, but the investigations often fail to reach the crime bosses. With drug offenses, the prosecutors are again looking beyond the end user, seeking information regarding the seller, manufacturer, or importer of the prohibited drugs. With

127. *See* Kai, *supra* note 22, at 1.

128. KEIJI SOSHOUHOU [C. CRIM. PRO.] 2018, art. 350-3 (Japan). Japan requiring the participation of defense counsel finds support in the literature on plea bargaining where some have analogized the role of defense counsel in a plea bargaining negotiation to a mediator in civil litigation. There is a powerful argument that "the plea bargain should be seen as part of the broad conception of Alternative Dispute Resolution," as defense counsel in such situations serve in a role virtually indistinguishable from that of a mediator. Gabriel Hallevy, *Is ADR (Alternative Dispute Resolution) Philosophy Relevant to Criminal Justice?*, 5 ORIGINAL L. REV. 1 (2009) (emphasis added).

129. KEIJI SOSHOUHOU [C. CRIM. PRO.] 2018, art. 350-3 (Japan).

130. *Id.* art. 350-2.

131. *Id.* arts. 350-2, 350-3. *See also* Nichibenren, *supra* note 16, at 4; Mikio Yamaguchi, *Nihonban Shihou Torihiki no Shikou ni Mukete: Yakuin ga Shitteoku beki koto*, BUS. L.J. 65 (May 2018).

corruption, commentators again suggest there is rarely physical evidence, and, absent a confession, rarely prosecution.[132]

When accused of one of these enumerated crimes, the defendant and defense counsel may agree:

> a) to provide truthful testimony to the prosecutor, the prosecutor's assistant (*kensatsu jimukan*), or the (*shihou keisatsu shokuin*);
>
> b) to provide truthful testimony under examination when called as a witness to testify;
>
> c) to cooperate with the prosecutor or the prosecutor's assistant (*kensatsu jimukan*), or the (*shihou keisatsu shokuin*) by submitting evidence or providing other necessary cooperation.[133]

The drafters and Diet specifically considered and rejected pleas bargained in exchange for information an accused provides about a crime s/he personally committed, as found in the United States.[134]

Not only must the information provided relate to a crime committed by another, amendments to the bill, submitted in 2015, added a section to the statute requiring a relationship between the crimes of the accused and that of the target investigation.[135] The party entering into a plea bargaining agreement must be accused of a crime related to that allegedly committed by the party against whom information is sought.[136]

In exchange for cooperation in the investigation or prosecution of another suspect, the prosecutor may agree to:

> 1. not prosecute the accused;
>
> 2. withdraw charges against the defendant;

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132. *See, e.g.*, Nikkei, *Shihou Torihiki, Nihon ni Netsuku? Soshiki Hanzai he no Kouka Kitai* (June 11, 2018), https://style.nikkei.com/article/DGXZZO31388930V00C18A6000000/ [https://perma.cc/RMH8-MWPA]; *Nihonban 'Shihou Torihiki' = 'Goui Seido' ga 6 Gatsu 1 Nichi kara Hajimarimasu!!*, ATOMU SHIKAWA FUNABASHI HOURITSU JIMUSHO (June 1, 2016).

133. KEIJI SOSHOUHOU [C. CRIM. PRO.] 2018, art. 350-2(1)(a)-(c) (Japan).

134. Kai, *supra* note 22, at 1.

135. Japan Ministry of Justice, *Keiji Soshou Hou nado no Ichibu o Kaisei Suru Houritsuan ni Tai Suru Shuuseian*, http://www.moj.go.jp/content/001321894.pdf [https://perma.cc/6PLF-7YV2] (last visited July 20, 2017).

136. *See* Gotou, *supra* note 18, at 4-5.

3. file only certain charges or seek only specified penalties;

4. seek a change in the charges filed or penalties sought;

5. submit an opinion letter regarding the appropriate sentence to be imposed on the defendant, pursuant to Art. 293(1);

6. petition the court to utilize summary criminal procedures (*sokketsu saiban tetsuzuki no moushitate*); or

7. seek a summary decision (*ryakushiki meirei*).[137]

In summary, the statue provides prosecutors with broad discretion to charge or not, and if they do, to frame the charge and the penalty.

c. The Bargaining Process

As a result of the agreement, the prosecutor may demand the accused testify in another party's criminal case.[138] If a binding plea bargaining agreement is not formed, this testimony may not be used as evidence.[139] If the prosecutor files charges against the accused after entering into a plea bargain, the prosecutor must promptly disclose the agreement after the prosecutor reads the charging sheet.[140] Similarly, if one of the parties violates the plea bargaining agreement, the prosecutor must promptly disclose this occurrence.[141]

A prosecutor, the accused, his attorney, or the court on its own authority may demand production of any records or recordings of the testimony offered by a party to a plea bargaining agreement.[142] If a party is called as a witness and testifies pursuant to a plea bargaining agreement, the prosecutor must promptly disclose the agreement.[143] If a prosecutor files for summary judgment (*ryakushiki meirei*), he must submit to the court the plea bargaining agreement upon which it is based.[144]

137. *Id.* at 10. KEIJI SOSHOUHOU [C. CRIM. PRO.] 2018, art. 350-2(2)(a)-(g) (Japan); Kai, *supra* note 22, at 1.

138. KEIJI SOSHOUHOU [C. CRIM. PRO.] 2018, art. 350-5 (Japan).

139. *Id.*

140. *Id.* art. 291, 350-7.

141. *Id.*

142. *Id.* art. 350-8.

143. *Id.* art. 350-9.

144. *Id.* art. 462.

Parties may terminate the agreement if one party violates its terms.[145] A defendant is also released from the terms of the agreement if the court rejects the charge or penalty proposed by the prosecutor pursuant to the terms of the agreement.[146] If the prosecutor files suit in violation of the plea bargaining agreement, the court must dismiss the suit.[147] If the prosecutor violates the plea bargaining agreement, the court may not use the accused's testimony or the information gained therefrom as evidence, unless the accused consents to its use in his, her or a third person's trial.[148]

The new legislation also includes penalties if a suspect provides false information.[149] Provision of false testimony or manipulated evidence will result in a prison term of up to five years. This sentence may be lessened if recanted prior to trial of the accused or a third party.[150]

Apart from formal recognition of plea bargaining, the legislation also creates a framework for authorizing prosecutorial immunity. When a witness has been or risks being charged with a crime and is scheduled to testify, the prosecutor may seek immunity for the witness.[151] On weighing the importance of the testimony, the gravity of the offense, and other circumstances, the prosecutor can request the court issue an order, either before or during the hearing, that precludes the testimony from being used in a manner detrimental to the witness's interests in criminal proceedings where the witness has been named a defendant.[152]

d. The Consequences of the Bargain

The list of economic crimes for which prosecutors may offer plea bargaining agreements has businesses worried. Prior to adoption, attorneys suggested the bill had the potential to dramatically change the investigation of white-collar crime in

145. *Id.* art. 350-10.
146. *Id.* art. 350-10(2)(i).
147. *Id.* art. 350-13.
148. *Id.* art. 350-14.
149. Osaki, *supra* note 17.
150. KEIJI SOSHOUHOU [C. CRIM. PRO.] 2018, art. 350-15 (Japan).
151. *Id.* arts. 157-2, 157-3.
152. *Id.*; NICHIBENREN, *supra* note 16, at 3.

Japan.[153] In the past, low level employees may have been hesitant to testify regarding the acts of officers and directors for fear of implicating themselves.[154] Plea bargaining and offers of prosecutorial immunity threaten to increase such cooperation.[155]

Commentators in the business community focused on the same risk.[156] Japan's antitrust act has long granted, in price-fixing cases, immunity to the first party to report the acts to Japan's Fair Trade Commission.[157] Commentators saw the plea bargaining statute as an expansion of this type of investigation and an attempt to prevent corporations from collectively responding.[158] The risk of a single employee, officer, or director, providing information against others or the company itself now creates the potential to pit individuals within the organizations against each other.[159]

The arrest, prosecution, and ultimately flight of Carlos Ghosn from Japan proved these commentators correct. Setting aside whether Mr. Ghosn is guilty of the charges that he violated Japanese securities and corporate laws, some of Nissan's internal email suggest that the initial reports to the prosecutors by high level executives seeking a plea bargain were motived, in part, by opposition to Mr. Ghosn's push to further integrate Nissan and Renault.[160] They went to the prosecutors to "neutralize his initiatives."[161]

Concerns about Japan's new plea bargaining system extend beyond the business community. Will the plea bargaining system increase the number of false accusations or charges? Will the plea bargaining system increase the risk that the accused or the defendant offer false testimony either intentionally or inadvertently? Will judges credit testimony secured as a result of

153. *See* Kai, *supra* note 22, at 1.
154. *Id.* at 2.
155. *See id.*
156. Hayashi, *supra* note 19.
157. *Id.*
158. *Id.*
159. *See id.*; Kai, *supra* note 22, at 1-2.
160. Reed Stevenson, *Nissan email trail casts new light on takedown of Carlos Ghosn*, JAPAN TIMES (June 15, 2020), https://www.japantimes.co.jp/news/2020/06/15/business/corporate-business/nissan-carlos-ghosn-takedown [https://perma.cc/Y939-F24V].
161. *Id.*

plea bargaining, or will the number of decisions exonerating defendants increase?

