CONFESSIONS AND THE RIGHT TO SILENCE IN JAPAN

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In several highly-publicized recent cases in Japan, individuals convicted of murder and sentenced to death were acquitted in retrials obtained after decades on death row. These so-called “death penalty retrial cases” generated great controversy and considerable reflection about the criminal justice system in Japan. A central, substantive issue presented by these cases relates to the procurement and use of confessions; each of these cases—and several other major recent Japanese cases in which defendants have been acquitted following

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1 Judgment of July 15, 1983, Chisai (District Court), 1090 Hanrei Jihō [HANJI] 21 (Japan v. Menda, Kumamoto D. Ct.) (popularly known as the Menda case) (over 31 years between date death sentence became final and ultimate acquittal); Judgment of March 12, 1984, Chisai (District Court), 1107 HANJI 13 (Japan v. Taniguchi, Takamatsu D. Ct.) (popularly known as the Saitakawa case) (27 years); Judgment and Rule of July 11, 1984, Chisai (District Court), 1316 HANJI 21 (Japan v. Saitō, Sendai D. Ct.) (popularly known as the Matsuyama case) (23 years); Judgment of Jan. 31, 1989, Chisai (District Court), 1316 HANJI 21 (Japan v. Akabori, Shizuoka D. Ct.) (popularly known as the Shimada case). For commentary on these cases, see, e.g., NIHON BENGOSHI RENGO-KAI-HEN [JAPAN FEDERATION OF BAR ASSOCIATIONS, ed.], SAISHIN [RETRIALS] (1977); NIHON BENGOSHI RENGO-KAI-HEN [JAPAN FEDERATION OF BAR ASSOCIATIONS, ed.], ZOKU-SAI SHIN [RETRIALS, CONTINUED] (1986) [hereinafter ZOKU-SAI SHIN]; HOKAKU SEMINA ZOKAN, NIHON NO ENZAI [Hogaku Seminar Extra Number, False Accusations in Japan] (1983) [hereinafter NIHON NO ENZAI].

As the references to the popular names of the cases reveal, in Japan it is rare to refer to a case by the names of the parties, in part due to concern over potential stigma. Citations normally include only the court, date, and reporter page number; but major cases often become known by a popular name, which may come from the place of the crime or even from a concise description of the crime itself (e.g., the “Case of the Murder of the Wife of a Hirosaki University Professor”). Following U.S. style, in citing to cases I have included the names of the parties where available. For some cases that did not appear in official public reports but rather were published only in private case reporters, the names of the parties did not appear.
bitterly contested trials—turned on the validity of repudiated confessions.

Consequently, much recent commentary has focussed on confessions and related issues. Not surprisingly, the battle lines generally reflect the professions of the authors, with prosecutors often arguing that these cases reveal the need to interrogate suspects more thoroughly and to obtain even fuller confessions, while defense attorneys and many academics contend that further restrictions should be placed on the procurement and use of confessions. This controversy, in turn, is part of a much broader debate over the right to silence and the role of confessions in Japan, a topic with deep historical roots.

That broader debate finds close parallels in the debate over *Miranda v. Arizona* in the United States. For the moment, the continued validity of *Miranda* itself seems secure, although that opinion has come under considerable attack in recent years and the Supreme Court recently indicated a willingness to reexamine other longstanding principles of the law on confessions. Among the commentaries critical of *Miranda* is a report on pre-trial interrogation prepared by the Office of Legal Policy of the Department of Justice at the direction of then-Attorney General Edwin Meese. In advocating that *Miranda* be overruled, the report noted the existence of less stringent restrictions on questioning of suspects in a number of foreign countries.

Although the report did not do so, it might well have relied heavily on the example of Japan. After all, the right to silence is enshrined in both the Constitution and Code of Criminal Procedure in Japan, in terms that are in some respects strikingly similar to standards set

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5 See Arizona v. Fulminante, 111 S. Ct. 1246 (1991) (overruling large body of precedent in holding that harmless error analysis applies to coerced confessions, with four Justices concluding that the confession in question was not involuntary).
7 Id. at 84-93.
8 *Kenpō* (Constitution) (Japan) [hereinafter Constitution or *Kenpō*].
9 Keiji Soshoho (Code of Criminal Procedure), Law No. 131 of 1948 [hereinafter Code or *Keisohō*].
forth in *Miranda* itself. Despite those constitutional and statutory provisions, Japanese police and prosecutors possess very broad tools for obtaining confessions. Moreover, according to such measures as crime rates and clearance rates, Japan's criminal justice system ranks as one of the best in the world,10 and Japanese prosecutors enjoy a conviction rate of 99.9%.11 What more could Ed Meese have wanted?

On the other side of the spectrum, the Japan Civil Liberties Union12 and many others13 contend that the current system of pretrial interrogation in Japan results in widespread invasion of human rights. As an examination of existing standards and practices will reveal, from an American perspective the current scheme appears to present an array of human rights concerns. It is important to consider those standards and practices not just from an American perspective but in the context of both historical attitudes toward confessions and authority in Japan and Japan's overall criminal justice system. The fundamental differences in history, attitudes and systems render the approach to the right to silence much more understandable and reasonable (although by no means entirely free of concerns and dangers) within the Japanese setting, yet raise grave doubts about Japan's suitability as a model for the United States in this regard.

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10 See, e.g., *Hōmushō, Hōmu Sōgō Kenkyūsho, Hanzai Hakusho* (Heisei 2-Nen-Ban) [MINISTRY OF JUSTICE, RESEARCH AND TRAINING INSTITUTE, WHITE PAPER ON CRIME] 24-29 (1990 ed.). Critics have questioned the accuracy of the statistics on clearance rates, noting that police may inflate their records by declining to include reports of crimes that have gone uncleared, among other possible deficiencies. See, e.g., Miyazawa, *Keiji seido o sūji de meiru me* [Looking at the Criminal Justice System Through Numbers], 427 Hōgaku Seminā 32, 37 (1990). Underreporting is by no means limited to Japan, however, and it seems safe to say that in relative terms Japanese police maintain an impressive clearance rate.


I. HISTORICAL OVERVIEW OF CONFESSIONS IN JAPAN

A. Tokugawa Era

It is frequently asserted that, with the possible exception of a short-lived adoption of Chinese criminal codes in the eighth century, confessions of the accused were regarded as a crucial element of prosecutions in Japan until 1876. This assertion is true to a certain extent, but not entirely.

In principle, during the Tokugawa era (1600-1868) the formal written confession of the accused was required for conviction and punishment. In most cases, investigative officials drafted a formal confession statement in a prescribed form and the suspect then affixed a seal to that document. The formal confession statement has been described as "a short, stereotyped, largely abstract, reconstructed account, crafted in a legal manner to correspond to the necessary elements for a particular crime under the substantive criminal law." Punishment was assessed in a separate proceeding, but the punishments for specific crimes were fixed quite precisely by the Osadamegaki (a compilation of prior decrees and precedents promulgated by the Shogun Yoshimune in 1742) and other materials and precedents. The facts of the crime as set forth in the formal confession almost completely determined the level of punishment to be assessed.

As a consequence, the investigative officials in effect played the key role in deciding sentences. In theory, those officials were only


15 Those codes, as adopted in Japan in the Taiho and Yoro codes, allowed judgments based on either confessions of the defendant or the testimony of witnesses. S. Dando, JAPANESE CRIMINAL PROCEDURE 12-13 (B. George, trans., 1965). The fact that they allowed the use of torture to extract confessions, though, suggests that the emphasis even under those codes may have been on confessions as a method of proof.


18 Id. at 806.

19 See, e.g., D. Henderson, I Conciliation and Japanese Law, Tokugawa and Modern 7 n.26 (1965).
supposed to determine the facts, and the confession statements did not contain conclusions about what crime had been committed or the appropriate punishment. In practice, however, the confessions were crafted with an eye toward the Osadamegaki and precedents. Numerous reports exist of cases in which the investigators deliberately altered the facts in a manner advantageous to the suspect (and sometimes were even encouraged to do so). In some cases this was done to avoid the shame of recognizing that a certain crime (such as adultery) had been committed and in others to avoid the imposition of a punishment regarded as unduly harsh. In this connection, one famous type of falsification was the practice of writing that the amount of a theft was "9 ryō, 3 bu and 2 shu" (the equivalent of 9.875 ryō, a monetary measure in use at that time), since the death penalty was required for thefts of over 10 ryō. The possibility that the facts could be altered in a disadvantageous manner also existed, provided that the suspect assented to the confession statement.

As in many other nations, torture was a recognized method for extracting confessions. Methods of torture were highly standardized. These commenced with the so-called "stone holding" torture, in which up to five or six stones, weighing approximately 100 pounds each, were successively placed onto the suspect's lap. The most severe level of torture was the gōmon, conducted in a special torture cell. (The most common category of gōmon was the tsurizeme, which consisted of being bound with one's arms behind one's back and then hung by the hands). The various tortures were alternated, with suspects sometimes undergoing as many as 30 or 40 torture sessions.

Subject to one exception, a person who refused to confess could not be convicted without undergoing torture. If solid evidence of guilt existed, but the suspect refused to confess despite undergoing torture, the suspect could nonetheless be convicted based on this other evidence. Nevertheless, this exceptional type of case required the

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21 Id.
22 See Abe, Self-Incrimination, supra note 14, at 613-15.
23 See id. at 614 n.5.
25 See Hiramatsu, supra note 17, at 831; but see Y. Futagawa, Gōmon [Torture] 67 (1957) (citing a case where the suspect was convicted without a confession and apparently without undergoing torture).
suspect to acknowledge the finding of guilt. This was done by sealing a document (the *satsudo*) acknowledging that the authorities, following a careful examination, had found that the suspect committed the crime in question. In such a case, the suspect’s punishment was to be reduced by one degree. Suspects who themselves confessed and also reported others for more serious crimes were also entitled to a one-degree reduction in punishment.

This emphasis on confessions originated in Chinese practice. Many of the particulars are virtually identical to practices under traditional Chinese law. These practices include the specific types of tortures prescribed, although many more types of torture were permitted in China than in Japan, as well as the practice of granting leniency to those who confessed their crimes voluntarily, especially for property crimes and the like that could be repaired by restitution or compensation. In traditional China, the voluntary confession apparently was viewed as “an instrument by which the harmonious balance in human and cosmic relations should be restored[;] . . . an offense which could be cancelled out by repentance and restitution required no punishment.” More recently, confessions have continued to play a major role in the criminal justice system of the People’s Republic of China. The emphasis, however, has shifted, with confessions consciously regarded as a tool for encouraging cooperation with authorities and establishing political control.

In Japan, the role of confessions has evolved as well. Several reasons have been suggested for the emphasis on confessions in Tokugawa Japan. These reasons bear some similarities, but also represent marked differences from those of traditional China. In Japan, one important reason for the emphasis on confessions was

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26 HIRAMATSU, *supra* note 17, at 829-30.
27 *Id.* at 830. In many cases, such a reduction could mean the difference between the death penalty and banishment. The reduction reportedly was performed on a case-by-case basis, however, and was not guaranteed.
28 *Id.* at 616.
30 See D. BODDE and C. MORRIS, *LAW IN IMPERIAL CHINA* 97-98 (1967).
31 See Rickett, *supra* note 29, at 798-799. In this regard, the principles followed in Tokugawa Japan may have differed from those in traditional China, for in Japan the reduction in punishment for a person who turned himself or herself in does not seem to have been limited in this manner. See HIRAMATSU, *supra* note 17, at 616.
32 Rickett, *supra* note 29, at 813.
33 *Id.* at 813-14.
proof; the confession was apparently regarded as the most reliable
evidence of the truth and was also regarded as the quickest and easiest
method of discovering accomplices and pursuing other crimes. In
addition, the confession and the alternative of acknowledgment of
guilt through the satsudo process were viewed as having great im-
portance as an acceptance and recognition of the authority of the
Shogunate’s criminal justice system.34

It is less clear whether confessions were regarded at that time as
also playing a role in the rehabilitation process, i.e., as a means of
achieving moral catharsis of the suspect. On its face, the aforemen-
tioned reduction in punishment for suspects who refused to confess
might be seen as rewarding the suspect who was able to hold out.
Thus, the reductions had quite the opposite effect of encouragement
of confession as a step toward rehabilitation. Furthermore, punish-
ments were in principle fixed on the basis of the facts of the crime,
with reference to the personal characteristics and background of the
suspect only in limited circumstances.35 Additionally, the rehabilitative
function is not commonly referred to in writings about the role of
confessions in Tokugawa Japan.

The reduction in sentence for those convicted without a confession,
though, is most likely an indication that the authorities were not
fully convinced of guilt but felt that punishment was warranted in
any event. As Yoshiro Hiramatsu, a leading Japanese legal historian,
noted, this reduction appears to have been a somewhat questionable
operation of the principle “in dubio pro reo.”36 Moreover, certain
evidence suggests at least some rehabilitative function for confessions
at that time. In the view of one of Japan’s leading legal historians,
the criminal justice system in the first half of the Tokugawa era
(from 1600 through roughly the time of promulgation of the Osa-
damegaki in 1742) was dominated by principles of general deterrence;
emphasis was placed on firm enforcement of fixed penalties as an
example for others.37 By the latter half of the Tokugawa period,
however, numerous aspects of specific deterrence (and efforts to
promote rehabilitation) developed in the criminal justice system, in-
cluding the practice of granting pardons (sha) both to suspects prior

34 HIRAMATSU, supra note 17, at 831.
35 Ishii, supra note 24, at 91, describes the enhanced penalty for repeated thefts
as one such of the primary such exceptions; the death penalty was mandated for a
third theft conviction.
36 HIRAMATSU, supra note 17, at 831-32.
37 Ishii, supra note 24, at 11-12.
to conviction and to previously convicted individuals.\textsuperscript{38} At that time, the primary purpose of these pardons was to encourage reform; remorse was a vital element for obtaining a pardon.\textsuperscript{39} Accordingly, it seems safe to assume that the sincerity of the confession played a significant role in determining whether such pardons would be granted. Yet it remains unclear whether the confession process was consciously regarded as a tool used to bring about remorse and rehabilitation or simply as evidence of such remorse.

\section*{B. Meiji Era through World War II}

After the Meiji Restoration in 1868, two of the features of Japanese law previously mentioned—confessions as an essential element of proof and standardized methods of torture—were embodied in the formal legal codes. Article 318 of the Revised Penal Code (\textit{kaitei ritsurei}) of 1873 stated that "all crimes shall be adjudicated on the basis of confessions," and the Rules of Criminal Procedure (\textit{dangoku sokurei}), adopted in that same year, specified certain methods of torture.\textsuperscript{40} Yet following criticism by Professor Gustave Emile Boissonade, a French law professor invited by the government of Japan to help codify and modernize Japanese law, and others, these provisions soon were revised. In 1876, Article 318 was amended to indicate that "all crimes shall be adjudicated on the basis of evidence," and an 1879 Cabinet Order specified the abolition of torture.\textsuperscript{41}

In theory, the \textit{Chizaihō} (Criminal Procedure Code) of 1880\textsuperscript{42} and the Criminal Procedure Codes of 1890\textsuperscript{43} and 1922\textsuperscript{44} further ensured the principle of trial on the basis of evidence and established limits on self-incrimination. While the \textit{Chizaihō} and the 1890 Code were based on French law and the 1922 Code on German law, the basic framework of investigation was similar. The framework consisted of three stages: first, the police and prosecutors conducted an initial investigation prior to the charge; second, a so-called "preliminary judge" (\textit{yoshin hanji}) conducted a thorough—and secret—investigation of the entire case to determine whether the accusation was

\begin{footnotes}
\item[38] \textit{Id.} at 12-17.
\item[39] \textit{Id.} at 14-15, 93; Takayanagi, \textit{Tokugawa bakufu no sharitsu ni tsuite [Regarding the Code on Pardons of the Tokugawa Shogunate]}, 12 \textit{Hōgaku} Nos. 9, 10 (1943).
\item[40] See Abe, \textit{Self-Incrimination}, supra note 14, at 615.
\item[41] See \textit{id.}; \textit{DANDO, supra} note 15, at 14; Gadsby, \textit{supra} note 16, at 452.
\item[42] Decree No. 37 of 1880.
\item[43] Law No. 96 of 1890.
\item[44] Law No. 75 of 1922.
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warranted; and finally, a trial court conducted a public trial. The police and prosecutors had the discretionary authority to summon "suspects" (higisha) for questioning in the first stage of the proceedings, and the preliminary judge had an absolute duty to question the "accused" (hikokunin) during the second stage, but the suspects or accused had no duty to answer the questions, nor were they subject to prosecution for perjury if they lied during questioning. Torture was regarded as impermissible, although that prohibition rested on the aforementioned 1879 Cabinet Order and was not embodied in either the Imperial Constitution of 1889 or the various criminal procedure codes.

In actual practice, however, heavy emphasis remained upon procuring confessions. To some extent, the safeguard supposedly provided by placing central investigations under the supervision of preliminary judges was vitiated, since "[m]ost preliminary judges were eager to force the accused to confess." In any event, the police and prosecutors developed many ways to avoid even that level of supervision until they had first secured a confession through their own methods. Primary means of dispensing with such supervision included the power to hold "dangerous" individuals or those "needing protection" under the Administrative Execution Law of 1900, confine individuals without judicial review under the "Procedure for Summary Sentence for Violating Police Regulations," and keep suspects in so-called "consensual custody" (shōdaku ryūchi). Although, at least

46 See George, supra note 14, at 1148; Abe, Self-Incrimination, supra note 14, at 618 n.25.
47 See Abe, Self-Incrimination, supra note 14, at 618 n.25.
48 Id. at 618.
49 Gyōsei shikkōhō, Law No. 84 of 1900.
50 Ikeizai sokketsurei, Cabinet Order No. 31 of 1885. As its title implies, this provision allowed police to impose summary sentences for misdemeanors, without any supervision by a judicial body.
for the first two, there were limits on the length of permissible custody,\footnote{52} police often avoided the time limits simply by shifting the prisoners to other police stations before the time limits expired. In this manner, suspects could be held and subjected to interrogation for months.\footnote{53} Furthermore, torture was by no means rare, although the methods were for the most part considerably more sophisticated than in earlier eras.\footnote{54} In the later prewar days even greater leeway was permitted for the investigation of communists and other "political offenders."\footnote{55}

Confessions were not recorded verbatim. Rather, investigators summarized the confessions in writing; subsequently, the suspect acknowledged the confession summary. With certain minor limitations, these confession statements were regarded as having full evidentiary capacity.\footnote{56} Typically, trials consisted primarily of a review of the dossier compiled by the yoshin hanji, with the confession statements carrying the greatest weight.

