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On the Ethics of Exporting Ethics: The Right to Silence in Japan and the U.S.

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In *The Question of Hu*, Jonathan Spence tells the story of a French missionary in China in the eighteenth century, who set out to prove that certain ancient Chinese documents confirmed his idiosyncratic Christian theory of world history.[1] It is the story of a foreigner's shabby and insensitive treatment of the Chinese people encountered in his spiritual quest, and equally of a European unable to reflect on the limitations of his own intellectual cocoon. The missionary failed to exercise two types of reflection—what I shall refer to as *double reflection*. He failed to discern what something could mean to the Chinese, especially when at variance with his own understanding, and he was unable to contemplate the contestability of his own worldview.

These are difficult abilities to cultivate, and most of us fail to some degree. Yet they are indispensable in a world of increasing communication and interdependence across cultures. When people from different ethical traditions confront one another in a practical context, what may we reasonably expect? We are most familiar with encounters in which effective control lies with one or the other party, such as the imposition of values by a dominant power or the appropriation of values by a professional elite. Neither of these involves mutual deliberation. Is deliberation across ethical traditions possible? Since the majority of my students at the Kennedy School of Government are international—with a large group drawn from Confucian countries—the question amounts to asking whether it is possible for me to engage in reasoned disputation

with my students, assessing the truth of moral claims, the pros and cons of alternative views. One of the ground rules in my ethics class is that no one is permitted to say simply "This is how we do things in my country." But to what extent do we—can we—succeed in justifying our conduct to one another? If we do not reach agreement on specific principles, can we at least converge on a framework for the identification of acceptable principles?

In this essay, I propose to examine a rule or practice in an "alien" culture quite antithetical to the comparable U.S. rule or practice, and show that a compelling case can be made for it—compelling, that is, to us. By compelling, I mean that, even if we cannot imagine living by it ourselves, we should be able to appreciate its moral force, understanding it as an alternative mode of human flourishing. The comparison itself could constitute (or elicit) a critique of our own practice, but that is not crucial. What matters is not whether we approve of the alien practice but whether we find it morally coherent or intelligible—itself a moral judgment but less demanding than approval.

Undergirding this enterprise is a wariness about dividing the world into distinct, unitary, enclosed moral spaces. That view imagines moral traditions to be like exclusive social clubs, in which everyone is a member of one or another. Each club has its own rules and its own standards of interpretation and justification—internal to itself and inaccessible to other clubs. Central concepts illuminate the meaning of morality to those within the club's boundaries but are opaque to those outside. Alasdair MacIntyre, for example, claims that the features of the moral life salient to a Confucian are "necessarily invisible" to an Aristotelian, and vice versa.[2] Yet he concedes that traditions develop over time, so that what could not be said or grasped at one temporal stage becomes available at a later stage. Then the possibility of genuine engagement depends on which stage one is in. Instead of the social club metaphor, I prefer to regard moral

traditions like schools—learning environments, each of which makes available the resources for moral understanding and criticism, including self-criticism. (I take moral conformity itself to be a reflective practice that generates criteria for its own assessment.) This alternative picture envisions the possibility of a common educational experience across societies; the important questions then are about pedagogy.

One learning strategy, for example, begins with the observation that traditions are carried on at different levels of abstraction; people who share a tradition at one level may diverge at another. The divergence provides a standpoint for examining what is shared, and vice versa. And similarly across traditions. Of course, confidence in this strategy is deeply antagonistic to the postmodern teaching that the only resources available to us are competing discourses with different, often incompatible, constructions of the moral world, without any reliable method for mediating between them. Postmodernists place themselves in enclosed, usually ethnocentric spaces and then express wonder at their imprisonment. I am ready to begin with particular societies and human beings in all their motivational and normative diversity, but that is only a starting point, and one with rich reserves for critical reflection. Just as we need not believe that moral reasoning requires an Archimedean point outside all social practices, so we need not believe it is inescapably constricted by specific linguistic or cultural categories. It is not just that there is no "outside," and no need for one, but no "inside" either—let alone an inside one can never get out of. One embarks at some local place and then advances, with caution, to more comprehensive understandings. In the process, contingency may infect our thinking and set obstacles to our grasp of things, but there are no limits in principle to inclusiveness and generality. Further, the stimulants to reflection are familiar, including the growth of knowledge and awareness of alternative norms from cross-cultural studies. Let us assume that, in

deliberation, we each have a different, perhaps idiosyncratic, starting point, like the French missionary in Jonathan Spence's story. We also have the capacity to reflect and follow lines of reasoning and make new discoveries, about ourselves as well as others. (Interestingly, as the lives of others become morally intelligible, our own may become somewhat opaque.) The result is that we enlarge our understanding—although success in this endeavor may require the adoption of a more encompassing idiom. In this way, double reflection avoids the pathologies of relativism and perspectivalism.

What I bring to this project is neither the deep immersion of an area specialist nor a social scientist's techniques for empirical generalization but the resources, such as they are, of a practical ethicist. These resources are perhaps too meager for the analysis I propose to undertake here, but I stress that my ambitions are limited. This essay is very much a personal, no doubt quirky attempt to come to grips with the challenges of cross-cultural ethical dialogue. My approach is to use available scholarly sources to offer an interpretive account of Japanese practice, reflecting my conviction that many social phenomena are unintelligible, descriptively as well as normatively, unless characterized in terms of their aspirations or guiding ideals.[3] Of course I could not pursue this project if area specialists did not pursue theirs; practical ethics operates at a meta-level and depends on good scholarship at the ground level. This essay is meant to be exploratory, clarifying, and suggestive, rather than definitive; I invite dispute and correction. My aim is to illustrate double reflection and draw some conclusions about exporting ethics across cultures.

The rule I have selected for examination is a specific, well-entrenched constitutional right of criminal defendants—commonly referred to as the privilege against self-incrimination but more generally called the right to silence—and my starting point is the attempt by U.S.

occupation forces to transplant this right in Japan at the end of World War II. The story of the constitutional right to silence in Japan is in part about the feasibility but more about the ethics of ethics export in the absence of double reflection.

I. **The right to silence in Japan**

During the occupation of Japan at the end of World War II, the U.S. engaged in deliberate institutional design on a grand scale. The general aim was to transform an autocratic political system into a functioning democracy, as we understood it. The principal strategy consisted in taking a distinctive parliamentary system and setting it within a constitutional structure, with a bill of rights and a supreme court. As part of this plan, the U.S. attempted to transplant the core components of an adversarial system of criminal justice, including the right to silence for suspects. Occupation forces regarded the traditional Japanese emphasis on confessions in criminal cases, including the extralegal use of torture to obtain them, as necessitating reform. The right to silence was made explicit in the new constitution (Article 38) and was supported by provisions in the Code of Criminal Procedure of 1948. However, written law and living law do not always coincide.[4]

Observers agree that while physical abuse by the police diminished considerably, the new legal structure failed to establish a meaningful right to silence or to change Japanese attitudes regarding the importance of confession. Thus, we have what John Haley refers to as the anomaly of Japanese criminal justice: Although laws and institutional forms closely resemble what one would find in other industrial countries, certain practices have few, if any, analogues in the West, specifically the "pattern of confession, repentance, and absolution," which is evident at every stage of law enforcement. "[T]he vast majority of those accused of criminal offences confess,

display repentance, negotiate for their victims' pardon and submit to the mercy of the authorities. In return they are treated with extraordinary leniency."[5] The principal statute under which officials operate is Article 248 of the Code of Criminal Procedure, which states: "Prosecution need not be instituted if it appears unnecessary because of the character, age and environment of the offender, the circumstances and gravity of the offense, or the circumstances following the offense." The reference to circumstances following the offense is meant to include changes in attitude such as expressions of remorse by the offender, as well as restitution to injured parties. Accordingly, a large percentage of cases of warranted prosecution (where evidence is sufficient to proceed) are disposed of in summary fashion or are quietly negotiated by police and prosecutors, if they judge that the conditions of repentance and personal rehabilitation are met. [6] Koichi Aoyagi observes: "Japanese suspects in virtually every case end their confessions by apologizing for the harm to the victim or for the shame of their parents, and admit to other crimes that have not yet been discovered."[7]

In the U.S., by contrast, expressions of remorse are largely unexpected, and if forthcoming are often greeted skeptically. Perhaps this reaction stems from the heavy reliance in the U.S. on plea-bargaining, which requires an admission of guilt (to some lesser crime) but not a confession (an admission of responsibility and contrition for what one actually did). Accordingly, U.S. prosecutors are likely to view an expression of remorse as a negotiating ploy rather than a component of personal rehabilitation. Further, when plea-bargaining fails, U.S. courts are much less hesitant to process and convict offenders on the basis of circumstantial evidence. Perhaps not coincidentally, many prisoners insist on their innocence, and we have recently learned in an alarming number of death penalty cases that they are sometimes right.

