

Prosecutors and Bargaining in Weak Cases: A Comparative View

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I. Introduction

One of the most controversial uses of prosecutorial discretion in plea bargaining concerns cases involving weak evidence of guilt. When a prosecutor bargains about the charges or even the facts in a case with weak evidence, at least three problems may arise. First, if the charge bargain is generous, it may coerce an innocent defendant to plead guilty. Second, such a bargain may let a guilty defendant off too easily, thus diserving the public and victim's interests. Third, if the parties bargain about the facts, the result may distort the truth of the case.

In this chapter, I examine how three major legal systems—those of the United States, Germany, and Japan—approach these potential problems. To do so, I discuss how prosecutors in these systems would resolve a hypothetical criminal case involving weak evidence. I have chosen to compare the United States, Germany, and Japan because of their distinct approaches to both plea bargaining and prosecutorial discretion. In the United States, prosecutors have largely unfettered discretion in both charging and plea bargaining. Germany allows a form of sentence bargaining that involves both the prosecutor and the judge, but sharply limits prosecutorial discretion with respect to charging and prohibits charge and fact bargaining. Japan does not allow any explicit bargaining, but gives prosecutors broad discretion to refrain from filing charges.

After describing the relevant differences in the prosecutors' role in these countries, I raise several questions about the proper approach for prosecutors in evidentially weak cases. While none of the systems I discuss has a perfect solution to the problem of factually weak cases, the comparison may encourage us to rethink three key features of American-style plea bargaining: our practice of aggressive charge bargaining, particularly in cases where the evidence is weak; the lack of limits on plea discounts; and the limited external and internal review of prosecutorial charge bargaining decisions.

II. United States

Consider the following hypothetical situation:

The defendant is charged with rape, but there is a question about the identity of the perpetrator. The only witness to the crime is the victim, and before identifying the defendant, she picked out a different suspect from a photographic array. Some physical evidence points to the defendant, but on the whole, the physical evidence is inconclusive. After investigating the case, the defense attorney believes his

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client is innocent and believes he has a good chance of securing an acquittal. The prosecutor, who thinks the defendant is guilty, but has doubts about the strength of the evidence, offers to permit a guilty plea to simple battery. A battery conviction would lead to a sentence no greater than 30 days of imprisonment, and there is a good possibility that the defendant will receive probation. When the defense attorney informs his client of this offer, he emphasizes that there is a good chance of acquittal at trial. The defendant's reply is simple: "I can't take the chance."¹

The case outlined above concerns one of the more controversial uses of plea bargaining in the United States—the prosecutor believes a defendant is likely guilty, but because the evidence is weak, the prosecutor offers a large sentence reduction in exchange for a guilty plea. This is not an uncommon occurrence. The strength of the evidence in the case is one of the most important factors in prosecutors' decision to bargain. Several features of the American criminal justice system allow prosecutors to bargain away weak cases.

First, in almost all jurisdictions, prosecutors are free to bargain about charges, and there is no requirement that the charge bargain fully and adequately reflects the facts of the case. A few jurisdictions have attempted to limit or prohibit charge bargains, but these attempts have not had lasting success.² Others, such as the federal system, have attempted to restrain fact bargaining, but these limits are also observed inconsistently.³

Furthermore, there are few restrictions on the concessions that a prosecutor can offer a defendant in exchange for a plea. In the rape case outlined earlier, in addition to reducing the charges, the prosecutor could offer to recommend to the court a very short suspended sentence and probation, as compared to a much longer prison sentence in the event of a conviction after trial. Because there are no limits on plea discounts and no requirement that the sentence be proportionate to the defendant's guilt, the prosecutor can make offers that are so attractive that even an innocent defendant might accept them. The severity of baseline sentences in the United States increases the possibility that plea discounts would be significant and therefore coercive.⁴

¹ This hypothetical is loosely based on a real case noted in Albert W. Alschuler, "The Prosecutor's Role in Plea Bargaining," *University of Chicago Law Review* 36 (1968): 61.

² Russell D. Covey, "Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings," *Tulane Law Review* 82 (2008): 1261-65; Teresa White Carns and John Kruse, "A Re-Evaluation of Alaska's Plea Bargaining Ban," *Alaska Law Review* 8 (1991): 27-69; Robert A. Weninger, "The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas," *UCLA Law Review* 35 (1987): 296; Ronald Wright and Marc Miller, "The Screening/Bargaining Tradeoff," *Stanford Law Review* 55 (2002): 61-66.

³ Covey, "Fixed Justice," 1261-65; Ronald Wright and Marc Miller, "The Screening/Bargaining Tradeoff," 61-66, 116.

⁴ One study estimates that sentences are on average three times more severe in the United States than in Germany. Richard S. Frase and Thomas Weigend, "German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?," *Boston College International and Comparative Law Review* 18 (1995): 347-48; James Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* (Oxford: Oxford University Press, 2005), 71. In Japan, too, average sentences for comparable offenders are significantly lower (and typically suspended) than in the United States. Daniel H. Foote, "The Benevolent Paternalism of Japanese Criminal Justice," *California Law Review* 80 (1992): 352-55; Motoo Noguchi, "Criminal Justice in Asia and Japan and the International Criminal Court," *International Criminal Law Review* 6 (2006): 596.