During the prewar period, the evidentiary function of confessions remained predominant. Confessions were regarded as extremely important, albeit not absolutely essential, evidence of guilt and continued to play an important role in investigations of other crimes (both those of the suspect in question and of accomplices and others). In addition, confessions also could affect the degree of punishment. Each of the criminal codes adopted between 1870 and the Criminal Code of 1907\footnote{57} provided for reductions in punishment for individuals who turned themselves in and confessed.\footnote{58} Moreover, during the first decades of the twentieth century, and certainly by the prewar period, one begins to find clear evidence of a conscious use of the confession process for reform of the individual. One noted example of this

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\footnote{52} Custody under administrative detention was limited until sunset of the day following the arrest, and custody under the summary sentences was limited to twenty-nine days.

\footnote{53} See, e.g., Abe, Self-Incrimination, supra note 14, at 619-20; Appleton, supra note 45, at 410; T. Odanaka, Keiishoho No Rekishieki Bunseki [Historical Analysis of the Law of Criminal Procedure] 319-20 (1976). Abe, Self-Incrimination, at 619 n.33, describes one case in which a suspect was thus kept in custody for 207 days.

\footnote{54} See generally Abe, Self-Incrimination, supra note 14, at 618-19.

\footnote{55} See, e.g., Appleton, supra note 45, at 403-04. See generally R. Mitchell, Thought Control in Prewar Japan (1976).

\footnote{56} See Odanaka, supra note 53, at 13, 140-45, 301-02, 326-28.

\footnote{57} Keihô (Penal Code), Law No. 45 of 1907, art. 42 [hereinafter Penal Code].

\footnote{58} See Rickett, supra note 29, at 802 n.17.
deliberate emphasis upon confession and repentance, coupled with relative leniency for those deemed to have truly undertaken a change in character, is the so-called tenkō (conversion) of ideological offenders.59

C. Post-war Reforms

Following World War II, the Occupation authorities regarded the emphasis on confessions and the use of torture to obtain them as areas necessitating major reform. In the Political Reorientation of Japan,60 a document in which the Occupation described its perceived role, the Occupation summarized this matter in the following way:

The worst abuses of civil liberties were not based on statutory authority, but arose through the use of loopholes deliberately left in laws and through the development of legal fictions. The provisions of the codes of criminal procedure proved adequate in the countries of their origin to protect the individual from limitless powers of the police and prosecution with regard to arrest, detention, search and seizure. Under the Japanese practice, however, through the use of a minor administrative law not challengeable before any court, the individual was powerless and at the mercy of the police. In spite of provisions in the Criminal Code which forbade abuse of authority and torture, the Japanese police extorted confessions by constant use of third-degree methods and long detention.61

Based on this perception, the Occupation insisted upon "elaborate safeguards for the protection of the individual in the field of criminal justice."62 A central change was the imposition of a strict warrant requirement under which, prior to apprehending a suspect, police must obtain from a judge an arrest warrant based on reasonable suspicion and specifying the offense with which the person is charged.63

59 See MITCHELL, supra note 55, at 97-147. See also Dando, System of Discretionary Prosecution in Japan, 18 AM. J. COMP. L. 518, 518-21 (1970) (noting the conscious use of discretion in declining to prosecute offenders based on factors including the character and environment of the offender, a practice in effect since at least 1908, and with roots as early as 1885).

60 SUPREME COMMANDER FOR THE ALLIED POWERS, GOVERNMENT SECTION, POLITICAL REORIENTATION OF JAPAN, SEPT. 1945 TO SEPT. 1948; 2 SUPREME COMMANDER FOR THE ALLIED POWERS, GOVERNMENT SECTION, POLITICAL REORIENTATION OF JAPAN, SEPT. 1945 TO SEPT. 1948. [hereinafter SCAP].

61 2 SCAP, supra note 60, at 192.

62 Id. at 227.

63 Constitution, supra note 8, arts. 33, 35; Code, supra note 9, art. 199. Exceptions exist for arresting a person in the act of committing a crime, Constitution art. 33,
Under Article 36 of the Constitution, "[t]he infliction of torture by any public officer . . . [is] absolutely forbidden." In addition, the Constitution and the Criminal Procedure Code of 1948 contain a number of provisions intended to ensure the privilege against self-incrimination and the right to silence—not just at trial, but during the investigation stage, as well.

Through these and related provisions concerning right to counsel and other matters, the Occupation sought to achieve "a fundamental and for so-called "emergency arrests" (kinkyū taiho) of persons reasonably believed to have committed major offenses, if due to the urgency of the situation an arrest warrant could not be obtained from a judge. Code, art. 210. Immediately after making an "emergency arrest," the police must request an arrest warrant from a judge. See Danjo, supra note 15, at 313-17.

64 Constitution, supra note 8, art. 36.
65 These include the following:

Constitution, art. 38:
No person shall be compelled to testify against himself.
Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence.
No person shall be convicted or punished in cases where the only proof against him is his own confession.

Code of Criminal Procedure, art. 198:
(1) When the need exists with respect to the investigation of crime, a public prosecutor . . . or a judicial police official may request a suspect to appear and may question the suspect; provided, however, that, except in cases where the suspect is under arrest or under detention, the suspect may refuse to appear or, having appeared, may leave at any time.
(2) In the case of questioning under the preceding section, the suspect shall be notified in advance that he may refuse to answer any question.

As amended by Law No. 172 of 1953, this provision now requires that a suspect be notified "that he need not answer any question against his will."

Art. 291:
After the indictment has been read, the presiding judge must notify the accused that he may be silent at all times and refuse to answer any question . . . .

Art. 311:
The accused may be silent at all times or refuse to answer any question during the course of the trial.

Art. 319:
Confession made under compulsion, torture or threat, or after prolonged arrest or detention, or that is suspected not to have been made voluntarily, shall not be admitted in evidence. The accused shall not be convicted in a case where his own confession, whether made in open court or not, is the only proof against him.

For a rather detailed account of the various changes in Japanese criminal procedure law, by a central participant in the Occupation's work in that area, see Appleton, supra note 43. See generally A. Opler, Legal Reform in Occupied Japan 136-49 (1976).
change of the criminological attitude” in Japan. In short, the Occupation attempted to transform the Japanese criminal justice system from an inquisitorial to a largely accusatorial, adversary system. In some respects, the reforms appear to have succeeded. The arrest warrant requirement, for example, has taken root and on the whole seems to be followed in practice.

Moreover, most observers agree that physical abuse has been largely eliminated, although it would be naive to assume that such abuse has been completely eradicated. Critics, including representatives of the defense bar, have raised a number of rumored instances of police and prosecutorial abuses, including alleged beatings at police stations throughout Japan. These critics have also argued that the press is reluctant to report on such allegations, perhaps in part because of the close relationship between reporters and the police engendered by the so-called “press clubs”—groups of reporters who regularly cover a particular police department. Not surprisingly, the police deny these assertions, and very few of the suspects have either filed civil suits or requested criminal prosecutions in connection with the

66 See supra, sources cited at notes 12 & 13. In a survey of thirty persons who allegedly had been “falsely accused” between 1949 and 1982 described by Igarashi, twenty claimed to have been subjected to physical violence. JOINT COMMITTEE, supra note 13, contains summaries of twenty cases, most containing allegations of physical abuse, between 1983 and 1989, which it describes as random cases that had come to the Committee's attention during a three-month survey.

67 See supra, at 3 (coverage by press likely only if the suspect is acquitted or wins damages in a civil suit against he investigators); A Japanese Skid Row Erupts, Exposing Nation's Underside, N.Y. Times, Oct. 11, 1990, A1, col. 3, at A10, col. 4 (describing assertions that, because of the existence of such press clubs, “the reporters in Japan have an overly cozy relationship to the police and suppress criticism of them.”)
alleged incidents. Since the vast majority of police questioning occurs behind closed doors, one cannot say with certainty whether the alleged instances of abuse are simply "the tip of the iceberg," as some critics contend, or at most a rare aberration, even if true, as the police would argue. Given the relative paucity of the alleged instances and accounts by several outsiders who have observed police activities suggesting at most a limited use of physical force, as well as the availability of other effective means of obtaining confessions from suspects, it seems likely that deliberate outright physical abuse is in fact quite rare.

On the other hand, the Occupation was less successful in its efforts to establish a meaningful right to silence and to change the inquisitorial nature of the system and the "criminological attitude" regarding the central role of confessions. Most investigators were not happy with the right to silence at the investigation stage; and as soon as the Occupation ended the police and prosecutors undertook a direct attack on that right, seeking a legislative modification of

71 Of the twenty cases described in Joint Committee, supra note 13, for example, civil suits were being filed in three, the suspects or their families had requested criminal charges in three others, and the prosecutors themselves indicted a police officer in another.

72 Id. at 4.

73 See, e.g., Ames, supra note 68, at 134-37; Bayley, supra note 68, at 152-54; Miyazawa, Hanzai Sōsa O Meguru Dainissen Keiiti No Ishiki O Ködo [The Attitudes and Actions of Front-Line Detectives Concerning the Investigation of Crime] (1985) [hereinafter Miyazawa, Hanzai Sōsa], translated in part, updated and supplemented, in S. Miyazawa, Policing in Japan: A Study on Making Crime (1991) (forthcoming) [hereinafter Miyazawa, Policing in Japan]. Although Miyazawa is considerably more critical of police practices than either Ames or Bayley, he agrees that deliberate physical abuse is not widespread, noting that during his observation of police in Sapporo he "did not observe any physical abuse of a suspect, much less a shooting." He attributes this in part to the existence of the various other techniques for obtaining confessions that I discuss below. S. Miyazawa, Policing in Japan, supra, ch. 15.

74 Other techniques alleged by critics include use of a sloping chair, designed so that the suspect will slide forward off the seat unless the suspect constantly maintains pressure on his or her legs, N. Akiyama, Ikari No Tejo [Handcuffs of Anger], 16 (rev. ed. 1987) and forcing suspects to sit on their knees (seiza) for several hours. For me, an American not used to sitting on my knees, even fifteen minutes of seiza can be "torture," but it's still a far cry from the gömon of old.

75 But see George, supra note 14, at 1166-67 (concluding that, as of 1968, "in major outline and in most details, the concept of a privilege to remain silent has proven acceptable both to the Japanese public and the legal profession.")

76 The term "investigators" is used throughout to refer collectively to the police and public prosecutors.
relevant statutory provisions. The only concrete change they were able to obtain was an amendment modifying the warning they were required to give suspects: from a notification that the suspect "may refuse to answer any question" to one that he "need not answer any question against his will." One former prosecutor, writing in the 1950s, reported that many investigators deliberately failed to give the warning in any case. Other prosecutors have contested that account and argue that, if it ever was true, it is no longer the case. In any event, investigators can easily make either of the above statements sound equivocal (especially given the statutory requirement that investigators also provide the suspect with an opportunity to explain), so the practical significance of the modest change in the nature of the warning is questionable.

Moreover, regardless of the warning requirement, the existing statutory system itself provides ample means for obtaining confessions despite the right to silence. The current Criminal Procedure Code, both on its face and as interpreted, leaves police and prosecutors many tools that aid in procuring confessions. These include the normal standards for interrogation of suspects after a lawful arrest, as well as certain techniques for avoiding the warrant requirement. These are complemented by the prevailing standards limiting rights to communicate with attorneys and the outside world.

II. Current Status of Interrogation of Suspects

A. Basic Standards for Interrogation

The most fundamental tool for obtaining confessions lies in the standards for post-arrest interrogation themselves. These standards provide the police and prosecutors with up to twenty-three days to

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78 Amendment to Code, supra note 9, art. 198(2), pursuant to Law No. 172 of 1953.
79 See Abe, Self-Incrimination, supra note 14, at 624 (about one third of investigators at Tokyo District Attorney's Office "practically dispense with the notification of the privilege," and another third gave the notification "in such a sarcastic manner that the suspects might take the meaning adversely.")
81 See infra note 106 and accompanying text.
82 See infra notes 100-101 and accompanying text.
interrogate a suspect before they must file an indictment. In theory, the suspect has the right to refuse to answer any questions. Under prevailing interpretations, however, the suspect must at least submit to questioning throughout that period and is given very little contact with defense counsel or the outside world during the course of the interrogation.

Following a valid arrest pursuant to a warrant, police are entitled to hold a suspect for up to forty-eight hours before they must either release him or turn him over to the public prosecutor’s office, along with the evidence already collected. Thereafter, the prosecutor may hold the suspect for twenty-four additional hours before taking formal action. By the end of that twenty-four hour period, the prosecutor must either release the suspect, institute prosecution, or ask a judge to authorize detention for ten more days. In the great majority of cases, prosecutors opt for such additional detention. The Code calls for the judge to grant such a request promptly, although a proviso to the relevant article requires the judge to deny the request if he or she finds that no reason for detention exists. Judges almost always grant such requests. At the end of the first ten days of

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83 See infra notes 86-88 and accompanying text.
84 See infra notes 95-102 and accompanying text.
85 Prior to issuing a warrant, a judge must determine that there are reasonable grounds to suspect that the person in question has committed the crime alleged, Code, supra note 9, art. 199(1). In addition, pursuant to a 1953 amendment to the Code, the judge is not to issue a warrant if he or she determines that the arrest is “clearly unnecessary,” id., art. 199(2) proviso (added by Law No. 172 of 1953). With regard to the latter determination, Rule 143-3 of the Rules of Criminal Procedure, Sup. Ct. Rules No. 32 of 1948, specifies as key factors the fear of the suspect's flight or destruction of evidence.
87 Code, supra note 9, art. 205(1). Technically speaking, this is not additional "detention." The initial period of up to seventy-two hours is regarded as custody following arrest. The term "detention" (koryū) is a term of art used to refer to the period in custody pursuant to a warrant for detention under the Code, supra note 9, art. 207.
88 In 1988, prosecutors requested detention for over 85% of all suspects who had been held following their arrest, Homusho, supra note 9, at 103.
89 Code, supra note 9, art. 207(2). The determination of reasons entails a two-step process, first to ascertain that a reasonable basis exists for believing that the suspect committed the crime, and then to determine that the suspect does not have a fixed address or that there is a fear he would either flee or destroy evidence.
90 In 1988, such requests were granted nearly 99.9% of the time, HOMUSHO, supra note 11, at 103. No formal mechanism exists for a judge to grant detention yet
detention, prosecutors may request an additional ten days before they must either file an indictment or release the suspect.\textsuperscript{91} Prosecutors request such extended detention for over one-third of the detained suspects.\textsuperscript{92}

Thus, in total the investigators may keep a suspect in custody for up to twenty-three days before filing any charges. During this period suspects are typically held in so-called "substitute prison" (\textit{daiyō kangoku}), generally holding cells of police stations, where they are readily available for questioning—questioning that may run all day and on occasion late into the evening.\textsuperscript{93}

Judging from the statutory grounds for detention—prevention of flight and the destruction of evidence—it would not appear that the detention period is meant as an investigatory tool, and defense counsel and some scholars have long maintained that detention should not be utilized for questioning of the suspect.\textsuperscript{94} In practice, however, prosecutors routinely use detention time to firm up their case by obtaining detailed confessions from the suspect and procuring other physical evidence based upon the suspect’s statements. In the words of one Ministry of Justice official, "When all is said and done, pre-indictment detention in Japan is for the purposes of questioning the suspect, demanding a confession, and pursuing other crimes. If someone were to tell you otherwise, I’d say that’s a lie."\textsuperscript{95}

limit it to a shorter period. Some judges request prosecutors to limit the detention to only five additional days in certain relatively minor cases, and that in such cases the prosecutors ordinarily comply with that request. In 1987 slightly over 2\% of suspects who were formally detained were released within five days after the start of the formal detention, \textit{Hō mushō [Ministry of Justice], Dai-113 Kensatsu Tōkei Nenpō, Shōwa 62 Nen [Annual Report of Statistics on Prosecution for 1987] 248-249 (1988) (Chart 34) [hereinafter Kensatsu Tōkei Nenpō]}.\textsuperscript{91} Code, \textit{supra} note 9, art. 208. In certain types of cases, including insurrection and riot, this period may be extended up to an additional five days, Code, art. 208-2. See \textit{Dando, supra} note 15, at 318.

\textsuperscript{92} These requests are granted in virtually all cases. See Kensatsu Tōkei Nenpō, \textit{supra} note 90, at 248-49 (Chart 34). In 1987, requests for extended detention were granted nearly 99.9\% of the time.

\textsuperscript{93} For discussions of \textit{daiyō kangoku} and problems associated with it, see, \textit{e.g.}, Sōsa To Jinken, \textit{supra} note 13, at 63-79; Araki, \textit{Higisha-hikounin no okubeki doko ni okubeki ka [Where Should Suspects and the Accused be Kept?]}, 55:2 Hōritsu Jihō 43 (1983).


\textsuperscript{95} Kensatsu no shomondai (2, kan) (zadankai) [Various Issues Relating to Prosecution (Part 2, Conclusion) (Roundtable Discussion)], 13 Hōshō Jihō 1050, 1058 (1961) (statement of Masayoshi Honda, translated by the author).
B. Suspects' Rights

Superficially, suspects appear to be protected by two key rights during detention: the right to an attorney and the right to silence. On closer examination, however, one may wonder how meaningful these rights are in practice.

1. Right to Counsel

At the time of arrest, police are required to inform the suspect of his or her right to designate an attorney. At this stage, however, the suspect must be prepared to retain his or her own attorney; the right to a publicly appointed counsel for indigents does not come into effect until prosecution is instituted. Moreover, even if the suspect is notified of the right to counsel and designates an attorney, the suspect is not likely to have much opportunity to confer with counsel during preindictment detention. Article 39 of the Code specifically provides that prosecutors and police may designate the time, place, and duration of meetings with counsel during the preindictment period "when necessary for the investigation."

Despite a statement by the Supreme Court in 1978 that designation is an "exceptional measure [to be used only] when necessary," investigators have not been shy about using this authority. Prosecutors have long followed a two-step approach to designation that has the effect of limiting meetings with counsel for many suspects. First, a so-called "general designation" may be issued to the person in charge of the facility where a suspect is being held. In principle, if no general designation has been issued, counsel is free to meet with the suspect. If such a general designation has been issued, however, defense counsel will be permitted to meet with that suspect only if counsel first obtains from the prosecutor a "specific designation" form, which specifies the date and time of the permitted meeting. Through this process, meetings with counsel have been sharply limited.

