# COMPARING THE NOTIONS OF THE JAPANESE AND THE U.S. CRIMINAL JUSTICE SYSTEM: AN EXAMINATION OF PRETRIAL RIGHTS OF THE CRIMINALLY ACCUSED IN JAPAN AND THE UNITED STATES

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## I. INTRODUCTION

The focus of the U.S. criminal justice system is claimed to be procedural justice. It is believed that the way to protect the constitutional rights of the criminally accused is to make the system procedurally just. It is also believed that affording the accused full procedural protection will achieve the just result while checking the abuse of power by the state.[1] The Japanese system, on the other hand, emphasizes substantive justice. Unlike procedural justice, the principal aim of substantive justice is to achieve the just result, not the just process. If the accused is indeed guilty, the Japanese system is driven to find him guilty even if his rights are violated in the process of determining his guilt.

The differing emphasis of the two criminal justice systems has resulted in the different treatment and rights of the criminally accused in Japan and in the United States. However, the difference in the criminal defendant's rights during the pretrial stage of

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1. *See, e.g.*, Judge Peter D. O'Connell, *Pretrial Publicity, Change of Venue, Public Opinion Polls—A Theory of Procedural Justice*, 65 U. DET. L. REV. 169, 175-76 (1988).

the two systems is not a straight-line dichotomy, with a system protective of the defendant's rights on the U.S.'s side and a system compromising those rights on the Japanese side.

Despite its focus on procedural justice, the U.S. justice system currently condones conviction without a trial in almost 90% of the cases that end in conviction.[2] Trials that have been designed to protect the rights of the accused are now largely substituted by plea bargaining involving negotiations between the prosecutor and the defense counsel and a summary hearing before the judge. On the other hand, the Japanese criminal justice system, which has long been criticized by procedure-focused legal academics[3] for its de-emphasis on procedural protection of the criminally accused, disallows plea bargaining. Despite its focus on substantive justice, it prohibits conviction without a trial, based on the accused's confession alone.[4]

This paper examines the treatment of the criminally accused by the Japanese criminal justice system and our own in the pretrial stage and assesses how the respective emphasis and de-emphasis of procedural justice and substantive justice affect the fairness of each system with respect to the criminally accused as well as to the society as a whole. The paper also explores the existence of a heavy component of procedural justice in the Japanese justice system in the context of its constitution and the Code of Criminal Procedure providing for protection of the rights of the accused and the existence of an even greater component of substantive justice in the U.S. justice system in the context of plea bargaining.

The comparison with the Japanese criminal justice system serves as a mirror for re-examining our own criminal justice system. The seeming contradiction in the U.S. criminal justice system, between its systemic preoccupation with procedural justice and its prevalent employment of plea bargaining, warrants a renewed look at our system, especially in comparison with the Japanese system which is grounded in an opposing philosophy of justice. The changing climate of public attitude toward crime and the administration of criminal justice in America also forces us to

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2. U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAM, BUREAU OF JUSTICE STATISTICS, SOURCE BOOK OF CRIMINAL JUSTICE STATISTICS 1993 (hereinafter SOURCEBOOK 1993), at 530 (In 1993, 88.5% of the convictions in U.S. Sentencing Commission guideline cases were achieved by plea of guilty and 11.5% by trial).

3. *See, e.g.*, Kenneth L. Port, *The Japanese International Law "Revolution": International Human Rights Law and Its Impact on Japan*, 28 STAN. J. INT'L L. 139 (1991); Makoto Mitsui, *Introduction to Criminal Procedure*, 149 HOGAKU KYOSHITSU 51 (1993).

4. KENPŌ [Constitution] art. XXXVIII, para. 3 (Japan) ("No person shall be convicted or punished in cases where the only proof against him is his own confession.").

reassess the value of insistence upon procedural justice. At the same time, for the Japanese criminal justice administrators who have long been cited and criticized for compromising and, at times, even sacrificing the rights of the criminal defendants for the supposed good of the society, the same comparison with the U.S. justice system provides an opportunity to reassess the benefits and shortcomings of their own system.

## II. HOW PROCEDURALLY JUST IS OUR SYSTEM?

### A. CUSTODIAL INTERROGATION PRACTICE—EMPHASIS ON PROCEDURAL JUSTICE

The notion of procedural justice derives its origin from the concern for police or prosecutorial misuse of power against the criminally accused. To achieve procedural justice, the U.S. Constitution guarantees many rights specific to the criminally accused, among which the most important are the right against self-incrimination, the right to counsel and the right to trial by jury.[5] The U.S. courts, in interpreting these three rights, have in turn instituted many procedural protections to facilitate the accused's exercise of these rights as well as to prevent the police and the prosecutors from violating them. *Escobedo*[6], *Miranda*[7] and a series of cases following them[8] have effectively discouraged the police from using the pretrial police interrogation as means of obtaining a confession from the accused.[9] Moreover, *Miranda*, in mandating the state to appoint a counsel for indigent suspects if one was requested anytime during the interrogation[10], has sup-

5. Although there are many more constitutionally and otherwise guaranteed rights to the accused, for the purpose of this paper, only these three rights will be considered.

6. Escobedo v. Illinois, 378 U.S. 478 (1964).

7. Miranda v. Arizona, 384 U.S. 436 (1966).

8. *See* Arizona v. Roberson, 486 U.S. 675 (1988) (Although the request for counsel is invoked three days prior to the interrogation, the accused's statement was still held inadmissible under *Edwards*); Edwards v. Arizona, 451 U.S. 477 (1981) (affirmed the *Miranda* mandate that the interrogation must cease at the accused's request for counsel).

9. The safeguard procedures instituted by these cases are: (1) a suspect in police custody must be advised prior to questioning that he has a right to remain silent and that anything he says can be used as evidence against him; (2) a suspect has a right to have counsel present during questioning and the state will appoint a counsel if the suspect cannot afford one. The suspect must be told this before questioning; (3) the interrogation cannot proceed unless the suspect makes a voluntary, knowing, and intelligent waiver of the rights described above; (4) if a suspect indicates in any manner, at any time that he does not want to be questioned or that he wishes to consult with counsel, questioning must cease immediately; (5) violation of any of the above results in automatic exclusion of the defendant's statements at trial; and (6) the suspect's silence or refusal to answer during interrogation may not be used at trial. Miranda, *supra* note 7.

10. *Id.* at 472.

plemented the Sixth Amendment right to counsel, which attaches "at or after the time judicial proceedings have been initiated."[11] Thus, in the U.S. even an indigent suspect can realistically exercise the right to counsel as early as at his first police questioning. The right to trial by jury[12] has also been interpreted to include various rules of jury selection[13] and venue change to ensure the impartiality of the jury as well as an elaborate set of evidentiary rules to ensure the fairness of the trial.[14]

The judicial scrutiny of the state's misuse of power, however, has traditionally been focused more on the pretrial stage than on trial. Because trials involve non-state fact-finders, i.e. jurors, and are open to the public, the focus of procedural justice in the U.S. criminal justice system has been the pretrial rights of the accused. Indeed, the strictures of *Miranda*, among which is the suspect's absolute right to silence and to assistance of counsel from the very moment that he is under police custody, have achieved procedural justice for the accused by curbing coercive police interrogations. However, the granting of these rights to the accused was not costless to the society. It meant decreased cooperation from suspects and an increased burden on law enforcement. Since the implementation of the *Miranda* system, it has been reported that suspects who were advised of their rights *prior* to questioning were less willing to confess or even submit to questioning.[15] Moreover, the heightened standard for voluntariness of confessions has made it easier for the accused to exclude his confessions from evidence at trial.[16] Police investigators, no longer able to rely on pretrial interrogation, must of course conduct more independent field investigations. This transformation in police practice implies greater cost and a longer disposition time per case. Because many crimes are committed in the absence of eye-

11. Brewer v. Williams, 430 U.S. 387, 398 (1977) ("at or after the time that judicial proceedings have been initiated against [a suspect]—'whether by way of formal charge, preliminary hearing, information or arraignment.' " (citing Kirby v. Illinois, 406 U.S. 682, 689)).

12. Although this right is covered by both Sixth and Seventh Amendment, the Sixth Amendment right to trial is more relevant here.

13. Although some jury selection issues involving discrimination arguably violates the Fourteenth Amendment right of a particular juror, in the main the jury selection issue goes to the core of the defendant's right to trial by impartial jury.

14. These rules consist of traditional hearsay rules as well as numerous exclusionary rules instituted by the courts under Fourth and Fifth Amendment.

15. U.S. DEP'T. OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION (1986), 57-60 [hereinafter PRETRIAL LITIGATION] (stating that in Philadelphia, for example, the percentage of arrestees making statements to the police dropped from 90% to 41% after the implementation of the *Miranda* system.).

16. *Id.* at 60 ("[C]rime will not be effectively abated so long as criminals who have voluntarily confessed their crimes are released on mere technicalities." quoting the Senate Judiciary Committee Report, 1967).

witnesses, the transformation also implies greater difficulty for law enforcement officials to gather sufficient evidence for prosecution.[17] Because the prosecution bears a high burden of proof for conviction and yet resources available to them are limited, prosecutors will not choose to prosecute a case without sufficient evidence. Thus, while the enforcement of *Miranda* strictures may provide an ideological satisfaction of achieving procedural justice on a system-wide level, it also entails less vigorous prosecution of crime for the society.[18]

### B. THE JAPANESE PRETRIAL PRACTICE—EMPHASIS ON CONFESSION

In contrast to the U.S.'s pretrial emphasis on procedural justice for the accused, the pretrial focus of Japanese criminal justice system is to find the substantive truth. The substantive truth in any criminal case is nothing more than "who committed the crime and why" and the most natural source of information for this inquiry is the accused. Thus, unlike the U.S. counterparts, which are effectively barred from resorting to interrogation, the Japanese police and prosecutors heavily utilize pretrial interrogation to gather relevant information for prosecution.

Despite this divergence in utilization of pretrial interrogation, the foundational legal rules are remarkably similar in the two countries. The Japanese Constitution ("Kenpo") guarantees criminal suspects[19] the right against self-incrimination[20] and the

17. *See* Seeburger & Wettick, *Miranda in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1, 15-16 (1967) (in 20 percent of all cases confession is probably necessary to secure conviction); PRETRIAL INTERROGATION, *supra* note 15, at 94. *Contra* YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS 599 n.c (8th ed. 1994) (In criticizing the Pittsburgh study, the author noted that although the confession rate decreased post-Miranda, the conviction rate and clearance rate did not). *But see* Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment* (unpublished) 5-7 (1995) (criticizing Kamisar and other Miranda defenders in relying on conviction and clearance rates as a measure of the Miranda's cost by asserting "[t]hese are, at best, indirect measures of Miranda's effects on confessions" and indicates that the real cost of Miranda lies in the "lost confessions").

18. Paul G. Cassell, *How Many Criminals Has Miranda Set Free?*, WALL ST. J., Mar. 1, 1995, at A15 (pointing out the dramatic reduction in the U.S. confession rates since the adoption of the *Miranda* rules, Cassell argues that about 4.1 % of all criminal cases cannot be successfully prosecuted in America because of the requirements imposed by *Miranda*); Cassell, *supra* note 17, at 4-25.

19. The Japanese law draws a distinction between a suspect and a defendant. A suspect is one who has not been charged by information (there is no grand jury proceeding in Japan and therefore no indictment). A defendant is one who has been charged. For the purpose of this paper, the suspect and the defendant collectively will be referred to as the "accused."

right to retain counsel[21] and provides for exclusion of coerced confession[22]. It also guarantees due procedure by law for everyone[23] and even specifically proscribes torture.[24] In addition, the Code of Criminal Procedure grants the suspect or the defendant the right to meet with his counsel in the absence of a guard.[25] It is notable that the Japanese Constitution is more detailed than the U.S. counterpart in spelling out the specific pretrial rights of the suspect and defendant. It is further notable that the suspect's right to counsel and the exclusionary provision for coerced confession of the Japanese Constitution are adoptions of specific constitutional interpretations rendered by the U.S. Supreme Court.

Absent from the Japanese criminal procedure, however, are the strict mandates of *Miranda*. To be sure, the constitutional provision for exclusion of coerced confession bears striking similarity to the exclusionary rule mandated by *Miranda*. However, the basis of exclusion is voluntariness only and does not include technical violations by the police.[26] Thus, the legal rules governing pretrial interrogation procedure, as interpreted and practiced in Japan more closely track the pre-*Miranda* law of the U.S.

