THE EXERCISE AND CONTROL OF PROSECUTORIAL DISCRETION IN JAPAN

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INTRODUCTION

It has long been recognized in the U.S. that prosecutorial discretion, as well as the discretion of other criminal justice officials, exerts a significant influence over the shape of law enforcement.[1] The force of this power received particular attention when the Supreme Court refused to interfere with the results of plea bargaining.[2] A prosecutor's discretion not only encompasses setting the charge, but also the power to free certain individuals from the threat of punishment, either by declining to prosecute or to investigate.[3]

The Supreme Court has upheld the exercise of prosecutorial discretion in deciding whether or not to file charges, so long as the

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The author expresses appreciation to the Ministry of Education of Japan and Harvard Law School for funding the research on which this paper is based. The author thanks Kotaro Ohno for his initial inspiration and the many individuals in the Prosecutor's Office of the Ministry of Justice of Japan who permitted her to observe their work and devoted much time to explaining the criminal justice system. The author also thanks Professor Matsuo and Professor Inoue of the Faculty of Law of Tokyo University, as well as Professor Goto of Chiba University and Professor Naganuma, for educating and advising her, and attorney Takanori Goto for insight into the Kawamoto case. Many others kindly lent their time and suggestions to help improve the authors understanding. Any errors remaining in interpretation or judgment are solely the author's responsibility.

1. *See, e.g.*, Baker, *The Prosecution*, 23 J. CRIM. L. & CRIMINOLOGY 770, 796 (1933): "The law is written by legislators, interpreted occasionally by appellate courts, but applied by countless individuals, each acting largely for himself. How it is applied outweighs in importance its enactment or its interpretation."

2. Bordenkircher v. Hayes, 434 U.S. 357 (1978).

3. The prosecutor has been described picturesquely as "the black hole of criminal justice." *See* the discussion *quoted in* Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 303 (1980).

decision was not based on constitutionally impermissible grounds. In *Oyler v. Boles*, the Court stated: "The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation."[4] Relying on this, several courts have refused to entertain charges of discrimination. Other courts have made even broader statements, negating the possibility of judicial review of prosecutorial discretion, either for practical or separation-of-powers reasons.[5]

Due to the prosecutor's role in bridging the gap between investigation and sentencing, routine decisions affect who is to be punished for what crimes. Proposals for reform are many and varied. Some have looked to the French and German systems for suggestions, in the belief that those systems provide for more control over prosecutors.[6] Although the extent to which this control actually functions in France and Germany is hotly debated,[7] it is indisputable that the formal system in those countries envisions an official with less freedom of action than an American prosecutor.

The American system is not the only one to provide little formal control. The Japanese system also provides for very few formal controls over the individual prosecutor's decision. Unlike the U.S. system, however, the Japanese Criminal Procedure Code explicitly gives the prosecutor the power, which American prosecutors have only assumed, to be lenient.[8] Moreover, the Japanese prosecutor is entitled or perhaps even obligated to spare a suspect the trauma of trial and the risk of punishment. Even though sufficient evidence may exist to convict, the prosecutor may decide to take no action on the grounds that no punishment is necessary in view of general deterrence or the rehabilitation of the individual. Furthermore, Japanese prosecutors are allowed considerable discretion in other

4. Oyler v. Boles, 368 U.S. 448, 456 (1962). *See also* Wayte v. U.S., 470 U.S. 598 (1985) [enforcement policy not discriminatory unless has discriminatory impact and discriminatory purpose].

5. *See, e.g.*, Newman v. U.S., 383 F.2d 479, 480 (D.C. Cir. 1967): "Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought." For a discussion of separation of powers and judicial control of prosecution, *see also*, U.S. v. Cox, 342 F.2d 167 (5th Cir. 1965), *cert. denied*, 381 U.S. 935 (1965) and Cardinale & Feldman, *The Federal Courts and the Right to Nondiscriminatory Administration of the Criminal Law: A Critical View*, 29 SYRACUSE L. REV. 659, 689-691 (1978).

6. *See, e.g.*, Pugh, *Ruminations Re Reform of American Criminal Justice (Especially Our Guilty Plea System): Reflections Derived from a Study of the French System*, 36 LA. L. REV. 947 (1976).

7. *See, e.g.*, Goldstein & Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy and Germany*, 87 YALE L.J. 240 (1978).

8. KEIJI SOSHŌ HŌ (Code of Criminal Procedure), Law No. 131 of 1948, arts. 247, 248 [hereinafter cited as KEIHŌ].

procedural matters as well.[9] This discretion, combined with a demand for perfect public results, has produced in recent years a conviction rate of close to one-hundred percent.[10]

Another factor augmenting the influence of a prosecutor's decisions is the importance placed by judges on prosecutorial sentence recommendations. If the prosecutor chooses to file an information, conviction is virtually assured, as is the relative severity of sentence recommended by the prosecutor. On the other hand, if the prosecutor chooses not to prosecute, or not to pursue an investigation, the individual goes unpunished. Clearly, in Japan, the decisions made by the prosecutor and the way he approaches a case have a tremendous effect on the outcome of any incident. Despite occasional criticism of this arrangement as "administration of justice by prosecutors" (*kensatsukan shihō*), until recently, the systemic grant of such broadranging power has not been widely questioned. However, in Japan, as in the U.S., some scholars are coming to see the prosecutorial powers as a potential threat to fairness and freedom.[11]

Two Japanese Supreme Court judgments have brought negative public attention to the exercise of prosecutorial discretion. In the Minamata case, the Tokyo High Court ruled that the Prosecutor's Office had abused its prosecutorial discretion in filing an indictment against the leader of a group of victims seeking compensation for their pollution-related disease. The leader had been prosecuted on bodily injury charges arising out of melees which accompanied the protests. The Supreme Court ruled on the issue of prosecutorial discretion in December 1980.[12]

The second case involved a violation of the Public Election Law. Again, a High Court ruled that the indictment must be dismissed, this time because of discrimination in the police investigation, which allegedly focused only on the recipients and not the payors of the bribe. In June 1981, the Supreme Court reversed the decision. Both cases have spurred further discussion of the issues involved in the exercise of prosecutorial power and the methods by which inappropriate uses of such power can be restrained.