The power of official forgiveness in Japan establishes a non-transparent yet authorized space within which police and prosecutors exercise judgment about states of mind and traits of character. For example, they evaluate the suspect's attitude in acknowledging guilt, the sincerity of remorse, and the likelihood of reform. They also assess the quality of an offender's environment, especially the family and work situation, to judge the prospects for reintegrating the suspect into society. Often, the police provide specific services, including travel expenses, to assist rehabilitation. From a U.S. perspective, this wide discretionary authority—and capacity for intrusion into the personal lives of suspects—is perhaps the most remarkable feature of Japanese practice. So it is important to observe that the broad exercise of discretion in Japan occurs within the context of a wholly different relation between police and public. Japanese police are part of daily life, a constant presence in their neighborhoods, serving as counselors, arbiters of disputes, and facilitators of neighborhood activities. Their reality is "pervasive, unofficial, and low-key."[8] They offer a variety of routine community services, from conducting residential surveys to providing cash loans in emergencies to handling general delivery mail addressed to transients working in their area. (This social presence and omnibus assistance, of course, allows for continuous surveillance.) On the public's side is a tradition of well-organized neighborhood crime prevention associations, whose activities range from the informational (flyers, newsletters) to the operational (patrolling streets, selling security hardware). The result is not just close cooperation but lack of a sharp contrast between citizen and police activity. The police interact with ordinary, law-abiding citizens in non-emergency situations over extended periods of time, not just with "people who are criminal, hostile, drunk, injured, distraught, vicious, dishonest, and emotionally disturbed."[9] In this context, discretionary judgment is not necessarily violative of rule of law values. A delinquent act is still the occasion for judgment,

but the particular facts in a dispute matter more than contravention of an abstract rule. And since leniency is a typical outcome, fairness (as between individuals) is less likely to be an issue.

Consistent with the public service role, Japanese police officers have sufficient moral authority to be "tutors of the responsibilities of civic life."[10] They remind suspects of their duties to society, their family, and fellow workers. The assumption is that misconduct results from ignorance or error (for example, regarding the consequences of one's deeds), rather than willfulness or any inherent defect of character. The use of reminders also reflects the fact that in Japan social control is more emergent than imposed, less the product of legal commands than of group socialization, which is one reason citizens may feel more comfortable with case-by-case judgments in the application of rules. By longstanding practice, the police often ask minor rule-breakers to express contrition by writing a "letter of apology" in lieu of official sanction. Such letters are kept on file in local stations, although, often unbeknownst to citizens, they are not official documents.[11] This practice indicates that the purpose of an apology or confession is not, in the first instance, to provide evidence or build a record (and certainly not to secure a conviction) but to determine proper disposition of the case, which often means suspending prosecution and rectifying the problematic situation. The aim is not to isolate offenders but to reintegrate them. Norms are reaffirmed and harmony is restored by engaging in a public ritual that displays the offender's understanding and commitment. In referring to ritual, I do not mean to suggest that the apology is pro forma—following the correct form without the requisite sentiment is as much to be condemned as not following the form at all. The point, rather, is that the focus of the ritual is less on the past misdeed than on promised future conduct. The police are agents of personal reform.

Some non-Japanese observers take a fairly benign view of these prosecutorial practices. David Bayley, for example, emphasizes the guiding ideals that they reflect, even though not evident in every case. He describes a police force keenly aware of its fiduciary obligations, one that acts more professionally than police in other societies.[12] On the other hand, some Japanese scholars, such as Setsuo Miyazawa, are highly critical, focusing especially on the abuses that appear to flow naturally from the unquestioned reliance on confessions and the institutional dynamics that make false admissions possible, or even likely. Miyazawa observes, for example, that too often the police fail to realize that they pressure recalcitrant suspects into false confessions by their own dogmatic commitment to an erroneous hypothesis about the facts. With each erroneous confession, the police have to review the investigation, sometimes resulting in "a vicious cycle in which a false confession cause[s] a longer investigation, and a longer investigation produce[s] yet another false confession." Meanwhile, opportunities to recover evidence and explore alternative hypotheses are lost. Hardly a model of professional behavior.[13]

Reinforcing Miyazawa's concerns are the interrogational powers available to police and prosecutors. The most striking is the power to hold a suspect for interrogation for extended periods, in some instances up to twenty-three days, before filing charges. During this period, the suspect may have little contact with legal counsel or the outside world, yet the exclusion of confessions even in these cases is very rare "and is virtually unheard of in cases where a guilty person would go free as a result."[14] Commenting on recent judicial decisions, Mark Ramseyer and Minoru Nakazato observe: "[E]ven where the detention was illegal, where prosecutors promised leniency if the defendant confessed, where the police kept the defendant handcuffed during the interrogations, where no one warned the suspect that he could refuse to answer questions, or where prosecutors limited the suspect's contact with his attorney to two- to three-

minute sessions, the Supreme Court has admitted the confession."[15] Exclusion occurs only where a defendant is able to raise serious questions about a confession's reliability, but concerns about voluntariness are, in comparison to the U.S., surprisingly muted. (At the same time, convictions are not based solely on confession; for Japanese judges, the reliability of evidence is a major preoccupation.)

Miyazawa is surely right to worry about the potential for abuse, even if suspects are disposed to the pattern of confession and absolution that Haley describes, and such a concern provides one of the standard justifications for the right to silence. Such a justification, however, construes the right only instrumentally, and the effect it is designed to achieve (to prevent abuse) could as well be realized in other ways, for example, by monitoring interrogations. To construe the right—or its absence—instrumentally is to miss the point. Behind the specific powers by which confessions are obtained in Japan are social norms that make confession the morally expected form of conduct. Even in cases where the police have sufficient basis for an arrest on some charge, they often instead ask suspects to accompany them voluntarily for questioning. "Japanese suspects seldom refuse such requests."[16] Why? Superficially, it may seem that a satisfactory explanation of one's conduct helps one avoid the stigma of arrest. More important, I believe, is the pervasive expectation that suspects will give an account of themselves. This expectation is apparent not only among interrogators and judges—who are likely to impose reduced or suspended sentences when offenders are cooperative, and to impose harsher penalties when they are recalcitrant—but in the public at large.

In a word, the importance of confession is not instrumental but intrinsic. Confession is a moral duty, owed to other citizens. Scholars who focus on institutional incentives that police and prosecutors have for extracting confessions, or that suspects have for engaging in the quid pro

quo of confession for leniency, fail to accord sufficient weight, I believe, to the moral imperative that sustains the practice. The account that highlights institutional dynamics, rather than social norms, is of course attractive. It seems plausible that if the state sustains a high degree of certainty of conviction, increases the penalty for noncooperation, and reduces the penalty for confession (conditions that all hold in Japan), we should expect to see more confession.[17] The question would remain why some states, and not others, develop institutions that promote confession. The answer could be that they want to secure their own legitimacy by assuring the public that wrongdoers have been caught. But I would observe that, just as Japanese police are embarrassed if a case is dismissed for lack of proof (hence the temptation to engage in pressure tactics), so they are disgraced if a case goes forward and is subsequently thrown out because a confession is unreliable. Dismissals and acquittals undermine public trust in the authorities, and in the criminal realm the Japanese take very seriously the need to sustain public trust. In this respect, a confession is indeed evidentiary, because a confession makes it more likely that the coincidence of guilt and conviction, or innocence and acquittal, will occur, and thus creates more confidence in the system. But, curiously, not every state gives such importance to sustaining confidence in the system—the U.S., for example—which shows that achieving legitimacy is more complicated. It depends not only on outcomes (success rates) but on the manner in which citizens are treated. And that is where background social norms are crucial.

Institutional incentives are undoubtedly real—but secondary, I would argue. They are dependent on the normative universe in which they operate, and in Japan they involve a web of beliefs about social duties, especially the duty of citizens to be answerable to one another for disruptions of the moral order. To take one telling cultural indicator: Many Japanese children's stories display a different pattern from their U.S. counterparts. In a common Japanese version of

Little Red Riding Hood, "the wolf falls on his knees before the irate woodsman, confesses his crime of eating grandmother, and begs forgiveness."[18] Instead of getting a blow from the woodman's axe, the wolf is forgiven because of his sincere contrition. No retributive justice, but reconciliation of the parties (including grandmother who, in many versions, is disgorged from the wolf). Thus, what the Japanese demand is accountability and cooperation. Underlying this demand is a concern about future membership in society, and the assumption that people will be virtuous if they are encouraged to be so. Confession is part of the catharsis needed for rehabilitation and a test of the prospects for reinstatement as a trustworthy member.

