Paternalism Versus Pugnacity: The Right to Counsel in Japan and the United States

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INTRODUCTION

Anthropologist Clifford Geertz posits a truism that for "a state to do more than administer privilege and defend itself against its own population, its acts must seem continuous with the selves of those whose state it pretends it is, its citizens—to be, in some stepped-up, amplified sense, *their* acts."[1] Professor Geertz's observation serves as a reminder to all who study law, or any institution in society, that institutions and rules in society must reflect the values and beliefs of citizens within that society if they are to maintain continued support and validity.

The United States and Japan have developed, and operate, their institutions, organizations, and laws against a backdrop of extremely different historical, social, political, and economic forces. With this understanding in mind, there is no reason to expect both countries[2] to view their citizens in the same manner or accord them similar rights. That being said, through one shared historical experience, World War II, both countries do measure their laws and legal systems against substantially similar constitutions. The different forces, however, lead to very different interpretations of similar textual provisions. This Note focuses on the right to assistance of counsel in the United States and Japan. Given the ideological and philosophical underpinnings to such a right, this Note examines the role and meaning of the right to counsel and what the timing and quality of that right teaches us about each system.

Part I of this Note summarizes the right-to-counsel doctrine in U.S. criminal procedure jurisprudence, mapping out the historical progression of the right, its Fifth and Sixth Amendment foundations, the stated and implicit reasons which support the right, and the contours of the right in practice. In a similar vein, Part II summarizes the right-to-counsel doctrine in Japan; specifically, the point at which the right to counsel attaches and the comparatively stringent limits placed on that right. Part III examines the reasons the right to counsel in the United States and Japan differs so much and discusses the broader objectives of each system and the respective roles the right to counsel plays in each. Finally, Part

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1. CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 317 (1973) (emphasis in original). Although this statement has been quoted in discussions of Japan's non-litigious ethos and "consensual myth," J. Mark Ramseyer, *The Cost of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, 94 YALE L.J. 604, 641 (1985), the statement holds true with equal force in the criminal law context of both the United States and Japan.

2. The author uses terms like "society" and "country" as an amalgam which represents broad majorities of people who support the laws and institutions of governance.

IV concludes with a discussion of lessons each country might learn, with respect to both general objectives and specific processes, by analyzing the other's approach.

This Note does not suggest that the U.S. system should be more like Japan's or that Japan's system should be more like the one in the United States. Through comparison, however, each system can better evaluate the underlying goals of their own criminal process. Beyond the obvious goal of reducing crime, what other goals does criminal process serve? This discussion proceeds along an analytical framework which examines whether criminal process—and specifically, the right to counsel—vindicates substantive criminal law goals and performs a legitimation function by helping resolve state-citizen disputes in a manner that commands the community's respect. The right-to-counsel analysis highlights the debate within each system about the proper role of suspects' and defendants' rights and whether those rights serve the interests of those individuals and society.

I. THE RIGHT TO COUNSEL IN THE UNITED STATES

In order to grasp the significance of the right to counsel in our system of criminal justice, one must first understand the contours of that right, both past and present. As an initial matter, the right to counsel in the American criminal process is grounded on both the Fifth and Sixth Amendments to the United States Constitution.[3] As those Amendments protect different interests, the context, timing, and activation of the right to counsel differs depending on which Amendment is implicated. The following discussion examines, first, the Fifth Amendment right to counsel, predicated on *Miranda v. Arizona*[4] and its progeny, followed by an examination of the Sixth Amendment right to counsel based on *Massiah v. United States*[5] and its progeny.

A. The Fifth Amendment Right to Counsel

The Fifth Amendment to the U.S. Constitution states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[6] In 1966, the Supreme Court held in *Miranda* that the constitutional guarantee against self-incrimination required limits on police custodial interrogations to prevent coercion by physical force or more subtle psychological means.[7] To ensure that police observed these limits, the Court established a bright-line rule, noting that "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way,"[8] the police must apprise him of his rights:

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3. *See* U.S. CONST. amend. V, VI.
4. 384 U.S. 436 (1966).
5. 377 U.S. 201 (1964).
6. U.S. CONST. amend. V.
7. *Miranda*, 384 U.S. at 447-48.
8. *Id.* at 444.

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning .... The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney ....[9]

Although the right of the accused to the presence of an attorney appears nowhere in the text of the Fifth Amendment, the Court has determined that this right implicitly stems from the right against self-incrimination.[10]

As the *Miranda* Court explained, the process of custodial interrogation contains inherent pressures that work to compel an accused to speak when he would rather remain silent. This premise led the Court to hold that "[i]n order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination,"[11] certain procedural safeguards were necessary, including informing the accused that he has the right to have counsel present during custodial interrogation.[12] After the authorities read the warnings, and the suspect indicates that he wishes to have counsel present, the police must cease all interrogation unless the suspect voluntarily, knowingly, and intelligently waives the right to counsel.[13]

As with any ground-breaking decision that purportedly creates a bright-line rule, subsequent clarification of *Miranda* became necessary. For example, the Court in *Rhode Island v. Innis*[14] defined interrogation as questioning that is direct or that is "reasonably likely to elicit an incriminating response from the suspect."[15] Such a definition does not comport with the images of bare-fisted interrogation or psychological trickery designed to overbear the will of a suspect—which some of the language in *Miranda* brought to mind. Nonetheless, this definition reflects a concern for surreptitious or covert interrogation likely to cause a suspect to incriminate himself.

Another point of clarification revolved around the issue of waiver; specifically, at which point police may continue questioning a suspect after he has invoked his Fifth Amendment right to counsel pursuant to *Miranda*. The Court resolved this

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9. *Id.* at 444-45.

10. David E. Sipprell, *Criminal Law—the Right to Counsel—Davis v. U.S., 114 S. Ct. 2350*, 73 N.C. L. REV. 2013, 2013 (1995).

11. *Miranda*, 384 U.S. at 467.

12. *Id.* at 469.

13. *Id.* at 474-75. Furthermore, once a suspect invokes his right to counsel under the Fifth Amendment, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id.* at 475 (citing Escobedo v. Illinois, 378 U.S. 478, 490 n.14 (1964)).

14. 446 U.S. 291 (1980).

15. *Id.* at 301.

issue in *Edwards v. Arizona.*[16] In this case, police arrested Edwards for robbery, burglary, and first-degree murder.[17] Police read Edwards his *Miranda* rights and submitted him to questioning. He later requested to speak with an attorney, at which point police ceased questioning and took him to jail. The next morning, two different detectives came to the jail, reread him his *Miranda* rights, and questioned him without counsel present.[18] During the questioning, Edwards implicated himself; his admissions were subsequently used against him on the basis that his statements were considered voluntary, and he was found guilty of the crimes charged. The Supreme Court reversed the lower court's decision, holding:

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights . . . . [H]aving expressed his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.[19]

Such an approach, the Court felt, added further protection from coercion, yet still allowed an accused to speak with the police without counsel present, so long as the police did not initiate the conversation. While this standard still poses definitional problems concerning "suspect-initiated" conversation, the Court noted that to constitute valid waiver of one's *Miranda* rights, it is "necessary . . . that the accused, not the police, reopen[] the dialogue with the authorities."[20] Since "waivers of counsel . . . constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege[,]"[21] the Court's holding suggests that merely speaking with police does not constitute such a waiver.

In the 1988 case of *Arizona v. Roberson,*[22] the Court made another far-reaching decision implementing the *Miranda-Edwards* rule. In *Roberson,* the Court considered the issue of whether police may interrogate an accused about a different crime than the one for which he has invoked his right to counsel. The state argued that *Edwards* should only preclude further questioning about the offense for which the suspect invoked the *Miranda* right to counsel. The Supreme Court held, however, that the *Miranda-Edwards* rule requires police to stop all interrogations regarding *any* offense once the suspect invokes his *Miranda* right to counsel.[23] The Court solidified this position in *McNeil v.*

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16. 451 U.S. 477 (1981).

17. *Id.* at 478.

18. *Id.* at 479.

19. *Id.* at 484-85. This holding has had significance beyond the Fifth Amendment custodial interrogation context, as discussed *infra* at text accompanying note 51.

20. *Id.* at 486 n.9.

21. *Id.* at 483; *see also* Miranda v. Arizona, 384 U.S. 436, 475 (1966); Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

22. 486 U.S. 675 (1988).

23. *Id.* at 687-88.

Wisconsin,[24] when it stated that "[t]he Edwards rule . . . is *not* offense specific: Once a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, he may not be reapproached regarding *any* offense unless counsel is present."[25]

Thus, a suspect may invoke[26] this Fifth Amendment right to counsel at the point of custodial interrogation, after which the police may not initiate further interrogation—communication likely to elicit an incriminating response from the suspect—regarding any offense. Although the Court allows use of statements elicited from suspects in violation of *Miranda* for impeachment and other purposes,[27] the Court has consistently prevented use of such statements in the prosecution's case-in-chief.[28] Without getting bogged down in the debate over the practical significance of allowing *any* versus *no* use of the fruits of *Miranda* violations, these decisions suggest a great deal about the purposes of the rule.

Throughout the foregoing cases, the Court notes its concern with the "'inherently compelling pressures' of custodial interrogation"[29] and notes that the rules are "designed to prevent police from badgering a defendant into waiving his [right to counsel]."[30] Prior to *Miranda*, the Court assessed suspect confessions for their voluntariness, invalidating them only upon a showing that, in the totality of the circumstances, the defendant involuntarily made the statement in question.[31] Such an approach was inherently case-by-case and did not give police clear guidelines regarding conduct which was or was not constitutional. Thus, the Court instituted *Miranda*'s prophylactic bright-line rule to which the police must adhere in order to avoid a presumption that police obtained the confession unconstitutionally. The perceived need for such bright-line rules to protect the rights of the accused denotes one great point of departure between Japan and the United States: in Japan, the police enjoy tremendous public support and are highly trusted; whereas in the United States, certain

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24. 501 U.S. 171 (1991).

25. *Id.* at 177 (emphasis in original) (citing *Roberson*, 486 U.S. at 678).

26. "[T]he suspect must unambiguously request counsel" in order to invoke his *Miranda* right to counsel. The suspect must articulate the request clearly enough that "a reasonable officer in the circumstances would understand the statement to be a request for an attorney." Davis v. United States, 114 S. Ct. 2350, 2355 (1994). It is important to note that once police read a suspect his *Miranda* rights, they may approach the suspect only once to seek a waiver of that right; courts carefully analyze circumstances surrounding waiver to ensure that it was knowingly and intelligently given. This requirement affords suspects the opportunity to speak directly with police at the ontset while still allowing suspects the freedom from potential coercion by invoking those rights.

27. Sipprell, *supra* note 10, at 2016 n.39 (citing Harris v. New York, 401 U.S. 222 (1971)).

28. *McNeil*, 501 U.S. at 177.

29. *Id.* at 176; *see also* Miranda v. Arizona, 384 U.S. 436, 467 (1966).

30. Michigan v. Harvey, 494 U.S. 344, 350 (1990).

31. Courts still assess confessions for their voluntariness. Thus, if a defendant can show that his confession was involuntarily elicited (as, for example, through physical beating), the prosecution may not use the confession either in the case-in-chief or for impeachment purposes.

groups, especially minority communities, view the police with suspicion and widespread distrust.[32]

B. The Sixth Amendment Right to Counsel

Although concerns with coercion play a subtextual role, the Sixth Amendment right-to-counsel jurisprudence depends more on "fair process" and "dignitary norms" within the adversary system.[33] This section first explains the contours of the Sixth Amendment right to counsel, and highlights the right for the accused to be free from surreptitious and overt interrogation after the state has initiated adversarial proceedings against him.

The Sixth Amendment reads: "[I]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."[34] The decisions which apply this constitutional principle involve police use of co-defendants, or jail-cell informants, to obtain confessions and other damaging statements from the accused after he or she has been indicted. In the case of *Massiah v. United States*,[35] which first defined present Sixth Amendment right-to-counsel doctrine, the petitioner retained a lawyer and pled not guilty after the government indicted him for violating federal narcotics laws. While he was free on bail, the petitioner made some incriminating statements which a federal agent overheard by surreptitious means. Over petitioner's objection, the state introduced evidence of these statements against him at trial, and he was convicted.[36] Noting that an interrogation by police in extra-judicial settings without counsel present "den[ies] a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him[,]'"[37] the Court recognized that the same denial of representation occurs regardless of whether the interrogation is direct, or indirect and surreptitious.[38]

The Court held, therefore, that the state had deprived petitioner of his right to counsel "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."[39] Emphasizing its concern over the fairness of extra-judicial proceedings, the Court asserted that:

> [T]he most critical period of the proceedings, . . . that is to say, from the time of the arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation [are] vitally important, the

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32. For example, the widely publicized police beating of Rodney King in Los Angeles in 1991, and public reaction to L.A. Police Detective Mark Furhman's racist statements about planting evidence to frame African-Americans during the infamous murder trial of O.J. Simpson in 1995 highlighted the apparent trust gap between law enforcement and minority communities.

33. Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right*, 29 AM. CRIM. L. REV. 35, 59 (1991).

34. U.S. CONST. amend. VI.

35. 377 U.S. 201 (1964).

36. *Id.* at 203.