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20. KENPŌ art. XXXVIII, para. 1 ("No Person shall be compelled to testify against himself."). *Compare* KENPŌ art. XXXVIII *with* U.S. CONST. amend. V (". . . nor shall be compelled in any criminal case to be a witness against himself.").

21. *Id.* art. XXXIV ("No person shall be arrested or detained without being at once informed of the charges against him or *without the immediate privilege of counsel*; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel."). Note that there is no comparable U.S. *constitutional* provision providing the suspect with the right to counsel. The suspect's right to counsel in the U.S. is based on the Supreme Court's interpretation of the right against self-incrimination.

22. *Id.* art XXXVIII, para. 2 ("Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence."). Note, again, that there is no comparable U.S. constitutional provision.

23. *Id.* art. XXXI ("No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except *according to procedure established by law*."). *Compare* KENPŌ art, XXXI *with* U.S. CONST. amend V (". . . nor be deprived of life, liberty, or property without due process of law.").

24. *Id.* art. XXXVI ("The infliction of torture by any public officer and cruel punishments are absolutely forbidden."). *Compare* KENPŌ art. XXXVI *with* U.S. CONST. amend. VIII (". . . nor cruel and unusual punishments inflicted.").

25. KEISOHŌ [Code of Criminal Procedure], art. 39 (1) ("Any criminal defendant or suspect subject to a physical restriction can meet with his counsel or with an attorney to be appointed his counsel by a person with the appointing power, in the absence of a guard, or can with the same exchange documents or things.").

26. *See, e.g.*, Judgment of November 25, 1952, Saikōsai [Supreme Court], 10 Keishū 1245 (Japan) (holding that even if the confession was obtained while the suspect was detained illegally, that fact alone does not make the confession involuntary).

Moreover, the standard of voluntariness employed by the Japanese courts is rather lenient.[27]

In the absence of the *Miranda* strictures but under a legal framework similar to the U.S.'s, the Japanese criminal justice system maintains three pro-interrogation features that are absent in the U.S. system: (1) the imposition of a duty to submit to questioning upon an accused under arrest or detention, (2) the exclusion of the defense counsel during interrogation and (3) the prosecutorial designation of the time, duration and place of a meeting between the accused and his counsel. These three features have been much criticized by the Japanese and U.S. legal academics and by the Japanese defense bar for their "incongruence" with the constitutional as well as the statutory rights of the accused.[28] The "incongruence" here has largely been judged by the standards established by the U.S. constitutional and criminal procedural jurisprudence.

### 1. *Imposition of a Duty to Submit to Questioning ("Torishirabe Junin Gimu")*

The Japanese Code of Criminal Procedure affirms the state's power to carry out interrogations for the purpose of investigating a crime. Specifically, the Code grants the state the general power to conduct any interrogations that are "necessary to achieve the goals of the investigation."[29] The Code further defines this power to interrogate suspects: "When necessary for investigation of crimes, prosecutors, . . . or police officials can request the appearance of the suspect and interrogate him."[30] But unless the suspect is under arrest or detention, he can refuse to appear or, even after appearance, can leave the place of interrogation at any time.[31] Along with the affirmation of the state's power to interrogate suspects, the Code also requires that the suspect be advised *in advance* of the questioning that he does "not need to make statements against his will".[32]

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27. Only in extreme cases do Japanese courts find confessions involuntary. *See, e.g.*, Judgment of July 1, 1966, Saikōsai [Supreme Court], 20 Keishū 537 (explaining that a confession obtained through a promise of suspension of charging was held involuntary); Judgment of July 19, 1948, Saikōsai [Supreme Court], 2 Keishū 944 (stating that the Court excluded a confession obtained after 109-day long detention where the grounds for detention was questionable).

28. *See generally*, YOSHIYA WAKAMATSU, RIGHT TO SEE THE COUNSEL AND CRIMINAL DEFENSE (1990); Daniel H. Foote, *Confessions and the Right to Silence in Japan*, 21 GA. J. INT'L & COMP. L. 3, 415-16 (1991); Port, *supra* note 3.

29. KEISOHŌ, *supra* note 25, art. 197 (1).

30. *Id.* art. 178 (1).

31. *Id.*

32. *Id.* art. 198 (2).

From the perspective of the U.S. constitutional and criminal procedural jurisprudence, this particular set of provisions should yield an absolute right to silence for the suspect. The affirmation of the state power to question suspects, although seemingly unnecessary, is not inconsistent with the current U.S. criminal procedure, provided that the state power is tempered by the suspect's right to silence. To be consistent with the U.S. perspective, however, the right to silence should include the right to refuse questioning and apply equally whether the suspect is free or otherwise.[33]

In practice, this particular set of provisions have led to a duty to submit to questioning ("torishirabe junin gimu") for Japanese suspects who are under arrest or detention. The Code grants "free" suspects the right to refuse appearance for questioning or refuse questioning itself by freely leaving the police station. However, it does not specify what arrested or detained suspects can do under the same circumstances. Because the provision granting this right of refusal specifically excludes the suspects arrested or detained, it has been interpreted, by negative implication, to mean that they cannot refuse questioning.[34] Moreover, since the Code grants the state an affirmative power to interrogate the suspect when necessary for investigation of the crime, the absence of the right to refuse questioning has in practice been transformed into an affirmative duty to submit to interrogation.

What exactly does this duty entail, especially in light of the provision requiring an advance warning to the suspect regarding his right "not to make statements against his will"? At the most basic level, it requires the suspect's physical presence during an interrogation. The suspect may not answer any or all questions if he so chooses; however, he has a duty to be present and listen to the questioning. In the U.S., as soon as the suspect expresses his unwillingness to submit to questioning, the interrogation would have to cease.[35]

Many critics question the effectiveness of the advance warning in light of the existence of this duty. Under the Code the state has up to 23 days to detain a suspect before prosecuting him.[36] Thus, theoretically the suspect can be forced to sit

33. Makoto Mitsui, *Higisha/Sankonin no Torishirabe (2)*, 150 HOGAKU KYOSHITSU 56, 57 (1993); Foote, *supra* note 28, at 436 nn. 113-114.

34. Mitsui, *supra* note 33, at 56.

35. This is one of the mandates of the *Miranda* decision.

36. In order to detain a suspect, the police must transfer him to the prosecutor within 48 hours of his arrest (Code, art. 203 (1)) and the prosecutor has 24 hours to request detention from a judge (Code, art. 205 (1)). The period of detention prior to prosecution is for ten days from the date of the request for detention. But the judge

through questioning for 23 consecutive days. The critics argue that any warning given on the first day of questioning is likely to be ineffective against daily questioning that ensues over a long period.[37] Some even question whether the police give the advanced warning at all.[38] Because the Japanese courts are usually unwilling to exclude confessions based solely on the police's failure to give a required warning,[39] it seems that the Japanese police have little to lose by omitting the advance warning.

The supporters of the duty to submit to questioning insist that the existence of this duty does not prevent the suspect from exercising his right to silence. Rather, they argue that it merely balances the important public needs for solving crimes against the suspect's right. The critics, however, believe that the right to silence in combination with the duty to submit to questioning is tantamount to no right to silence at all.[40] They argue that only the most stout-hearted suspect can insist on his right to silence while being physically subject to questioning. For most suspects, the right to silence is likely to be undermined by daily questioning over many days. In any event, the Japanese right to silence as it is granted in practice falls short of the absolute right to silence mandated in the current U.S. pretrial interrogation procedure.

### 2. *Exclusion of Counsel during Interrogation ("Bengonin Tachiaiken Nashi")*

Japanese suspects and defendants are interrogated in isolation. They have no right to request their attorney's presence during questioning, nor can they stop the questioning in order to confer with their attorney.[41] In consideration of the role that an attorney plays during the pretrial stage in the United States, under the U.S. constitutional jurisprudence this exclusion of counsel from the questioning of the accused should violate the right against self-incrimination as well as the right to counsel under the *Miranda* rationale. However, in Japan this is an accepted practice.

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may extend the period no longer than ten days upon request of the prosecutor, and regarding certain crimes such as insurrection may further extend the period for additional five days (Code, art. 208).

37. Judgment of April 14, 1953, Saikōsai [Supreme Court], 7 Keishū 841 (Regarding a follow-up interrogation that occurred eight days after the first interrogation, the court held that the failure to warn the accused again did not violate the law).

38. Foote, *supra* note 28, at 435.

39. YUICHI KUSAMA, SOME PROBLEMS ON THE APPLICATION OF EXCLUSIONARY RULES IN JAPAN 4-29, 43 (1985).

40. Mitsui, *supra* note 33, at 57.

41. Compare with *Miranda* and *Escobedo*.

There are no actual legal provisions either requiring or prohibiting the presence of counsel during interrogation. The practice is based solely on legislative history of the Constitutional and Code provisions related to confessions and the right to counsel. It has been reported that in the course of preparing a model draft for the Japanese Constitution, the Human Rights Committee under Supreme Commander for the Allied Powers ("SCAP") recommended that "confessions should be inadmissible unless made in the presence of the counsel."[42] However, the Japanese legislature in approving the final form of the Constitution rejected this recommendation and replaced it with the current Article 38 (2) ("Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence").[43] In enacting the Code also, although there was some discussion among the members of the Judiciary Committee of the Lower House ("Shugiin Shiho Iinkai") regarding inclusion of the right to presence of counsel during interrogation as part of the right to counsel, the final version of the Code provided for no such right.[44] Thus, the legislative history has bolstered the practice of interrogating the suspect without the presence of his attorney. Even among the Japanese legal scholars the majority accepts the legality of the practice.[45]

Many do attack the practice for its potential for abuse and question its real purpose.[46] Under the current system of interrogation, the suspect is isolated in an interrogation room with his interrogators. Although he can refuse to answer questions, he cannot refuse the questioning itself. As far as the outside is concerned, what goes on in the interrogation room is a complete unknown and within the interrogation room there is no force to restrain the police from misusing its power except the individual police officer's own morals and professional ethics.

The critics argue that the real purpose for excluding the counsel from the interrogation room is to facilitate the police in obtaining confessions from the suspect.[47] That is, if the counsel is allowed to be present during interrogation, the counsel can serve the following roles: (1) ensure that the suspect exercises his right to silence at his will; (2) give the suspect legal advice during the

42. Makoto Mitsui, *Sekken Kotsuken/ Bengonin Tachiaiken*, 155 HOGAKU KYOSHITSU 101, 106 (1993).

43. *Id.*

44. *Id.*

45. *See, e.g., id.* at 107; KOYA MATSUO, KEIJI SOSHOHO (JO) 112 (1989).

46. *See, e.g.*, HIROSHI TAMIYA, KEIJI SOSHOHO 129 (1992); TOSHIKI ODANAKA, KEIJI SOSHO TO JINKEN NO RIRON 152-53 (1983).

47. *Id.*

interrogation; and (3) develop the defense strategy early.[48] These roles are antithetical to the aims of the police who wish to pry information from the suspect. The supporters of the practice themselves recognize these "interfering roles" of the counsel as a motive behind the practice. However, they justify the practice on the legal ground that the Code provides for the state's power to interrogate the suspect but is silent on the right to presence of counsel.[49]

### 3. *Prosecutorial Designation Power ("Sekken Shiteiken")*

The right to "retain counsel" guaranteed under Article 34 of the Japanese Constitution is further defined by Article 39 of the Code to include the right to meet with counsel without a guard and to exchange documents and things ("himitsu sekken kotsuken"). The meetings with counsel enable the suspect to prepare his defense as well as to have vicarious contact with the outside.[50] However, this right to meet with counsel is not absolute. When necessary for the purpose of the investigation and to the extent the suspect's right to prepare his defense is not unjustifiably restricted, the prosecutor can designate the date, time, place and duration of the meeting between the suspect[51] and his counsel.[52]

Similar to the practice of excluding counsel from the suspect's interrogation, this prosecutorial designation practice stands on a relatively solid legal ground because of the legislative history. The suspect's right to meet with counsel in confidence was again the initiative of SCAP. Under the previous Code of Criminal Procedure ("Kyu-Keisoho") the right to meet with counsel was given only to defendants and the meeting was attended by a guard. SCAP, in rewriting the Code, insisted on guaranteeing the suspect the right to meet with counsel. In response, the Japanese government put forth a compromise proposal which recognized the suspect's right to meet with counsel but at the same time, in order also to accommodate the needs of criminal investigations, granted the prosecutor the power to designate the time, place and duration of the meeting. Finally, the

48. TAMIYA, *supra* note 46, at 138-39.

49. Homu Sogo Kenkyusho, *Problems Regarding the Right to Meet with Counsel in Confidence and Investigations*, 62 HOMU KENKYU 6 (1974).

