Policymaking by the Japanese Judiciary in the Criminal Justice Field

Daniel H. Foote

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I Introduction

When one speaks of policymaking by the judiciary, the image that often comes to mind is the U.S. judiciary, especially the Supreme Court of the United States. That reaction is understandable. Examples abound of policymaking by courts in the United States; and a seemingly never-ending stream of books and articles discuss, analyze, and, depending on the authors' point of view, praise or decry "policymaking" or "judicial activism" by U.S. courts. The field of criminal justice frequently is offered as a prominent example of judicial policymaking in the United States. Expansion in due process protections and other rights for criminal suspects and defendants often is attributed to the Warren Court (that is, the U.S. Supreme Court under Chief Justice Earl Warren, who served from 1953 to 1969). Among the many decisions of the Warren Court
related to criminal justice, one decision in particular typically is offered as an example of that Court's "judicial activism": *Miranda v. Arizona*, which announced concrete, detailed standards regarding the right to silence.

In contrast to courts in the United States, the Japanese judiciary frequently is regarded as a paragon of judicial restraint. Japanese judges, it is widely thought, defer to policymaking by the legislature and bureaucracy; they are loath to make policy themselves. This characterization, I would submit, misses a good deal of conduct by the Japanese judiciary. In matters of private ordering, at least, the Japanese judiciary frequently has played an important role in creating norms. In numerous cases, the courts have consciously and deliberately shaped the legal standards, often in highly creative ways, with policy considerations in mind. In sum, the Japanese judiciary engages in policymaking. (A caveat: This essay deals primarily with policymaking through judicial decisions. The Supreme Court of Japan naturally engages in a wide range of policymaking in its capacity as the body vested with rule-making authority with respect to the administration of judicial affairs.)

In his classic work *Law and Social Change in Postwar Japan*, Frank Upham provided detailed case studies of two such examples: judicial creation of policy in the fields of the environment and equal employment opportunity (Upham 1987). In a recent book I discussed these and several other examples of policymaking by the Japanese courts (Foote 2006). On occasion the policymaking would be regarded as unusually active even by U.S. standards. As reflected by the handling of pollution, traffic accident disputes, and insolvency matters, for example, the policymaking activities of the Japanese courts are not limited to shaping norms through the issuance of judgments in individual cases; at times the Japanese judiciary as an institution has taken the lead in creating policy for major bodies of cases, utilizing standard-setting and coordination activities one more normally would associate with an administrative agency.

What of the criminal justice arena? Have Japanese courts played a major role in shaping criminal justice policy, as well? As I will discuss in more detail below, the *Shiratori* case of 1975 stands as a prominent example of top-down shaping of norms in the criminal justice field by a single Supreme Court decision. One can offer a few other examples of judicial decisions that have expanded protections for suspects and defendants, as well. On the whole, however, as compared with the situation in the
United States, the Japanese judiciary has followed a conservative approach in the criminal justice arena. From that standpoint, one might point to criminal justice as a classic example of judicial restraint, with little involvement by the Japanese judiciary in policymaking.

This view, I will argue, is mistaken. Just as surely as the Warren Court helped to shape criminal justice policy in the United States, so too the Japanese judiciary has helped to shape criminal justice policy in Japan. But it has done so based on a very different conception of the criminal justice system from that in the United States, a conception that is heavily influenced by a stance of deference to the prosecutors. After discussing the basis for this conclusion, I will offer some thoughts on the underlying reasons for the different postures of the U.S. and Japanese courts, and close by discussing recent developments suggesting a modest shift in the stance of the Japanese judiciary.

II Comparative Setting: The Courts and Criminal Justice in the United States

The central focus of this essay is policymaking in the criminal justice field by the Japanese judiciary. Before turning to Japan, however, a brief discussion of the situation in the United States will be helpful in providing a baseline for comparison. As noted above, Miranda often is treated as a paradigmatic example of policymaking by the judiciary, so let us begin there.

In Miranda, the Supreme Court stated:

[W]e hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of any attorney, and that if he cannot afford an attorney one will be appointed for him prior to questioning if he so desires. Oppor-
tunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of the interrogation can be used against him.3)

The standards set forth in Miranda quickly took root. As anyone who has watched U.S. crime dramas can attest, the “Miranda warnings,” repeated word-for-word from the language quoted above, are enshrined in criminal practice. Yet the Supreme Court derived these detailed, concrete and influential standards from the following brief and somewhat abstract provisions of the Constitution: “No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ....” (Amendment V), and “No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws” (Amendment XIV).

From a law and society viewpoint, Miranda stands as a fascinating example of the impact of empirical study and socio-legal scholarship on judicial decisions, and vice versa. In explaining the need for concrete standards to protect the privilege against self-incrimination, the opinion (written by Chief Justice Warren) discussed at length the actual nature of interrogation practices, relying on factual studies by governmental commissions, police manuals and texts, and socio-legal studies of police practices. Virtually as soon as the decision appeared, law and society scholars began studying it. Over the years, Miranda has given rise to a multitude of socio-legal scholarship, including a seemingly endless series of competing analyses of the impact on conviction rates, numerous studies of the impact on police practices, and studies from law and linguistics and law and psychology perspectives.4)

In terms of judicial policymaking, Miranda and the protections for the right to silence set forth in that opinion represent one part of a broader conception of the criminal justice system, shaped to a significant degree by the judiciary. The great majority of criminal cases in the United States are resolved without trials, through guilty pleas typically preceded by plea bargaining between the prosecution and defense. Yet
the vision of criminal justice that has animated many of the relevant judicial decisions treats the trial as the centerpiece of the process, with prosecution and defense battling as adversaries. The following are among the elements of the criminal justice system closely tied to that vision.

Right to counsel. The right to counsel lies at the core of the adversary system. The Sixth Amendment to the U.S. Constitution provides: “In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.” The Sixth Amendment applies directly to the federal government; and it has always been clear that Amendment entitled persons accused in federal prosecutions to retain their own lawyers. In 1938, the Supreme Court held that federal courts could not “deprive an accused of his life or liberty unless he has or waives the assistance of counsel,” and thereby in effect held that indigents prosecuted in federal court have the right to have counsel appointed for them at government expense. In the famous 1963 case of Gideon v. Wainwright, the Supreme Court held that the right to appointed counsel for indigents also applies to state prosecutions. The Sixth Amendment right to counsel has been held to apply only after the commencement of adversarial judicial proceedings, and thus does not necessarily apply at the police interrogation stage. As noted above, however, Miranda found that the right to counsel, including appointed counsel for indigents, attaches from the time a suspect is “taken into custody” and “throughout the interrogation,” as an aspect of the due process ensured by the Fifth and Fourteenth Amendments.

Right to effective assistance of counsel. In 1970, the Supreme Court observed that if the right to counsel “is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel.” In 1984, the Court confirmed that the purpose of the right to assistance of counsel, that being “to protect the fundamental right to a fair trial,” means the right to effective assistance of counsel, and made clear that convictions may be overturned if defendants do not receive effective assistance. According to professional responsibility standards announced by the American Bar Association, effective assistance includes the duty to interview and consult with one’s client (Standards 4–3–2 and 4–5–2), to investigate (Standard 4–4–1), and to exercise professional judgment “within the bounds of the law, solely for the benefit of [the] client” (Commentary to Standard 4–3–5) (American Bar Association 1993).
Right of confrontation; hearsay. In some ways the most striking affirmation of the centrality of the trial to the U.S. criminal justice system may be found in decisions relating to the so-called Confrontation Clause in the Sixth Amendment and to the use of hearsay evidence. The Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

Over one hundred years ago, the Supreme Court explained the purpose of that clause as follows:

The primary object ... was to prevent depositions or ex parte affidavits ... being used against the [accused] in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection ... of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor ... and the manner in which he gives his testimony whether he is worthy of belief.9)

As that explanation indicates, the Confrontation Clause serves a number of interrelated purposes: it permits the cross-examination of witnesses, thereby promoting both the adversarial process and the search for truth, and it allows the fact-finder (jury or judge) to assess the credibility of witnesses. Notably, these objectives also lie at the heart of the hearsay rules in the field of evidence; and, so as to ensure the opportunity for vigorous cross-examination and assessment of demeanor and credibility through direct observation of witnesses' in-court testimony, exceptions to the hearsay rule are interpreted quite strictly.

