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Book Review: Policing Japan

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BOOK REVIEW

POLICING JAPAN

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POLICING IN JAPAN: A STUDY ON MAKING CRIME. By *Setsuo Miyazawa*, translated by Frank G. Bennett, Jr. [with] John O. Haley. State University of New York Press 1992. Pp. 267.

Professor Setsuo Miyazawa's *Policing in Japan: A Study on Making Crime*[1] represents a very valuable addition to the growing body of English-language works on the Japanese police. This is the first such observational study of the police by a Japanese scholar and the only study to examine the behavior of Japanese detectives.[2] Miyazawa, a professor at Kobe University and one of the leading legal sociologists in Japan, has buttressed his own observations with an extensive, and revealing, questionnaire survey of police attitudes.

Miyazawa conducted the study underlying this book in 1974, when he was a doctoral candidate at Hokkaido University. After completing his dissertation, he published it first in a series of law review articles and then as a book in Japanese in 1985.[3] *Policing in Japan* is the English-language version of that work (ably translated by Frank G. Bennett, Jr.). Despite the passage of nearly twenty years since Miyazawa's initial study, the fundamental features of Japanese criminal procedure law remain essentially unchanged, and there is little reason to think that police attitudes have shifted in any

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1 SETSUO MIYAZAWA, POLICING IN JAPAN: A STUDY ON MAKING CRIME (Frank G. Bennett, Jr. with John O. Haley trans., State University of New York Press 1992) (1985).

2 Another Japanese scholar, Masayuki Murayama, conducted an observational study of patrol police in the Tokyo area in 1977 and 1978, and published his findings in Japanese in 1990, under the title KEIRA KEISATSU NO KENKYŪ [A STUDY OF PATROL POLICE].

3 *See* MIYAZAWA, *supra* note 1, at xv.

major way. Thus, Miyazawa's observations continue to ring true today. Moreover, in preparing the English-language version, Miyazawa has substantially revised the earlier work and has supplemented it both with background information essential to a foreign readership unfamiliar with Japanese law and with information on more recent developments.

Miyazawa speculates that one of the reasons he was the first Japanese scholar given permission to conduct a study of this nature may have been the fact that he was still young (and presumably unpublished), and that the police therefore may have thought he "might become a police sympathizer."[4] If so, the police were sorely mistaken. Miyazawa reports that "it became the focus of my research to find situations where the procedure-minded supervisors would deviate from their own principles under [the] pressure [to improve their statistics], where the precarious balance of due process and crime control would be broken in favor of the latter."[5] In deciding whether to treat a particular police action as "questionable" or not, Miyazawa chose "to make the standard of questionability quite low and concentrate on whether an action arouses even slight debate or doubt."[6]

Miyazawa succeeded in his aim of showing that the Japanese police engage in aggressive investigations. In one case he observed, detectives held a bar hostess—whose complaints of illness, it turned out, were true—in a police holding cell for sixteen days. They repeatedly questioned her for hours at a time throughout that period as they sought to get her to confess to numerous thefts.[7] In another case, police subjected an arson suspect to intense interrogation throughout an entire month during which he was held at the police station.[8] Miyazawa thus provides detailed real-life examples of the careful interrogation of suspects which, despite the stated existence of a right to silence in Japan's Criminal Procedure Code,[9] is a stan-

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4 *Id.* at 31.

5 *Id.* at 34.

6 *Id.* at 101.

7 *Id.* at 57-67.

8 *Id.* at 67-89.

9 KEIJI SOSHŌHŌ (Code of Criminal Procedure), Law No. 131 of 1948 [hereinafter CODE CRIM. P.]. Following World War II, Japan's existing Code of Criminal Procedure, which was based heavily on a German model, was thoroughly revised under Occupation influence. In addition, the Occupation insisted that the new postwar Constitution, KENPŌ [hereinafter CONST.], contain a series of basic rights for criminal suspects and defendants. Largely based upon American principles, the postwar reforms included strengthening warrant requirements for both arrests and searches, establishing broad limits on searches and seizures, instituting a privilege against self-incrimination, prohibiting the use of coerced confessions at trial, and strengthening the adversary system. *See*

dard feature of actual Japanese criminal investigations. Moreover, Miyazawa supplemented his own observations with descriptions of numerous recent scandals involving the police, including the illegal wiretapping of the phone of a Japan Communist Party official and cases involving the bribing of police officers.[10]

By examining these darker aspects of the Japanese police system, this book serves as an important and sobering counterweight to the positive assessments of the Japanese police contained in most other English-language materials on the subject.[11] Yet, given Miyazawa's stated aim of uncovering questionable practices by police, coupled with his decision to treat as "questionable" any action that "arouses even slight debate or doubt," to American readers the key question may not be why there are so many questionable practices by Japanese police, but why there are not far more. This is particularly true when one takes into account the social setting Miyazawa describes.