There is also no meaningful judicial oversight over the prosecution's decision to bargain about the charges and facts. Prosecutors are free to withdraw charges at any point in the proceeding. While judges can review the charges filed to ensure there is sufficient evidence to support them, they cannot add or modify counts or replace the charges with more serious ones to ensure that the charges fully reflect the facts of the case.⁵ Once the parties have agreed to a particular charge bargain, judges can either accept or reject the agreement but cannot modify it.⁶ Judges must ensure that the defendant's guilty plea is voluntary, knowing, and factually based, but the factual basis review is typically quite superficial in practice.⁷

In most American jurisdictions, prosecutors' bargaining and charging decisions are rarely subject to internal review. At the state level, supervisors tend to oversee such decisions only in more sensational or politically charged cases.⁸ Even in the federal system, where supervision is more regular, plea bargains are usually reviewed only in high-profile cases or when a defense attorney or a judge alerts the supervisor to a problem.⁹

The environment in which American prosecutors work and advance also encourages aggressive charge bargains in factually weak cases. Most prosecutors handle very heavy caseloads and feel pressure to dispose of their cases efficiently. In theory, American prosecutors might dispose of cases more quickly by being very selective during the charging process and rejecting cases that are not likely to meet the burden of proof at trial.¹⁰ But the incentives for most American prosecutors disfavor this solution. To advance in their career, prosecutors must show a high rate of convictions. Dismissing weak cases does not help them achieve this goal, and losing cases at trial squarely conflicts with it. In any case in which the evidence is not solid, negotiating a plea bargain with the defendant seems the optimal approach for prosecutors. It allows them to secure a conviction without the time, resources, and unpredictability of trial. Prosecutors will therefore often be willing to reduce charges significantly and even agree to a different version of the facts, as long as they can obtain an easy conviction in a complicated case.

⁵ In re United States, 345 F.3d 450 (7th Cir. 2003); United States v. Robertson, 45 F.3d 1423, 1437-38 (10th Cir. 1995); William T. Pizzi, "Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform," *Ohio State Law Journal* 54 (1993): 1353.

⁶ Jenia Iontcheva Turner, "Judicial Participation in Plea Negotiations: A Comparative View," *American Journal of Comparative Law* 54 (2006): 202 n.6.

⁷ Jenia Iontcheva Turner, *Plea Bargaining Across Borders* (New York: Aspen Publishers, 2009), 41-42. Even if American judges wanted to conduct a more searching factual basis inquiry, they lack some of the tools to do so. Unlike their German and Japanese counterparts, for example, they do not have at their disposal the investigative file containing all the evidence gathered by the state. Courts therefore have to rely primarily on their own questioning of the defendant as to the facts underlying the guilty plea.

⁸ David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (Oxford: Oxford University Press, 2002), 153.

⁹ Mary Patrice Brown and Stevan E. Bunnell, "Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia," *American Criminal Law Review* 43 (2006): 1082-83.

¹⁰ New Orleans District Attorney Harry Connick implemented this type of screening policy without suffering electorally for it—but as Marc Miller and Ron Wright have pointed out, prosecutors must proactively make the case for hard screening policies because the public may not automatically favor such an approach. Miller and Wright, "The Screening/Bargaining Tradeoff," 60-66, 115-16.

These features of the American system raise the concern that innocent defendants might feel coerced to plead guilty when offered charge bargains that are much more favorable than the possible outcome at trial.¹¹ In a recent study of exonerations, Samuel Gross and his team of researchers found that about six percent of exonerated defendants they studied had pleaded guilty.¹² Fifteen innocent murder defendants and four innocent rape defendants pleaded guilty in exchange for long prison sentences in order to avoid the risk of life imprisonment or the death penalty. While Gross and his colleagues focused only on cases involving death or a long prison term, the numbers are likely to be even higher in less serious cases.¹³

Conversely, another problem with such charge bargains is that if the defendant is in fact guilty of the original charge, the bargain may seriously misrepresent the facts and the gravity of the offense. An example of this problem was revealed during a recent investigation by the *Dallas Morning News* of a series of decisions by Dallas prosecutors to recommend probation in homicide cases.¹⁴ In a number of these cases, the prosecutors believed the suspect was guilty but were concerned that weaknesses in the case might have led to acquittal at trial. Instead of risking an acquittal, they offered deferred adjudication and probation to defendants who agreed to plead guilty. To obtain a conviction, prosecutors were willing to dispose of the cases in an extraordinarily lenient fashion.