Discovery. Historically, neither the defense nor the prosecution had the right to discovery in criminal cases in the United States. The situation has changed greatly. In 1966, the Supreme Court commented on "the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice."10) That same year, the Federal Rules of Criminal Procedure were amended to expand discovery, and the trend toward expanded discovery, by both the defense and the prosecution, has continued ever since (2 Dressler & Michaels 2006: §§ 7.05–7.08). This expansion in discovery is premised on the view that discovery aids in the functioning of the adversary system and the search for truth.
Most of the expansion in discovery has come by statute. Part of the expansion came about judicially, however. In 1957, for example, the Supreme Court, in *Jencks v. United States*, held that, as an element of "the administration of criminal justice," the defense was entitled to disclosure of prior statements of the prosecution's trial witnesses, which would enable the defense better to prepare for cross-examination. And in the landmark 1963 case *Brady v. Maryland*, the Supreme Court held that, based on the principle of avoidance of unfair trials, the due process clauses of the Fifth and Fourteenth Amendments require the prosecution to disclose to the defense "evidence favorable to an accused ... where the evidence is material either to guilt or to punishment."

As with *Miranda*, in most of the above respects, the judiciary has derived concrete and rather detailed standards from brief and somewhat abstract provisions of the Constitution. This "constitutionalization" of criminal procedure often is attributed to the Warren Court. There is considerable justification for doing so; the Warren Court issued many landmark decisions in the criminal justice field. Yet the roots for the protections extend much earlier. For federal prosecutions, many of these protections had been recognized by the Supreme Court by the 1930s. In terms of criminal justice jurisprudence, the most important activity of the Warren Court was extending the protections to state prosecutions, which constitute the vast majority of criminal prosecutions in the United States.

### III Japan

#### A. Retrial Standards: *Shiratori* and Its Impact

Turning to Japan, one of the most striking examples of judicial policymaking in the criminal justice field is the 1975 decision of the Japanese Supreme Court in the *Shiratori* case. That case involved the interpretation of Article 435, item 6, of the Code of Criminal Procedure (hereinafter, "CCP" or "the Code"), which grants the right to a retrial "when clear evidence is newly discovered requiring the declaration of innocence of ... one who has been found guilty." For many years the various elements of this right were interpreted so strictly it was regarded as "the door that never..."
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"In a 1950 Grand Bench ruling, the Supreme Court, emphasizing "the need to respect final judgments," stated that "the grounds for retrials attacking final judgments must be interpreted clearly and strictly." For the following twenty-five years, the courts interpreted item 6 very narrowly. Under the judicial interpretations that prevailed through the mid-1970s, to obtain a new trial a petitioner in effect was required to establish actual innocence clearly on the basis of new evidence standing alone.

Then, in 1975, in a landmark ruling by the First Petty Bench, the Supreme Court announced the following governing standards:

The phrase "clear evidence requiring the declaration of innocence" should be deemed to refer to evidence that gives rise to a reasonable doubt concerning the factual findings of the original judgment and that is sufficient to give rise to a probability that those findings would be overturned. The judgment of whether evidence is "clear evidence" within this meaning should be based on a comprehensive evaluation of the new evidence along with all the other evidence, from the standpoint of determining whether the factual findings contained in the original judgment would have been reached had the new evidence been presented during the deliberations of the court that entered the original judgment. In making that determination, the hard and fast rule of criminal trials that "doubts are to be resolved in favor of the defendant" should be applied, in the sense that if a reasonable doubt is raised as to the factual findings contained in the original judgment, that will be a sufficient basis for ordering a retrial.

In this manner, Shiratori adopted both the "comprehensive evaluation" and "reasonable doubt" standards, for which critics of the prevailing interpretations of the retrial standards had been fighting for years. The court also appears to have relaxed the level of proof required from the high probability some courts had demanded to a simple probability the prior findings would be altered.

Shiratori bears a number of similarities to Miranda. Both decisions dealt with questions that had been the object of numerous prior court cases and extensive debate among academics and practitioners. And both decisions elucidated concrete, detailed standards based on rather brief and somewhat abstract constitutional (Miranda) or statutory (Shiratori) language.
One salient difference lies in the style of the respective opinions. Part I of the *Miranda* opinion, which spans over ten pages in the official reporter, examines in detail the actual circumstances of interrogation practices. Part II, covering another eight pages, discusses the history of the self-incrimination clause and prior precedents. Only then does the decision turn to the appropriate standard.

The contrast with *Shiratori* is striking. A close examination of the record suggests two Justices, Dandō Shigemitsu and Kishi Seiichi, played key roles in the dramatic change in the retrial standards. Dandō was a leading criminal law and procedure scholar and Kishi was a distinguished judge who had specialized in criminal matters. Nearly forty years earlier, when they were young criminal law specialists, both had written commentaries criticizing as unduly narrow judicial interpretations of a nearly identical provision in the prewar criminal procedure code (Keiji hanei kenkyūkai-hen 1938; Keiji hanei kenkyūkai-hen 1939). Thus, both were deeply knowledgeable about the history of the statutory provision in question, the debate surrounding its interpretation, and the circumstances of retrial cases. There can be no question they brought their knowledge and experience to bear in *Shiratori*. Yet one would never know this from the opinion itself. Without intimating it was doing anything more than restating the existing law, the court announced the new standard at virtually the outset of the opinion, in one matter-of-fact paragraph containing no references to earlier decisions or the vigorous debate over the issues.

On first blush, one other major difference between *Miranda* and *Shiratori* might seem to be the impact of the respective decisions. Soon after *Miranda* was announced, "Miranda warnings" became firmly embedded as part of standard police practice; to this day, *Miranda* comes into play in a vast range of criminal cases. In contrast, *Shiratori* affects only a very small percentage of cases, those in which retrials are sought.

A strong argument can be made, however, that *Shiratori* has had a great impact on Japanese criminal justice, albeit in a more circuitous manner than *Miranda*. While announcing the new standard in *Shiratori*, the Court nevertheless denied the retrial petition in that case, holding that even the relaxed standard had not been met. The following year, though, the same Petty Bench (of which Dandō and Kishi were still members), in remanding the lower courts' denial of a retrial in the *Saitakawa* case,¹⁸
made clear its view that a retrial was warranted in that case. Shiratori and Saitakawa together opened the door for retrials in the so-called four “death penalty miscarriage of justice cases” (shikei enzai jiken) – the Menda,\(^{19}\) Saitagawa,\(^{20}\) Matsuyama,\(^{21}\) and Shimada\(^{22}\) cases. In turn, the death penalty retrial cases brought to light various improprieties by the investigators; and the specter of those cases – the thought that four innocent men had spent their entire adult lives on death row and had come close to execution – prompted critical scrutiny of many aspects of the criminal justice system and much soul-searching by all three branches of the legal profession.\(^{23}\) The death penalty retrial cases also led to a wave of books and articles, together with a host of reform proposals. Perhaps most notably, those cases invigorated movements for re-introduction of the jury (baishin) system or introduction of a lay participation (sanshin) system. It would be futile to ascribe the recent introduction of the saiban'in system to any single cause. Yet it is doubtful whether the saiban'in system or other recent reforms to the criminal justice system would have come about without the impetus for reform generated by the death penalty retrial cases.

One other important difference between Miranda and Shiratori cannot escape notice. Miranda, while especially prominent, is just one in a long line of major precedents by the U.S. Supreme Court expanding due process and other protections in the criminal justice field. As a precedent substantially expanding rights in the criminal sphere in Japan, Shiratori is much more unusual.

To be sure, Shiratori does not stand alone in that regard. As another example, one might point to the judiciary’s treatment of meetings between suspects and defense counsel. Article 34 of the Constitution states, “No person shall be arrested or detained ... without the immediate privilege of counsel”; and article 39(1) of the CCP provides that “a suspect in custody may, without any official present, meet with counsel.” Yet section 3 of the same article provides that investigators may “designate the date, place, and time” of meetings between suspects in custody and counsel “when necessary for the investigation.” For many years, the courts by and large granted the prosecutors broad discretion to limit meetings between suspects and counsel under this provision, including accepting the use of so-called “general designation,” which treated meetings with counsel as an exception requiring special permission from the authorities (Tamiya 1970).
In 1978, in one of the last decisions issued by the First Petty Bench while Justices Kishi and Dandō were serving together, the Supreme Court declared that designation is an "exceptional measure [to be used only] when necessary." This was technically dictum; the court denied an attorney's request for damages allegedly resulting when he was prevented from meeting a suspect. Nonetheless, the decision went on to discuss in some detail the circumstances under which designation might be justified. Over the subsequent decade, widespread criticism of the severity of limitations on meetings with counsel continued; and, in 1988 the Ministry of Justice, through changes in internal guidelines, undertook some relaxation of the designation system (Takada 1998: 75). Presumably it is no mere coincidence those guidelines included principles set out by the Supreme Court in the 1978 decision.