Japanese practice originated in China, and legal orders throughout East Asia emphasize the importance of confession.[19] However, my reading on Chinese practice suggests that the norms of mutual accountability and reconciliation are less in evidence. Whereas, in Japan, confession elicits a suspended sentence or an aborted prosecution, in China it may—or may not—simply elicit a lighter penalty. Further, during the Qing dynasty torture was permitted to obtain confessions, "not when the evidence was insufficient, but when it was convincing and only the offender's confirmation was required."[20] In other words, the function of confession was not evidentiary, and indeed it did not constitute evidence—in contrast to *ancien regime* Europe, where "torture was applied when there was some proof, but not enough."[21] Rather, confession displayed the suspect's submission to the authority of the state. That remains a desideratum in China today. There is no legal right to refuse to answer questions or testify; torture is officially prohibited, but few safeguards are in place to prevent it. China has signed the UN treaty banning torture but exempted itself from the requirement to allow monitoring by outside investigators.[22] When submission is the overriding aim, limits on the use of torture to ensure the credibility of confessions as evidence do not necessarily come into play. The difference between Japan and

China, then, is this: If we ask to whom the duty to confess is owed, the Japanese answer is that it is owed to other citizens, who have a right to an accounting. The role of state officials is to mediate between citizens; thus, although a confession is made to an official, the official is a surrogate for ordinary citizens, with a responsibility to ensure that an accounting takes place. In China, the state is the supreme authority; obedience is owed directly to the state, and other citizens are, at best, secondary beneficiaries.

Cultural determinants of conduct are not uniform across societies, needless to say. Nonetheless, norms of accountability and cooperation are evident in other areas of Japanese law and society, especially regarding the enforcement of rules. Yoshinobu Kitamura reports, for example, that water pollution control officials believe it is morally preferable—and more effective—to treat violators as erring students than as amoral deviants. Informal consultation and technical (and moral) instruction are given priority. If officials find they have to resort to legal sanctions, it is regarded as a kind of occupational failure. Only when a violation becomes widely publicized do inspectors issue formal orders.[23] Further, the demand for social accountability finds expression in the criminal code itself, rendering its message about the right to silence somewhat equivocal. Article 198(2) requires that suspects be informed prior to interrogation that they need not answer any question. But Article 203(1) provides that they must also be told of the allegation against them and given an opportunity to explain their conduct. In resolving the apparent conflict between these two provisions, the Japanese Supreme Court has given priority to the opportunity to explain oneself.

Admittedly, the attitudes and manners I have sketched in this brief account may belong to a particular (and transient) historical period, before Japan becomes fully integrated into the emergent global regime dominated by "U.S. values." Yet, the norms of accountability and

cooperation have considerable traction. They persist, most notably, in the recently issued recommendations of the Justice System Reform Council. While recommending a radical overhaul of Japanese legal education and certain aspects of the legal system itself, in conformity with U.S. models, the Council nonetheless speaks in traditional tones about the importance of confession. Although it concedes that "excessive emphasis" on confession can lead to police interrogation that "lacks propriety," the recommended remedy consists of introducing measures to preserve the integrity of the interrogation process, such as written records or audio and video recordings. The Council does not emphasize the right to silence, for "the questioning of a suspect, so long as it is conducted properly, contributes to the discovery of the truth, and, in the event the suspect who actually committed the crime truly regrets the crime and confesses, it also contributes to his or her rehabilitation."[24]

II. **Double reflection: first thoughts**

The difference between U.S. and Japanese practice regarding the right to silence, to put it simply, is that in the U.S. citizens have no moral duty to aid the government in proving their own crime, whereas in Japan the duty to cooperate with authorities, even in proving one's own crime, has very broad support.[25] This difference indicates that the legal transplant intended by U.S. forces after WWII, if intelligible, was not an isolated rule but a set of understandings and values and attitudes—manners as well as institutions, in Montesquieu's phrase—regarding the nature of citizens' responsibilities to one another. U.S. hubris lay in thinking it had a superior understanding of these responsibilities. The constitution makers failed to realize they were in a pedagogical moment and, unfortunately, violated a basic duty of civility: to act only on the basis of principles that Japanese citizens could not reasonably reject.[26] Of course, it is difficult to fault

them—the U.S. had just defeated a despised and implacable enemy. Military hegemony was easily equated with cultural superiority. The notion that the East could teach the West, that the U.S. had something to learn from the Japanese, was incomprehensible. Yet, in hindsight, it is clear that the confrontation between the two moral traditions was not notional but real; each side should have felt the moral force of the other side's values. That did not happen.[27] Can we do better?

As we begin to reflect on the apparent difference, Japanese practice may appear attractive, morally, because repentance and restitution are superior to punishment—more effective in reducing crime and more humane. Haley formulates the argument on crime reduction, but the evidence is inconclusive.[28] Further, the hypothesis itself—that police practices alone, or primarily, explain Japan's low crime rate—seems implausible. It is difficult to imagine detaching Japanese criminal justice from existing informal but pervasive forms of social surveillance and control. These nurture dispositions in citizens that make success of a system of confession and forgiveness more likely. The system would also fail were it not for the support networks—families, workplaces, and other social groups—that actively participate in the reformation of offenders. (Accordingly, I do not interpret the scholarly research as demonstrating a causal relation between police practice and the low crime rate. Rather, it demonstrates that criminal justice, in essential respects, reflects values embedded in the larger society.) The humaneness argument, in turn, may appear to depend less on the widespread, labor-intensive activities that rehabilitation requires. But the "restorative justice" movement in the U.S. and elsewhere suggests otherwise. In an effort to displace the current system of punishment, practitioners of restorative justice convene a "discussion circle" (or "sentencing circle") composed of all the stakeholders affected by an offender's delict—the offender's family,

the victims and their families, criminal justice officials, religious counselors, employers, friends of various parties, and other community members (but not lawyers)—to discuss how they have been affected by the wrongdoer, and to determine what could be done to correct the harm done and prevent a recurrence. Like Japanese practice, these circles combine high levels of control with high levels of support. Typically, they are made available only to offenders who admit their misdeeds, and the effect of discussion is often to induce intense shame, expressions of remorse, and a pledge to repair the damage. Not surprisingly, given the commitment of resources required, few restorative justice programs have been implemented.[29]

In any case, neither the crime reduction nor humaneness argument addresses the core question about confession—whether there is a moral duty to confess one's crimes, as Japanese practice appears to presuppose. The argument, briefly stated, could go as follows: No one has a moral right to conceal an immoral illegality. If there is no moral right to conceal, there is an obligation to confess. Hence, silence is a species of wrongful concealment.[30] Of course, if the law one has violated is itself immoral, one has a moral right of silence, for then there is no moral guilt. By hypothesis, however, the act forbidden by the law is immoral. In such a case, even if the legal right to silence were available, its use would not be morally justified. The right to silence, in other words, gives one a legal right to do something morally wrong. The opportunity should be declined.

One form of resistance to the moral duty argument is based on what I shall refer to as a literary approach to confessions. At issue are not apprehensions about abusive police tactics but the darkness of human psychology. In the literary approach, the very desire to confess is suspect. Why would someone want to tell the truth? Isn't it only individuals in an abject or degraded state of mind who engage in self-unmasking? Doesn't the exploration of one's motives

shade ineluctably into self-justification? In the literary approach, non-self-serving motives are suspect for being non-self-serving, whereas self-serving motives are suspect because they do not probe deeply enough to expose the full extent of the confessant's depravity. J. M. Coetzee remarks: "[W]hatever authority a confession bears in a secular context derives from the status of the confessant as a hero in a labyrinth willing to confront the worst within himself…."[31] Authority is at issue for Coetzee because the aim of confession is to reveal a deep inner truth, to which only the confessant has access. Confession is about secret desires and intentions, not about deeds. Since, in principle, others cannot verify the true inner state, the potential for deception (of others) is ineradicable. More serious, still, is each individual's capacity for self-deception. The disease of self-consciousness feeds on itself; the close analysis of motives throws up ever-new motives in unending succession. In the end, being truthful about events gives way to being true to oneself. Sincerity is not the concern but authenticity—which involves interminable exercises in self-scrutiny.

One bit of support for the literary approach comes from the real and disturbing cases of totally sincere, fully voluntary confessions that were nonetheless false. (As Montaigne observed, people have been known sometimes to "accuse themselves of having killed people who were found to be alive and well."[32]) As a general posture, however, the skepticism of the literary approach is based, I believe, too much on the examples of confessants who exhibit what Luther referred to as obsessive scrupulosity. In such a state inextricable layers of motivation—shame, guilt, contempt, disgrace, self-loathing, propitiation, and expiation (to take Peter Brooks' list)—confound our understanding of human action.[33] The image is more fitting for the likes of Rousseau or many of Dostoyevsky's protagonists than ordinary criminal suspects. If one assumes that everyone is guilty of major sins and disposed to reveal them at length, for

complicated psychological reasons, whenever afforded an opportunity (even in a police station), then the case for unreliability is strong. But, even then, confessions could be checked; the moral duty to confess could remain.

A line of reasoning more supportive of the moral duty argument starts from the idea that a general purpose of law, and especially criminal law, is to enlarge each citizen's capacity for responsible decision.[34] In this view, law aims to have a developmental effect, enabling citizens to realize their potential as communal beings, facilitating their growth as participating and productive members of society. Criminal law is central to this task because it specifies the minimum conditions of responsibility to others and holds citizens to account by teaching the lessons of choosing. Wisdom in choosing, Henry Hart argues, develops when one is confronted with options and made aware that one must abide the consequences of one's choices. Presumably, Hart means to suggest that, if citizens are compelled to "take responsibility" for their choices, by accepting the consequences, they will act "more responsibly" (that is, with more concern for others) when they choose. Japanese practice, we should note, indicates that it is possible to cultivate responsible choice in a less punitive way than Hart has in mind; what matters more than a citizen's ability to incorporate consequences in a calculus of choice is cultivation of a mindful, not to say benevolent, attitude. Owning up publicly to one's mistakes is an alternative to punishment and could work more effectively to vindicate the law. But, either way, confessing one's misdeeds is a responsible act.