37. *Id.* at 204 (citing Spano v. New York, 360 U.S. 315, 326 (1959)).

38. *Id.* at 206.

39. *Id.*

> defendants . . . [are] as much entitled to such aid [of counsel] during that period as at trial itself.[40]

Thus, rather than protecting the accused from police coercion, the Court's holding and dicta evidence a concern that surreptitious interrogation of defendants would compromise the ability of the accused to receive a fair trial.

The *Massiah* doctrine lay dormant for thirteen years, primarily because *Miranda* had eclipsed it, until the Court decided *Brewer v. Williams*.[41] In *Brewer*, Williams, the defendant, turned himself in to the police and was arraigned on an arrest warrant in Davenport, Iowa. Detectives who had been investigating the murder of a ten-year-old girl (whose body had not yet been found) transported Williams to Des Moines for trial. During his transportation, one of the detectives appealed to Williams's "religious sensibilities" by giving a speech about the need for a proper Christian burial for the little girl. The defendant responded to the speech by directing the detectives to the site of the body.[42] All of these events occurred despite defense counsel's request that police not question Williams until he arrived in Des Moines and consulted with counsel.

Because adversarial proceedings had begun and Williams's right to counsel had attached, the Court held that the government violated *Massiah* when detectives deliberately elicited incriminating statements from him.[43] While sidestepping the issue concerning the meaning of "interrogation," the Court highlighted the point at which the right to counsel attaches under the Sixth Amendment, stating that "a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'"[44]

The Court subsequently decided several cases, perhaps inconsistently given their factual similarity, holding that government use of a defendant's cellmate as an informant violated the *Brewer* rule,[45] but that the use of a similarly situated

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40. *Id.* at 205 (quoting Powell v. Alabama, 287 U.S. 45, 57 (1932)) (omissions and alterations in original). Although the absence of direct interrogation in *Massiah* distinguishes it from *Spano*:

> [T]he Sixth Amendment right to counsel extends to both surreptitious informant elicitations and overt official interrogations. The three conditions essential for a "critical stage" in surreptitious investigation situations are: (1) the initiation of formal proceedings; (2) a government informant's active, deliberate elicitation; and (3) government knowledge that it is exploiting a situation in which its informant is likely to elicit inculpatory statements from a defendant. When these conditions exist, Massiah bars government use at trial of an accused's incriminating statements given without counsel's assistance.

James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the* Massiah *Doctrine*, 22 U.C. DAVIS L. REV. 1, 21-22 (1988) (citations omitted).

41. 430 U.S. 387 (1977).

42. *Id.* at 389-93.

43. *Id.* at 401.

44. *Id.* at 398 (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

45. United States v. Henry, 447 U.S. 264 (1980).

cellmate did not violate the rule if he remained only a "passive listener."[46] The Court further held, in *Maine v. Moulton*,[47] that even if the defendant initiates communication with a governmental informant, the government violates the Sixth Amendment as long as the government "must have known" that its agent—here, Moulton's co-defendant—was likely to elicit incriminating statements from the defendant without counsel present.[48] Concerned with the state's ability to conduct investigations and uncover crime, the Court noted that *prior* to initiation of adversary proceedings, at which point the right to counsel attaches for the particular offense charged, the state may use at trial uncounseled incriminating statements obtained by government agents without violating the Sixth Amendment.[49]

The Court gave the Sixth Amendment right to counsel its most expansive reading in *Michigan v. Jackson*.[50] There, the defendants had waived their *Miranda* rights and made confessions to detectives after arraignment. In invalidating the confessions, the Court relied on the critical distinction that adversarial proceedings against the defendants had already begun and defendants had invoked their right to counsel at their arraignments. Before defendants had the opportunity to consult with counsel, however, the *police* initiated the interrogation which produced the confessions. Although the defendants had agreed to proceed with the post-arraignment interrogations outside the presence of their attorneys, the Court held that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid."[51] This case seems to confuse Fifth and Sixth Amendment issues, and indeed, the Court's statements evidence concern regarding coercion of defendants; the Court nonetheless rested its holding squarely on the Sixth Amendment. The Court did, however, rely on the *Edwards* rule regarding suspect-initiation of contact with police to buttress its conclusion. In addition, the Court emphasized the language in *Moulton* that the Sixth Amendment ensures a suspect "the right to rely on counsel as a 'medium' between him and the State" after the state has formally charged a suspect.[52] The Court underscored the breadth of this right, *beyond* the Fifth Amendment context of custodial interrogation, when it noted:

> [A]fter a formal accusation has been made—and a person who had previously been just a "suspect" has become an "accused" within the meaning of the Sixth Amendment—the constitutional right to the assistance of counsel is of

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46. Kuhlmann v. Wilson, 477 U.S. 436 (1986).

47. 474 U.S. 159 (1985).

48. *Id.* at 174-75, 176 n.12.

49. *Id.* at 180 n.16. In addition, the Court noted that "to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at the time, would unnecessarily frustrate the public's interest in the investigation of criminal activities." *Id.* at 180.

50. 475 U.S. 625 (1986).

51. *Id.* at 636.

52. *Moulton*, 474 U.S. at 176.

> such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation.[53]

Undoubtedly concerned with not impeding law enforcement efforts, the Court subsequently backed away from the *Jackson* bright-line rule that the Sixth Amendment right to counsel automatically attaches after formal proceedings begin by requiring the accused to invoke the right. Thus, in *Patterson v. Illinois*,[54] the Court held that police-initiated interrogation after the right to counsel attaches, and after commencement of formal proceedings against the suspect, does not violate the Sixth Amendment *if* he does not invoke his right to counsel *and* he properly executes a *Miranda* waiver.[55] Thus, once an accused has invoked this Sixth Amendment right to counsel, at arraignment or some other triggering formal proceeding, the police may not approach the defendant even once to ask if he would like to waive the right to counsel, *unlike* the *Miranda* context where police have that one opportunity.

Some commentators have criticized *Patterson*, however, for severely undercutting the Sixth Amendment right to counsel:

> [T]he *Patterson* Court bases the right to counsel on the fortuity of whether the accused has either requested counsel or whether counsel has been appointed on his behalf. This rationale is at variance with . . . Sixth Amendment . . . principles . . . [which] interpose counsel as a "medium" between the prosecution and the accused once formal proceedings begin . . .[56]

The *Patterson* dissent underscored this point when it noted that "counsel must be furnished whether or not the accused requested the appointment of counsel."[57] Notwithstanding such criticism, the Court in *Patterson* seemingly watered down the waiver restrictions built up in *Jackson*, and thereby seemingly confused the *Miranda* and the *Massiah* rights to counsel.

Further clouding the Fifth and Sixth Amendment right-to-counsel doctrines, the Court in *Michigan v. Harvey*[58] allowed the prosecution to use the fruits of *Massiah* violations for impeachment purposes. The *Harvey* Court's approach to the right to counsel has been criticized, however, as undermining the adversary system:

> Because the Sixth Amendment promotes fair process trial norms that differ from the values the Fifth Amendment fosters, the reasoning supporting *Harvey* is suspect. . . . [T]he right to counsel is designed to assist the accused when he is "confronted with both the intricacies of the law and the advocacy of the public prosecutor." This guarantee, being necessary in all parts of a trial, not just in the prosecution's case-in-chief, should not be circumscribed. Again, the restriction outlined in Harvey weakens the adversary system to the

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53. *Jackson*, 475 U.S. at 632.
54. 487 U.S. 285 (1988).
55. *Id.* at 300.
56. Garcia, *supra* note 33, at 73.
57. *Patterson*, 487 U.S. at 301 (Blackmun, J., dissenting) (quoting Carnley v. Cochran, 369 U.S. 506, 513 (1962)).
58. 494 U.S. 344 (1990).

extent that it prevents the defendant from relying on counsel as a "medium between him and the State."[59]

C. The Fifth and Sixth Amendment Rights: An Overview

In practice, the right to counsel under the *Miranda* and *Massiah* doctrines attaches at different points and protects different interests. *Miranda* protections apply, in custodial interrogations, to prevent police attempts to get defendants to incriminate themselves in violation of the Fifth Amendment. *Miranda*, thus, requires that police apprise suspects of their right to counsel and demands exclusion of incriminating statements from the prosecution's case-in-chief when police have not respected a suspect's unambiguous request for assistance of counsel. Although police get one chance, after apprising an accused of his rights, to ask the suspect if he would like to waive those rights, *Edwards* prevents the police from initiating further questioning regarding *any* offense after the suspect invokes his *Miranda* right to counsel; however, the suspect may subsequently waive this right to counsel by initiating contact with the police and voluntarily, "knowingly and intelligently" waiving his *Miranda* rights.

While the Court has vacillated over whether the Sixth Amendment right to counsel under *Massiah* attaches automatically without a suspect's invocation, once a suspect invokes the right at arraignment, the right to counsel applies with equal force in judicial proceedings and extra-judicial proceedings. Moreover, this right applies to both overt interrogations by police and to surreptitious elicitations through the aid of informants. Unlike the *Miranda* context, after invocation of the right to counsel, police do not get even one chance to approach the defendant on his own and inquire whether he wishes to waive the right. Thus, for any offense with which a suspect has been formally charged, neither the police nor police informants may question the suspect without counsel present, unless the suspect knowingly and intelligently waives his right.[60]

II. THE RIGHT TO COUNSEL IN JAPAN

In Japan, the right to counsel attaches at different times than in the United States, and Japanese courts restrict that right to effectuate their criminal process goals. As in the United States, the Japanese Constitution guarantees criminal suspects the right to counsel. That the rights are textually similar should surprise no one, since the primary impetus behind Japan's adoption of its most recent

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59. Garcia, *supra* note 33, at 74 (citations omitted) (quoting United States v. Ash, 413 U.S. 300, 309 (1973) and Maine v. Moulton, 474 U.S. 159, 176 (1985)).

60. *See* Brewer v. Williams, 430 U.S. 387, 404 (1977) (It is "incumbent upon the State to prove 'an intentional relinquishment or abandonment of a known right or privilege.'" (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938))); Farretta v. California, 422 U.S. 806, 835 (1975) (noting that where a defendant relinquishes his rights, "the accused must 'knowingly and intelligently' forgo those relinquished benefits").

constitution came from the United States.[61] Also unsurprising, given the different historical and cultural forces in each country, is that the Japanese courts interpret their remarkably similar textual provisions quite differently.

The primary basis for the right to counsel in Japan is found in two provisions dealing with two different contexts: first, Article 34 of the Japanese Constitution (given effect in accordance with Article 39(3) of the Code of Criminal Procedure ("CCP")); and second, Article 37 of the Japanese Constitution. Article 34 of the Japanese Constitution and Article 39 of the CCP together address the right to counsel in the context of arrest and detention, while Article 37 addresses access to counsel regardless of an accused's wealth.

As a preliminary matter, Article 38 of the Japanese Constitution states that, "[n]o person shall be compelled to testify against himself."[62] Unlike the Fifth Amendment to the U.S. Constitution, however, Japanese courts do not interpret this right to grant a right to the presence of counsel during interrogation.[63] When one understands the heightened role that confession—both for its evidentiary and rehabilitative value—plays in the Japanese criminal justice system,[64] one can see why police and prosecutors wish to keep defense counsel out of the interrogation room. Still, police and prosecutors in the United States feel the same way about confessions, at least with regard to their evidentiary value; yet the U.S. Supreme Court does not accord similar deference regarding interrogation methods.[65]

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61. Percy R. Luney, Jr., *Introduction* in JAPANESE CONSTITUTIONAL LAW at vi (Percy R. Luney & Kazuyuki Takahashi eds., 1993) (describing the Japanese constitution as "a document imposed by the Supreme Commander for the Allied Powers (SCAP)," which oversaw the Occupation of Japan for the Allies immediately following World War II). Additionally, "[t]he fact that the Occupation was overwhelmingly American meant that the American democratic tradition provided the political and psychological coloration of the Occupation." John M. Maki, *The Constitution of Japan: Pacifism, Popular Sovereignty, and Fundamental Human Rights*, *in* JAPANESE CONSTITUTIONAL LAW, *supra*, at 49.

62. KENPO [Constitution] art. 38 (Japan). Article 38 also includes that: "(2) Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence. (3) No person shall be convicted or punished in cases where the only proof against him is his own confession." *Id.*

63. Notably, although Japanese defendants have the right to remain silent, few can or choose to do so: 85-90% of suspects indicted fully confess guilt, and the remaining 10% or so confess factual guilt but resist confessing moral responsibility. *See* Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317, 336-37 (1992); *see also* A. DIDRICK CASTBERG, JAPANESE CRIMINAL JUSTICE 58 (1990). For confessions in Japan to be admissible, they must be "voluntary"; although as some scholars have noted, courts deem confessions inadmissible only when they doubt the "reliability" of the confession or guilt of the suspect. Ryuichi Hirano, *Diagnosis of the Current Code of Criminal Procedure*, *translated in* 22 LAW IN JAPAN 129, 135-38 (1989). Aside from the potential "voluntariness" inquiry regarding an accused's confession, Japanese courts have not developed a *Miranda*-type prophylactic rule to give effect to that right. This lack of a prophylactic rule stems partly from the view that investigations are not part of the "trial" proper, to which the right to counsel applies, and partly from the primacy the system places on defendant confessions which are necessary to correct and rehabilitate offenders. *See* Foote, *supra*, at 337.