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96 See Constitution, supra note 8, art. 34, cl. 1; Code, supra note 9, art. 203; cf. Judgment of Dec. 5, 1950, Saikōsai (Supreme Court), 4 KEISHU 2481 (Odera v. Japan).
97 See Code, supra note 9, art. 272.
98 Code, supra note 9, art. 39(3).
99 Judgment of July 10, 1978, Saikōsai (Supreme Court), 32 MINSHU 820, 829 (Sugiyama v. Osaka Pref.) (denying an attorney's request for damage allegedly resulting when he was physically restrained from meeting a suspect).
both in number and length. By one estimate, defense attorneys gen-
erally have been allowed one visit during a suspect’s time in police
custody, and from two to five during the twenty days in prosecutors’
custody, with each meeting averaging only about fifteen minutes.\textsuperscript{101} In a rather early case concerning the scope of permissible limitations,
the Supreme Court even upheld the prosecutors’ refusal to allow the
first meeting with counsel until the day on which they completed
their investigation and filed the indictment.\textsuperscript{102} As a general rule,
moreover, for those suspects for whom a general designation has
been issued, prosecutors will seek a court order banning meetings
with family and friends during the period of arrest and detention,
and such court orders are normally issued as a matter of course.\textsuperscript{103}

Presumably in response to widespread criticisms of the severity of
these limitations, in 1989 the Public Prosecutor’s Office, through
changes in internal guidelines, undertook some relaxation of the
system for meetings with counsel. First, the prosecutors narrowed
the categories of crimes for which the general designation is to be
issued to such cases as conspiracies, bribery cases, election law viol-
ations, drug dealing cases (currently the largest category of general
designation cases), and other cases in which prosecutors feel that the
case is complex or there is a possibility that evidence might be altered.
In cases where a general designation has been issued, moreover,
procedures for obtaining the specific designation have been relaxed:
counsel no longer need obtain the designation in person, but instead
may obtain it by facsimile or by a telephone call to the prosecutor
in charge of the case. In addition, prosecutors have adopted a more
flexible attitude toward designation of dates and times for meetings,
permitting meetings at the dates and times requested by defense
counsel unless the suspect is actually undergoing interrogation at that
time or has been taken outside of the detention facility to view the
crime scene or for other such investigative purposes.\textsuperscript{104}

\textsuperscript{101} D. Bayley, \textit{supra} note 68, at 151-52. A similar estimate is contained in Abe,
\textit{supra} note 79, at 70-71 (one 15-20 minute meeting per defense counsel during each
10-day period in detention; up to six such meetings if a suspect has three defense
counsel). For further discussion of this issue, see generally Itoh, \textit{supra} note 12, at
54-61; Tamiya, \textit{supra} note 100, \textit{passim}.

\textsuperscript{102} Judgment of April 20, 1955, Saikōsai (Supreme Court), 54 \textit{Hanji} 27.

\textsuperscript{103} Such orders are permitted under Code, \textit{supra} note 9, art. 81.

\textsuperscript{104} Although the contents of these guidelines have been described informally by
prosecutors, the guidelines themselves were announced through an internal document
which has never been formally disclosed to the public or the practicing bar.
It is probably no mere coincidence that these guidelines reflect principles set out by the Supreme Court. The new standards, however, are only internal standards for guidance of prosecutors; they are not binding and may be ignored in any given case. In fact, the relaxed standards expressly do not apply in the more difficult and complex cases, and interrogation of a suspect would not normally be interrupted for a meeting with counsel. Article 39 does, after all, permit designation “when necessary for the investigation,” and the prosecutors’ position remains that meetings with counsel will not normally be allowed if they might interfere with the degree of questioning deemed necessary to elucidate the facts of a crime. Moreover, in no event, is counsel permitted to attend the actual questioning. Finally, it bears repeating that the right to appointed counsel for indigents arises only after indictment; the above debate has practical significance only for suspects able to retain attorneys who have time for meetings.

2. The Right to Silence

The other main protection lies in the right to silence itself. In practice, however, there are many reasons why the right to silence does not quite function in the manner that its name implies. One factor is the method used to notify the suspect of this right. As mentioned above, Article 198(2) of the Code requires that a suspect be informed prior to questioning that he or she need not answer any question “against his [or her] will.” Yet a separate provision, Article 203(1), stipulates that when police arrest a suspect they must immediately explain the crime of which he or she is suspected and provide the suspect with the opportunity to give an explanation. In view of that provision, one can easily imagine a police officer arresting a suspect and, prior to making any mention of the right to silence, announcing, “We know you committed this crime, but the law says you have to have the chance to give your side of it. So what’s your explanation?” The apparent inconsistency between the requirement of providing an opportunity to explain oneself and notification of the right to silence was early resolved in favor of the former: in 1952 the Supreme Court ruled that when giving the suspect the opportunity to explain, the police need not mention the right to

105 See Judgment of July 10, 1978, Saikōsai (Supreme Court), 32 Minshū 820 (Sugiyama v. Osaka Pref.).
106 Code, supra note 9, art. 203(1) (emphasis added).
silence; the transcript of the explanatory statement can still be used as evidence.\(^{107}\)

As noted earlier, it has been reported that even at the start of questioning, investigators sometimes neglect to inform the suspect of the right not to answer questions or give the warning in such an offhand manner that it is not understood as a serious option\(^{108}\) (although prosecutors assure me that this is no longer the case).\(^{109}\)

In cases where no warning is given, that failure will not affect the admissibility of statements made by the suspect. In another early opinion, the Supreme Court held that failure to notify a suspect of the right to silence is not a constitutional violation and does not render a subsequent confession either involuntary or inadmissible.\(^{110}\)

C. Duty to Submit to Questioning—“Torishirabe Junin Gimu”

Even when a warning is given, doubts exist as to how much effect it will have in the face of the subsequent investigation. Within academic circles there is an ongoing debate as to whether a suspect in custody following arrest or detention may refuse to sit through questioning and may demand to be allowed to leave the interrogation room. This debate centers on the meaning of the proviso to Article 198(1) of the Code of Criminal Procedure, which reads: “[E]xcept in cases where the suspect is under arrest or in detention, the suspect may refuse to appear [for questioning] or, having appeared, may leave at any time.”

That proviso was added at the insistence of the Occupation. After the Japanese drafters proposed granting investigators the authority to summon and interrogate a suspect whenever necessary for the investigation, with no mention of any right for the suspect to refuse, SCAP insisted upon adding a provision that the suspect “has the right to refuse to answer, and, if not under arrest, may withdraw at any time.”\(^{111}\)

Despite the clear evidence of its origin, however, the meaning of the proviso remains in controversy. Under the literal Japanese text,

\(^{107}\) Judgment of March 28, 1952, Saikōsai (Supreme Court), 6 Keishū 520 (Kaneyasu v. Japan).

\(^{108}\) See Abe, Self-Incrimination, supra note 14, at 624.


\(^{110}\) Saikōsai (Supreme Court), 4 Keishū 2359 (Shirogane v. Japan).

\(^{111}\) See K. Matsuo, supra note 77, at 62; SCAP, supra note 60.
the rights to refuse to appear for questioning and to leave apply only to those not under arrest or in detention.112 Thus, under the prevailing, literal view arrestees and detainees have no right to leave the interrogation room and hence are in effect under a duty to submit to questioning (known as torishirabe junin gimu). Counter to this view, Professor Ryuichi Hirano argued that the proviso was intended only to clarify that those under arrest had no right to leave the place of detention, but that in light of the intent of the Constitution it was clear that they had the right to refuse to sit through questioning.113 The Hirano view has gained much support among academics,114 but the literal interpretation remains dominant in actual practice.115 Accordingly, suspects have no choice but to submit to questioning throughout post-arrest custody, which, as noted above, may last as long as twenty-three days, although they need not answer any questions during that time.

Typically, notification of the right to silence is given only once at the very outset of questioning; warnings are not repeated at the start of subsequent interrogation sessions during the suspect’s detention.116 Moreover, even if the suspect asserts the right to silence, it will not terminate the questioning; no matter how many times a suspect asserts that right nor how long he or she maintains absolute silence, the investigators may continue to talk to the suspect and address questions to him or her throughout the period of detention, until the suspect finally gives in and begins to talk.

112 SCAP’s description of this provision differs slightly from the final Japanese text. The summary contained in THE POLITICAL REORIENTATION OF JAPAN, reads as follows: “Under the new code, persons asked to appear for interrogation by police or procurators will even have the right to refuse and, if they do appear, may refuse to answer any questions and, if not under arrest, may leave at any time.” 2 SCAP, supra note 60, at 228. As with the Japanese text, that explanation, interpreted literally, would not permit one under arrest to leave at any time. Unlike the Japanese version, however, under the literal language of SCAP’s summary even one who is under arrest would have the option of refusing to appear for questioning in the first place.


114 See, e.g., Araki, Higisha ni wa “torishirabe no junin gimu” ga aru ka [Do Suspects Have a “Duty to Submit” to Questioning?], in JURISUTO Zōkan, Kei’i Soshōhō No Sōten [Jurist Extra Number, Issues in Criminal Procedure] 60 (1979), and materials cited therein [hereinafter JURISUTO Zōkan].


116 See George, supra note 14, at 1152; Murakami, supra note 115, at 6-8, and cases cited therein.
D. Interrogation Techniques

Thus, the foregoing analysis indicates that investigators have plenty of time in which to obtain a confession. As a handbook on investigative techniques emphasizes, "patience and perseverance" are keys to good investigations.\(^{117}\) Interrogation should be treated "like a balloon. If you push suddenly, it will break; the true skill lies in pushing gradually and steadily."\(^{118}\) The handbook continues:

Among the suspects are some who begin by maintaining silence and refusing to speak for no valid reason . . . . But even though they deny [the crime], most will admit to established facts and to evidence that has been collected. In the face of skilled persuasion, questioning, and pursuit by the interrogator, they will find it more and more difficult to maintain their denial, and will eventually be forced to the point where they have to confess to the full story.\(^{119}\)

That handbook contains a revealing account of interrogation of suspects who either deny their involvement or maintain silence—categories that are treated as essentially equivalent. The discussion begins by stating that in earlier times investigations proceeded "from the person to the evidence," with the focus on eliciting a confession from the suspect and then using that confession to find corroborating evidence. Investigations now move in the opposite direction—"from the evidence to the person."\(^{120}\) Nonetheless, "obtaining confessions is . . . indispensable to criminal investigations"; the "inability to get a true confession from the person who has committed the crime leaves a bad aftertaste."\(^{121}\)

The process should begin by selecting good interrogators, "based on [agreement with] the collective spirit that inability to force a full confession is the responsibility of all the investigators."\(^{122}\) As for the


\(^{118}\) SUZUKI, supra note 117, at 86-87.

\(^{119}\) Id. at 13. Cf. TSUNAKAWA, supra note 118, at 29-30 ("If, then, questioning is a struggle with the suspect, a test of guts, in short, a type of battle, . . . who's in the stronger position? The suspect has the right to silence and other legally recognized defense rights. But . . . the suspect is beset by anxieties and, when in detention, is cut off from the outside world . . . and faces great uncertainty.")

\(^{120}\) SUZUKI, supra note 117, at 143.

\(^{121}\) Id. at 144. See also MIYAZAWA, HANZAI SÔSA, supra note 75, at 240, 243-44 (police regard obtaining confessions as essential to investigation).

\(^{122}\) SUZUKI, supra note 117, at 148.
questioning itself, it should usually be conducted one-on-one, isolated from other people, since this is normally the most psychologically conducive to a confession. In some cases, though, it is more effective to use two or three questioners.\textsuperscript{123} The non-public, confrontational nature of the interrogation is important, so the setting for the interrogation should be selected carefully. The ideal interrogation room: (a) should be cut off from outside noise and have no visual distractions; (b) should be small, ideally with no windows, or with clouded glass, so that the suspect is not distracted by changes in the weather; (c) should have no telephone or bells that might distract the suspect; (d) should have few decorations, and only essential furnishings (such as a desk, chairs, and a bookrack); and (e) should have lighting that is not too bright, focused on the suspect's face from behind the interrogator.\textsuperscript{124}

As to the notification of the right to silence, the handbook contains the following advice:

The legal process calls for informing the suspect of the right to refuse to testify at the start of questioning. . . . Depending on the manner in which this notification is given, it can harden the denial or be interpreted in a good light. Some suspects will take the notification as an indication of the fairness of the investigators, and by removing the preconception that the investigators will be unpleasant the warning can in fact lead to an invisible benefit in the form of an affinity to the investigators. It is not enough, however, simply to give this warning in the specified form. If the investigator tells the suspect that he or she must confess before the echo of the notification has even died away, this benefit will be lost.

The following sort of statements should be added: "If you don't want to talk, that right is recognized so you're free not to do so. But if you don't give any answer to the questions, people—not just me, you understand, but everyone—will think that you're hiding something. Think about that. Won't you just be in a worse position? There are probably things that would help you, things you want to talk about; but even those won't come out. I'm simply doing my job and trying to resolve this by discovering the truth." Of course, if the investigator is too obvious [about turning the warning into a request for information], there is a risk that the suspect will become hostile. So it is essential to bear in mind that the manner in which the warning is given can lead to a denial.\textsuperscript{125}

\textsuperscript{123} Id. at 152.
\textsuperscript{124} Id. at 153-54. See Tsunakawa, supra note 117, at 98-100.
\textsuperscript{125} Suzuki, supra note 117, at 155-56.
The handbook then discusses various techniques for the actual questioning. It notes that the proper technique will vary depending upon the case and the stage of interrogation. In difficult cases, it recommends starting with generalities to get the suspect talking, turning to the crime itself only after completing the first couple of sessions. Although there is no suggestion of physical compulsion, the book strongly advocates psychological pressure. Pointers include showing sympathy and understanding—emphasizing that the victim and society are also to blame and the suspect need not suffer alone—and strongly emphasizing that continued silence will only work to the suspect's disadvantage, for other evidence exists which compels the same result whether the suspect confesses or not.\textsuperscript{126} The "Mutt and Jeff" routine—tough interrogator/sympathetic friend—is also recommended.\textsuperscript{127} In no event, warns the handbook, should the suspect be given privileges, "\textit{such as the opportunity to meet with his or her family}," in return for a pledge to confess, since that would provide the basis for a claim that the confession was induced by promises of benefits.\textsuperscript{128}

In addition, the handbook notes that many suspects assert alibis and suggests that when no other evidence can be found to disprove such alibis, investigators have no choice but to break down the alibi during the interrogation. It recommends continued questioning until the suspect eventually runs into so many inconsistencies that he or she will be forced to give up and admit that the story was just a fiction.\textsuperscript{129} To demonstrate the importance of patience and perseverance, the handbook contains numerous examples of suspects who confessed only after many days of questioning.\textsuperscript{130}

Other materials on interrogation techniques confirm the approach described above.\textsuperscript{131} In the face of extended questioning under these conditions, one possibly equivocal recitation of "the right not to answer questions against one's will" scarcely seems sufficient to

\textsuperscript{126} Id. at 156-61.

\textsuperscript{127} Id. at 166.

\textsuperscript{128} Id. at 111-12 (emphasis added).

\textsuperscript{129} Id. at 174.

\textsuperscript{130} Id. at 95-102 (confession on tenth day); 106-09 (confession on fifteenth day).

\textsuperscript{131} See generally TSUNAKAWA, supra note 117; S. Kawai, Tokuso Kenji Not [Notes of a Special Crimes Prosecutor] (1986); Hotta, Tadashiku jihak saseru hōho [Methods for Forcing Accurate Confessions], 533 Hanrei Taimuzu 51 (1984), and materials cited therein; MIYAZAWA, Hanzai Sōsa, supra note 75 (containing numerous case studies and results of surveys regarding police attitudes toward questioning); MIYAZAWA, Policing in Japan, supra note 75 (translation of above cited article, containing supplemental information).
guarantee the right to silence. To the contrary, with up to twenty-three days to interrogate a suspect who remains virtually incommunicado, the author’s faith in patient questioning seems entirely justified.

III. POTENTIAL MEANS FOR AVOIDING LIMITS ON INVESTIGATION

A. Arrest for a Separate Incident—“Bekken Taiho”

One might think that Japanese investigators should be satisfied with these basic standards. Yet the normal custodial interrogation period is not always enough. Sometimes police do not have sufficient grounds to make an initial arrest on a crime, and in a few cases investigators find that the suspect simply refuses to give in during the first twenty-three days. In these cases, police may resort to other tools for detaining the suspect for questioning. The technique that appears most frequently in case accounts is *bekken taiho* (arrest for a separate incident).\(^\text{12}\)

This technique involves just what its name implies. Even though police may lack sufficient evidence to link the suspect to the crime in chief, they often uncover evidence of some relatively minor crime. Using this evidence, they obtain an arrest warrant and use the post-arrest custodial investigation period—which, even on a minor crime, may extend for the full twenty-three days—to interrogate the suspect on the crime they initially pursued. If the initial detention period still proves too short, rearrest on some other minor crime (and consequent renewed detention for investigation) remains a possibility. In extreme cases, the cycle may be repeated several times.\(^\text{13}\)

A leading Japanese criminal procedure scholar described *bekken taiho* as an investigative technique unique to postwar Japan.\(^\text{14}\) During prewar years, police had no need for this technique, for they had other means sufficient to hold suspects for questioning. Left without these techniques, postwar investigators turned to *bekken taiho* as the

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12 See generally KUMAGAI, BEKKEN TAIHO NO KENKYU [RESEARCH ON BEKKEN TAIHO] (1972).

13 For example, in the so-called Shiratori case, Judgment of Oct. 17, 1963, Saikōsai (Supreme Court), 17 Keishū 1795 (Japan v. Murakami), the suspect was arrested on a total of fourteen different crimes, and the total period in detention—which apparently included time pending trial on some of those charges—lasted for almost three years, see Matsuoka, Shiratori jiken [The Shiratori Case], in KEITI SAISHIN NO KENKYU [RESEARCH ON CRIMINAL RETRIALS] 357 (Y. Kamo ed. 1980).

14 H. Tamiya, supra note 51, at 74.
simplest device for obtaining custody of a suspect—and eliciting the desired confession—when there is insufficient evidence for arrest on the crime in chief.

Nevertheless, the process is not quite as simple as it seems. First, the "other crime" cannot be too minor; to obtain an arrest warrant the crime in question ordinarily must be punishable by a fine of at least 100,000 yen. That figure, however, leaves considerable latitude, for offenses such as fraud, assault, petty larceny, and virtually any sort of trespassing will suffice. Moreover, this limit does not apply if the suspect lacks a fixed address or refuses a request to appear at the station voluntarily for questioning "without good cause."

Another potentially important limitation on this technique is the requirement that the police and/or prosecutors obtain judicial approval at several stages of their investigation. First, they must get a warrant authorizing the initial arrest on the "other" crime. Three days later, they must seek permission for a ten day extension of the detention period relating to the "other" crime; this process must be repeated if they want an additional ten days of detention. Subsequently, if they have gathered enough evidence to arrest on the main crime, they normally will seek an additional arrest warrant for that crime. Following the second warrant will be one or two requests for extensions of the detention period relating to that main crime. At each of these stages, the judge must determine the existence of reasonable grounds to suspect that the individual committed the crime alleged and ascertain that the arrest or detention is appropriate. Moreover, at each of these stages and again at the trial itself, the suspect theoretically has the right to protest that he or she has been subjected to illegal arrest or detention.