50. The suspect is also given the right to meet with people other than his attorney under Article 80 of the Criminal Code. However, this right can be taken away by a judge at the request of the prosecutor if there is a likelihood of flight or destruction of evidence. But the right to meet with counsel cannot be taken away. KEISOHO, art. 81.

51. The designation power does not reach the *defendant's* right to meet with his counsel.

52. KEISOHO, art. 39 (3).

two sides agreed on the final version as Article 39 stands, which made the meetings confidential but retained the prosecutorial designation within the limit of "not unjustifiably restricting the suspect's right to prepare his defense."[53] Thus, the legislative history supports the legitimacy of prosecutorial designation.

Its legitimacy notwithstanding, the prosecutorial designation in practice has caused much legal controversy. Although the legality of the prosecutorial designation power is not in question, the validity of how prosecutors exercise this designation power has been much challenged. The traditional method of practice has been the so-called "general designation" ("Ippan Shitei"). Under the general designation system, the prosecutor decides in advance over which suspects he will exercise his designation power. He then notifies the relevant parties—i.e., the police in charge of the suspect's case, the relevant official at the jail where the suspect is detained and the suspect's counsel—regarding the application of the general designation. The suspect's counsel, upon this notification, is expected to obtain a particular designation from the prosecutor in charge before he can meet with his client. Thus, under the general designation practice for any suspect to whom the general designation is applied, the right to meet with his counsel is subject to a blanket restriction initially and then to a discretionary approval by the prosecutor.

The legal controversy over the general designation practice is based on interpretations of Article 39 of the Code. More specifically, Section 1 of Article 39 provides for the accused's right to meet with his counsel in confidence; Section 3 of the same article allows the prosecutor to designate such meeting between suspects and their counsel *if necessary for the purpose of investigation* and to the extent not unjustifiably restricting the suspect's right to prepare his defense. The question is which is the rule and which the exception.

The critics argue that Section 1 prevails over Section 3. That is, the language of Section 3 limiting the prosecutorial designation to only situations "necessary for the purpose of investigation" implies that it is an exception. Moreover, "necessary for the purpose of investigation" should be interpreted to mean only the times when the suspect is physically not available for the meeting, such as when the suspect is currently under interrogation or is accompanying the police to the scene of crime, etc.[54]

53. Kenkyusho, *supra* note 49, at 8-10.

54. RYUICHI HIRANO, KEIJI SOSHOHO 105 (1958); FUMIO AOYAGI, GOTEI KEIJI SOSHOHO TSURON (I) 198; KOYA MATSUO, SOGO HANREI KENKYU SOSHO KEISOHO (11) 127; NORIMICHI KUMAMOTO, KEIJI SOSHOHO (I) 426 (Hiroshi Tamiya, ed.).

Thus, a blanket prohibition of the meetings between the suspect and his counsel until further approval by the prosecutor extends beyond the scope of the designation power granted in Section 39. The supporters, on the other hand, point to the breadth of the limit set by the Code. That is, the prosecutor can exercise his designation power whenever necessary for *investigation*, not merely for interrogation or crime scene inspection. Investigation is a broad term that encompasses not only interrogation but also other administrative aspects such as preventing destruction of evidence. Thus, depending on the nature of the crime,[55] the needs of investigation can justify the general designation as regarding a particular suspect.[56]

Numerous cases challenging the legality of the general designation practice have been litigated. The key question in these cases is how broadly should "the needs of investigation" be defined. The lower courts for a long time had generally adopted a broad definition and upheld the practice.[57] In 1978 the Supreme Court in the *Sugiyama* case[58] rendered its definition of "the needs of investigation." Sugiyama was an attorney who was prevented from meeting with his client for about four hours because he did not have the requisite particular designation document. He sued the government for civil damages on the grounds of illegal prevention of meeting with his client as well as the injury he received from his struggle with the police officer. In deciding this case, the Supreme Court first recognized that the right to meet with counsel is derived from the constitutional right to retain counsel. Thus, the Court held that "the right to meet with counsel is not only one of the most important fundamental rights of a suspect who is in the custody of the state for receiving assistance of the counsel but also one of the most important rights uniquely belonging to the attorney."[59] The Court further held that the prosecutorial designation is "strictly an exceptional measure that is warranted only in an unavoidable situation" and therefore cannot be used to unjustifiably restrict the suspect's

55. For example, it has been reported that many of the general designation cases involve drug crimes.

56. Kazuo Kawakami, *Kensatsu Jitsumu Kara Mita Sekken Kotsu* [*The Meetings between the Suspect and the Counsel Seen from the Perspective of the Prosecutorial Practice*], 54 HORITSU JIHO 16, 17-19 (1982) (Especially in drug-related cases, the probability of the suspect trying to destroy or hide evidence through his contact with the outside (including his attorney) is high).

57. *See, e.g.*, Judgment of Feb. 14, 1956, Fukuoka Kosai [Fukuoka High Court], 3 Keisai Tokuho 214; Judgment of Feb. 26, 1972, Hiroshima Chisai [Hiroshima District Court], 668 HANJI 98. *But see* Judgment of Mar. 4, 1969, Hiroshima Chisai [Hiroshima District Court], 1 Keisai Geppō 335.

58. Judgment of July 10, 1978, Saikōsai [Supreme Court], 32 Minshū 820 (the Sugiyama Case).

59. *Id.* at 829.

right to prepare his defense. Thus, "when the attorney applies to see his client, the police and prosecutor should, as a rule, allow such meeting at any time. However, if the suspect is currently being interrogated, accompanying the police to the crime scene, inspecting the evidence, engaged in other activities which requires the suspect's presence and so on, so as the stoppage of such activity will significantly interfere with the investigation, then [the prosecutor] should confer with the counsel and designate the earliest possible date and time for the meeting."[60]

At first impression, the *Sugiyama* holding seems to reflect the dominant views of the critics—that "necessary for the purpose of investigation" means merely interrogation and other limited situations which require the suspect's presence. However, the Supreme Court's exact language left room for broader definitions. That is, the inclusion of "so on" at the end of the enumerated exceptions allowed the prosecutors and other supporters of the designation practice to argue that the specific situations enumerated by the Supreme Court were mere examples and the scope of what is "necessary for the purpose of investigation" is not settled by *Sugiyama*.[61] As if to bolster this argument, the Supreme Court in *Asai*, a recent suit against the government by another defense attorney, broadened its own definition of "necessary for the purpose of investigation" to include a situation in which an interrogation of the suspect is scheduled in the near future but not currently taking place.[62]

Putting the legal challenges aside, on a practical level many defense attorneys have cited the evils of the designation practice. For example, for the suspect who is under general designation, the attorney must obtain a particular designation from the prosecutor in charge. If the prosecutor's office is quite a distance away from where the suspect is held, the attorney must bear the time and cost burden for the travel. Moreover, many attorneys complain that the time allotted for the meetings is usually too short for any meaningful communication with the client.[63] In a survey of defense attorneys conducted by Kanto Attorney Federation in 1981, of the 118 surveyed, 33% reported that meetings with their clients typically lasted under 15 minutes, 27% reported 20 min-

60. *Id.*

61. Kawakami, *supra* note 56, at 19-20.

62. Judgment of May 10, 1991, Saikōsai [Supreme Court], 45 Minshū 919 (the Asai Case).

63. *See* Seiichiro Koizumi, *Sekken ni kansuru Jun-Kokoku* [*Interlocutory Appeals Regarding the Meeting with Counsel*], 54 HORITSU JIHO 28, 28 (1982); Kaoru Hiraide & Katsuhiro Terashima, *Zaiya Hoso kara Mita Keisoho Sanjukyu-Jyo San-Ko* [*Article 39 (3) of the Code Seen from a Left Legal Prospective*], 54 HORITSU JIHO 38, 39-40 (1982).

utes and another 28% reported 30 minutes. All in all, 88% of the attorneys surveyed were allotted 30 minutes or less for meetings with their clients.[64]

Owing largely to legal challenges some improvements have been made in the practice of prosecutorial designation. For example, to lessen the inconvenience on the suspect's counsel, some prosecutors now give particular designation by facsimile or phone.[65] However, the practice of general designation is still widely utilized. Because of the Supreme Court's definitive stance on the exceptional nature of the prosecutorial designation, it can no longer be argued that the designation power trumps the suspect's right to meet with his counsel. Thus, many lower courts have ruled that a general designation, as a decision enforceable against the suspect or his attorney, cannot be justified under Article 39(3) of the Code; only a particular designation based on justifiable needs of investigation is legitimately enforceable.[66] Under the Code, the suspect or his counsel can interlocutorily appeal ("jun-kokoku") a designation decision ("sekken shitei shobun") enforced against him.[67] However, the applicability of the interlocutory appeal turns on the nature of the designation. That is, unless the designation is a decision enforceable against the suspect or the counsel ("sekken shitei no shobunsei"), the appeal cannot be filed.[68] Utilizing this legal point, prosecutors now treat the general designation as only an internal communication between the prosecutor's office and the relevant detention institution and not a decision applicable to either the suspect or the counsel.[69] Thus, the notification regarding the general designation only goes out to the officials at the place of detention and not to the defense counsel. The counsel finds out about the need to obtain a particular designation only upon arrival at the jail.[70] Thus, except for the change in the legal name-calling of the

64. Akiyoshi Terazaki et al., *Sekken Kotsu no Jittai* [*The Reality of Meeting with Counsel*], 54 HORITSU JIHO 22, 23 (1982).

65. Masahito Inoue, *Higisha to Bengonin no Sekken Kotsu* [*Meetings between the Suspect and His Counsel*], 119 JURISTO 40, 45 (1992).

66. *See, e.g.*, Judgment of Aug. 12, 1983, Akita Chisai [Akita District Court], 527 Hanrei Times 162; Judgment of Mar. 7, 1967, Tottori Chisai [Tottori District Court], 9 Kakyu Keishū 375.

67. KEISHŌ, *supra* note 25, art. 430 (1) ("Anyone who contests a [designation] decision made by a prosecutor . . . under Art. 39 (3) may apply to the court . . . for revocation or modification of such decision").

68. Kenkyusho, *supra* note 49, at 60-64.

69. Judgment of Oct. 5, 1983, Tokyo Chisai [Tokyo District Court], 527 HANREI TIMES 162 (denied the applicability of interlocutory appeal to a general designation that was communicated only within the law enforcement); Kawakami, *supra* note 56, at 20-21.

70. *Id.*

general designation, the essential mechanism of the designation remains the same.

The putative purpose of the prosecutorial designation is the prevention of flight and the destruction of evidence.[71] However, the more basic purpose is admittedly to facilitate the extraction of confession from the suspect. Limiting the suspect's access to the attorney makes the suspect more likely to confess and this under *Miranda* and *Escobedo* would violate the suspect's right against self-incrimination. Regardless of the manner used to carry out the prosecutorial designation, the designation practice itself by the U.S. standard is likely to be deemed unconstitutional. Yet, very few Japanese legal scholars, if any, have questioned the constitutionality of Article 39(3) of the Code.[72] Part of the reason is that, as stated above, the legislative history supports the institution of the designation practice. However, from a strict procedural justice point of view, the very existence of the prosecutorial designation—the underlying premise of which is that the necessity for the suspect's presence during interrogation or crime scene inspection takes precedence over the suspect's right to meet with his counsel[73]—undermines the constitutional right against self-incrimination and the penumbral right to counsel[74] thereunder. The same argument can be made for the imposition of the duty to submit to questioning and the exclusion of counsel from interrogation. Both practices, along with the prosecutorial designation, undermine the suspect's right against self-incrimination. From the procedural justice perspective, the Japanese pretrial practice seems unjust. Indeed, in comparison to the U.S. custodial interrogation standards set by *Miranda* and the cases following it, the Japanese counterparts fall short of achieving the same degree of procedural justice.

### C. Plea Bargaining—Undermining Procedural Justice

We have compared the confession-oriented pretrial practice of the Japanese criminal justice system with the *Miranda*-governed custodial interrogation practice of the U.S. Now then, how

71. Implicit in this is the distrust of defense attorney. Kawakami, *supra* note 56, at 16 (whether knowingly or not, sometimes defense attorneys serve as a conduit for destruction of evidence or flight); *see* Kenkyusho, *supra* note 49, at 24 (reported instances of the attorney aiding the suspect destroy evidence).

72. For those few that have, see Seiichiro Koizumi, *supra* note 63, at 28-29; Kaoru Hiraide & Katsuhiro Terashima, *supra* note 63, at 41.