64. Foote, *supra* note 63, at 337.

65. *Compare* part II of this Note *with* the text accompanying notes 65-69.

Although the *language* of these constitutional provisions gives the impression that defendants enjoy quite expansive access to counsel from the time of arrest or detention through trial, this is patently not the case. Several factors limit defendants' access to counsel, including: Supreme Court rulings interpreting the right narrowly; the CCP, which grants prosecution broad discretion to limit such access; and popular support for the current system, which vests great trust and discretion in police and prosecutors.

A. Article 34 of the Japanese Constitution and Article 39 of the Code of Criminal Procedure

It is misleading to analogize Japan's Article 34 right to counsel in the arrest and pre-indictment context to the *Miranda* pre-indictment context in the United States. First, a Japanese suspect does not have a right to have counsel present during interrogation.[66] Second, the right to meet with defense counsel to discuss case strategy is highly circumscribed as compared to the American right.[67] To appreciate fully the contours of the right to counsel under Article 34, one must first understand the procedural context in which the right attaches.

1. Procedural Context in Which the Right to Counsel Exists

In the Japanese system, two types of police custody exist: that which is involuntary requiring formal arrest procedures; and that which is "voluntary," whereby police may question suspects without formal arrest. The right to counsel only attaches during formal arrest, while no right to counsel exists for those who voluntarily accompany the police. This Note's discussion of Article 34 rests on the assumption that a formal arrest has occurred.

Formal arrest procedures, addressed in the CCP, allow for a maximum seventy-two hour period of suspect confinement following arrest.[68] First, police may hold a suspect in custody for forty-eight hours, after which time police must release him or transfer his case to the prosecutor's office.[69] Within twenty-four hours after receiving the case, the prosecutor's office must decide whether to petition the court in order to detain the suspect[70] for a period of up to ten days, with a possible extension of up to ten more days.[71] Thus, "[a] suspect assigned to . . .

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66. "Counsel are never permitted to attend interrogation sessions." Foote, *supra* note 63, at 60.

67. *Compare, e.g.*, Strickland v. Washington, 466 U.S. 668, 686 (1984) (citing Geders v. United States, 425 U.S. 80 (1976), for the proposition that a "bar on attorney-client consultation during overnight recess" violates the right to effective assistance of counsel because it interferes with the ability of counsel to make indepcndent decisions about how to conduct the defense) *with* Baba v. Japan, *infra* note 85 and accompanying text.

68. Takeo Ishimatsu, *Are Criminal Defendants in Japan Truly Receiving Trials by Judges?*, *translated in* 22 LAW IN JAPAN 143, 147 (1989).

69. KEISOHO [Code of Criminal Procedure], Law no. 131 of 1948, § 203 (Japan).

70. *Id.* § 205.

71. *Id.* §§ 207, 208.

detention remains in the physical custody of the police from the point of arrest to the point of indictment, a period which may be as long as twenty-three days."[72]

In reality, however, police may contact and question a suspect for a much longer period than the twenty-three days which the CCP allows. As in the United States, police may speak with suspects and witnesses prior to arrest without implicating any constitutional rights. While U.S. citizens usually draw a line at some relatively early point during police questioning and require the police to make an arrest if they wish to continue any further questioning, in Japan, people "voluntarily accompany" the police and submit to questioning, sometimes for days, without ever triggering formal arrest.[73] Although suspects are not legally bound to remain in police custody prior to arrest, the stigma surrounding formal arrest, and the fact that police usually have enough evidence to arrest and detain a suspect anyway, usually lead suspects to remain in police custody until released by the police.[74] At no time during this "voluntary" process, however, does a suspect's right to counsel attach. In this way, police shield themselves from potential constitutional scrutiny for overreaching their official powers. As will become evident below, "[t]he Supreme Court [has been] generally reluctant to elaborate rules in regulating criminal investigation."[75] Thus, "[t]he majority of the accused go through the investigation process without legal advice and . . . court-appointed counsels [sic] come to defend them only after incriminating evidence is secured by the prosecution."[76]

2. Prosecutorial Discretion as It Affects the Quantity[77] of Access to Counsel Under Article 34

Just as police have discretionary power, prosecutors exercise a great deal more discretion and control over cases than the law explicitly allows, and certainly more than their American counterparts. In addition to possessing the discretion

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72. Frank Bennett Jr., *Pretrial Detention in Japan: Overview and Introductory Note*, 23 LAW IN JAPAN 67 (1990).

73. Foote, *supra* note 63, at 345 n.172. Professor Foote recounts the story of one person who "voluntarily" accompanied the police for questioning for four days without ever triggering formal arrest and the attendant right to counsel; he was interrogated in the police quarters from early in the morning until late in the evening all four days.

74. *Id.* at 344-45.

75. Masayuki Murayama, *Post War Trends in the Administration of Japanese Criminal Justice: Lenient but Intolerant or Something Else?*, 4 J. JAPAN-NETHERLANDS INST. 221 (1992).

76. *Id.* at 252. Professor Foote notes that "[c]ounsel are never permitted to attend interrogation sessions," and further adds that "[t]he role of the adversary process—and even the formal trial itself—remains highly circumscribed." Foote, *supra* note 63, at 338.

77. "Quantity" refers to when, and for how long, attorneys and suspects may meet. *See supra* notes 66-70 and accompanying text. While police and prosecutors may place stringent limits on such access to counsel in Japan, similar restrictions would likely run afoul of the Sixth Amendment right in the United States. *See supra* note 67.

to decide whether to further detain suspects,[78] during suspect detention prosecutors may also decide whether to indict and prosecute or to suspend prosecution. Moreover, the prosecutor exercises great discretion in the access suspects have to their counsel.[79]

Within this procedural context, Japanese courts interpret Article 34 of the Japanese Constitution, which states that "[n]o person shall be arrested or detained without . . . immediate privilege of counsel,"[80] very narrowly.[81] As such, courts have determined that "[t]he right to court-appointed counsel does not attach until after indictment,"[82] even though Article 34 uses the language of "arrest" and "detention." As explained above, the *timing* of this right to counsel, in form, does not differ substantially from the Sixth Amendment right to counsel under the *Massiah* doctrine.[83] The *substance* of the right to counsel afforded a defendant differs tremendously, however, because Article 39, section 3, of the CCP grants police and prosecutors discretion to control a defendant's access to counsel during the pre-indictment period:

> The public prosecutor, public prosecutor's assistant office, and judicial police official . . . may, when it is necessary for investigation, designate the date, place, and time of interview and delivery or receipt of [documents or other things] only prior to the institution of prosecution, provided that such designation does not *unreasonably* hold the suspect in check when he exercises his rights for the defense.[84]

The following two appellate court cases give some idea of what the Code means by "unreasonable." In the 1950 case of *Baba v. Japan*, "the Sapporo High Court found that the prosecutor acted reasonably in allowing defense counsel [to meet with the suspect] twenty minutes on the third day of a ten day detention, and thirty minutes each on the eighth, and ninth days."[85] But the Japanese Supreme Court, in the 1953 decision of *Hongo v. Japan*, "found that police restriction of access to a detained suspect of two or three minutes was inadequate."[86] Professor Shigemitsu Dando, a prominent scholar of Japanese criminal procedure, also noted that the Supreme Court has "held that it was not an improper limitation even though the interview [between counsel and defendant] was not permitted until the same day that prosecution was instituted."[87] Accordingly, the U.S. State Department Human Rights Report describes access to counsel in Japan thus, "[t]he Criminal Procedure Code grants the prosecution and investigating police

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78. Prosecutors request detention for 85% of suspects referred to them, and 99.7% of prosecution requests for additional detention are granted, amounting to de facto authority to detain suspects. *See* Foote, *supra* note 63, at 58-59.

79. CASTBERG, *supra* note 63, at 55-73; *see also* JOHN O. HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX 121-138 (1991).

80. KENPO [Constitution] art. 34 (Japan).

81. Foote, *supra* note 63, at 55.

82. Bennett, *supra* note 72, at 68.

83. *See supra* note 44 and accompanying text.

84. KEISOHO [Code of Criminal Procedure] art. 39(3) (Japan) (emphasis added).

85. CASTBERG, *supra* note 63, at 76-77 (citations omitted).

86. *Id.* at 77.

87. SHIGEMITSU DANDO, JAPANESE LAW OF CRIMINAL PROCEDURE 122 n.25 (1965) (decision of April 20, 1955, 54 Hanreijiho 1423).

officials the power to control access to attorneys before indictment when deemed necessary for the sake of the investigation."[88] Such power to limit defendant's access to counsel for the "sake of the investigation" contrasts sharply with the picture of access to counsel in the United States described above.

B. Article 37 Right to Counsel

Article 37 is the other constitutional provision which addresses the right to counsel in Japan. In relevant part, it reads:

> In all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal. . . . At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State.[89]

While the right to counsel appears in the right-to-trial provision of the Japanese Constitution, it does not approximate the Sixth Amendment right to counsel, nor does it rest on the same "fair process" and "dignitary" concerns that infuse Sixth Amendment jurisprudence in the United States. The primary focus of this provision concerns the right to counsel regardless of a person's ability to pay.

Article 36 of the CCP reads:

> Where the accused is unable to select a defense counsel for poverty or some other reason, the court shall assign defense counsel on behalf of the accused upon his request. However, this shall not apply where defense counsel has been selected for him by some person other than the accused.[90]

Putting aside the structural barriers to full realization of this equal access to counsel,[91] this Note accepts the U.S. State Department report's finding that "[s]ome local bar associations provide detainees with a free counseling session prior to indictment. Counsel is provided at government expense after indictment if the arrested person cannot afford one."[92] Although equal access to counsel regardless of wealth is an important aspect of such a right, such concerns do not substantively provide defendants with access to counsel. The fact that the constitution entitles everybody to the *same* right of counsel is small consolation given the formal limitations of that right in practice.

Thus, the formal role of counsel in Japan is highly circumscribed, especially with regard to a defendant's right to access. Even assuming that every suspect who wishes representation of counsel receives it, no defendant may have an attorney present during interrogation. Furthermore, police and prosecutors limit suspect-attorney meetings with respect to time and duration so as not to interfere with ongoing investigations. Though not discussed above, similar restrictions

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88. *Japan Human Rights Practices, 1994*, DEP'T ST. DISPATCH, March 1995 [hereinafter *Human Rights Report*].

89. KENPO [Constitution] art. 37 (Japan). Article 36 of the CCP implements art. 37.

90. KEISOHO [Code of Criminal Procedure] art. 36 (Japan).

91. For example, extremely few people pass the Japanese bar exam equivalent: Of those who do, most practice in urban areas unevenly spread out across the country; and relatively few Japanese attorneys practice criminal law. HALEY, *supra* note 79, at 83-121.

92. *Human Rights Report*, *supra* note 88.

exist regarding discovery. Any evidence that will not be introduced at trial, including exculpatory information, is non-discoverable.[93] Castberg notes that:

> This is a particular problem because defense attorneys almost without exception lack the resources to conduct extensive investigations of their clients' cases, whereas prosecutors have the full resources of the police as well as their own offices. Prosecutors respond that some evidence is very sensitive and can damage the criminal justice system if revealed.[94]

This does not mean that Japanese defense attorneys play *no* role within the criminal justice system. They play a significant informal role. For example, they contact a victim's family to make apologies and offer restitution, and they encourage their clients to make formal apologies, which play a role in getting prosecutors not to prosecute and in mitigating post-conviction sentences. Far from the American ideal of defense counsel as the unbridled advocate for his client—interposed at every "critical stage" between the police and the defendant—the Japanese defense attorney sometimes looks more like an advocate for the state, at least with regard to the truth-seeking function of the investigatory process. The fact that defense counsel plays a more vibrant role for defendants informally, however, means more in Japan where informal institutions take on greater importance.

III. A COMPARISON OF THE ROLES THE RIGHT TO COUNSEL PLAYS IN THE U.S. AND JAPANESE CRIMINAL JUSTICE SYSTEMS

This Part examines why the right to counsel in the United States and Japan differs so much. This part of the analysis entails looking at the broader objectives of each system and the respective roles criminal procedure—specifically the right to counsel—play in each. Specifically, the different treatment each country gives to the right to counsel demonstrates a fundamentally different approach to criminal justice. Simplistically viewed, the United States, with its dichotomized approach to criminal justice, views "law enforcement interests" and the "individual-suspect's interests" as diametrically opposed. Viewed in such a way, any procedural protection conferred on the individual necessarily impedes effective law enforcement. Similarly, any procedural protection granted the authorities is viewed as a loss to the individual. Rarely does a lawyer, judge, policeman, or prosecutor suggest that the state's investigation serves the interests of both sides.

On the other side of the Pacific, Japan gives police and prosecutors great discretion in their treatment of criminal suspects and defendants. If one accepts for the most part Professor Foote's view of Japan's criminal justice system as a "benevolent paternalism model,"[95] Japan seems to operate at the other side of the "rights" spectrum entirely. The Japanese investigative manner yields almost unbelievable clearance rates, confession rates, and conviction rates. Japanese

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93. CASTBERG, *supra* note 63, at 77.
94. *Id.*
95. Foote, *supra* notc 63.

police, prosecutors, judges, and many defense lawyers accept that "getting at the truth," which includes a suspect's or defendant's confession, is in the interest of *both* society and the individual. The system demands confession, partly for its evidentiary value and partly for its correctional value. Society views confessions, in the absence of counsel, as necessary to effect what Foote calls "specific prevention" (a process which emphasizes rehabilitation, reintegration, and the prevention of recidivism).[96] It is hard for Americans to believe that Japan achieves these statistics without significant deprivation of individual freedom, and indeed, that assumption is true in a procedural sense. Accepting Professor Foote's benevolent paternalism metaphor, there are some pretty ugly aspects to living in such an authoritarian "family" structure.