This article will first describe the role of prosecutors in the Japanese system, as the system is supposed to function and as it actually appears to function. The article will also analyze the implications of the prosecutor's role on the outcomes produced by

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9. *See infra*, Parts I(I)(B) and I(II).

10. The high conviction rate, while shocking at first, is not as different from the American picture as might be thought. In the U.S., guilty pleas are entered in approximately 80-85% of the cases. When guilty pleas were included, one U.S. Attorney's office found a conviction rate of 91%. *See* Frase, *supra* note 3.

11. *See, e.g.*, Mitsui Makoto, whose work is discussed in detail, *infra* notes 24-5.

12. Japan v. Kawamoto, 428 HANREI TAIMUZU 69 (S. Ct., 1st P. B., Dec. 17, 1980).

the criminal justice system as a whole. Information on how the system actually functions was gleaned both from the limited number of studies in existence and from a two-month period of interviewing prosecutors, judges and lawyers and observing proceedings in courtrooms, with the co-operation of the Ministry of Justice, in 1978. The second part of the article will focus on the control of prosecutorial discretion and deal with the concerns about the actual exercise of prosecutorial discretion which have been expressed by Japanese lawyers and scholars. It will also be necessary to discuss the methods which have been suggested to address these concerns and the likelihood of their success in facilitating control over inappropriate exercises of power.[13]

While it is hoped that this article will serve as more than a curiosity to those concerned with the administration of criminal justice in America, it should be emphasized that it is not intended to be part of the recent rush to recommend the adoption of all things Japanese.[14] It happens very rarely that one country can directly adopt the solutions of another country to its problems, and in this case, neither Japan nor America has a solution. Nevertheless, it can be instructive to study the process by which a similar problem is approached in a different context. It is in this spirit that the present example is offered.

PART 1. THE EXERCISE OF PROSECUTORIAL DISCRETION

I. The Prescribed Role of the Prosecutor in Japanese Criminal Justice[15] and its Ideological Basis

A. Background—The Development of Japanese Criminal Procedure and the Prosecutor's Position

The opening of Japan to the West by Admiral Perry and his black ships in the 1850's was an event of great significance for the country's legal system. Demands of extraterritoriality plus the search for institutions to support the newly democratic political system that was emerging pushed leading figures to study European systems of law and governance. The new criminal justice system

13. Of course, it is necessary to recognize that there may be unending debate over what is and what is not appropriate, as well as about the process by which such determinations should be made. *See infra*, Introduction to Part 2, for a discussion.

14. *See, e.g.*, E. VOGEL, JAPAN AS NUMBER ONE (1979); W. OUCHI, THEORY Z (1981).

15. The formal place of the prosecutor in the criminal justice system, as prescribed in the KEIHŌ, *supra* note 8, has been described in many other articles. A particularly detailed treatment of the legal rules and theory involved in interpretation of the KEIHŌ is B. J. George's translation of now Supreme Court Justice Dando's classic treatise, *infra* note 16. Accordingly, as for those aspects prescribed clearly in the law, I will present here only a brief description necessary in order to comprehend what follows.

adopted in the Meiji period (1868-1912) was based first on the French system, with an increasingly dominant German influence. Its orientation was inquisitorial, with judges and prosecutors being of equal status. The prosecutor's job was to collect evidence, lay it before the judge and demand punishment for the wrongdoer, the judge taking an active role in conducting the trial.[16] The prosecutor and the judge sat side by side on a raised platform, the accused more an object than a party. In addition, a system of preliminary judges was established to supervise the prosecutor's investigation on the model of the French *juge d'instruction.*

By the 1930's, Japan's government had become extremely repressive, and political deviations in thought were widely and severely punished. Both prosecutor and police had a great deal of power in this period, and law enforcement was often arbitrary. With defeat in World War II and the Allied Occupation, the legal system entered a new era.

The Occupation authorities were eager that Japan never be a military threat again. One way to accomplish this was to prevent authoritarian philosophies from gaining control over the political or legal processes. To this end, a new constitution and criminal procedure code were promulgated.

The present Constitution guarantees such familiar rights as a speedy trial, freedom from search and seizure without a warrant, the right against self-incrimination, the right to counsel and equal protection under the law. In addition, the Criminal Procedure Code requires, among other things, that the accused be advised of the reasons for his detention, and that there be a presumption of innocence and a standard of proof higher for criminal than for civil cases. This time, the guiding principle was to be adversarial, rather than inquisitorial. Symbolically, the prosecutor's seat in court was lowered to the same level as that of defense counsel, and the judge was directed to behave more as a referee and less as an active participant. To prevent the judge from being excessively influenced by the prosecutor's position, before trial he is now furnished only with a copy of the charges and the "prosecution facts" rather than the entire prosecution dossier.

Signs of the change in alignment between prosecutors, lawyers and judges are apparent in their training as well. Before World War II the government trained judges and prosecutors together, while lawyers were subject to completely different and generally inferior requirements. Now future lawyers, judges and prosecutors are all selected by a single national examination. Candidates are primarily holders of undergraduate law degrees, and are trained for two years

16. *See generally*, George, *The Impact of the Past Upon the Rights of the Accused in Japan*, 14 AM. J. COMP. L. 672 (1966).

at government expense at the Legal Research and Training Institute. Each year about 500 students, or two percent of the applicants, are admitted. All students receive the same training, including internships at courts, prosecutor's offices, and lawyer's offices, and from this experience they are to choose their future role.