Thus, certain procedural safeguards exist. Nevertheless, the practice of bekken taiho went largely unnoticed and unchecked for many years after the adoption of the new Code. Moreover, the very sim-
plicity of the technique and the relative ease of finding some minor transgression by virtually any suspect made this a key means of circumventing the warrant requirement and the right to silence. *Bekken taiho* was extensively used, apparently without much notice, after the new Code of Criminal Procedure went into effect in 1947. In 1955, the Grand Bench of the Supreme Court issued a decision upholding the practice. In that case, known as the *Teigin* case, police originally arrested the suspect on suspicion of having murdered twelve people in the process of robbing a bank. The police and prosecutors were unable to secure a confession to that crime, yet during their questioning, they learned of a separate fraudulent incident. They then indicted the suspect for the fraud and continued to interrogate him pending the fraud trial until they finally obtained a confession to the murders about a month and a half later. In upholding his murder conviction, the Supreme Court rather summarily rejected assertions that the investigation had been unlawful. The Court described this case as one in which investigators simply discovered the fraud during their investigation of the murders, rather than one in which they deliberately indicted the suspect on the fraud charge in order to investigate the murders.

This reasoning, however, laid the theoretical groundwork for several subsequent lower court decisions ruling *bekken taiho* illegal. In 1963, a district court for the first time clearly stated—albeit in dictum—that it would be illegal for investigators to arrest a suspect on one charge simply as a pretext for questioning him on some other matter. In 1969, a district court actually held a *bekken taiho* illegal. In the *Takoshima* case, a schoolboy disappeared on his way home from school and was found dead the next morning. The police initially arrested a fifty-two year old man on a separate charge of larceny. After thirteen days of confinement and interrogation, he confessed to the murder. Despite the confession, however, he turned out to

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142 Judgment of April 6, 1955, Saikōsai (Supreme Court), 9 Keishi 663 (Hirasawa v. Japan). In this case, Sadamichi Hirasawa was convicted of murdering 12 employees of the Teikoku Ban in 1948 by deceiving them into drinking poison as a supposed protection against dysentery. Hirasawa died in 1987, while his eighteenth petition for a new trial was pending; see Decision of July 13, 1987, Chisai (District Court), 1246 HANJ 144 (To Hori District Court) rejecting that retrial petition.

143 See I. KEOI SOSHÔ, supra note 115, at 272.

144 Judgment of March 11, 1964, 6 Keishi 206, (Japan v. Ishikawa) (Urawa District Court), aff'd, Judgment of Oct. 31, 1974, 756 HANJ 3 (Toyko High Court).

have a valid alibi and was released. The police then turned to another suspect, a sixteen year old carpenter's apprentice. They obtained a warrant for his arrest on suspicion of trespassing and his having stolen four record albums. After six days of custody and questioning, he too confessed to the murder. He then was rearrested on the murder charge and held for twenty-three more days of questioning before being indicted for murder.

The trial court found that the bekken taiho in this case was merely a pretext to which the police resorted when they had nothing more than a hunch to go on. According to the court, bekken taiho violated the spirit of the Code in that it "viewed arrest and detention as means for obtaining confessions" and constituted an illegal attempt to evade the time limits on pre-indictment detention.146 Moreover, since investigators used the bekken taiho to bypass judicial review of warrant requests, it also violated the warrant requirements contained both in the Code and the Constitution.147 The court proceeded to hold that these procedural violations required exclusion of both the original and subsequent confessions.

To an American reader, the exclusion of the confession might seem to follow naturally from the finding of an illegal arrest and interrogation. Yet since the exclusionary rule is invoked only rarely in Japan,148 this decision attracted much attention. As a leading criminal procedure scholar observed, however, the exclusion of the confession was rendered much less "shocking" because it apparently had no effect on the case's result. The court seemed convinced that the youth was innocent in any event, for virtually no other evidence linked the suspect to the murder. Accordingly, exclusion of the confession had no impact on the outcome of the case.149

In a twenty year period subsequent to that decision, a number of other courts have excluded confessions in bekken taiho cases.150 As

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146 1 Keisai Geppō at 674-75.
147 Id.
149 MATSUO, Bekken taiho to jihaku no kyōyōsei [Bekken taiho and the Compelled Nature of Confessions], 432 JURISUTO 108, 113 (1969).
150 These include the so-called Tokyo Bed case, Judgment of Feb. 26, 1970, 2 Keisai Geppō 137 (Tokyo District Court), in which the Tokyo District Court excluded a confession to a series of arsons that had been obtained during interrogation of the suspect after he was arrested for trespassing when he wandered into his neighbor's garden one night, apparently while sleepwalking after taking sleeping pills. A more recent decision is the so-called Case of the Murder of a Kagoshima Couple, Judgment
in *Takashima*, however, in most of these cases the exclusion of evidence has not affected the actual outcome of the case.\textsuperscript{151} At the same time, numerous other courts have upheld investigations involving *bekken taiho*.\textsuperscript{152} Both courts and academics have split over the proper limits of *bekken taiho* and the appropriate theoretical framework for analyzing the issue.\textsuperscript{153} Despite numerous opportunities to review *bekken taiho* cases, the Supreme Court has never directly addressed the question that it left open in the *Teigin* case—whether arrest on a separate minor crime purely as a pretext for interrogation on a more serious crime would be legal.\textsuperscript{154}

Under these circumstances, it is not surprising that police have continued to make widespread use of *bekken taiho*. After all, as a practical matter, the only potential deterrent at present appears to be the threat that confessions illegally obtained through *bekken taiho* may be excluded. Yet exclusion of confessions still remains very rare and is virtually unheard of in cases where a guilty person would go free as a result. Accordingly, the decisions holding *bekken taiho*...
illegal would seem to amount to little more than judicial jawboning, and subsequently the practice continues to remain a key tool for investigators.155

B. Voluntary Accompaniment—“Nin’i Dōkō”

In some cases, however, police are unable to come up with probable cause for an arrest on even a minor crime. In many such cases (and, one should note, in the vast majority of cases where the police do have sufficient basis for an arrest on some charge), investigators ask the suspect to “voluntarily accompany” them for questioning (nin’i dōkō). Japanese suspects seldom refuse such requests.156

Most voluntary accompaniments in Japan are undoubtedly just that—truly voluntary attempts to explain one’s actions and avoid the stigma of an arrest. As interpreted by Japanese courts, however, the concept of “voluntary accompaniment” is broad enough to allow police to put considerable pressure on suspects to “consent” to rather extensive questioning. Accordingly, this approach easily can be abused to pursue hunches. It is not surprising that many of the problematic cases in Japan, including several of the death penalty retrial cases, began with voluntary accompaniments. In the Menda case,157 for example, the police initially lacked sufficient evidence to arrest the suspect, but had a hunch that he had committed a murder and asked him to accompany them “voluntarily” for questioning. Ultimately, in a ruling some thirty-five years later (thirty-three of which the suspect had spent on death row), the Kumamoto District Court concluded that the manner of the request—conveyed by five armed policemen late one evening—exceeded the bounds of voluntariness.158 As is typical of such decisions, however, that court already had concluded, as a factual matter, that the defendant had a valid alibi and could not have committed the crime. Thus, the ruling on the voluntariness issue did not affect the outcome of the case.

Of course, police in the United States also often seek the voluntary cooperation of suspects. Yet the prevailing Japanese standards for

155 See MIYAZAWA, HANZAI Sōsa, supra note 73, at 232-34. For a discussion of bekken taiho by a high court judge, criticizing the practice but describing it as being used frequently as an “everyday matter,” see Ishimatsu, Wagakuni no keiji hikokunin wa, saibankan ni yoru saiban o hontō ni ukete iru no ka [Are Criminal Defendants in Japan Truly Receiving Trials by Judges], 423 Hōgaku Seminā 62, 65 (1990).
156 See, e.g., BAYLEY, supra note 68, at 146.
157 Judgment of July 15, 1983, Chisai (District Court), 1090 HانJJ 21, 85 (Japan v. Menda, Kumamoto D. Ct.).
158 Id.
“voluntariness” are quite different from those in the United States. Given the heavy overlay of constitutional jurisprudence in the area of criminal procedure in the United States, many Americans might expect that in Japan, as well, this issue would be resolved on constitutional grounds. After all, Article 38 of the Japanese Constitution provides that “[c]onfession[s] made under compulsion . . . shall not be admitted in evidence.” The key cases, however, do not turn on matters of constitutional interpretation; this issue is treated as a matter of statutory interpretation in Japan.

With respect to voluntary accompaniment, the key debate centers on Article 197(1) of the Criminal Procedure Code.\(^\text{159}\) That article provides that “[i]nvestigators] may conduct questioning necessary in order to attain the objectives of the investigation; provided, however, that compulsory measures (kyōsei no shobun) may not be taken except in situations where there are special provisions in this law.”\(^\text{160}\) Within Japanese legal circles there is broad agreement that this provision, by referring only to “compulsory measures,” permits all forms of voluntary investigations.\(^\text{161}\)

Academic theories abound regarding the borderline between “compulsion” and “voluntariness.”\(^\text{162}\) At one extreme are those who argue that all actions that infringe upon the legal rights of citizens should be regarded as compulsory, whether or not the individual has given his or her consent.\(^\text{163}\) At the other extreme is the view that the term

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159 Two other key provisions are Article 198 of the Code, supra note 9, and Article 2 of the Performance of Police Duties Act, Law No. 136 of 1948, arts. 2(1) and 2(2). As mentioned earlier, the former provides police and prosecutors with authority to question suspects with respect to the investigation of crime, but expressly recognizes the right of suspects to refuse to answer and to leave “if not under arrest,” see supra text accompanying notes 111-15. The latter provides that police may question individuals reasonably suspected of having committed or being about to commit a crime or thought to have information about a crime that has been committed, and further provides that, when it would be to the detriment of the individual or would impede traffic, the police may request the individual to accompany them to the police station or police box for questioning. That article makes no mention of the right to refuse to answer or to refuse to accompany the police. Performance of Police Duties Act, supra, art. 2.

160 Code, supra note 9, art. 197(1) (emphasis added).


162 See id., at 137-44, for a description of five different theories.

“compulsory measures” refers only to measures specifically mentioned in the Code (such as arrests, confinement, and searches and seizures) for which warrants are normally required, and that all other types of investigation are voluntary and may be carried out entirely at the discretion of investigators. Middle views include one theory which places primary emphasis on the extent of force and overbearing of the will of the suspect. Another suggests that there should be an intermediate category, referred to as “actual force” (jitsuryoku), which would be recognized as permissible within limits regarded as appropriate “from the standpoint of socially accepted views.” Although Japanese courts have never formally adopted this “actual force” theory, they frequently have referred to “socially accepted views” (shakaitṣūnen) in permitting broad activities under the aegis of “voluntary investigation.”

In the leading case on the meaning of “compulsory measures,” the Supreme Court’s Third Petty Bench ruled in 1976 that the use of physical force does not necessarily constitute compulsion. The Court held that a policeman did not undertake a “compulsory measure” when he grabbed an individual who stood up and tried to leave a police station two hours after he “voluntarily” accompanied police to the station following his refusal to take a breath test. The Court rejected the argument that use of physical force per se constitutes compulsion, instead setting forth a two-tiered analysis of the meaning of “compulsory measures.” At the first level are true “compulsory measures”—“measures that it would be inappropriate to permit in the absence of special authorizing provisions, such as acts that dominate the will of the individual and compulsorily effectuate the objectives of the investigation by imposing restraints on [the individual’s] person, home, possessions, etc.” These are impermissible unless authorized by statute (and are generally subject to a warrant requirement). The Court regarded other measures—including other uses

165 Saikūsaihansho Hanrei Kaïsetsu, Keiïhen, Shōwa 51-Nendo [Commentary on Supreme Court Precedents, Criminal Volume] 64 (1976) (case comment by research judge Kōjo).
167 Judgment of March 16, 1976, Saikūsai (Supreme Court), 30 Keishū 187 (Tanahashi v. Japan).
168 Id. at 191, 192.
of physical force—as so-called "voluntary measures," holding that their permissibility depends upon a balancing of the need for and urgency of the measures against the degree of infringement of legal interests.

In Tanahashi, the Court held that the policeman's actions did not rise to the level of a true "compulsory measure" which the Court equated with an arrest. Applying a balancing test, the Court found that the suspicion of drunk driving and the desire to promptly perform a breath test provided the need and urgency for restraining the driver and outweighed the relatively weak restraint employed. The Court did not describe the circumstances under which the driver agreed to accompany the police to the station, nor did it mention whether he ever requested to be allowed to leave the station.

Assuming that he had in fact voluntarily agreed to go to the station and remain there for questioning, the additional restraint involved in grabbing him as he sought to leave does not seem very great. Moreover, given current sensitivity to drunk driving, the conclusion that the police acted reasonably probably would not strike most Americans as surprising. Yet, the fact that the driver continually refused to submit to the breath test and attempted to run out of the station raises considerable doubt as to just how "voluntary" he thought his presence was.

Other cases strain the "voluntary"/"compulsory" distinction further. For instance, in two decisions involving individuals suspected of bank robbery, courts found a permissible "voluntary accompaniment" even though the police surrounded the suspects, grabbed them by the shoulders and elbows, and dragged them along.169

One of the most extreme examples is reflected by the Takanawa Green Mansion Hostess Murder Case.170 In that case, the Supreme Court upheld an investigation in which the so-called "voluntary accompaniment" lasted for four and a half days. The suspect was subjected to intense questioning at a police station from morning until late each evening, then taken in a police car to a room arranged by the police, where he was kept under continuous observation until the police car arrived to take him back to the station the next morning.

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169 Judgment of March 29, 1976, Chisai (District Court), 838 Hanji 99 (Tottori D. Ct.); Judgment of June 30, 1977, Kōsai (High Court), 866 Hanji 180 (Tokyo High Ct.).

170 Ruling of Feb. 29, 1984, Saikōsai (Supreme Court), 38 Keishū 479 (Ikuhara v. Japan).
Although the following description of that case is somewhat long, it reveals much about police and judicial attitudes regarding the bounds of "voluntariness" and suspects' rights.

As its popular name suggests, the case involved the murder of a bar hostess in her apartment in the Takanawa Green Mansion condominium complex on May 18, 1977. Two days later, Isamu Ikuhara, a thirty-three year old hotel employee who previously lived with the victim, went to the police station in Takanawa (a district of Tokyo) and gave an alibi. Although the alibi did not check out, the police could not find sufficient evidence to obtain an arrest warrant. Nevertheless, early on the morning of June 7th, four policemen went to Ikuhara's room at his company's dormitory and asked him to accompany them to the police station in Takanawa as a prime suspect in the case. He assented, and the four policemen escorted him to the station in a police car. That morning police administered a polygraph test. They then questioned him in a small room at the Takanawa police station until he confessed to the murder at about ten o'clock that evening. After preparing a confession statement, the police broke off questioning sometime after 11 p.m.

At that point Ikuhara signed a statement indicating that he wished to provide a more detailed explanation the next day and wanted the police to arrange a place for him to spend the night. The police then put him up in another company's rooming facility. One policeman occupied the room next door, and three or four more policemen stayed in the same facility to keep him under observation. The following morning, police again picked him up in a police car and took him to the station for questioning, which again lasted until eleven in the evening. That night they had him stay in a local hotel. The same pattern continued for two more days and nights, with the questioning continuing through mid-afternoon on June 11th. Yet, despite obtaining several detailed confession statements, the police still found no corroborating evidence sufficient in their view to arrest Ikuhara. On June 11th they turned him over to his mother, who came to the station from her home in another prefecture after she signed a release form acknowledging that she was taking her son (who, remember, presumably was at the station of his own free will).

171 Article 38 of the Constitution, supra note 8, and Article 319(2) of the Code, supra note 9, expressly state that no person may be convicted where the only proof against him is his own confession. No such formal requirement applies to probable cause for arrest, though.
The police continued to search for evidence to confirm Ikuhara's confession and eventually arrested him two and a half months later. He asserted another alibi but confessed after three more days of questioning. Police and prosecutors continued to interrogate him for another seventeen days before finally indicting him.

Although Ikuhara denied the crime at trial, he was convicted. After the Tokyo High Court upheld the conviction, Ikuhara appealed to the Supreme Court, claiming that his original questioning amounted to an illegal and unconstitutional arrest without a warrant and that his confession should be excluded. Although the Second Petty Bench rejected his appeal unanimously, the five Justices split 3-2 on the legality of the original investigation. As the controlling legal standard, the majority announced that in order to pass muster as a "voluntary investigation," the investigation must not rise to the level of "compulsory measures" (as defined in the 1976 drunk driving case discussed above). Furthermore, "compulsory measures" must be within limits "regarded as appropriate, based on socially accepted views, in light of the nature of the case, the degree of suspicion concerning the suspect, the attitude of the suspect, and other relevant factors." 172 Applying that standard to the facts of this case, the Court found nothing inappropriate about the methods and manner of the original "voluntary accompaniment," noting that there was growing suspicion about Ikuhara and that, in light of the nature and gravity of the crime, "the need existed to hear the circumstances and obtain an explanation directly from the defendant." 173 Additionally, the Court found no signs of "violence, intimidation, or the like that would affect the voluntariness of the defendant's statements in the questioning that followed this voluntary accompaniment." 174

The majority recognized that certain elements of the case suggested that the defendant felt that he had no choice but to submit to the long hours of questioning which continued over several days, and indicated a reluctance to hold that the methods were appropriate for voluntary questioning. 175 The court noted, however, that

the defendant did submit the request for the first night's lodging . . . , and, on the record, there is no indication that defendant refused

172 Ruling of Feb. 29, 1984, Saikōsai (Supreme Court), 38 Keishū at 485 (Ikuhara v. Japan).
173 Id.
174 Id. (emphasis added).
175 Id. at 486.
the questioning or lodging during that period, nor that he requested or sought to leave the interrogation room or lodging facilities. Nor can we perceive any sign that the investigators compelled the questioning or refused or detained the defendant from leaving. Based on the various facts, we conclude that the defendant, of his own will, accepted both the questioning and the lodging. . . . [Moreover,] upon considering the concrete circumstances, including the nature of the case and the need to obtain detailed facts and explanations from the defendant promptly, we find that the investigation was unavoidable from the standpoint of socially accepted views, and did not exceed the limits of a permissible voluntary investigation.176

Justices Kinoshita and Ohashi sharply disagreed, arguing that, "under the circumstances, it was extremely difficult for the defendant to determine his own will freely."177 They contended that no matter how grave the crime nor great the suspicion and need for questioning, the methods employed in this case were extremely inappropriate and argued that if this investigation were not ruled illegal, investigators would take the decision as a license to pursue the same methods in future cases.178 Nevertheless, Justices Kinoshita and Ohashi agreed with the majority that Ikuhara's conviction was valid. They based their concurrence on the view that the effects of the illegal investigation had dissipated by the time of his arrest and questioning two and a half months later and accordingly concluded that his later confession was admissible.179

The Green Mansion Case is undoubtedly an extreme example of nin'i dōkō and presumably is near the borderline of permissibility. It is not unique, however. In 1980 the Tokyo District Court reviewed a similar case in which the police booked a hotel room for a murder suspect and stayed with him for two nights during the course of a "voluntary investigation." Interestingly enough, the court concluded that the investigation rose to the level of an illegal, warrantless arrest.180

In a more recent decision, the Supreme Court upheld as voluntary a confession obtained through over twenty-two hours of virtually continual questioning. The interrogation commenced with a voluntary

176 Id. at 486-87 (emphasis added).
177 Id. at 492 (Kinoshita and Ohashi, JJ., separate opinion).
178 Id.
179 Id. at 493.
180 Judgment of August 13, 1980, Chisai (District Court), 972 HANJI 136 (Tokyo D. Ct.).
accompaniment at 11 p.m. and continued until the suspect’s arrest on a robbery murder charge at 9:25 the following evening—a period during which the suspect was not given the opportunity to sleep.