At this point, the strongest resistance to the moral duty argument emerges. Although we would like the criminal justice system to succeed in its goal of convicting only the guilty, and ascertaining whatever information is relevant to that end, in the U.S. we deliberately create obstacles to this goal, such as the right to silence. We do this even at the cost of making the

discovery of truth more difficult and promoting an adversary relation between individual and society, because other fundamental values are at stake. What are those values? For some proponents, it is a certain idea of human dignity. Thus, Peter Brooks believes that confession "reveals pathetic dependency and a kind of infantile groveling," such that the act of confessing "in its very nature undercut[s] the notion of human agency that the law wishes to—and must—promote."[35] This claim strikes me as muddled. Responding truthfully when there is reason to call one to account evinces no lack of dignity. If anything, the call (like the response) affirms one's status as a responsible moral agent. Dignity is incompatible with humiliation, but not with embarrassment for wrongdoing.

A more plausible candidate for the fundamental value is individual autonomy, that is, respect for a person's capacity to be self-governing, including the decision whether or not to cooperate with enforcement officials. If we focus on police tactics—such as the common use of threats and deceit to induce confession—it seems clear that many suspects' autonomy is routinely violated in the course of interrogation. Yet, while morally problematic, these police tactics are permitted under U.S. Supreme Court rulings. So, autonomy, in that sense, is not constitutionally protected. At the same time, for a judge or jury to draw an inference from a suspect's silence is prohibited. Why does that inference violate a suspect's autonomy? Many commentators find most plausible the principle that it is cruel to compel people to do serious harm to themselves, even when infliction of the same harm by others is warranted.[36] The instinct of self-preservation is deeply rooted, and individuals required to speak against themselves, or have inferences drawn from their silence, will face an intolerable dilemma—or trilemma: self-destruction for speaking, perjury for lying, or contempt for remaining silent. Notice, however, that this argument assumes that the natural consequence of speaking is confinement or worse—

not, as in Japan, reconciliation and forgiveness. The argument may also underestimate the strength of the feeling of social connectedness in a society like Japan, in comparison to the concern with self-preservation. The disjunction between self and others in Japan is less salient; what puts at risk the individual's sense of wholeness is loss of attachment. More importantly, the U.S. Supreme Court has distinguished compelled *testimony* from compelled *evidence*. Defendants can be required to produce a handwriting sample or voice recording, to submit to a blood test, or to surrender tax or bank documents. These acts, as far as I can see, are equally self-destructive. So, if autonomy considerations have weight, it is not obvious how or why—apart, of course, from the problem of police abuse. But the problem of police abuse goes only so far; it applies to the pre-trial phases of prosecution, not the trial itself, where maintaining one's dignity as a responsible agent may require explaining oneself.

Perhaps the autonomy justification of the right to silence is a legacy of efforts in former times to protect dissenting religious belief, when individuals could be compelled to utter heresies under oath. The legacy takes the form of according priority to freedom of conscience in our conception of the good society. With this priority, we construe the function of law as establishing security for the pursuit of self-chosen activities and commitments. Yet this scheme may pervert our understanding of morality and its relation to law. If freedom of conscience is understood as protecting nonconformity and dissent, that is one thing; if it rests on the right of individuals to make a final determination of what morality requires, that is something else. In the latter view, the ultimate obligation of individuals is to themselves or their god. And this intimate connection, in Michael Walzer's words, warrants "protestantism" in every other social relation; the individual putatively connected to a god is "constitutionally authorized to have scruples" about every other social relationship.[37] The consequence is a political order built on

non-accountability to other members of society. I would suggest, rather, that a tacit presupposition of respect for personal conscience is that it meets a public standard of reasonableness; therefore, claims of conscience are not immune to challenge. The space we create for freedom of conscience has more to do with our regard for moral identity than the validity of individual moral judgment. Within limits, we respect the right of individuals to fashion self-defining moral commitments, but not to construct autonomous codes of conduct.[38]

In the end, however, I am not persuaded by the argument for a moral duty to confess, in the context of the U.S. criminal justice system. To confess to a legal wrong is to make oneself liable to whatever legal sanction happens to be attached to that wrong. But the legal sanction may or may not be a warranted response to the moral wrongdoing. Defenders of the moral duty argument rule out confession to a priest as a mode of fulfilling the duty, because the confession is not to the appropriate public authorities. They would presumably also object that the priest's response is typically forgiveness. But perhaps the duty to confess does not stand alone but in necessary relation to the type of response it elicits. Perhaps the duty is more compelling in some contexts than in others.

III. **Legal transplant in a familiar setting: college tribunals**

To appreciate the persuasive force of the moral duty argument, I believe we need to explore the goods of association, that is, goods the enjoyment of which necessarily requires the reciprocal enjoyment of at least one other person. Our lives are pervaded by associative connections: schools, corporations, religious fellowships, benevolent orders, labor unions, professional societies, and the like, yet we often have difficulty acknowledging associational ties as constituent elements of the good life. I shall argue that understanding the goods of

association, and tracing their implications for what rights we have, is essential to engaging the Japanese in meaningful deliberation on the right to silence.

To this end, I propose to review a case from my personal experience that raised the prospect of (what I believe to be) an unwise legal transplant wholly within the U.S.[39] The transplant question arose for college tribunals formed in the wake of student demonstrations in 1968. These tribunals were, by and large, new entities. Previously, discipline had been handled in the privacy of a dean's office, where the college exercised authority *in loco parentis* for academic and social offenses. In the late '60s the offenses were broadly political and, though mainly directed at a non-university audience, were intended also to challenge the complicity of educational institutions in sustaining racial inequality. Students engaged in unprecedented forms of protest, including disrupting classes, occupying buildings, even destroying professors' research. Obviously, the old disciplinary procedures were no longer workable. Many colleges turned to tribunals composed of representatives of the different segments of the campus community, which conducted public hearings. Given the procedural history, however, little relevant experience was available for these new quasi-judicial bodies to draw on. Institution building was ad hoc, with procedures invented in response to problems as they arose. Among these was whether students should be able to invoke the right to silence.

The question was addressed in one of two ways, which, for lack of better terms, I shall call abstract and contextual. The abstract approach simply borrowed the right to silence as it already existed in the criminal sphere. The core of the right is that citizens shall not be compelled to accuse or testify against themselves. This is expressed in the form of a package of rights, beginning with so-called Miranda warnings ("You have a right to remain silent …."), through the right to counsel, to the presumption of innocence and the right not to testify at trial.

This package offers suspects a shield against the fearsome power of the state, where important individual goods—life and liberty—are at stake. In transplanting the right to silence from the criminal to a noncriminal context, the thought was that whatever justification the right has can be readily extended to other powerful institutions where important individual goods are also in jeopardy. A decision such as suspension or expulsion has potentially severe consequences, which were compounded in the '60s by the military draft and the tacit agreement among most colleges not to accept transfer applications from suspended or expelled students.

In educational settings like a college, the abstract approach, in my view, gets all the crucial relationships wrong. There is no question that a student appearing before a college tribunal should receive fair treatment, but criminal standards are not necessarily the correct measure of what is fair. Criminal standards operate among strangers, in a context of contentiousness and distrust. The criminal setting assumes no continuing relation between the parties and displays no concern for the personal convictions or idiosyncratic moral attitudes that may have motivated rule-violations. Despite the efforts of the restorative justice movement, the aim of a U.S. criminal trial is not to reconcile the parties or induce expressions of regret or repentance, let alone elicit the public affirmation of common values. It is to impose proportionate punishment for illegal acts.

The contextual approach, by contrast, emphasizes that in educational settings the concern is to preserve mutual commitment to a distinctive pattern of relationships, sustaining a special kind of endeavor. The moral vocabulary, sentiments, and expectations are all different. Since education thrives on the expression of differences of view, dissenting opinion is welcomed in the academy. There is a long tradition of respect for personal, including non-conforming, belief. But the conditions conducive to the development of the reflective and critical capacities that

education promotes also set constraints on allowable forms of dissent. While disruptive political protest may sometimes be of value in the world at large as a mode of free expression or civil disobedience, in the academy, I would argue, its scope is measured by whether it enhances or interferes with the distinctive methods of learning to which the institution is committed. Similarly, the focus of inquiry in a college tribunal should be the capacity and willingness of the accused to engage in continuing, collegial relationships. The aim is less punitive than corrective, less an effort to sanction than to re-integrate offenders into the academic community, if possible. Such an aim would only be hindered by a refusal to speak. A college could, needless to say, simply expel violators and retain only those members committed to its rules, but that would be a lost opportunity, on both sides. Disciplinary hearings provide the occasion for determining whether violators accept responsibility for their conduct, are contrite, and wish to be restored to full membership; and also to determine if the violations had a reasonable justification that ought to prompt the college to reconsider some rule or policy. In short, such a hearing is potentially a pedagogical moment for everyone involved.