B. Traditional Policy Stance of the Japanese Judiciary: Deference to Prosecutors

As the preceding discussion reflects, in the past the Japanese judiciary on occasion issued decisions supporting expanded protections in the criminal sphere; and those decisions at times had important implications for criminal justice policy. Such examples are rather unusual, however. From this, one might be tempted to conclude that the Japanese judiciary has been relatively uninvolved in policymaking in the criminal justice sphere. Not so, I would argue. The Japanese judiciary has played a major role in helping to shape criminal justice policy; but it has done so based on a very different conception of the criminal justice system from that in the United States. Just as the Warren Court helped to shape criminal justice policy, centered on due process protections for suspects and defendants, so too the Japanese judiciary has helped to shape criminal justice policy, but centered on deference to prosecutors. In many respects, the situation in Japan has been the mirror opposite of that in the United States. The Warren Court interpreted broadly, imposing limitations on the authority of police and prosecutors and finding rights and protections for criminal suspects and defendants in the interstices and penumbrae of short, relatively abstract constitutional provisions. In contrast, the Japanese judiciary interpreted narrowly, granting broad authority to the prosecution and limiting rights and protections for suspects and defendants, often in the face of rather explicit language in the Constitution, at times buttressed by even more detailed language in the Code.
To appreciate the role played by the Japanese judiciary in shaping criminal justice policy, one should bear in mind the content and objectives of the postwar reforms to the Constitution and Code, together with the ills those reforms were designed to remedy. Following World War II, the Occupation authorities (hereinafter sometimes referred to as “SCAP,” short for Supreme Commander for the Allied Powers) regarded criminal procedure as an area necessitating major reform. The central document describing SCAP’s role as seen through its own eyes, *Political Reorientation of Japan* (Supreme Commander for the Allied Powers, Government Section [hereinafter, “SCAP” 1949]), contained the following analysis:

The worst abuses of civil liberties ... arose through the use of loopholes deliberately left in laws and through the development of legal fictions. ... Under the Japanese practice, ... 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 (SCAP 1948: vol. 2, 192).

To remedy these and other perceived ills in the Japanese criminal justice system, SCAP sought to achieve “a fundamental change of the criminological attitude” and insisted upon “elaborate safeguards for the protection of the individual in the field of criminal justice” (SCAP 1948: vol. 2, 227). Not surprisingly, the image SCAP had in mind was based largely on the U.S. model, with a robust adversary system and strong safeguards for protection of the individual. The reformers’ views were influenced by U.S. Supreme Court precedent, which already had recognized a wide range of constitutional protections for suspects and defendants in federal prosecutions. Furthermore, in an effort to forestall the possibility that Japanese criminal justice authorities would be able to utilize “loopholes deliberately left in laws” and “the development of legal fictions,” the reformers sought to craft clear and detailed constitutional and statutory provisions. Despite that aim, the new Code contained numerous ambiguities. The police and prosecutors (hereinafter, collectively referred to as “the investigators”) were quick to exploit the ambiguities, developing what many observers would regard as new sets of loopholes and legal fictions. And, to a great extent, the judiciary went along. The
Japanese judiciary adopted, accepted or silently acquiesced in a wide range of interpretations that greatly circumscribed the protections for suspects and defendants, while granting broad authority to the investigators.

From this perspective, let us review various elements of the Japanese criminal justice system, as embodied in the postwar reforms, together with the loopholes and legal fictions that developed.

**Right to counsel, and right to effective assistance of counsel.** Apart from the basic issue of the right to counsel, three more specific aspects of that right are: (1) when the right to counsel attaches, (2) whether counsel will be appointed for indigents, and (3) the quality of counsel required. As noted earlier, in the United States the Sixth Amendment specifies that “the accused shall enjoy the right ... to have the assistance of counsel.” Only through judicial precedent did it become clear that indigent defendants were entitled to publicly provided counsel; that suspects were entitled to counsel at the time of arrest; and that “assistance” meant “effective assistance.”

In contrast, the Constitution of Japan explicitly deals with the first two of these aspects; and, from the English-language text, it appears to deal explicitly with the third, as well. Article 34 provides: “No person shall be arrested or detained ... without the immediate privilege of counsel ....” Thus, that provision seemingly leaves no question that a suspect is entitled to consult with counsel without delay at the time of arrest (without addressing the further question of whether indigent arrestees are entitled to publicly provided counsel). As Ministry of Justice official Nagashima Atsushi observed in his 1963 assessment of the postwar reforms:

Under the [prior system], the defense attorney had no powers during the process of investigation. ... The situation has changed completely under the new code. Now the defense attorney ... has a very important function in protecting his client. He ... may protest against improper investigative procedures. He should collect ... any evidence that is favorable to the suspect. Thus the defense counsel must have free access to his client and must be able to interview him without any guard present. Private conference is vitally important at the early stages of the investigation, especially when the suspect wants his attorney’s advice as to whether he should make a factual statement or remain silent. (Nagashima 1963: 304–05).

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Article 37(3) appears to address each of the other two aspects of the right to counsel. That article provides: "At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State." The article makes clear that indigents are entitled to publicly provided counsel; but that right applies to "the accused" (hikokunin), and hence does not by its terms extend to suspects prior to indictment, even those under arrest or in detention. Upon reading the English text, most Americans likely would assume Article 37(3) also deals expressly with the quality of counsel required. That article calls for the "assistance of competent counsel" — an expression that, on its face, appears to parallel closely the right to "effective assistance." When one reads the Constitution in Japanese, though, it becomes apparent the phrase in question means something quite different. From the Japanese, shikaku o yūsuru bengonin, it is evident this phrase requires "competence" only in the sense that counsel must be licensed as an attorney.

One could imagine a court interpreting Article 34's assurance that "No person shall be arrested or detained ... without the immediate privilege of counsel," as incorporating a right to publicly provided counsel from the arrest stage. It would be somewhat difficult to reconcile that interpretation with the narrower language of Article 37, however. One also could imagine a court finding that the word "qualification" (shikaku) in Article 37 implies not only a license to practice law, but the knowledge and ability necessary to handle the case in question. Yet given the common understanding of the relevant phrase in Japanese, that interpretation also would require considerable judicial creativity. If the Japanese judiciary had adopted either of those interpretations, prosecutors likely would cite those interpretations as evidence of judicial policy-making in favor of suspects and defendants. Of course, the judiciary did not adopt either of those interpretations. In several respects, though, the judiciary accepted interpretations that strain the natural meaning of constitutional or statutory provisions, but in the opposite direction, in favor of the prosecution.

As discussed earlier, notwithstanding the constitutional guarantee of "the immediate privilege of counsel" and the assurance in CCP Article 39(1) that "a suspect in custody may, without any official present, meet with counsel," investigators imposed strict limits on meetings with counsel, utilizing their authority, granted under section...
3 of the same CCP article, to "designate the date, place, and time" of meetings between suspects in custody and counsel "when necessary for the investigation." From time to time, lower court decisions found impermissible certain extreme limitations — such as limiting the meeting between counsel and suspect to just two or three minutes. Yet such decisions were quite rare; on the whole, the judiciary routinely accepted broad limitations on meetings with counsel (Tamiya 1970). According to one estimate from the early 1960s, defense attorneys generally were allowed only one fifteen to twenty minute visit during each ten-day period a suspect was in detention (Abe 1961: 70–71). In a 1955 case, 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. So much for the constitutional right to the immediate privilege of counsel!

Confrontation clause; hearsay. As the U.S. Supreme Court explained, the Confrontation Clause of the U.S. Constitution provides the accused with the opportunity to examine and cross-examine witnesses in open court. Yet the language of that clause ("the right ... to be confronted with ... witnesses") is difficult to understand. The postwar reforms in Japan left no such ambiguity. Article 37(2) of the Japanese Constitution expressly provided: "[In all criminal cases the accused] shall be permitted full opportunity to examine all witnesses ...." The CCP also provided that, in principle, documents were not to be used in place of testimony in open court, and hearsay evidence was not to be used. While the CCP contained a number of exceptions to the prohibition on use of hearsay evidence, those exceptions set forth "strict conditions of need and high credibility" (Dando 1965: 199). The reforms thus contemplated trials centered on oral testimony in open court, with the accuracy of testimony and the credibility of witnesses to be subject to testing through vigorous cross-examination. Despite these efforts, the pattern of so-called chōsho saiban (which means, in effect, "trials by affidavit") quickly took root.