73. Even the most strict interpretation of the designation power should admit this so long as the legality of the designation power itself is not questioned.

74. As implied in *Miranda*, the right to counsel during pre-prosecution stage is auxiliary to the exercise of the right against self-incrimination.

does the U.S. plea bargaining practice compare with the Japanese pretrial practice in achieving procedural justice?

### 1. *The State of Plea Bargaining in the U.S.*

Plea bargaining in the U.S. has been much opposed and criticized.[75] The main points of contention surrounding plea bargaining are: first, the notion that the government strikes a bargain with a criminal defendant seems corrupt and inappropriate; second, plea bargaining leads to inaccuracy in criminal justice since an innocent defendant may plead guilty for the certainty of a lighter sentence or a guilty defendant may be punished for a crime lesser than that he actually committed; and third, the incentive structure of the plea bargaining system combined with the inherent power imbalance between the state and the defendant burdens the defendant's exercise of his constitutionally guaranteed right to trial and right against self-incrimination.[76] However, despite these criticisms and advocacy for its outright abolition, the practice has taken root as the only viable alternative for the overburdened U.S. criminal justice system.[77] Since the late 1960's, despite numerous cases challenging the constitutionality of plea bargaining, the Supreme Court has steadily recognized the legitimacy of the practice.[78]

According to statistics current through the end of 1993, close to 90% of both federal and state felony cases are disposed through plea bargaining.[79] Heavy criminal case loads and limited resources are the two main forces driving such mass case disposal through plea bargaining. Proponents of plea bargaining argue, and many opponents concede, that without plea bargaining the U.S. criminal justice system will require much greater resources, which currently are unavailable.[80]

Plea bargaining entails a defendant foregoing his constitutional right against self-incrimination and right to trial in return for a more lenient sentence than one he could receive if he were

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75. *See generally*, D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992).

76. *Id.*

77. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1911 (1992); Note, *Plea bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 564 (1977); Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387, 1388 (1970).

78. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357 (1978); Blackledge v. Perry, 417 U.S. 21 (1974); Brady v. United States, 397 U.S. 742 (1970).

79. *See infra* Tables 1 & 2 at 64-65.

80. Given the current American political climate, any initiative to raise taxes to fund this spending increase is likely to fail.

to be convicted at trial.[81] In ideal plea bargaining, the defendant and the state are on a level playing field and both parties benefit by an arrangement reached through a plea bargain: the defendant, in exchange for providing the prosecutor with valuable information, i.e., a confession to the crime, receives a sentence or charge reduction and the state in return for its leniency disposes of the case quickly and thereby saves resources. At the same time, the public interest is also served. Quicker case disposition means that a criminal is punished and removed from the society that much more quickly. It also means that the convicted can begin his rehabilitation process at the state-designated correctional facilities sooner.

Under the ideal scenario, plea bargaining seems like a perfect mechanism for criminal justice—cheap[82], efficient and beneficial to all. However, this ideal scenario makes two incorrect assumptions about the current U.S. criminal justice system. First, it assumes the power of the defendant and the state to be equal; however, the design of the current U.S. criminal prosecution arguably favors the state. The defendant's main bargaining tool is the information that he holds regarding his guilt or innocence. The prosecutor's bargaining tools are more numerous. First, the prosecutor has near-absolute discretion over charging decisions[83]; thus, he can charge or threaten to charge the defendant with every legally possible crimes for the sake of obtaining a "better deal" even though the actual act committed by the defendant may not normally warrant such a charging decision.[84] Second, judges usually accept the prosecutor's sentence recommendation;[85] thus, the prosecutor can promise either to make a lenient sentencing recommendation or to refrain from making a harsh one in return for the defendant's plea of guilt. Third, pretrial detention also works in the prosecutor's favor.[86] If the defendant poses a serious risk of flight or threat to the community,

81. Whether the plea bargain involves sentence reduction or charge reduction, the ultimate result in either case is a more lenient sentence for the defendant.

82. Compared to a full-blown trial.

83. United States v. Batchelder, 442 U.S. 114, 123-124 (1979) ("[W]hen an act violates more than one criminal statute, the Government may prosecute under either.").

84. *See, e.g.*, United States v. Goodwin, 457 U.S. 368 (1982); *Bordenkircher*, 434 U.S. at 358.

85. With the Federal Mandatory Sentencing Guidelines limiting the judge's discretion over sentencing, this tool has largely been taken away from the federal prosecutors. But state prosecutors can still use this tool.

86. Stevens H. Clarke & Susan T. Kurtz: *The Importance of Interim Decisions to Felony Trial Court Dispositions*, 74 J. CRIM. L. & CRIMINOLOGY 476, 502 (1983) (As a pretrial detainee, "the defendant may be more willing to accept a disadvantageous plea bargain offer after having spent a long time in jail.").

the defendant may be detained without bail before the trial.[87] Under the Federal Bail Reform Act of 1984, this usually means that pretrial detainees are kept in a facility separate from prison facilities for the convicted. However, because the statute mandates the separate facilities only "to the extent practicable,"[88] depending on the severity of space limitations, some pretrial detainees may be imprisoned with regular convicts.[89] Facing the possibility of pretrial detention, the defendants who are charged with crimes the maximum sentence of which is less than the maximum period of pretrial detention would be particularly pressured to plead guilty. Since the prosecutor has the power to raise the motion for a detention hearing,[90] pretrial detention provides the prosecutor with another powerful bargaining tool for plea bargains.

Compared with these "structural" tools on the prosecutor's side, the defendant's tools are more "circumstantial" in character. That is, his tools are the information regarding the crime and his will to insist on a trial so as to make the case disposition lengthier and costlier for the government. In addition, if the government's case against the defendant is weak or if the defendant happens to have a competent plea bargainer as his lawyer, this too becomes his tool. Since the strength of the defendant's tools

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87. Other factors to be considered for pretrial detention are:

> (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug; (2) the weight of the evidence against the person; (3) the history and characteristics of the person, including (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and (B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing appeal, or completion of sentence for an offense under Federal, State, or local law.

18 U.S.C.A. § 3142(g) (West Supp. 1995).

88. "In a detention order . . . the judicial officer shall . . . (2) direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, *to the extent practicable*, from persons awaiting or serving sentences or being held in custody pending appeal." 18 U.S.C.A. Section 3142(i) (emphasis added).

89. David J. Rabinowitz, *Preventive Detention and United States v. Edwards: Burdening the Innocent*, 32 AM. U. L. REV. 191, 205 n.101 (1982) ("As a practical matter, pretrial detainees are confined in the same facilities as convicted prisoners . . . . 'to separate in jail those convicted from those awaiting trial is an iridescent dream . . . .' "(cite omitted)).

90. The judge may also raise a motion, *sua sponte*, to hold a detention hearing "in a case that involves—(A) a serious risk that the person will flee; or (B) a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror." 18 U.S.C.A. Sec. 3142(f).

depend largely on the particular circumstances of his case—i.e., whether he is actually guilty,[91] whether pretrial media exposure has formed a community bias against his case,[92] whether he is to be detained pretrial, the length of the pretrial detention in comparison to the possible actual sentence, the severity of the maximum sentence that can be imposed at trial[93]—even if some defendants fare well under the system, under the current U.S. plea bargaining system the structural advantage lies with the prosecutor.

Another incorrect assumption in the ideal scenario is that the adversarial system functions perfectly in plea bargaining. Most defendants, on their own, lack both the legal expertise and the familiarity with the criminal justice system to adequately bargain with the government. Thus, almost all plea bargains involve the defendant's attorney[94] and the real bargainer that negotiates an agreement with the government is not the defendant, but his attorney. Both critics and supporters of plea bargaining question, however, whether an attorney can adequately represent the defendant's interest in a plea bargaining context.[95] This so-called "agency cost" problem stems from several potential sources of conflicts of interest between the defendant and his attorney. First, the attorney, whether he is privately retained or a public defender, has a strong interest in quick disposition of any one case. Because the retainer fee usually does not increase even if the case goes to trial, privately retained attorneys have a strong financial incentive to plea bargain. Likewise, public defenders, driven by their work loads, have an incentive to economize their time per case. Second, the attorney has an incentive to maintain a good relationship with prosecutors. In negotiating a plea for his client, a criminal defense lawyer who deals with prosecutors on a daily basis will not only worry about the case at hand but also consider potential ramifications on his future cases. Thus, the attorney may refrain from acting as a "zealous advocate" for his client in a particular case to preserve the possibility of overall

91. If the defendant is innocent, he holds no useful information for the purpose of plea bargaining. In fact, he would have to make up a lie in order to plead guilty.

92. In a widely publicized case, the prosecutor may feel pressured to take the case to trial and thus may not offer the option of plea bargain to the defendant. Imagine the public reaction if O.J. Simpson was offered a plea bargain.

93. *See, e.g.*, *Brady*, 397 U.S. at 742 (Facing a maximum penalty of death at a jury trial, the defendant pled guilty, and although he later challenged his plea as coerced, the Court held it voluntary).

94. Santobello v. New York, 404 U.S. 257 (1971) (In upholding the constitutionality of plea bargaining, the Supreme Court gave the defendant's right to attorney as a prerequisite to its constitutionality).

95. Alschuler, *supra* note 75, at 79-80; Schulhofer, *supra* note 75, at 1984-90; Scott & Stuntz, *supra* note 77, at 1958-59.

favorable results for his future clients as well as to maintain his personal record and reputation as a defense lawyer. Third, the attorney's own opinion as to the guilt or innocence of the defendant may affect the strength of the attorney's advocacy. Many veteran defense attorneys through their years of experience have developed biases and usually prejudge the defendant's guilt and innocence and their prejudice can affect the outcome of the plea bargain. Thus, the conflicts of interest between the lawyer and his client and the lawyer's personal bias dilute a core principle of the adversarial system—an attorney as a zealous advocate—upon which the Supreme Court and other proponents of plea bargain greatly rely to legitimize plea bargain. Analysis of the above two incorrect assumptions suggests that plea bargaining in practice may not benefit the defendant as much as the ideal scenario implies.

### 2. *Lack of a Plea Bargaining Counterpart in Japan*

As examined above, the Japanese pretrial practice concentrates on obtaining confessions from the accused. However, confessions are obtained without plea bargaining in Japan. In fact, the Japanese criminal justice system provides no arraignment procedure during which the accused can plead guilty or innocent. Instead, after a thorough pretrial interrogation of the accused, Japanese prosecutors decide whether to prosecute the accused based on the strength of the evidence gathered ("kiso dokusen shugi").[96] In deciding whether to prosecute the accused, the prosecutor can consider the accused's "personality, age, environment, seriousness and the circumstances of the crime" or whether the prosecution "has become unnecessary because of a change in the post-crime circumstance" ("kiso bengi shugi").[97] Thus, even if the accused confesses to the crime, he may avoid prosecution at the prosecutor's "benevolent" discretion.[98] The prosecutor can either suspend the prosecution ("kiso yuyo") or drop the prosecution all together.[99]

Having such broad discretion over prosecution decision, Japanese prosecutors may seem well-situated for engaging in plea bargaining.[100] After all, if the prosecutor can drop the prosecu-

96. Because Japan has no grand jury system, prosecutors have the sole indictment power. In the United States this is more properly called "charging by information."

97. KEISOHŌ, *supra* note 25, art. 248.

98. Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317, 347 (1992).

99. TAMIYA, *supra* note 46, at 165-67.

100. An authority in Japanese criminal procedure, Hiroshi Tamiya, suggests the possibility of adopting the American-type plea bargaining mechanism into the Japa-

tion of a confessed criminal solely at his election, offering a less drastic form of leniency (say, sentence or charge reduction) "in exchange for" a confession or any other useful information would seem within the prosecutor's discretion. So what prevents Japanese prosecutors from engaging in plea bargaining?

The Japanese criminal justice system stresses truth-seeking and accuracy—i.e. substantive justice. Bargaining with the accused for his confession casts doubt on the truthfulness of the confession obtained. An innocent accused tempted by the promise of leniency, especially if it is suspension of prosecution, may confess to a crime he did not commit. Likewise, a guilty accused may give only half-truths to suit the charge he bargained for. In either case, the goals of truth-seeking and accuracy are undermined.