In many ways, however, the prosecutor and the structure of the Prosecutor's Office continues to resemble its European rather than its American counterpart. Once the decision is made to become a prosecutor, judge or lawyer, the individual's career is in theory decided. Although judges and prosecutors are entitled to become lawyers any time they wish, in general, they do so only when it becomes clear that promotion possibilities are limited or when the mandatory retirement age nears. Of course, there are exceptions, but there is no expectation, typical in America, that the prosecutor may be merely one of a variety of roles a lawyer may take on during his career.

In Japan, prosecutors are generally assigned to the Prosecutor's Office. The Prosecutor's Office is a national hierarchical bureaucracy, under the immediate direction of the Prosecutor-General, who is chosen from the ranks of career prosecutors. Though the Prosecutor's Office is a part of the Ministry of Justice, the Minister is not empowered to intervene to force a particular resolution of an individual case, nor does he hire or fire the Prosecutor-General.[17] The object of this arrangement is to preserve the political neutrality of the Prosecutor's Office, since only the Prosecutor-General, who is not a political figure, directly controls its operation. At the same time, political accountability is preserved by allowing the Minister of Justice to enunciate general enforcement policy.[18] This division is not perfect; political influences may be felt to the extent that the Minister is able to convince the Prosecutor-General of his view on a case or convince the Cabinet to appoint his candidate for the post.[19]

The Prosecutor's Office itself is divided into Local Prosecutor's Offices (staffed mainly by assistant public prosecutors who are not trained at the Legal Research and Training Institute), fifty District Public Prosecutor's Offices, eight High Public Prosecutor's Offices and a Supreme Public Prosecutor's Office. These offices handle

17. The Prosecutor-General is nominated by the Cabinet and approved formally by the Emperor.

18. "The Minister of Justice may . . . supervise public prosecutors generally in regard to their functions. . . . However, in regard to the investigation and disposition of individual cases, he may [direct] only the Prosecutor-General." KENSATSU-CHŌ HŌ (Public Prosecutor's Office Law), Law No. 61 of 1947, art. 14 [hereinafter cited as PPOL].

19. The fact that former Prime Minister Tanaka was actually detained for questioning in the Lockheed case is some evidence for the proper functioning of this system.

cases that are in the realm of the Summary Courts, District Courts, High Courts, and the Supreme Court respectively. Each District Office has a Chief Public Prosecutor and an Assistant Chief Public Prosecutor. The larger offices may be further divided into a Criminal Division, Trial Division, General Affairs Division, a Special Investigation Division for such matters as bribery and organized crime, and a Public Safety Division. Each division has a Head Officer and an Assistant Head Officer. Superintending Public Prosecutors head the High Public Prosecutor Offices, and the Prosecutor-General and the Assistant Prosecutor-General are at the head of the Supreme Public Prosecutor's Office and the entire agency.

Prosecutors may be assigned to any of these offices or to the Ministry of Justice, where they are exposed to the administrative policy side of the prosecutorial function. Personnel decisions are made at the Ministry of Justice. Every three to four years, a prosecutor is given a new assignment, often necessitating a geographical move. One reason for this is the demand of maintaining a high-level bureaucracy nationwide in a country where the educated tend to cluster in the big cities. Other purposes include preventing different regions from arriving at different internal practices uniform only in that region and hindering the development of unwholesome relationships between officials and the populace.

Despite the hierarchical organization of the Prosecutor's Office, the prosecutor is to act as an independent professional, rather than as an assistant to a superior. Accordingly, each prosecutor is responsible for making sure that sufficient investigation is carried out in each case he is assigned, deciding on the proper disposition, and carrying to trial those cases which are prosecuted.[20] In reality, dispositions must be approved by a superior, but prosecutors are instructed to consider the full decision-making responsibility to be theirs. In turn, prosecutors are protected from reprisals for their decisions by provisions guaranteeing their tenure, except in extraordinary circumstances.[21]

One of the most important decisions the prosecutor must make is whether to file an information or to suspend the prosecution and allow the suspect to be released.[22] Prosecutors did not always have

20. In some offices, investigation and disposition functions are separate from the trial function.

21. PPOL, *supra* note 18, arts. 23, 25.

22. KEIHŌ, *supra* note 8, art. 248. "Suspension of prosecution," in an analogy to a suspended sentence, is defined as the disposition which is proper when the prosecutor determines that, due to "the character, age and situation of the offender, the gravity of the offense, the circumstances under which the offense was committed, and the conditions subsequent to the commission of the offense," it is unnecessary to prosecute a suspect and seek punishment for his deeds. In the KEIHŌ, in statistics, and in prosecutorial parlance, the term "suspension of prosecution" is sharply distinguished from a failure to indict for lack of evidence.

this explicit permission for leniency. Originally, the 1880 Meiji Code of Criminal Procedure directed "compulsory prosecution" but it was not long before the need for exercising some selectivity was recognized. In 1885, the Minister of Justice noted that prisons were becoming over-crowded, costs of prosecution were excessive, and the existing system was producing too many ex-convicts among the population.[23] The Minister's response was to urge that henceforth fewer prosecutions be filed.