According to Miyazawa, the Japanese police system internally places primary emphasis upon achieving high clearance rates.[12] Police officers are commended and rewarded for solving large numbers of crimes efficiently. Success in clearing crimes might lead to the coveted goals of promotion (including promotions from patrol to detective status) and transfer to a desirable location (such as the Eastern District of Sapporo, where Miyazawa conducted his study). In contrast, says Miyazawa, "procedural compliance was not rewarded."[13] Nor, presumably, as he makes no mention of any such instance in the cases he observed, were detectives punished for violating procedural rules. Moreover, detectives apparently do not even view the possibility of such penalties as a danger. According to Miyazawa, "observational data clearly indicates that the detectives

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generally Richard B. Appleton, *Reforms in Japanese Criminal Procedure under Allied Occupation*, 24 WASH. L. REV. 401 (1949). For a discussion of how the impact of certain of these reforms has been limited in practice, *infra* notes 38-47 and accompanying text.

[10] MIYAZAWA, *supra* note 1, at 5.

[11] The growing body of literature on crime prevention and policing in Japan includes: WILLIAM CLIFFORD, CRIME CONTROL IN JAPAN (1976); WALTER L. AMES, POLICE AND COMMUNITY IN JAPAN (1981); L. CRAIG PARKER, JR., THE JAPANESE POLICE SYSTEM TODAY: AN AMERICAN PERSPECTIVE (1984); DAVID BAYLEY, FORCES OF ORDER: POLICING MODERN JAPAN (1991); TED D. WESTERMANN & JAMES W. BURFEIND, CRIME AND JUSTICE IN TWO SOCIETIES: JAPAN AND THE UNITED STATES (1991); and ROBERT Y. THORNTON & KATSUYA ENDO, PREVENTING CRIME IN AMERICA AND JAPAN: A COMPARATIVE STUDY (1992). Ames, Parker, Bayley, and Thornton and Endo base their work in substantial part on observations of the police.

[12] Miyazawa cites statistics from 1985, showing a clearance rate for major crimes of 64.2% in Japan, as compared with 20.9% in the United States and 47.2% in then-West Germany. MIYAZAWA, *supra* note 1, at 13.

[13] *Id.* at 216.

believe that they are evaluated solely in terms of investigative efficiency, and that procedural compliance does not count at all."[14]

What then of external constraints on police behavior? Miyazawa considers four possible sources of external oversight: defense counsel; prosecutors; judges; and the public, as represented by the mass media. For varying reasons, he concludes as to all four that "expectations and controls from these sources work mainly to demand, excuse, or ignore aggressive investigative action."[15]

As Miyazawa observes, indigents in Japan are not entitled to defense counsel until indictment, after the investigation has been completed. Even where suspects with sufficient means have retained attorneys at the investigation stage, he reports, the attorneys typically do not aggressively challenge police investigative activities. For these reasons, he concludes, "attorneys are not taken very seriously by supervisors and detectives . . . in ordinary cases [and] do not have a great impact upon the operation of criminal investigation."[16]

Regarding prosecutors, Miyazawa describes an ambiguous oversight role. Although prosecutors frequently caution police to exercise restraint in their investigations (and on occasion reinforce the message by refusing to file warrant requests or to indict suspects in cases where they believe the police have overstepped appropriate bounds), they often send precisely the opposite message by requesting the police to obtain more thorough confessions and other evidence. "To the detectives," Miyazawa observes, "[these requests for more evidence mean] longer detention of the suspect [,] tougher interrogation . . . [and] . . . longer and more aggressive investigations. . . ."[17]

As described by Miyazawa, the views of the public and the mass media, while also somewhat ambiguous, on the whole operate to condone and even encourage aggressive investigations. Occasional incidents, such as the wiretapping and bribery cases mentioned earlier, have provoked widespread condemnation in the Japanese press.[18] Yet, as Miyazawa reports, the much more dominant tone in

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14 *Id.* at 213.

15 *Id.* at 217.

16 *Id.* at 219. Of course, even if defense counsel do not file immediate challenges at the investigation stage, they might still play a valuable oversight role by challenging use of the results of the investigation at trial or filing other claims against questionable police conduct. Miyazawa only touches on this possibility, but he implies that defense counsel typically do not aggressively pursue these avenues either. This in turn may relate to the low likelihood of success even if they were to do so.

17 *Id.* at 222.

18 *Id.* at 5.

media coverage favors aggressive investigative activities, including tough interrogation of suspects. As an instructor at the police academy observed, "[the police in a popular television show] engage in illegal investigations as a matter of course. Nonetheless they are accepted by the public."[19] Moreover, the media seldom question the police about procedural improprieties and routinely press the police to exert greater efforts to solve major crimes—frequently criticizing suspects for "hiding behind" the right to silence and exhorting the police to "get the suspect to confess."[20]

This leaves judges as the remaining possible outside guardians of procedural standards. Miyazawa writes that "Japanese detectives are strongly concerned with . . . judicial behavior, especially in a case on which they are personally working."[21] He describes instances in which detectives voiced concern over possible judicial rejection of applications for warrants and detention because the detectives felt that their activities had come close to the legal limits.[22] Yet the courts never denied the applications in those cases. This suggests, Miyazawa says, that either the courts did not know the actual circumstances of the cases or chose to overlook the "problematic elements."[23] Given these circumstances, he concludes, "detectives see no significant threat in judicial control."[24] In fact, he reports, concern over judicial scrutiny operated in a quite different manner: Detectives believe that the courts place primary emphasis on substantive aspects of the case, such as the contents of confessions and their consistency with other evidence, rather than procedural matters. This belief "serves to promote longer, more aggressive investigations and interrogations."[25]

In sum, according to Miyazawa, the internal incentive structure for the Japanese police favors aggressive investigations and con-

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19 *Id.* at 227.