Even if the prosecutor seeks a reduced sentence as part of an agreement with a defendant, there are no guarantees that the judge will impose a reduced sentence. And, even if the prosecutor agrees not to file charges, there remains the possibility that a Prosecution Review Commission (*Kansatsu Shinsakai*) may find grounds to prosecute.[162]

In light of these concerns, Japan's Supreme Prosecutor's Office instructed its prosecutors, in a March 19, 2018 directive, to exercise restraint in using the plea bargaining system and, for each case, coordinate with and follow instructions from an appellate-level prosecutor's office.[163] The early plea bargaining cases, implicating pillars of Japan's business community, suggest prosecutors will not hesitate to use their new authority.[164] The question remains, should they?

C. South Korea

South Korea presents similar questions: is there informal plea bargaining? If so, will formal plea bargaining displace informal practices? Those questions are answered in the context of a criminal justice system that resembles, in important respects, Japan's.

South Korea's legal system, like that of Japan, is part of the Civil Law tradition, heavily influenced first by German law and later by American legal principles.[165] At the same time, "[w]hen Japan colonized South Korea (1905-1945), it imposed many of its

162. Haley, *supra* note 19, at 8 ("These citizen commissions have the power to review and override prosecutor decisions to indict or not indict.").

163. Min. of Justice, *Houmu Daijin Kakugigo Kishakaiken no Gaiyou* (June 1, 2018), moj.go.jp/hisho/kouhou/hisho08_01009.html; *Nihonban 'Shihou Torihiki' = 'Goui Seido'*, *supra* note 132.

164. *See Thai bribery case leads to Japan's first plea bargain*, *supra* note 30. (Tokyo prosecutors agreed to forego indictment of an employee of Mitsubishi Hitachi Power Systems, Ltd. accused of bribing a Thai civil servant, in exchange for cooperation in the prosecutor's investigation of the employer).

165. *See, e.g.*, Jootaek Lee, *A research guide and bibliography for Korean law resources in English*, GLOBALEX, http://www.nyulawglobal.org/globalex/South_Korean_Legal_Resources1.html [https://perma.cc/62US-2NQ7] (last visited Aug. 5, 2018).

own institutions and procedures of criminal justice. As a result, the two systems of criminal justice closely resemble each other."[166] Given this similarity, scholars have suggested that "[i]f the Japanese models of case processing produce [informal] plea bargaining practices . . . then we should expect to find more similarities in quantity and style of plea bargaining in South Korea."[167]

1. Informal Plea Bargaining

South Korean law practitioners and scholars confirm that informal plea bargaining occurs regularly. One practitioner-scholar suggests there are already mechanisms in place, including self-confession, summary trial procedures, and consent of evidence, that function like plea bargaining.[168] Another criminal law scholar, with prior experience as an economic crime investigator with Korea's national police agency, states: "[i]t is an open secret that the prosecutor's conduct negotiations informally in criminal proceedings."[169]

In practice, this occurs in one of two ways: a prosecutor may informally encourage a defendant to plead guilty in exchange for a lesser sentence.[170] Or a prosecutor may offer to investigate only one of several potential charges.[171] This charge and sentence bargaining is similar to what one finds in Japan and the United States.

Informal plea bargaining in South Korea is, however, influenced by different institutional factors. Prosecutors are

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166. David T. Johnson, *Prosecution of Corruption*, *supra* note 45, at 162.

167. *Id.*

168. Roh Myeong Seon, *Sae-lo-un jin-sul-jeung-geo hwag-bo-bang-an-e gwan-han gae-jeong* (Amendment on Expansion of Evidence), at 15.

169. Park Paper, *supra* note 51, at 4. In OECD reports on the OECD Antibribery Convention, South Korea reports that with no plea bargaining procedures available in South Korea, the prosecutor's discretion to discontinue criminal proceedings based on a defendant's cooperation in an investigation serves as a basis to obtain cooperation in an investigation. *Implementing the OECD Anti-Bribery Convention: Korea Phase 4 Report*, OECD, 43-44, http://www.mofa.go.kr/eng/brd/m_5463/down.do?brd_id=8118&seq=318890&data_tp=A&file_seq=1 (last visited Nov. 20, 2020).

170. Interview with Dr. Re-Seop Park, Hallym University (July 28, 2017) (on file with the authors) [hereinafter Park Interview]; Park Paper, *supra* note 51, at 4.

171. Park Interview, *supra* note 170; Park Paper, *supra* note 51, at 4.

enormously powerful in South Korea.[172] So much so that scholars have labeled South Korea's criminal legal system "prosecutorial justice."[173] Some have suggested that prosecutors wield "absolute power and authority over defendants."[174]

In contrast to Japan, where the police "independently handle virtually all reported crimes" and are "not subject to prosecutorial direction or supervision,"[175] in South Korea, prosecutors often control the investigations: the police are a subordinate "helping" agency.[176] Prosecutors have the authority to investigate matters independent of the police.[177] While most criminal offenses are reported to the police, prosecutors can intervene in an investigation at any time.[178] They also have the authority to investigate matters independent of the police.[179] Police officers are permitted to arrest without a warrant only when the suspect is caught in the act or when there is a risk of flight.[180] In all other cases, only the prosecutor has authority to request the issuance of a warrant.[181]

In South Korea, there is neither a grand jury system nor private prosecution.[182] The prosecutor has exclusive authority to institute a criminal action.[183] And the South Korean prosecutor has

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172. Park Interview, *supra* note 170; Park Paper, *supra* note 51, at 1.

173. David T. Johnson, *Prosecution of Corruption*, *supra* note 45, at 51, 61.

174. Nat'l Assembly of the Republic of Korea, *Plea Bargaining*, WHAT'S NEW 3 (Apr. 19, 2005). At the same time, some suggest that when it comes to corruption, this gets "inverted." When it comes to money and politics, the prosecutor's office "traditionally has 'kowtowed to the chief executives.'" David T. Johnson, *Prosecution of Corruption*, *supra* note 45, at 51. "The most common criticism of Korean prosecutors is that they are insufficiently independent from "politics". *Id.* at 56. Others find "the anti-corruption achievements of Korean prosecutors . . . more significant than many commentators claim." *Id.* at 53.

175. Haley, *supra* note 19, at 2.

176. Park Interview, *supra* note 170; Park Paper, *supra* note 51, at 1; Jung-Soo Lee, *The Characteristics of the Korean Prosecution System and the Prosecutor's Direct Investigation*, 53 UNITED NATIONS ASIA & FAR E. INST. RES. MATERIALS, 83-84, https://unafei.or.jp/publications/pdf/RS_No53/No53_13VE_Soo.pdf (last visited Dec. 19, 2020).

177. Park Interview, *supra* note 170; Park Paper, *supra* note 51, at 1.

178. Park Paper, *supra* note 51, at 1.

179. *Id.*

180. *Id.*

181. *Id.*; Park Interview, *supra* note 170.

182. Park Paper, *supra* note 51, at 1-2.

183. *Id.*

"almost unlimited discretion" in deciding whether a particular crime should be prosecuted.[184]

The prosecutor may grant a reprieve from indictment after considering, *inter alia*, the suspect's age, character and likely motive.[185] "[U]nder their judgment, a suspect may be brought to a trial or walk away."[186] If they go to trial, prosecutors will recommend a penalty at the time they seek a guilty verdict,[187] and judges routinely follow this recommendation.[188]

That "almost unlimited discretion" is exercised jointly within the prosecutor's office. As in Japan, front-line prosecutors in Korea "routinely 'consult' with their superiors about disposition decisions—whether to arrest, detain, indict, and so on."[189] This practice of "consultation and approval" (*gyeljae*) is "one of the main mechanisms for ensuring that like cases are treated alike across different prosecutor offices . . . and across different prosecutors within the same office."[190]

In summary, the prosecutors, collectively, wield enormous power in the South Korean criminal justice system.[191] They decide who to investigate and what to investigate. They decide who to charge and what to charge. And with that power, comes the power to encourage cooperation.

As in Japan, all defendants who plead guilty stand trial. There is no arraignment system in Korea.[192] Yet, as in Japan, trial can take different forms. If the crime is minor, punishable by a fine not exceeding S. Kor.₩200,000 (approximately US$200), a police station chief may request that a judge sentence a defendant by summary judgment, without a public trial.[193] Where prosecutors

184. *Id.*

185. *Id.*

186. Kwoncheol Lee, *Criminal Law and Procedure*, *in* INTRODUCTION TO KOREAN LAW 155, 181 (Korea Legislation Research Institute ed., 2013).

187. Park Interview, *supra* note 170.

188. *Id.*

189. David T. Johnson, *Prosecution of Corruption*, *supra* note 45, at 58.

190. *Id.* at 58.

191. Park Interview, *supra* note 170.

192. Jae-Hyup Lee, *Getting Citizens Involved: Civil Participation in Judicial Decision-Making in Korea*, 4 E. ASIA L. REV. 177, 190 (2009).