Institutional design reflects this difference in orientation. In the criminal sphere, as I mentioned, the package of protections includes the presumption of innocence. This presumption means that securing a conviction requires collecting and examining evidence—tasks for agencies specifically devoted to fact-finding or intelligence gathering. As we know, the power that devolves to those engaged in these functions is notoriously open to abuse, whether from maliciousness or simple incompetence. Placing the burden of proof on the prosecution, and combining it with the right to silence, protects citizens from possible mistreatment. Colleges, however, have forgone such fact-finding agencies. Indeed, many colleges induct students into an honor system—and it is to them that my argument has special relevance. They place a special

obligation on students to be conscientious about the application of academic norms to their own conduct and vigilant about the conduct of other members of the community. This system includes a duty to report known offenses, including self-reporting of one's own moral lapses. In this context, confession of error is not so much to an authority as to authorized representatives of the collectivity, including fellow students. Being understood—and forgiven—by *these* individuals has a special moral significance. Confession in these circumstances creates vulnerability and hence is difficult, but it also expresses the offender's allegiance to a common enterprise. The adversarial relation is replaced by one of shared responsibility.

To get a sense of this alternative, consider the elaboration of the honor principle as it appears in the orientation handbook of Reed College. The core ideas include these:

"The honor principle is based upon the assumption that members of the community will be honest (not only in their academic work but in all of their behavior), will respect others' rights and persons, will take responsibility for the effect of their behavior on the college as a whole, and will engage in conscientious self-reflection about their words and deeds….

"The honor principle implies that when individuals sincerely believe it necessary to violate a policy or break a rule, or to embarrass, discomfit, or in some way injure others or the community as a whole, *they must acknowledge and explain their behavior* [emphasis added], and be prepared to accept the judgment of the community's judicial processes."[40]

Similarly, the honor code of Mount Holyoke College begins with the statement that "Mount Holyoke students are expected to behave in an honest, responsible, and respectful manner so as not to bring discredit upon themselves, the College, or any other member of the Mount Holyoke community." In describing the proceedings of the hearing board, the code says "the Complainant and Respondent will be given an opportunity to state their cases and *will be*

expected to answer any questions put to them by the Hearing Board honestly and clearly [emphasis added]." And the enumeration of possible sanctions begins: "Sanctions are not intended to be punitive, but rather, to educate and restore the community."[41]

I do not mean to suggest that this orientation is uniform across small colleges in the U.S., but it is widespread. The crucial feature is mutual commitment to a particular kind of association in which members care about one another and are respected as whole persons. Mutual acknowledgement and sustained commitment, rather than transient and utilitarian relations, are conditions of the experience of belonging. Self-respect depends on the quality of one's relations with other members. In such an environment, obligations are more open-ended and presuppose trust. When the value of trust is understood, and can be taken for granted, it contributes to responsible choice. Members rely on one another to act with integrity. If they commit errors, they expect themselves, as they expect others, to make amends. They also expect an understanding response, not threats of punishment. Failure to re-affirm communal norms, as with the Japanese, generates "surprising levels of consternation" and raises questions about one's sociality.[42]

No doubt we should be careful not to make too much of the apparent similarities between tribunals in some U.S. colleges and Japanese criminal justice. The tribunals have their own cultural dynamic. (As in the Japanese case, my effort has been not to explain the phenomenon but to appreciate it.) Nor do I want to suggest that the small college is the only U.S. setting exhibiting associative values. Still, the comparison is a resource for double reflection, because it is a familiar setting in which we see how the assertion of an individual right—the right to silence—could undermine the achievement of an associational good.

IV. **Reconsidering rights in double reflection**

I have not rehearsed the full argument for excluding the right to silence in college tribunals; my aim has been simply to draw attention to an implication that facilitates double reflection, as we attempt to come to grips with Japanese practice. The implication is that, in determining whether a right such as the right to silence should be recognized or not, the critical determinant is the nature of the relationships relevant parties are attempting to foster. In other words, rights are constituent components of an associational ideal, or derived from it. To know which rights we have we first formulate the relevant associational good. As we specify the good, we model relationships among members to determine which would, and which would not, facilitate its realization.

If that is correct, we have an idiom for thinking about rights in double reflection, across societies. I refer to it as the *enabling conception of rights*.[43] According to this conception, which rights we have depend on which goods we intend. As associations intend different goods, they will honor different rights. A right that enables the good of an association to be realized has what justification it needs to be recognized and practiced; a right that derogates from that good is justifiably rejected. Rights are reformulated or reallocated accordingly—differently in different associations. In this way, the enabling conception directs attention to individuals as participants in and contributors to mutual endeavors, rather than focusing on them as single claimants or beneficiaries. Enabling rights protect the interests of individuals, but the interests they protect are of individuals in relation to others. So, in a perspicuous definition, the content of such rights will make reference to the association they sustain.

Rights, then, are not valued for their own sake; they are valued for the good they help to bring about. Rights are subordinate to goods, not trumps of them.[44] Yet, if we left matters at

that, we would have missed something crucial in the contrast between educational and criminal contexts in the U.S. In the criminal realm, the right to silence still enables an alleged good to be realized, but the good is individual—personal autonomy. So perhaps we should say that all rights are enabling but some are enabling of individual goods and some of associational goods, and these are often incompatible. The right that would enable the individual good to be enjoyed would undermine the associational good, and vice versa. The question, then, would be: Which takes priority? Or, in a society that values personal autonomy, what place is there for associational goods? The question has some urgency in societies like the U.S. with a deep preference for individual goods. Inalienable rights protect inalienable individual goods—life, liberty, and either honor (Grotius), property (Locke), or happiness (Jefferson). Even goods requiring ongoing associations for their realization are often construed, in the U.S., in terms of what they do for individuals taken singly or as private persons. Education is regarded as instrumental to personal career goals. Voting is regarded as a self-interested act (as in "voting one's pocketbook"), like a market transaction, rather than participation in collective decision making. Further, the conventional view is that rights-consciousness is essential to respecting the autonomy of individuals, including the capacity to resist the demands of those in authority. Sustaining the rule of law, it is said, requires a culture of rights-consciousness. The enabling conception, however, suggests that the contrast between rights-consciousness and non-rights-consciousness is too simple. For not every mode of rights-consciousness necessarily looks like ours.[45] The right to silence, as practiced in the U.S. criminal context, no doubt appears to the Japanese as an abuse of rights, not a legitimate exercise of them. When a crime has been committed, other members of society are destined to live with the criminal. On what terms? In Japan, the concern to maintain a certain mode of association appears to be paramount.

What is the argument for the conventional U.S. view? One could surmise that in a pluralistic society the details of human flourishing involve a large element of personal choice and commitment and are best left to individuals to work out for themselves. Therefore, the satisfactions to be had from associational life depend crucially on personal decisions about whether and how to participate. Although associations provide goods that can be gained only by membership, it is a condition of accepting the duties of associational life that they are incurred voluntarily. If individuals choose to modify their rights by joining an association because of the good it is expected to realize, that is a choice for them to make. They should also have the option to withdraw. Within the bounds of voluntary participation, members have the privilege of defining a shared idea of the good, along with its implications for which rights they have. No doubt this is the central argument regarding college tribunals.

The critical question is whether this argument puts too much weight on voluntariness. In rejecting a comprehensive good that subordinates individuals to the collectivity, pluralism may go too far in the opposite direction, overestimating the separateness of persons and the degree to which attachments are elective. In a pluralistic society, people disagree about the nature of the good life, and these disagreements are often profound—but not therefore anarchic. Citizens in pluralistic societies have strong associative dispositions, and it is mistake to think that the patterns of association—which may track religious, racial, gender, occupational, or social ties—are fully voluntary. Consider the obvious example of marriage. If any social relationship counts as voluntary, this one does. Yet the terms of marriage are not negotiated by the parties; they are set independently by law and reflect background understandings of society's interest in the marital relationship, such as channeling sexual passion and providing for the care of children. In more general terms, everyday associations—often implicating the most basic human goods:

security, livelihood, identity—involve degrees of constraint in three crucial ways: the need to enter them, lack of control over their design, and serious costs in the event of withdrawal. Churches, labor unions, professional societies, political parties—all provide illustrations of these kinds of constraint.[46]

A democratic state, too, is a nonvoluntary association whose members are citizens. It has a practical preeminence among actual and possible associations; it frames associational life, fixes boundary conditions, and sets the basic rules of interaction—and thereby compels citizens to think about common goods beyond the goods of more specialized groups.[47] Yet personal conscience and commitment, feelings of attachment and identity, can be bound up with the state (in some societies) in just the way that is characteristic of more limited associations, where shared purposes and norms prevail. The use of coercive methods—a use that in any case is not monopolized by the state—does not undercut these connections.