At that time, suspension of prosecution had only the status of an informal internal practice. Nevertheless, both the numbers and the types of cases in which this discretion was exercised continued to increase. After suspended prosecutions first appeared as a separate category in the official statistics in 1909,[24] even the justification given for the practice began to change. No longer were the exigencies of prosecutorial time or government funds cited. From this point on, criminal justice policy demanded the option to suspend prosecution. It was thought that once an individual is convicted, he is marked for failure and it becomes difficult for him to regain his place in society. The result is a detriment, not only to the individual, but to society as well since it is robbed of a potentially productive member.[25]

The opinion of the Ministry of Justice was clear—suspension of prosecution was necessary as a "diversion" policy. Other sectors of the legal profession criticized the practice as not only unwise, but unauthorized by law. Most fears were directed toward the potential use of the system to grant leniency to those with political power, as in the 1914 Oura Incident.[26] Despite the controversy, a statute authorizing suspension of prosecution was enacted by the Diet in 1923,[27] and the practice is now considered a natural prosecutorial prerogative.

B. The Legal Framework for the Prosecutor's Activities

The provisions of the Code of Criminal Procedure set forth the prosecutor's powers and duties. Normally, a prosecutor obtains his cases by referral from the police, although occasional cases result from complaints filed directly with the Prosecutor's Office or investigations originally carried out by them. When the police arrest a

23. Dando, *The System of Discretionary Prosecution in Japan*, 18 AM. J. COMP. L. 518, 519 (1970).

24. Mitsui, *Kensatsukan no Kisō Yūyō Sairyō, pt. 1* [*The Discretion of the Prosecutor to Suspend Prosecution, pt. 1*], 87 HŌGAKU KYŌKAI ZASSHI 897, 933 (1970).

25. Mitsui, *Kensatsukan no Kisō Yūyō Sairyō, pt. 2* [*The Discretion of the Prosecution to Suspend Prosecution, pt. 2*], 91 HŌGAKU KYŌKAI ZASSHI 1047, 1049 (1974).

26. A cabinet member involved in a vote-buying scandal was permitted to resign rather than face indictment. *Id.* at 1052-55.

27. *See* Mitsui, *supra* note 24, at 897-98.

suspect, they may detain him for forty-eight hours before deciding either to release him or to transfer the case to the Prosecutor's Office.[28] Arrests require a warrant except in the case of a crime in progress, a "quasi-crime-in-progress" or under the provisions for "emergency arrest."[29]

When a prosecutor is assigned a case in which the suspect is under arrest, he has twenty-four hours to investigate and decide either to release the suspect, to institute a prosecution[30] or to apply to a judge for a warrant to detain the suspect for ten more days.[31] A suspect may be released at any time if there is no longer any necessity for detention. On the other hand, detention may be extended for an additional period of up to ten days upon permission of the judge,[32] and for certain crimes for five days after that.[33] Therefore, the total investigatory detention period can be as long as twenty-eight days.

After the filing of the information and before the trial, a custodial kind of detention may be imposed.[34] A suspect may choose defense counsel at any time during detention,[35] and must be allowed to meet with his counsel without any officer present.[36] The Constitution guarantees appointed counsel for the indigent.[37]

Many suspects are never arrested or detained but are merely asked to come to the police or prosecutors voluntarily for questioning, much as a witness might be summoned. Even if a suspect is released from detention, this form of voluntary questioning may continue and eventually lead to prosecution. In voluntary questioning, the suspect is free to refuse to answer any questions and to leave at any time. He must be advised of his right to silence,[38] but not of his right to leave.

Naturally, the objective of investigation is to obtain a confes-

28. KEIHŌ, *supra* note 8, art. 203. Release may signify a judgment of innocence, a decision to suspend prosecution, a decision to prosecute without the necessity of custodial detention, or a decision to continue investigation on a voluntary basis.

29. *Id.* arts. 210, 212-13.

30. *Id.* art. 205.

31. *Id.* arts. 206, 208.

32. *Id.* art. 208(2).

33. *Id.*

34. The question of whether or not interrogation may continue during this custodial detention is a controversial one. At present, the courts take the position that the accused may be questioned during this period if he consents. A more conservative view considers all interrogation to be voluntary by definition and thus permissible, since an unwilling suspect may always decline to answer questions based on his right to silence. On the other hand, many scholars insist that no questioning is permissible after indictment if the individual is detained.

35. KEIHŌ, *supra* note 8, arts. 203-04.

36. *Id.* art. 39.

37. KENPŌ (Constitution), art. 38 (Japan) [hereinafter cited as KENPŌ].

38. KEIHŌ, *supra* note 8, art. 198(2).

sion and information which will facilitate the gathering of other necessary evidence. However, suspects are afforded protection in several ways. The Code of Criminal Procedure provides that "confession made under compulsion, torture, or threat, or after prolonged arrest or detention shall not be admitted as evidence."[39] Promises of lenient treatment in exchange for confession are viewed as a type of coercion which goes to the weight of the confession as evidence. Further, the Constitution provides that no person shall be convicted solely on the basis of his confession (or guilty plea).[40] Corroborating evidence is required.

Once investigation is complete, it is the prosecutor's responsibility to decide on the disposition of the case. Every year, approximately eighty-eight percent of those arrested are prosecuted.[41] Of course, the prosecutor must decide which charge to file as well. Unlike American prosecutors who may plea bargain, Japanese prosecutors theoretically have no discretion in the charging decision. The charge is determined by the facts themselves and not the prosecutor. When one element of a possible crime remains questionable, the prosecutor is directed to file an information, which relies only on the facts of which he is absolutely certain.[42] Judgments as to the circumstances of the offense are to enter into the decision only in regards to recommendation for sentencing. Both the charge and sentence decisions must be submitted to a superior for approval.

Where the defendant is charged with a crime punishable only by a fine, or with certain other crimes such as burglary or theft, the prosecutor has the option of pursuing the case through a "Summary

39. *Id.* art. 319. *See also*, KENPŌ, *supra* note 37, art. 38.

40. KENPŌ, *supra* note 37, art. 38, sec. 3.

41. The statistics show the following percentages of suspects were prosecuted and given suspension of prosecution disposition, respectively.