193. Act on the Proceedings for Summary Judgment art. 2 (S. Kor.), translated in Korea Legislation Research Institute's online database,

seek imposition of a fine or confiscation of property, they may submit a dossier of evidence for the court's review, and seek the court's entry of a summary order, without pubic trial.[194] If the accused confesses, the prosecutor may petition the court to utilize summary trial procedures, where the judge may review the evidence and sentence the accused, without his or her appearance.[195] This abridged trial may take less than ten minutes.[196]

The result is that in South Korea, as in Japan, prosecutors have choices in deciding whether or not to charge a defendant and whether or not to utilize abbreviated procedures resulting in lesser sentences. As in Japan, they have an incentive to encourage the defendant's cooperation and use of summary procedures, because doing so conserves resources. That incentive has grown as the demands on the prosecutors and the courts have grown.[197]

In 2008, South Korea introduced a jury system, where serious crimes—cases punishable by capital punishment, life imprisonment, or a sentence of one-year imprisonment or more—are now prosecuted before a mixed panel of three judges and up to nine jurors.[198] These crimes include not only violent crime resulting in death or serious injury, but also white collar crimes, including bribery and embezzlement.[199] After additional legal reforms, including institution of the right to counsel during examination, adoption of an exclusionary rule for evidence obtained in violation of due process, a victim compensation act,

https://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=45373&type=part&key=9 [https://perma.cc/H7MM-62UR]. *See* Lee, supra note 170, at 173.

194. Kwoncheol Lee, *supra* note 186, at 173.

195. *Id.* at 171, 173-4; Park Interview, *supra* note 170; Korea Criminal Procedure Act art. 286-2, 297-2 translated in Korea Legislation Research Institute's online database, http://www.law.go.kr/lsInfoP.do?lsiSeq=183537&chrClsCd=010203&urlMode=engLsInfoR&viewCls=engLsInfoR#0000 [https://perma.cc/LLC6-47SE]; Jae-Hyup Lee, *supra* note 192, at 190 n.76; Park Paper, *supra* note 51, at 2 (It is not considered the duty of the court to investigate the case).

196. Nat'l Assembly of the Republic of Korea, *supra* note 174, at 3.

197. *See, e.g.*, Park Paper, *supra* note 51, at 3; *Implementing the OECD Anti-bribery Convention, Phase 4 Report Korea*, *supra* note 169 at 43.

198. Ryan Y. Park, *The Globalizing Jury Trial: Lessons and Insights from Korea*, 58 AM. J. COMP. L. 525, 554 (2010); Kwoncheol Lee*, supra* note 186, at 174-76.

199. The Act on Citizen Participation in Criminal Trials identifies the crimes subject to jury trial as violent crimes including murder, serious assault, serious battery, and rape, as well as white collar crimes including bribery and embezzlement. Kwoncheol Lee, *supra* note 186, at 174.

and sentencing reform,[200] Korean scholars now describe the criminal justice system as "overloaded."[201] Proponents argue that a plea bargaining system could help alleviate the burden.[202]

2. Formal Plea Bargaining Proposed

In 2004, a Supreme Court committee in South Korea announced its plans to begin study of a plea bargaining system for its courts.[203] Shortly thereafter, proponents in the Korean National Assembly began urging its adoption. They argued it "contributes to the protection of defendants by enhancing lawsuit's efficiency."[204]

Just as the ABA argued in its 1967 report, a 2005 Korean National Assembly report argued that plea bargaining would enable most cases to be handled quickly, allowing those where guilt is contested to move more quickly through the legal system.[205] Delay for the accused, it was argued, is an injustice, and delay for the prosecutors precludes them from focusing on more pressing cases.[206] The goal was to "maximize judicial effectiveness and eradicate corruption, while guaranteeing that a defendant who pleads innocent is given the fullest and fairest legal process possible."[207]

Second, they recognized that informal plea bargaining occurs, and a formal process can codify safeguards to ensure the defendant does not make an "ill-informed" decision.[208] The Korean Assembly report suggested requiring an attorney to participate in the plea bargaining process, a safeguard the Japanese subsequently enacted in their statute.[209] The report also suggested requiring that the defendant plead guilty in the presence of a judge.[210] Finally, it argued that a formal plea bargaining system encouraging

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200. *Id.* at 185, 190.
201. Park Interview, *supra* note 170; Park Paper, *supra* note 51, at 3.
202. Park Interview, *supra* note 170; Park Paper, *supra* note 51, at 3.
203. Choi Jae-Hyuck, *Korea Considering Plea Bargain System for Courts*, CHOSUN ILBO (Oct. 25, 2004).
204. Nat'l Assembly of the Republic of Korea, *supra* note 174, at 1.
205. *Id.* at 1.
206. *Id.* at 2.
207. *Id.* at 1-2.
208. *Id.* at 2.
209. *Id.* at 2; Gotou, *supra* note 18, at 6-7.
210. *Id.* at 2.

defendants with sufficient evidence to plead guilty will facilitate rehabilitation by allowing "prompt correctional procedures."[211]

The report found concern about the abuse of prosecutorial powers exaggerated given the protections in the Criminal Procedure Act, vigilant oversight by civic groups and the press, and judicial oversight in deciding a defendant's guilt and the severity of the sentence.[212] "[I]f a judge explains in detail to a defendant, the consequences of his or her pleading guilty, plea bargaining can contribute to enhancing fairness."[213] At the same time, the National Assembly report recognized that plea bargaining could conflict with the criminal justice system's truth-seeking function by encouraging bargained compromise; that it could result in sentence disparity among defendants who accept a plea bargain and those who do not; and that in cases involving multiple defendants, the most culpable could get lighter sentences.[214]

This debate stalled for a number of years. Then, in 2008, Korea's Supreme Prosecutor's Office formed a study group,[215] and the Ministry of Justice began drafting legislation recognizing plea bargaining.[216] In 2010, the Ministry of Justice announced legislation to introduce a plea bargaining system in South Korea.[217]

It was simple in form and focused on crimes of violence, corruption, and terrorism.[218] As referenced above, Article 247 of the Criminal Procedure Act affords prosecutors broad discretion to prosecute, or not, based on the same general principles considered

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211. *Id.* at 2.

212. *Id.*

213. *Id.*

214. *Id.* at 2-3.

215. *Prosecution Head Wants Plea Bargaining System*, KBS World RADIO (Nov. 1, 2008 1:15 PM), http://world.kbs.co.kr/service/news_view.htm?lang=e&Seq_Code=58755 [https://perma.cc/9X3G-FXW4]; *see Plea Bargaining System May be Introduced*, KBS World RADIO (Oct. 14, 2008 1:57 PM), http://world.kbs.co.kr/english/news/news_Dm_detail.htm?lang=e&id=Dm&No=58276¤t_page=1162 [https://perma.cc/ZLT9-JXU9].

216. *Justice Ministry to Introduce Plea Bargaining*, KBS World RADIO (June 7, 2010), http://world.kbs.co.kr/english/news/news_Po_detail.htm?lang=e&id=Po&No=73110¤t_page=7 [https://perma.cc/AD2A-VT87].

217. *Id.*

218. Park Interview, *supra* note 170. *See* Proposed Amendment to Criminal Procedure Act, art. 247(2)(1).

in determining punishment.[219] These principles include consideration of the age, character and conduct, intelligence and environment of the offender; the offender's relation to the victim; the motive for the crime, means, and result; and circumstances after the commission of the crime.[220]

The proposed legislation sought to add to the prosecutor's discretion. Proposed Article 247(2)(1) provided prosecutors the authority not to prosecute persons offering testimony "indispensable to a criminal investigation" related to crimes of violence, corruption, and terrorism.[221] Procedurally, Article 247(2)(2) required only a signed written statement setting out the specifics of the agreement, including the charge, facts constituting the offense, applicable laws, and testimony of the unindicted person.[222] Article 247(2)(3) then provided immunity: "A person, who has given written testimony pursuant to Art 247(2)(2), cannot be prosecuted."[223]

The legislation failed to pass.[224] Backlash arose from those concerned about an already powerful procuracy, "where the prosecution monopolizes the investigation and prosecution right."[225] Underlying this concern about the lack of checks and balances on the authority of the prosecutor, was a deep-seated concern about abuse of power in the criminal justice system.[226]

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219. Criminal Procedure Act, art. 247 (S. Kor.), *translated in* Korea Legislation Research Institute's online database, http://www.law.go.kr/lsInfoP.do?lsiSeq=183537&chrClsCd=010203&urlMode=engLsInfoR&viewCls=engLsInfoR#0000 [https://perma.cc/KF7G-FLSW] (last visited Aug. 28, 2018); Kwoncheol Lee, *supra* note 170, at 181.

220. Criminal Act, art. 51. (S. Kor.), *translated in* Korea Legislation Research Institute's online database, http://www.law.go.kr/lsInfoP.do?lsiSeq=188383&chrClsCd=010203&urlMode=engLsInfoR&viewCls=engLsInfoR#0000 [https://perma.cc/9PWD-X5CM] (last visited Aug. 28, 2018).

221. Proposed Amendment to Criminal Procedure Act, art. 247(2)(1).

222. *Id.* art. 247(2)(2).

223. *Id.* art. 247(2)(3).

224. Park Interview, *supra* note 170.

225. *See* The Judicial Surveillance Center, *Opposition to Proposed Amendments*, PARTICIPATION SOLIDARITY (Jan. 8, 2011), http://www.peoplepower21.org/Judiciary/524151 [https://perma.cc/74HT-RE5L].