In assessing the Japanese state as an association, one should not assume that citizens are dependent on it for all of life's necessities. The Japanese have a rich and diverse associational life. If, in general, they are more dependent on communal groups than U.S. citizens, it is a variegated dependency, favorable to sustaining dense networks of reciprocal social relations.[48] Perhaps U.S. citizens too readily equate dependency with docility or servility, missing the value of mutual or reciprocal dependency, or at least connecting it only to limited-purpose groups. Dependency rightly understood is an essential ingredient of civic consciousness, implicating mutual obligation, concern, and trust. Alexis de Tocqueville captured the U.S. spirit when he identified the tendency of Americans to detach themselves from fellow citizens, draw into their own intimate circle of family and friends, and leave others to fend for themselves. These *individualists*, as he called them, cultivate a way of life that depends on receiving nothing from

anyone else and owing nothing to anyone else. They acquire the habit of always considering themselves as standing alone, and they are apt to imagine that their whole destiny is in their own hands.[49] The Japanese are less likely to make this mistake. Interdependence generates solidarity; as one owes so much to the group for what one is and is able to do, so one has a duty to give back in appropriate ways.

The less pluralistic a society is, the more encompassing associational ties may be. One could even speculate that relative homogeneity in a society works to break down any sharp distinction between model citizens and rule-violators. Members are more likely to have the thought: "There but for divine mercy go I." Without participating in a violator's acts, the model citizen could yet share the violator's feelings. As Edmund Morgan says of the Puritans: "They were all guilty [and knew they were guilty] of lust if not of fornication, of greed if not of theft, of hate if not of murder."[50] With this self-identification, the Puritans were strongly disposed to forgive rule-violators, at least if they were repentant, and attempt to re-integrate them into the community. With a shared identity and bound by a fiduciary sense of duty, citizens become mature human beings in solidarity with one another. At any rate, conduct that many in the U.S. regard as the result of conformity or excessive attention to appearances may rather be an expression of genuine concern for community, responsive to the legitimate demands, i.e., rights, of others. (As Edwin Reischauer comments, social conformity in Japan is not a sign of weakness "but rather the proud, tempered product of inner strength."[51]) Observers who see subjugation, if not oppression, whenever public officials enforce communal values may fail to understand that trust doesn't just happen—it is fragile and requires hard work to generate and sustain. It can be undermined by indifference or neglect, as well as by direct assault. A telling example of the

failure to appreciate this point, also from the U.S. occupation of Japan, was the order to disband the neighborhood crime prevention associations "because they smacked of totalitarian rule."[52]

The contentious issue in Japan, as I see it, is not enforcement of shared values but selective enforcement, or a narrow definition of who is a member of the community. At various times, excluded persons have been women, the *buraku* community (outcasts), political radicals, the disabled, hemophiliacs, and Koreans.[53] There is a special irony in Japanese attitudes toward Koreans, because the Korean criminal justice system is as committed to the ethic of confession as the Japanese system. Yet, the harsh treatment of Koreans in Japan has often provoked them to be uncooperative in police investigations—contrary, one might say, to their cultural disposition. In the abstract, communal loyalty and respect for the rights of members—treating them fairly and justly—are not incompatible. But communal loyalty may well lead to invidious distinctions between insiders and outsiders, especially when founded on ethnic homogeneity. U.S. collective identity, in contrast, is largely ideological rather than ethnic, founded on a commitment to political ideals.

Japan, like Confucian societies generally, may not accept the inevitability of pluralism, and rather think the interests of all citizens—or citizens that matter—are ultimately reconcilable. Conflict is a natural consequence of ethnic, religious, or racial pluralism, and some societies are more willing than others to put up with it—and so for social theorists. Whether or not that is right, we may characterize the salient difference between Japan and the U.S. as *a thick versus a thin conception of citizenship*. Civil society in Japan is constituted not just by multiple, unrelated associations independent of state control, but also by a pervasive solidarity cutting across particular memberships. The state as association embodies an encompassing identity. To say it is encompassing is not to say that it is uncontested, that there do not exist deep divisions, say,

between conservatives and progressives on the interpretation of Japan's military adventures in the 20th century and what it means for Japanese self-understanding. Indeed, one observer has suggested that the only constant in Japanese identity is "the popular conviction dating back at least to the late Tokugawa era that such an identity exists or ought to exist."[54] But while self-identity is not fixed or static (even if stable over time), neither is it amorphous or infinitely pliable. The self in relationship depends crucially on the others to whom one stands in relation. In Japan, the sense of affiliation is more profound. Interdependence is more readily acknowledged. Self-esteem is more contingent on the responses of fellow citizens. In so far as members value such an association, they have good reason to recognize special duties to one another.[55]

If this formulation is correct, it helps us to realize that the dichotomy between political society dominated by the collectivity or fragmented into self-reliant individuals is not exhaustive. In a good society, wherever it is, what matters is how we stand to relevant others. The question is the nature and scope of meaningful association. Which satisfactions can one have, which aspirations can one realize as a member of an association, that one could not achieve alone—and what responsibilities follow? These are core questions in ethical deliberations across cultures.

With this observation, we may now have a way of re-interpreting the autonomy defense of the right to silence in the U.S., where courts recognize so-called testimonial privileges that extend beyond criminal suspects themselves. These privileges allow certain persons in whom a suspect has confided to refuse to testify in court. (In some jurisdictions, the defendant can also block such testimony, even if the other party is willing to take the stand.) The standard cases include communications between husband and wife, attorney and client, physician and patient, priest and penitent. In protecting confidential communications between these parties, the law

protects what we could call *the moral interest* of individuals in sustaining certain kinds of important relationships. This moral interest, arguably, entails a right to silence, if we allow that an individual may give priority to particular close associations over any relation to impersonal others. However, the question arises: Why just these? Why not other important relationships? Why not extend the spousal privilege to parents and children; the attorney privilege to accountants and financial planners; the religious exemption to confidants and friends?[56]

Why indeed? Presumably any answer needs to consider whether we are prepared to wall off citizens from accountability to third parties for the sake of privileging the relationships in question. Giving priority to personal or professional relationships is presumably easy, perhaps a bit too easy, for us in the U.S. to do. We should also be able to see that a reasonable view of the moral interest of individuals might not be so restrictive, but instead acknowledge the value of relationships within a moral universe defined by more encompassing identities. The question is: Which relationships, which associations are most valued? Who counts as relevant others, and what claims can they make on us? Different responses to these questions are not a matter of rights-consciousness but of the value placed on different forms of associational life.

V. **On the ethics of exporting ethics**

These reflections are an effort to appreciate the moral force of an alien practice. Specifically, I have attempted to engage the claim that criminal suspects in Japan have a moral duty to confess their crimes. Using resources at hand, I identified a familiar context, U.S. college tribunals, in which the moral duty to confess is also practiced and seems compelling—so I believe. These tribunals provide a vehicle for identifying factors that make a difference for the success of the moral argument. To capture them, I suggested an idiom, and speculated about its

elaboration, that promises to encompass college tribunals and Japanese criminal practice, facilitating—without resolving—ethical disputation across cultures. In this idiom, claims of right are assessed in terms of the quality of relationships they sustain or undermine, that is, rights are components of associational goods, or derived from them. The divergence between Japan and the U.S. regarding the right to silence, then, centers on which mix of associations is most desirable, which relationships or which goods take priority. Framing the divergence this way not only cautions us against assuming that alien moral beliefs are really alien; it allows both sides to grasp what is compelling in the other side. It also suggests a way of reinterpreting the importance of the U.S. right to silence in relational terms, perhaps making recognition of the right more defensible.

Whether or not I have succeeded in offering a compelling case, I hope I have made clear the importance of the undertaking. The need to cultivate double reflection is especially acute in the U.S. (although not only here), because the U.S., in the words of my colleague William Alford, "has a long history of endeavoring to enlighten, if not save, our foreign brethren by exporting ideas and institutions that we believe we have realized more fully."[57] This missionary zeal is sometimes sincere and well meaning, but we know that benign intentions are no barrier to cultural insensitivity and wanton destruction of local practices. And we cannot forget that too often the motives driving missionary work are self-protective. This is a special danger in the U.S., where many believe that U.S. interests require us to take the lead in building a world order shaped by U.S. values.[58] Which values are U.S. values, we may ask, and do they just happen to coincide with our interests? If we aim to be in the business of exporting ethics, it matters greatly how we answer that question.