III. Germany

Could the hypothetical charge bargain discussed earlier take place in Germany? For several reasons I believe it is very unlikely to occur. While sentence bargaining has become commonplace in Germany—and as of last year was officially authorized by the German legislature¹⁵—charge and fact bargaining are still formally prohibited. Decisions by the Federal Supreme Court, as well as the recent legislation on plea bargaining, specifically forbid “bargains about the verdict,” which include charge and fact bargains.¹⁶ This prohibition applies with full force to serious cases.¹⁷

¹¹ See, for example, Reese Dunklin and Brooks Egerton, “Unequal Justice: Prosecutors’ Ploy in Shaky Cases,” *Dallas Morning News*, November 14, 2007, 1A; Brooks Egerton and Reese Dunklin, “This Case Cannot Be Proven: Though They Knew Guilt Was Far from Certain, Prosecutors Played To Win,” *Dallas Morning News*, November 14, 2007, 13A.

¹² Samuel Gross et al., *Exonerations in the United States, 1989 Through 2003* (2004), 12, http://www.soros.org/initiatives/usprograms/focus/justice/articles_publications/publications/exonerations_20040419/exon_report.pdf.

¹³ See John D. King, “Procedural Justice, Collateral Consequences, and the Adjudication of Misdemeanors,” in the present volume.

¹⁴ Reese Dunklin and Brooks Egerton, “In Some Cases, It’s High Crime, No Time,” *Dallas Morning News*, November 12, 2007, 1A.

¹⁵ Beschlussempfehlung und Bericht des Rechtausschusses, [Decision and Recommendation Report of the Legal Committee], May 20, 2009.

¹⁶ *Ibid.*; Bundesgerichtshof [BGH] [Federal Court of Justice], March 3, 2005, BGH GSSt 1/04.

¹⁷ Prosecutors have various tools to summarily dispose of a large percentage of less serious cases before trial. Beatrix Elsner and Julia Peters, “The Prosecution Service Function Within the German Criminal Justice System,” in *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power Across Europe*, eds. Jörg-Martin Wehle and Marianne Wade (Berlin: Springer 2006), 207, 219-23; Marianne Wade, “The Januses of Justice:

Some limited charge bargaining occurs in less serious cases where prosecutors have greater discretion to refrain from filing charges. In such cases, where the defendant's guilt is "minor," prosecutors may refrain from pressing charges if the defendant agrees to fulfill one of several conditions, such as compensating the victim or paying money to the treasury or a charity.¹⁸ Prosecutors may also decline to file charges with respect to insignificant offenses, when the same defendant has committed more serious offenses as well, and the less serious charges would not have a material effect on the sentence the defendant receives.¹⁹ On the same grounds, with the agreement of the parties, the court may dismiss filed charges that it considers insignificant and immaterial to the sentence.²⁰ These provisions occasionally lead to "understandings" between the parties (often including the court as well), about the declination or withdrawal of charges in exchange for concessions by the defendant. Fact bargaining may also occur informally in some less serious cases, but this appears to be rare.²¹ In interviews I conducted, German prosecutors and defense attorneys have asserted that fact bargaining does not occur and expressed general disapproval of the practice.²²

There are several reasons for the rare use of charge and fact bargaining. To begin with, there is a longstanding tradition of limiting prosecutors' ability to refrain from filing charges. Under the "legality principle" (also known as the principle of mandatory prosecution), at least in more serious cases, prosecutors must file the charges that the evidence supports. This principle dates back to the Code of Criminal Procedure of 1877 and is used to enforce the law equally and protect against prosecutorial bias.²³ Both in their training and supervision, prosecutors are taught the importance of the mandatory prosecution principle. Complaints by victims also provide an effective enforcement mechanism. When a prosecutor dismisses charges for lack of evidence, victims can file a departmental complaint to demand that charges be instituted. If the departmental complaint fails, victims can bring an action in court to demand prosecution.²⁴ While this occurs rarely in practice, prosecutors have to take it into account in their charging decisions.²⁵ At least in more serious cases, then, German prosecutors are relatively more likely to file the correct charges, even when they have some doubts about the strength of the evidence.

How Prosecutors Define the Kind of Justice Done Across Europe," *European Journal of Crime, Criminal Law and Criminal Justice* 16 (2008): 438-40, 445-46.

¹⁸ Strafprozessordnung [StPO] [Code of Criminal Procedure], §§ 153(1), 153a(1).

¹⁹ StPO § 154(1).

²⁰ StPO §§ 154a(1)-(2).

²¹ A sort of fact bargaining may occur when the parties agree to resolve a case under Section 153(a)(1), even though the defendant's culpability is not minor. Bernd Schünemann, "Absprachen im Strafverfahren? Grundlagen, Gegenständen und Grenzen," B19 (1990) [*Agreements in Criminal Proceedings? Fundamentals, Purpose, and Limits*]; Raimund Hassemer and Gabriele Hippler, "Informelle Absprachen in der Praxis des deutschen Strafverfahrens," [*Informal Agreements in German Criminal Practice*] *StV* 8 (1986): 360, 363.

²² Turner, "Judicial Participation," 239.

²³ Joachim Herrmann, "The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany," *University of Chicago Law Review* 41 (1974): 469.