226. *See, e.g.*, Johngryn Mo, *Introduction: The Elusive Goal of the Rule of Law in Southern Korea*, *in* THE RULE OF LAW IN SOUTH KOREA xi (Jongryn Mo & David W. Brady eds., 2009); Chulwoo Lee, *The rule of law and forms of power: theorizing the social foundations*

When Japan occupied Korea, Japan's resident-general administered the criminal courts and used criminal procedure as an instrument of power.[227] During the authoritarian regimes following World War II, criminal law continued to be "a symbol of authoritarian rule."[228] The democratization movement that began during the June Struggle of 1987, began with the death of a dissident student tortured during police interrogation.[229]

Those concerns about abuse of power in the criminal justice system overlay criticism about its inconsistent use. Protests regarding outsized disparities in judicial outcomes and sometimes too lenient sentencing gave rise to the Korean National Assembly establishing a Sentencing Commission in 2007.[230] The Sentencing Commission enacted sentencing guidelines identifying seven types of crime, each with its own sentencing factors and sentencing range.[231] The guidelines sought to guarantee fair and objective sentencing.[232] According to some, plea bargaining would reintroduce inequity into the system.[233]

While the 2010 bill failed to pass, the issue failed to go away. The debate over plea bargaining in South Korea continues. Apart from the increased burden felt by prosecutors as legal reforms have offered increased procedural rights to the accused, prosecutors have voiced concern about conviction rates and difficulties in obtaining convictions in recent high-profile corruption cases.[234]

While prosecutors wield enormous power within the criminal legal system, the tools they have to investigate are limited. South Korean prosecutors have limited authority to conduct wiretaps and undercover stings.[235] They have no formal authority to plea

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of the rule of law in South Korea and East Asia, *in* LAW AND SOCIETY IN KOREA 39 (Hyunah Yang ed., 2013).

227. Kwoncheol Lee, *supra* note 186, at 170.

228. Cho Kuk, *Korean criminal law and democratization*, *in* LEGAL REFORM IN KOREA 71, 71 (Tom Ginsburg ed., 2004).

229. *Id.*

230. Kwoncheol Lee, *supra* note 186, at 166, 174; Ginsburg, *supra* note 45, at 11 (noting widespread perceptions of corruption and selective prosecution).

231. Kwoncheol Lee, *supra* note 186, at 166.

232. *Id.*

233. Park Interview, *supra* note 170; Park Paper, *supra* note 51, at 3.

234. David T. Johnson, *Prosecution of Corruption*, *supra* note 45, at 59-62.

235. *Id.* at 61.

bargain or grant immunity to cooperating suspects and witnesses.[236] Without these "essential" tools for gathering evidence in corruption cases, they rely on interrogation.[237] Some suggest that "[t]o forbid particular investigative techniques is to condone the crimes those techniques are best suited to solve."[238]

In December 2017, South Korea's Supreme Prosecutor's Office again proposed formal recognition of plea bargaining in Korea.[239] And the Ministry of Justice is again considering adoption of a criminal immunity statute for "inside witness[es]."[240] While neither agency has published proposed legislation yet, commentators have described the new proposal as an "inside witness criminal immunity system," providing prosecutors with the authority to reduce a criminal sentence if the accused confesses or provides testimony regarding others.[241] The focal points are again organized crime and corporate corruption.[242] The intent, again, is to provide immunity to certain defendants if they provide information regarding others.[243] Scholars describe this proposed legislation as "similar" to Japan's newly adopted plea bargaining system seeking to encourage cooperation in gathering evidence in exchange for an agreement regarding prosecution.[244]

Advocates for introducing a plea bargaining system in South Korea argue that it is necessary to regulate the informal plea bargaining that happens as a matter of course.[245] They continue to argue that a formal plea bargaining system will increase transparency and protect human rights.[246] They argue that introduction of a plea bargaining system in South Korea will reduce the burden on the criminal justice system, and they now point to

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236. *Id.*

237. *Id.*

238. *Id.* at 53-55, 61.

239. Lee Kyung-min, *Prosecutors float idea of adopting plea bargaining*, KOREA TIMES (Dec. 7, 2017, 4:44 PM), http://www.koreatimes.co.kr/www/nation/2018/10/356_240577.html [https://perma.cc/AC3T-G9GK].

240. Park Paper, *supra* note 51, at 6.

241. *Id.*

242. *Id.*

243. Park Interview, *supra* note 170.

244. Park Paper, *supra* note 51, at 6-7.

245. *Id.* at 4; Park Interview, *supra* note 170.

246. Park Paper, *supra* note 51, at 4.

Germany.[247] In 2009, Germany introduced a plea bargaining system recognizing the "disposition of the parties as a contract between the suspect and the state."[248]

Significant concerns, however, remain.[249] South Korean scholars argue that plea bargaining is ill-suited to the South Korean criminal justice system, both philosophically and procedurally.[250] They continue to see a fundamental conflict between plea bargaining and the criminal justice system's truth-finding function.[251] In South Korea, as in Japan and Germany, justice is not a value to be "bargained."[252] "Plea bargaining is highly likely to lead to results that may go against the basic principles of criminal justice systems, which are to seek truth and reach a fair decision, by making a compromise with criminals for the benefit of investigative authorities and the prosecution."[253]

They also argue that, absent broader procedural reform, plea bargaining is ill-suited to the South Korean criminal justice system.[254] Scholars speak of the need to address an existing "imbalance of advantage" by strengthening controls over prosecutors' "overgrown powers."[255] Prosecutors already play a "dominant role" in South Korea's criminal justice system.[256] There is a need to balance the interests of efficiency with fairness.[257]

Absent that rebalancing through broader procedural reform, scholars express concern about the risk of returning to the old inquisitorial system, where a prosecutor has authority to investigate, prosecute, and *de facto* adjudicate.[258] They see few constraints coming from a judge with no authority to investigate

247. *Id.*

248. *Id.*

249. *Id.* at 5-6; Park Interview, *supra* note 170; Nat'l Assembly of the Republic of Korea, *supra* note 174, at 3.

250. Park Interview, *supra* note 170.

251. *Id.*

252. David T. Johnson, *Prosecution of Corruption*, *supra* note 45, at 61-62. "An emphasis on finding the truth is a distinctive characteristic of both civil and criminal law processes in civil law systems." Haley, *supra* note 19, at 8.

253. Nat'l Assembly of the Republic of Korea, *supra* note 170, at 2-3.

254. Park Interview, *supra* note 170.

255. David T. Johnson, *Prosecution of Corruption*, *supra* note 45, at 61-62.

256. *Id.* at 61.

257. Park Paper, *supra* note 51, at 5; Park Interview, *supra* note 170.

258. Park Paper, *supra* note 51, at 6; Park Interview, *supra* note 170.

the case and no information about the case until evidence is presented at trial.[259] They find it unlikely that defendants, even with the help of counsel, can bargain with prosecutors on an equal basis.[260] And they see a real risk that failed negotiations will lead to retribution in the form of a prosecutor demanding a heavier punishment than originally proposed.[261]

These concerns are exacerbated by concerns about the inequity that currently arises from "favored relationships" (*jeon-gwan-ye-u*), where former prosecutors and judges find favor in the courts after they return to the practice of law.[262] Similar to the "old-boy" network documented in Japan,[263] in South Korea when a former judge or prosecutor is appointed as defense counsel, the defendant is more likely to receive a not-guilty verdict or a reduced sentence.[264] The former judge or prosecutor is, as a result, able to demand higher attorney's fees.[265] Some defendants, as a result, receive more lenient sentences than others—an issue the Sentencing Commission sought to address.[266] The concern is that plea bargaining will exacerbate the problem, magnifying unfairness already in the system.[267]

In short, many oppose the introduction of plea bargaining absent broader reforms. Conferring more power on the prosecutor, through expanded authority to wiretap, conduct stings, plea bargain and offer immunity may reduce corruption, but it will exacerbate the imbalance of power in the criminal justice system.[268] Yet, the prosecutors want it, and the need remains the same.[269] South Korea's Supreme Prosecutor's Office and the Ministry of Justice are pushing now for amendment to the Criminal Procedure Act recognizing formal plea bargaining, to better investigate corruption and reduce the burden on prosecutors.

259. Park Paper, *supra* note 51, at 6; Park Interview, *supra* note 170.
260. Nat'l Assembly of the Republic of Korea, *supra* note 174, at 3.
261. Park Paper, *supra* note 51, at 5.
262. Jiunn-rong Yeh & Wen-Chen Chang, ASIAN COURTS IN CONTEXT 133 (2015).
263. *See supra* note 104 and accompanying text.
264. Park Paper, *supra* note 51, at 6.
265. Park Interview, *supra* note 170.
266. Kwoncheol Lee, *supra* note 187, at 166.
267. Park Paper, *supra* note 51, at 6; Park Interview, *supra* note 170.
268. David T. Johnson, *Prosecution of Corruption*, *supra* note 45, at 61-62.
269. *See* Park Paper, *supra* note 51, at 3; Park Interview, *supra* note 170.

III. PLEA BARGAINING IN THE LABORATORY—A COMPARATIVE ANALYSIS

In the midst of this push to introduce formal plea bargaining systems in Japan and now South Korea, and the growing concern in the United States over the innocence problem its plea bargaining system has created, the Authors engaged in a multi-year international collaboration with law and psychology researchers to administer psychological studies to test the prevalence of false pleas of guilty by the innocent in each country. Our findings show not only that false pleas of guilty in response to the pressures of plea bargaining is a global problem, i.e., it transcends borders and legal jurisdictions, but also that significant numbers of defendants are willing to falsely testify against others in official proceedings to secure the benefits of those bargains.

A. Study Methodology

Building on methodology used previously to study false confessions,[270] a plea bargaining paradigm was investigated in each country, in a controlled laboratory setting, utilizing college students as participants. The goal was to mirror real-world plea bargaining conditions as closely as possible in a laboratory, by accusing students of academic dishonesty and offering them a plea. We also sought to add to the prior paradigm by adding aspects reflective of the procedural protections adopted in Japan and being considered in South Korea to test whether those mechanisms for making the plea system more reliable were effective.