In the so-called post-Cold War period, we have witnessed a proliferation of efforts at exporting "the rule of law," which is advanced in the U.S. as an obvious and sure-fire remedy for the challenges facing transitional countries. Rule of law initiatives include legislative drafting ("modernizing" or introducing new laws), institutional reform (including training programs for judges, prosecutors, and police), improving legal education, supporting law-oriented NGOs, and so on. Many U.S. lawyers have responded with enthusiasm to these initiatives, as may seem only fitting if one believes that lawyers have a special obligation to promote the values that reflect the best in their profession. Yet, too often, one has to wonder whether the lawyers know what they are about. For the last three years, U.S. lawyers have been helping to establish an adversarial system of justice in the new nation of East Timor. The effort has required them to confront the odd fact that East Timorese tend to confess to the crimes they have committed. As a result, according to the report of one participant, in order to create an adversarial system "it [has been] necessary to teach defendants to lie."[59]

The fly in the ointment is egregious parochialism, exemplified by the remark that the U.S. constitution "has proved to be a brilliant success, which unitary nation states and parliamentary democracies all over the world would do well to copy."[60] Some U.S. lawyers are busily engaged in writing one-size-fits-all constitutions. Of course, unpleasant facts sometimes intrude, such as the many respects in which U.S. law is not taken as a model by other countries: for example, first amendment law (protection of hate speech in the U.S.); the death penalty (including execution of teenagers and the mentally retarded); private law (allowing for punitive damages); legal practice (the use of contingency fees); and so on.[61] These counterexamples, however, do not appear to give pause to the triumphalist attitude or deter enthusiasm for legal transplantations. In this regard, Americans are prone to Jeremy Bentham's approach to political

and legal change. Bentham typically spoke of institutions either as deliberate human creations or at least as having emerged to meet definite human needs. He was an indefatigable reformer and prolific designer of new structures, based on a simple utilitarian psychology of universal validity. (The Panopticon is his paradigmatic and most well known invention.) Perhaps everyone would admit that Bentham took rationalism too far, failing to recognize limits to the malleability of institutional, as well as human, forms. But the attraction of his view is evident if we take it as a requirement of democratic governance that political and legal arrangements are more subject to human direction than not. Alan Watson's pioneering work on legal transplants is more nuanced than Bentham's but nonetheless disposed to view legal institutions as detachable and movable components of political systems. [62]

We should aim, I think, to avoid Bentham's rationalism, but we need also to avoid exaggerating the hermetic or holistic character of societies, which underestimates the openness of many to change. Connectedness and interdependency are matters of degree. Some rules or practices reach more deeply than others and are more, or less, resistant to change. When transplantation is feasible, numerous linked elements are likely to be confounded. This orientation helps us maintain a balanced view of U.S. hubris. The problems of export in a given case do not necessarily derive from attempting to impose a rule from outside. Imposing rules or values is always problematic, but not therefore always unjustified. The opposite view could be equally problematic, that is, the view that value change is acceptable only if it develops from within, free of outside assistance (let alone interference). That view may reflect a romantic picture of cultural integrity or an exaggerated sense of what political independence requires. The fact that rule change requires attitude change does not mean that outsiders cannot be helpful; it means, rather, that assistance must be prudential as well as ethical. Or, only prudential

assistance is ethical. In the case at hand, the most obvious lesson is that the tendency of U.S. lawyers (and politicians) to believe that the rule of law is the cure to every country's problems may reflect a poor appreciation of associational life. The export of prefabricated models may not only fail, they may inhibit the development of indigenous models that better integrate rule of law principles with local values. With greater awareness of associational goods, and the civic dimensions of individual choice and action, we may better appreciate where differences—and similarities—really exist.[63]

[1] Jonathan D. Spence, *The Question of Hu* (New York: Random House, 1988).

[2] Alasdair MacIntyre, "Incommensurability, Truth, and the Conversation Between Confucians and Aristotelians about the Virtues," in *Culture and Modernity: East-West Philosophic Perspectives*, ed. Eliot Deutsch (Honolulu: University of Hawaii, 1991), 110.

[3] For elaboration of this approach, see Kenneth Winston, "Lessons from the Right to Silence," *Legality and Community: On the Intellectual Legacy of Philip Selznick,* eds., Robert A. Kagan, Martin Krygier, and Kenneth Winston (Lanham: Rowman & Littlefield, 2002), especially 399-402.

[4] The new constitution was more progressive, in some respects, than U.S. law at the time. For example, it prohibits discrimination based on sex, race, creed, social status, and family origin. But while the constitution has never been formally amended, it has not necessarily been followed either—and that applies to the protection against discrimination as it does to the right to silence.

[5] John Owen Haley, "Confession, Repentance and Absolution," in *Mediation and Criminal Justice: Victims, Offenders and Community*, eds., Martin Wright and Burt Galaway (London: Sage Publications, 1989), 195. See also Haley, *Authority Without Power: Law and the Japanese Paradox* (New York: Oxford University, 1991), 129-138. Haley asserts that there are no Western analogues to the Japanese system, but Daniel Foote observes that accounts of the Netherlands, at least before 1975, "describe a criminal justice system that bears a striking resemblance to that of Japan," including "the extent and types of discretion afforded to criminal-justice officials; the conscious use of leniency (including extensive pretrial diversion); the deliberate deemphasis of imprisonment; the emphasis placed on confessions; and the importance of informal community and social controls." Daniel H. Foote, "The Benevolent Paternalism of Japanese Criminal Justice," *California Law Review* 80:2 (1992), 384-385.

[6] These procedures are discussed by one of the Code's drafters, Shigemitsu Dando, in "System of Discretionary Prosecution in Japan," *American Journal of Comparative Law* 18 (1970), 518-531. See also Dando, *Japanese Criminal Procedure*, translated by B. J. George, Jr. (S. Hackensack: Rothman & Co., 1965), 343-345. (Since my sources, even by Japanese authors, are in English, I follow the English convention on name order.)

[7] Quoted by Daniel H. Foote, "Confessions and the Right to Silence in Japan," *Georgia Journal of International and Comparative Law* 21 (1991), 476n.

[8] David H. Bayley, *Forces of Order: Policing Modern Japan* (Berkeley: University of California, 1991), 46. Also, Peter J. Katzenstein, *Cultural Norms and National Security: Police and Military in Postwar Japan* (Ithaca: Cornell University Press, 1996), 63.

[9] David H. Bayley, "Modes and Mores of Policing the Community in Japan," *Law and Society: Culture Learning Through the Law*, ed., Richard Vuylsteke (East-West Culture Learning Institute, 1977), 75. See also Bayley, *Forces of Order*, 82.

[10] Bayley, "Modes," 78. See also *Forces of Order*, chapter 7.

[11] Hiroshi Wagatsuma and Arthur Rosett, "The Implications of Apology: Law and Culture in Japan and the United States," *Law & Society Review* 20:4 (1986), 488-492.

[12] Bayley, *Forces of Order*. Bayley's portrait of the Japanese police has been sharply criticized in recent scholarly work, especially by David T. Johnson in *The Japanese Way of Justice: Prosecuting Crime in Japan* (New York: Oxford Univ., 2002), and his forthcoming article (brought to my attention by John Kleinig) "Police Integrity in Japan," *The Contours of Police Integrity*, eds., Carl B. Klockars, et al. (Thousand Oaks: Sage). Johnson's critique emerges from close attention to bureaucratic determinants of behavior and the exercise of power within the domain of the criminal justice system, rather than elucidation of background social norms as they work themselves out, or become perverted, in criminal justice contexts. The result is an obscuring of the idea that order is sustained through

fidelity to right relationships. Not surprisingly, Johnson believes the primary function of a confession is to establish the truth in a case, which is of course a bureaucratic function. See chapter 8, "Confessions," 243-275.

[13] Setsuo Miyazawa, *Policing in Japan: A Study on Making Crime*, trans. Frank G. Bennett, Jr., with John O. Haley (Albany: SUNY Press, 1992), 81.

[14] Foote, "Confessions," 444.

[15] J. Mark Ramseyer and Minoru Nakazato, *Japanese Law: An Economic Approach* (Chicago: Univ. of Chicago, 1999), 170.

[16] Foote, "Confessions," 445.

[17] I am grateful to my colleague Ashish Nanda for pressing this argument.

[18] Walter L. Ames, *Police and Community in Japan* (Berkeley: University of California, 1981), 136n.

[19] See Foote, "Confessions," 420, and Haley, "Confession," 203.

[20] Alison W. Conner, "True Confessions? Chinese Confessions Then and Now," *The Limits of the Rule of Law in China*, eds., Karen G. Turner, et al. (Seattle: University of Washington, 2000), 139-140. W. Allyn Rickett describes the historical practice of reducing or remitting punishment for offenders who confessed before their offense was discovered by officials, in "Voluntary Surrender and Confession in Chinese Law: The Problem of Continuity," *Journal of Asian Studies* 30:4 (1971), 797-814.

[21] Conner, 157 n37.

[22] Erik Eckholm, "China Begins to Shine Light on Use of Torture," *The New York Times*, February 13, 2001, A4. See, also, Craig S. Smith, "Chinese Fight Crime with Torture and Executions," *The New York Times*, September 9, 2001, A1.

[23] See Robert A. Kagan, "Introduction: Comparing National Styles of Regulation in Japan and the United States," *Law and Policy* 22:3&4 (2000), 230.