What Americans might fail to see, however, is that the Japanese system ultimately aims to "correct" offenders, not merely to determine guilt and punish them. The Japanese system thereby adds to the freedom which both individual offender and society enjoy. With this criminal justice goal in mind, any obstacle to determinations of guilt—which includes interposing an attorney at every interrogation—presumptively hinders a defendant from accepting responsibility for a crime, increases society's retributive desires, and inhibits acceptance and reentry of the defendant into society.

This Note does not suggest that we should import facets of Japan's approach to the right to counsel. Comparing the right to counsel in Japan to that in the United States, however, highlights the issue of whether American criminal jurisprudence has perhaps over-emphasized the adversarial nature of the American process at the expense of rehabilitating and reintegrating a defendant into society. Keeping in mind the original justifications for the American right to counsel, which include fair process and dignitary norms fostered by adversary proceedings, Part III.A first examines U.S. criminal justice goals, and second whether we in the United States implement the right to counsel in accordance with these goals. Part III.B similarly analyzes the fit between the Japanese right to counsel and Japanese criminal justice goals.

A. The American Right to Counsel Within the Broader Criminal Justice System

No serious discussion of the right to counsel, either under the Fifth or Sixth Amendment, should proceed without first establishing the functions which it, and criminal procedure generally, serve. Professor Peter Arenella, relying on Professor Packer's famous Due Process/Crime Control Models, notes that the American criminal justice system has conflicting objectives.[97] He identifies three principle "functions" which the procedural system serves:

> First, criminal procedure must provide a process that vindicates substantive criminal law goals. This procedural mechanism must determine substantive guilt reliably, authoritatively, and in a manner that promotes the criminal

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96. *Id.* at 348; *see also supra* note 63 and accompanying text.

97. Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 197 (1983).

> law's sentencing objectives. Second, criminal procedure must provide a dispute resolution mechanism that allocates scarce resources efficiently and that distributes power among state officials. Finally, criminal procedure can perform a legitimation function by resolving state-citizen disputes in a manner that commands the community's respect for the fairness of its processes as well as the reliability of its outcomes.[98]

In order for criminal procedure, and individual facets such as the right to counsel, to be effective, it must accord with these three functions. While the right to counsel implicates all of these functions, this Note emphasizes the "vindication" and "legitimation" functions, because these two functions interact with the right to counsel in ways that starkly contrast with the way the Japanese view the role of counsel in their society.

1. How the Right to Counsel in the United States Vindicates Substantive Criminal Law

At an intuitive level, one would think that interposing counsel between police and the suspect or defendant during interrogation would only impede effective fact-finding. In turn, this impediment would undermine the vindication of "substantive criminal law goals" such as determining a suspect's guilt, or at least getting information which would help police "solve" the crime at hand. Although this supposition is true in a sense, police interrogation and investigative fact-finding form but one part of the overall process of guilt determination in the United States. As the cases discussed above indicate, trials play a more central role in guilt determinations. Although the facts which police discover are important, vindicating substantive criminal law goals requires more than simple fact-finding: "the substantive criminal law's definition of guilt protects individual autonomy and preserves the moral force of the criminal sanction by requiring some showing of the defendant's moral culpability"[99] by the state in a court of law.

Beyond "reliable historical fact-reconstruction and moral evaluation,"[100] the vindication function requires heightened proof requirements. "At least in theory, our system prefers erroneous acquittals over erroneous convictions . . . [and] criminal procedure deliberately places the risk of factual error on the state to protect the integrity and moral force of a guilty verdict."[101] While it is clear that not every system needs this built-in bias against the state, nor gives effect to the concepts of "integrity" and "moral force" in the same manner, part of "guilt" in the U.S. criminal justice system includes the imperative that the state determine guilt by procedurally correct means. But this begs the essential question: what procedures render a guilt determination correct? In the United States, constitutionally-correct procedures require a "fair trial" with effective assistance of counsel for the defendant.

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98. *Id.* at 188.

99. *Id.* at 197.

100. *Id.* at 198.

101. *Id.* The historical reasons for this preference are briefly discussed below, but essentially stem from a combination of distrust of government and severity of punishment.

As the Court stated in *Gideon v. Wainwright*:[102]

> From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[103]

Thus, whereas other systems, Japan's included, place less emphasis on trials as the forum for determining guilt; in the United States, vindicating substantive criminal law—determining guilt—can only be ensured if counsel is made available.

Professor Garcia has concisely pointed out the underlying rationale and role of a trial in the U.S. criminal justice system: "[*Gideon* was] founded on an adversarial clash between two relatively equal sides whose conflicting interests allegedly produce an accurate result."[104] Thus, it is not the police and prosecutors alone who determine guilt, but at a trial where each side vigorously questions the other side's evidence to produce the ultimate "truth." And, as *Gideon* makes clear, vindication of truth at trial is not possible without a meaningful right to counsel.

This result, affirmed in earlier cases,[105] has served as the guiding theme throughout *Massiah* and its progeny.[106] The Court, explaining the historical significance of the right to counsel in *Farretta v. California*,[107] quoted Zephanian Swift in one of the first American colonial treatises on law:

> [I]t is apparent to the least consideration, that a court can never furnish a person accused of a crime with the advice, and assistance necessary to make his defense. . . . Our ancestors . . . denied counsel to prisoners to plead for them to any thing but points of law. *It is manifest that there is as much necessity for counsel to investigate matters of fact, as points of law, if truth is to be discovered.*[108]

Lest one believe that the investigative function of counsel is merely perfunctory, U.S. courts do overturn guilty verdicts on ineffectiveness of counsel grounds due to failure to investigate. The Eighth Circuit stated, in *Hawkman v. Parratt*,[109] "ordinarily a reasonably competent attorney will conduct an in-depth investigation of the case which includes an independent interviewing of the witnesses."[110] In this case, the defense counsel limited his investigation of the case to "discussing the case with petitioner, securing and reviewing state

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102. 72 U.S. 335 (1963).

103. *Id.* at 344. The Court went on to hold that the Sixth Amendment right to assistance of counsel applied to the states through the Due Process Clause of the Fourteenth Amendment.

104. Garcia, *supra* note 33, at 49-50 (footnote omitted).

105. *See e.g.*, Johnson v. Zerbst, 304 U.S. 458 (1938); Powell v. Alabama, 287 U.S. 45 (1932) (holding that due process of law requires that, in capital cases, it is the duty of the court to provide counsel to a defendant who is incapable of making his own defense).

106. *See supra* notes 33-59 and accompanying text.

107. 422 U.S. 806 (1975).

108. *Id.* at 827-28 n.35 (citations omitted) (emphasis added) (quoting from 2 Z. SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT, 398-99 (1796)).

109. 661 F.2d 1161 (1981).

110. *Id.* at 1168 (citation omitted).

investigation materials, . . . and contacting the deputy sheriff who was called to the scene."[111] Given that eyewitnesses saw events which could have provided the defendant with a viable defense, counsel's conduct fell below minimum professional standards for effectiveness of counsel required by the Sixth Amendment.

Such standards again highlight the fact that the trial serves as the forum in which one's guilt or innocence is conclusively established. Police and prosecutorial authorities do not alone perform the task of fact-finding; for even if they alone possess the means to obtain evidentiary information, defense counsel must reexamine that evidence and vigorously question it to arrive at the truth. Ideally, defense counsel independently investigates the facts in building its defense. In reality, the state has far greater resources at its disposal to craft a compelling case against the accused.

The right to counsel should address this imbalance in resources if the defendant is to receive a fair trial. As the Court eloquently noted in *Powell*:

> The right to be heard [at trial] would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . [The defendant] is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence. . . . He requires the guiding hand of counsel at *every step* in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction beeause he does not know how to establish his innocence.[112]

Furthermore, this principle served as the justification ultimately leading up to the *Massiah* and *Jackson* Courts' holdings that police, either directly or indirectly, may not approach the defendant to seek waiver of this Sixth Amendment right to counsel. Recognition of diametrically opposed interests, with the life or liberty of a defendant at stake, rightly or wrongly has contributed to the implacably hostile positions of state versus the individual. And, though the complexity-of-trial concerns do not motivate the Court's Fifth Amendment jurisprudence in the right-to-counsel area, concern over a defendant's self-incrimination and protection against coercive conduct on the part of police do. Beyond fair process in the Sixth Amendment sense—that prosecution and defense testing of evidence in adversarial proceedings will produce an accurate result—it is the firm belief that government itself should not break the laws in the pursuit of justice that serves the vindication function. In the United States, *how* we determine guilt is important.[113]

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111. *Id.*

112. Powell v. Alabama, 287 U.S. 45, 68-69 (1932) (emphasis added).

113. Justice Brandeis spoke eloquently about criminal process integrity in a Fourth Amendment case, Olmstead v. United States, 277 U.S. 438 (1928):

> If the Government becomcs a law-breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.

Id. at 485 (Brandeis, J., dissenting).

While we are daily inundated with stories of criminal defense attorneys obstructing truth by vigorously advocating their clients' defense, sometimes advising them to remain silent, the ideal of our system includes the notion that the state must be able to prove its case without the help of the individual who faces harsh punishment—the defendant. There are, however, limits to the means which counsel may employ in defense of his client. Lawyers are also "officers of the court."

In *Nix v. Whiteside*,[114] the Court held that the right to effective assistance of counsel is not contravened if defense counsel refuses to help the defendant commit perjury at trial. As explained below with regard to the "legitimation function" of criminal procedure, defense counsel owes his client a duty of loyalty. This duty, however, is not absolute. "[C]ounsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law."[115] Essentially, this rule rests on the Court's belief that denial of counsel's aid in committing perjury "is consistent with the governance of trial conduct in what we have long called 'a search for truth.'"[116] The trial serves as the forum where guilt or innocence is established,[117] and defense counsel must vigorously defend his client *while not willfully obstructing the search for truth.*

Thus, at least ideally, our criminal procedure best serves the function of vindicating substantive criminal law goals by providing a mechanism—the trial at which counsel vigorously represents the defendant—that determines guilt reliably and authoritatively. Part of the reliability and authority, again, rests on the idea that the defense counsel serves two masters, the defendant and the truth. As *Nix* shows, when the two clash, the truth should prevail even if at the expense of the defendant's liberty which might otherwise be secured through deceit (perjury).

2. How the Right to Counsel in the United States Performs a Legitimation Function

In addition to vindicating substantive criminal law goals, the right to counsel must also "perform a legitimation function by resolving state-citizen disputes in a manner that commands the community's respect for the fairness of its processes as well as the reliability of its outcomes."[118] The right to counsel in the United

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114. 475 U.S. 157 (1986).

115. *Id.* at 166.

116. *Id.* at 171.

117. Of course, the defendant enters court cloaked with a presumption of innocence:

> The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law."

In re Winship, 397 U.S. 358, 364 (1970) (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)).

118. Arenella, *supra* note 97, at 188 (footnote omitted).

States serves this legitimation function perhaps even better than, and at a cost to, the vindication function discussed above:

> The legitimation role of resolving state-eitizen disputes in a fair manner is inextricably tied to the Sixth Amendment's right to counsel clause. Principally, the clause fosters respect for the system by guaranteeing "procedural fairness" and by "ensuring formal equality of access to the system." Additionally, [it] promotes the defendant's meaningful participation in the inner workings of the system. Rather than being treated as an object of the process, a defendant represented by knowledgeable counsel is accorded dignity and respect.[119]

A defendant, therefore, benefits from fair process and dignity, norms that legitimate the criminal justice system. He is made to feel a part of the process which potentially exposes him to harsh penalties. While there are limits, demonstrated by the *Nix* decision above, the defendant must receive "effective" assistance of counsel and not merely superficial presence of counsel. As the Court noted in *Strickland*, "[the] Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. . . . For that reason, . . . 'the right to counsel is the right to the effective assistance of counsel.'"[120]

Thus, government-imposed measures that limit the vigorousness of counsel are unconstitutional.[121] Moreover, failure on the part of defense counsel to meet certain performance standards can deprive the defendant of effective assistance of counsel and thereby fail to pass constitutional muster. Although wary of establishing constitutional guidelines which counsel must follow, the Court has laid down some basic obligations that defense counsel owes a defendant, both to make the adversarial contest *fair*, and in no small part, to give effect to dignitary norms: "Representation of a criminal defendant entails certain basic duties. Counsel[] . . . owes the client a duty of loyalty, a duty to avoid conflicts of interest[,] . . . [a] duty to advocate the defendant's cause[,] . . . to consult with the defendant on important decisions and to keep the defendant informed of important developments. . . ."[122]

Although deficiency in any one of these duties will not alone lead a court to set aside a trial result,[123] taken together these deficiencies give a flavor of the manner

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119. Garcia, *supra* note 33, at 59 (footnotes omitted).