Three exceptions to the hearsay rule played key roles in fostering chōsho saiban. The first exception, relating to statements of the accused, is found in CCP Article 322 (1). That article states, in part, "a written statement recording the statement of the accused ... may be used as evidence, when [it] contains an admission of a disadvantageous fact, or is made under circumstances that afford special credibility." When cou-
pled with the broad set of tools for obtaining confessions that have been afforded to investigators, as discussed below, this exception means that *jihaku chōsho* ("confession statements") take center stage in most trials.

The second exception relates to statements of witnesses. Prosecutors routinely interview witnesses and prepare written records of those interviews. Notably, these records (*kyōjutsu chōsho*), as with confession statements, are not verbatim transcripts of the witnesses' statements. To the contrary, in the typical situation, at the conclusion of an interview session (or sometimes even after multiple sessions), the prosecutor prepares a document in which he or she organizes and summarizes the testimony of the witness, to which the witness then affixes his or her seal. Article 321(1)(ii) governs the use of those written records at trial; that provision permits the use of a "document which contains a statement [by a person other than the accused], given before a public prosecutor, when the person who made the statement is unable to testify at trial ...", or when the person has given testimony in trial preparation or at trial that conflicts or substantially differs from the previous statement." In the latter case, a proviso limits use of such statements "to cases where the previous statement was made under special circumstances that render it more credible than the testimony given at trial."

In practice the proviso did not prove much of a check. The courts quickly showed their willingness to recognize "special circumstances" sufficiently broad to cover nearly all witness statements prepared by prosecutors. For example, in a 1949 decision authorizing use of a witness statement, the Nagoya High Court reasoned that "the statement before the prosecutor was more logical" and "better matched the objective evidence." Along similar lines, in 1955 the Supreme Court declared that "the special circumstances need not necessarily be external circumstances; from the content of the statement itself one may infer special circumstances of reliability." As Hirano Ryōichi observed, this reasoning conflates the content of the statement with special circumstances lending credibility (Hirano 1958: 214). One can readily imagine that a document, organized and prepared by prosecutors, would seem more logical than the often rambling, disjointed testimony of a live witness; that, one would think, is a reason to be especially cautious about using such a document. In a 1950 decision, the Sapporo High Court offered another rationale for admitting a witness statement pre-
pared by prosecutors, stating that, "in terms of timing, at the time of questioning by the prosecutor [the witness's] memory was fresher." Needless to say, this will always be the case, so that reasoning in effect renders the proviso nearly meaningless. Initially, these types of rationales were severely criticized as infringing on the constitutional right to cross-examination. Over time, however, they became entrenched. As Murayama Masayuki has noted, "Academics were critical of the exception [to the hearsay rule] until the 1970s, but the criticisms disappeared as the practice became firmly rooted." (Murayama 2002: 59 n. 11.)

The third key exception is found in Article 326(1), which permits the introduction of documents or statements if both the prosecution and defendant consent to their use and the court "finds" it appropriate. With a robust adversary system, this exception might appear commonplace; if there were any dispute as to the content of the statement or credibility of the witness, one might assume effective defense counsel would refuse consent and insist the witness testify in open court. One's faith in the adversary system as an adequate check is somewhat shaken, however, to hear that in a 1991 JFBA survey to which nearly 1800 lawyers responded, nearly two-thirds said that in their entire careers they had never objected when a prosecutor moved to introduce a witness statement (Johnson 2002: 83). Given the judiciary's willingness to recognize broad exceptions to the hearsay rule for witness statements before prosecutors, defense counsel might feel there is no point in withholding consent, since the court would admit the document in any event. Nonetheless, if the great majority of defense counsel routinely consent to use of what are in effect the equivalent of the "ex parte affidavits" about which the U.S. Supreme Court expressed concern over a century ago, it seems inevitable that chōsho saiban would thrive and trials centered on oral in-court testimony would wither.

**Discovery.** As of the time of the Occupation, neither the U.S. Supreme Court nor state courts had recognized rights to discovery, so it should come as little surprise SCAP did not insist on including such a right in the Constitution or CCP. Indeed, in important respects, the postwar reforms reduced defense access to information in the hands of the prosecution. Under the prewar system, the prosecutor was supposed to present to the court all the evidence, including evidence favorable to the defendant. While defense counsel had no powers during the investigation process, once the case
was filed, defense counsel was given access to all that evidence. With the adoption of the adversary system, this system was dropped; the new Code contained no requirement for either side to disclose evidence it was not planning to introduce at trial. From the early 1950s, the Japan Federation of Bar Associations fought hard for legislation or criminal procedure rules granting defense counsel access to all evidence in the possession of the prosecutor, as in the prewar system; but, in the face of strong resistance by the Ministry of Justice, those efforts failed (Nagashima 1963: 308-310). Consequently, expansion in discovery would have to come, if at all, through judicial decision.

On the judicial front, in October 1959, in what appeared to be a path-breaking decision, the Osaka District Court issued a pretrial order directing the prosecutor to disclose all the evidence in his possession to the defendant. The court based its decision on the prosecutor's duty, as representative of the public interest, to cooperate in the court's search for the truth (reasoning similar to the U.S. Supreme Court's reliance on "administration of criminal justice" in Jencks, its 1957 decision ordering discovery). The prosecution immediately appealed the decision directly to the Supreme Court. The Supreme Court firmly sided with the prosecutors; it struck down the pretrial order, declaring flatly that, "Under [existing law], no provision exists that would justify the court to order the prosecutor to permit the defendant or defense counsel to view documents or evidence in advance, whether or not the prosecutor intends to introduce such documents or evidence at trial."

Following much criticism, the Supreme Court loosened that rule in 1969, but not too far. In that case, the district court had relied on its general supervisory authority in ordering the prosecutor's office to disclose statements obtained from four witnesses. The Supreme Court upheld the disclosure order, but the conditions it announced were so highly circumscribed that even after this decision it remained rare for courts to order disclosure of documents.

Confessions and the right to silence. Reflecting the Occupation's deep concern over compelled confessions, the postwar reforms contained a number of provisions intended to ensure the right to silence. In language almost identical to that in the Fifth Amendment to the U.S. Constitution, Article 38 of the Japanese Constitution guaranteed, "No person shall be compelled to testify against himself." Other provisions in the
Constitution and CCP established numerous safeguards with respect to confessions, including notification of the right to silence and prohibitions on the admissibility of confessions obtained under questionable circumstances. Here again, however, the CCP also contained exceptions and ambiguous language, which the investigators soon exploited to generate loopholes and legal fictions. And here again, the courts for the most part acquiesced.

(a) Notification requirements. Presumably based on the view that the right to silence would be essentially meaningless unless suspects and defendants are aware of it, the postwar reforms demanded, nearly twenty years before Miranda, that suspects and defendants be informed of the right to silence at various stages of the proceedings. Under Article 198(2) of the original 1948 CCP, when a suspect appears for questioning, “the suspect shall be notified in advance that he/she may refuse to answer any question.” The investigators were not happy with the right to silence; and as soon as the Occupation ended they undertook a direct attack on that right, seeking a legislative modification of relevant statutory provisions (Abe 1956: 624; Matsuo 1979: 62). The only concrete change they were able to obtain was an amendment modifying the warning they were required to give: from a notification that the suspect “may refuse to answer any question” to one that “he/she need not answer any question against his/her will.”

In any event, investigators could easily make either of the above warnings sound equivocal, especially given a separate CCP provision, Article 203(1), which 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. As it turns out, the courts did not even demand an equivocal notification of the right to silence. In 1950, 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. In another decision two years later, the Supreme Court resolved the apparent inconsistency between the requirement of providing an opportunity to explain oneself and notification of the right to silence: the court ruled that when giving the suspect the opportunity to explain, the police need not mention the right to silence; the suspect’s explanation can still be used as evidence.
(b) *Grounds for detention.* As a practical matter, the standards for arrest and detention assume great importance in connection with confessions. For arrest, the postwar reforms imposed a warrant requirement requiring reasonable suspicion. When arrests are undertaken, within three days after the arrest, prosecutors are required either to release the suspect or seek court authorization for detention; and Article 60 specified seemingly rather strict limitations for when detention would be warranted: that the suspect “has no fixed residence,” “probable cause to suspect the [suspect] will conceal or destroy evidence,” or “probable cause to suspect the [suspect] will flee.” Assuming the court found one or more of these grounds to be met, the CCP (Art. 208) authorizes continued detention for up to ten days, with the possibility of a further ten-day extension. Thus, cumulatively, the CCP recognizes a total of up to 23 days from arrest through the point at which prosecutors must either release or indict the suspect.