One may question, then, how the suspension or dropping of prosecution of the guilty at the prosecutor's discretion serve the goals of truth-seeking and accuracy and achieve substantive justice. As long as the accused confesses voluntarily—that is, without an advance promise of leniency by the prosecutor—both the truth-seeking and accuracy are achieved in solving that particular crime.[101] The question is more, whether substantive justice is achieved when the guilty goes free at the prosecutor's discretionary "benevolence." If substantive justice merely means distributive justice, the answer should be no. That is, under distributive justice, the guilty should be punished proportionate to his crime. However, if substantive justice goes beyond distributive justice and includes the full gamut of admission of wrong, apology, forgiveness and rehabilitation,[102] the prosecutorial benevolence does achieve substantive justice. In fact, it is not uncommon for Japanese accused's to apologize to victims after a full confession to the police.[103] Although some may still insist that the guilty should not go unpunished, by admitting to his guilt and apologizing for his crime, the guilty can be said to have punished himself through self-humiliation and thereby have moved toward rehabilitating himself to the society.

One may argue that this vision of substantive justice in the Japanese criminal justice process may only be an idealized scena-

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nese criminal justice in light of the breadth of Japanese prosecutors' discretion over prosecution. *Id.* at 166.

101. Although it is arguable that an accused may be able to guess whether a prosecutor will offer him leniency if he confesses, it is unlikely that the accused would rely on such hunch to decide whether to confess.

102. John O. Haley, *Sheathing the Sword of Justice in Japan: An Essay on Law without Sanctions*, 8 J. JAPAN STUD. 265, 269 (1982) ("Confession, repentance, and absolution provide the underlying theme of the Japanese criminal process.").

103. Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 479, 481-83 (1986).

rio. That is, Japanese prosecutors could, in reality, be bargaining with the accused's to extract their confessions.[104] Especially, in investigation of an organized crime or conspiracy case, one could reasonably suspect Japanese prosecutors to bargain with a "small catch" for information on the "bigger catch." However, there is no available evidence that supports this speculation.[105] Moreover, the current pretrial practice in Japan, as examined above, by limiting the accused's right to silence and right to counsel, enables the law enforcement to obtain confessions without the aid of bargaining. Although the Code grants Japanese prosecutors absolute discretion to choose which case to prosecute,[106] it does not grant them a discretion to reduce charges or sentence in exchange for the accused's confession.[107] Thus, the Japanese legal framework as it stands allows benevolent nonprosecution but not bargain-based leniency.

### 3. *The U.S. Legal Framework Supporting Plea Bargaining—Constitutional Justification*

Although the plea bargaining in the U.S. is often justified based on a cost/benefit analysis—how much it benefits the defendant and at the same time serves the public interest—to gain recognition as a legitimate practice in the U.S. criminal process, it must also pass constitutional muster. Plea bargaining involves

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104. *See* Marcia E. Goodman, *The Exercise and Control of Prosecutorial Discretion in Japan*, 5 UCLA PAC. BASIN L.J. 16 (1986) (Although admitting to the absence of explicit plea bargaining in Japan, the author raises a possibility of behind-the-closed-door plea negotiation between the prosecutor and the defense counsel.). *But see* Daniel H. Foote, *Prosecutorial Discretion in Japan: A Response*, 5 UCLA PAC. BASIN L.J. 96, 100 (1986) ("Given [the] cultural difference, it becomes much less clear whether the plea bargaining analogy is appropriate [in Japan] . . . . the more appropriate image would seem to be that of one throwing himself on the mercy of the prosecutors, confessing to his transgressions, and imploring their forgiveness.").

105. One exception might be the Lockheed Scandal, in which to obtain a testimony from an American employee of Lockheed from America, the Japanese Attorney General gave a special "promise of immunity" according to the U.S. customary practice. However, the legality of this promise of immunity was much questioned by Japanese legal scholars. The measure taken is considered a rare exception necessitated by the international nature of the case. Another exception is Kanemaru's corruption scandal in which prosecutors issued a summary indictment and imposed only a fine of $1,666 on "Japan's most powerful politician" for accepting $4.1 million illegal political contribution. This case, too, was exceptional in that the defendant was a powerful political figure and the need for "face-saving" of the then-ruling party was overwhelming.

106. *See* Judgment of Dec. 17, 1980, Saikōsai [Supreme Court], 34 Keishū 672 (holding that the prosecutor's charging decision can only be challenged in extreme circumstances).

107. *See* Judgment of July 1, 1966, Saikōsai [Supreme Court], 20 Keishū 537 (Uncharacteristic of the Japanese court, it affirmed the exclusion of the defendant's confession because the confession was induced by the prosecutor's promise of leniency).

the accused's waiver of basic constitutional rights—namely the Fifth Amendment right against self-incrimination and the Sixth Amendment right to trial.[108] Thus, the main constitutional issue regarding plea bargaining is whether and when plea bargaining is coercive in the constitutional sense—that is, whether and when plea bargaining unconstitutionally burdens the accused's right against self-incrimination and right to trial.

The U.S. Supreme Court addressed this question in *Brady* v. *United States*.[109] The Court flatly rejected the argument that plea bargaining is unconstitutionally coercive by emphasizing the "mutuality of advantage" gained by both the defendant and the government:

> We declined to hold, . . . that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged. . . .For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately and the practical burdens of a trial are eliminated. For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is a substantial doubt that the State can sustain its burden of proof. *It is this mutuality of advantage* that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty. . . .[110]

In addition, the Court distinguished the plea of guilt under a plea bargain attended by a counsel from a confession given in custody, "alone and unrepresented by counsel."[111] The Court reasoned that the presence and assistance of counsel can offset any coercive effect of plea bargaining upon the defendant, as could "the presence of counsel or other safe-guards" dissipate the coercive atmosphere of police custodial interrogation.[112] Justice Brennan, however, in his concurring opinion criticized the

108. Waiver of other Sixth Amendment rights that attach at the time of trial is also involved. But this paper will not deal with them separately except as the general right to trial.

109. *Brady*, 397 U.S. at 742.

110. *Id.* at 751-52.

111. *Id.* at 754 (citing Bram v. United States, 168 U.S. 532 (1897)).

112. *Id.* at 754 (citing Miranda v. Arizona, 384 U.S. 436 (1966)).

Court's regard for the role of counsel in plea bargaining as a panacea.

> The Court's answer to the stringent criterion of voluntariness imposed by *Bram* and subsequent cases is that the availability of counsel to an accused effectively offsets the illicit influence upon him which threats or promises by the government may impose. Of course, the presence of counsel is a factor to be taken into account in any overall evaluation of the voluntariness of a confession or a guilty plea. However, it hardly follows that the support provided by counsel is sufficient by itself to insulate the accused from the effect of any threat or promise by the government. . . .
>
> The assistance of counsel in this situation, of course, may improve a defendant's bargaining *ability*, but it does not alter the underlying inequality of *power*[113] (emphasis added).

In *Bordenkircher* v. *Hayes* the Court went further by explicitly accepting the modus operandi of plea bargaining.

> Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial. . . .While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an *inevitable*—and *permissible*—'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.' It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty.[114] (emphasis added)

In acknowledging the prosecutor's role in plea bargaining to persuade the defendant to plead guilty, the Court refused to see any coerciveness in such persuasion and instead characterized plea bargaining as a "give-and-take negotiation . . . between the prosecution and the defense, which arguably possess relatively equal power."[115] In such a negotiation, under the Court's holding, the prosecutor can threaten to charge the defendant with a more serious crime than usually warranted since such threat would only be a part of the give-and-take necessarily involved in

113. Parker v. North Carolina, 397 U.S. 790, 803-4 (1969).

114. *Id.* at 363-65.

115. *Id.* at 362 (citing Parker v. North Carolina, 397 U.S. 790, 809 (1970)).

a bargaining.[116] Again, the Court's approval of bargaining between the defendant and the prosecutor is largely based on the Court's belief in the "counter-balancing" role of the attorney.[117]

In *Alford* v. *North Carolina*[118] the Supreme Court upheld the constitutionality of a plea bargain even though the defendant still insisted on his innocence.[119] In this case the defendant waived his right to trial and consented to entry of a judgment against him, but at the same time denied that he committed the crime. Although the Court recognized that normally a guilty plea is expected to be accompanied by both admission of guilt and waiver of trial, the Court still upheld the validity of the defendant's waiver.

> While most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty.[120]

The Court deemed the defendant's plea to waive his trial to be voluntary, knowing and understanding despite his claim of innocence. The Court also reasoned that because Rule 11 of the Federal Rules of Criminal Procedure as well as various state and federal court decisions requires judges to find a factual basis for the guilty plea before the court can enter a judgment against the defendant, this also justified the defendant's conviction. Although the judge's finding of a factual basis does not amount to a finding of guilt by jury at trial, the Court still concluded that the defendant's willingness to waive his right to trial coupled with the judge's finding of a factual basis[121] was sufficient to convict and sentence the defendant without his explicit admission of guilt or, in this case, despite the defendant's explicit denial of guilt. The extremeness of the Court's position in *Alford* is telling of the degree to which the U.S. criminal justice system relies on plea bargaining for case disposal.

Although not an explicit constitutional issue, the conflict between the principle of presumption of innocence and the implicit

116. The Court rejected a due process claim by distinguishing the prosecutor's action "to penalize a person's reliance on his legal rights," which is "patently unconstitutional," and the prosecutor's offer to increase charges if the defendant insists on his right to trial, which is not unconstitutional because "the [defendant] is free to accept or reject the prosecution's offer." *Id.* at 362-63.

117. *Id.* at 363.

118. North Carolina v. Alford, 400 U.S. 25 (1970).

119. The Court, without explanation, affirms the constitutionality of nolo contendere cases, in which "an accused who is unwilling expressly to admit his guilt but who, faced with grim alternatives, is willing to waive his trial and accept the sentence." *Id.* at 36.

120. *Id.* at 37.

121. This is clearly far less rigorous than jury's finding of guilt based on the "beyond a reasonable doubt" standard.

premise of plea bargaining is another question of constitutional dimension posed by the institutionalization of plea bargaining. The principle of the presumption of innocence nowhere appears in the Constitution. However, because it is an integral part of the common law tradition which forms the backdrop of the U.S. Constitution, it is accepted as one of the bedrock tenets of the American criminal justice. In contexts other than plea bargaining the presumption of innocence issue has often reached the Supreme Court as a part of a due process claim.[122] In the context of plea bargaining, however, such legal challenges based on the principle of the presumption of innocence have not yet been argued before the Supreme Court.

The conflict between the premise of plea bargaining and the presumption of innocence is obvious. The object of a plea bargain is a guilty plea; the prosecutor has no reason to bargain with the defendant unless he presumes that the defendant is guilty. Under the traditional adversarial system the defendant's case goes to a full-blown trial and during the trial the jury decides the guilt or innocence of the defendant after hearing the evidence from both the defendant and the prosecution. Thus, the prosecutor's personal presumption about the defendant's guilt does not determine the outcome of the trial. Furthermore, in an adversarial trial setting, the prosecutor's personal belief in the defendant's guilt is to be encouraged for it increases the adversarial vigor of the trial. However, under plea bargaining, the prosecutor's presumption of the defendant's guilt is not merely his own, but represents the institutional presumption of the entire criminal justice system. If the prosecutor believes that the accused is innocent, he can exercise his discretion not to prosecute the accused. However, those against whom the prosecutor decides to press charges are fair game for a plea bargain. Having made the decision to charge, the prosecutor under the presumption of guilt bargains with the defendant for a guilty plea. As an adversarial player in the system, bargaining a plea with the defendant under the presumption of guilt poses no moral[123] or ethical problem for the prosecutor. However, the notion that anyone charged with a crime is fair game for a plea bargain is problematic for the criminal justice system grounded on the principle of the presumption of innocence. Under the traditional adversarial setting, the presumption of innocence was upheld by the judge and jury at trial; under plea bargaining, the jury is missing and the judge's role,

122. In the preventive detention context, see United States v. Salerno, 481 U.S. 739 (1987).

123. Since the prosecutor's charging decision is probably made partly due to his personal sense of the defendant's guilt, the presumption of guilt should pose no moral problem for the prosecutor.

limited to ascertaining the voluntariness of the defendant's plea and finding a factual basis for the defendant's commission of the crime, is too narrow to safeguard the system's putative presumption of innocence.

Plea bargaining does not work unless the defendant is presumed to be guilty.[124] If every defendant is given the benefit of the presumption of innocence until proven guilty, the inevitable plea that can be entered short of a trial is that of innocence unless the defendant voluntarily confesses to the crime and asks for leniency. One might argue that this is exactly what does happen under plea bargaining: the accused is still presumed to be innocent until he confesses to the crime; the prosecutor merely lets the defendant know the possible consequences for going to trial versus pleading guilty. If the defendant is innocent, he will choose to go to trial; if the defendant is guilty and sufficiently induced by the promise of leniency, he will choose to plead guilty.