20 As examples, Miyazawa cites several headlines, including: "Man runs and hides; Cafeteria operator arrested; Pretends ignorance at interrogation." *Id.* at 228.

Another headline in the same vein involved the case of Kazuyoshi Miura, who was suspected of having had his wife killed for insurance money. He was arrested (initially on a charge of conspiracy in an earlier attack on his wife by his girlfriend) but refused to talk. Even though the right to silence is recognized by Japanese law, media coverage centered on how Miura could be forced to confess. A typical headline that appeared in a popular news magazine read: "This Is the Way I'd Bring Down the 'Pro of Evil' Who Won't Confess." Daniel H. Foote, *Confessions and the Right to Silence in Japan*, 21 GA. J. INT'L & COMP. L. 415, 467 n.245 (1991).

21 MIYAZAWA, *supra* note 1, at 223.

22 *Id.* at 53, 55-57, 65, 69, 192-93.

23 *Id.* at 225.

24 *Id.*

25 *Id.*

dones procedural improprieties. Defense counsel are lax and ineffective. Police supervisors, prosecutors, and judges all give lip service to procedural niceties but then demand thorough and intensive investigations. Finally, the public and mass media clamor for the police to solve crimes and obtain confessions, and rarely criticize police for overstepping their bounds (and then typically only if it turns out that an innocent person was wrongly accused or convicted). Given this setting, one might expect Japan to be both rife with procedural violations by police and largely bereft of any concern for the formal procedural standards contained in the Constitution and the Code of Criminal Procedure—which, in keeping with an American model under the influence of the Occupation, include strict warrant requirements, protections against unreasonable searches and seizures, an express right to silence and prohibition against use of non-voluntary confessions, and a strong adversary system.[26]

Despite Miyazawa's emphasis on uncovering "questionable" activities by police detectives, his factual observations for the most part belie the image of a police force out of control. It comes as little surprise that Miyazawa saw no evidence of physical abuse. It seems highly unlikely that police would engage in physical abuse in the presence of an academic observer; and, given the code of silence that would undoubtedly apply,[27] it would be very difficult to learn of such abuse otherwise, even if it were widespread (and most other observers agree with Miyazawa's findings that it is not[28]). Still, Miyazawa's account reveals that attention to procedural niceties runs far beyond simply eschewing the rubber hose.

Training in applicable procedural standards begins at the police academy. There, Miyazawa notes, "heavy stress is laid upon respect

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26 *See, e.g.*, Appleton, *supra* note 9; Atsushi Nagashima, *The Accused and Society: The Administration of Criminal Justice in Japan*, *in* LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 297 (Arthur T. von Mehren ed., 1963). For a comprehensive treatise on Japanese criminal procedure, see SHIGEMITSU DANDO, JAPANESE CRIMINAL PROCEDURE (1965). Although each of the above materials is over a quarter-century old, the fundamental concepts and interpretations have remained remarkably stable.

27 Miyazawa recounts a conversation with a police supervisor who proudly described how strict obedience is in the Japanese police force: "If I gave just one word, it would be a piece of cake to cover up the truth from you." Of course, the supervisor went on to assure Miyazawa that he would never give such an order. MIYAZAWA, *supra* note 1, at 183.

28 *See, e.g.*, AMES, *supra* note 11, at 134-37; BAYLEY, *supra* note 11, at 1-4, 52-53; Ryūichi Hirano, *Diagnosis of the Current Code of Criminal Procedure*, 22 LAW IN JAPAN 129, 137 (1989). *But see* Igarashi Futaba, *Forced to Confess*, *in* DEMOCRACY IN CONTEMPORARY JAPAN 195, 196-205 (Gavan McCormack & Yoshio Sugimoto eds., 1986) (alleging widespread physical abuse and harsh treatment).

for procedure."[29] He even describes one instance in which an instructor went well beyond what Japanese Supreme Court precedent requires. The precedent in question was a 1961 decision involving a search incident to arrest. In that case, police went to a house, ostensibly to arrest a suspect for selling drugs. The suspect was not home, but the police went ahead and searched the entire house while waiting for him to return, and then arrested him. The Supreme Court upheld the search, holding that a search incident to arrest may take place even before the arrest, and even if the suspect is not yet present. Although that decision presumably remains good law today, the instructor, after explaining the case, flatly stated, "this holding is unreasonable."[30] While the instructor may have drawn the proper conclusion, his teaching scarcely suggests an aggressive desire to take advantage of every investigative tool the courts are willing to recognize.