While academic discipline is not precisely equivalent to traditional criminal penalties, the anxiety experienced by students accused of cheating and anticipating punishment is similar in form to the anxiety experienced by one charged with a criminal offense. There are also procedural similarities with students able to contest guilt at a hearing, akin to a trial. Punishments may similarly require students to forfeit time, money, and freedom. These various similarities enable a meaningful comparison.

270. Melissa B. Russano et al., *Investigating True and False Confessions with a Novel Experimental Paradigm*, 16 PSYCHOL. SCI. 481, 484-85 (2005); Dervan & Edkins, *supra* note 6.

In this study, participants were placed in a situation in which cheating with a fellow student may or may not have occurred, yet all were accused of academic dishonesty. As such, this study recreated the innocent defendant's dilemma by presenting two difficult choices to students and asking them to make a decision: plead guilty to academic dishonesty and receive a lighter punishment or contest guilt and potentially receive a harsher punishment. This is the same decision defendants in the criminal justice system make every day.

As discussed above, Japan has adopted and South Korea is debating a plea bargaining system that recognizes plea bargaining only where the accused offers information regarding others. The focal point is securing information regarding other targets of the investigation and rewarding that cooperation with a reduced sentence. To account for this, our experiment was divided into two studies. The first tested conditions relating to self-incrimination, severity of sentence, and implicating others. The second study introduced additional steps to test participants' willingness to provide incriminating evidence about a putative colleague.

In the United States, participants were college students attending a small university in Florida. In Japan, the participants were students at a large university with campuses in Kyoto and Osaka. In South Korea, the participants were students at a small university in Seoul and a larger one outside the capital.

We ran the experiment using similar Japanese, Korean, and English language scripts and procedures. The goal, in each case, was to better understand what motivates people to plead guilty and the interaction between the incentives to maintain innocence, plead guilty and/or falsely accuse. In each iteration of the study, the study participants signed up for what they believed was a psychological inquiry into individual versus group problem-solving. When the study participant arrived for the problem-solving experiment, s/he was met by another student pretending to be participating in the exercise as well. Unbeknownst to the study participant, the second student was actually a confederate working with the researchers.

At this point, a research assistant, also working with the Authors, led the two students into a private room and explained the testing procedures. The research assistant informed the students that they would be participating in an experiment about

performance on logic problems. According to the research assistant, the two students would be left alone to first complete three logic problems together as a team and, after that, the students would receive three additional logic problems that must be completed individually.

When the individual problems were distributed, the research assistant stated: "Now I will hand out the individual problems, remember that you are to work alone." In fact, in one half of the study the confederate encouraged the participant to cheat and work together. In half of the cases, the confederate asked the study participant for assistance in answering the questions, a clear violation of the instructions. First, the confederate asked the study participant: "What did you get for No. 2?" If the study participant did not respond with the answer, the confederate followed up by saying, "I think it is . . . ." If necessary, the confederate asked for assistance with additional problems: "Did you get . . . for No. 3?" Those study participants who acquiesced and offered assistance were placed in the "guilty condition," because they "cheated" by violating the research assistant's instructions.

In the other half of the cases, the confederate sat quietly and did not ask the study participant for assistance. Absent unprompted attempts to cheat initiated by the participant, those in this scenario were placed in the "innocent condition," because they did not "cheat" by violating the research assistant's instructions.

After completing the second set of logic problems, the research assistant, who did not know whether cheating occurred, collected the logic problems and asked that the students remain in the room while the problems were graded. Approximately five minutes later, the research assistant reentered the room and indicated there was a problem and asked to speak to the students individually. The research assistant looked at the sign-in sheet and read off the confederate's name and the two then left the room together.

Five minutes later, the research assistant reentered the room, sat down near the study participant, and made the following statement: "You and the other student had the same wrong answer on the second and third individual questions. The chances of you both getting the exact same wrong answer are really small—in fact they are like less than 4%—because of this, when this occurs, we

are required to report it to the professor in charge and she may consider this a form of academic dishonesty."[271]

The research assistant then informed the student that this had occurred before and that she had been given authority to offer two alternatives. The first alternative was to admit to the academic dishonesty, lose any promised compensation, and the student's academic advisor would be informed of the dishonesty. This alternative was akin to receiving a promise of probation—the defendant could leave without future proceedings (assuming the probation rules were met), but there was the stigma of criminal, or in our case "cheater", attached to the decision.

The second alternative offered to the participant mimicked the decision to go to trial. Students were told they could contest the accusation. They were told the professor in charge would bring the incident to an academic review board. In the study, the descriptions of the academic review board and procedures utilized varied slightly depending on the location of the experiment.[272] In general, to make the review board sound similar to a jury or panel of lay-judges in a criminal trial, the research assistant described it as being a forum in which the student had the option of telling his or her version of events, presenting evidence, and arguing for his or her position.

The panel was generally described as a board of faculty and staff who would hear the incident and decide if academic dishonesty had occurred. Students were told that if the board found no academic dishonesty (i.e., if they were acquitted) then they would receive the compensation owed to them for the study. If the board found academic dishonesty (i.e., if they were found guilty), then they would lose the compensation, the academic

271. To ensure the study participant is unable to argue that he had answered questions two and three correctly, the second set of logic questions were designed to have no correct answer.

272. The descriptions vary depending on the university's student code of conduct. *See, e.g.*, *Ritsumeikan Daigaku Gakusei Choukai Kitei*, http://www.ritsumei.ac.jp/pathways-future/common/file/life/pathwaysFuture-life-studylife-13regulation.pdf [https://perma.cc/42EU-4VFL] (last visited Dec. 20, 2020); *Ritsumeikan University Student Disciplinary Regulations*, http://www.ritsumei.ac.jp/file.jsp?id=227385&f=.pdf.http://www.ritsumei.ac.jp/file.jsp?id=227385&f=.pdf [https://perma.cc/M7WN-U8NS] (last visited Dec. 20, 2020).

advisor would be informed of the incident, and one of two punishments would be conveyed.

Half the students were offered a "harsh" sentencing condition and the other half were offered a "lenient" sentencing condition to test the impact of "sentencing differentials" on the rate of innocent and guilty students accepting the plea offer. In the lenient condition, students were told they would need to attend an 8-hour seminar on ethics training with a pass/fail exam at the end. In the harsh condition, students were told they must attend the seminar, pass the exam, and also complete 10 hours of community service.[273]

The two punishments were meant to test the effect of sentence disparity on decisions to plea. While there was no threat to students of actual incarceration—as a jail or prison sentence does—there was a threat to their time, which represented a deprivation of liberty interests.

To further mirror the actual process of deciding whether to accept a plea deal, the participant was provided with a form of "representation" that was meant to serve the function of counsel. Before the participants elected to plead or contest the charges, the experimenter informed the participant of their right to have an advocate in situations such as these. The experimenter then presented a one-page document from a "student advocate" available to represent students in cases of possible academic dishonesty. The paper reiterated the right to the review board and the right to defend oneself in front of the board. A phone number was provided for students to call if they chose the review board option.

One might argue that the advice a defense attorney provides is not adequately captured on a piece of paper outlining the implications of the decision, but this is often not far from what a

273. The lenient and harsh punishment conditions are slightly different in the current paradigm than the previous research—most notably, the lenient condition is less onerous and both conditions focus more on time requests (e.g., 10 hours of community service) than actual duties. The goal was to increase the non-significant trend found in the previous research where more innocent participants were enticed to plead guilty when the disparity between the ramifications of accepting the plea and what will occur if found guilty by the review board were increased. If so, this will be important information for policy makers to consider when determining how much of an incentive to create for accepting a plea bargain and providing information on co-defendants.

typical public defender in the United States representing an individual charged with a minor offense provides. In 2011, the National Association of Criminal Defense Lawyers ("NACDL") concluded that individuals in misdemeanor cases are often processed with no attorney or with one that offers little more than a few minutes of time.[274] Counsel's access to the accused in Japan and South Korea may be similarly limited.[275]

Finally, after the participant was presented with the rights of the accused document, the experimenter repeated the choices and added that if the participant chose the academic review board, s/he should be aware that over 80-90% of students appearing in front of the board are found guilty. This statement was intended as a low-end approximation of conviction rates in the United States, Japan, and South Korea, with the assumption that these high rates are communicated to most defendants by either the government or defense counsel.[276] Once the study participants were presented with the option of pleading guilty or proceeding to the review board, the research assistant presented them with a piece of paper. The paper outlined their options and asked that they circle their selection.

Plea bargaining in the United States allows an accused to receive a lighter sentence by either acknowledging personal guilt or providing incriminating evidence regarding another.[277] Most plea deals, nonetheless, typically require that the party cooperate with the government. In the United States, in some situations, this means the plea deals requires the defendant to provide information about or testify against a co-defendant. As discussed above, in Japan and South Korea, doing so is a prerequisite.[278]

To examine this facet of plea bargaining, if a participant in Study 1 chose the plea deal, s/he was presented with a second sheet of paper asking him or her to indicate who instigated the

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274. Alisha Smith & Sean Maddan, Nat'l. Ass'n. of. Crim. Def. Law, *Three-Minute Justice: Haste and Waste in Florida's Misdemeanor Courts*, 13-18 (2011).

275. *See, e.g.*, Levin, *supra* note 17 (describing extended custody in isolated police holding cells in Japan, "with minimal opportunity for meaningful oversight by an attorney on behalf of the suspect").