	Penal Code Violations		Special Law Violations[1]	
Year	Rate of Prosecution	Rate of Suspension of Prosecution[2]	Rate of Prosecution	Rate of Suspension of Prosecution[2]
1976	64.3	30.6	70.1	26.8
1977	64.0	30.8	68.7	28.3
1978	64.4	30.0	74.5	22.0
1979	65.2	29.0	73.1	24.0
1980	65.9	28.6	75.0	22.5

1. These figures exclude violations of traffic laws.
2. This rate is calculated as follows:

$$\frac{\text{Persons Prosecuted}}{\text{Persons Prosecuted \& persons given Suspension}} \times 100 \text{ of Prosecution}$$

MINISTRY OF JUSTICE (Japan), 1981 WHITE PAPER ON CRIME, Chart III-5 (1981).

42. HOMUSHO KEIJIKYOKU, (CRIMINAL JUSTICE DIVISION, MINISTRY OF JUSTICE), KENSATSU KŌGIAN NO. 188 [PROSECUTION MANUAL no. 188] 376 (1978) [hereinafter cited as KENSATSU KŌGIAN].

Order" and the procedure is more informal and non-public. Only fines may be imposed.[43] The prosecutor must obtain the defendant's consent before pursuing this procedure, as the truth or falsity of the charge cannot be contested. The reduced stigma and risk of the "Summary Order" proceeding, however, makes it a desirable option for most defendants.

The prosecutor may also decide not to prosecute at all. He may decline to prosecute for reasons such as insufficient evidence or facts which do not constitute a crime. The prosecutor may also decline to prosecute suspects who could legitimately be prosecuted. Although the authorizing statute itself provides only very broad guidelines, a somewhat more detailed listing of the factors a prosecutor may consider in his decision is available.[44] Internal circulars (*tsūtatsu*) and on-the-job training provide further guidance. All decisions require that an explanation for non-prosecution be submitted to the prosecutor's superior for approval.

C. The Philosophical Basis for the Prosecutor's Activities

To fill in the model picture of the prosecutor's role in Japanese criminal justice, it is important to add to the skeleton of rules the flesh of philosophy expounded by the criminal justice authorities. One source for expressions of such philosophy is the *Prosecutor's Instruction Manual* (*Kensastsu Kōgian*), used at the Legal Research and Training Institute. The manual represents the beginning of a prosecutor's socialization. As the *Girl Scout Manual* instructs girl scouts, the *Prosecutor's Manual* tells prosecutors what is expected of them.

Prosecutors often describe their work in terms reminiscent of the ideas in the manual, indicating that the norms it contains are significant. Additionally, the manual is a source of standards to

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43. SUPREME COURT OF JAPAN, OUTLINE OF CRIMINAL JUSTICE IN JAPAN 5 (1977).

44. Considerations concerning the criminal: character, habits, heredity, schooling, intelligence, work history, prior record or not, habitual nature of crime or not, age and sex (in particular, leniency is suggested if the suspect is aged or an unmarried female), family situation, place of residence, occupation and place of employment, living environment, character and existence of friends, the existence of a person who would watch over and control him, etc.

Considerations concerning the crime: the gravity of the penalty prescribed for the crime, aggravating or mitigating circumstances provided for by law, the extent of damage or injury, motive, cause (objective) and method of crime, prior relationship with victim, existence of profit for the criminal, interest of public in the crime, and its influence or likely influence on society (including the likelihood of the crime serving as a model).

Circumstances following the crime: penitence, payment of reparations or restitution, actions in destroying evidence, change in the criminal's environment, the opinion of the victim, and whether the victim has written to pardon the defendant. KENSATSU KŌGIAN, *supra* note 42, at 25.

which lawyers and judges, who are taught from the same manual, may attempt to hold the prosecution.

The prosecutor must not be satisfied merely to win cases or succeed in obtaining heavy sentences. His responsibility is profoundly different from that of a civil adversary. According to the manual, the prosecutor not only seeks punishment for the accused, but also bears an obligation to protect the interests of the accused by ensuring that investigation and trial procedures are carried out fairly.[45]

As a representative of the state, the prosecutor must be a figure worthy of respect. Prosecutors must focus not on technical procedures but rather on the obligation to make a just disposition of each case, one which is optimal for the protection of society at large (general prevention) as well as for the rehabilitation of the individual offender (special prevention).[46] In this sense, the prosecutor is acting rather like a judge.

The *Prosecutor's Manual* explicitly recognizes the quasi-judicial nature of these activities and emphasizes the responsibility for correct and humane law enforcement that as a result resides with the prosecutor.[47] Often this system is cited with pride as a distinguishing characteristic of the Japanese system, one which permits prosecutors to protect the human rights of the accused.[48] Research has also suggested that prosecutors feel the quasi-judicial aspect of their job to be the most worthwhile and interesting.[49]

Prosecutorial theory rejects suggestions that standards for the exercise of such tremendous power should be made more definite or more public in order to increase predictability.[50] It is argued that an enunciation of prosecution standards more liberal than the wording of the law is not permissible, as that is the province of the legislature,[51] and not advisable, since it would only serve to encourage the populace to skirt the edges of the pronouncement. Apparently a moral and law-abiding society is to be achieved by proclaiming broad principles to be followed as law, but enforcing the principles with compassion, rather than to the letter of the law.