As Miyazawa points out, the most important question is not what is taught at the academy, but what happens in actual practice. But on the streets as well as in the classroom, the police Miyazawa observed showed considerable restraint. Although Miyazawa observes that supervisors on occasion encourage detectives to undertake aggressive investigations, he repeatedly notes that, in the district he observed, supervisors were on the whole very concerned with observing applicable procedural standards. "An ideal detective not only must master regulations, one supervisor says, but he also must be conservative and precise with respect to procedures."[31] Similarly, Miyazawa quotes the following admonition from a supervisor to his subordinates: "Even things which are not illegal may cause trouble if they are inappropriate. You must act rationally, legally, appropriately. I want you to pay constant attention to these points."[32]

As these quotations reflect, supervisors normally take a relatively conservative approach to procedural standards, rather than pressing prior precedent to the limit. This bears particular note, given the rather common pattern of so-called *kyūsai hanketsu* (literally, "relief judgments") by Japanese courts dealing with criminal procedure issues. The relief judgments are in essence a form of judicial jawboning. In a typical formulation, a court will state that a certain investigative practice—for example, asking a suspect to come to the police station "voluntarily" late one evening and pro-

29 MIYAZAWA, *supra* note 1, at 128.
30 *Id.* at 119.
31 *Id.* at 196.
32 *Id.* at 200.

ceeding to question him all night and half the next day, or arresting a suspect on a minor crime such as assault and then questioning about an unrelated major crime such as murder—is not illegal, but comes close to the limits of acceptability and is "inappropriate" or "undesirable." No evidence is excluded, and the conviction remains intact, but the court sends a message to police and prosecutors that such activity should be avoided in the future. One could easily imagine that police might either ignore such a decision, treating it as mere *dictum* at best, or even regard it as a license to engage in such activity freely in the future, since the court concluded that the activity was not illegal. Miyazawa's account suggests, however, that police supervisors take these decisions seriously in determining the limits of appropriate police behavior.

Miyazawa makes clear, moreover, that the supervisors' statements went beyond mere lip service. After noting reports of lax supervisor oversight of police detectives in the United States and Canada, Miyazawa states that the situation in Japan is quite different. The supervisors he observed routinely reviewed detectives' requests for warrants and criticized (and on occasion rejected) them if they failed to meet procedural requirements, kept close watch over the investigative techniques used by detectives, and oversaw interrogations based on detailed progress reports. Miyazawa concludes that "even if complete control is impossible, supervisors strive mightily to maintain correct procedures," and adds: "Most supervisors I observed were very conscientious in maintaining close supervision."[33]

The detectives Miyazawa observed were not as concerned with procedural niceties as their supervisors, and he reports rather widespread frustration among detectives over procedure-minded supervisors who failed to appreciate the practical needs of investigators. Nonetheless, the cases he describes and his survey results disclose that, while not always exercising procedural restraint, detectives paid close attention to a wide range of procedural matters.[34] Given

[33] *Id.* at 202.

[34] For example, detectives typically exercised great care in deciding whether to undertake an arrest, *id.* at 55-56, 59; expressed great caution regarding the use of any physical force—even grabbing the arm of a suspect, *id.* at 108, 116, 246 (Items 86, 102); and kept careful track of the amount of time that elapsed after a suspect voluntarily appeared at the police station (apparently out of concern that the courts would focus on that fact, even though the law contains no express limit on the duration of consensual questioning). *Id.* at 107-08. Despite widespread agreement among detectives concerning the importance of securing confessions, fewer than ten percent felt it proper to promise leniency or other favors in return for a confession or to continue questioning into the middle of the night. *Id.* at 249-50 (Items 369, 370, 378). Moreover, with regard to nearly every category of investigative activity, the survey revealed a perception among

all the apparent incentives in the system for ignoring procedural details, and the apparent absence of any effective mechanisms to prevent such behavior, it is surprising to find that the detectives cared as much about the procedural rules as Miyazawa found.

As Miyazawa suggests, one possible explanation for this level of concern may relate to the district he was observing.[35] He reports that the district had a reputation for being especially procedure-conscious (which, he hypothesizes, may be one of the reasons he was permitted to observe it).[36] Yet there is nothing to suggest that the district was different in kind, rather than simply degree, from other regions of Japan.[37]

A second possibility is that Miyazawa has underestimated the impact of internal constraints on detective behavior. He observes that compliance with procedural standards was not rewarded and implies that procedural violations went unpunished. However, when I asked a Japanese prosecutor what would happen if a police detective repeatedly violated procedural requirements, he immediately replied that the detective would be demoted and would go back on the beat. Rereading Miyazawa with that comment in mind, I find hints of just such an attitude. Miyazawa notes that prosecutors at times refused to seek detention warrants or declined to prosecute cases because of procedural irregularities by police. He quotes a police supervisor who, in sharply criticizing mistakes in investigation papers prepared by his subordinates, emphasized the impact on the police station's reputation. That supervisor stated: "The [headquarters] Detective Bureau chief meets with the prosecutor four times each month. And if papers are prepared carelessly for the prosecutor, he's going to tell the chief that [this station] is hopeless."[38] Given these concerns over proper observance of rules, coupled with the degree to which supervisors actively monitor procedural compliance by detectives, it is hard to believe that repeated procedural violations would not subject a detective to some form of internal sanction.