120. Strickland v. Washington, 466 U.S. 668, 684-86 (1984) (citations omitted) (citing McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)).

121. *See, e.g.*, Geders v. U.S., 425 U.S. 80 (1976) (holding a bar on attorney-client consultation during overnight recess unconstitutional); Herring v. New York, 422 U.S. 853 (1975) (holding bar on summation at bench trial unconstitutional); Brooks v. Tennessee, 406 U.S. 605 (1972) (holding a requirement that a defendant testify first, or not at all, unconstitutional); Ferguson v. Georgia, 365 U.S. 570 (1961) (holding a bar on direct examination of defendant unconstitutional).

122. *Strickland*, 466 U.S. at 688.

123. The test to determine effectiveness of assistance of counsel has two parts. The first looks into the performance of counsel to see whether counsel, generally speaking, lived up to the duties discussed above; if he did not, the second looks to whether counsel's failure was "prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Id.* at 692.

in which a defendant participates in the process, and thereby, the process's ultimate fairness and dignity. Further, the dignitary norms find expression in a defendant's ability to forgo representation entirely.

As the Court stated in *Faretta*,[124] the Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants the accused personally the right to make his own defense. The Sixth Amendment grants the accused directly the right to a defense, for it is he who suffers the consequences if the defense fails. From this logic, the Court went on to conclude that the "Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation."[125] This notion accords strongly with the overarching fair process and dignitary norms effectuated by the Sixth and Fifth Amendment rights to counsel. Undergirding these "rights" is the strong preference that the defendant should have the ultimate freedom to exercise or dispense with his rights when faced with the full panoply of state power. As the *Faretta* Court further noted, "[f]reedom of choice is not a stranger to the constitutional design of procedural protections for a defendant in a criminal proceeding."[126] This freedom of choice also serves the legitimation function of criminal procedure.

What emerges, therefore, is a picture of the right to assistance of counsel as it relates to the overall functions of criminal procedure. Counsel rights vindicate the substantive criminal law goal of determining guilt in our adversarial system because we view guilt not as a mere question of fact, but as a mixed question of fact, law, and moral culpability only *after* tested in our adversarial waters.[127] There is no doubt that there are other valid ways to determine guilt, but the validity of those other ways rests on different cultural assumptions. For example, in countries that view guilt as an objective factual question to be determined solely by certain investigatory state agents, the right to counsel would play a significantly diminished role and would not *add* to, but merely obscure, the truth determination.

Furthermore, although the right to assistance of counsel occasionally creates tension with the determination of substantive guilt, the U.S. approach was born of its own historical and cultural experiences. As Garcia explains: "[T]he right to counsel significantly advances 'fair process' and 'dignitary' norms that . . . are not necessarily consonant with achieving an accurate result. Indeed, . . . both norms may hinder the determination of factual guilt because they reflect the policy values of a system premised upon suspicion of unlimited governmental power." [128]

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124. Faretta v. California, 422 U.S. 806 (1975).

125. *Id.* at 832.

126. *Id.* at 835 n.45.

127. This Note ignores the more problematic issue of plea-bargaining. Some people argue that the plea-bargaining system too serves the adversarial function. Frank H. Easterbrook, *Plea Bargaining As Compromise*, 101 YALE L.J. 1969 (1992). Others contend that the plea system merely undermines the criminal law's substantive goals. *See* Arenella, *supra* note 97, at 218-219.

128. Garcia, *supra* note 33, at 59.

Unlike civil law systems which view government as father or family, the United States was born of a quite different idea:

> The American revolution, as understood by the Court in *Bridges v. California*, was accomplished to get Government off the backs of the people. The Bill of Rights . . . was devised as a means of guaranteeing individual rights against a mistrusted government. Government was viewed not as a sibling, but as "big brother," an enemy, and a dangerous enemy at that.
>
> . . . .
>
> . . . The accused is viewed, not as a member of the family, but as an outlaw. A basic feature of the accusatorial system is distrust of government and officials. Punishment and deterrence are its primary goals. Rehabilitation and education are lofty ends, but thought too broad, difficult, and expensive to achieve.[129]

Given the historical suspicion with which Americans view government and the built-in procedural protections designed to emphasize fairness at trial, such as the right to counsel, one can see the importance which *formal* processes attain. Additionally, in the United States, the mediating institutions of family, company, church, and friends do not provide strong informal social control mechanisms. Against this backdrop, formal processes take on added importance. As explored more at length below, Japan's history and culture do not view state power with such suspicion, and the mediating institutions of family, company, and friends play a large role in controlling aberrant behavior. These differences help explain the various roles that counsel plays in each society.

Having examined how the right to counsel ideally fits into and serves the criminal process in the United States, this Note next examines that same right in Japan. Again, any evaluation of rights such as these cannot be divorced from the cultural and historical processes that lead to their development. Consequently, any change must ultimately accord with each society's value system. Through comparison, however, we learn to requestion some basic assumptions and relearn why society's criminal processes accord with society-at-large.

B. The Japanese Right to Counsel Within the Broader Criminal Justice System

Although discussed within the context of the United States, the framework for analyzing the right to counsel and criminal process, generally, applies equally for any country.[130] Simply put, the criminal process must: (1) vindicate the substantive criminal law goals by "determin[ing] substantive guilt reliably,

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129. Louis M. Natali, Jr. & Edward D. Ohlbaum, *Redrafting the Due Process Model: The Preventive Detention Blueprint*, 62 TEMP. L. REV. 1225, 1257-58 (1989) (footnotes omitted).

130. The purpose here is not to view Japan's criminal procedure—and the right to counsel therein—through a U.S. lens which reflexively points out the relative weakness of defense counsel in Japan and declares the system morally bankrupt. As noted above, the rights afforded citizens in society must make sense to *that* society. By the same token, this Note does not compare the relative roles of counsel with an eye towards implementation of Japan's approach. Comparative analysis helps the student of comparative models gain better insight into *why* the rights take the form they do and how each might achieve a better fit within its own system.

authoritatively, and in a manner that promotes the criminal law's sentencing objectives"; (2) "provide a dispute resolution mechanism that allocates scarce resources efficiently and that distributes power among state officials"; and (3) "perform a legitimation function by resolving state-citizen disputes in a manner that commands the community's respect for the fairness of its processes as well as the reliability of its outcomes."[131]

This Note emphasizes the "vindication" and "legitimation" functions of criminal procedure because it is with regard to these two functions that the differences between U.S. and Japanese criminal procedure emerge. One must, however, first understand the heightened importance of informal over formal mechanisms of social control. Japanese society relies *heavily* on informal social control to ensure that individuals do not act in ways—including commission of crimes—that undermine the cohesion, harmony, safety, and success of society at large. As Professor Haley notes, "by depending upon informal social mechanisms for crime control, the Japanese state has in effect abandoned the most coercive of all legitimate instruments of state control. In contemporary Japan these powers thus reside with the society at large and its constituent, lesser communities of family, firm, and friends."[132]

This informal control alters tremendously the expectations society has for its police, prosecutors, judges, and lawyers. There are very real differences between a society like Japan, which expects institutional power structures—police, courts, prisons—to handle aberrant behavior largely informally while reserving *formal* punishment as a last resort, and a society like the United States which does not. One gets a sense that a society that controls behavior through informal means would view everything from procedure to punishment differently than we do in the United States. Again, Haley points out that:

> [Official, formal] penalties . . . were perhaps *never as important* as the simple community sanction of ostracism and expulsion, especially when joined with vicarious liability. Social control develops new dimensions when landlords are made responsible for the conduct of their tenants, village headmen for the activities of the village at large, or parents for the conduct of their children, and when expulsion from the community and its sustaining resources is an ever-present threat.[133]

This subtextual understanding of informal social control in Japan informs and changes the very meaning (from a U.S. perspective) of what constitutes "legitimate procedure." For example, the mechanisms of informal social control *prevent* vast amounts of anti-social behavior, or at least deal with it internally once committed, such that the overall crime rate is lower and the defendants in those cases that make their way into formal channels are presumed guilty. While this perhaps overstates the case, suspects *indicted* by prosecutors reach that stage based on a higher quantum of evidence than necessary for arrestees in the United

131. Arenella, *supra* note 97, at 188 (footnotes omitted).
132. HALEY, *supra* note 79, at 138.
133. *Id.* at 170 (emphasis added).

States.[134] This presumption, in turn, leads to the different societal expectations that Japan has with regard to police and prosecutorial handling of a defendant. Japanese society expects a suspect to confess, repent, and make restitution. In a similar fashion, courts play a guilt-confirmation role rather than a guilt-determination role. Such emphasis on informal social control also leads defense counsel to play a role largely *outside* of the guilt-determination phase, but nonetheless serves a vindication and legitimation function by obtaining the most favorable result possible for the defendant.

In addition, a system with such formal-informal control interplay ultimately reinforces itself and reaffirms those informal mechanisms which in turn strengthen social relationships and structures in society: "The inability of the formal legal system in Japan to provide effective relief, to impose meaningful sanctions, thus tends to buttress the cohesion of groups and the lesser communities of Japanese society and to contribute to the endurance of vertical, patron-client relationships."[135] As long as criminal procedure effects this outcome in Japan, it accords with the overall values and beliefs of Japanese society and thereby serves valid ends.[136]

1. How the Right to Counsel in Japan Vindicates Substantive Criminal Law Goals

If there is one area where Japanese authorities seem to excel, it is in their apparent ability to suppress crime and solve criminal cases when they occur. As Professor Bennett explains:

> The Japanese criminal justice system presses ever closer to, as it were, perfection. Clearance rates . . . improved from 69.4% of reported eases in 1982 to 73.5% of reported cases in 1987. . . . Prosecutorial performance has pressed to the inevitable plateau awaiting all percentages, improving from a 98.25% rate of conviction in 1949 until today an indicted suspect has literally but one chance in a thousand of avoiding conviction.[137]

Such statistics have led Japanese criminal procedure scholar Ryuichi Hirano to declare Japan's criminal procedure "abnormal" and "diseased."[138] He bases such remarks, at least in part, on the observation that "courts in Japan are 'places that confirm that the defendant is guilty'" rather than "'places that determine whether the defendant is guilty or innocent.'"[139] Before passing on the validity of such statements, one must delve into the manner in which the authorities determine guilt in Japan. From Hirano's statement above, however, it is apparent that there

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134. Hirano, *supra* note 63, at 130 ("Courts in Japan are 'places that confirm that the defendant is guilty'" rather than "places that determine whether the defendant is guilty or innocent.").

135. HALEY, *supra* note 79, at 180.

136. The system has a dark side, too, in the form of the extra-legal unchallengeable influence that groups have over individuals. *See infra* note 180 and accompanying text.

137. Bennett, *supra* note 72, at 67 (footnote omitted).

138. Hirano, *supra* note 63, at 129.

139. *Id.*

is no vibrant adversary system with courts of first instance playing a strong role in guilt determination.

"When an individual comes under suspicion of criminal conduct, the authorities [police and prosecutors] have wide discretion to investigate."[140] Although there is a warrant requirement textually similar to our own, Japanese courts interpret it to provide police with broad exceptions so as not to inhibit police investigation of crimes.[141] Searches and seizures do not provide the greatest source of evidence implicating a suspect. "For Japanese investigators, . . . the questioning of suspected criminals is considerably more important than searches and seizures. . . . Japanese police and prosecutors possess broad powers for preindictment interrogation."[142] As mentioned above, the preindictment arrest and detention may last up to twenty-three days with no serious court oversight.[143] Although courts do not convict defendants based solely on their confessions,[144] it is clear that confessions and suspect-defendant statements play a central role in any case that proceeds to trial.[145] Although there are several purposes for which police elicit confessions, here we are primarily concerned with the evidentiary value in helping police and prosecutors determine guilt.

Given the manner in which trials are conducted, Japanese Judge Takeo Ishimatsu views Japanese prosecutors as de facto judges. In a speech Judge Ishimatsu gave, he decried the "trial by dossier" system, whereby defendants are tried almost entirely based on evidence that prosecutors pass to judges in documentary form. He described the guilt-determination system thus:

> [T]rial by dossier . . . may be thought of in the following manner: Prosecutors, police and other investigators question victims, witnesses and other related persons, or undertake inspections. . . . Having thereby established their hunches . . . as investigators . . . they then undertake long and thorough . . . questioning of the suspects . . . [and] pursue confessions corresponding to the investigators' hunches. . . . They then put the results of the investigation, including these [uncounseled] statements, in order in accordance with their own hunches . . . and record and solidify those results in a detailed dossier . . . . [In addition,] a few articles of real evidence that have been seized by the investigators [are also admitted]. If this evidence is accepted, a guilty verdict can immediately be issued.[146]

On the basis of the dossier alone, courts can, and for the vast majority of cases do, convict defendants. "Further evidence against a defendant is almost never

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140. Foote, *supra* note 63, at 333.

141. *Id.* at 333-34.

142. *Id.* at 334 (footnote omitted).

143. *See* Ishimatsu, *supra* note 68, at 149. Ishimatsu explained, "with respect to preindictment detention judges are deprived of just about any chance to concern themselves with the treatment of suspects; releases that constitute a cancellation of detention are carried out on the sole determination of the prosecutors themselves." *Id.*

144. HALEY, *supra* note 79, at 132.

145. As mentioned above, the Japanese criminal justice system places great emphasis on confessions for *more* than just their evidentiary value. Defendant-confession and expression of genuine remorse lead to lenient treatment by the government and serve a rehabilitative and correctional purpose. *See supra* text accompanying notes 64-65.