According to the official philosophy, it is impossible to establish rigid standards since the prosecutor must represent the national

45. *Id.* at 14.
46. *Id.* at 178.
47. *Id.* at 12.
48. *Id.* at 6. *See also*, Dando, *supra* note 23.
49. Mitsui, *supra* note 25, at 898. In this author's interviews with prosecutors, similar opinions were expressed. *See* discussion of U.S. attitudes toward indefinite prosecution standards contained in the Introduction *infra*.
50. *See Kōsoken no Unyō o Megutte Kenkyūkai* [*A Symposium on the Exercise of Discretion in the Right to Prosecute*], 354 HANREI TAIMUZU 47, 52 (1979) [hereinafter cited as *Symposium on Prosecution*].
51. *Id.* at 57.

will (*kokka ishi*),[52] and standards must therefore flow with the changing times and environment.[53] Sufficient consistency is to be guaranteed by review by superiors, long years of practice and the "principle of oneness of the procuracy" (*kensatsu dōittai no gensoku*).[54] This principle proclaims that any one prosecutor is the functional equivalent of any other. As a result, it makes no difference if, for instance, a prosecutor is switched in the middle of a case. As a further guide to action, prosecutors are advised that inappropriate judgments or abuse of their power could cause a decline in public mores, uneasiness on the part of the populace and general social chaos.[55]

The Ministry of Justice's view is that the peculiar conditions of Japan force prosecutors to take on this multifaceted role. In Japan, unlike other countries, it is said, citizens are not content to wait for the judgment of a court but are convinced that an individual is guilty as soon as he is prosecuted. It is also argued that the stigma of being regarded as a criminal is much more severe in Japan. A defendant may be forced to quit his job, and family members may be humiliated, ostracized and fired. Marriage prospects for children or siblings may be compromised. These consequences are not mitigated by a defendant's eventual acquittal. Therefore, not only must a prosecutor be absolutely convinced of his ability to convict before deciding to prosecute a case, he must also be convinced that the requirements of society and of the individual leave no alternative but to deal with the situation publicly in a courtroom, rather than quietly by suspension of prosecution.

The fact that social ostracism may effectively make punishment for a crime more severe than that prescribed or sought by law has also been recognized in the United States.[56] However, it seems likely that sanctions may in fact be somewhat more severe in Japan than in the U.S., if only because of a comparative lack of geographical and job mobility, as well as a relatively greater willingness to judge an individual's character by the character of family and friends around him.

One irony of the cultural uniqueness explanation for prosecutorial power is that the success of Ministry of Justice policies has resulted in a close to one hundred percent conviction rate. This in turn reinforces the public conception that only the guilty are prosecuted. Knowledge of the suspension of the prosecution system results in a public conception that those prosecuted are not only

52. KENSATSU KŌGIAN, *supra* note 42, at 18.
53. *Id.* at 178.
54. *Id.*
55. *Id.*
56. *See, e.g.*, B. WRIGHT & V. FOX, CRIMINAL JUSTICE AND THE SOCIAL SCIENCES 153 (1978).

guilty, but are the worst of the guilty. One scholar, Professor Mitsui Makoto, has even questioned the factual basis of this prosecution policy, suggesting that social and economic disabilities attach at arrest, rather than at prosecution.[57] Whatever the actual state of the Japanese national personality, a press and media eager to report all the personal details and sordid background behind the crimes, with little regard for the presumption of innocence, only aggravates the situation.

D. Systems for Control of the Prosecutor's Discretion

The *Prosecutor's Manual* states that "the prosecutor's broad vision and good judgment as well as a fair and impartial attitude" is the most effective control over prosecutorial discretion.[58] Although in general it is believed that training, internal guidelines and the check by the superior will ensure the correct disposition for each case, it is recognized that malfunctions are possible. Accordingly, two outside systems permit the review of decisions not to prosecute a particular case.

One system is the "inquest of prosecution." In each court district a panel of eleven people chosen at random from the rolls of eligible voters considers cases in which a complaint has been lodged concerning a failure to prosecute. Cases may be referred to the panel by the injured party or by anyone with standing to make a complaint in the case, usually after failing to get satisfaction from a protest to the superior prosecutor. The panel may also take up cases on its own initiative. If upon investigation the panel believes that a mistake has been made, it recommends to the originating Prosecutor's Office that it reconsider its disposition. Although the Prosecutor's Office is compelled to reconsider, it is not obliged to prosecute if it still believes the relevant interests demand that the case not go forward.[59]

The other mechanism for registering complaints is the "analogical institution of prosecution."[60] This system exists primarily to deal with crimes related to the abuse of authority by a public official, such as police brutality. Where the complainant feels a decision not to prosecute is improper, he may apply directly to a court for an order to prosecute. If the court grants the application, it then appoints a private lawyer to act in the prosecutor's stead and pursue

57. Mitsui, *Kensatsukan no Kisō Yuyō Sairyō pt. 5*, [*The Discretion of the Prosecutor to Suspend Prosecution pt. 5*], 94 HŌGAKU KYŌKAI ZASSHI 852, 899-900 (1977).

58. KENSATSU KŌGIAN, *supra* note 42, at 177.

59. KENSATSU SHINSA KAIHŌ, (Inquest of Prosecution Law), Law No. 147 of 1948 [hereinafter cited as KSK].

60. KEIHŌ, *supra* note 8, arts. 262-269.

the case.[61]

II. The Prosecutor's Role in Everyday Practice

A. Criminal Procedure in Practice

1. Introduction

Looking only at the formal schema of the prosecutor's labors, the system appears clear and relatively simple. Observing the limits laid down by law, the prosecutor continues the investigation begun by the police. If he has any doubts about conviction due to insufficient evidence, the accused's lack of mental capacity, or the facts fitting the elements of the crime, he will dismiss the case. If conviction is virtually assured, the prosecutor will seek the highest charge which is provable or, if punishment is not necessary, suspend the prosecution.

In theory, the prosecutor must make two separate decisions in each case. He must first determine whether prosecution is possible, given the demand for a near-perfect conviction record. This decision is nondiscretionary. Only when he has determined that prosecution is possible may the prosecutor make the highly discretionary decision as to whether or not prosecution is advisable.