Judging from the statutory grounds for arrest and detention, it would not appear the detention period was meant as an investigatory tool. In practice, though, investigators routinely used that time to obtain detailed confessions from the suspect and assemble other evidence based upon the suspect’s statements. As one Ministry of Justice official commented in 1961, “[P]re-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.” There can be no doubt most judges always have been well aware of this situation. Nonetheless, the courts routinely have granted virtually all requests for detention, evidently accepting the prosecutors’ expansive interpretation of the phrase “conceal or destroy evidence” as embracing the possibility the suspect might talk to potential witnesses and get them to change their testimony.

(c) *Duty to submit to questioning.* By far the most important tool investigators possess for obtaining confessions is the so-called “duty to submit to questioning” (*torishirabe junin gimu*). How, those unfamiliar with the Japanese criminal justice system might wonder, could a nation with a right to silence also recognize a duty to submit to questioning? The answer, as Japanese who have studied criminal procedure well know, lies in the proviso to CCP Article 198(1). That article states, “When the need exists with respect to the investigation of crime, a public prosecutor ... or a judi-
cial police official may request a suspect to appear and may question the suspect; pro-
vided, however, that, except in cases where the suspect is under arrest or under de-
tention, the suspect may refuse to appear or, having appeared, may leave at any
time.”

The proviso’s origins seem clear; the key debate centers on its meaning. During the
CCP drafting process, the Japanese side proposed granting investigators the authority
to summon and interrogate suspects whenever necessary for the investigation, with
no mention of any right for suspects to refuse. SCAP officials involved in the process
acceded to the basic proposal, but insisted on adding safeguards relating to the right
to refuse (Matsuo 1979: 62). SCAP authorities explained their understanding of the re-
sulting proviso as follows: “Under the new code, persons asked to appear for interro-
gation ... will even have the right to refuse and, if they do appear, may refuse to an-
swer any questions and, if not under arrest, may leave at any time” (SCAP 1949: vol. 2,
228). Thus, according to the SCAP summary, even one who is under arrest would
have the option of refusing to appear for questioning in the first place. That is not
what the literal language of the Japanese text says, however. Under the literal Japa-
nese text, the right to refuse to appear and the right to leave apply only to those not
under arrest or in detention.

Not surprisingly, prosecutors chose the narrow, literal reading of the proviso, and
took the further position that the “duty to appear” meant the duty to appear for ques-
tioning. Thus, under the prosecutors’ view, arrestees and detainees have a duty to ap-
pear at the interrogation room and have no right to leave. Suspects need only “sub-
mit” to questioning; they need not answer any questions. Thus, by this view, they are
not “compelled to testify against themselves,” which would violate Article 38 of the
Constitution, nor are they “required to make statements against their will,” which
would conflict with CCP Article 198(2). Hirano offered a counter-intepretation,
which gained wide support among academics and the defense bar. He 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 they
had the right to refuse to sit through questioning (Hirano 1958: 106).

What of the courts? One would assume the courts are the ultimate arbiter of the
meaning of the proviso, so what position did the judiciary take? None, it seems. The
judiciary evidently never has recognized the "duty to submit to questioning" expressly. On the other hand, the judiciary never has expressly rejected that interpretation, either. And by routinely admitting into evidence confessions obtained through questioning during post-arrest custody, the courts tacitly have recognized the duty.

(d) Admissibility. Another important set of issues relating to confessions concerns their admissibility at trial. While the Fifth Amendment to the U.S. Constitution states that "No person ... shall be compelled to be a witness against himself," it never expressly refers to admissibility. Here again, the Occupation left no such ambiguity in Japanese law. Using language nearly identical to that of the Fifth Amendment, the first section of Article 38 of the Japanese Constitution guarantees, "No person shall be compelled to testify against himself." The second section of the same article contains an even more concrete prohibition: "2) Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence" (emphasis added). Article 319 of the CCP repeated the same guarantee, and added the further assurance that "confession ... as to which there is doubt that it was not made voluntarily, shall not be admitted in evidence" (emphasis added). A SCAP official who was deeply involved in the criminal procedure reform characterized this provision as "excluding from evidence confessions ... whose voluntary character [is] in any way suspect" (Appleton 1949: 424; emphasis added); and SCAP's official account of the Occupation proclaimed that, as a result of the reforms, "no confession will be admitted in evidence if there is any possibility it was not made freely and voluntarily" (SCAP 1949: vol. 2, 228; emphasis added).

On their face, these prohibitions on admissibility seem rather clear and absolute. One might think they would result in the exclusion of a considerable number of confessions. That has not been the case.

One specific ground for exclusion is for confessions made "after prolonged arrest or detention." As interpreted by the courts, these provisions very seldom apply. In one of the earliest Supreme Court decisions on this issue, the Grand Bench upheld a confession obtained after detention of more than six months where the detention was based on valid reasons. Ever since, the basic stance of the courts has been that time in lawful detention – even if it extends to several months through a series of arrests – normally will not bring this rule into play. Given that and other precedents,
the suggestion that interrogation of 23 days following a lawful arrest on a single crime might constitute "prolonged arrest or detention" is out of the question.

One of the contentions raised most frequently by defense counsel is that a confession is inadmissible because it was not voluntary. Interrogations have been conducted behind closed doors, with no defense counsel present and, at least until very recently, no videotaping at all. Consequently, the actual circumstances have been shrouded in secrecy, and one can understand that proving compulsion might be difficult. Yet one might think the prohibition on use where there is "doubt" as to voluntariness would lead to a considerably more relaxed standard for exclusion of confessions. That has not been the case. As the relevant constitutional and statutory provisions have been interpreted and applied by the courts, if the investigators have satisfied the statutory standards for arrest and detention, any confession obtained almost certainly will be regarded as voluntary. Questions might arise, according to precedent, if the investigators exceed the normal bounds of questioning by, for example, leaving the suspect handcuffed during interrogation,\textsuperscript{43} promising non-indictment in return for a confession,\textsuperscript{44} or deliberately deceiving the suspect about the evidence.\textsuperscript{45} Such cases have been rare, however, and, in the judgment of the courts, virtually all types of lesser illegality — such as failure to warn of the right to silence or questioning during illegal detention\textsuperscript{46} — have not affected the voluntariness of the confession or its admissibility.\textsuperscript{47}

A further limit relates to the reliability of the confession; even if the court finds a confession was voluntary, if the court concludes it was not reliable, the court may exclude it from consideration or place very little evidentiary weight on it.\textsuperscript{48} Accordingly, most challenges to confessions have included a two-pronged attack on both voluntariness and reliability. Even when a court has serious doubts about voluntariness it will seldom exclude a confession on that basis. Instead, the court will typically engage in a painstaking review of the confession in an attempt to determine whether it is reliable or not.

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As we have seen, the postwar reforms sought to establish a robust adversary system and strong protections for suspects and defendants. With the exception of effec-
tive assistance of counsel and discovery, in all the above respects – and many more – the reforms included the establishment of concrete and seemingly rather explicit constitutional and statutory provisions. Yet in each of the above respects – and many more – loopholes and legal fictions quickly arose, reducing the protections for individuals and expanding the authority of police and prosecutors. The Legal Realists would have had a field day dissecting the rationales used to get around some of the constitutional and statutory language. (The original version of what became Article 38(2) of the Constitution contained the following provision: “No confession shall be valid unless made in the presence of counsel for the accused ....”) Had that language made it into the final Constitution, one can only wonder what legal fictions would have been devised to avoid its impact.)

Of course, the judiciary did not create the system by itself. With respect to virtually all of the above matters, the prosecutors were the primary movers; it was the prosecutors who developed most of the rationales used to justify the loopholes and legal fictions. Yet nearly all of the issues discussed above turn on the interpretation of the Constitution and CCP; and it is the judiciary that bears ultimate responsibility for interpreting and applying the law. Accordingly, just as the U.S. judiciary’s expansive interpretation of relatively brief and abstract constitutional provisions represents one form of judicial policymaking, so too the Japanese judiciary’s narrow interpretation of relatively explicit constitutional and statutory provisions represents another form of judicial policymaking. The respective approaches reflect rather different conceptions of the criminal justice system and fundamental concerns regarding that system, the topic to which we now turn.