²⁴ StPO §§ 172-175.

²⁵ Thomas Weigend, "Germany," in *Criminal Procedure: A Worldwide Study*, ed. Craig M. Bradley (North Carolina: Carolina Academic Press, 2007), 243, 262.

Moreover, German prosecutors see themselves as semi-judicial figures, not as advocates in a narrow sense, and a high conviction rate is not central to their success and advancement. Unlike American district attorneys, chief prosecutors in Germany are civil servants and do not have to worry about electoral defeat when they have a relatively modest conviction rate. As a result, they are not as likely to put pressure on their subordinates to increase conviction rates. German line prosecutors are evaluated in part based on their efficiency in resolving cases, but they can achieve such efficiency through dismissals or diversion of less serious cases.²⁶ Moreover, other factors, such as “intra-office relations; legal analysis and drafting; and the avoidance of judicial rebuke and citizen complaint,” are just as important to their career advancement.²⁷ Failure to obtain a high number of convictions is not seen as a blemish on a prosecutor’s record. To the contrary, if a prosecutor is perceived as cutting corners to obtain convictions, this is likely to undermine her standing among her peers. For these reasons, German prosecutors are not driven to strike bargains in weak cases. If they believe a suspect is guilty of a serious crime but have some doubts about the strength of the evidence, prosecutors are likely to file charges and pursue the case to trial rather than attempting to bargain it away.²⁸

Another reason why charge bargaining occurs rarely is that German prosecutors operate in a system that is devoted above all to uncovering the substantive truth of the case.²⁹ In this system, courts have broad powers to oversee prosecutorial decisions to ensure that the facts of the case are fully investigated. The court’s duty to create a complete and accurate record of events is a longstanding principle enshrined in the Criminal Procedure Code and is repeatedly emphasized in judicial decisions and legal scholarship.³⁰

As a result of the commitment to investigating the precise truth of a case, German courts have a duty to intervene and correct attempts by the parties to dispense with certain facts. The Federal Supreme Court has held that a court must not accept a mere formal confession as support for a guilty verdict. Instead, a “confession... must at least be so concrete that the court can determine whether the confession reflects the facts presented in the case file to such an extent that a further examination of the matter is not necessary.”³¹ So even after a plea bargain has been arranged, the proceedings must continue to ensure that the defendant’s confession is supported by other evidence.

²⁶ See Shawn Boyne, “Is the Journey from the In-Box to the Out-Box a Straight Line? The Drive for Efficiency and the Prosecution of Low-Level Criminality in Germany,” in present volume.

²⁷ John H. Langbein, “Land Without Plea Bargaining: How the Germans Do It,” *Michigan Law Review* 78 (1979): 217 (citing Thomas Weigend, *Anklagepflicht und Ermessen: Die Stellung des Staatsanwalts zwischen Legalitäts und Opportunitätsprinzip nach deutschem und amerikanischem Recht* (1978), 98-102). [*Charging Duty and Discretion: The Position of the Prosecutor between the Legality and Expediency Principles under German and American Law*].

²⁸ Weigend, “Germany,” 262.

²⁹ Thomas Weigend, “Is the Criminal Process About Truth? A German Perspective,” *Harvard Journal of Law and Public Policy* 26 (2003): 168.

³⁰ StPO § 244(2); BVerfG, Kammerbeschuß vom 27. Januar 1987, NJW 1987, 2662, NStZ 1987, 419; BGHSt 43, 195, *Decision of August 28, 1997*, translated in Stephen Thaman, *Comparative Criminal Procedure: A Casebook Approach* (Durham: Carolina Academic Press, 2002), 145-150; BGH, *Decision of March 3, 2005*, BGH GSSt 1/04.

³¹ BGH, *Decision of March 3, 2005*, BGH GSSt 1/04.

German judges have important tools at their disposal to examine the reliability of such confessions. They have access to the entire investigative file, in which the prosecution and police are supposed to include both inculpatory and exculpatory evidence. Due to the principle of “orality,” which is somewhat analogous to the American hearsay rule, judges cannot formally rely on the file to support their judgment. But the file does inform judges’ understanding of the case when they decide whether to accept a confession and the related agreement. Moreover, the requirement that prosecutors include exculpatory evidence in the file ensures that both judges and defense counsel have access to such information before negotiations.³² And because a bargain does not entirely dispense with the trial, judges may still conduct further investigation by questioning witnesses, calling experts, and requesting additional evidence.³³

In interviews, German judges insist that they take seriously their duty to review the evidence supporting negotiated confessions. They carefully review the file compiled by the prosecution and ask clarifying questions to confirm the facts in the record. Judges end evidence-gathering early only when, in addition to the confession, the written record before them clearly establishes the defendant’s guilt. When the file reveals ambiguities in the evidence, judges follow up with additional questions; when that is not enough, they gather further evidence.³⁴ Of course, some judges may be making self-serving statements, and a few concede that courts will at times accept “quick confessions” without a thorough review of the evidence.³⁵ While a more thorough empirical study of this question is necessary, it is notable that judges at least profess to be scrupulous in reviewing the factual basis of bargained-for confessions.