276. Conviction rates in both Japan and Korea have historically exceeded 99%. Even excluding the large number of cases where the defendants have confessed, conviction rates remain high, about 95%. David T. Johnson, *Prosecution of Corruption*, *supra* note 45, at 58.

277. *See supra* Part II.A.2.

278. *See supra* Parts II.B, II.C.

cheating. It was presented as the next step in the process, and participants were encouraged to complete the sheet. Upon completion, they also signed their names to this sheet, increasing the perception of the document as a binding agreement.

For guilty individuals, making the decision to accept the deal likely increases cooperation. These individuals should be naturally primed by accepting the plea to move to the next logical step of implicating their "co-defendant." For the innocent who accept the plea, Study 1 examines whether these individuals can rationalize implicating another person when they know that no actual wrongdoing took place.

Study 2 focused more closely on this issue. If the participant chose to plead, the script required the participant identify the party who they provided assistance to or received assistance from. Participants who admitted to cheating were also asked to provide information to the academic review board regarding the cheating incident. In other words, in Study 2 a plea bargain depended on implicating another, rightly or wrongly. It tested the willingness of those in the non-cheat condition to falsely accuse a third party in exchange for a lighter punishment. It also tested the willingness of those in the non-cheat condition to testify against an innocent third party.

It is important to note that both Studies 1 and 2 utilized safeguards similar to those employed in research on false confessions and in other deception studies to ensure the well-being of the study participants. The research assistant was instructed to terminate the experiment and debrief the student regarding the true nature of the study if the student took too long to select an option, seemed overly stressed, or tried to leave the room. For those that completed the study, they were fully debriefed at the end. The experimenter explained the study and ensured that the participant left without distress.

B. Study Results

1. Pleading Rates in the United States

In the 2013 study completed in the United States, approximately nine out of ten guilty study participants accepted

the plea deal, while six out of ten innocent study participants did.[279] Results from the current research in the United States showed similar trends: guilty participants plead at a high rate, but substantial numbers of innocent participants were also willing to plead.

In the first study, a total of 204 individuals participated. Fourteen people were removed because they showed suspicion to the deception. The experimenter had to end eight sessions early due to distress on the part of the participant, evidence that the paradigm elicits some of the same psychological reactions as found in plea bargaining. One additional individual had to be excluded because the condition was not recorded. We also had a number of individuals (N=21) originally assigned to the "cheat" or "guilty" condition who had to be reassigned to "innocent" when our confederate's attempts at cheating were unsuccessful or ignored. Of the remaining 181 participants, ages ranged from 18-25 (M=19.49, SD=1.42), and 30.4% (N=55) identified as female while 69.6% (N=126) identified as male. Plea rates did not differ by gender. Overall, 51.9% (N=94) pleaded guilty to cheating in order to avoid our academic review board, and 48.1% (N=87) rejected the plea offer.

This first study tested the impact of the proposed punishment attached to a guilty finding in front of an academic review board. Student participants were randomly assigned to hear about a harsh punishment or a lenient punishment. There was no difference in plea choice for these students ($\chi^2 < 1.0$). For students who were "guilty", the rate of pleas when faced with a harsh punishment was 73.1% and 72.4% when faced with the more lenient punishment. This trend was the same for "innocent" participants: 45.9% plead guilty in the harsh conditions and 40% in the lenient conditions.

As is evident from the previous paragraph, the largest difference in plea rates is between those who cheated and those who did not cheat. Similar to previous work, Study 1 showed that 72.7% of those guilty of cheating chose to plead guilty and 42.9% of the innocent chose to plead guilty, χ^2 (1, 181)=12.51, p<.001, phi=.28 (continuity correction applied). Logistic regression

279. Dervan & Edkins, *supra* note 6, at 34.

confirmed that punishment did not affect pleas (Beta=.19, p=.55) but guilt was a strong predictor (Beta=1.27, p<.001, Odds Ratio=3.57).

Equally important, the available data shows participants' willingness to implicate others. Of our 94 individuals (across conditions) choosing to plead guilty to the accusation, 73 agreed to voluntarily sign our "instigator" sheet, supposedly identifying who instigated the cheating. Of those actually "guilty" of cheating who agreed to sign the sheet (N=32), 81.3% (n=26) correctly stated the confederate was the instigator, while 18.8% (n=6) indicated they personally instigated the cheating. Of those actually "innocent", i.e. those who did not cheat on the assignment given them but who pled guilty to doing so and agreed to sign the instigator sheet (N=41), 41.5% (n=17) took the blame and stated that they personally instigated the (nonexistent) cheating but 58.5% (n=24) said the confederate was the instigator.

This means that for those falsely confessing, *over half* falsely implicated an innocent person. In other words, it was more likely than not that the plea bargains generated misinformation and implicated innocent people, when individuals were willing to discuss instigation. This effect of guilt condition was significant, χ^2 (1, 73)=12.51, p=.04, *phi*=.24.

The second study more directly tested plea bargains obtained through cooperation by requiring that individuals implicate their fellow student to receive a plea deal. Since we found no effect for punishment from the first study, the sanction we tied to the academic review board was the same for all participants in this study. A total of 133 students participated in Study 2; six of these individuals were excluded because they became upset and had to be debriefed prior to the dependent variable; one individual refused to complete the study; and eight individuals were excluded after displaying suspicion about the deception. As with Study 1, a number of individuals (N=38) who were initially assigned to our "cheat" condition had to be moved to the "no cheat" condition after failing to collaborate with our confederate. Of the remaining 118 participants, ages ranged from 18-47 (*Median*=19, *SD*=3.55); 38.1% (N=45) identified as female and 60.2% (N=71) identified as male. Plea rates did not differ by gender.

Again, the results from the study in the United States showed significant rates of guilty pleas and of innocent students pleading

guilty. Our overall rate of guilty pleas was 67.8% (*N*=80) across conditions. For our "guilty" participants, 71.4% (*N*=30) chose to plead guilty, and for our "innocent" participants, 65.8% (*N*=50) accepted the plea deal. This means that guilt was actually *not* a significant predictor of plea acceptance—the rates were high across the board, regardless of guilt or innocence. Adding in the extra requirement of implicating a fellow student in order to receive a deal did not lead to fewer innocents pleading, but instead we saw even more accepting the deal than in Study 1. Additional research will need to explore why this outcome occurred, but one possibility is that the extra step introduced into the process made the ordeal seem more formal and more daunting, leading to more individuals to want to get the process over with as quickly as possible.

Those who succumbed to our confederate's requests to cheat were, overall, willing to indicate that the confederate was indeed the instigator only about a third of the time (33.3%, *n*=10). Instead, they indicated that they themselves were to blame in the majority of sessions (66.7%, *n*=20). All 50 of our innocent participants answered the instigator questions in Study 2, and 52% (*n*=26) stated that the confederate was the one who started the cheating —again, this is when no cheating actually occurred. The most concerning part was that of our 50 innocent individuals, 88% (*n*=44) were willing to testify that cheating had, in fact, occurred and that the confederate was involved in the event.

Data from these experiments suggests the burden of contesting innocence and the risks of increased punishment influence behavior. Equally important, this data shows this influence precludes reliance on the veracity of a bargained statement or cooperation. It casts doubt on information provided about third parties in exchange for a lesser punishment.

2. Pleading Rates in South Korea

Our South Korean colleagues collected data from 89 students for Study 1 from two universities in South Korea. Out of the 89 participants, 63 completed the study without suspicion and without needing to end early. Their ages ranged from 18-27 (*M*=21.33, *SD*=2.27); 65.07% (*N*=41) identified as female and 34.9% (*N*=22) identified as male. Plea rates did not differ by gender.

Similar to the United States results, the manipulation of punishment did not affect plea rates. Broken down by category, for those in the cheat condition faced with the harsher of the two proposed punishment, 68.4% pled guilty, and 31.6% chose the academic review board. Of those faced with the more lenient punishment, 62.5% pled guilty, and 37.5% chose academic review board.

The South Korean sample also showed that the best predictor of plea rates was actual guilt. Logistic regression confirmed that punishment did not affect pleas (Beta=-.11, p=.90) but guilt was a predictor (Beta=1.39, p=.06, Odds Ratio=4.00). For those in the non-cheat condition, when faced with the harsher punishment, 27.3% pled guilty and 72.7% chose the academic review board. When faced with the more lenient punishment, 29.4% pled guilty and 70.6% chose the academic review board. Collapsed across punishment, 65.7% of guilty participants chose to plead guilty, and 28.5% of innocent participants chose to plead guilty.

The data regarding the number of students who provided evidence regarding the "instigator" is limited, but shows participants willing to implicate others, albeit at a lower rate than found in the United States. Out of a sample size of 63, 59% (N=37) of the participants who accepted the plea offer provided evidence regarding the "instigator". Among the participants who were solicited to cheat, did cheat, and then pled guilty (N=23), 39% (n=9) indicated that they instigated the cheating; 61% (n=14) indicated that the other person instigated the cheating. With the innocent participants, among those participants who were asked to cheat but refused and still pled guilty, all 9 students indicated the other person instigated the cheating. Among those who were not asked to cheat but pled guilty, 3 out of 5 falsely stated that they instigated the cheating while the other 2 falsely implicated the other student.

Results from the study in South Korea again show large numbers of innocent students, roughly 30%, pleading guilty to cheating to avoid the burden of contesting innocence and risks of increased punishment. The results also show those guilty of cheating frequently, almost 40% of the time, giving inaccurate information about the role of the confederate. For the innocent pleading guilty, while they had a higher tendency to implicate

themselves, still 40% of the time they falsely implicated their innocent colleague.