[24] "Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century," June 12, 2001, 31. I am indebted to my student, Takayuki Nakamura, for bringing this document to my attention. I should note that many members of the Japanese bar, especially defense lawyers, are critical of current practices and favor changes that would bring Japan into conformity with the U.S. But their criticism appears to reflect their own discomfort with the background social norms, and that discomfort is not necessarily shared by officials.

[25] Foote, "Confessions," 473-474.

[26] John Rawls, *The Law of Peoples* (Cambridge: Harvard University, 1999), 56.

[27] On U.S. attitudes about promoting democracy in Japan ("the revolution from above"), see John Dower, *Embracing Defeat: Japan in the Wake of World War II* (New York: W.W. Norton, 1999), especially chapter 6. Kyoko Inoue argues that the misunderstandings between U.S. text writers and their Japanese translators were such that the two versions of the constitution, in English and in Japanese, have very different meanings. The one speaks in the language of the U.S. constitution; the other speaks in a language much like that of the Meiji constitution. In particular, Inoue believes that the Japanese text does not convey the idea that individuals have rights that the government must protect or is prohibited from infringing. Because the two sides did not realize how great the cultural differences were, they could not correct each other's misunderstandings. (The U.S. principals did not know the Japanese language and had little grasp of Japanese history or culture.) *MacArthur's Japanese Constitution: A Linguistic and Cultural Study of Its Making* (Chicago: University of Chicago, 1991).

[28] Haley, "Confession," 207-208.

[29] For a collection of sympathetic essays, see *Restorative Justice and Civil Society*, eds., Heather Strang and John Braithwaite (Cambridge, Eng.: Cambridge University, 2001).

[30] Richard Bronaugh, "Is There A Duty to Confess?," *APA Newsletter* 98:1 (1998), 86-87.

[31] J. M. Coetzee, "Confession and Double Thoughts: Tolstoy, Rousseau, Dostoevsky," *Doubling the Point: Essays and Interviews*, ed., David Atwell (Cambridge: Harvard University, 1992), 263.

[32] Quoted by Peter Brooks, *Troubling Confessions: Speaking Guilt in Law and Literature* (Chicago: University of Chicago, 2000), 109.

[33] Brooks, 63.

[34] Henry M. Hart, Jr., "The Aims of the Criminal Law," *Law and Contemporary Problems* 23:3 (1958), 69-70.

[35] Brooks, 74.

[36] See Kent Greenawalt, "The Right to Silence and Human Dignity," *The Constitution of Rights: Human Dignity and American Values*, eds., Michael J. Meyer and W. A. Parent (Ithaca: Cornell University, 1992), 192-209.

[37] Michael Walzer, *What It Means To Be An American* (New York: Marsilio, 1992), 110.

[38] See John Rawls, *A Theory of Justice*, rev. ed. (Cambridge: Harvard University, 1999 [1971]), 453-456, and Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (Berkeley: University of California, 1992), 529-531. For elaboration of this point, see Kenneth Winston, "Moral Opportunism: A Case Study," *Integrity and Conscience*, eds., Ian Shapiro and Robert M. Adams (New York: New York University, 1998), 169-172.

[39] I served from May 1968 to January 1969 as the first chair of the Columbia College Disciplinary Tribunal. My discussion here draws on "Self-Incrimination in Context: Establishing Procedural Protections in Juvenile and College Disciplinary Proceedings," *So. California Law Review* 48:4 (1975), 813-851. The skepticism expressed here about the autonomy justification of the right to silence departs from the uncritical view set forth in my earlier article.

[40] The Reed College orientation handbook is available at http://web.reed.edu/life/sa/orientation/Handbook/8_the_honor_principle.html

[41] See http://www.mtholyoke.edu/org/csa/honor-code.html

[42] Thomas P. Rohlen, "Order in Japanese Society: Attachment, Authority, and Routine," *Journal of Japanese Studies* 15:1 (1989), 29. Rohlen offers an extended description of child-rearing practices in the U.S. and Japan and traces their implications for group attachments.

[43] Winston, "Lessons," note 3 above, offers an initial formulation of this idea and acknowledges my debt to Richard Pildes.

[44] Kenneth Winston, "Principles and Touchstones: the Dilemma of Dworkin's Liberalism," *Polity* 19:1 (1986), 53. Dworkin's analysis has generated considerable muddle on this point. Note the confusion, for example, in David L. Hall and Roger T. Ames, *The Democracy of the Dead: Dewey, Confucius, and The Hope for Democracy in China* (Chicago: Open Court, 1999), 108.

[45] Eric Feldman emphasizes this point in his illuminating study, *The Ritual of Rights in Japan: Law, Society, and Health Policy* (Cambridge, Eng.: Cambridge University, 2000). His principal thesis is that the rhetoric of rights has "a long history and a rich present" in Japan. The challenge for scholars is "to learn by whom rights are asserted, when [or for what purpose], and with what impact." See pp. 7 and 143.

[46] Mark E. Warren, *Democracy and Association* (Princeton: Princeton University, 2001), especially chapter 3.

[47] Michael Walzer, "The Civil Society Argument," *Theorizing Citizenship*, ed. Ronald Beiner (Albany: SUNY, 1995), 169.

[48] It is an empirical question whether in any particular society, such as Japan, the reciprocal relations that inhere in multiple and cross-cutting affiliations are displayed primarily within groups (bonding each group's members to one another) or extend beyond groups to a larger collectivity (bridging between groups). See Robert Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster, 2000), 22-24.

[49] Alexis de Tocqueville, *Democracy in America*, vol. 2, part II, chapter 3. Similarly, John Dewey describes the "intellectual mistake" of regarding "the isolated individual [as] possessed of inherent rights 'by nature' apart from association." *The Public and Its Problems* (Chicago: Swallow Press, 1954), 86-95.

[50] Edmund S. Morgan, "Those Sexy Puritans," *The New York Review of Books*, June 27, 2002, 15.

[51] Edwin Reischauer, *The Japanese* (Cambridge: Harvard University, 1977), 152.

[52] Bayley, "Modes," 79. However, compare Tatsuo Inoue's critical view of the "tyranny of intermediary communities" in "The Poverty of Rights-Blind Communality: Looking Through the Window of Japan," *Brigham Young University Law Review* 1993:2 (1993), especially 539 and 545.

[53] See Frank K. Upham, *Law and Social Change in Postwar Japan* (Cambridge: Harvard University, 1987) on the treatment of *burakumin* (chapter 3) and women (chapter 4). Eric Feldman discusses the plight of hemophiliacs in *The Ritual of Rights*, chapter 4. Reischauer remarks on the "extreme ethnocentrism" of the Japanese and the minority Korean community's "disruptive" response, in *The Japanese*, 35-36.

[54] Andrew Gordon, "Society and Politics from Transwar through Postwar Japan," *Historical Perspectives on Contemporary East Asia*, eds., Merle Goldman and Andrew Gordon (Cambridge: Harvard University, 2000), 289.

[55] Feldman suggests that rights-assertion in Japan is more likely on behalf of groups rather than individuals. Feldman, 163. I would note, however, that Feldman mentions an exception, without perhaps seeing the significance of it. Recent legislation in Japan gives citizens the legal right to choose which definition of death applies to themselves, traditional cardio-pulmonary death or brain death. See Masahiro Morioka, "Reconsidering Brain Death: A Lesson from Japan's Fifteen Years of Experience," *Hastings Center Report* 31:4 (2001), 41-46.

[56] See David Luban, "The Warren Court and the Concept of a Right," *Harvard Civil Rights-Civil Liberties Law Review* 34:1 (1999), 33. Sanford Levinson exposes the incoherence of U.S. case law on testimonial privileges in "Testimonial Privileges and the Preferences of Friendship," *Duke Law Journal* 1984, 631-662.

[57] William P. Alford, "Exporting 'The Pursuit of Happiness,'" *Harvard Law Review* 113:7 (2000), 1678.

[58] For a representative expression of this view, see William Jefferson Clinton, "Remarks By the President [at] Freedom House," October 6, 1995, in *Clinton Administration Foreign and Security Policy: Fact Sheets and Selected Addresses* (The White House, September, 1996).

[59] Seth Mydans, "In a Contest of Cultures, East Embraces West," The New York Times, March 12, 2003, A4.

[60] The quote from Steven Calabresi is cited by Bruce Ackerman, "The New Separation of Powers," *Harvard Law Review* 113:3 (2000), 634.

[61] These and other examples are mentioned by Frederick Schauer, "The Politics and Incentives of Legal Transplantation," *Governance in a Globalizing World*, eds., Joseph S. Nye and John D. Donahue (Washington, D.C.: Brookings, 2000), 253-268.

[62] See Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Charlottesville: University Press of Virginia, 1974). On the "mistaken belief" that social arrangements are infinitely pliable, see Lon Fuller, "Means and Ends," *The Principles of Social Order: Selected Essays of Lon L. Fuller*, rev. ed., ed., Kenneth Winston (Oxford: Hart Publishing, 2001), 70.

[63] I am grateful to members of the Harvard faculty seminar on "The Professions in Asia" for comments on an earlier draft, presented to the seminar in April 2001, and to Akira Okamoto and Chambers Boyd Moore for research assistance.