German judges also have relatively broad powers to alter charges, thus limiting prosecutors’ ability to engage in aggressive charge bargaining. When the charges do not adequately reflect the underlying events, German judges can (after giving notice) convict the defendant on different charges, including more serious ones.³⁶ Indeed, once the indictment is filed, prosecutors have limited say over the ultimate counts on which the defendant will be convicted. At that point, only the court may reduce the charges, albeit with the consent of the prosecution and under certain conditions.³⁷ The court also has the exclusive power to dismiss a case,³⁸ as the prosecution cannot withdraw the charges after it has filed the indictment and the main court proceedings have begun.³⁹

Finally, German courts adhere to a notion of proportionality in sentencing, which further reduces the possibility that prosecutors may enter into bargains that fail to reflect the blameworthiness of the defendant. Under the proportionality principle, appellate courts may

³² StPO § 160(2). In fact, the provision goes further and requires prosecutors to actively seek exculpatory evidence, but this is rarely observed in practice. Heribert Ostendorf, “Strafvereitelung durch Strafverteidigung,” [Obstruction of Justice by Criminal Defense] *Neue Juristische Wochenschrift* 28 (1978): 1348.

³³ StPO §§ 155; 238; 244(2).

³⁴ Turner, “Judicial Participation,” 227-28.

³⁵ *Ibid.*, 226-27.

³⁶ StPO § 265(1).

³⁷ StPO § 154(a).

³⁸ StPO § 174.

³⁹ StPO § 156.

intervene to reverse a sentence that is unduly severe or unduly lenient, even when the sentence is the result of a bargain. The Federal Supreme Court has emphasized that sentences must be neither too lenient as a result of a plea bargain, nor too severe when negotiations have failed.⁴⁰ In practice, bargained-for confessions tend to be rewarded with no more than a thirty-percent reduction in sentences, and the baseline sentences are already substantially lower than those in the United States.⁴¹ Compared with their American counterparts, therefore, German prosecutors have less leverage to induce a defendant to confess. They can rarely bargain about the charges, and they cannot credibly promise that the court will accept a recommendation for a significant sentence reduction as part of a bargain.

For all these reasons, if a German prosecutor is faced with a case like the hypothetical rape case described earlier, she is not likely to bargain away the charges. The prosecutor may decline to file the charges because of the evidentiary difficulties. But the principle of mandatory prosecution is likely to pull the prosecutor toward preferring charges in serious cases, particularly since victims can demand judicial review of a decision not to prosecute in such cases. If the prosecutor does proceed with the charges, the court may dismiss them for lack of sufficient evidence.⁴² Finally, the case may go to trial. If that happens, there is a chance that the defendant may be convicted of the more serious offense despite the evidentiary weaknesses. But if either of the last two possibilities occurs, the outcome of the case will be based on the facts as determined by the finder of fact after a transparent public process—not on the unreviewable judgment by individual prosecutors as to the strength of the case and the culpability of the defendant.

IV. Japan

A prosecutor in Japan handling the same hypothetical rape case would most likely decline to file charges because of the case's evidentiary weaknesses. He certainly would not resolve the case by a plea bargain, at least not as openly practiced in United States. Japanese law does not allow plea bargaining of any kind—there is no provision for bargaining in the criminal procedure code, and the courts have held that confessions obtained through explicit promises of leniency are involuntary and unconstitutional.⁴³ Most Japanese scholars and practitioners also assert that bargaining does not happen in practice.⁴⁴

However, while explicit plea bargaining is not permitted, something similar may happen by way of implicit understandings. For example, it is common for a Japanese defendant to

⁴⁰ BGH GSSt 1/04, NJW 1440/05, Beschluss v. 3.3.2005; BGH 4 StR 240/97, Urteil v. 28.8.1997; BGH 1 StR 171/02, Beschluss v. 11.09.2002; BGH 4 StR 371/03, Urteil v. 19.2.2004.

⁴¹ Turner, "Judicial Participation," 235; Frase and Weigend, "German Criminal Justice," 347-48; Whitman, *Harsh Justice*, 71.

⁴² This rarely occurs, however. Frase and Weigend, "German Criminal Justice," 340.

⁴³ Daniel H. Foote, "Prosecutorial Discretion in Japan: A Response," *UCLA Pacific Basin Law Journal* 5 (1986): 101.