146. Ishimatsu, *supra* note 68, at 146-47.

added at trial. Rather, the only new evidence is exculpatory evidence aimed at undercutting the results of the investigation."[147]

This process means, essentially, that trials in Japan do not serve the fact-finding function that they do in the United States. Nor does defense counsel vigorously question the evidence which investigating authorities have developed and admitted to the judge. As Judge Ishimatsu explained: "criminal trials—and in particular the fact-finding that lies at the heart of trials—are conducted in closed rooms by the investigators, and the proceedings in open court are merely a formal ceremony."[148]

Thus, in the formal criminal justice sphere, Japanese defense counsel plays a *very* limited role: they may not attend interrogations, during which police and prosecutors gather confessions which lead to more physical evidence. If one accepts the view of prosecutors as judge and fact-finder, there is a certain logic to preventing counsel access to interrogation sessions. It would be the equivalent of interposing counsel between judge and defendant in a U.S. court setting. In Japan, defense attorneys have an opportunity to challenge the admissibility of a confession on the grounds that it was not voluntary, but this challenge rarely succeeds. As Professor Hirano points out, "[w]hen the contents of the confession comport with other evidence and are accurate, [interrogation] questioning is not called into question."[149] And, even when a confession itself is thrown out, other evidence obtained as a result of that confession will remain admissible and support a conviction.[150] Thus, with regard to fact-finding and investigations, the defense counsel does not play much of a formal role.

That noted, one does not understand *why* a defendant's right to counsel is highly circumscribed until one comprehends that investigators, prosecutors, and judges prize confessions for their "correctional" value:

> A fundamental aim of the criminal process in Japan is correction, not just determination of guilt or punishment of the offender. Law enforcement officials at all levels tend to share this objective. . . . Thus, their roles are not confined to the formal tasks of apprehending, prosecuting, and adjudicating. Rather once personally convinced that a suspect is an offender, their concern for evidentiary proof of guilt shifts to a concern over the suspect's attitude and prospects for rehabilitation and reintegration into society, including acceptance of authority. Leniency is considered an appropriate response if the correctional process has begun.[151]

The contrast between the U.S. and Japanese approaches to vindicating the substantive criminal law goal of determining guilt appears striking to students of American criminal process. In the United States, judges and juries determine guilt based on evidence adduced at trial, which the prosecutor and defense

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147. Hirano, *supra* note 63, at 135-36.

148. Ishimatsu, *supra* note 68, at 143.

149. Hirano, *supra* note 63, at 137.

150. *See, e.g.*, Abe v. Japan, 20 Keishu 6 at 537, Supreme Court, Second Petty Bench, 1 July 1966 (Court held that prosecutor's promise to suspend prosecution in exchange for confession rendered defendant's confession inadmissable at trial. The Court upheld Abe's conviction, however, because other evidence existed sufficient to support the conviction.); *see also* Foote, *supra* note 63, at 337.

151. HALEY, *supra* note 79, at 133.

counsel vigorously support or challenge. Society places a premium on procedural correctness because of how severely it can affect the evidentiary record and, thus, the ultimate outcome of the trial. Only after a court in the United States finds a defendant guilty can the punishment or correctional process begin.

By contrast, guilt determination in Japan is a highly factual inquiry by police and prosecutors. They possess great discretion to pursue almost any line of evidence, producing investigations unhobbled by the procedural constraints found in the United States. Furthermore, correctional purposes infect the investigation and guilt-determination phases.[152]

The early introduction of correctional purposes into investigatory stages further explains the limitations on the formal right to counsel in Japan. Defense counsel in the United States *add*, in principle, to the determination of guilt; the defendant must have meaningful access to counsel to investigate facts independently and question the prosecution's evidence before a neutral fact-finder. Punishment or correction cannot constitutionally begin until after the prosecution proves the defendant's guilt. In Japan, correction begins when the prosecuting authorities believe in a defendant's guilt and elicit a confession. Japanese authorities view a confession as a "means [of] getting the suspect to accept moral responsibility,"[153] the starting point for rehabilitation. This approach leads to different emphases in the counsel rights of defendants. Looking to the U.S. model, Japanese citizens, policy-makers, and criminal justice authorities naturally believe that the presence of counsel at interrogations would reduce the number and quality of confessions, which would not only result in fewer successful prosecutions, but in a less efficacious correction process. Simply put, any barrier to confession would impede defendants from taking moral responsibility and hinder their reentry into society.

Less procedure, of course, means less procedural protection for innocent suspects and defendants. Given the heavy reliance on confession, police and prosecutors are under a lot of pressure to get suspects to confess once they are convinced of a suspect's guilt.[154] As has been shown, few defendants actually get relief from conviction, even if their confessions are involuntary, as long as they are reliable.[155] To counteract this concern, individuals wrongfully prosecuted, or even indicted, may sue for damages. There is no real viable protection for an innocent suspect, however, at least at the front end of an investigation, unless the authorities themselves believe that the suspect is innocent.

Thus, unlike the U.S. system where defense attorneys ideally play an active role in vindicating substantive criminal law goals by helping determine guilt or innocence at trial, in Japan, counsel plays an extremely limited role. Defense counsel in Japan may even encourage his client to plead guilty, much as an

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152. In effect, this creates a "presumption of guilt" as soon as the police and prosecutor believe the defendant is guilty.

153. Foote, *supra* note 63, at 337.

154. HALEY, *supra* note 79, at 131. Moreover, "obtaining a confession becomes a primary aim in all investigations, and as a result, police detectives emphasize the necessity for direct interrogation of suspects and . . . detention before arrest." *Id.* at 131-32.

155. Foote, *supra* note 63, at 337.

American attorney would at plea-bargaining stages, which in turn might lead to a reduced sentence or suspension of prosecution.[156]

Although the defendant's right to counsel is highly circumscribed with regard to the vindication function of criminal procedure, the defense counsel in Japan serves a legitimation function in the informal criminal justice system and in the informal extra-judicial system of social control.

2. How the Right to Counsel Performs a Legitimation Function in Japan

Although innocent suspects whom authorities believe are guilty do not receive procedural protections, such as the right to deal with authorities through counsel as in the United States, in the long run, guilty suspects can benefit greatly from the Japanese system. "Prevailing societal values in Japan, whatever the historical origin, do encourage the use of confession and, more important, permit a lenient response."[157] Though defense counsel play a limited role in the formal system, within the *informal* context Japanese defense counsel play their most vibrant role.

As discussed above in the U.S. context, the right to counsel "perform[s] a legitimation function by resolving state-citizen disputes in a manner that commands the community's respect for the fairness of its processes as well as the reliability of its outcomes."[158] This function, however, need not be purely within the formal criminal justice system. That is especially true for a country like Japan, which relies heavily on informal mechanisms for social control and permits police and prosecutors a great deal of discretion.

"[T]he primary role of the defense attorney [in Japan] is in the pre- and post-trial stages of the criminal process, in working for suspension of prosecution or for leniency in sentencing, and in appealing cases where a perceived injustice has taken place."[159] The role that victims play in the system demonstrates the truth of this statement. "Restitution is ordinarily made and the victim has a voice in the authorities' decisions whether to report, to prosecute, or to sentence the offender."[160] Although it is ultimately the authorities' decision whether or not to prosecute, defense counsel works with the defendant to contact all parties involved, make restitution, and convince victims to support lenient disposition. If the charge is fairly serious, for example rape or murder, and the authorities press forward with prosecution, "the role of the defense attorney becomes one of persuading the judge to impose a lenient sentence . . . [by] effectively present[ing] factors in mitigation of the offense . . . . The defense attorney . . .

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156. In the *Abe* case discussed above, *supra* note 150, defense counsel told the defendant: "[I]f you have indeed [committed the crime], you should admit it. You will be much better off to admit it quickly than to hurt yourself by continuing to talk foolishness." HIROSHI ITOH & LAWRENCE WARD BEER, THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS, 1961-70 at 167 (1978).

157. HALEY, *supra* note 79, at 135.

158. Arenella, *supra* note 97, at 188 (footnote omitted).

159. CASTBERG, *supra* note 63, at 82.

160. HALEY, *supra* note 79, at 130.

serves as an advisor to the defendant as well, suggesting . . . how best to make restitution and to show remorse."[161]

Given Japan's pervasive informal control mechanisms, the informal sphere of operation for defense counsel is deceptively great. By U.S. formalistic standards, the role of defense counsel seems inadequate, and the plight of presumed-guilty defendants seems equally hopeless. The reality, measured in terms of *final disposition*, is quite different due to the leniency with which most courts treat defendants:

> Japan is extraordinarily lenient. Large numbers of offenders identified by the police are never reported as suspects to the procuracy. Of those reported, most are convictable. Yet the vast majority are allowed to take advantage of summary proceedings that result in minor fines equivalent to a few hundred dollars. For many others prosecution is routinely suspended . . . [and of those convicted] sentences are generally suspended in more than half of all cases.[162]

This predisposition towards leniency translates into more viable operating room for defense counsel than one would notice when looking only at the formal, procedural context in which authorities handle defendants.[163] Defense counsel, thus, serve the legitimation function by helping resolve state-citizen disputes, while at the same time helping to smooth defendants' reentry into community, family, and firm. This reintegration of defendants into society, in turn, reinforces those informal social control mechanisms because authorities only reintegrate offenders when they believe the informal social controls will prevent future aberrant behavior. In this way, criminal procedure accords with the values, beliefs, and structures in society.

In sum, the right to counsel in Japan does serve the vindication function of criminal law, but in a quite different way than in the United States. Because police and prosecutors, rather than courts, determine a defendant's guilt and rely heavily on confessions for their evidentiary and correctional value, a right to vigorous counsel during the formal investigation would undermine the substantive correctional goal which inheres early in the process. Since the Japanese view correction as *the* primary and ultimate goal, the right to counsel serves to vindicate substantive criminal law largely by remaining outside the formal investigation. The absence of defense counsel from investigations, however, obviously results in quite serious risks of coercion to both innocent and guilty suspects. For the Japanese, lenient treatment after confession offsets the serious threat to individual liberty where procedural protections are lacking. In the case of the innocent defendant, the system's reliance on weak procedural protection and early correction of suspected offenders amounts to a lose-lose proposition. But Japanese society does not view the authorities or their

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161. CASTBERG, *supra* note 63, at 79 (footnote omitted).

162. HALEY, *supra* note 79, at 129.

163. This author has not, however, found statistics which explain the extent to which—by percentage of cases—defense counsel plays an integral role in negotiating with victims and authorities for more lenient treatment. This Note concerns the functions which the right to counsel plays in the criminal justice system and assumes that there is a great deal more operating room for defense counsel informally—both in society-at-large and in those areas where authorities exercise extra-legal discretion—than in the formal system.

procedures with such distrust. Whereas people in the United States view defense counsel as important to preserve the integrity of the guilt-determination phase, "it is probably safe to say that the view that trials by investigators are proper has solid support among the people of Japan."[164]

The right to counsel in Japan also performs a legitimation function, though in informal settings, with more efficacy than at first is apparent. Given police and prosecutorial discretion to drop cases and suspend prosecution, defense counsel has a very real chance to help his client while at the same time legitimizing the system which trusts the authorities with such autonomy. Furthermore, the right to counsel legitimizes the informal social control mechanisms by reinforcing the primacy of community-group control. Defense counsel helps legitimate Japan's system by playing the role of intermediary between victim, offender, law enforcement authorities, and the community, firm, and family to which a guilty defendant will return.

Just as the right to counsel in the United States serves functions of a criminal justice system which grew out of its own particular history, the same is true of Japan. Whereas the adversarial system and the right to counsel in the United States stem from a distrust of government power, Japan's current system stems from a history which trusts government. Part of this trust rests on a history of relative group autonomy. As long as groups[165] maintained internal harmony, there was no need for the state to exert control over members of the group.[166] The Japanese also have trust that their government is a guarantor of freedom, not a power which takes freedom away. As noted in a Joint Declaration by Japan's Commission on the Constitution:

> [T]he nation and state power itself have eome to the point where they are structurcd democratically. State power in itself is not antagonistic to individual rights and freedoms, rather, it is in a position to become thcir most powerful guarantor . . . state power makcs manifest to the maximum degree the rights and freedoms of the individual members of the nation.[167]

This trust in authority is evident throughout Japan's criminal justice system and in its criminal processes. Professor Foote describes Japan's criminal justice system as a benevolent-paternalism model. It is benevolent insofar as the goal is not merely to punish but to correct offenders. "[T]he term 'benevolence' . . . refers to an underlying orientation toward specific prevention. The goal of a benevolent system is to achieve reformation and reintegration when possible

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164. Ishimatsu, *supra* note 68, at 146.

165. "Groups" in this context refers to social groupings along hamlet or village lines, in the past, and more current social groupings such as family and firm today.

166. Concern for autonomy and the perccption of outside intcrvention as a threat is another widely recognized characteristic of Japanese organizational behavior. . . . Collective rather than individual action enhances the ability of the individual to achieve such freedom from governmental control and, in the process of the subordination of individual interests to the group . . . each [group] "has virtually complete autonomy."