There are several problems with this argument. First, under the traditional notion of "the presumption of innocence until proven guilty" the burden of proof lies with the prosecution—the state is expected to gather evidence and prove its case independent of the defendant's assistance. Laying out the alternatives and thereby letting the defendant choose the outcome of the case does not accord with the traditional notion of the state's independent effort in proving its case. Second, to an innocent defendant any state's gesture toward discussing the weightiness or the lightness of penalty signals the criminal justice system's presumption of his guilt, since implicit in discussing the potential sentence is the dismissal of his innocence by the state. Third, since under mandatory sentencing guidelines prosecutors are limited only to charge bargain[125] with the defendant, defendants will rarely give a full confession to their crimes. Instead, the specific terms of the plea agreement reached between the prosecutor and defendant's counsel will largely determine the extent and specificity of the defendant's confession. Under this bargaining setting, the defendant's actual guilt or innocence seems hardly relevant.

124. Even if each prosecutor resists the personal bias for presuming the defendant guilty, the plea bargaining requires prosecutors employ the presumption of guilt.

125. Because mandatory sentencing guidelines limit the judge's discretion over sentencing by mandating a pre-determined range of sentence for a given charge, the prosecutor can only lower the charges in order to offer the defendant any leniency in penalty.

### 4. *Plea Bargaining and Procedural Justice*

As we have seen, the U.S. practice regarding custodial interrogation is mainly driven by the concern for government abuse and achieving procedural justice for the accused. We have also seen that during the custodial interrogation stage the U.S. criminal justice system delivers greater procedural justice for the accused than the Japanese counterpart. However, when we evaluate the U.S. pretrial process as a whole, including plea bargaining, the comparison in regard to procedural justice between the U.S. and the Japanese system does not yield an easy answer.

Unlike the rules regarding custodial interrogation, the practice of plea bargaining was not created by the concern for procedural justice. In fact, whereas the focus of procedural justice is protection of the rights of the accused, the aim of plea bargaining is to seek a waiver of the most important[126] of those rights. As recognized even by the Supreme Court,[127] plea bargaining serves an essential administrative need of the U.S. criminal justice system for a case disposal mechanism that is quicker and less resource-consuming than a constitutionally guaranteed jury trial. Thus, plea bargaining in effect shifts the system's emphasis from procedural justice for the accused to the needs of the state.

This emphasis on "the needs of the state" strikes a familiar chord in the Japanese criminal process. The three "controversial" features of the Japanese pretrial practice—the imposition of the duty to submit to questioning, the exclusion of the counsel from the accused's interrogation and the prosecutorial designation of the meeting between the accused and his counsel—all serve "the needs of the state" to solve crimes. Plea bargaining in the United States serves "the needs of the state" to dispose of cases quickly, but in effect also solves crimes.[128] This similarity between the three "controversial" Japanese pretrial features and plea bargaining in the United States, at least in the principal justification for the adoption of each, should not be dismissed too easily.[129]

To be sure, the plea bargaining process in the United States does provide for some procedural safeguards. For example, the

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126. It would not be an overstatement to characterize the right against self-incrimination and the right to trial as such.

127. *Brady*, 397 U.S. at 752 n.10 (citing that over 90% rate of guilty pleas in overall criminal convictions).

128. To the extent that the defendant confesses to a crime and gets convicted for that crime, the crime is "solved."

129. Many would contend that plea bargaining is different from the three Japanese features in that it is based on "the mutuality of advantage," not just the interest of the state. This point will be explored, *infra*, in the discussion of substantive justice.

Federal Rules of Criminal Procedure requires that before the plea of guilt is entered, the judge must advise the accused of the charges and his rights,[130] confirm the voluntariness of the accused's confession[131] and make a finding of factual basis for the plea.[132] However, since the judge has no way to detect any improprieties that may occur during the plea negotiation process,[133] the judicial hearing for plea-taking rarely changes the actual plea agreement reached between the prosecutor and the defense attorney.[134]

The more significant procedural safeguard for the accused, which also legitimizes plea bargaining under the constitutional scrutiny, is the accused's right to be represented by a counsel, whether private or state-appointed. The attorney, as a zealous advocate for his client, is expected to bargain with the prosecutor for the best "deal" that he can get for his client. The same degree of "adversarial" vigor is expected of the defense attorney in private negotiations as in the open court. However, as discussed above, the problem of "agency cost" belies this expectation. Moreover, although the premise underlying the guarantee of counsel in plea bargaining is similar to that of *Miranda* in custodial interrogation, the custodial interrogation context does not pose the same "agency cost" problem that distorts the expected role of the attorney in plea bargaining. That is, in a regime with custodial interrogation but no plea bargaining, the attorney present at his client's questioning has no conflict of interest which would cause him to deviate from his expected role as a zealous advocate. The attorney who tries his case every time has no reason to maintain a "friendly" relation with or expect any favors, future or otherwise, from prosecutors. In a regime with plea bargaining, the defense attorney has important reasons to count the favors of prosecutors. Thus, although *Miranda*'s reliance on the attorney as the protector of the accused from the government abuse is reasonable, the similar reliance in the plea bargaining context is arguably misplaced. Moreover, in a regime with both custodial interrogation and plea bargaining, the conflicts of interest existing because of plea bargaining may also dilute the zealous advocacy of the attorney during custodial interrogations.[135]

130. FED.R.CRIM.P. 11 (c).
131. FED.R.CRIM.P. 11 (d).
132. FED.R.CRIM.P. 11 (f).
133. Such improprieties may include the prosecutor's improper coercive tactics as well as the defense counsel's less-than-vigorous representation of the defendant due to his own interest to keep a good relationship with the prosecutor.
134. Schulhofer, *supra* note 75, at 1993-95.
135. Since an attorney will handle both cases that go to trial and those that lead to plea bargaining, he still faces the dilemma of what is best for the current client versus what is best for his overall legal practice.

The procedural safeguards in the plea bargaining process do little to achieve procedural justice for the accused. In fact, many of the rationales for accepting plea bargaining are based more on substantive arguments than on procedural arguments. The "due" process guaranteed by the Constitution is a full-blown trial with subpoenaing of witnesses, cross-examination and putting the state to its burden of proof beyond a reasonable doubt. Plea bargaining bypasses that "due" process by inducing the accused to waive his constitutional rights. Whether that waiver is given voluntarily or not, from a strictly procedural justice point of view, the accused is "short-changed." In comparing the overall "procedural justness" of the U.S. pretrial criminal process—with both the current custodial interrogation and plea bargaining practices—to that of the Japanese counterpart, the answer to the question of "which system comes out more procedurally just?" is no longer clear.

## III. HOW IMPORTANT IS PROCEDURAL JUSTICE NOW TO THE U.S. CRIMINAL JUSTICE SYSTEM AND TO THE AMERICAN SOCIETY?

As we have seen, the U.S. criminal justice, whether intentionally or not, in adopting plea bargaining as a legitimate mode of case disposal has steered away from the zealous emphasis on procedural justice which has long governed the custodial interrogation practice. The state's need, namely the need to handle ever increasing case loads with limited resources, is balanced against giving all accused's their constitutionally guaranteed "due" process. The conclusion reached is that the "due" process for everyone is too costly.

The following tables make it clear how prevalent and important plea bargaining is in case disposal for the U.S. criminal justice system, on both the federal and state level.

Table 1 shows that since 1980, the federal criminal justice system has, on the average, disposed of between 80 to 90 percent of its cases each year by guilty pleas. The states also obtain about 90 percent of the convictions from guilty pleas. Trials, relatively speaking, are a rarity.

These statistics and the reality underlying them defy the traditional liberal insistence on procedural justice for the accused, which still dominates much of the legal academia in America. The jurisprudence that developed around the *Miranda*-esque concerns for "ensuring the effective exercise of the accused's constitutional rights" applies at most to about 10

TABLE 1. DEFENDANTS DISPOSED OF IN U.S. DISTRICT COURTS[136]

| | Convicted and Sentenced | | | | | | |
|---|---|---|---|---|---|---|---|
| | | Plea of Guilt / Nolo Contendere | | Convicted By | | | |
| | | | | Court | | Jury | |
| Year | Total | | | | | | |
| 1980 | 28598 | 23111 | 81% | 1851 | 6% | 3636 | 13% |
| 1985 | 38530 | 33823 | 88% | 994 | 3% | 3713 | 9% |
| 1990 | 46725 | 40452 | 87% | 1063 | 2% | 5210 | 11% |
| 1991 | 46768 | 41213 | 88% | 699 | 1% | 4856 | 11% |
| 1992 | 50260 | 44632 | 89% | 576 | 1% | 5052 | 10% |

* All percentages are calculated to the nearest whole number.

TABLE 2. FELONY CONVICTIONS IN STATE COURTS[137]

| | Convicted and Sentenced | | | | | | |
|---|---|---|---|---|---|---|---|
| | | | | Convicted By | | | |
| | | Plea of Guilt | | Court | | Jury | |
| Year | Total | Number | Percent | Number | Percent | Number | Percent |
| 1986 | 582764 | 516398 | 89% | 19801 | 3% | 46565 | 8% |
| 1988 | 667366 | 610218 | 91% | 25305 | 4% | 31843 | 5% |

percent of all criminal cases disposed.[138] The other 90 percent is governed by the newer notions of swift justice and mutual advantage. How important, then, is procedural justice now to the U.S. criminal justice system? Although as an aspiring ideal its significance cannot be denied, on a practical level it no longer seems to take the center stage in the U.S. criminal justice agenda. Coping with limited resources, clearing the overcrowded dockets and locking the criminals away are the overriding concerns now facing the U.S. criminal justice system.

These overriding concerns no doubt reflect the American public's attitude toward crime and criminal justice as well as the social realities of America. Average Americans feel threatened by rampant crime[139] and the public cry for "getting tough on

136. SOURCEBOOK 1993, *supra* note 2, at 520, Table 5.43.

137. U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAM, BUREAU OF JUSTICE, U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1989, at 516, Table 5.32 & 517, Table 5.34; BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1989, at 510, Table 5.31.

138. This figure is based on the total number of convicted cases.

139. *U.S. Drug Trade, Violent Crimes Increase*, DEUTSCHE PRESS AGENTUR, Feb. 14, 1995, at Int'l News Section (From 1960 to 1993, the number of violent crimes reported in America increased 567 percent.); *Nightline*: (ABC television broadcast, July 13, 1994 ("[E]very poll in America today shows crime is the number one problem.") (transcript on file with the author).

crime" is unlikely to subside in the near future. The issue of crime control is also an important annual legislative agenda for the U.S. Congress.[140] The public's "get tough" demand has led to the adoption of "three strikes and you're out" laws,[141] mandatory sentencing guidelines[142] as well as the consideration of other "get tough" measures by the federal government and the states.[143] Moreover, with victims of crime becoming more politically vocal, initiatives to give victims a role in the criminal process are becoming more widespread.[144]

Satisfying these demands means greater law enforcement and prison capacity. It also means heavier caseloads for the criminal justice system. If the system were to give each defendant his day in court, it would necessitate a large increase in the hiring of judges, prosecutors and public defenders as well as building more court houses and jails. If the public demands to "get tough" are followed by a commensurate increase in the budget, each defendant can indeed have his day in court. The same crime-conscious American public, however, disfavors any tax increase. With the federal government and many state governments carrying heavy budget deficits, absent tax raises, such "commensurate increase in the budget" of the criminal justice system is unlikely.

For the criminal justice system, the public's "get tough" demands translate into a pressure to convict and convict swiftly.

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140. For example, the Omnibus Crime Control Act passed in 1994 calls for greater prison construction ($9.9 billion) and increase in the hiring of police officers ($8.8 billion). Currently, the Republican-sponsored "The Taking Back Our Streets Act" also calls for tough anti-crime measures through local government initiatives.

141. The federal three-strikes law was passed last year as part of the Omnibus Crime Control Act. At the state level, Georgia voters by 81% to 19% margin established one of the most stringent laws in the nation (life sentence without parole for second-time violent offenders) and California voters passed the Prop. 184 (its three-strikes and you're out law) with 72% approval in March of 1994.

142. One of objectives of the Federal Mandatory Sentencing Guidelines is "honesty in sentencing"—that is, the convicted must serve the sentence actually given without the possibility of a parole.