In this case, the Court followed the standard announced in the *Green Mansion Case*, inquiring as to whether the questioning should be "regarded as appropriate, based on socially accepted views, in light of the nature of the case, the degree of suspicion concerning the suspect, the attitude of the suspect, and other relevant factors." The Court stated that the extended interrogation in this case, which included "questioning throughout the night without permitting the suspect one moment's sleep, followed by yet another half day's questioning after the suspect started to provide a confession [at about 9:30 in the morning], . . . should not readily be approved, even if conducted as a voluntary investigation, unless special circumstances exist."

Nevertheless, the majority found just such special circumstances in this case. The Court noted that the suspect, who had previously lived with the dead woman, initially indicated a willingness to do anything he could to help solve the case. The Court found that the police had not continued questioning after the initial confession in the morning in order to obtain sufficient evidence to arrest the suspect or to evade the time limits before sending the suspect to the prosecutors; rather, even though they possessed evidence sufficient to arrest the suspect, they sought to discern the true nature of the crime since they felt that the suspect was lying about his intent and the course of events. Finally, the Court noted the absence of any "trace" that the suspect sought to return home or indicated that he wished to rest, and held:

Given the nature and gravity of the case, together with these other circumstances, we cannot conclude that the investigation exceeded permissible bounds, from the standpoint of socially accepted views, nor that the interrogation was such as to give rise to doubts concerning the voluntariness of the defendant's confession. As that

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181 Judgment of July 4, 1989, Saikōsai (Supreme Court), 43 Keishū 581.
182 Id. at 585-86.
183 Id. at 586-87. Justice Sakagami dissented from the ruling, noting various issues. In addition to expressing concern over the length and nature of the questioning, he noted that the police had begun to treat Miyauchi as a suspect early on, but that the record did not reveal whether they had ever informed him of his right to remain silent, and he concluded that the police should have proceeded to obtain an arrest warrant and should have provided Miyauchi with a chance to rest at an early stage in the questioning. Id. at 588-89.
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case reveals, rather severe questioning continues to occur under the rubric of "voluntary accompaniment," and less extreme cases of nin'i dōkō abound.

Prosecutors and Justice Ministry officials acknowledge the need to study the Green Mansion decision and do not want such investigations to become everyday occurrences. At the same time, some seek to justify the investigation in that case and suggest the continued need for such investigations in cases where there is insufficient evidence to arrest. In the words of one prosecutor:

The real problem is that the number of suspects who give a general confession during voluntary questioning, and then say that they'll provide the details the following day after getting their thoughts in order, is greater than academics imagine. One can say, "If you've got a confession, then why don't you make an arrest?" But in the real world there are many timid souls who get very flustered under questioning, and it's extremely dangerous to make an arrest without a concrete confession. Yet if you send them home, there is a strong possibility of suicide, flight, or destruction of evidence. And if we arrest the person on another charge, it will be criticized as bekken taiho.  

This, rather than suggesting an attitude of respect for a suspect's free will, reflects a belief that nin'i dōkō and bekken taiho are key tools for securing confessions when police either are unable to gather sufficient evidence for a lawful arrest or unwilling to make the effort to do so. Or, to suggest a less sinister motive, when they desire to provide the suspect with the opportunity to explain his or her actions without having to suffer the stigma of an arrest.

IV. USE OF CONFESSIONS AT TRIAL

A. Form of Confession Statements

Article 198(3) of the Code provides that the testimony of a suspect during interrogation may be recorded in writing in a "confession statement." After it is compiled, the confession statement is to be shown or read to the suspect so that the suspect can verify its accuracy.

\[184\] Kawakami, Nin'i sōsa no genkai [The Limits of Voluntary Investigations], 528 HANREI TAIHEI 47, 51 (1984) (emphasis added).
\[185\] Code, supra note 9, art. 198(3).
The suspect may then be asked to sign and seal the document, although the suspect has no duty to do so.\footnote{186} Although the confession statement on occasion is prepared in question and answer form, it is by no means a verbatim transcript of the questioning. To the contrary, the investigators prepare what is known as a "summarized statement" in which they organize and summarize the testimony of the suspect.\footnote{187} This summarized statement may cover one full session or even several days' worth of questioning.\footnote{188} As one former prosecutor recalls:

In major cases I would question for two or three days, taking notes on the confession in my notebook, and then prepare a statement covering that two or three days' worth of material. If you don't do that you can't get an organized statement and you run the risk of getting a statement that contradicts earlier or later statements of the same suspect or statements of other suspects.\footnote{189}

Moreover, although the statement ordinarily is prepared as soon as an interrogation session ends, courts have permitted the use of confession statements prepared several days after the end of the questioning. In at least one case, a court upheld the admissibility of a confession statement prepared \textit{one month} after the questioning took place.\footnote{190}

Unlike the confession statements in Tokugawa Japan, contemporary confession statements are not simply "short, stereotyped, largely abstract \ldots accounts."\footnote{191} Rather, today's confession statements are typically lengthy and highly detailed. Yet much like Tokugawa con-
fession statements they are "reconstructed accounts," and defense
counsel and judges have expressed concern that today's confession
statements are sometimes "crafted in a legal manner to correspond
to the necessary elements for a particular crime under the substantive
criminal law" as they were in the Tokugawa era. Defense counsel
have complained that contemporary investigators "eliminate any as-
psects of the testimony that, to the investigators, might seem to be
useless out-of-place elements," thus generating "closely-knit and log-
ically consistent accounts" which judges may find difficult to resist.
Furthermore, judges, prosecutors and defense counsel all agree that
these written confession statements continue to play an extremely
important role in the criminal justice process (although presumably
not so great a role as that of the powerful Tokugawa confession
statements).

B. Admissibility

In addition to seeking to limit opportunities to obtain confessions,
the Occupation sought to limit use of out-of-court testimony at trial.
In place of the prewar reliance on dossiers containing written sum-
maries of confessions and of pretrial testimony by witnesses prepared
by the investigators, the Occupation envisioned U.S.-style trials with
direct in-court testimony and only limited use of hearsay. To that
end, the postwar Code of Criminal Procedure contains a broad
hearsay rule prohibiting use of documents as a substitute for in-court
testimony and a series of specific exceptions to that prohibition.
The key exception applicable to confessions is contained in Article
322, which provides that an out-of-court statement of the accused
that is against his or her interests ordinarily may be used at trial. A
proviso to that article prohibits use of such a statement, however,
if "there exists suspicion that the admission was not made volun-
tarily." In addition, as mentioned earlier, Article 38 of the Con-
stitution provides that confessions "made under compulsion, torture

192 Id. See, e.g., Tamura, Komento 2 [Comment 2], in Keiji Tetsuzuki Ge, supra
note 186, at 890.
193 Tamura, supra note 192, at 890.
194 E.g., Hiratani, supra note 186, at 880-82; Kawakami, supra note 190, at 889;
Tamura, supra note 192, at 890.
195 2 SCAP, supra note 60, at 228.
196 Code, supra note 9, art. 320(1).
197 Id. at arts. 321-28.
198 Id. at art. 322(1).
or threat, or after prolonged arrest or detention shall not be admitted in evidence." Article 319 of the Code repeats that language and also prohibits admission into evidence of confessions "suspected not to have been made voluntarily." As a further limit relating to the reliability of the confession, a court may exclude the confession from consideration or give it very little evidentiary weight if the court concludes that a given confession is not reliable.

1. Confessions Obtained after Prolonged Arrest or Detention

As mentioned earlier, courts have excluded confessions in some bekken taiho cases. In those cases, which remain rare, the courts based their decision to exclude the evidence upon reference to basic principles underlying the criminal procedure code, particularly the use of bekken taiho as a deliberate ploy to evade the warrant requirements. One might wonder why confessions obtained following bekken taiho are not excluded due to prolonged detention of the suspect, for Article 38(2) of the Constitution and Article 311(1) of the Code both render confessions made "after prolonged arrest or detention" inadmissible.

Nevertheless, these provisions as interpreted by the Japanese courts seldom apply. As reflected by two of the Supreme Court's earliest decisions interpreting the provisions, time in lawful detention—even if extended to several months through a series of arrests—normally will not bring this rule into play. In one of those cases, the Court rejected a confession obtained after detention of 109 days where the validity of grounds for the detention were doubtful. In the other case, however, the Court upheld a confession obtained after detention of more than six months where the detention was based on valid reasons. Given this precedent, the suggestion that interrogation of

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199 Constitution, supra note 8, art. 38(2).
200 Code, supra note 9, art. 319(1).
201 Article 318 of the Code provides, "The probative value of evidence shall be left to the free discretion of judges." Id. at art. 318.
202 See supra notes 143-51 and accompanying text.
203 Judgment of July 19, 1948, Saikōsai (Supreme Court), 2 Keishū 944 (Imai v. Japan).
204 Judgment of Feb. 6, 1948, Saikōsai (Supreme Court), 2 Keishū 17 (Miura v. Japan). In another leading case, the Supreme Court held that a confession obtained after unduly long detention will only be rendered inadmissible if it was caused by that detention. Judgment of June 23, 1948, Saikōsai (Supreme Court), 2 Keishū 715 (Kawashima v. Japan). See generally DANDO, supra note 15, at 196-97 and accompanying notes; MURAKAMI, supra note 115, at 26-32.
twenty-three days following a lawful arrest on a single crime might bring the "prolonged arrest or detention" limit into play seems implausible.

2. **Voluntariness**

Defense counsel frequently contend that a confession is inadmissible because it was not voluntary. The Code requires the exclusion of any confession that is "suspected not to have been made voluntarily." A SCAP official deeply involved in the criminal procedure reform characterized this provision as "excluding from evidence confessions ... whose voluntary character [is] in any way suspect." Furthermore, SCAP's official account of the Occupation proclaimed that "no confession will be admitted in evidence if there is any possibility it was not made freely and voluntarily." That provision clearly has not had such a drastic effect.

As in the issue of "voluntary accompaniment," the key question regarding this limitation is the definition of "voluntariness." Again, a precise definition appears impossible. Although the standard for voluntariness in this context differs somewhat from that in the "voluntary accompaniment" situation, there are many parallels. It is clear, for example, that "voluntariness" as interpreted by the Japanese courts in this context does not refer to the subjective state of mind of the suspect. Provided the investigators have satisfied the statutory standards, any confession that is obtained will almost certainly be regarded as voluntary. Questions may arise, however, if the investigators exceed the normal bounds of questioning by, for example, leaving the suspect handcuffed during interrogation, promising non-

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205 Code, supra note 9, art. 319(1) (emphasis added).
206 Appleton, supra note 45, at 424 (emphasis added).
207 2 SCAP, supra note 60, at 228.
209 Judgment of Sept. 13, 1963, Saîkôsai (Supreme Court), 17 Keishû 1703 (Ogura v. Japan). Even in that case, though, despite stating that keeping the suspect handcuffed would normally raise doubts as to the voluntariness of the confession, the Supreme Court upheld the voluntariness of the confession in question, noting that the questioning had taken place in a "calm atmosphere." Id., see generally Suzuki, Tejô o kaketa mama no torishirabe to jihaku no nin'isei [Questioning While Handcuffed and the Voluntariness of a Confession], 74 BESSATSU JURISUTO, supra note 150, at 148.
indictment in return for a confession, or deliberately deceiving the suspect about the evidence against him. Such cases are rare, however, and virtually all types of lesser illegality—such as questioning during illegal detention or failure to warn of the right to silence—have not affected the voluntariness of the confession or its admissibility. Furthermore, as noted earlier, Japanese courts rarely have excluded confessions where there is substantial evidence against the defendant and the result of exclusion would be to free a presumably guilty person.

3. Reliability

Generally, a confession deemed voluntary will be admissible as evidence. However, a court still may reject it, or at least heavily discount it, on reliability grounds. Accordingly, the vast majority of challenges to confessions include a two-pronged attack on both the voluntariness and reliability of the confession. Courts tend to place far more emphasis on the latter, paying much more attention to the substance of the confession than to the circumstances under which it was obtained.

Even when a court has serious doubts about the voluntariness of a confession, it will seldom exclude it on that basis. Instead, the court typically will engage in a painstaking review of the confession in an attempt to determine whether it is reliable. It is not uncommon to find detailed discussions of the contents of confessions even at the Supreme Court level, and at the lower court level such dis-

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210 Judgment of July 1, 1966, Saikōsai (Supreme Court), 20 Keishii 537 (Abe v. Japan). See generally Takesaki, Yakusoku ni yoru jihaku [Confession Pursuant to Promises], 74 Bessatsu JURISUTÔ, supra note 150, at 152.

211 Judgment of Nov. 25, 1970, Saikōsai (Supreme Court), 24 Keishii 1670 (Okayama v. Japan). See generally Izumiyama, Gikei ni yoru jihaku [Confession Pursuant to Deception], 74 Bessatsu JURISUTÔ, supra note 150, at 152.

212 Judgment of Nov. 25, 1952, Saikōsai (Supreme Court), Keishii 1245 (Tsukahara v. Japan).

213 See Murakami, supra note 115, at 5-6 and case cited therein.


215 For instance, in remanding the Saitakawa case, one of the death penalty retrial
cussions can run for thousands of words.\textsuperscript{216} In carrying out these inquiries, key concerns include: inconsistencies between the confession and objective facts, unnatural and/or irrational points in the confession, failure to explain facts clearly revealed by the evidence, absence of "secrets" known only by the perpetrator, and frequent shifts in the confession during the course of questioning.\textsuperscript{217} In short, these opinions seem to expect a confession that, if not perfect, at least answers all the key questions and contains no major inconsistencies.

This tendency to focus on reliability rather than voluntariness may be seen in all of the death penalty retrial cases—even in the ultimate decisions acquitting the defendants following the retrials. In one case, the district court on retrial uncovered various illegalities in connection with the arrest and investigation. The court found that the defendant, who was not mentally strong nor in very good health, was interrogated without sleep for over three full days and questioned at one point while stripped to his long underwear in an unheated cell. Nevertheless, the court declined to rule on the voluntariness of the confession, instead rejecting it for lack of reliability after examining its substance in great detail.\textsuperscript{218} In another case, the district court on retrial apparently accepted the defendant's claims that he was not given enough food and was subjected to interrogation "without regard to whether it was day or night," also finding strong indications that he had

\textsuperscript{216} For example, in the judgment acquitting one of the death penalty retrial defendants, Sakae Menda, on retrial, the discussion of the reliability of the confession spans thirty-six large pages. See Judgment of July 15, 1983, Chisai (District Court), 1090 HANJI 21, at 61-98 (Japan v. Menda, Kumamoto D. Ct.). The Saitakawa retrial decision discussion is twenty-two pages long. See Judgment of March 12, 1984, Chisai (District Court), 1107 HANJI 13, at 17-39 (Japan v. Taniguchi).

\textsuperscript{217} See, e.g., Usui, supra note 150, (pt. 3), KEISATSUGAKU RONSHU 36:4, at 67-86 (1983), and cases discussed therein; Ono, Jihaku—kensatsu no tachiba kara [Confessions—From the Standpoint of the Prosecution], in KEIJI TETSUZUKI GE, supra note 186, at 807, 815-16.

\textsuperscript{218} Judgment of July 15, 1983, Chisai (District Court), 1090 HANJI 21 (Japan v. Menda, Kumamoto D. Ct.).
simply said what he thought would please the investigators. The court rejected claims that the confession was involuntary. The court also rejected a claim that it had been obtained after unduly long detention, noting that the detention (which, including time in confinement during trial for another robbery, extended to almost five months) was pursuant to a series of presumably valid arrests on other crimes. The court chose to reject the confession as unreliable.219 Similarly, the court in a third case found on retrial numerous problems with the investigation, including illegal arrest, late night questioning, undue influence by the defendant's cellmate (who was spying for the police), and perhaps even "pokes" by investigators and inducement of parts of the confession. Despite all these concerns, the court upheld the voluntariness of the confession, in part precisely because the defendant maintained his denial for so long before finally succumbing. Yet again, the court rejected the confession for lack of reliability after carefully reexamining its contents.220

As these cases reflect, even where the investigation has been harsh and serious doubts surround the circumstances under which the confession was obtained, Japanese courts traditionally have almost never rejected confessions as involuntary, choosing to focus on reliability as the central issue.221 As one former judge remarked in describing the decision whether to admit a confession at trial:

Of course, voluntariness will be denied if assault or intimidation has occurred, but otherwise defining the limits of voluntariness is very difficult. Moreover, when defense counsel argues against admission of a confession statement for lack of voluntariness, as a judge one naturally wants to know what the statement contains. The prosecutor and defense counsel are fighting over this issue, both having read the confession statement. The judge alone listens to the arguments, not knowing what the statement says. In the end, the desire to admit the confession and judge it after reading it naturally wins out.222

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219 Judgment of March 12, 1984, Chisai (District Court), 1107 HANJL 13 (Japan v. Taniguchi, Takamatsu D. Ct.).
220 Judgment and Ruling of July 11, 1984, Chisai (District Court), 1127 HANJL 34 (Japan v. Saitō, Sendai D. Ct.).
221 See, e.g., TAMIYA, supra note 51, at 204-07.
222 Mitsui, Gohan to saibankan no sekinin [Mistaken Verdicts and the Responsibility of Judges], in NIHON NO ENZAI, supra note 1, at 202, 205. I am told that judges frequently voice this concern, but technically it would appear to be merely a persuasive-sounding excuse. As the immediately preceding discussion indicates, courts
In sum, instead of promoting the right to silence by restraining intensive investigations, many judicial decisions seem to assume that investigators will be able to elicit a full and accurate confession and appear to demand no less.\textsuperscript{223}

In the wake of the death penalty retrial cases, each of which seemed to turn upon confessions obtained subsequent to rather severe questioning, there has been renewed concern about the voluntariness of confessions. Not surprisingly, defense counsel and academics have argued forcefully for closer scrutiny of the conditions under which confessions are obtained.\textsuperscript{224} They have been joined by a number of judges.\textsuperscript{225} In a few recent cases, courts have rejected confession statements on grounds of lack of voluntariness or to remedy police misconduct.\textsuperscript{226} In addition, some judges reportedly have begun to examine claims of involuntariness more carefully and demand a better ac-

routinely address the issue of voluntariness after having heard the contents of the confession, and Article 192 of the Code expressly permits the court to order disclosure of potential evidence in determining whether that evidence is admissible. See Code, \textit{supra} note 9, art. 192.