In actual practice, legal limits are not always the bright lines they appear to be. The interpretations given to various provisions of the criminal procedure law plus the deference shown by courts in reviewing prosecution requests has given the prosecutor a great deal of freedom in investigation. This freedom increases the play given the prosecutor's charging discretion.

2. Actual Practice

As outlined in the last section, the police maintain control of the suspect for forty-eight hours following arrest, at which point he must be turned over to the Prosecutor's Office.[62] In a few large cities suspects are held in houses of detention (*kochishō*) prior to trial. However, the majority of suspects everywhere continue to be held in police jails, even after formal control of the case has been shifted to the prosecutor. Since police jails are smaller, less public, and less centrally managed than the houses of detention, their facilities are in general said to be less satisfactory. In theory, the place where a suspect is to be detained is decided by the judge when he approves a detention request. In practice, the prosecutor applying

61. Once a lawyer is appointed, the system bears similarities to our own system of special prosecutors.

62. Since prosecutors obtain a majority of their cases from the police, a complete picture of the prosecutor's work would also require a study of police activities. Unfortunately, that is beyond the scope of this article.

for detention specifies on the application form the place of detention. The prosecutor's request is rarely denied. Therefore, the place of detention is yet another aspect of the suspect's experience over which the prosecutor has primary control.

As for whether or not a suspect may be detained for investigation in the first place, prosecutors say they seldom have difficulty in obtaining the necessary permission from the court. Although there is academic debate over the standards to be used by the courts in acceding to or refusing such requests, it appears that the prosecutor's judgment regarding the necessity for detention or extension of the detention period is largely respected. Therefore, in practice the prosecutor is able to effectively determine the length of a suspect's confinement.[63]

Another source of flexibility for the prosecutor in making detention decisions is the fact that he or she may apply for a new detention order each time an individual is suspected of a new crime. Thus, the period of detention for questioning may be drawn out by the discovery of new incidents. Of course, this is a sensible practice from the point of view of crime investigation, but one consequence is increased play for prosecutorial judgment. It has been charged that the detention prerogative is sometimes manipulated by prosecutors. Not having enough evidence to detain a suspect believed to be involved in a serious crime, the prosecutor may request a detention order based on a separate, insignificant charge, hoping to obtain enough information during interrogation to obtain a new detention order on the more serious charge.[64]

From the prosecutor's point of view, the main purpose of detention is to allow the prosecutor to search out evidence and to question the suspect and witnesses in order to decide whether to prosecute. Prosecutors expect that in all but the most recalcitrant cases, if the suspect is guilty, a confession will be forthcoming.[65] In some cases, prosecutors conduct only the final questioning, entrusting the remainder to the police. Since the police are perceived as

63. Of course, it should also be remembered that in many cases suspects are not detained at all. However, this decision is also at the prosecutor's behest.

In 1980, prosecutors sought detention for 80.5% of those suspects actually arrested, and in 99.5% of those cases, the prosecutors' requests were granted. MINISTRY OF JUSTICE (Japan), 1981 WHITE PAPER ON CRIME, Chart III-3, p. 172.

64. Courts have dismissed indictments when the initial arrest was without probable cause; that is, when it was a pure fabrication for the purpose of detaining and interrogating a suspect. Some scholars would extend this practice to prohibit prosecution of the more serious charge whenever it is judged that the investigation on the less serious charge was merely a pretext.

65. For instance, in 1979, statistics show that of 64,921 criminal cases handled by the district courts, there were full confessions in 56,527, or approximately 87% of those cases. In only 12% of the cases was there a denial of the charges, a partial denial of the charges, or an assertion of the right to remain silent. SHIHŌ JUKEI NENPŌ, [ANNUAL LEGAL STATISTICS], Chart No. 31-4, p. 114.

more strict and less understanding than prosecutors, the suspect may confess to the police in the hope that he may receive more lenient treatment from the prosecutor. The clear advantage the police do have is greater numbers; therefore they have more time to devote to interrogation.

Whether interrogation is accomplished by the police or the prosecutor, no suspect is permitted to have his lawyer present. While adequate opportunity to consult privately with retained counsel is guaranteed by law,[66] in practice, one provision of the Criminal Procedure Code has been used to considerably restrict the suspect's access to his attorney. Article 39(3) of the Code of Criminal Procedure provides that "the public prosecutor . . . may when it is necessary for investigation, designate the date, place and time of interview [between lawyer and suspect] . . . only prior to the institution of prosecution, provided that such designation does not unreasonably hinder the suspect's right to prepare his defense." Under this provision it has become common practice to limit interviews to fifteen to twenty minutes per day while interrogation continues. Significantly, prosecutors consider this provision to be an important aid in investigation. Although some cases have held that such prosecution restrictions are extreme, other cases have upheld the validity of quite severe restrictions.[67]

The prosecutor questions the suspect in his office in the presence of a clerk. Although the clerk's job is to take down the statements of the suspect or witness, his function is not purely mechanical. After a certain period of questioning, the prosecutor dictates his summary of the facts that have been stated. As a result, the written statement is not in the words of the individual being questioned but in the prosecutor's words. The transcript is then read aloud or shown to the suspect or witness, and he is asked to sign it. He may refuse to sign for any reason, but questioning can then continue. Apparently, it is not uncommon to draft numerous statements before a signature is obtained.[68]

Of course, the suspect always retains the right to remain silent. There is debate in academic circles, however, over the precise meaning of this right where the suspect has not voluntarily appeared for questioning. Some argue that the prosecutor must cease question-

66. As determined in an interpretation of KENPŌ, *supra* note 37, art. 37, sec. 3.

67. *See* KEIHŌ, *supra* note 8, art. 39(3). Although these cases are dated, the Supreme Court held in 1953 that limiting access to counsel to just two or three minute sessions did not render a confession invalid. Also, in a decision of April 20, 1955, the Court ruled that the right to prepare a defense was not unduly hampered when counsel was prevented from interviewing the suspect until the day the prosecution was instituted.