The second study in South Korea again more directly tested plea bargains obtained through cooperation by requiring that individuals implicate their fellow student to receive a plea deal. In this study, 84 students participated with 78 completing the experiment. Ages ranged from 18-27 (M=20.78, SD=2.18); 82.1% (N=64) of the participants identified as female and 17.9% (N=14) identified as male. Plea rates did not differ by gender.

While the need to implicate another did not greatly reduce the plea rates in the United States sample, it seemed to have an effect on the South Korean participants. The overall guilty plea rate was actually lower than the rate of those rejecting the plea—41% (N=32) compared to 59% (N=46). For those in the guilty condition, 72.9% (N=27) pled guilty, but only 12.2% (N=5) of the innocent participants chose to plead to the accusation and avoid the Academic Review Board. The Chi-Square test indicated that this was significantly fewer innocents pleading guilty than expected, χ^2 (1, 78)=27.24, p<.001, *phi*=.62 (continuity correction applied).

For the South Korean sample, all of those individuals who cheated and pled guilty (N=27) correctly implicated the confederate as the instigator, and 88.9% (n=24) stated they would be willing to do so in testimony to the Academic Review Board. For the five innocent students who pled guilty, two stated that they themselves instigated the cheating while the other three implicated the confederate. Only two were willing to testify to the Academic Review Board.

3. Pleading Rates in Japan

Our Japanese colleagues encountered a number of difficulties administering the experiment, which precluded completion of either study. As a result, there are no statistically valid conclusions to draw. But there is data to discuss, and there are some trends to identify.

In Japan, 29 students participated in Study 1, with 27 completing the same. Of those, 29.6% (N=8) identified as female and 70.3% (N=19) identified as male; ages ranged from 18-27, with a mean of 21.76. Analysis of this limited data, including both the participants in the harsh and lenient portion of the study, showed

35.7% of the innocent participants and 61.5% of the guilty participants accepting the plea bargain offered.

Broken down by category, for those in the cheat condition faced with the harsher of the two proposed punishment, 57.1% pled guilty, and 42.9% chose to appear before the academic review board. Of those faced with the more lenient punishment, 66.7% pled guilty, and 33.3% chose to appear before the academic review board. For those in the non-cheat condition, when faced with the harsher punishment, 28.6% pled guilty, and 71.4% chose the academic review board. When faced with the more lenient punishment, 42.9% pled guilty, and 57.1% chose the academic review board. Plea decisions did not differ by gender. The numbers are limited, but, again, show significant numbers of innocent students, roughly thirty to forty percent (30-40%), pled guilty to cheating to avoid the burden of contesting innocence and risks of increased punishment.

IV. PRELIMINARY CONCLUSIONS & ONGOING INQUIRIES

The data suggest that the innocent pleading guilty is not a localized concern. It happens in the United States. It happens in South Korea. It happens in Japan. And it happens at rates that should lead to a re-evaluation of the risks and benefits of plea bargaining, formal or informal, in each country. Plea bargaining's innocence phenomenon is global.

The research in the United States shows forty to fifty percent of the study population willing to falsely condemn themselves in return for a perceived benefit. This suggests that the US Supreme Court was wrong in its 1970 *Brady* decision to place confidence in the ability of individuals to assert their right to trial in the face of uncertainty and risk.[280] The data also suggest it is wrong to place confidence in the information provided as a result of the plea bargain, including information against co-defendants provided in formal proceedings by those who have pleaded guilty.

In Study One, twenty percent of the study population guilty of cheating gave incorrect information regarding the role of the other student. More striking, fifty-six percent of those pleading guilty to cheating who did not actually cheat falsely implicated another

280. Brady v. United States, 397 U.S. 742, 750-51, 758 (1970). *See also* Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978).

student. In Study 2 in the United States, almost sixty-six percent of the innocent participants pled guilty and fifty-two percent of them were willing to falsely implicate other innocent students.

Our 2013 study provided laboratory evidence that plea bargaining can lead to false pleas by a significant number of innocent defendants. We now have laboratory evidence indicating that plea bargaining's innocence problem extends beyond individuals offering false confessions that implicate themselves in return for leniency. This new data demonstrates that individuals are also willing to provide false testimony against others in return for the benefits of a bargain. If a significant number of individuals are willing to falsely implicate others in return for a plea bargain, this phenomenon might lead others to falsely plead guilty in response or result in a wrongful conviction at trial. In either case, these findings call into question the reliability of any system that relies on plea bargaining to adjudicate guilt. These findings also demonstrate, unequivocally, that the *Brady* compromise has failed and that the efficiency of plea bargaining comes at a high price with regard to accuracy.

Laboratory evidence from South Korea showed the same concerns exist there, and a need for caution in implementing a plea bargaining system there. Approximately thirty percent of innocent study participants in Study 1 were willing to forgo a chance to prove their innocence and falsely condemn themselves in return for a perceived benefit, suggesting the pressures created by offers of leniency are significant. Forty percent of the innocent falsely implicated another in pleading guilty to something that they did not do, suggesting "cooperation in gathering evidence" may result in false evidence gathered. The Study 2 results showed far fewer innocent students pleading guilty when doing so required them to implicate another. But note what happened for those that did: the sample size is small, but sixty percent of these innocent students falsely implicated another student, and forty percent indicated a willingness to testify against another student.

Finally, while the data from Japan is limited, there are trends that suggest concerns similar to those found in the South Korea and United States studies. They sound a similar warning to those beginning to implement plea bargaining in Japan. Absent significant procedural safeguards, the innocent will be implicated.

While this study highlights the dangers of a plea bargaining system, it does not suggest abolishing plea bargaining as the answer. Doing so in the United States is impractical as court systems are overburdened even with more than ninety-five percent of convictions resulting from pleas of guilty. Even if we adequately addressed the devastating impacts of overcriminalization and the need for criminal justice reform in the United States, including de-criminalization, having no plea bargaining system seems untenable.[281] Further, at its core, plea bargaining holds the potential of being beneficial to all parties and, therefore, eliminating plea bargaining may be as detrimental to the parties as to the system itself. The aspiration is not to eliminate plea bargaining, but to find a path forward that better protects the rights of those within the system, while simultaneously valuing accuracy more than efficiency.

The same concerns and realities are important to the discussions occurring in Japan and South Korea. Institutional incapacity explains the current "necessity" of informal plea bargaining and the use of summary procedures in exchange for pleas in Japan and South Korea. There are simply not enough prosecutors, judges, and courts to try every case. At the same time, the idea of "trading justice" is "appalling" to many Japanese and South Koreans.[282]

They continue to see a fundamental conflict between plea bargaining and the criminal justice system's truth-seeking function.[283] In South Korea, as in Japan and Germany, justice is not a value to be "bargained."[284] "Plea bargaining is highly likely to lead to results that may go against the basic principles of criminal justice systems, which are to seek truth and reach a fair decision,

281. For a discussion of the symbiotic relationship between plea bargaining and overcriminalization, see Lucian E. Dervan, *Overcriminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 J. L., ECON. & POL'Y 645 (2011).

282. *See* David T. Johnson, *Plea Bargaining in Japan*, *supra* note 34, at 141: Park Interview, *supra* note 170.

282. KEIJI SOSHOUHOU [C. Crim. Pro.] 2018, art. 1 (Japan).

283. Park Interview, *supra* note 170.

284. David T. Johnson, *Prosecution of Corruption*, *supra* note 45, at 62. "An emphasis on finding the truth is a distinctive characteristic of both civil and criminal law processes in civil law systems." Haley, *supra* note 19, at 8.

by making a compromise with criminals for the benefit of investigative authorities and the prosecution."[285]

Second, abolishing a formal plea bargaining system does not end plea bargaining. It simply drives it into the shadows. Scholars and practitioners have long acknowledged the presence of informal plea bargaining in Japan and South Korea.[286] And widespread existence of informal plea bargaining in the United States was one of the reasons for the *Brady* compromise in 1970.[287] Plea bargaining is likely here to stay.

The question is how best to structure this system of justice. Informal plea bargaining is not necessarily the answer. How often will the lure of quickly resolving the issue through confession and a summary procedure, just like quickly resolving the cheating allegation, result in false confession and misinformation? Are those risks greater in a system with a "dominant" South Korean prosecutor negotiating a deal in the shadows, or a Japanese prosecutor engaging in "subtle communication" (*haragei*)?

The current studies presented here provide some clues about how one might instead structure or revise a formal plea bargaining system to provide better protection for defendants and reduce the likelihood of false pleas or false testimony. And they suggest that the limitations implemented in Japan and under consideration in South Korea fall short. Though limiting plea bargaining to those implicating another in specified crimes and requiring the consent of defense counsel may reduce false pleas, these steps alone are not enough.

Examination of notes compiled during the debriefing of participants in the 2013 study in the United States shows two common concerns drove participants' behavior. First, study participants sought to avoid the review process and move directly to punishment. Second, study participants sought a punishment that minimized risk and did not require the deprivation of future liberty interests.[288]

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285. Nat'l Assembly of the Republic of Korea, *supra* note 174, at 2-3.
286. *See supra* Parts II.B.1, II.C.1.
287. *See supra* Part II.A.1.
288. *See* Dervan & Edkins, *supra* note 6, at 37.