⁴⁴ Fumio Aoyagi, *Nihonjin no Hanzai Ishiki* (1986), 201, cited in David T. Johnson, "Plea Bargaining in Japan," in *The Japanese Adversary System in Context*, eds. Malcom M. Feeley and Setsuo Miyazawa (New York: Palgrave Macmillan, 2002), 140; David H. Bayley, *Forces of Order: Policing Modern Japan* (Los Angeles: University of California Press, 1991), 147; Foote, "Prosecutorial Discretion in Japan," 97.

confess to a crime in order to receive a sentencing discount, earlier release on bail, or suspended prosecution.⁴⁵ Courts and prosecutors tacitly accept these exchanges and even encourage them at times. Japanese prosecutors are likely to recommend a lower sentence for a cooperative and remorseful defendant and a harsher sentence for a non-cooperative one.⁴⁶ Judges regularly follow prosecutorial recommendations and reward confessions and remorse with sentence reductions and other benefits.⁴⁷

But several features of these exchanges make them quite different from plea bargaining in the United States—and especially from the kinds of charge and fact bargaining that occurred in the rape case outlined earlier. To begin with, any exchange of concessions is implicit, not explicit. Although prosecutors and courts rarely state this openly, defendants understand that if they confess and show remorse, they are likely to receive a lower sentence.⁴⁸ Another difference is that the average sentences in Japan for comparable offenders are significantly lower than sentences in the United States,⁴⁹ with any exchange of confessions between Japanese prosecutors and defendants further reducing the potential punishment.

Moreover, the driving force behind the exchange of these concessions has been to encourage the rehabilitation and reintegration of defendants. Prosecutors and courts do not offer leniency to defendants who merely formally acknowledge guilt. A remorseful attitude is a precondition to a lower sentence because a remorseful defendant is seen as more likely to be rehabilitated.⁵⁰ There is reason to believe that, as the prosecutorial caseload grows and cases become more complex, the need to expedite cases will become more relevant to the exchanges between the prosecutor and the defense.⁵¹ But for the moment, rehabilitation and reintegration are the key values that undergird prosecutorial decisions to offer leniency in exchange for a confession.

In addition, the Japanese criminal justice system, like that of Germany, emphasizes the search for substantive truth. Japanese prosecutors and courts strive for what commentators call “precise justice.”⁵² Judges write detailed reasoned judgments, laying out all the relevant circumstances of the case. Even in simple cases in which the defendant confesses, judicial

⁴⁵ Johnson, “Plea Bargaining in Japan,” 141; J. Mark Ramseyer and Eric Rasmusen, *Measuring Judicial Independence: The Political Economy of Judging in Japan* (Chicago: University of Chicago Press, 2003), 98-99; Foote, “Prosecutorial Discretion in Japan,” 98-99.

⁴⁶ Masahito Inouye, “Witness Immunity and Bargain Justice: A Look at the Japanese Concept of the Adversary System,” in *The Japanese Adversary System in Context*, 173, 185-186 n.19; Johnson, “Plea Bargaining in Japan,” 146; “Comments by Shu Sugita, Tokyo District Office Prosecutor,” in *Crime and Criminal Justice in Canada and Japan: Understanding Our Differences—A Report from the First Joint Canada-Japan Symposium*, eds. Neil Boyd and Monique Layton (Burnaby, B.C.: Simon Fraser University School of Criminology, 1991), 57.

⁴⁷ Turner, *Plea Bargaining Across Borders*, 190.

⁴⁸ Johnson, “Plea Bargaining in Japan,” 141; Joseph Sanders, “Courts and Law in Japan,” in *Courts, Law and Politics in Comparative Perspective*, eds. Herbert Jacob et al. (New Haven: Yale, 1996), 344.

⁴⁹ Foote, “Benevolent Paternalism,” 352-55; Noguchi, “Criminal Justice in Asia and Japan,” 596.

⁵⁰ Carl F. Goodman, *The Rule of Law in Japan: A Comparative Analysis*, 2nd ed. (The Netherlands: Kluwer, 2008), 418-19, 422, 425; Foote, “Benevolent Paternalism,” 353.

⁵¹ Turner, *Plea Bargaining Across Borders*, 174-78.

⁵² Johnson, *The Japanese Way of Justice*, 46, 264-72; Noguchi, “Criminal Justice in Asia and Japan,” 592.

opinions may take as many as eight to ten pages to explain the decision.⁵³ In contested cases, judges “routinely write book-length manuscripts.”⁵⁴ Because the requirement for precision is so strict, prosecutors in Japan know that they need to submit extensive evidence to meet their burden of proof. Prosecutors are very selective about the charges they file, therefore, and they simply will not pursue a case that lacks sufficient evidence.⁵⁵

Like their American counterparts, Japanese prosecutors have broad discretion in their charging decisions. Even if they believe the evidence probably warrants the filing of charges, they are not bound by a principle of mandatory prosecution and may choose to drop charges altogether or at least suspend prosecution.⁵⁶ Suspension may occur even in cases where the evidence is strong, if the defendant confesses, repents, makes amends to the victim, and has no prior record.⁵⁷

But unlike in the United States, discretion is limited by significant controls within the prosecutor’s office. As in Germany, charging decisions in Japan are subject to extensive internal review, which helps ensure consistency and fairness across cases. Even in minor cases, a decision not to file charges or suspend prosecution requires a consultation with two or three supervisors.⁵⁸ Prosecutors must provide reasons for deciding not to prosecute, and anyone dissatisfied with the decision can appeal it to the chief of a superior prosecutor’s office.⁵⁹