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most detectives that judicial scrutiny has become stricter, which suggests that the detectives felt the need to exercise considerable care over proper procedures. *Id.* at 124-26, 137.

35 *Id.* at 32.

36 *Id.* at 32, 233.

37 In fact, if transfers work in the manner Miyazawa describes—largely as rewards for successful performance—and if all that really counts is high clearance rates, with little regard for procedural compliance, *id.* at 214, 234, one might expect this district, which was regarded by the police as a desirable posting, to have had more than its normal share of free-wheeling, aggressive investigators.

38 *Id.* at 201.

Without doubt the single largest reason for the relative absence of procedural violations, though, lies in what Miyazawa refers to as the "enabling legal environment." For most cases, the Code of Criminal Procedure itself, and the manner in which the courts have interpreted its provisions, provide police with ample tools to conduct thorough investigations, including intensive interrogation of suspects, without violating procedural requirements. As Miyazawa says, "The formal legal system in Japan provides detectives with so many advantages that they rarely need to resort to obviously illegal tactics."[39]

Perhaps the clearest example of this enabling environment lies in provisions that, as interpreted by the courts, permit police to conduct custodial interrogation of suspects for up to twenty-three days following their arrest before the prosecutors must decide whether to indict.[40] A cursory reading of the Constitution and Code might lead one to believe that there are numerous limitations on use of the twenty-three-day period for questioning by police. Among these apparent limitations are the following: suspects appear to enjoy the right to silence (of which they must be notified)[41] and the right to counsel;[42] the stated reasons for detention are to prevent flight and destruction of evidence—not to investigate the suspect;[43] and the case must be transferred from the police to the prosecutors after

39 *Id.* at 25.

40 This period consists of 48 hours before the police must transfer the case to the prosecutors, CODE CRIM. P. art. 203(1); 24 more hours before the prosecutors must either release or seek a warrant to detain the suspect, *id.* art. 205(1); and up to 20 days of detention before an indictment must be filed. *Id.* art. 208.

41 CONST. 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."); CODE CRIM. P. arts. 198(1) (When necessary for an investigation, the police "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."), 198(2) ("In the case of questioning under the preceding section, the suspect shall be notified in advance that he need not answer any question against his will."), 291 (at trial, "[a]fter 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"), 311 (accused may be silent throughout trial), 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.").

42 CONST. art. 34 ("No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel."); CODE CRIM. P. arts. 203 (Upon arrest, the police "shall immediately inform the suspect of the essential facts of the crime and the fact that he is entitled to select defense counsel."), 272 ("Upon the institution of prosecution, the court shall notify the accused without delay that he may appoint counsel and that he may request the appointment of counsel when he cannot do so because of poverty or other causes.").

43 CODE CRIM. P. art. 60.

just two days—not twenty-three.[44] In practice, however, courts have accepted the police position that, by negative implication from a provision stating that suspects who are not under arrest or in detention may leave at any time,[45] suspects who have been arrested or detained have a duty to "submit" to questioning.[46] Suspects need not answer any questions, but they have no choice but to sit there and listen. The Constitution guarantees that suspects are entitled to the immediate privilege of counsel upon arrest, but only if they can afford to retain an attorney.[47] Under another Code provision, meetings with counsel may be conditioned on the needs of the investigation.[48] This provision has been used to sharply limit meetings with counsel in cases police or prosecutors regard as difficult, and even to prohibit meetings altogether throughout the early stages of interrogation. And the courts have never recognized the right to have counsel present during questioning. By implication from these and other provisions of the Code, courts consistently condone the use of the 23-day period for questioning.[49] Finally, while the "case" must be transferred to the prosecutors after two days, the suspect need not be. Suspects are frequently detained in police holding cells, where they are readily available for questioning by police, throughout the 23-day period.[50] Given these and similarly enabling standards with regard to search and seizure and other investigative techniques, Japanese police may undertake aggressive investigations in most cases without ever facing questions of illegality, so long as they exercise some care in preparing the cases properly.

With this enabling environment in mind, some reexamination of the dividing line between aggressive investigations and legally questionable behavior may be warranted. Miyazawa's examples of questionable behavior include activities expressly upheld by the Supreme Court—such as post-indictment questioning of suspects

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44 *Id.* at art. 203(1).

45 *Id.* at art. 198(1). *See supra* note 41 for a quotation.

46 *See, e.g.*, HIROSHI TAMIYA, KEIJISOSHŌHŌ [CRIMINAL PROCEDURE LAW] 126-27 (1992). Some commentators agree with this interpretation, but currently most academics argue that suspects should have no duty to submit to questioning. *Id.* For a discussion of this debate, see Foote, *supra* note 20, at 435-36.

47 *See supra* note 41.

48 CONST. art. 39(3) (Prosecutors and police may, "when necessary for the investigation, designate the place, date and time" of meetings with counsel.). For a further discussion of this issue, see Hiroshi Tamiya, *On the Designation of Communication with Counsel*, 4 LAW IN JAPAN 87 (1970); Kazuo Itoh, *On Publication of the "Citizens' Human Rights Reports"*, 20 LAW IN JAPAN 29, 54-61 (1987); Foote, *supra* note 20, at 432-34.