143. One example of these "get tough" measures is the treatment of juvenile offenders as adult offenders. Currently, the House of Representatives Judiciary Committee is considering a Juvenile Crime Bill which would treat burglars over the age of 16 as adults. And at least 20 states have moved to prosecute more violent juveniles as adults in 1994. Charles Oliver, INVESTOR'S BUS. DAILY, Dec. 19, 1994, at A1.

144. *See, e.g.*, Francis T. Cullen et al., *Explaining the Get Tough Movement: Can the Public Be Blamed?*, 49 FED. PROBATION 16, 16; Wade Lambert, *Victims' Rights Receive a Fresh Focus*, WALL ST. J., Feb. 27, 1995, at B10; Diane Oltman, *Victims' Families Rally for Rights Amendment*, UPI, Oct. 27, 1992 *available in* LEXIS, NEXIS Library, UPI File; Nazneen Qazi, *Vermont Counsel Fights for Victims' Rights*, AM. LAW., Sept. 1991, at 110; David A. Starkweather, Note, *The Retributive Theory of "Just Deserts" and Victim Participation in Plea Bargaining*, 67 IND. L.J. 853 (1991-92) (suggesting that a victim should take part in plea bargaining).

The traditional mode of criminal process emphasizing procedural justice was created to oppose such pressure, not to accommodate. Plea bargaining is more accommodative of this pressure. Because of the budget constraints the U.S. criminal justice system faces, a system-wide application of the traditional mode is also financially infeasible. Thus, both politically and financially, plea bargaining seems better suited to meet the current demands of the system.

The American public's attitude toward plea bargaining, however, has often been reported as negative.[145] Because plea bargaining takes place "under-the-table," many believe that it undermines the respect for the criminal justice system. But more importantly, the public object to the promise of leniency given to the accused as inducement to plead guilty. Being lenient to criminals is directly antithetical to the "get tough" political mood. However, as long as America upholds its Constitution, the system cannot simply demand the accused to give up his right to trial without compensating him. Either the public pays for the accused's full exercise of his constitutional rights—i.e. a full-blown trial—or it must accept leniency as a necessary evil accompanying the resource-constrained criminal justice system.

It is now apparent from examining the public's attitude towards, and demands on, the U.S. criminal justice system that the American public's focus strays away from the traditional concerns of procedural justice. Their focus is more on deterrence and punishment. As the U.S. criminal justice, both in practice and as a reflection of societal attitude, steers away from the liberal tradition of procedural justice, we should reexamine our recommendation abroad of "more procedural protection for the accused".[146]

## IV. JAPANESE REACTION TO INSISTENCE ON PROCEDURAL JUSTICE

It is no secret that the current Japanese Constitution is largely a product of MacArthur and his American colleagues' initiative to "democratize" post-war Japan.[147] The so-called "American Draft" of the Japanese Constitution, which was

145. *See, e.g.*, Barbra Boland & Brian Forst, *Prosecutors Don't Always Aim to Pleas*, 49 FED. PROBATION 10 (1985); Starkweather, *supra* note 145, at 853.

146. For examples of such recommendations, see Port, *supra* note 3; B.J. George, Jr., *Rights of the Criminally Accused*, 53 LAW & CONTEMP. PROBS. 71, 107 (Spring, 1990).

147. Theodore H. McNelly, *"Induced Revolution": The Policy and Process of Constitutional Reform in Occupied Japan*, DEMOCRATIZING JAPAN 76-103 (Robert E. Ward & Sakamoto Yoshikazu, eds. 1987).

adopted as the final version with few changes[148] in 1947, was modeled after the U.S. Constitution and was very much in accordance with the American constitutional principles at the time.[149] One of these constitutional principles written into the Japanese Constitution was, of course, the protection of the accused in criminal proceedings.[150] The American drafters at the time believed in the "universal application" of the American constitutional principles.[151] This attitude is well expressed in a letter written by General MacArthur himself in 1948:

> The pattern of my course in the occupation of Japan lies deeply rooted in the lessons and experience of American history. . . .There is no need to experiment with new and yet untried, or already tried and discredited concepts, when success itself stands as the eloquent and convincing advocate of our own—nor is there factual basis for the fallacious argument occasionally heard that those high principles upon which rest our own strength and progress are ill-fitted to serve the well-being of others, as history will clearly show that the entire human race, irrespective of geographical delimitations or cultural tradition, is capable of absorbing. . . .[152]

The Japanese reaction to this "imposition" of the American-style constitution ("oshitsuketa Kenpo") was marked by many reactionary initiatives to revise the new Constitution[153] and even challenges to the Constitution's binding effect on the Japanese people.[154] Although the revisionist initiatives led to no actual amendment of the Constitution as adopted in 1947, they did come to affect how the Constitution was interpreted.[155] That is, although the Constitutional Investigation Committee ("Kenpo Chosa Kai")[156] did not recommend any direct amendments to

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148. Examples of these changes are 1) changing from an unicameral to a bicameral Diet, 2) elimination of the provision for a 2/3 majority legislative veto over the Supreme Court's decision on non-human rights-related constitutional issues; 3) elimination of a sentence in a human rights provision: "The feudal system of Japan should be abolished." For these and more examples, see HIDEO TANAKA, KENPO SEITEI KATEI OBOEGAKI 180-84 (1979).

149. KYOKO INOUE, MACARTHUR'S JAPANESE CONSTITUTION 73-74 (1991).

150. McNelly, *supra* note 148, at 98.

151. Inoue, *supra* note 150, at 74.

152. *Id.* at 75 (citing from SUPREME COMMANDER FOR THE ALLIED POWERS, GOVERNMENT SECTION, POLITICAL REORIENTATION OF JAPAN, SEPTEMBER 1945 TO SEPTEMBER 1948 vol. 2, p. 785 (1968)).

153. MASAYASU HASEGAWA, KENPO GENDAISI(II)—ANPO TO KENPO 430-447 (1981); KENPO KYOIKU KENKYUKAI, KENSHO: NIHON KOKU KENPO 36-45 & 208 (1987).

154. MORIO JIN, IKEN KENPO 97-100 (1973).

155. KENPO KYOIKU KENKYUKAI, *supra* note 153, at 42.

156. The Constitutional Investigation Committee (Kenpo Chosa Kai) convened its first meeting in August, 1957 and met over a seven-year period. At its last meeting in July, 1964, it released a final report recommending no textual revision of the Constitution.

the Constitution, it did embrace a notion of "de facto" constitutional revision through interpretation and practice ("kaishaku gaikenron").[157]

We have seen this "de facto" constitutional revisionism at work in the context of the Japanese pretrial criminal procedure. The American drafters, in accordance with the American tradition of guaranteeing procedural justice, wrote into the Japanese Constitution the fundamental principles of the American constitutional jurisprudence regarding protection of the criminally accused—guarantees of the right against self-incrimination, the right to due process and the right to counsel. The contents of these rights, however, have all been revised both through legislative and judicial interpretation and through prosecutorial and police practice to reflect the Japanese "factors."

The Japanese redefined these rights to fit their own traditional values and societal demands. The emphasis on procedural justice and individual rights has never been part of the Japanese tradition.[158] Instead, the Japanese culture stresses the concept of "giri"—the individual's responsibility to the people in a hierarchical relationship with him[159]—and "gimu"—the individual's duty to the society and the country.[160] As if to reflect this importance of duty in the Japanese society, Chapter III of the Constitution, which the American drafters regarded as "the bill of rights" for the Japanese people, is entitled "Rights and *Duties* of the People." Of the thirty-one articles contained in Chapter III, however, only one article, Article 12, makes an indirect reference to duty: "The freedom and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare ("kokyo no hukushi")."[161]

Not surprisingly, Japanese judges and prosecutors often rely on Article 12 to justify pretrial practices that restrict the rights of the accused. For example, the accused's duty to submit to questioning can be justified on this "public welfare" ground. Solving crimes and punishing the guilty, after all, are for the protection of the public welfare. The prosecutorial designation also serves the

157. KENPO KYOIKU KENKYUKAI, *supra* note 153, at 42.
158. George, *supra* note 147, at 72-74.
159. Inoue, *supra* note 150, at 52-53.
160. George, *supra* note 147, at 73-74.
161. KENPŌ, art. XII. Compare this language with the corresponding provision of the American Draft: "The freedoms, rights and opportunities enunciated by this Constitution are maintained by the eternal vigilance of the people and involve an obligation on the part of the people to prevent their abuse and to employ them always for the common good." HIDEO INUMARU, ET AL., NIHONKOKU KENPOHO SEITEI NO KEIYI 440 (1988).

public welfare by facilitating crime investigation.[162] Moreover, Japanese judges often condone procedural violations by the police which would trigger an exclusionary rule in the U.S. as long as evidence indicates the defendant's guilt.[163] In balancing the interest of the individual defendant against that of the public, Japanese judges usually side with the public's interest.

Likewise, the Japanese public does not whole-heartedly approve of letting the criminally accused freely exercise their constitutional rights. For example, any accused who invokes his right to silence is highlighted by the media and criticized by the public.[164] The accused's adamant insistence on silence may even be viewed as selfishness.[165] Although the Japanese public may not necessarily approve of coerced confession, they share the Japanese authority's belief in the importance of confession in criminal investigation.[166] As one Japanese constitutional scholar put it, "The Japanese dote on the discovery of the 'truth.' No matter how long it takes, they would rather know exactly how the crime occurred."[167] Protecting an individual accused of a crime—an ultimate "anti-social" act—from telling the truth to the public, whether that truth is an admission of guilt or innocence, is antithetical to the Japanese traditional emphasis on social duty and public welfare.[168]

Many Japanese constitutional scholars have attributed this public attitude to the public's lack of a "constitutional consciousness" ("Kenpo ishiki").[169] That is, because the Japanese have a long tradition of hierarchical order and group conformity, they lack the appreciation for the protection of individual rights. Ac-

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162. Kenkyusho, *supra* note 71, at 21-22.

163. Judgment of June 28, 1978, Osaka Kōsai [Osaka High Court], 9 Keiji Geppō 334 (Even when the evidence was clearly derived from a coerced confession, the court denied the exclusion of this "fruit of the poisonous tree" on the ground that the protection of the defendant's right must be balanced against the importance of discovering the truth); Judgment of July 10, 1953, Saikōsai [Supreme Court], 7 Keishū 1474 (similar holding in the context that the right to meet with the counsel was violated); Judgment of Nov. 21, 1950, Saikōsai [Supreme Court] 4 Keishū 2359 (held that even if the police did not give a warning regarding the right to silence in advance of an interrogation, so long as the voluntariness of the confession is reasonably ascertainable, the confession should be admissible as evidence).

164. Foote, *supra* note 98, at 466-468.

165. NAOKI KOBAYASHI, NIHONKOKU KENPO NO MONDAI JOKYO 108 (1964).

166. KENPO KYOIKU KENKYUKAI, *supra* note 153, at 64.

167. TOSHIYOSHI MIYAZAWA, PEACE AND HUMAN RIGHTS 217 (1969).

168. In a survey on the "constitutional consciousness," to a question "between public welfare and individual's freedom and rights, which should be given more weight?" 42% chose public welfare, 14% chose individual freedom and rights, and the remaining was undecided. KOBAYASHI, *supra* note 165, at 60.

169. *See generally* NAOKI KOBAYASHI, NIHONJIN NO KENPO ISHIKI (1968); MIYAZAWA, *supra* note 167, at 65; NAOKI KOBAYASHI, KENPO TO NIHONJIN 188-217 (1987).

cording to a constitutional scholar, Naoki Kobayashi, the Japanese lack a constitutional consciousness because they did not fight for their Constitution. Unlike the Americans or the French, the Japanese Constitution was not a product of a domestic popular struggle. The Japanese did not ask for it; it was thrust upon them.[170]

Upon a culture that emphasizes duty and public welfare, the American drafters' "imposition" of the legal framework which focuses on procedural justice seems a bit presumptuous in hindsight. The Japanese do not share the American's historical mistrust of the government, nor do they believe in the protection of the individual rights at the expense of the public welfare. Ironically, the current public attitude in America also tends to reject the notion that the individual rights—especially those of the criminally accused—should be protected at any cost. The Japanese de-emphasized the foreign concept of procedural justice through an interpretational and practical revisionism of their Constitution. The U.S. Supreme Court's recognition of plea bargaining's constitutionality and its shift away from the traditional insistence on procedural justice can perhaps also be characterized as a form of interpretational revisionism.