The strict supervision of prosecutors’ decisions to suspend or decline charges may seem to deter such actions. But in fact, the environment in which Japanese prosecutors are evaluated tends to promote declinations or suspensions of weak cases. Like their German counterparts, Japanese prosecutors are career civil servants who are not under pressure to stack up convictions. But there is another factor that favors dismissal of questionable cases. Japanese media and public opinion are more likely to focus on acquittals of those who were wrongfully charged than on failure to charge seemingly guilty suspects.⁶⁰ If a prosecutor is seen as responsible for “mistaken indictments” and “negligent acquittals,” his career is likely to suffer.⁶¹ Japanese prosecutors are therefore much more likely to take “the risk that an uncharged offender will re-offend over the risk that a charged suspect will be acquitted.”⁶²

⁵³ Johnson, *The Japanese Way of Justice*, 46.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, 219-220, 230-32; Ryuichi Hirano, “Diagnosis of the Current Code of Criminal Procedure,” *Law in Japan* 22 (1989): 130; “Comments by Osamu Takada, Lawyer, Kusaka Law Office,” in *Crime and Criminal Justice in Canada and Japan*, 52; Shu Sugita, *Crime and Criminal Justice in Canada and Japan*, 54; J. Mark Ramseyer and Eric B. Rasmusen, “Why is the Japanese Conviction Rate so High?,” *Journal of Legal Studies* 30 (2001): 61-62.

⁵⁶ Japan. Crim. Proc. Code § 248.

⁵⁷ Turner, *Plea Bargaining Across Borders*, 185.

⁵⁸ Johnson, *The Japanese Way of Justice*, 225-26.

⁵⁹ Masahito Inouye, “Prosecutorial Discretion and Its Control in Japan,” *University of Tokyo Journal of Law and Politics* 4 (2007): 80.

⁶⁰ The media and the public see acquittals as a “disgrace” for a prosecutor’s office. Johnson, *The Japanese Way of Justice*, 238.

⁶¹ *Ibid.*, 228.

⁶² *Ibid.*, 239.

In theory, judicial review also works to constrain prosecutorial decisions to charge in Japan. Once the formal accusation has been filed, Japanese judges can review a prosecutor's decision to drop charges. When a prosecutor requests that charges be withdrawn or altered after the accusation has been filed, the judge will review the request to ensure that the proposed amendment to the charges does not "modify the identity of charged facts."⁶³ The judge may also "order the public prosecutor to add or alter a count . . . when the court finds it appropriate during the course of the proceedings."⁶⁴ In practice, judges rarely object to prosecutorial charging decisions.⁶⁵ Still, the very possibility of judicial review may be sufficient to ensure that prosecutors do not make concessions they would not be able to support before a court.

If a Japanese prosecutor decides not to file charges at all, a court does not have the authority to review that decision.⁶⁶ But a victim can file a complaint with a grand-jury type institution called the Prosecutorial Review Commission (PRC), which can review the decision not to charge and request that charges be brought. For much of their existence, PRCs were largely ineffective because they were only able to issue nonbinding recommendations. As a result of a 2004 amendment to the criminal procedure code, PRCs can now issue binding instructions.⁶⁷ This provision became operative in 2009, and it will be interesting to see how it affects prosecutorial charging decisions.

All of this makes it highly unlikely that the kind of fact bargaining that occurred in the hypothetical rape case would take place in Japan. Odds are that if the evidence in the case is not compelling after interrogation, the prosecutor will not file charges.⁶⁸ One result of this conservative approach to charging is that the rate of acquittal at trial is astoundingly small—less than one percent.⁶⁹ Prosecutors' charging decisions therefore effectively determine the outcome of the case.

Another possibility in the hypothetical rape case is that the prosecutor may suspend prosecution. The rates of suspended prosecutions have been rising over the last two decades,⁷⁰ which raises an interesting question as to whether such suspensions are increasingly used to dispose of cases with evidentiary difficulties. A suspended prosecution usually requires the confession and cooperation of the suspect. Although it is not a formal conviction and is not subject to judicial review, a suspended prosecution remains on a person's record with the

⁶³ Japan. Crim. Proc. Code §312(1).

⁶⁴ *Ibid.*, §312(2).

⁶⁵ Johnson, *The Japanese Way of Justice*, 61, 63.

⁶⁶ The only exception to this rule is in abuse of authority cases. Japan. Crim. Proc. Code §§461-470; Inouye, *Witness Immunity and Bargain Justice*, 82-83.

⁶⁷ *Ibid.*, 81-82.

⁶⁸ Of course, this raises a separate issue that many believe is a problem in Japan—lengthy interrogations in detention that may produce coerced confessions.

⁶⁹ Ramseyer and Rasmusen, "Why is the Japanese Conviction Rate so High?," 55; Japanese Ministry of Justice, *White Paper on Crime* (Japan: Research and Training Institute, 2006), tbl. 2.3.1.1, http://hakusyo1.moj.go.jp/en/55/nfm/n_55_2_2_3_1_1.html.