HALEY, *supra* note 79, at 176-77 (citation omitted).

167. JAPAN'S COMMISSION ON THE CONSTITUTION: THE FINAL REPORT 273-74 (John M. Maki trans. & cd., 1980).

through lenient sanctions tailored to the individual circumstances of the offender."[168] The system is "paternalistic" in that it "depends on great trust in public officials, for it vests great discretion in them at nearly all stages of the system."[169]

As demonstrated above, this system characterized by benevolent-paternalism has wide support among the populace, resulting in part from society's heavy reliance on informal mechanisms of control which reduce the need for institutional or formal interference, and in part from society's general belief that government protects but does not inherently threaten individual autonomy. But where paternalism takes this form and "reigns supreme over every stage of the process[,] . . . defense counsel plays no more than a limited role . . . ."[170] Giving that much discretion and trust to officials can, and does, lead to significant intrusions into personal autonomy. This intrusiveness does not alter the fact that the right to counsel in Japan, like the right to counsel in the United States, does serve the vindication and legitimation functions of criminal justice in that society.

IV. LESSONS LEARNED

Comparing the role of defense counsel in Japan and in the United States demonstrates that the textually similar "rights" differ significantly in practice. They protect different interests, each seeming to its own society to be in the best interest of the individual and society as a whole.

The United States, with its adversarial system and in-trial guilt determinations, ideally gives criminal defendants the right to counsel to protect them from coercive custodial interrogations, to add prophylactic protection to the right against self-incrimination, and to protect the integrity of *trial* by balancing power between defendant and state. The system is premised on a distrust of government power and focuses on the threat to individual liberty. Such concerns seem natural to U.S. citizens—especially those citizens who belong to groups which police traditionally target—who live in a society where the state holds a virtual monopoly on coercive power.

Japan, on the other hand, gives its citizens a very limited formal right to counsel. Defense attorneys' activities in Japan find greater expression in the informal negotiating and mediating role between guilty offender, law enforcement authorities, and the communities to which the offender will return. This role is natural to the Japanese who trust their officials to make accurate guilt determinations and begin the correctional process as soon as possible, even before reaching trial. Where the informal system of control predominates in Japan, the defense counsel can do his client the most practical good by helping smooth the guilty offender's reentry into the informal social structure.

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168. Foote, *supra* note 63, at 363.
169. *Id.* at 360.
170. *Id.* at 361.

A. Who Has It Right?

Many authors, scholars, and students who compare cultures often look for aspects which each country can transplant "back home" to fix this or that problem. Given the numerous failures the U.S. criminal justice system has experienced in controlling crime, Japan indeed looks alluring with its low crime rates and high conviction rates. No other industrialized democracy can boast Japan's statistics on crime control. This Note has examined the right to counsel in each country, not with an eye towards borrowing specific tools to control crime, but to elucidate some of the reasons *why* each country implements certain rights and the form they take. Such a study reminds society of the history and social structures which produced those rights and, by doing so, helps society reevaluate whether changes in the implementation of such rights are desirable. The yardstick for measuring the desirability for change must always remain the society from which the rights emerged and to which they will apply.

As for the question of "who has it right," there is no clear cut answer. Each country benefits from a reevaluation of some of its criminal processes, based on an examination of what the other society does. With that in mind, the following discussion attempts to draw some lessons to the fore.

B. Lessons for the United States

First, this Part suggests some specific changes to the way the United States implements the right to counsel, reflecting the lessons above but which accord with our underlying adversarial philosophy. While this Note has not focused much attention on what happens to offenders once convicted, there can be no doubt that the American criminal justice system is much more punitive than Japan's. Examining the right to counsel as it relates to both the Fifth and Sixth Amendments highlights a pervasive theme: that the state holds a monopoly on coercive authority and implements the coercive aspects of that monopoly in ways which Americans believe require limits on the authority to do so. The limit on authority to punish does not stop the state from instituting extremely harsh penalties, but merely requires that the state follow certain procedures which reliably guarantee society that they are punishing the correct person. Hence, the system has certain built-in biases and presumptions against the state.

But is severe punishment the best approach? If the goal is to deter crime, instituting severe punishments has not succeeded. Though we incarcerate offenders at extremely high rates, we do not have a correspondingly lower rate of crime. One criminologist has described the current prison system in the following way:

> These abominable and unjust institutions do not effectively protect citizens from criminality but instead provoke new criminality by making inmates less fit to live in society than they had been before incarceration. It has been known for ages that prisons are superb schools for criminal education. They

> most certainly do not deter crime; they stigmatize offenders and are, economically speaking, a disaster.[171]

This view has wide support. The problem of crime stems from a wide range of social phenomena and goes far beyond the criminal justice system's ability to contain it. Although public opinion polls routinely rank "fear of crime" as the top concern of citizens,[172] the amount of "getting tough on crime" by Congress, state legislatures, or courts does not seem to effectively reduce crime by commensurate rates.

While this topic exceeds the scope of this Note, the right-to-counsel analysis above has demonstrated that aspects of Japan's system offer an alternative model regarding the punitiveness of harsh prison sentences. As shown above, Japan has two effective crime control systems: one formal, another informal. In Japan, defense counsel has the opportunity to participate much more vigorously in the informal system. That informal system, as shown above, serves to reinforce Japan's formal system in ways which allow it to focus on specific prevention rather than punishment. Although homogeneity, low poverty rates, low unemployment rates, and high literacy rates all undoubtedly contribute to lower crime generally, the informal social control mechanisms of family, firm, and friends add tremendously to deterrence and prevention of crime. American society overemphasizes the role of government (making detailed regulations, serving as arbitrator between citizens, controlling aberrant behavior) and formal process, relying on it to the exclusion of informal social mechanisms. This overemphasis on government solutions may in fact deprive society of its informal institutions which reinforce the goals and messages of the formal system. There is only so much that society can accomplish through its formal governmental institutions.

The lack of strong informal social control mechanisms, and reliance instead on formal government processes obviously has had benefits, such as civil rights for many people who previously suffered systematic discrimination. But there has also been a withdrawal, perhaps not totally unrelated to government's increased presence (and people's reliance on it), of informal social groupings who previously dealt with aberrant behavior on their own. Although there are certainly negative aspects to relying on informal social control,[173] for example, subjugation of individual autonomy to the group, Japan demonstrates that there are benefits for crime control that are worth studying.

As for the formal criminal justice system, Japan offers alluring correctional aspects. The U.S. system is extremely punitive and does not seem to correct

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171. HERMAN BIANCHI, JUSTICE AS SANCTUARY: TOWARDS A NEW SYSTEM OF CRIME CONTROL at viii (1994). Bianchi argues for new modes of thinking when addressing problems of crime control. Several of his ideas resemble aspects of the Japanese system: bringing victims into the process concerning restitution and offender disposition, establishing processes which recognize offender remorse, and working to reform, rather than merely punish, offenders.

172. *See* Tom Morganthau et al., *The Lull Before the Storm?*, NEWSWEEK, Dec. 4, 1995, at 40 (noting that the majority of Americans routinely list crime as one of their most important concerns).

173. The "dark side" of unchecked informal social control is discussed below. *See infra* note 179-80 and accompanying text.

offenders once they find their way into the system. Japan more effectively corrects offenders and reintegrates them back into their communities which, as already discussed, helps to maintain order and reduce future aberrant behavior. Japan has remarkable recidivism rates.[174] Part of Japan's recidivism rates may be attributable to the leniency with which Japan treats suspects and defendants after they confess; and part of such rates may be attributable to good prediction by authorities based on offender characteristics (age, family relations, employment, past criminal history, etc.). In either event, the statistics are noteworthy for the simple fact that they demonstrate that a society can be lenient in the way it punishes offenders and still enjoy reduced crime and recidivism. Analyzing the right to counsel in Japan has highlighted the different approach that Japan takes from the United States in offender disposition. Although beyond the scope of this Note, Japan's success at low recidivism, while maintaining a lenient environment at disposition, should lead all Americans, not just policy makers, to reevaluate some basic assumptions about the causes of crime, the benefits of healthy non-governmental mediating institutions such as family, firm, church, and friends in suppressing aberrant behavior, and the relationship between punishment, crime control, and deterrence.

More directly applicable and within the scope of this Note, however, there are some aspects of the U.S. right-to-counsel jurisprudence which need reevaluation in light of the analysis above. Here, courts need to consider the philosophical and practical underpinnings of the adversarial system, and to evaluate whether the right to counsel serves those animating premises.

As previously explained, the Fifth Amendment right to counsel grew out of concerns about coercion in custodial settings and violations of the privilege against self-incrimination stemming from that coercion. Police may still question suspects after apprising them of their rights, but they must get a voluntary, knowing, and intelligent waiver before using evidence in the prosecution's case-in-chief.[175] The Supreme Court has balanced concerns with coercion in crafting the *Miranda* rules in a way that does not unduly limit the ability of authorities to

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174. A Ministry of Justice study found that:

> Recidivism, as defined by criminal conviction within three years, increased with the severity of the initial disposition, but remained less than 50 percent in all categories except upon release after incarceration for the term of the sentence. The aggregate rates by disposition were as follows: suspension of prosecution—11.5 percent; fines—16.3 percent; suspension of execution or sentence—21.5 percent; suspension of execution of sentence with probation—35.4 percent; release by parole—44.5 percent; and release after termination of sentence—57.2 percent.

HALEY, *supra* note 79, at 136 (citations omitted).

175. Evidence is admissible for impeachment use, however, if taken in violation of *Miranda*. Some scholars, in calling for *Miranda*'s overruling, have noted that *Miranda* lacks constitutional basis and, thus, exceeds its authority to craft mere prophylactic rules which bind state courts. JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 173-98 (1993). Others argue that allowing police any use of statements taken in violation of *Miranda* encourages police to ignore its mandate. Again, this Note does not explore the reality of damage to a defendant who takes the stand in his own defense after incriminating statements have been taken in violation of *Miranda*. Emphasis is given to waiver standards and potential for police-defendant interaction.

speak with a suspect or for a suspect to waive his rights and speak with authorities.

Although no hard statistics exist to prove it, Japan's system seems to demonstrate that there may be something to the truism that "confession is good for the soul." As noted above, Japanese authorities place great emphasis on confessions for both their evidentiary and correctional value. While the United States would not wish to import the methods Japanese authorities use to elicit such confessions,[176] at a minimum, the U.S. should create an atmosphere conducive to making confession for offenders inclined to do so.

For that reason, the *Miranda-Edwards* approach—apprise suspects of their right to silence and counsel, while allowing police to ask if they wish to waive these rights—seems to walk the appropriate line between respect for the suspect's free will and the investigators' desire for helpful information. It allows the suspect to make an informed decision about whether to speak to the police. Case law such as *Farretta* emphasizes this lesson and accords with historical concerns.

By contrast, the Sixth Amendment jurisprudence, especially under the *Jackson* rule, seems to go beyond the point where the defendant is given an opportunity to take advantage of adversarial proceedings, and in fact encourages him to do so. *Jackson* held that after formal proceedings have begun and a defendant has invoked his right to counsel, police may not approach the defendant to seek waiver or to ask any questions. As noted above, concerns for fairuess of trial and the dignity with which the government treats defendants motivates Sixth Amendment jurisprudence. Our system prizes equality; Fifth and Sixth Amendment cases recognize that equality and fairness can be compromised before trial. Courts determine guilt, based not just on simple facts, but on a combination of facts, including moral culpability, and procedural correctness.

That noted, Japan's approach demonstrates, at least for guilty offenders, that repentance, acceptance of authority, and perhaps restitution, help ease an offender's conscience *and* his path back into society. Again, while the United States would not countenance the procedural environment in which Japanese authorities obtain confessions, the United States does not want to unnecessarily inhibit a defendant who experiences feelings of remorse from coming forward. Confession would redound to his benefit, perhaps in a reduced sentence, and perhaps in simple psychological relief for having made an apology.

The problem with the *Jackson* rule, as experience demonstrates, is that once a defendant meets with his attorney, at least in the earliest stages of investigation, the attorney is likely to tell his client to exercise his right to remain silent.[177] Such

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176. Again, this fear of coercion goes back to the issue of trust in authorities and the perception that checks need to be placed on police—especially in "inherently compelling" custodial settings—to preserve a defendant's right against self-incrimination and involuntary confessions. This concern is highlighted among certain sub-groups in society who perceive themselves as the object of undue police attention to begin with. *See supra* note 29 and accompanying text.

177. "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." Watts v. Indiana, 338 U.S. 49, 59 (1949). As demonstrated in the *Strickland* line of cases above, *supra* note 67, part of the defense counsel's

advice naturally tends to encourage defendants, even guilty defendants with feelings of remorse, to take a more adversarial position than perhaps they otherwise would.

Imagine this scenario under *Jackson*: A person commits a crime, or commits an act accidentally which looks like a crime. Out of fear of the harsh penalties he may face, he remains silent at first, even through the *Miranda* custodial interrogation setting. Eventually, police gather just enough information to indict him. At arraignment, the (now) defendant invokes his right to counsel under the Sixth Amendment. At this point, the police are not allowed to ask him whether he would like to talk, nor whether he would like to waive his rights to counsel and silence and explain the circumstances. Suppose this defendant, no longer in the frightening custodial setting where he first invoked his rights, feels remorse for his actions (purposeful or accidental). If he were otherwise inclined, but simply too timid to approach police himself, his attorney would most likely not support such a move. The attorney would give advice which is more likely to make the defendant further solidify his nascent adversarial position.