49 *See, e.g.*, Foote, *supra* note 20, at 429-36, 440-53, 455-58, 462-64, and cases and materials discussed therein.

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

and use of physical restraints to stop a suspect from running away during so-called "duty questioning." From an American due process mindset, many of these activities appear questionable; but in view of the Japanese Supreme Court's precedent, it is probably unfair to fault the police for questionable behavior in this regard.[51]

That is not to say that Japanese police detectives are gentle and deferential to the personal autonomy of suspects. Miyazawa's observations convincingly demonstrate otherwise. But, as Miyazawa ultimately concludes, the blame for this state of affairs (or the credit, depending on one's viewpoint) does not lie entirely, or even primarily, with the police, but rather with the prosecutors, courts, and ultimately the legislature and the public, that have created and supported the existing system. In fact, one of the most interesting aspects of Miyazawa's study is his identification of instances in which prosecutors and courts may have encouraged the police to engage in aggressive behavior.

The concept of "voluntary" investigations, for example, may encourage aggressive questioning of suspects. Police state that "arrest is for the guilty" and are reluctant to arrest until they have a full confession.[52] Courts seem to agree and have construed the notion of "consent" or "voluntariness" so broadly that it permits much questioning without probable cause. In the most extreme case to date, the so-called *Takanawa Green Mansion Case*,[53] the Supreme Court concluded that police actions did not exceed the bounds of voluntariness, and that the resulting confession was therefore consensual. Four police officers picked up a murder suspect one morning as he was leaving his company dormitory. Upon getting his consent, they took him to a police station, where they questioned him from morning until late at night for four consecutive days, arranging his lodging on the intervening nights (with police occupying the adjoining room the first night). The suspect finally left the station only after his mother came to Tokyo from the family home in another prefecture and signed a statement assuring police that she would take responsibility for her son.[54]

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[51] In these instances, Miyazawa bases his determination of questionability on the existence of isolated district court opinions rejecting the activities in question (based on the specific facts involved). For example, after acknowledging Supreme Court precedent permitting physical restraint of a suspect who seeks to run away, Miyazawa points to a single district court decision that had found such physical restraint illegal, then concludes, "Depending upon the circumstances . . . there is *a possibility* that similar actions will be held illegal." MIYAZAWA, *supra* note 1, at 114 (emphasis added).

[52] *Id.* at 105.

[53] Ikuhara v. Japan, 38 Keishū 479 (1984), *discussed in* Foote, *supra* note 20, at 448-53.

[54] *Id.*

In upholding the voluntariness of this investigation, the Supreme Court noted the gravity of the crime and the degree of suspicion, as well as the fact that there was no evidence *in the record* to indicate that the suspect had ever asked to leave the police station. The Court also emphasized that this case came very close to exceeding permissible limits (with two of the five Justices who considered the case finding that it in fact had exceeded those limits).[55] If the limits extend this far, however, police obviously have considerable room within which to operate without approaching the bounds of illegality. Although the courts do not force the police to proceed on a voluntary basis rather than through arrests, judicial willingness to accept even rather intrusive conduct as "voluntary" appears to represent tacit encouragement to police to proceed in this manner, even if the police may lack probable cause.

The very notion that voluntary questioning is a substitute for arrest, moreover, reflects the assumption that interrogation of the suspect is an integral part of all arrests and investigations. That assumption in turn rests on the view that confessions are a central element of the Japanese criminal justice system.[56] Although the courts routinely inform defendants of their right to remain silent, it is clear that judges expect the police and prosecutors to have obtained full confessions before instituting prosecution.[57] Convictions based solely on circumstantial evidence, without confessions, are still rare enough to warrant headlines in major case reporting services. The courts are not satisfied with simple admissions of the "I did it"-type, either. Even in routine, uncontested cases, the police and prosecutors typically prepare several confession statements, totalling fifty pages or more, during the course of the investigation. In more complicated cases, the confession statements may reach hundreds of pages. At least in major or contested cases, courts typically scrutinize very carefully the contents of these confession statements. They are not verbatim accounts, but rather are summaries prepared by the police or prosecutors, typically after several hours or even days of questioning. In their review, courts look for thorough and convincing confessions: confessions that cover all major details of

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55 *Id.*

56 *See, e.g.*, Haruo Abe, *Police Interrogation Privileges and Limitations Under Foreign Law: Japan*, 52 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 67, 67-69 (1961) (describing importance of obtaining confessions); Keiji Yonezawa, *Higisha no torishirabe [Questioning of Suspects]*, 537 HANREI TAIMUZU 61, 61 (1984) ("[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.").

57 *See, e.g.*, Hirano, *supra* note 28, at 135-37; Foote, *supra* note 20, at 440-64, and cases and materials discussed therein.

the crime, the defendant's motives and intent, and even the defendant's background and character; that do not contain too many shifts or inconsistencies with the physical evidence and that reveal secrets that only the real criminal would know.