⁷⁰ Japanese Ministry of Justice, *White Paper on Crime*, tbl. 2.2.3.2; Noguchi, "Criminal Justice in Asia and Japan," 593.

prosecutor and carries a certain social stigma.⁷¹ In some respects, therefore, a suspended prosecution seems similar to an American charge bargain leading to a suspended sentence. But unlike in the United States, a defendant in Japan must also show remorse and compensate the victim in order to obtain suspended prosecution, even in cases in which the evidence of guilt is weak.

V. Conclusion

When a prosecutor has a relatively weak case, but nonetheless believes a suspect is guilty, she has to make a difficult choice—dismiss the case or proceed to trial despite the weakness of the evidence. In the United States, prosecutors often avoid making this unpleasant choice by striking a deal with the defense. But the use of bargaining raises thorny questions of its own: Does it impose too great a pressure on innocent defendants to admit guilt in order to receive a more lenient disposition? Does it allow guilty defendants to get off with an unduly mild sentence? Should prosecutors be given the discretion to dispose of problematic cases in this manner? What safeguards should be implemented to avoid the dangers that accompany such discretion? The review of the American, Japanese, and German systems illustrates the advantages and disadvantages of three different approaches to this quandary.

The approach of Japanese prosecutors is to be very selective about the cases they bring forward. Unless a conviction is highly likely at trial, Japanese prosecutors refrain from filing charges.⁷² But this conservative approach to charging may ignore the interests of victims in some of these cases, particularly when prosecutors underestimate the possibility of winning at trial. Arguably, it also disserves the public interest in deterrence by decreasing the incidence of conviction and punishment. For these reasons, this approach is unlikely to be popular in the United States, where chief prosecutors are often elected and would find it politically unfeasible to decline to press charges in more than a very small number of cases. Moreover, when prosecutors effectively make the judgment about guilt or innocence in all cases where this is a real question, the public trial itself becomes a largely meaningless ceremony, where judges merely “confirm that the defendant is guilty.”⁷³

The other possible response to evidentially weak cases is to test more of them at trial instead of dismissing them or bargaining them away. This is the approach that German prosecutors tend to take, at least in the case of more serious crimes. Yet it is not clear whether the benefit of having more cases brought to a public trial before a judge or jury outweighs the risk of a wrongful conviction on more serious charges.

Along these lines, it would be interesting to engage in the following thought experiment: Assume that no one but the defendant could know whether the defendant is guilty or innocent, but the evidence would indicate there is an 80-90% chance that the defendant is guilty. Would it ever be acceptable in such a case to have a system that allows the defendant to be convicted of a lesser offense?

⁷¹ Marcia E. Goodman, “The Exercise and Control of Prosecutorial Discretion in Japan,” *UCLA Pacific Basin Law Journal* 5 (1986): 45-46.

⁷² Johnson, *The Japanese Criminal Justice System*, 231; Noguchi, “Criminal Justice in Asia and Japan,” 594.

⁷³ Hirano, “Diagnosis of the Current Code,” 129.

In the abstract, a plea bargain that accurately prorates the charges and sentence to reflect the evidentiary weakness of the case might be defensible, so long as it is entered into voluntarily and with full knowledge by the defendant. But as actually attempted in the American system, this approach has serious shortcomings. Long sentences and unregulated plea discounts impose undue pressures on defendants to plead guilty, even if defendants are innocent of some or all of the charges. In turn, the pressure on prosecutors to maintain a high rate of convictions encourages them to bargain aggressively about the charges in order to obtain easy victories in close cases. Limited internal and external review of prosecutors means that aggressive charge bargains are rarely corrected. Various other factors—such as broad and overlapping criminal statutes, inadequate prosecutorial disclosure requirements, and underfunded defense representation—also reduce the likelihood that charge bargains would be fully informed, voluntary, and factually based.⁷⁴

It is debatable which factors are most to blame, but it seems clear that our current practice offers a worse alternative than either outright dismissals or the trial of weak cases. In this light, it would be instructive for American reformers to closely study the approaches of other systems, like those of Germany and Japan. The comparison suggests the use of caution in allowing prosecutors to dispose of evidentially weak cases through charge bargains. Neither Germany nor Japan has a perfect solution to such cases. Japanese prosecutors may dismiss or suspend too many cases that should proceed to trial, and German prosecutors may bring to trial too many (serious) cases that should be dismissed. But both systems seem to do a better job of avoiding plea bargains that are not based on the facts and impose unacceptable risks of coercing innocent defendants to plead guilty. In these respects, they may serve as useful models for American reformers interested in curbing the dangers associated with plea bargaining in cases where the evidence is weak.

⁷⁴ William J. Stuntz, “The Pathological Politics of Criminal Law,” *Michigan Law Review* 100 (2002): 512-520; Turner, “Judicial Participation,” 210-11.