\textsuperscript{223} In this connection, prosecutors often at least appear to believe that many judges will not be satisfied unless they see a confession. See \textit{Zadankai, Enzaijiken o meguru keiji shihō no kadai [Symposium, Criminal Justice Issues Surrounding the False Accusation Cases] in \textit{Nihon no enzai, supra} note 1, at 158, 163 (statement of former prosecutor Honda) [hereinafter \textit{Enzaijiken Zadankai}]; \textit{Hyōtani, supra} note 215, Sōsa Kenkyū [Oct. 1984], at 2; cf. \textit{Miyazawa, Hanzai Sōsa, supra} note 73, at 240 (police believe that prosecutors will not indict unless there is a confession). This perception is widely shared; cases in which defendants are convicted of major crimes solely on circumstantial evidence, without a valid confession, are regarded as exceptional and given special coverage in legal publications. See, e.g., \textit{ Judgment of July 3, 1985, Chisai (District Court), 1167 Hanji 3 (Japan v. Amano, Tokyo D. Ct.).}

\textsuperscript{224} See, e.g., Niwayama, \textit{Jihaku (Confessions), in Keji Tetsuzuki ge, supra} note 186, at 818.


\textsuperscript{226} \textit{E.g., Judgment of Dec. 16, 1987, Chisai (District Court) 1275 Hanji 35 (Tokyo D. Ct.)} (rejecting as involuntary a confession obtained after investigators had lied about other evidence, but in the context of a case where the court acquitted on the basis of objective evidence of innocence); \textit{Judgment of April 22, 1988, Kōsai (High Court) 680 Hanrei Tamuzu [Hanta] 248 (1989, Osaka High Ct.)} (denying evidentiary capacity for confession statements resulting from questioning following arrest pursuant to warrant obtained on the basis of fabricated evidence, albeit not on voluntariness grounds, but on grounds that the evidence had been illegally obtained). See generally Moriya, \textit{supra} note 214.
counting of the circumstances of questioning from the investigators. These judges remain the exception, however; the predominant practice is still to admit confession statements quite readily and focus most attention on the issue of reliability.

V. JAPANESE ATTITUDES TOWARD THE "RIGHT TO SILENCE"

A. Police and Prosecutors

Japanese police and prosecutors generally oppose any restrictions on their ability to question suspects. From the outset, police and prosecutors opposed the adoption of the right to silence in Japan, and they sought its elimination as soon as the Occupation ended. Despite their lack of success on the statutory front, in actual practice they have continued to regard one of their main functions as obtaining full confessions from all suspects, regardless of any denials or assertions of the right to silence. In the words of one prosecutor, "[W]ith certain exceptions, such as cases in which the suspect is caught in the act, it is necessary and indispensable ... to get the suspect himself to tell the whole story." Most investigators undoubtedly share that view; to them, the right to silence at the investigation stage appears to amount to little more than a legal inconvenience, the primary practical significance of which lies only in the fact that they are supposed to notify suspects of the right at the start of questioning, and in the possibility that even greater patience and perseverance will be needed to obtain confessions from suspects who are conscious of that right.

B. Courts

Of course, it is only to be expected that police and prosecutors might resist the right to silence. Yet over forty years after the adoption of that right, serious doubts also remain about just how well it has taken hold among courts and in Japanese society as a whole.

1. Attitudes Toward Interrogation

As reflected by the discussions above concerning interrogation standards and admissibility of confessions, the expectation that all accused...
persons should, and will, seek to explain their activities appears to pervade judicial attitudes toward interrogation of suspects. In this connection, it bears note that decisions relating to the admission of confessions and limits on investigations focus almost entirely on statutory, not constitutional, standards. One reason for this is that the key constitutional provision relating to confessions, Article 38, has been incorporated almost word-for-word into Article 319 of the Code of Criminal Procedure (which proceeds even further than the constitutional provision by prohibiting use of confessions "suspected not to have been made voluntarily.") Thus, rather than looking directly to the constitutional standard, Japanese courts instead may judge the admissibility of confessions as a statutory matter. Nevertheless, to many Americans, certain statutory provisions relating to interrogation practices—including the very basic scheme allowing preindictment detention with attendant questioning for up to twenty-three days, along with more minor provisions such as that specially permitting arrest for petty crimes only if the suspect refuses to submit to "voluntary" questioning—might seem to conflict with at least the spirit of Article 38 of the Constitution. The constitutionality of these provisions, however, has long been settled.

Furthermore, Japanese courts have tended to interpret those statutory standards in a manner quite favorable to investigators. Perhaps the most fundamental of these interpretations is the judicial acceptance of the torishirabe junin gimu—the duty of arrestees and detainees to submit to questioning—and of continued questioning throughout the period of detention, no matter how many times the suspect may assert a desire to remain silent. The same basic attitude is reflected in the practice of granting warrants rather readily, as long as probable cause is shown, even in cases where it presumably should be apparent that the detention period is being used for investigation of some other crime (the bekken taiho situation) or for questioning to which the suspect has clearly objected.

This attitude also is apparent in judicial views regarding "voluntary investigations." Although the Japanese Supreme Court has referred

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231 Code, supra note 9, art. 319.
232 In this connection, it bears note that courts also have interpreted certain exceptions to the warrant requirement broadly, for example, by permitting the warrantless search of a house several hours before the suspect's return as a valid "search incident to arrest." See, e.g., Judgment of June 7, 1961, Saikōsai (Supreme Court), 15 Keishū 915 (Japan v. Arima) translated in H. Itoh and L. Beer, The Constitutional Case Law of Japan 157 (1978).
to "the will of the individual" in defining impermissible compulsory measures, the actual level of force allowed appears considerably greater than that phrase might suggest. As described earlier, many of the activities permitted by Japanese courts go far beyond what almost any American would think of as "voluntary." After all, it would take someone with a very low level of respect for authority indeed not to feel compulsion when confronted by several policemen and asked to take a ride down to the station in the waiting police car for a few hours—or days—of questioning.233

Moreover, standards set by the courts directly reflect the belief that it is natural and expected that the suspect will talk. For example, in the balancing test used to determine whether a "voluntary investigation" is permissible, a key factor is "the need for the measures" in question. As Supreme Court opinions make clear, this primarily signifies the investigators' "need" to question the suspect. In the Green Mansion case, for instance, the Court expressly referred to "the need to obtain detailed facts and explanations from the defendant promptly" in holding that the four and a half days of questioning under continual police supervision "did not exceed the limits of a permissible voluntary investigation." In an analogous situation, the Supreme Court held that a suspect’s continued silence and refusal to open his bag in response to police requests heightened suspicion and justified police in opening the bag themselves.234 Viewed cynically, one might say that one has the right to silence, but attempts to assert it will justify the police in taking firmer measures to overcome it.235

2. Attitudes Regarding Testimony at Trial

In a similar vein, judges appear to regard it as normal and expected for the defendant to testify at trial, although Article 38(1) of the Constitution and Article 311(1) of the Code guarantee defendants the right not to do so. Based on the trials I have observed, the presiding judges normally notify defendants of that right, but you sometimes have to listen closely. The warning is typically given in a rather

233 Another reason for the courts' willingness to recognize broad use of "voluntary accompaniment" may be the desire not to force the police into arresting suspects in cases where there is a chance that the suspects might be able to explain their actions to the satisfaction of the police, thereby avoiding the stigma of an arrest.

234 Judgment of June 20, 1978, Saikōsai (Supreme Court), 32 Keishū 670 (Sakai v. Japan).

235 See generally Mitsudō, Shinmin to keisatsu no deai [The Encounters of Citizens and the Police], in Gendai no keisatsu, supra note 51, at 84, 86-88, 91-93.
perfunctory fashion after the prosecutor has presented the indictment, and is followed immediately by the judge's request for the defendant to explain his side of the story. Moreover, during the trial it is not uncommon for the presiding judge to turn to the defendant from time to time and request his views about a particular piece of evidence or testimony by a witness.\textsuperscript{236}

This of course represents a great contrast to a typical American trial, where one of the key points of interest is usually whether the defendant will take the stand and where the judge takes great care to avoid any suggestion that the defendant should testify. To some extent, the difference may reflect the absence of a jury in Japan. Moreover, the verdict and sentencing phases are merged into the same proceeding, so evidence of other crimes and other evidence reflecting on the defendant's character will be admitted into evidence at the trial in any event. In addition, the Code provides that Japanese defendants are not subject to prosecution for perjury if they lie on the stand, in principle ensuring that defendants will not be penalized for taking the stand.\textsuperscript{237}

By far the most important reason for the difference in attitudes, however, is undoubtedly the perception, reported to me by several Japanese judges, that the only defendants who assert the right to silence at Japanese trials are political defendants and foreigners.\textsuperscript{238} Although 10-15% of defendants may deny at least criminal intent or some other aspect of the crime (including a smaller percentage who deny the crime altogether),\textsuperscript{239} it is virtually unheard of for a Japanese defendant simply to assert the right to silence and refuse to take the stand at all. Moreover, many judges appear to regard the admission of guilt as an essential part of the psychological catharsis needed to put the defendant on the road to rehabilitation.\textsuperscript{240} Failure to confess

\textsuperscript{236} Article 311(2) expressly provides that, when the defendant voluntarily testifies, the presiding judge may request the defendant's testimony at any time with regard to items for which it is deemed necessary. Code, \textit{supra} note 9, art. 311(2).

\textsuperscript{237} See, e.g., Abe, \textit{Privilege, supra} note 14, at 180-81.

\textsuperscript{238} Cf. AMES, \textit{supra} note 68, at 137 (police have greatest difficulty in obtaining confessions from foreigners and radicals).

\textsuperscript{239} See Miyazawa, \textit{supra} note 10, at 47 (as of 1988, full confessions by 91.9% of defendants in district court and 89.0% of defendants in petty Court).

may be seen as a sign that the defendant is beyond redemption. For this reason, some observers believe that those who refuse to confess are likely to be given heavier sentences and run a disproportionate risk of being sentenced to death. In sum, judges appear to believe that it is natural that suspects and defendants should cooperate in questioning; judicial precedent reflects that view.

C. The Japanese Public

The level of appreciation of the right to silence appears low among the Japanese public as a whole, as well. As one former judge has observed:

Even if you interpreted the proviso to Article 198(1) of the Code as saying that suspects in custody have no duty to submit to questioning, as Professor Hirano proposes, the ordinary suspect just couldn’t say, “I don’t want to be questioned today, so I’m leaving.” Students and some other highly educated suspects know about the right to silence and can maintain silence throughout, but other suspects are easily lured into talking.

As the above statement indicates, knowledge of the right to silence is low among the general Japanese public, and an understanding of its significance is undoubtedly even lower.

On an anecdotal level, this is reflected in the popular culture of Japan. In police dramas on Japanese television, for example, interrogation scenes abound, but the right to silence never puts in an appearance and police are not shown notifying suspects of that right. And while suspects frequently deny their guilt, it is unheard of for them to “plead the Fifth” and simply refuse to submit to questioning.

Although such dramas undoubtedly affect common perceptions of the criminal process, they are merely fiction. Similar attitudes, however, are displayed in the media’s treatment of real cases. When a suspect is arrested in a highly publicized case, the popular expectation is that he or she will confess. If the suspect continues to deny the crime or seeks to remain silent, interest turns to how long it will take the police and prosecutors to break the suspect down and obtain a confession. Thus, in a relatively recent case involving quite sen-

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241 See, e.g., Enzaijiken Zadankai, supra note 223, at 158, 161 (statement of atty. Takezawa). Cf. Suzuki, supra note 237, at 10 (defendants less likely to contest points in prosecutors’ account, out of fear that it will look as though they lack remorse).

242 Enzaijiken Zadankai, supra note 223, at 166-67 (statement of former Judge Yokokawa) (emphasis added).
sational allegations, virtually every commercial television station ran thorough coverage throughout the twenty-three days of questioning following the suspect's arrest, and magazines and newspapers also carried long stories on the investigation. The coverage contained extensive speculation as to how long it would take the police and prosecutors to get the suspect to talk. This included descriptions of typical interrogation rooms and interrogation techniques, interviews with former prosecutors, and even discussions with psychological experts regarding the suspect's personality type and the best means for overcoming his will. In all of this, very little mention was given to the right to silence, and even that was primarily in the context that asserting the right to silence was simply another ploy the suspect might use to try to stall the investigators. In the wake of the death penalty retrial cases and other celebrated cases of mistaken prosecution, the popular press contains numerous references to concerns over human rights, including the right to silence. In new cases of suspected wrongdoing, however, the press focuses its attention on

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243 Kazuyoshi Miura's wife was murdered during a visit to Los Angeles in 1981. Initially, the Japanese media treated this as another example of violent U.S. society and was highly sympathetic to Miura. Eventually, though, revelations began to appear that Miura had taken out a large insurance policy on his wife shortly before her death and allegedly had had an affair with another woman who had disappeared after withdrawing a large amount of money, and the media began to carry allegations that Miura had arranged his own wife's murder. After extensive investigation, Japanese police eventually arrested both Miura and his girlfriend, Michiko Yazawa, on September 11, 1985, on the charge that Yazawa had attempted to murder Miura's wife by attacking her with a hammer in a Los Angeles hotel in a separate incident a few months prior to her murder, at Miura's urging. Yazawa confessed to the charges during post-arrest detention. Miura did not assert the right to silence, but fought both his detention and maintained his denial of the charges throughout the twenty-three day period. Without ever having himself confessed, Miura was convicted of that charge, largely on the basis of Yazawa's testimony. See Judgment of Aug. 7, 1987, Chisai (District Court), 1248 HANJI 38 (Japan v. Miura, Tokyo D. Ct.).

244 See, e.g., SHUKAN SANKEI (Oct. 10, 1985); SHUKAN BUNSHUN (Oct. 3, 1985); SHUKAN ASahi (Oct. 4, 1985).

245 See, e.g., Jihaku shinai "aku no puro" o "watashi nara kō shite otosu" [This is the Way I'd Bring Down the "Pro at Evil" Who Won't Confess], SHUKAN SANKEI, (Oct. 10, 1985), at 28; Miura wa kō yatte otosareru! [Is This the Way Miura Will Be Brought Down?!?], HEIBON PUNCH, Oct. 14, 1985, at 32; NIKKAN SPOTSU, Oct. 27, 1985, at 14, col. 2; ASAHI SHINBUN, Sept. 17, 1985 (eve. ed.), at 17, col. 1.

246 Although coverage of the Miura interrogation was extreme, similar stories also appear from time to time when suspects in other well-publicized cases fail to confess quickly. See, e.g., Pistol satsujin no "Hirota" dōbō no yakuza mo bibitta reiseisa [So Cold that even the Yakuza in the Same Cell with Pistol Murderer "Hirota" was Terrified], SHUKAN YOMURI, Sept. 23, 1984, at 20; Jikyō shita no ka shinai no ka [Did He Confess or Didn't He?], SHUKAN BUNSHUN, Nov. 1, 1984, at 188.
how the interrogation is going. Under these circumstances, it is probably not surprising to find little awareness of the right to silence among the general public.

VI. THE RIGHT TO SILENCE AND THE ROLE OF CONFESSIONS IN JAPAN

In assessing the extent to which the right to silence has taken hold in Japan, one should keep in mind that the current Japanese Code of Criminal Procedure was adopted nearly twenty years before Miranda. However, certain Japanese provisions appear to prefigure that opinion. As described earlier, the Constitution and the Code clearly recognize a right to silence at the investigation stage. In addition, the Code requires notification of the right to silence and the right to an attorney at the time of arrest, provides suspects with the right to withdraw from questioning at any time, and mandates that any confession suspected of being involuntary be excluded from evidence. Nonetheless, regardless of the constitutional and statutory language, it is perhaps unrealistic to expect that standards that were even more progressive than those in effect in the United States at the time would immediately take root in Japan. On their face the Japanese standards on the right to silence, with their use of a two-prong voluntariness/reliability test, resemble to some extent the pre-Miranda standards in the United States. Furthermore, the interrogation techniques utilized in Japan bear more than a passing resemblance to those advocated by a prominent American scholar, Fred Inbau. The methods set forth in the investigative handbook described above could have been, and in some cases quite obviously were, taken almost verbatim from Inbau and Reid's Criminal Interrogations and Confessions, and Inbau appears to be regarded as something of a guru by many investigators in Japan.

As the standards have been applied, however, the approach followed in Japan is very different from even pre-Miranda standards. Although

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249 SUZUKI, supra note 117.
251 Moreover, Inbau and Reid's book itself appeared in translation in Japan in 1966, entitled JINMON NO GIUTSU TO JIHAKU [INTERROGATION TECHNIQUES AND CONFESSIONS].
the United States Supreme Court expressly referred to doubts about reliability in excluding confessions in certain cases shortly before the Japanese Code was enacted,252 the key test employed by the U.S. Court was voluntariness.253 On the whole, voluntariness was construed much narrower in the United States than in Japan. In many cases prior to the adoption of Japan's postwar Code of Criminal Procedure, the United States Supreme Court held confessions involuntary and impermissible as evidence when obtained after custodial questioning over a period of several days254 or even several hours on the same day.255 Moreover, in several decisions handed down in the same year in which Japan's Code took effect, the Supreme Court announced that the failure to warn a suspect of his rights to silence and to counsel was an important factor in assessing the voluntariness of a subsequent confession.256

Although many state courts did not go as far as the Supreme Court, it seems highly unlikely that confessions obtained after being questioned intensively while kept virtually incommunicado for a substantial portion of the statutory twenty-three day period permitted in Japan would have passed muster as voluntary in the United States even under standards prevailing before the *Miranda* decision. Furthermore, when the techniques described by Inbau and Reid were brought to the attention of a wider audience in the United States,257 that disclosure led to considerable public concern ultimately reflected in *Miranda* itself.258 Despite attempts by the Japan Federation of Bar Associations and others to bring public attention to bear on conditions of questioning in Japan,259 no public outcry has resulted. Moreover, the courts appear well aware of the various techniques utilized by

255 See, e.g., Haley v. Ohio, 322 U.S. 596 (1948) (confession after five hours).
259 See, e.g., sources cited *supra* notes 12-13.
investigators in obtaining confessions, yet in practice condone the extended questioning and psychological pressure utilized by investigators. At least in these respects, the Occupation's goal of "a fundamental change of the criminological attitude" does not appear to have occurred.