Not surprisingly, prosecutors and police construe this judicial expectation of near-perfect confessions as a basic demand. Miyazawa quotes one organized crime detective's statement that "courts and prosecutors require confessions even if there is evidence," then adds: "When a prosecutor refused to indict in one case, an organized crime detective remarked, 'I wonder if the real reason wasn't because there was no confession. No matter how solid your proof is, I guess without a confession they won't indict for you.' "[58] A constant theme throughout Miyazawa's case studies is the desire of the police to obtain thorough confessions. For the most part all the investigative tools he describes—voluntary appearances, arrest, detention, and even search and seizure—are viewed as means to the end of securing full confessions.

In one significant respect, judicial standards for evaluating the credibility of confessions may have helped perpetuate an investigative pattern that has come under great criticism in recent years: seeking a confession early in the investigation, without conducting a full investigation of other evidence, then collecting corroborating evidence based on information obtained directly from the suspect. Critics have observed that this practice may lead to mistaken convictions stemming purely from the hunches of police officers and have claimed that the practice is primarily a matter of convenience for the police, since it is often far easier for them to proceed in this manner than to try to find the other evidence themselves.[59] As Miyazawa's interviews reveal, however, the courts' own review standards help perpetuate this practice. One of the key criteria used by the courts in evaluating credibility is whether a confession reveals any secrets known only by the offender. As a result, Miyazawa reports: "Detectives as a policy do not collect too much evidence before the confession. [As a detective stated in one case], 'If we run a complete investigation at the scene, there will be a question of whether we have gotten a statement that conforms to our own preconceived

58 MIYAZAWA, *supra* note 1, at 159.

59 *See, e.g.*, KŌICHIRŌ YOKOYAMA, GOHAN NO KŌZŌ-NIHONGATA KEIJI SAIBAN NO HIKARI TO KAGE [THE STRUCTURE OF MISTAKEN CONVICTIONS-THE BRIGHT AND DARK SIDES OF JAPANESE-STYLE CRIMINAL TRIALS] 11-22 (1985) (concluding that in the great majority of cases the Japanese system works well, but that there are few effective checks when police proceed on hunches).

ideas.' "[60] Thus, the judiciary may inadvertently be influencing police to maintain investigative practices that focus on confessions first, physical evidence later.

While the basic tenor of judicial opinions is to support the importance of confessions, Miyazawa's study shows that the courts, at least in lower court opinions, frequently criticize the police's deliberate use of subterfuge and pretext. The most frequently cited example involves so-called "arrest for another crime"—a pattern in which police arrest a suspect for one crime, typically a minor crime, and then use the bulk of the ensuing 23-day period of custody to question the suspect about some other crime for which police lack probable cause.[61] As Miyazawa discusses, a similar pattern exists in the search and seizure area, with police at times securing a warrant to search for evidence of one crime on which they possess probable cause, but with the true aim of finding evidence of a second, typically more serious crime, on which they will then proceed to arrest and interrogate the suspect.[62]

Miyazawa's observations and survey reveal widespread recognition among detectives and supervisors of the problematic nature of such use of pretext.[63] Nonetheless, the interviews and case studies disclose that detectives deliberately utilize these techniques, at least when they feel the circumstances demand. Despite the supervisors' professed adherence to procedural standards, Miyazawa reports that at least for this category of investigative activities, supervisors sometimes push detectives to bend the rules.[64]

This use of pretext, then, may represent one area in which Miyazawa's characterization of police practices as "questionable" is accurate, even in the enabling legal environment he describes. Still, it would be useful to know how often and, in particular, in what types of cases the activities in question occur. Miyazawa's case studies suggest that such pretexts are most frequently used by detectives, and condoned or even encouraged by supervisors, in cases that meet each of three separate conditions: (1) there are strong suspicions (albeit short of probable cause) about a particular suspect; (2) the case involves either a serious crime, a crime that is difficult to prove (such as bribery), or a series of several thefts or other crimes; and (3) the suspect refuses to cooperate in the investigation.

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60 MIYAZAWA, *supra* note 1, at 159.

61 For a discussion of the academic debate and judicial precedent on the "arrest for another crime" issue, see Foote, *supra* note 20, at 440-45.

62 MIYAZAWA, *supra* note 1, at 122.

63 *Id.* at 69, 191-92.

64 *Id.* at 122, 129, 198.

If that is in fact the pattern in which pretext is utilized, a strong argument can be made that the police Miyazawa observed were not only acting within the limits permitted by judicial precedent, but in fact were doing precisely what the Japanese courts seem to be signalling. In determining whether certain types of police action are permissible, Japanese courts in a wide range of cases have utilized a broad balancing test, weighing the perceived needs of the investigators against the interests of the individual. The courts frequently cite factors such as the degree of suspicion, the gravity and nature of the crime, and the "need" for prompt questioning. In this vein, Miyazawa quotes one judge who states that "some investigations can be permitted as lawful voluntary investigations even when the suspect does not consent," arguing that difficult-to-prove cases such as bribery and election law violations could not be prosecuted otherwise.[65] Thus, if the Sapporo police detectives were arresting on a different—but valid—charge or were searching for evidence of a different crime—but with probable cause, and if they truly had strong suspicions of involvement in a serious crime or in multiple crimes and reasonably believed that custodial interrogation would aid in the investigation, they may have been doing exactly what most Japanese courts want.