Further research is necessary to better understand these motivations, but one trend is clear. The accused are risk adverse and seek immediate resolution to the dispute. The participants' actions directly mimic a phenomenon that has drawn much debate in the United States. The students appear to select "probation" and immediate release rather than risking further constraint or "incarceration" through forced participation in a "trial." [289] One must question how different this is from current criminal procedure offering offenders, who are not given or cannot afford pretrial release, an option of time served in return for a plea of guilty. A recent study conducted by two of the three authors of this Article suggests there is little difference: in that study participants were almost three times more likely to falsely plead guilty when pretrial detention was utilized.[290]

The present study also speaks to risk avoidance. Previous research suggested that plea bargaining's innocence problem might be minimal if defendants are risk prone and willing to defend themselves before a tribunal. [291] Our research, however, demonstrates that when South Korean, Japanese, and American study participants are placed in real, rather than hypothetical, bargaining situations and informed of their probability of success, innocent individuals are highly risk averse. [292]

These trends highlight the need for procedural reforms in each country studied. Countering basic human tendencies to seek a quick resolution and avoid risk requires adequate information and space to consider alternatives.

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289. *See* Dervan & Edkins, *supra* note 6, at 37-38.

290. *See* Vanessa A. Edkins & Lucian E. Dervan, *Freedom Now or a Future Later: Pitting the Lasting Implications of Collateral Consequences against Pretrial Detention in Decisions to Plead Guilty*, 24 PSYCHOL., PUB. POL'Y, & L. 204, 205 (2018).

291. Avishalom Tor et al., *Fairness and the Willingness to Accept Plea Bargain Offers*, 7 J. EMPIRICAL LEGAL STUD. 97, 113 (2010) ("[I]f innocents tend to reject offers that guilty defendants accept, the concern over the innocence problem may be exaggerated."); Oren Gazal-Ayal & Limor Riza, *Plea Bargaining and Prosecution*, 155 (European Ass'n of Law & Econ., Working Paper No. 013-2009, 2009) ("Since trials are designed to reveal the truth, an innocent defendant would correctly estimate that his chances at trial are better than the prosecutor's offer suggests. As a result, innocent defendants tend to reject offers, while guilty defendants tend to accept them."); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1165 (2008); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2507 (2004) ("Defendants' attitudes toward risk and loss will powerfully shape their willingness to roll the dice at trial.").

292. *See* Dervan & Edkins, *supra* note 6, at 36-37.

One protection that might reduce the risk of false pleas is to limit pre-trial detention. Such reforms can limit the sometimes-overwhelming need to "just be done with it" even if it means accepting a penalty wrongly imposed. Providing meaningful counsel to the accused early in the process can also assist by providing the space and perspective to better weigh the impulse to "just be down with it" with the value of contesting innocence.

Japan's pre-trial detention procedures almost certainly exacerbate tendencies for the innocent to "cooperate". Police may detain a suspect for forty-eight hours before referral to a prosecutor. If the prosecutor concurs with the police, s/he then has twenty-four hours to obtain a warrant of detention. The prosecutor may then petition the court to approve detention of the suspect for up to ten days, with the possibility of an additional ten-day detention order. As a result, a suspect may be held in custody before indictment for twenty-three days.[293] But with sequential investigations and indictments twenty-three days can turn into months.[294] In Carlos Ghosn's case, it turned into 139 days of detention.[295] During that time, for the police and prosecutors, obtaining a confession is one of the highest priorities.[296] For the accused, long periods of interrogation followed by isolation in a police holding cell are not uncommon.[297]

Those who are indicted in Japan usually remain in detention. There are reports suggesting that bail is denied in approximately seventy-five percent of the cases and, when granted, it is delayed

293. Haley, *supra* note 19, at 9 (noting that this corresponds to the average number of days persons arrested in the US spent in jail awaiting trial in 2013).

294. Professor Levin in his work discusses events where the Japanese authorities detained, without trial, one of the leaders of the Okinawan protests against US military base expansion from October 2016 to March 2017. *See* Levin, *supra* note 17, at 183. *See also* Lawrence Repeta, *The Silencing of an anti-U.S. base protestor in Okinawa*, JAPAN TIMES (Jan. 4, 2017).

295. *See, e.g.*, Nicolas Johnson, *supra* note 24; Wingfield-Hayes, *supra* note 24.

296. Haley, *supra* note 19, at 9. The purpose is two-fold. "Confessions are the 'king of evidence' (*shouko no ou*)." *Id.* at 10. Japanese prosecutors see confessions as evidence of remorse and the first step towards reintegration into society. *Id.* Obtaining a confession is a means of correcting offender behavior without retributive or incapacitating sanctions. *Id.* Professor Johnson describes confessions as "the heart" of the Japanese criminal justice system. DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN 243 (2002).

297. For Professor Levin's description of extended custody in isolated police holding cells, see Levin, *supra* note 17, at 175-76, 183.

until after the first hearing resulting in several months of detention before bail.[298] In short, for those seeking immediate resolution, lengthy pre-trial detention will place inordinate, perhaps overwhelming pressure on the accused to "cooperate" and reach a plea agreement.

Pre-trial detention practices in South Korea present similar risks and pressure. In South Korea, the accused may be detained up to forty-eight hours before being charged, and the opportunity for bail is "limited"[299] Instead, the accused are routinely detained up to two months, with extensions up to six months during the police and prosecutor's investigation. The result, again, is inordinate pressure to cooperate. Often the accused must weigh six months in jail and little chance of prevailing at trial, with the chance to "cooperate" and get on with life.[300]

There are other reforms that may also reduce the likelihood of false pleas and false testimony in the United States, Japan, South Korea, and any other country relying on plea bargaining. First, the trial penalty, the increase in punishment a defendant receives if they reject a plea offer and proceed to trial, must be limited. Few things are more coercive than the prospect of spending month, years, or even decades longer in prison for exercising the right to trial. Second, plea bargaining must be more transparent. This includes providing defendants more information before deciding whether to plead guilty, such as exculpatory information, and placing information about plea offers and incentives on the record for review. Third, defendants must be afforded a reasonable amount of time to consider pleas with the assistance of counsel. Pleas of guilty, even in misdemeanor cases in the United States, carry significant collateral consequences that deserve considered decision-making, not rushed attempts to move forward too quickly. Finally, courts must carefully examine plea agreements

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298 . *See, e.g.*, *Hoshaku ga mitome rareru kakuritsu wa, dono kuraidesu ka*, https://www.yokohama-roadlaw.com/qa-soudan/cat4/post_576.html [https://perma.cc/DB7Z-U4AB] (last visited Dec. 20, 2020).

299. *See, e.g.*, Sean Hayes, *Korea's Criminal Procedure Act: Pre-Trial Detention in Korea*, KOREAN L. BLOG (Feb. 26, 2015), https://www.thekoreanlawblog.com/2015/02/koreas-criminal-defense-lawyer-procedure-act-detention.html [https://perma.cc/395W-UUY7].

300. *Id.*

and pleas of guilty to ensure that defendants are making knowing and voluntary decisions.

While a full discussion of these and other reforms is outside the scope of this Article, this brief discussion of some reforms is intended to illustrate that there are paths forward to better and more accurate plea bargaining systems.[301] In moving forward, however, it is important to note that the research described herein demonstrates that simply adopting a plea bargaining system without adequate protections for defendants or merely relying on requirements that defendants provide testimony against others in hopes that such a hurdle will prevent false pleas is insufficient to address the innocence phenomenon.

From a comparative perspective, additional questions remain. Are there meaningful differences among the countries in terms of the risk that the innocent will plead guilty? At this point, it appears that the innocence problem transcends borders and ensnares approximately thirty to fifty percent of all innocent study participants.

The numbers are slightly lower in Japan and South Korea, which average around thirty percent compared to the forty to fifty percent in the United States. Some of that may be attributable to the different roles that academic dishonesty and academic dishonesty proceedings have historically played in the different countries. One could posit that there is somewhat less of a stigma in Japan and South Korea to academic dishonesty than in the United States, and the procedures for resolving such claims are less established. But that could also mean that in the actual criminal systems in Japan and South Korea the numbers of innocent falsely pleading guilty might be higher.

At the same time, differences in perceptions of academic dishonesty do not explain differences in the numbers of those "pleading guilty" to cheating and then providing false information regarding who instigated the wrongdoing. Again, the data is limited, but in the United States fifty-six percent of the innocent who pleaded guilty falsely implicated another student. In South Korea, in Study 1, that number was forty percent, declining to

301. The American Bar Association Criminal Justice Section Plea Bargaining Task Force is currently working on a report containing many additional recommendations regarding how best to reform the American plea bargaining system. The report is anticipated to be complete in 2021.

twelve percent in Study 2, when the subject was required to testify against another.

There are different societal, cultural, and institutional factors that may explain the difference. Unknown differences in the administration of the study may also explain the difference. Regardless, the rates are significant. The data are cause for concern about the accuracy of criminal proceedings that utilize plea bargaining to obtain convictions or secure information against others.

"It is a common saying in South Korea that a good man is one 'who can live without the law.'"[302] After this research, one might question whether good men or women can live without good laws. Plea bargaining, whether informal or formal, is a fact of life in South Korea, Japan, and especially the United States. We would do well to recognize that basic human nature will lead the innocent to confess and those accused to falsely implicate others. The time has come to recognize these failures in our criminal legal systems and begin the process of building a new and better plea bargaining structure.

302. Johngryn Mo, *The Elusive Goal of the Rule of Law in South Korea*, *in* THE RULE OF LAW IN KOREA XXVII (Jongryn Mo & David W. Brady eds., 2009).