Simplistically, one might say that the reason for this is that the right to silence is a foreign concept that is just not suited to Japan. One could point to the deep historical roots of confessions in Japan and argue that, despite its central place in both the Constitution and the Code of Criminal Procedure, the right to silence remains an alien concept transplanted to Japan by the Occupation and never fully accepted. This argument, however, proves both too much and too little. First, the right to silence was not an entirely new and alien concept. As early as 1916, some local bar associations and legislators had advocated adoption of a right to silence. Shortly after the right was adopted, moreover, some members of the profession discussed it with considerable hope. And for a short period following the enactment of the new Code of Criminal Procedure, the right to silence reportedly had considerable impact. In the words of one prosecutor who served after the new Code was adopted, "[T]he privilege against self-incrimination [initially] functioned far better than had been expected by the legislators. . . . [T]he Japanese people . . . accepted the imperative of the new system at over its face value[;] . . . investigators became too humble and timid . . . [; and the] privilege of silence became the favorite weapon of the experienced criminal." In some respects, therefore, the right to silence may be seen as an example of a Western influenced reform that flourished for a brief period of time and then was deemphasized during the reverse course later in the Occupation. Yet even during the first

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260 See, e.g., Gōdō hōkoku, supra note 225.
261 Professor B.J. George reached a rather different conclusion in 1968, when he suggested that the right to silence was well on its way to acceptance in Japan. See George, supra note 14, at 1166-67. For the reasons set forth above, I believe that, despite the passage of over twenty more years, a meaningful right to silence has yet to truly take hold.
263 See, e.g., Ogotsura, Jihaku arekore [This and That About Confessions], 6 SHINHōSOKAIHō 4 (1949).
264 Abe, Self-Incrimination, supra note 14, at 623.
265 For a brief overview of debate concerning the reverse course, see Ward, Conclusion, in DEMOCRATIZING JAPAN 392, 405-414 (R. Ward and Y. Sakamoto eds. 1987).
years after the new Code took effect, investigators conducted extended questioning of suspects, at times utilizing repeated arrests on separate crimes, and these practices were upheld by the courts. Nevertheless, it would be overstating to suggest that the right to silence was a new and alien concept that had no support in Japan. Moreover, the retrial system, the warrant requirement, and many other aspects of Japanese criminal procedure that have taken root were in large part imported from either Europe or the U.S., just like the right to silence. In any event, the argument that the right to silence is a foreign concept unsuited to Japan is at most simplistic shorthand. In probing for the underlying reasons for the current attitudes toward the right to silence, it is important to consider the role confessions play in Japan.

A. Evidentiary Factors

1. The Search for Truth

It is frequently asserted that the search for truth is the dominant function of Japan's criminal justice process. When one speaks of the entire criminal justice process, the search for truth, as important as it may be, would seem to be only a means of achieving one or more ultimate goals. In Japan's case, I would suggest maintenance of order as the ultimate goal. In the context of confessions, though, the search for truth rationale on its face appears to underlie many of the attitudes toward the right to silence.

The primary function of confessions in Japan is evidentiary. Certain aspects of Japan's criminal justice system merit discussion as possible reasons for the continued emphasis on confessions as an essential element of proof. First, great weight is placed upon ensuring that only truly guilty individuals—or, at least, only those who will be convicted—are indicted. In Tokugawa Japan, it was regarded as a disgrace if a suspect was acquitted at trial, at least in part because it was feared that such acquittals would undermine public trust in the authorities. The sometimes harsh interrogation of suspects and the demands for sealed confession statements helped ensure against such occurrences. Whether or not the same concern over public trust still exists, it continues to be regarded as a disgrace for prosecutors

266 See, e.g., Ogotsura, supra note 263, and cases discussed therein.

267 See, e.g., Matsuo, supra note 149 at 112 (few decisions apply exclusionary rule, in part because search for truth is dominant in actual practice).

268 See HIRAMATSU, supra note 17, at 831.
to indict individuals who are subsequently acquitted. The conviction rate currently hovers at around 99.9%. Moreover, those who have been indicted and ultimately acquitted are entitled to damages from the government for the mistaken prosecution, even if the acquittal comes only on appeal following conviction in the first instance.

The police and prosecutors frequently contend that the need for confessions is much greater in Japan than elsewhere because of the need to prove subjective intent for most crimes in Japan. On its face, this contention would seem to overlook the need for proof of mens rea for most crimes in the United States. Yet the argument reflects a more fundamental issue: the perceived reluctance of Japanese courts to base a conviction in a contested case solely upon circumstantial evidence. Japanese judges undoubtedly find that thorough confessions make it easier to achieve certainty in their decisions and note that confessions obtained soon after the events in question are fresher (and presumably more accurate) than later testimony. As the discussion earlier in this article reflects, however, this attitude appears to go beyond a simple preference for confessions; Japanese courts have come to expect full, detailed confessions. While it may be an overstatement to say that judges demand such confessions, at the very least it is clear that many judges are reluctant to convict a defendant in a contested case without such a confession. This in turn becomes part of a self-fulfilling cycle in which investigators seem genuinely convinced that they need to obtain such detailed confessions if they are to prove guilt beyond a reasonable doubt.

That attitude reveals another aspect of the search for truth: the assumption that it is vitally important not only to make sure that

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269 Hirano, supra note 68, at 408-09 ("mass media and the great majority of the Japanese people" think that prosecutors should only indict "if, through the questioning, their suspicions have been confirmed fully (jūbun ni) - or even more than fully (junibun ni)"; "an acquittal at the trial is regarded as a disgrace for the prosecutors and police").

270 See Constitution, supra note 8, art. 40; Keiji hoshōhō [Criminal Compensation Law], Law. No. 1 of 1950.

271 See, e.g., Yonezawa, supra note 230, at 61, 63-64; Kawai, supra note 131, at 107. Another common assertion is that without intensive questioning it is often impossible to prove victimless crimes. For a discussion of circumstances in which confessions are regarded as nearly essential, see Tamiya, supra note 115, at 306-09.

272 See, e.g., Hiratani, supra note 186, at 880-81.

The Right to Silence in Japan

the innocent are not convicted, but also that the guilty do not get away.\textsuperscript{274} As the earlier discussion reveals, many investigators seem to feel that if they are unable to question a given suspect to their satisfaction under the normal statutory standards, they should be able to utilize other methods to do so, i.e., voluntary accompaniment or \textit{bekken taiho}.\textsuperscript{275} Judges of course would not explicitly recognize such a view, but one can find various reflections of that same basic attitude in numerous judicial decisions, both in such specific language as in the Supreme Court’s reference to the “need to obtain detailed facts and explanations from the [unarrested suspect] promptly” in the \textit{Green Mansion} case\textsuperscript{276} and in the various standards on questioning of suspects.

If that is the case, what is the function, if any, of the right to silence in Japan? It is frequently said by practitioners and scholars, as well as judges, that the reasons for the right to silence include insuring against mistakes and protecting the human rights of suspects.\textsuperscript{277} From a U.S. perspective, one might suggest at least two levels to the human rights concerns: abuse (including actual physical abuse, extreme mental cruelty or the like) and simple intrusion on one’s personal autonomy,\textsuperscript{278} which in turn can both be seen as aspects of the broader notion that the individual has no duty to aid the government in proving one’s own crime. In their writings on the right to silence, Japanese judges frequently refer to human rights concerns. Yet as reflected in judicial opinions, the protected human rights in question primarily fall into the first category—outright physical compulsion, questioning suspects in handcuffs, and the like.\textsuperscript{279} The notion

\textsuperscript{274} This does not necessarily mean that the guilty will in fact be prosecuted. Japanese prosecutors have great discretion in deciding whether or not to indict and, in an exercise of that discretion, suspend prosecution—in other words, voluntarily decline to prosecute despite solid evidence of guilt—against some 35% of suspects in penal code offenses. See generally, Dando, \textit{supra} note 59; George, \textit{Discretionary Authority of Public Prosecutors in Japan}, 17 \textit{Law in Japan} 42 (1984); Goodman, \textit{The Exercise and Control of Prosecutorial Discretion in Japan}, 1 UCLA Pac. Basin L.J. 16 (1986).

\textsuperscript{275} See, e.g., \textit{supra} text accompanying note 184.

\textsuperscript{276} See \textit{supra} text accompanying note 176.

\textsuperscript{277} See, e.g., Ono, \textit{supra} note 217, at 807, 810-11; Niwayama, \textit{Jihaku—ben go no tachiba kara [Confessions—From the Standpoint of the Defense] Keiji Tessuzuki ge}, \textit{supra} note 186, at 818, 822-26 (noting that the two concerns are combined in yet a third concern, that of deterring illegal activity by investigators).


\textsuperscript{279} See \textit{supra} notes 209-11 and accompanying text.
of the absence of a duty to aid in uncovering one's own crime is not apparent. To the contrary, the view that one has a duty to cooperate with authorities, even in proving one's own crime, appears to enjoy wide support and seems to be reflected in the various references in judicial opinions to the need for investigators to obtain explanations from suspects and in the statutory provisions regarding the questioning of suspects and even the "opportunity to provide an explanation." An apparent consequence is that the rather substantial intrusion on personal autonomy entailed by the process of custodial interrogation is defined out of the equation. That level of intrusion is quite simply not regarded by judicial precedent as an infringement of one's basic human rights.

Where confessions have been rejected on grounds other than reliability, one reason is undoubtedly to deter the conduct in question by investigators. When one examines more closely the specific types of confessions that have been excluded, however, it seems more than mere coincidence that they have almost exclusively involved conduct of a sort regarded as most likely to give rise to false confessions. In addition to physical compulsion and questioning of a manacled suspect, such presumably suspect conduct has included promises of leniency or favors in return for testimony and use of lies about other evidence. One can imagine promises or lies that might inflict mental suffering; yet the concern in these cases does not seem to be preventing mental abuse or intrusion on personal autonomy, but rather deterring conduct that might result in false confessions. In this connection, it is striking to find that even many of the judges who have recently been most vocal about the desirability of tighter checks on voluntariness and use of confession statements, frame their views largely in the context of avoiding mistakes. In short, despite references to the protection of human rights and deterrence of illegal investigations,

280 See, e.g., Hirano, supra note 68, at 411, 415-16 (noting the existence of but criticizing such attitudes).
281 Code, supra note 9, art. 198.
282 Id., arts. 203 and 204.
283 See supra note 209 and accompanying text. As noted therein, however, the Supreme Court permitted use of a confession obtained from a suspect who was questioned while handcuffed, observing that the prosecutors had presented evidence that the questioning took place in a "calm atmosphere" and that the lower court had found that the suspect's entire statement was given voluntarily.
284 See supra text accompanying notes 210-11.
285 See, e.g., Ōdō hōkoku, supra note 225, at 5-6; Ishimatsu, supra note 155, at 67-68.
the key concern appears to remain that of reliability, based on an assumption that the search for truth is the dominant goal.

a. Dangers to the "Search for Truth"

The recent self-reflection by some judges does represent somewhat of a challenge to another dominant basic assumption that in all but very rare cases judges can ferret out false confessions by comparing the confession statement with other evidence. It is difficult to evaluate this assumption. After all, the confession statements normally are very detailed. And, at least in cases where the defendant has recanted the confession and decided to contest the case, judges normally consider the evidence carefully. Yet, as the recent articles by judges reflect, the potential for false confessions is not limited to the specific types of suspect conduct that have been highlighted by the courts. In some cases the reliance on confessions may in fact hamper the search for truth.

Presumably, the main danger of false confessions is not that of deliberate attempts by investigators to frame an individual. Although such conduct is surely not unknown in Japan, it is unquestionably rare. Rather, the greater danger is that of unconscious manipulation of the evidence, for example where investigators acting on limited

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286 Under both Article 38(3) of the Constitution, supra note 8, and Article 319(2) of the Code, supra note 9, there must be at least some corroborating evidence; no person may be convicted solely on the basis of his or her own confession. The corroborating evidence may be rather limited, though, particularly if the defendant does not contest the charges.

287 It is widely accepted that there is no great concern over use of confession statements in uncontested cases, see, e.g., Tamura, supra note 192, at 890 (defense counsel perspective). A leading prosecutor has characterized such use as akin to the arraignment system in the United States, a form of guilty plea without which the system would quickly become clogged. Kawakami, supra note 190, at 887-88. Given the care with which prosecutors screen cases and the need for the court to ascertain the existence of at least some corroborating evidence, one would assume that the likelihood of mistaken convictions in uncontested cases is low. Nonetheless, there is a phenomenon in Japan known as the "substitute criminal" case (migawari hannin), in which a subordinate will deliberately "take the rap" for his or her superior. This practice seems to be most common in the context of driving offenses (where fines are far more likely than prison time), but at times includes major offenses. See, e.g., Takada, Migawari yūzai to saishin seikyū [Guilty "Stand-ins" and Retrial Requests], in Hiraba Yashuara Hakase kanreki shukuga, gendai no kei hōgaku (GE) [Collection of Works Dedicated to Dr. Yasuharu Hiraba on the Occasion of His Sixty-first Birthday, Modern-day Criminal Law Study, Vol. 2] 287 (1977).

288 See Johnson, supra note 14, for discussion of such suspicions in a case involving Communist Party activists.
circumstantial evidence form a hunch, pick up a suspect of whose guilt they are convinced, and then lead the suspect to a confession that fits the existing evidence. In such a case, the investigators may be so convinced of the suspect's guilt that they regard any denials, alibis or assertions of inconsistent details as lies. Some observers have suggested that Japanese suspects are more likely to succumb to leading questioning and to give false confessions, as a result of both cultural expectations and a greater deference to authority. Whether or not that is the case, one can easily imagine that just about any suspect cut off from contact with the outside world and subjected to persistent questioning over a period of many hours, days or even weeks might say what he or she thought the investigators wanted to hear or start to believe what is said. This may be especially true if the matter at issue is not a physical act, but rather a question of one's state of mind at the time the act was committed.

Critics note another related concern, asserting that the wide array of tools for obtaining confessions has fostered a tendency for investigators to rely too heavily on confessions and as a consequence to not place sufficient effort into other investigative techniques. These critics contend that, despite statements by prosecutors that other evidence should be investigated thoroughly prior to questioning a suspect, in practice the process often follows much the opposite course. Investigators assume that they need not place great effort into the initial investigation of other evidence, since once they pick up the suspect and begin questioning they will be able to obtain a confession that will lead them to other relevant evidence. As a

289 E.g., id. at 150-56, and sources cited therein; cf. Aoyagi, Jishu to jihoku [Turning Oneself in and Confessing], 898 Toki no Hōrei 7 at 7, 10-11 (1975) (Japanese suspects in virtually every case end their confession by apologizing for the harm to the victim or for the shame to their parents, and admit to other crimes that have not yet been discovered).

290 Miyazawa describes one such case in considerable detail, Miyazawa, Hanzaï Sōsa, supra note 73, at 109-28 (with later information concerning the case, in Miyazawa, Policing in Japan, supra note 73 (Case No. 17)). One may contrast the view set forth in the text above with yet another widely held view, the view that Japanese "are not at heart suited to testimony in open court." Kawakami, supra note 190, at 888-89. This point is made most strongly in connection with use at trial of documents in which investigators have summarized the testimony of witnesses during the investigation stage, but also reflects the view that the only way investigators are able to get to the true story is through a period of private questioning of the individual with no one else present.

291 See supra text accompanying note 120.

292 See, e.g., Miyazawa, Policing in Japan, supra note 73 (Ch. 15).
result, suggest the critics, investigators may fail to turn up potentially exculpatory evidence that a more thorough investigation would have found.

A separate set of concerns relating to the search for truth arises from the fact that the confession statement is not a verbatim transcript of the suspect's testimony. Rather, as described above, it is a document prepared by the investigators after a significant period of questioning, in which the investigators organize and summarize the suspect's testimony. It seems likely that, either deliberately or unconsciously, investigators may eliminate aspects of the testimony that appear to them to be irrelevant, inconsistent or unnatural. The confession statement is acknowledged by the suspect (who has an opportunity to amend it), but by that time the suspect may have come to believe the account or feel that he or she has no choice. In any event, it seems unlikely that a suspect would often challenge omissions. Thus, as defense counsel have alleged, the prepared confession statement may represent "a closely-knit and logically consistent account" from which "seemingly useless out-of-place elements" have been excluded, with an "allure of convenience" that judges unconsciously may find difficult to resist at times.

b. Possible Safeguards

On the whole, there is no question that confessions and confession statements aid in getting a more complete picture of the facts. At least in the above respects, however, they have the potential for clouding or even distorting the truth (or for making a cloudy situation seem clear and logical). It bears note, moreover, that other tools that might aid in revealing possible distortions have not been widely utilized.

One such possible tool is the institution of broader requirements for disclosure of the prosecutor's evidence, either to defense counsel

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293 See Gōdō hōkoku, supra note 225, at 7 (noting great tendency to include in confession statements only testimony that accords with the views of the investigators); id. at 21 (statement of Judge I, reporting on one prosecutor's statement that the prosecutor would never prepare a statement reporting a suspect's initial denial of involvement in a crime, since "once a 'denial statement' is prepared the suspect will never confess thereafter").

294 Even if the suspect refuses to acknowledge the document, though, it still may be introduced if the court concludes that it was prepared "under circumstances of special reliability," Code, supra note 9, art. 323, item (3).

295 Tamura, supra note 192, at 890.
or to the court itself. Under the 1922 Code, prosecutors had the duty of filing a complete chronological record of the case, including all confession statements and other evidence, with the court at the time of indictment.\textsuperscript{296} This record was also open for inspection and copying by defense counsel.\textsuperscript{297} With the adoption of the adversary system contained in the new Code, however, this system was dropped, in part to avoid the possibility of prejudicing the judge before the trial began.\textsuperscript{298} Article 299(1) of the current Code requires prosecutors to disclose to defense counsel in advance of trial evidence that is to be presented in court, but it does not provide for the disclosure of other evidence.\textsuperscript{299} In solid, uncontested cases this presents no problem; prosecutors generally disclose evidence voluntarily to defense counsel in such cases. In major cases where the defendant denies the charges, however, prosecutors frequently refuse to disclose evidence in their possession. Accordingly, defense counsel complain that they are unable to see potentially exculpatory materials and, because the prosecutor's office generally collects all relevant evidence before filing an indictment, even much of the basic factual evidence in those cases.\textsuperscript{300}

For many years, the Japanese Supreme Court agreed that prosecutors had no duty to disclose any evidence in their files that they did not intend to present to the court.\textsuperscript{301} Following much criticism,\textsuperscript{302} the Supreme Court loosened that rule in 1969, but not too far. In Japan v. Kozura\textsuperscript{303}, the Osaka District Court had relied on its general

\textsuperscript{296} Criminal Procedure Code, Law No. 75 of 1922, art. 44.


\textsuperscript{298} See Appleton, \textit{supra} note 45, at 413-14.

\textsuperscript{299} Code, \textit{supra} note 9, art. 299(1). Prosecutors also must disclose statements in their files if a witness' testimony at trial differs from that given during pretrial questioning by prosecutors. See \textit{id.}, art. 300.


\textsuperscript{301} \textit{E.g.}, Ruling of Dec. 26, 1959, Saikōsai (Supreme Court), 13 Keishū 3372 (Japan v. Doi).


\textsuperscript{303} Ruling of April 25, 1969, Saikōsai (Supreme Court), 23 Keishū 248 (Japan v. Kozura).
supervisory authority in ordering the prosecutor's office to disclose statements obtained from four witnesses. The Supreme Court upheld that disclosure order, but the governing standard it announced contained numerous conditions, some of which are as follows:

When the defense has requested disclosure of certain evidence and has demonstrated a concrete need, a court, in the exercise of its due discretion, taking into consideration the nature of the case, the status of review, the type and contents of the evidence requested, and the time and manner of inspection, may order the prosecutor to disclose the evidence for inspection by defense counsel, if the court determines that the evidence is especially important to the defendant's case and that disclosure would not give rise to the fear of destruction of evidence, intimidation of witnesses, or other such harms.304

Plainly, obtaining disclosure of evidence in prosecutors' files is no routine matter.