CONCLUSION

Miyazawa's study clearly reveals that there is another side to the Japanese police from the *omawarisan*—the kindly patrolman walking the beat or sitting in the police box—that has permeated most American images of Japanese police until now.[66] As his research shows, the Japanese police routinely engage in aggressive investigations, often accompanied by long and intense interrogation of suspects, and at times utilize techniques of at least questionable legality in achieving their aims.

Based on Miyazawa's own data and case studies, though, one can construct a picture quite different from that of a largely uncontrolled police force "making crime" that one might infer from his title and much of the rhetoric in the book. Under this alternative interpretation, the Japanese police for the most part carefully observe the existing procedural standards and truly attempt to conform their behavior to the law, as it has been interpreted by the

65 *Id.* at 238.

66 All of the English-language sources cited *supra* note 11 offer a generally positive picture of the Japanese police. AMES, *supra* note 11, at 17-55; BAYLEY, *supra* note 11, at 11-51; and PARKER, *supra* note 11, at 44-79, provide extensive accounts of the police walking the beat and interacting with the community.

courts, without seeking to push every judicial precedent to the limit. And while the procedural standards are highly enabling, judicial interpretations and police practice alike utilize a balancing approach, with the cases falling along a continuum.

On this view, the low end of that continuum consists of cases in which the crime is not especially serious, suspicion is relatively low, or the suspect is generally cooperative. In those cases, the appropriate police response is a "voluntary investigation" in which the suspect is given the opportunity to explain him- or herself without facing the stigma of an arrest.

The middle range of the continuum includes at least moderately serious crimes where the detectives have probable cause for either an arrest or a search for evidence of the crime in question. For this range of cases, supervisors do not treat failure to comply with applicable procedural standards as acceptable. Rather, where detectives could achieve their investigative aims without bending the rules, supervisors would insist that they do so.[67] This category probably contains most of the cases Miyazawa observed in which supervisors sharply criticized the procedural failings of detectives.

The top end of the continuum consists of serious crimes where suspicion of a particular suspect is high but the suspect refuses to cooperate. Miyazawa's case studies suggest that decisions on how to treat cases in this last stage in the continuum are not made lightly. Supervisors screen the cases carefully and examine whether there are other alternatives before approving an escalation in strategy. Where the police conclude they have no other choice,[68] though, for this class of cases, detectives are willing to bend the rules. Their supervisors condone or even encourage the action, the prosecutors and judges look the other way or declare that the police activity was justified "in light of all relevant circumstances," and the mass media, if it mentions the case at all, voices its approval. This state of affairs holds unless and until a case arises in which it turns out that

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[67] For these cases, detectives still might opt to provide the suspect with the opportunity to proceed voluntarily, without arresting him or her. Miyazawa's observations reveal that detectives frequently obtained proper arrest warrants first, and simply chose not to execute them if the suspect complied voluntarily. This apparently did not mean that the police in those cases were using the voluntary appearance as a means for evading the time limits under the Code of Criminal Procedure. To the contrary, they regarded the clock as having started to run as soon as the suspect was brought into the station.

[68] Of course, there is one other, rather obvious, alternative available: treat the matter as unsolved and let the suspect go, at least until other corroborating evidence can be found. Miyazawa's study suggests that Japanese police do not regard this as an acceptable choice.

the suspect really was innocent. At that point the police may close ranks but all the others immediately seek to distance themselves, with the mass media shouting out its condemnation.

Given this interpretation of Miyazawa's findings, some observers might well wonder if harms exist. After all, in the great majority of cases, the police observe the existing procedural rules. Except in rare instances, the innocent are screened out early and suffer at most the relatively modest intrusion of a voluntary appearance at the police station. And the guilty get caught. They may have to undergo several days, or even weeks, of interrogation, with no counsel present. But they won't face physical abuse. And the questioning, along with the bit of moral guidance that often goes along with it, might even be good for them.

I believe harms exist, even if one accepts the benign view—which, despite his rhetoric, Miyazawa largely confirms—that Japanese police generally observe the procedural rules laid down by the courts.[69] These harms include the potential for mistaken confessions and convictions, the potential for bias, the degree of intrusion on personal autonomy, the questionable weight accorded to the constitutional and statutory guarantees of voluntariness and to other due process rights, and the relative absence of effective external checks on the activities of the police and prosecutors (which in turn means external mechanisms to assure that the questionable activities are limited to cases at the upper end of the continuum). Miyazawa's detailed case studies, together with his descriptions of recent scandals involving the police, serve to highlight these dangers. Nonetheless, it is by no means a rhetorical question to ask whether these harms are outweighed by the benefits of the Japanese criminal justice system. Proper evaluation of that question, however, requires consideration of the investigative process in the context of the criminal justice system as a whole—a topic that lies beyond the scope of Miyazawa's book.

69 *See* Foote, *supra* note 20; Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317 (1992); Daniel H. Foote, *From Japan's Death Row to Freedom*, 1 PAC. RIM L. & POL'Y J. 11 (1992).