C. The Difficulty of Legal Transplants: Contrasting Conceptions of the Criminal Justice System

The preceding section contains an account of an interrelated set of legal transplants and the manner in which those transplants developed. Recently, Kanda Hideki and Curtis Milhaupt reviewed the major schools of thought on legal transplants and offered their own theory. They suggested that the likelihood of success for legal transplants should be analyzed in terms of the degree of “fit”; and they proposed two major components for analyzing fit: “how well the imported rule complements the preex-
isting legal infrastructure" and “how well [it] complements the preexisting institutions ... in the host country” (Kanda & Milhaupt 2007: 441). Of course, the postwar criminal justice reforms were not designed to “fit” the existing system; rather, they were intended to transform major aspects of both the legal infrastructure and the institutions. SCAP officials may have hoped to achieve “a fundamental change of the criminological attitude,” but they scarcely were so naive as to expect the new rules to be embraced wholeheartedly right from the outset. Indeed, their efforts to draft elaborate constitutional and statutory safeguards reflected their recognition of the difficulty of achieving fundamental change.

As Kanda and Milhaupt point out, “[m]otivation is ... highly relevant” to the success of legal transplants – the motivation not just of the reformers themselves, but, probably even more importantly, the motivation of “the legal actors (courts, attorneys, government officials) with the potential to make use of [the legal transplants]” (Kanda & Milhaupt 2007: 441). With that in mind, let us consider the motivation, or mindset, of the Japanese judiciary with regard to the reforms discussed above, in comparison to the mindset in the United States. Attitudes toward the adversary system and the right to silence overlap in some respects but differ in other important respects, so it may be useful first to examine those two topics separately, beginning with the right to silence.

Confessions and the right to silence. In the United States, at least six distinct rationales may be identified with respect to the right to silence and non-admissibility of involuntary confessions: (1) the risk of false confessions, together with the resultant potential for mistaken convictions; (2) prevention of “fundamental unfairness in the use of evidence,” coupled with the view that it is unfair for police and prosecutors to violate the law while enforcing it; (3) the view that use of statements obtained through torture or other egregious conduct is morally offensive; (4) the view that, based in part on a reaction to religious persecution in the Inquisition, in the American accusatorial system the government should bear the burden of proving crime on its own, and it is unjust to require the individual to provide evidence to convict himself/herself; (5) protection of human dignity, personal autonomy, and mental freedom; and (6) the objective of deterring misconduct by police and prosecutors, through exclusion of improperly obtained confessions (1 Dressler & Michaels 2006: 426–27). Notably,
all these rationales can be found in U.S. Supreme Court opinions dating back many years.

In Japan, two primary rationales typically are offered for the right to silence, by practitioners and scholars as well as judges: protecting the human rights of suspects and defendants and avoiding mistakes. Arguably, protecting human rights might embrace rationales (2) through (6) above. Yet as reflected in judicial opinions and the writings of judges, the protected human rights in question primarily fall into something close to category (3): torture or other egregious conduct. Outright physical compulsion, questioning suspects in handcuffs, and similar conduct may constitute violations of the Constitution or Code; but, unless extreme in nature, intrusion on human dignity, personal autonomy, or mental freedom does not.

The rationale on which the greatest weight is placed is avoiding mistakes. On its face, that appears to be essentially the same as the first rationale listed above for the United States. Yet one often finds a second side to this view in Japan: the assumption that it is vitally important not only to make sure that the innocent are not convicted, but also that the guilty do not get away. Not surprisingly, police and prosecutors frequently voice this view. Yet one finds reflections of that same basic attitude in numerous judicial decisions, as well, both in the broad standards on questioning of suspects and admissibility of confessions discussed earlier, and in such specific language as the Supreme Court's reference to the investigators' "need to obtain detailed facts and explanations from the [unarrested suspect] promptly," in holding that four and a half days of questioning under continual police supervision "did not exceed the limits of a permissible voluntary investigation" in the so-called Takanawa Green Mansion case of 1984.52 As that quote reflects, the notion that it is unjust to require a person to aid in uncovering his/her own crime is not evident. 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.53

The reason for these attitudes, one might contend, is that the right to silence simply is "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 Code, the right to silence remains an alien concept transplanted to Japan by the Occupation and never fully accepted. One might also point to the religious aspects of the
early debate in England and the United States – the revulsion toward the Inquisition, with its exquisitely cruel tortures – as an important historical difference.

These arguments conveniently ignore much other historical evidence. Japan, of course, has its own history of religious persecution (which, as the recent Shibushi case revealed, has overtones to this day\(^4\)). Prior to reforms during the Meiji Era, Japan utilized its own system of elaborate and excruciating tortures to extract confessions; and, even after torture was legally abolished in 1879, third-degree methods of questioning (including torture) continued to be used (Abe 1956: 618–20). Nor was the right to silence an entirely new, alien concept when it was introduced. Although their efforts did not succeed, as early as 1916 some local bar associations and legislators advocated adoption of a right to silence (Odanaka 1976: 360, 366–67). Furthermore, whether the right to silence was accepted in Japan depends on whom you ask. Not surprisingly, defense counsel and defendants welcomed it; and, for a short period following the promulgation of the Constitution and enactment of the new Code, the right reportedly had considerable impact. In the words of one prosecutor who served at the time, “For a short period ..., [the privilege against self-incrimination] 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” (Abe 1956: 623). As that quote reflects, the investigators most decidedly did not welcome the right to silence. As we have seen, when the Occupation ended, police and prosecutors pushed for legislation to limit the right to silence, but were only able to achieve a modest revision in the language of the required warning. The courts proved considerably more receptive to the narrow interpretations, legal fictions and other techniques the investigators devised to limit the practical impact of that right.

The adversary system. In the United States as well as Japan, the search for truth is an important goal of the criminal justice system. Yet one difference between the two nations would appear to be the degree of faith in the adversary system as a vehicle for establishing the truth. Historically, in the Anglo–American context, the adversary system has been regarded as a superior method for achieving that objective. At least as early as 1906, Roscoe Pound decried the so-called "sporting theory of jus-
tice," in which both prosecutor and defense counsel seek victory, rather than "truth and justice" (Pound 1906: 738). Nonetheless, underlying the traditionally strong support for the adversary system in the United States has been the view that that system represents a more effective means of establishing the truth than the inquisitorial system. One of the leading commentators on the role of defense lawyers, Monroe Freedman, asserted that the adversary system is "one of the most efficient and fair methods for finding [the truth]" (Freedman 1975: 1065). In a similar vein, John Henry Wigmore stated that one of the key aspects of the adversary system, cross-examination of witnesses, is "the greatest legal engine ever invented for the discovery of truth" (5 Wigmore 1940: § 1367 at 29). At the same time, in the United States a robust adversary system is regarded as valuable for promoting other aims, including protecting the due process rights of suspects and defendants, protecting the civil liberties and personal autonomy of all residents, and promoting equality.

If anything, in the Japanese criminal justice system the search for truth is accorded even greater primacy than in the United States. Yet there does not seem to be the same degree of faith in the adversary system as a vehicle for achieving the truth. Hirano appears to have captured a common (albeit normally unstated) attitude toward the adversary system in the following observation:

If one tries to judge a matter based only on testimony in court, won't one inevitably be influenced by the parties' performances in examining witnesses at trial, and thus in fact lose sight of the truth? I suppose that among Japanese judges and other persons involved in the justice process there are many people who secretly harbor thoughts of that sort (Hirano 1989: 141-42).

Notably, most Japanese defense lawyers appear to accept truth as the central objective of the criminal justice system and to view the search for truth as being entirely compatible with their clients' best interests. If convinced a client is innocent, defense lawyers may work hard to establish that fact. But if they think a client is guilty, most Japanese defense counsel appear to believe it is fair and appropriate the client be convicted. In such cases they place their efforts into seeking a lenient disposition, not into trying to obtain an acquittal (Johnson 2002: 75-84). As David Johnson observes,
this is one explanation for the highly cooperative, non-confrontational role traditionally adopted by most defense counsel. A somewhat less charitable explanation, also highlighted by Johnson (Johnson 2002: 79–82), is the economics of criminal defense. Criminal defense does not pay well, and, for many lawyers, expending substantial time and effort in preparing for and aggressively contesting trials may not seem worth it.

In the Japanese context, the role of the adversary system in promoting aims other than the search for truth also is muted. As Murayama has observed, “Even when the defense lawyer emphasizes the procedural rights of the accused, it is done not for the purpose of challenging the legality of the crime investigation, but rather to secure the integrity of crime investigation as a fact-finding process” (Murayama 2002: 54).