## V. THE ROLE OF SUBSTANTIVE JUSTICE IN BOTH CRIMINAL JUSTICE SYSTEMS

### A. PRESENCE OF AND DEMANDS FOR SUBSTANTIVE JUSTICE IN THE U.S.

Many arguments for plea bargaining are based on a notion of substantive justice for the accused. Under a contract theory of plea bargaining, for example, an outcome based on the accused's rational choice of the certainty of a lenient sentence over the uncertainty of a trial is substantively just for the accused.[171] Another theory holds that because trials are only a fallible method of learning the truth, it is even in an innocent defendant's interest to plea bargain. Given the fallibility of trials, plea bargaining in offering an alternate "way out" of trials, therefore, is beneficial for the defendant, whether he is innocent or otherwise.[172]

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170. NAOKI KOBAYASHI, *supra* note 165, at 101.

171. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1914 (1992).

172. *Id.* at 1943 ("[T]rials make mistakes. Some innocent defendants . . . are convicted . . . any innocent defendant faced with formal charges must consider the possibility that he might lose at trial. . . . Given a high level of risk aversion among innocent defendants than among guilty ones, the high price/high probability contract will often prove attractive even to the innocent.").

Some arguments focus more on the substantive justice for the state and the society. The most obvious is that the state and the society save resources. Some also argue that through plea bargaining the state can obtain convictions that it otherwise could not obtain through trial.[173] For example, if the available evidence without the defendant's confession is not adequate to prove the defendant's guilt beyond a reasonable doubt but the defendant is in fact guilty, the conviction obtained through plea bargaining is substantively just for both the state and the society. Whether the focus is on the accused or on the state and the society, the underlying rationale for plea bargaining is substantive justice. Thus, given the prevalence of plea bargaining, the role of substantive justice in the U.S. criminal justice system can be said to be already quite significant.

The American public's demand for tougher law enforcement also manifests the growing importance of substantive justice in the United States Increasingly, procedural justice is viewed as only "helping the criminals" and locking up the guilty is emphasized over the police observance of technical procedural rules.[174] Recently, some communities have even passed laws requiring public notification regarding any sex offender that moves into the community.[175] Implicit in the passage of such laws is that the public's "right to know" takes precedence over the criminal's right to privacy. The notion of giving priority to the public interest over the individual's (albeit convicted) even goes beyond the normal notion of substantive justice based on "just desert"[176] and closely resembles the Japanese "ordering" of substantive justice between the public and individual interest.

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173. *See, e.g.*, Thomas Church, Jr., *Plea Bargains, Concessions and the Courts: Analysis of a Quasi-Experiment*, 10 LAW & SOC'Y REV. 377, 383 (1976); Scott & Stuntz, *supra* note 172, at 1932.

174. A manifestation of this attitude is the House's recent passage of the Exclusionary Rule Reform Act of 1995, 1995 H.R. 666. The Act codifies certain exceptions to the exclusionary rules.

175. Barry Meier, *"Sexual Predators" Finding Sentence May Last Past Jail*, N.Y. TIMES, Feb. 27, 1995, at A1; Megan O'Matz, *Megan's Law Moves Toward Vote in State Senate*, THE MORNING CALL (Allentown, PA), Feb. 28, 1995, at A4; *PA Senate Passes "Megan's Law"*, U.P.I. 1995, Feb. 28, 1995, at Regional News Section (The Pennsylvania's Megan's Law would require convicted sex offenders to register with police for 10 years or for life, with the longer period depending on whether they are classified as a "sexually violent predator" by a three-member psychiatric board. Child molesters would automatically be classified as predators under this law. The law would allow the police to notify neighbors when certain offenders move into their neighborhood); *Warning Neighbors With Repeat Pedophiles, Notice Seems Fair*, THE COLUMBUS DISPATCH, Feb. 23, 1995 (In Louisiana, Washington and Oregon, the law requires sex offenders to inform their communities of their presence).

176. The normal notion of substantive justice "stands for the concept that a legal system is just if the results are fair." O'Connell, *supra* note 1, at 176.

## B. THE JAPANESE CRIMINAL JUSTICE—SUBSTANTIVE JUSTICE AS A REFLECTION OF THE PUBLIC ATTITUDE

As discussed in Section III above, the Japanese public generally values public welfare more than the protection of individual rights. Particularly, in the context of criminal justice, the public expects the accused to confess despite his constitutional right to silence. If an individual commits a crime against the society, he is expected to admit his wrong and beg for forgiveness. Intuitively, if the accused is innocent, he will naturally want to explain his innocence. Only the guilty will insist on silence and refuse to explain the evidence against him. Thus, the constitutional guarantee of the right against self-incrimination is a concept not readily embraced in the Japanese society.[177]

Not surprisingly, despite the constitutional constraints, the Japanese police focus on obtaining a confession from the accused.[178] The pretrial practices of the police and prosecutors are also "enabling" for obtaining confessions.[179] With the accused's confession playing an important role in the Japanese criminal justice, the constitutional guarantee of the right to silence is subject to the needs of the state to protect the public welfare. Substantive justice in the Japanese criminal justice system is discovery of truth and appropriate punishment of the criminal for the public, and acceptance of punishment commensurate with the crime and reconciliation with the society for the convicted. But overall, greater weight is given to achieving substantive justice for the public than to achieving that for the individual accused.

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177. The Japanese are not alone in noticing this lack of coherent logic behind granting the right against self-incrimination. For example, Jeremy Bentham characterizes the problem as follows:

> Let us now consider the case of persons who are innocently accused. Can it be supposed that the rule in question has been established with the intention of protecting them? They are the only persons to whom it can never be useful. Take an individual of this class; by the supposition, he is innocent, but by the same supposition, he is suspected. What is his highest interest, and his most ardent wish? To dissipate the cloud which surrounds his conduct, and give every explanation which may set it in its true light; this is the desire which animates him. Every detail in the examination is a link in the chain of evidence which establishes his innocence. If all the criminals of every class had assembled, and framed a system after their own wishes, is not this rule the very first which they would have established for their security? Innocence never takes advantage of it; innocence claims the right of speaking, as guilt invokes the privilege of silence.

JEREMY BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 241 (1825). For more recent discussion, see Dolinko, *Is there a Rationale for the Privilege Against Self-Discrimination?*, 33 UCLA L. REV. 1063 (1986); William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227 (1988).

178. SETSUO MIYAZAWA, POLICING IN JAPAN: A STUDY ON MAKING CRIME 158 (1992).

179. *Id.* at 16-22.

### C. Substantive Justice as a Way to Inject Greater Honesty into Criminal Justice—Elimination of Dissonance between Legal Rules and Social Reality

The Japanese criminal justice as currently practiced reflects the Japanese public attitude and values. The Japanese law-makers and judiciary have reinterpreted the American-style legal framework to yield this result. The U.S. criminal justice as currently practiced appears only to partially reflect the American public demands and priorities. Moreover, it possesses a "split personality": on one hand, it grants the accused a trial attended by an elaborate set of procedural safeguards and on the other, it goes for swift justice through plea bargaining. One reason for this phenomenon in our criminal justice may be that the American public itself makes conflicting demands on the system. That is, the public wants the system to be "tough" on criminals—i.e. no leniency—but does not want to bear the enormous cost for giving every accused a trial. The public wants the accused's rights protected but at the same time demands a victim's right to be heard in adversarial proceedings traditionally reserved for the accused and the state.[180] Another reason may be that the traditional American legal framework based on procedural justice for the accused has become too costly for the American society, both monetarily and for the sake of public welfare. It is easy to see that trials are more expensive than summary disposal of cases through plea bargaining. Moreover, the procedural safeguards adopted to protect the rights of the defendant, such as the *Miranda* rules before trial and various exclusionary rules at trial, have made evidence gathering more difficult[181] for the police and prosecutors. Because the government must meet a high burden of proof, the likelihood of convicting a defendant at trial is certainly lower with exclusionary rules than without. If a dangerous criminal is acquitted despite damaging evidence because the evidence was obtained in violation of his right and gets excluded, the result undermines the public welfare in a society plagued by rampant crime.

Perhaps the current criminal justice system in America accurately represents the values and attitudes of the American public. Perhaps the "split personality" of the system is an accurate re-

180. *See*, Paye v. Tennessee, 111 S.Ct. 2597 (1991) (upheld the constitutionality of allowing victim impact statements at a capital murder sentencing); Lambert, *supra* note 144 ("Twenty states have added 'victims-rights' amendments to their constitutions in recent years, and voters in at least three states are expected to consider such provisions next year.").

181. Pretrial Interrogation, *supra* note 15, at 57-60.

flection of corresponding split values and attitudes in our society. Americans are proud of the legal tradition founded on procedural justice. Protection of human rights are as much a part of our foreign policy agenda as is the propagation of democracy. However, we also want less costly criminal process and greater substantive justice. With crime becoming a more prevalent threat to the society, we want more protection from crimes and tougher punishment for the criminals. How do we reconcile these conflicting desires?

It seems that at least for now the demand for substantive justice and less costly process is prevailing over the desire to preserve the traditional ideal of procedural justice. The dominance of plea bargaining in the current U.S. criminal process is good evidence of this trend. Greater focus on the public interest in the Supreme Court's discussion of criminal procedural issues is another indication.[182] Although the U.S. criminal justice system has not abandoned the tradition of procedural justice, it has all but admitted to the shortcomings of the traditional approach to criminal justice in a society plagued with crime and constrained by limited resources. The tradition based on procedural justice no longer adequately accommodates the needs of the American society.

## VI. CONCLUSION

It is unlikely that in either criminal justice system the respective grounding philosophical emphasis—on substantive justice in Japan and on procedural justice in the U.S.—will change. So long as the culture of "collective consciousness" remains firmly rooted in Japan, the demand for the societal good will prevail

182. *See, e.g.*, McNeil v. Wisconsin, 111 S.Ct. 2204, 2210 (1991). The Court rejected the defendant's claim to exclude his confession made after his request for a counsel at a judicial proceeding by drawing a fine line between the Sixth Amendment right to counsel and the Fifth Amendment right to counsel. The Court, in making such distinction, expressed a very different vision of confessions from the *Miranda* Court:

> [I]f we were to adopt petitioner's rule, most persons in pretrial custody for serious offenses would be unapproachable by police officers suspecting them of involvement in other crimes, even though they have never expressed any unwillingness to be questioned. Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser. Admissions of guilt resulting from valid *Miranda* waivers "are more than merely 'desirable'; they are *essential to society's compelling interest* in finding, convicting, and punishing those who violate the law." (emphasis added)

Paye, *supra* note 180, at 2605 (In justifying allowing victim impact statements in a capital murder sentencing, the Court quoted an Italian criminologist: "[T]he punishment should fit the crime. . . .We have seen that the true measure of crimes is the *injury done to society*" (emphasis added)). Notice the similarity to the Japanese emphasis on the public welfare.

over the protection of the rights of an individual defendant. Likewise, as long as Americans remain heterogeneous, the importance of protecting individual rights will take precedence over any appeal for the collective good, especially when individual rights are pitted against the power of the state.

The comparison of the two systems, however, does show that neither system, in practice, exclusively employs its grounding philosophy in fashioning the mechanism for administering justice. In Japan the constitution and criminal procedural law based on the Anglo-American legal tradition prevent exclusive reliance on substantive justice. Moreover, the modern public opinion, both within Japan and abroad, checks any further expedient omission of the defendant's rights in the name of substantive justice. In the U.S. the numerosity of criminal cases and the resource constraints within the system have led to a systemic preference for the expedient plea bargaining over the full extension of the defendant's procedural rights at trial.

Both the Japanese and the U.S. justice system face the need to balance its traditional notion of justice against the constraints posed by the demands within and outside the system. Explosion of crime has led the American public to demand tougher sanctions and swifter administration of justice for criminals. Under this climate, the presumption of innocence until proven guilty in the court of law is proving too costly both in time and in resources. On the other hand, more Japanese legal scholars and practicing attorneys are questioning and challenging the well-settled pretrial practices. As the Japanese public becomes increasingly aware of these practices and their potential for abuse , the courts, the prosecutorial administrators and the police in Japan will need to accord criminal defendants greater freedom and ease to exercise their legally guaranteed rights.

Despite the polar philosophies of criminal justice, in practice both systems are making a converging shift toward a hybrid ground on which the two opposing notions of justice blend to create a workable and fair system. Unlike in the polar extremes of substantive justice favoring the society and procedural justice favoring the accused, it is difficult to label which hybrid system of justice is fairer with respect to the accused or to the society. Each is the reflection and product of the circumstances of two distinct societies. However, the comparison still renders a valuable lesson: that is, as one system incorporates more of the other's philosophy of justice, one can perhaps envision where it may end up.