In some recent cases, including the death penalty retrial cases, the courts helped obtain disclosure of documents in the possession of investigators and the disclosed evidence proved helpful in gaining acquittals.305 However, in the absence of any statutory requirement for discovery and with standards as strict as those set forth by the Supreme Court, it is rare for a court to order disclosure of documents formally, although judges may informally urge prosecutors to reveal certain materials.

Not surprisingly, prosecutors oppose compelled discovery in any form.306 The most straightforward reason for such opposition is the absence of any statutory requirement for compelled discovery. In addition, in a somewhat ironic twist, one finds that prosecutors become firm proponents of the adversary system when it comes to

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304 See id. at 250.
305 See Zadankai, Bengonin ga kataku shikei saishin sanjiken muzai kakutei no igi [Roundtable Discussion, Defense Counsel Discuss the Significance of the Final Acquittals in the Three Death Penalty Retrial Cases], 35:11 Jiyu to Seigi 50, at 64-67 (1984); Zoku-saisinhin, supra note 1, at 366-70. In one of the cases, the previously undisclosed evidence helped establish that the defendant had been in a different place on the night of the killing. In another, the key proof of reliability of the confession was the defendant's supposedly spontaneous statement that he had killed the victim with "two thrusts" of a knife to the heart. The file revealed that the police had received an autopsy report disclosing that detail before the defendant "admitted" it.
306 See generally Kawakami, Komento 2 [Comment 2], in Kein tetsuzuki ge, supra note 186, at 531 (lawyers favor compelled discovery).
disclosure of evidence. In contrast to their traditional attitude toward that system when addressing the issue of meetings between suspects and counsel, prosecutors argue that to compel disclosure of evidence within their possession would undermine the very principles upon which the adversary system is based. Yet another factor in their opposition is the concern that such disclosure would enable defendants (and defense counsel) to develop plausible stories that fit the evidence in the prosecutors' possession—and thereby distort the search for truth.

This is not the place for an extended discussion of the discovery debate. If one is concerned over the potential for abuse of discovery by defendants, though, what about ordering disclosure of prosecutorial records to the court for its in camera inspection? Apart from other possible objections, such an approach would return to a system quite similar to that under the prewar Code of Criminal Procedure—a system that was deliberately abolished by the Occupation; and I have seen no indications of support for reinstituting that approach, which presumably would go too far for prosecutors' tastes and not far enough for defense counsels' likings.

In any event, disclosure of prosecutors' files to either defense counsel or the courts would not necessarily meet the concern over the potential for mistakes resulting from the circumstances under which confessions have been obtained or the manner in which the confession statements have been prepared; the files might not address those matters. To that end, judges in some recent cases have required

307 See, e.g., id., at 532-34; Nagashima, supra note 297, at 309-10; Fujino, Gohan mondai to handansha to shite no saibankan [The Problem of Mistaken Verdicts and the Role of Judges as Arbiters], HOGAKU SEMINA ZOKAN, SOGO TOKUSHU SHIRIZU 27, GENDAI NO SAIBAN [HOGAKU SEMINAR EXTRA NUMBER, SPECIAL COMPREHENSIVE SERIES No. 27, PRESENT-DAY TRIALS] at 163, 169 (1984). Given the broad powers of Japanese prosecutors, it is somewhat ironic to find them decrying the advantage that disclosure would provide to defense counsel. Cf. Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 YALE L.J. 1149 (1960) (challenging arguments that a right of discovery for defense counsel would tip the "balance of advantage" to the defense).

308 See, e.g., Horigome, Komento 1 [Comment 1], in KEIJI TETSUZUKI GE, supra note 186, at 527, 529-30.

309 For a concise introduction to various positions in the debate, see Yoneda, supra note 300 (defense counsel), Horigome, supra note 308 (Cabinet Legislative Bureau), and Kawakami, supra note 306 (prosecutor). There are of course a wide range of options between full disclosure and complete non-disclosure, several of which are discussed in these pieces.

310 See supra text accompanying note 298.
prosecutors to provide records indicating the dates of interrogation sessions and the times at which they started and ended, as well as certain other information regarding the circumstances of the questioning (although the use of such court orders remains highly exceptional in nature).  

In addition to the possible benefit in guarding against false confessions, requiring disclosure of such records might aid in deterring extremely lengthy questioning and perhaps certain other questionable practices in the questioning process. Other recent proposals have placed even more emphasis on the concern over the circumstances of questioning. As one example, the defense bar has strongly attacked the use of "substitute confinement" of suspects in police holding cells, where, critics contend, suspects are more likely to undergo harsh questioning. Proposals to restrict the use of holding cells have met with fierce opposition and are unlikely to prevail, however.

Another proposal seeks the establishment of a right for defense counsel to attend questioning. This proposal has an impressive pedigree: defense counsel have been seeking that right since at least as early as 1916. In light of investigators' strongly held views that the presence of "outsiders" would make it impossible for them to conduct effective questioning, however, recognition of such a right for counsel seems no more likely today than it was then (nor, given the absence of a right to appointed counsel at the preindictment stage and the limited number of counsel in Japan, would it provide protection for more than a small percentage of defendants in any event).

Yet another proposal advocates the adoption of mechanisms to afford greater visibility to the circumstances of questioning, including tape-recording or even videotaping interrogation sessions. If adopted, such mechanisms might provide certain safeguards for the factfinding process, both by permitting scrutiny of the actual manner of questioning and by ensuring the availability of a verbatim

312 See, e.g., JOINT COMMITTEE, supra note 13.
314 See ODANAKA, supra note 53, at 350.
record of the questioning, rather than simply a prepared summary. Equally important, such measures would enable the Japanese judiciary and public to make more informed judgments about whether existing interrogation practices are acceptable as is or should be more strictly regulated. Such measures would of course present numerous logistical problems. Moreover, despite the fact that judges and even some prosecutors have joined defense counsel in discussing the possibility of moving toward tape-recording of interrogation sessions, adoption of a firm requirement for tape-recording as a regular procedure would face considerable opposition from investigators and appears unlikely.

Thus, for the moment the concrete proposals for reform have not achieved great success, nor is significant strengthening of protections for the right to silence itself at all likely. Instead, the most visible effects of the discovery of the false confessions in death penalty retrial cases appear to be a recommitment by prosecutors to conduct thorough investigations. These include even more careful questioning and a rededication by judges to a more careful review of the record to ensure against mistakes in the future. For the most part, however, courts continue to place great trust in prosecutors and to defer to their judgments on a wide range of issues, including the need for detention, the nature of questioning, and the preparation of the confession statements. In this sense, rather than a pure judicial "search for truth," the current criminal justice system reflects a large measure of deference to the determinations of prosecutors, and the primary recent development—the occasional modest use of inquiries into the circumstances of questioning—has done little to alter that balance.

316 See, e.g., Tamura, supra note 192, at 893 (defense counsel), and Kawakami, supra note 190, at 887 (prosecutor). See also Moriya, supra note 214, 1249 HANH 10, at 10-13 (1987) (judge discussing cases in which prosecutors presented audio tapes as evidence of voluntariness).

317 The same cannot necessarily be said for police. In practice, I have been told, courts scrutinize confession statements prepared by police more carefully than those of prosecutors, although the applicable legal standard is the same. See Code, supra note 9, art. 322. With respect to statements by witnesses, the Criminal Procedure Code establishes much stricter standards for use of statements prepared by police than those prepared by prosecutors, contrast, e.g., Code, supra note 9, art. 321, cl. 1, item 3 with art. 321, cl. 1, item 2.

318 As a reflection of the key role played by prosecutors in the entire criminal justice process, one long-time criminal judge, shortly before his retirement, argued that criminal defendants are receiving trials by prosecutors and not by judges. Ishimatsu, supra note 155, passim.
2. Proof of Other Crimes

The interests of investigators also appear to underlie a second important role of interrogations and confessions in Japan: proof of other crimes.\textsuperscript{319} Prosecutors frequently assert that without the broad opportunity to question suspects they will be unable to obtain sufficient evidence to prove the involvement of accomplices. They forcefully argue that this is especially true—and especially important—for such crimes as bribery, drug dealing, and crimes of organized crime groups, where the mastermind typically has insulated himself or herself carefully so involvement is difficult to prove unless a subordinate talks. They further assert that, unless intensive questioning is permitted, they will have to revert to such “excesses of the U.S. criminal justice system” as wiretapping, entrapment, plea bargaining, and offers of immunity from prosecution.\textsuperscript{320} A cynic might find some amusement, though, in recent statements by Ministry of Justice officials that just such tools may be necessary for Japan to fight drugs and other crimes.\textsuperscript{321}

In a similar vein, investigators point to the importance of interrogation in ferreting out other crimes committed by the same suspect, noting that suspects frequently volunteer confessions to crimes of which they were not suspected\textsuperscript{322} and that without careful questioning such crimes might have gone unsolved.\textsuperscript{323} This may well be true, and one characteristic of questioning in Japan since at least the Tokugawa era has been an emphasis on determining any other crimes that the suspect may have committed.\textsuperscript{324} This rationale, which focuses exclu-
sively on the interests on the investigators, seems rather at odds with the right against self-incrimination, however.

B. Confessions and Rehabilitation

The emphasis on eliciting information about other crimes the suspect may have committed is closely tied to another important function of the confessions process, the rehabilitation of the offender. As numerous commentators have observed, sincere confessions are regarded as playing a key function in reform of the individual and hence in specific deterrence in Japan. Prosecutors and judges share this view; even some of the harshest critics of the current system of criminal justice recognize these benefits.

For the confession to have that effect, however, it must be more than a simple, "I did it." Rather, prosecutors desire the suspect to engage in serious self-reflection, in the process truly accepting responsibility for his or her acts and recognizing the wrongfulness of those acts. They suggest, with some reason, that such self-reflection is an important step in moral reform, and note that a sincere confession and demonstration of remorse (coupled with restitution) also help to satisfy victims' desires. To achieve that degree of self-reflection, though, it is regarded as essential that there be continued close contact between the investigators and the suspect over a period of time, in a closed setting without outside intrusions (or observers), and that the questioning be thorough and probing, thereby revealing

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326 See supra text accompanying note 240.

327 See Hirano, supra note 68, at 415; Ishimatsu, supra note 155, at 67.

328 See Haley, supra note 325, at 200-01, 208; Haley, Victim-Offender Mediation: Japanese and American Comparisons (to be published by Kluwe Academic Publishers, in collection of papers from the Advanced Research Workshop on Conflict, Crime and Reconciliation—The Organization of Welfare Intervention in the Field of Restitutive Justice, Il Ciocco, Italy, April 8-12, 1991); Wagatsuma and Rosett, supra note 325, at 464-65. In Haley's view, the reconciliation between offender and victim and consequent restoration of the social fabric represents one of the most important functions of confession and apology in the Japanese setting. I agree with him (and with Wagatsuma and Rosett) that this is an important aspect of Japan's criminal justice system; but my conversations with Japanese judges and prosecutors convince me that they feel confessions play a far more important role in bringing about moral reform of the offender, with the potential effect on the victim (and on community feelings) a secondary and lesser benefit.
not only all relevant details of the crime in question but also the true character of the suspect, including any other wrongdoings he or she may have committed. Only through such a process, it is argued, can one achieve the "meeting of the minds" necessary to bring about true remorse and acceptance of responsibility.\textsuperscript{329}

If the investigators are convinced that the suspect has truly repented and that there is little likelihood of recidivism (and if other factors are satisfied), they may opt not to prosecute further.\textsuperscript{330} In a similar vein, sincere confessions and remorse may also have considerable influence on leniency in judges' sentencing decisions.\textsuperscript{331} At the trial stage, however, the close personal contact assumed to be vital to achieving full confessions and self-reflection is missing. Thus, the perceived value of confessions in achieving the moral catharsis and rehabilitation of suspects represents another fundamental assumption underlying the grant of authority for intensive and extended pretrial questioning.

\section*{VII. Conclusion}

Despite the U.S. influence on Japan's criminal justice system and the superficial similarity in legal provisions on the right to silence, the right to silence as viewed in Japan is a quite different concept from that in the United States. In Japan, the right to silence exists within a framework where the suspect's cooperation historically has been expected and where confessions continue to play a central role in the vast majority of cases. Japan's criminal justice system, one might add, ranks among the best in the world on such measures as crime rates and clearance rates and has maintained that position while keeping levels of imprisonment and penalties rather low. Thus, an evaluation of the manner in which the right to silence has been treated must consider it in the context of the criminal justice system as a whole. A thorough exploration of that broad topic is beyond the scope of this article, but some initial observations are in order.

\begin{footnotes}
\item[329] See, e.g., Hirano, \textit{supra} note 68, at 415.
\item[330] The police may decline to refer the case to the prosecutors or the prosecutors may opt to "suspend prosecution"—i.e., not indict for policy reasons, despite finding that the suspect committed the crime in question and concluding that there is sufficient evidence to obtain a conviction. For discussions of these points, see, e.g., Dando, \textit{supra} note 59; George, \textit{supra} note 274; Goodman, \textit{supra} note 274; Haley, \textit{supra} note 325.
\item[331] See \textit{supra} notes 239-40 and accompanying text.
\end{footnotes}
Given the Japanese public's apparent willingness to accept intensive questioning of suspects, at least so long as the investigators maintain a high degree of accuracy in identifying the suspects subjected to arrest and questioning (which the public also appears to trust to be the case), the fundamental approach in Japan is unlikely to change. Numerous factors of course influence the crime rate in Japan, of which the role of confessions in assuring identification of and proof against offenders, and in helping to achieve their rehabilitation and the satisfaction of victims, is but a small part. Given the impressive record and relative leniency of Japan's criminal justice system, though, one bears a strong burden in advocating change toward a model based on American conceptions of personal autonomy and lower trust of authority. This hesitancy to advocate sweeping change seems especially appropriate if what one is offering in return is not the American ideal of a suspect who is arrested pursuant to a warrant based on probable cause, declines to answer the questions of investigators, is promptly provided with an attorney, makes bail, and returns to his or her family to begin preparation for trial with the active assistance of an attorney, but rather the more typical suspect who declines to talk, is unable to make bail and while awaiting trial remains in jail, where he or she will have very little contact with overburdened defense counsel or any other outsider.

Looking at the other side of the picture, what significance does the Japanese experience with the right to silence have for the United States? In advocating the reversal of Miranda in the United States, the Meese Justice Department report contended that a number of benefits would ensue. These purported benefits included enabling the "government to protect the public" more effectively, enhancing "public confidence in the law," and encouraging state-by-state development of alternatives.332

That report did not refer to the possible role of confessions in enhancing prospects for rehabilitation of offenders, however. The omission is not surprising; that role—the potentially cathartic influence of confessions as one step in the rehabilitation process—has received relatively little attention in the debate over the right to silence in the United States. This is not to say that that effect has gone unnoticed. To the contrary, judges and sentencing bodies presumably are taking into account just such a factor when they focus on the

332 Report to the Attorney General, supra note 6, at 93-96.
sincerity of remorse at the post-conviction sentencing phase. Yet the practice of maintaining silence or denial throughout the trial (or the plea bargaining process), followed by confession only at the end of the process, would seem to have far less potential for achieving true self-reflection and reform than the close one-on-one questioning common in Japan. Moreover, the opportunity to take the stand and tell one’s own side of the story may lead to a greater sense of fairness in the system even among some defendants; many U.S. defendants now express frustration that the criminal justice system, which directly affects their lives, simply goes on around them and never seems to want to hear what they have to say. Thus, had Ed Meese’s Justice Department wished to include Japan as an example in support of calls for overturning Miranda, it could have buttressed arguments relating to the similarities in basic legal provisions on the right to silence and Japan’s success in crime control by asserting yet another range of potential benefits: the role of confessions in the rehabilitation process (or, if the word “rehabilitation” sounds too “liberal,” the role of confessions in achieving “specific deterrence”) and in helping to satisfy victims.

Yet several factors caution against great reliance on the Japanese model of the “right to silence.” First, the cultural and historical setting for that right is vastly different in Japan. A mere moment’s reflection on such concepts as the torishirabe junin gimu (duty to submit to questioning), bekken taiho (arrest on other crime), or “voluntary accompaniment” should leave no question that attitudes toward personal autonomy and expectations concerning the suspect’s cooperation with investigators diverge widely from those in the United

333 See Wagatsuma and Rosett, supra note 325, at 464-65; Goodman, supra note 274, at 49 and sources cited therein.

334 This point was brought home to me forcefully by discussions with inmates at Monroe State Reformatory, Monroe, Washington, in October and November of 1990, when many inmates voiced this feeling quite eloquently.

It is sometimes asserted that Japanese defendants are more willing to talk at trial because they are not subject to prosecution for perjury relating to their testimony, see supra text accompanying note 237. Even if the perjury penalty were removed in the United States, however, many U.S. defendants presumably would still be reluctant to testify because of the fear that evidence of other crimes or wrongdoing would be introduced as impeachment evidence. The right for the prosecution to introduce evidence of other crimes or wrongdoing as impeachment evidence also exists in Japan; but as a practical matter it does not make much difference to defendants, since the sentencing phase is not separated from the fact-finding phase and thus any such evidence can already be introduced at trial, ostensibly for sentencing purposes.
States. The operation of the Japanese system, moreover, depends upon the high level of trust in authority that exists in Japan - another fundamental difference from the United States.

Furthermore, the heavy reliance on confessions in Japan comes at a price. Within Japan, the greatest concern has been expressed over the potential for mistakes arising from false confessions. On balance, the broad questioning of suspects undoubtedly has been truth-enhancing in the great majority of cases. Among critics within Japan, though, a continual refrain is that the availability of broad tools for obtaining confessions has reduced the impetus for investigators to undertake thorough independent investigations of other evidence. Whether or not that charge is warranted, the death penalty retrial cases, which turned largely upon the existence of apparently false confessions obtained from suspects who had been subjected to intense questioning after being picked up on the basis of rather limited circumstantial evidence, stand as a stark reminder of the danger of false confessions.

A final, and in my view greater, concern is the extent of intrusion on the individual permitted as a routine matter. While Japanese courts may define terms such as "prolonged detention" and "voluntariness" so narrowly that very few cases ever rise to the level of constitutional or statutory violations or "human rights" abuses, the fact remains that Japanese investigators may—and on a regular basis do—undertake intensive questioning of suspects, utilizing a variety of psychological ploys, over an extended period that may last for several days or even weeks. Moreover, through such tools as "voluntary accompaniment" and bekken taiho, the investigators may even undertake such questioning when they lack probable cause to link the suspect to the crime they are really pursuing. One may conclude that, in the overall context of the Japanese criminal justice system, this is an acceptable price to pay; but one should not operate under the illusion that the questioning process itself is a model of leniency, nor that the existence of a "right to silence" in Japan in fact means that suspects have a meaningful right to refuse to participate in the questioning process.