Trust in authority. The views on both the right to silence and the adversary system are affected by a common element: attitudes toward authority. In the United States, views on both aspects are rooted deeply in distrust of authority and fear of abuse of power. The strength of the exclusionary rule, barring the admission into evidence of illegally obtained confessions and evidence, reflects a widely held belief that such a sanction is needed in order to deter wrongdoing by investigators. Most U.S. defense lawyers firmly believe investigators will abuse their authority unless subjected to strong external checks. That view is by no means limited to defense counsel; it extends to many judges as well, with the Miranda opinion providing a prominent example.

The contrast to Japan is striking. The high degree of deference accorded to prosecutors by the Japanese judiciary reflects a high level of trust. Exclusion of confessions or other evidence in order to deter wrongdoing by investigators remains rare. In the early postwar years, the trust presumably was strengthened by the fact that most judges and prosecutors had continued in office from the earlier period, when the judiciary and procuracy were both part of the Ministry of Justice, with relatively close identification between the two careers. While the judiciary was separated from the procuracy as part of the postwar reforms, trust presumably has continued to be enhanced ever since by the fact that new entrants into the legal profession all undergo training together at the Legal Training and Research Institute, as part of which all experience training in prosecutors’ offices, and trust also is enhanced by personnel exchanges between the judiciary and procuracy (Johnson 2002: 64–66). Since the post-
war reforms, the shared training has included those who go on to careers as practicing lawyers, as well as judges and prosecutors. Perhaps in part as a result of the shared experiences and the shared beliefs inculcated through this training, most defense lawyers also appear to place considerable trust in the prosecutors (Johnson 2002: 82–83). Of course, not all defense lawyers share the same degree of trust in the criminal justice authorities. Indeed, the sharp contrast between the views of members of the Miranda League and other harsh critics of the criminal justice system, on the one hand, and those who praise the system, on the other, seems to rest largely on a difference in the degree of trust in the authorities.

IV Recent Developments: A Shift in the Balance?

This essay has focused on the traditional policy stance of the Japanese judiciary in the criminal justice field. The past two decades have witnessed a number of important developments with respect to many of the topics addressed above. This final section briefly examines some of those developments.

On first glance, relatively little has changed with respect to confessions jurisprudence. There are signs the judiciary may have begun to scrutinize voluntariness of confessions somewhat more carefully, however. In a 2005 discussion of the likely impact of introduction of the saiban’in (lay participation) system on criminal trials, Imazaki Yukihiko, a judge with extensive experience in criminal trials, commented:

Based on the perception that, under prior practice, ... some judges relatively easily deemed a confession to be voluntary and then focused the bulk of their attention on whether it is reliable, quite a few researchers have voiced the fear that, if this approach continues under the saiban’in system, the lay jurors may form their perceptions based on the confession statement. For this reason, some researchers have suggested, in the future the determination on voluntariness must be conducted carefully; and some have voiced the view that, with the exception of cases in which the assertions of the defendant can clearly be denied, ... in cases in which objective evidence is not provided, the number of situations is likely to rise in which confessions are rejected because of doubt as to voluntariness (Imazaki 2005: 10).

In an important ruling consistent with the shift in attitude to which Imazaki alluded,
the Supreme Court in late 2007 upheld a Tokyo High Court decision ordering the prosecution to disclose investigative records, including memoranda prepared by police, for purposes of evaluating a confession's voluntariness.56

Despite this apparent shift in the stance of the judiciary, to date there does not appear to have been any major change with respect to questioning practices themselves. Questioning, of course, occurs behind closed doors, so the actual nature of questioning remains shrouded in secrecy. Police and prosecutors adamantly continue to refuse to allow defense counsel to attend interrogation sessions; and the Japanese judiciary seems unlikely to follow the lead of Miranda and insist defense counsel be given that opportunity as a condition for the admissibility of confessions. If the current drive to introduce full videotaping of interrogations57 becomes a reality, though, it may have considerable impact on the nature of questioning practices. One can easily suppose the fear of public scrutiny is the primary reason police and prosecutors have resisted videotaping so strongly.

As to another aspect discussed earlier, "effective assistance of counsel," there does not appear to have been any significant movement. Woeful inadequacy bordering on willful neglect might possibly give rise to a disciplinary claim against the lawyer involved. Yet the notion that ineffective assistance by counsel might warrant throwing out a defendant's conviction remains virtually unheard of in Japan.

Over the past two decades, however, there have been important developments with respect to all the other aspects of the adversary system discussed above. In connection with access to counsel, in the early 1990s, with the bar association in Oita Prefecture taking the lead, bar associations throughout Japan introduced the so-called "duty lawyer" (tōban bengoshi) system, through which suspects who had been arrested or detained could meet a lawyer once free of charge (with the costs financed by the bar associations) (Murayama 2002: 47-48). This system, to which prosecutors, police and the judiciary gave their acceptance, helped ameliorate the absence of a system for publicly provided defense counsel at the pre-indictment stage (although the inadequate funding for legal aid meant most indigent suspects were unable to afford continued representation (Johnson 2002: 81-82)).

Influenced heavily by the recommendations of the Justice System Reform Council (Shihō seido kaikaku shingikai 2001), the past decade has seen a wide array of reforms
to the criminal justice system. These include extension of the right to publicly pro-
vided counsel to indigents from the suspect stage; establishment of a statutorily based
discovery system; institution of pre-trial coordination procedures (kōhanzen seiri to-
tszuki) intended to expedite trials, pursuant to which judge, prosecution, and de-
defense confer in advance of trial to organize the evidence and points of contention and
establish a plan for the trial; and, of course, the introduction of the saiban’ın system
for trials in serious criminal cases. Each of these reforms is linked organically with a
robust adversary system. For the saiban’ın system in particular, the goal of attaining
trials that “one can understand by hearing with one’s ears and seeing with one’s eyes”
seemingly presupposes oral in-court testimony by witnesses, subject to vigorous cross
–examination. Thus, at least for contested cases involving crimes subject to saiban’ın
trials, the introduction of that system would seem likely to spell an end to “trials by
affidavit.”

All these reforms were introduced through legislation. Given the Supreme Court’s
role as the institution charged with responsibility for judicial administration, it is only
natural that the judiciary played an active role in the debates that preceded the legis-
lation and that the Supreme Court, through its administrative arm, has been heavily
involved in developing policies related to the implementation and effectuation of the
reforms. The extent of the Supreme Court’s activities in preparation for introduction
of the saiban’ın system, in particular, has been staggering.

The judiciary’s recent role in helping to shape criminal justice policy has extended
beyond these sorts of essentially administrative activities, however. The judiciary has
been shaping policy through decisions in concrete cases, as well. Sentencing is one
area in which a shift in judicial approach has been evident. Whether in response to
perceived public sentiment that the courts have been too lenient in the past (reflected
most concretely in legislation raising the maximum and, in some cases, minimum punishment
for a wide range of crimes) or out of a desire to set a higher baseline for sentencing
“norms” in advance of the introduction of the saiban’ın system, courts have been
imposing heavier sentences in recent years, with sharp increases in the number of
death sentences (Johnson 2007; Miyazawa 2008).

In other respects, judicial decisions in recent years suggest a desire to foster a
more robust adversary system. One set of developments relates to access to counsel.
The guidelines adopted by the Ministry of Justice in 1988 helped ameliorate use of the designation system, but conduct by police and prosecutors limiting meetings with counsel has continued to generate problems. Over the past decade, the Supreme Court has issued two important decisions in this regard. In 2000, the Court highlighted the importance of the initial meeting between suspect and counsel immediately after arrest, stating: “for a suspect who has been placed in custody, the initial meeting ... is the first opportunity to receive advice with respect to interrogation by the investigative body and, as the point of departure for the constitutional guarantee that one shall not be arrested or detained without the immediate privilege of counsel, promptly undertaking this meeting is of especial importance for preparing the suspect's defense.” While recognizing that special circumstances might warrant a delay in granting the meeting, the Court found insufficient circumstances to justify the delay in the case in question and awarded damages. In the second decision, issued in 2005, the Court again emphasized the duty of investigators to afford the opportunity to meet with counsel unless doing so would give rise to marked difficulties for the investigation. With these decisions, the Supreme Court has signaled clearly its view of the importance of access to counsel.