This strategy may very well lead, ultimately, to some plea agreement which would not significantly differ from a scenario where he went to the police immediately. But it may not. Police may become more convinced of his guilt, or at least that he is hiding something. Such perceptions might, naturally, lead police to investigate the incident in ways which conform to those misperceptions. Facts and evidence do not explain themselves; at times, people view evidence differently depending on their preconceptions. Given this scenario, the inability of police to ask the defendant, even once after arraignment, if he would like to speak with them could harm him. In this way, *Jackson* may harm both the defendant's long term best interests and society's as well. This hypothetical may seem fanciful: people may argue that it gives police too much credit because they investigate *only* to confirm guilt and frequently disregard exculpatory evidence; or that it underestimates the ability of a defendant to simply seek out the police for more questioning and to make a confession, which he may do under *Jackson*.

Such criticism misses the point that *Jackson* pushes a defendant who might be wavering or confused *into* an adversarial position which could hurt him from both an evidentiary and a confessional (in the remorse-sense of the word) standpoint. A better approach would allow the defendant to invoke his Sixth Amendment right, but then allow the authorities their one chance to approach him and see if he wishes to talk. Maintaining the *Johnson* waiver standards—that waiver must be "knowing and intelligent"—affords the remorseful-but-intimidated defendant both the protection of his rights and the opportunity to clear his conscience.[178] Such an approach not only implements the kinder lessons

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role includes conducting an independent investigation. It is logical to conclude that until an attorney has done some investigating, the prudent attorney will advise the defendant to remain silent, lest any statement be used against him in some manner.

178. This opportunity to clear one's conscience, as Japan's approach demonstrates, could lead to many beneficial results: a defendant's sense of absolution; a defendant's ability to clear up police misperceptions, thereby giving investigating authorities a different perspective from which to view evidence, which, in turn, may lead to a less harsh disposition. While federal courts and many state courts are bound by sentencing guidelines, there is room for imposition

of Japan's system, but does so in a way that substantially accords with the animating premise of Fifth and Sixth Amendment jurisprudence: respect for individual dignity, fair treatment, free will, and the desire to make the adversarial processes *available, not mandatory.*

C. Lessons for Japan

Having examined some of the lessons from Japan's formal and informal criminal justice system, Japan, too, might benefit from a good look at America's approach. The following discussion, like that above dealing with the United States, examines the concepts and ideas which animate Japanese criminal process generally, and then suggests particular modifications to Japan's right to counsel specifically.

This Note has utilized Professor Foote's benevolent-paternalism model as a framework for discussing Japan's criminal justice system. The examination, until this point, proceeded from a neutral, nonjudgmental perspective. Although the "benevolent" emphasis on specific prevention clearly holds lessons for the United States, Japan might benefit from asking itself some tough questions about the "paternalistic" aspects, both in the formal and informal systems which reinforce each other.

Beginning with the informal system, as Haley notes, "[t]here is . . . a dark side to Japan's resort to social controls. Implicit in reliance on community rather than the state in maintaining social and economic order is the substitution of private for public means of direct coercion."[179] The fact that Japan's government does not interfere with the informal social control mechanisms allows individual groups to exert extreme coercion on individual members. This approach, which infects the formal systems of control, obviously has the benefit of suppressing aberrant behavior, but it also remains insulated from constitutional and governmental oversight, and leaves weaker individuals and minorities without effective legal recourse.

Japanese authorities, as actors in the paternalistic model, tend to treat suspects and offenders as errant children. Most people would agree that there are some pretty unpleasant aspects to living in the kind of family which presumes guilt. A presumption of guilt liberates the "father" to exert a great deal more coercion than a presumption of innocence (or at least no presumption). The same societal forces which undergird the informal system—deference to authority, trust in officials, overwhelming desire to suppress aberrant behavior—lend credibility and almost unquestioned discretion to law enforcement authorities.

In effect, these societal attitudes lead individuals suspected of crime to behave in ways that render police and prosecutor activities beyond the scope of constitutional oversight. "Voluntary accompaniment" can obviously be a good

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of sentences below the minimum, at the government's request, for defendants who render "substantial assistance" to authorities investigating other crimes or suspects. 18 U.S.C. § 3553(e) (1994). There might also be room for further lenient disposition if defendants come forward with full confession—whether or not the government gleans useful information from that confession. 18 U.S.C. § 3553(f)(5) (1994).

179. HALEY, *supra* note 79, at 183.

thing if truly voluntary; it may even be a good thing if not voluntary, as long as the suspect is guilty. But for weaker-yet-innocent individuals presumed guilty, the price seems too high. Although Japan is not likely to rethink the informal social ordering which suppresses aberrant behavior,[180] state *authority* is diminished when actors in the formal system coerce individuals in ways which resemble the informal social control.

Although the U.S. criminal justice system seems "process-happy," there are valid reasons for the state to follow procedural rules when acting in an official capacity. Japan should ask itself what differentiates formal state action from informal group action in the administration of justice. The United States has answered that question in a way which places importance on keeping society ordered *according to rules.*

The Japanese, looking at the U.S. approach to procedural correctness, should ask themselves: if police and prosecutorial discretion allow them to act in ways which go beyond formal oversight and constitutional scrutiny, how does their behavior differ from that of private enforcers? If part of the goal is to get individuals to accept moral responsibility *and* respect authority, how should suspects and defendants recognize the appropriate authority as anything substantially different from any other, stronger opponent who does not follow rules? The more police and prosecutors rely on extra-legal processes, a suspect's or defendant's acceptance of authority becomes less meaningful because it is based on the threat of punishment instead of respect for society's rules. At some point, and certainly for innocent suspects, a confession signals only that a suspect has bowed to power, not to authority.

While Japan may not be quite to that point, several recent release and retrial cases have shocked the ordinary Japanese citizen and made many question their faith in criminal justice authorities.[181] This observation relates precisely to Geertz's statement in the introduction. There must be more than naked power which justifies the action of the state and the continued support from its people. Professor Hirano has made the following observation:

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180. Every year the country reexamines the coercive aspects of society which lead to a problem of "bullying" in the schools and large numbers of suicides. Newspapers dutifully report such instances and pose questions which highlight pressures which the social order creates:

> In Japan the victims of bullying are considered as much at fault as the bullies. Because of the country's emphasis on a group mentality, any child who sticks out from the crowd is penalized. Schoolchildern follow the old Japanese adage: "The nail that sticks out must be hammered down".
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> ....
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> According to Japanese education ministry statistics nearly 60,000 cases of bullying were documented last year and five children committed suicide as a result of being tormented at school. the ministry believes the problem is even more widespread as the majority of incidents go unreported.

Japan Begs for Advice to Beat School Bullies, SUNDAY TIMES, Oct. 6, 1996, *available in* LEXIS, World Library, ALLWLD File. One never sees, however, any large-scale change.

181. "[I]n my view, much more deep-seated problems [in criminal procedure] remain unresolved. In fact, the troubled state of criminal procedure in Japan has been brought to light recently by the various retrial cases . . . ." Hirano, *supra* note 63, at 129.

> [P]ersons being detained in holding cells . . . [and] questioned in closed rooms under the complete control of the police . . . [are] humiliat[ed]. Police in Japan seek to maintain utmost secrecy about the circumstances of questioning in holding cells. *This is probably because they are aware that they would be subjected to great criticism if those circumstances were to become public.*[182]

With that observation in mind, this Note suggests specific changes to Japan's right to counsel which better accord with its own values, philosophy, and culture than the present approach taken.

At a concrete level, Japan should invigorate certain aspects of its right to counsel. The paternalistic aspects of the Japanese system—while apparently justified in the case of guilty suspects willing to take responsibility—has some pretty unpleasant repercussions on truly innocent suspects once authorities believe they are guilty. Putting aside for the moment the great trust the public generally has in its police and prosecutors, people do make mistakes. Authorities can interpret evidence in several ways. A problem with Japan's system is that there are few real "checks" on the discretion enjoyed by investigating authorities.[183] Once police and prosecutors believe a suspect is guilty, judges approve virtually all requests for detention. It is at this level that Japan could learn from the U.S. approach to the right to counsel, without significantly altering the current system for those who are guilty.

In the United States, defendants may expect their counsel to independently investigate the circumstances of alleged crimes. They do so from an advocate's position, tending to present as much exculpatory and as little inculpatory evidence as possible. An unbridled independent investigation clearly would, by Japanese standards, interfere with ongoing investigations and correctional processes if done in the exact same manner as in the United States. For instance, it might encourage guilty defendants to resist confessing, in the hope that their attorney might present enough exculpatory information to earn their release. Currently, however, once Japanese prosecutors feel a suspect is guilty, all energies shift into the correctional mode, requiring confession, and often disregarding—perhaps because they are no longer able to "see"—exculpatory evidence for its proper probative value.

Although a great percentage of confessions may be voluntary and reliable, few people, innocent or not, have the fortitude to resist twenty-three days of interrogation. For the innocent suspect especially, an invigorated defense counsel might play the following role: First, right-to-counsel jurisprudence should shift to allow defense counsel access to the prosecution's records. Although prosecutors currently need only share evidence they will produce in court,[184] for innocent defendants, this may lead to overlooking key pieces of exculpatory evidence. Second, the state should allow defense counsel more room to conduct an independent investigation. This investigation need not obstruct the prosecution's ongoing investigation, but would merely require some more

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182. *Id.* at 136 (emphasis added).

183. *See supra* notes 66-94 and accompanying text.

184. CASTBERG, *supra* note 63, at 77 ("Discovery is limited to evidence that is going to be introduced in the trial.").

(modest) access to suspects and more freedom to conduct external investigations. This invigorated counsel, to remain within Japan's current value system, would not be the unbridled advocate as in the United States, but rather, a "fresh pair of eyes." Counsel would present any information it uncovers to the neutral judge at the time the prosecution requests additional detention—the second ten-day period.

This proposal walks the line between the current approach with virtually no oversight, and the U.S. approach which would interfere with Japan's dual goals of evidence-gathering and specific prevention. Such an approach also reinvigorates the judicial oversight function of the pretrial detention system by giving judges more tools, specifically more evidence to weigh, in evaluating whether to order additional detention.[185]

As Hirano notes, "the real substance of criminal procedure in Japan lies in the investigative process. . . . [It] is an inquisitorial process performed by the prosecutors and police."[186] There is no reason, of course, that inquisitorial systems need be less respecting of individual rights. Germany bears this point out through various procedural requirements.[187] The statement that investigative process represents the "real substance of the criminal procedure" begs the question: if there is no judicial oversight into prosecutorial conduct, but law enforcement authorities enjoy unfettered discretion, where is the "real substance"? The benefit of invigorating the role of defense counsel is that it brings into alignment Japan's own procedural theory and investigatory practice (at least modestly); it cuts down on the potential for abuse of discretion by police and prosecutors and gives some measure of protection to truly innocent suspects.[188]

CONCLUSION

Both Japan and the United States benefit, not so much through imitation as through encouraged reflection, from a comparison of the right to counsel and how such a right fits into each criminal justice system. Examining the right to counsel in each country exposes a great deal more than merely the extent of such a right: it helps explain the underlying goals of criminal justice. To the extent that the right to counsel exposed goals beyond mere crime control, both Japan and the United States can learn to retool their rights, first, to accord more with their own systems' animating premises, and second, to take into account other objectives seemingly not comprehended by the current system.

The United States would learn that treating offenders leniently with an eye towards reintegration into society need *not* result in more crime. It would also

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185. Currently, Japanese judges grant 99.7% of prosecutors' applications for detention of suspects. *See supra* notes 78 and 143.

186. Hirano, *supra* note 63, at 131.

187. In Germany, courts, not prosecutors determine guilt, defendants and suspects have the right to refuse to testify, and for counsel to sit in. *Id.* at 130-34.

188. Presumably, guilty suspects will not benefit from the "fresh pair of eyes" because it will not convince a judge that the detention is inappropriate. Thus, for the vast majority of cases, there will be no detrimental effect on the investigation or rates of confession.

benefit the United States, at the private level, by educating citizens of the need for reinvigorated mediating institutions such as family, church, and local community. Japan demonstrates that, if strong enough, those institutions might facilitate a shift in the focus of criminal justice from one of punishment to one of rehabilitation and reintegration. With regard to the right to assistance of counsel itself, Japan's example teaches that staunch adversarial positions might preclude the correctional benefits which come from confession. While the United States would not go to Japan's non-process extreme, it still accords with the United States' own notions of procedural fairness and dignity to have a right to counsel which does not *encourage* defendants to solidify adversarial positions.

In a similar way, Japan can learn from the U.S. approach that formal processes serve as the primary means by which government differentiates its acts from mere private power, and thus earn respect and continued deference from its people. Although not at great risk presently, current investigative methods might not find as much support if made fully known to the public.[189] A partially invigorated right to counsel might restore some measure of procedure to its putative processes while not unduly burdening law enforcement efforts at correction and specific prevention—both laudable goals.

189. Hirano, *supra* note 63, at 136.