A closely related development relates to bail. In the past prosecutors typically opposed bail in contested cases where the defendant did not confess, and the courts usually went along with the prosecutors (Shunomiya 2002: 116-17). As a practical matter, this made it more difficult to prepare the defense, since defendants could not easily consult with counsel. The past few years have seen a rise in the percentage of defendants in detention to whom the courts grant bail. This rise is widely attributed to the impact of the introduction of the saiban'in system and pre-trial coordination procedures, but there are contrasting views as to how these matters relate to each other. By one view, with the new expedited procedures and the institution of trials held on a continuous basis, there is a greater need for defense counsel to be able to consult freely with the defendant to help prepare for trial, and the rise in grants of bail is a response to that need. By another view, however, once the points of contention and evidence have been fixed in the pre-trial procedures, there is little danger the defendant will "conceal or destroy evidence." Under the latter view, evidently, the defense strategy will already have been finalized by the time the defendant is re-
leased on bail, so there would seem to be little more the defendant can do to help prepare for trial.

A third important development relates to discovery. The 2004 amendments to the Code of Criminal Procedure statutorily recognized disclosure duties for both the prosecution and defense, with several provisions specifying the types of evidence subject to disclosure, procedures for disclosure, and other matters. As mentioned above, in an early decision interpreting discovery provisions, in late 2007 the Supreme Court upheld a Tokyo High Court decision ordering the prosecution to disclose investigative records. In that decision, the Supreme Court evinced a willingness to construe the discovery duty rather broadly.

In each of the above respects, the judiciary has adopted decisions that promote the adversary system. It bears note, moreover, that the impact of these decisions, as is true for many of the statutory reforms, is not limited to trials subject to the saiban'in system. While the introduction of the saiban'in system may have provided the impetus for many of these steps, their influence is likely to extend much more broadly.

One might posit several possible explanations for the evident shift in judicial attitudes. Insofar as the decisions discussed above largely parallel statutory reforms aimed at enhancing the adversary system, one could view them simply as reflecting judicial adherence to policy preferences expressed by the legislature. Another possibility is that these decisions signal either a decline in the judiciary's trust in prosecutors or, conversely, a rise in the judiciary's trust in defense counsel. A few recent cases, it is true, have attracted widespread public condemnation of the failings of police and prosecutors. On the other side, there have been recent signs of greater commitment to criminal defense among some lawyers. Nonetheless, neither explanation seems particularly persuasive as a reason for a shift in judicial views. Trust in police may have suffered somewhat, but trust in prosecutors appears to remain high. And, despite some increase in the number of lawyers committed to defense work, major hurdles to achieving a truly robust defense bar still remain, including compensation and organization of workload (Johnson 2009). Although there is growing recognition of the need for thorough preparation and special types of skills by defense counsel, the perception remains widespread that, "because it requires little skill and creativity, criminal defense work is something that every lawyer is capable of doing" (Murayama 2002: 72).
A further possible explanation for a shift in judicial attitudes, and one with considerably more persuasive appeal, is a desire by the judiciary to assert its primacy in the criminal justice sphere. For judges, one can well imagine a sense of frustration at being told, for decades, that Japan's is a system of "prosecutorial justice," and that criminal defendants do not receive "trials by judges," but rather trials by investigators, in which the trial is simply "a ceremony" to confirm the results of the investigation (e.g., Ishimatsu 1989). The advent of the saiban'in system holds promise for truly putting judges at the center of the criminal justice process, at least for cases subject to that system, and other recent reforms increase the role of judges in non-saiban'in trials, as well. The promise of a heightened role for judges may represent a hidden factor behind judicial support for measures promoting the adversary system.

Whatever the underlying motivations, these trends in judicial decisions, coupled with the statutory reforms, portend at least a modest shift in the dynamics of the adversary process. These developments provide expanded opportunities for defense counsel to demonstrate their skill and creativity. At the same time, the reforms carry heightened expectations and increased burdens for defense counsel. If the defense bar is to maintain and build on the momentum, it is important the defense bar meet those heightened expectations. A robust adversary system, after all, depends not only on access to counsel, but on effective assistance by counsel.

2) See, e.g., Law 2009.
3) 384 U.S. at 478-479.
4) See, e.g., Thomas & Leo (2002), and sources discussed therein.
10) Dennis v. United States, 384 U.S 855, 870 (1966)
13) For a detailed examination of the retrial standards, see Foote (1993).
16) S. Ct. (G.B.), Ruling of April 21, 1960 (Kanai v. Japan), 4 Keishi 666, 668–69 (construing a provision from the 1922 Criminal Procedure Code that was virtually identical to art. 435)
17) 29 Keishi at 180.
21) Sendai Dist. Ct., Judgment and Ruling of July 11, 1984 (Japan v. Saotô), 1127 Han-rei jihō 34
23) For an examination of the impact of the death penalty retrial cases, as of the early 1990s, see Foote (1992).
24) Kishu reached mandatory retirement age three days after the decision was issued
26) For a nearly contemporaneous account of the reforms to Japanese criminal procedure, by a central participant in SCAP's efforts in that area, see Appletor (1949)
33) See Matsuoka (1981: 123), and articles described therein.
34) S. Ct. (2d P.B.), Ruling of April 25, 1969 (Japan v. Onuki), 23 Keishi 248, 250
35) Arts 291 and 311 required that defendants be notified of the right to silence at trial.
36) Amendment to Code, art. 198(2), pursuant to Act No. 172 of 1953
37) S. Ct. (3d P.B.), Judgment of Nov. 21, 1950 (Shirogane v. Japan), 4 Keishi 2369.
38) S. Ct. (1st P.B.), Judgment of March 28, 1952 (Kin v. Japan), 6 Keishi 520
39) Kenpo (Constitution), art. 33; CCP, art 199.
40) "Kensatsu no shomondai (2, kan) (zadanka)" [Various Issues relating to Prosecution (Part 2, Conclusion) (Roundtable discussion)], 13 Hōsō jihō 1050, 1058 (1961) (statement of Honda Masayoshi)
43) S. Ct. (2d P.B.), Judgment of Sept. 13, 1963 (Ogura v. Japan), 17 Keishi 1703 (nonetheless upholding voluntariness of confession, noting the questioning had taken place in a "calm atmosphere").
44) S. Ct. (2d P.B.), Judgment of July 1, 1966 (Abe v. Japan), 20 Keishū 537 (but upholding conviction, because sufficient other evidence).
47) For an extensive examination of how courts have treated various issues relating to voluntariness, written by a district court judge, see Moriya (1987 & 1988).
48) Article 318 of the Code provides, "The probative value of evidence shall be left to the free discretion of judges."
49) With respect to confessions, other major loopholes include so-called "voluntary accompaniment" (un'n dōkō) and "arrest on other charges" (bekken taiho). These are discussed in some detail in Poote (1991). Other examples abound, with regard to arrest, search and seizure, and many other facets of the criminal justice process.
53) See, e.g., Hirano (1989: 137 (noting, but criticizing, such attitudes)).
55) See, e.g., Takano (2002).
57) See, e.g., Repeta (2009). As Repeta notes, the Ministry of Justice recently commenced selective recording of portions of questioning sessions, on an experimental basis. Typically, however, the recording is limited to the confession at the conclusion of the questioning process; from this, one cannot observe the actual circumstances of the questioning.
58) In the saibon'in system, lay jurors deliberate together with professional judges on sentencing as well as determination of guilt. So as to provide guidance for lay jurors, the judiciary reportedly has undertaken compilation of a database, showing typical sentencing ranges for various types of cases in recent years.
60) S.Ct. (3d P.B.), Judgment of April 19, 2005 (Japan v. Jōsha), 59 Minshū 563. In this case, the Court found illegality in the denial of a requested meeting, based on the unavailability of any room in which the confidentiality of communications between suspect and counsel could be ensured, where the prosecutors had not ascertained whether suspect and counsel were willing to meet despite the inability to ensure confidentiality.
61) This discussion relates only to defendants. Suspects have no legal right to bail until after indictment.
63) Both views are discussed in Matsumoto (2006: 146–47), and Kawade (2009: 113).
65) The two cases that have received the most attention are the *Shibushti* case (Kagoshima Dist Ct., Judgment of Feb. 23, 2007) and the *Ashikaga* case (Tokyo H. Ct., Ruling of June 23, 2009). In the former, the Kagoshima District Court acquitted twelve defendants of vote-buying charges, criticizing the confessions as the product of police coercion. In the latter, the Tokyo High Court ordered the opening of a retrial after new DNA tests showed the original conviction to have been in error; further scrutiny revealed numerous defects in the original investigation and subsequent handling of the case.

66) Murayama, of course, was merely reporting that perception, not agreeing with it.

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(Professor, The University of Tokyo)