68. *See* Part 1(II)(B), *infra*.

ing when the suspect refuses to answer.[69] Others feel that while a detained suspect must submit to questioning, he is simply not obligated to respond.[70] Present practice adopts the latter view. Accordingly, although no responses may be forthcoming, interrogation may continue as long as the prosecutor has the necessary stamina.

Another approach appears to be used by prosecutors when dealing with multiple offenses. A suspect may admit to nine thefts but refuse to admit to a tenth. The prosecutor may suggest to the suspect that if he is responsible for the tenth crime, he should confess since there is no difference in penalty between nine or ten thefts. Such suggestions are not technically illegal and are probably not aimed at coercing false confessions. They can, however, create tremendous pressure on the suspect to confess.[71]

Although no person may be convicted solely on the basis of his own confession, it is obviously very helpful in investigation and trial for the prosecutor to have a confession. As discussed above, a prosecutor may not promise more favorable disposition in return for a confession. On the other hand, when prosecutors or other criminal justice personnel, such as guards, clerks or police, inform a suspect that the sooner he confesses, the sooner he is likely to be released, they are only informing the suspect very realistically of actual practice. Conversely, the suspect may be advised that he is not likely to receive lenient treatment unless he shows some remorse.

The only prescribed barrier to false confessions is the often pro forma requirement of corroboration.[72] Once a statement of confession is put into written form and signed, it can be submitted as evidence to the court by two different procedures. Article 321(1)(12) of the Code of Criminal Procedure stipulates that when a witness gives testimony in court which differs substantially from the content

69. Araki, *Higaisha ni wa Torishirabe no Jimu ga Aru ka*, [*Is There a Duty to Investigate a Suspect?*], in JURISUTO ZŌKAN: KEISHI SŌSHOHŌ NO SOTEN (K. Matsuo ed.) 60-61 (1979).

70. *Id.*

71. In one case, a defendant charged with two murders claimed that after she admitted to participation in one of the murders, she falsely confessed to the other on the urging of the prosecutor to "get it off her chest" since she was told there was little difference between one murder or two. Later she discovered that while the death penalty may be imposed for multiple homicides, it is virtually never imposed for a single murder. In the District Court, this defendant was convicted, so the claim that the confession was false was never actually proven.

72. Based on experiences at the Prosecutor's Office, this author hypothesized that the presence of the clerk might also serve to inhibit excessive prosecutorial zeal. Since the clerk is a member of a separate bureaucracy, albeit within the same overall bureaucratic structure, he can be somewhat independent. Although in general work a cooperative attitude exists between the prosecutor and clerk, in a sense the clerk still belongs to a different "class" of lower status. Therefore, it seems possible that prosecutors, desiring to maintain their position of honor and respect, feel constrained in their actions before the clerk. The clerk, in turn, might not be willing to endanger his own livelihood to cover up for the overzealousness of the prosecutor.

of the deposition taken by the prosecutor, upon a showing of special circumstances indicating that the deposition may be more reliable than the testimony in court, the deposition may be admitted as substantive evidence. It appears that as a rule the courts accept depositions tendered in this manner.[73] Under article 322, a statement by a defendant before a prosecutor may automatically be introduced in court as long as the statement was not coerced.

The other way in which recorded out-of-court statements are admitted at trial is through the consent of the opposing party. Although hearsay rules technically forbid a trial based solely on affidavits, consent obviates the rules. In most cases, before the taking of evidence the judge or the prosecutor will ask the defense to specify the portions of the prosecutor's evidence to which it will consent. Quite often, the prosecutor will have requested such notification from defense counsel beforehand, though counsel is under no obligation to respond.

Affidavits to which consent has been given may be delivered directly to the judge. For all other evidence, witnesses must be called. In the typical trial few, if any, witnesses other than character witnesses are called. The fewer the witnesses that are called, the more the situation resembles the guilty plea in the American system, in that the outcome is determined mainly by affidavits produced by the prosecution.[74]

The system encourages defense counsel to consent to statements taken by the prosecution, since if consent is denied and the witness takes the stand to materially contradict the statement offered by the prosecution, the statement may nevertheless be introduced into evidence. Accordingly, unless defense counsel believes he can create substantial doubt regarding the prosecution's evidence, there is nothing to be gained by refusing to consent to the admission of the documents. Because the rule permitting the introduction of prior statements as substantive evidence applies in practice only to prosecution depositions, there is no similar impetus to consent to defense evidence.

Thus far the description of investigation and the pre-charge decision-making procedures has not taken account of the existence of defense counsel or any representative of the suspect. This is appropriate since the lawyer does not play a formal role until the adver-

73. Although statements taken by police or private attorneys may in theory be admitted through a similar procedure (KEIHŌ, *supra* note 8, art. 321(3)), in fact, the courts are less likely to admit such statements. This is one incentive for prosecutors to carry out the final questioning themselves, even where the bulk of investigation has been completed by the police.

74. The lawyer does, however, avoid the American lawyer's dilemma of wishing to admit the crime in general while contesting the details of the police or prosecution report.

sarial relationship is established by the filing of an information. In practice, the procedures give the prosecutor virtually total control over the route the investigation takes. As a result, in the typical case the defense does not take a very aggressive approach to the investigation of the facts of a case.[75]

The one formal step that the defense lawyer or other representative of the suspect, such as a family member, may take, is to visit the victim, apologize for the incident, make reparations and obtain a statement of some degree of forgiveness (*jidansho*), which may include a request from the victim for lenient treatment of the perpetrator. In some cases, character witnesses or those willing to oversee the defendant's behavior also submit written statements.

In addition, there are certain ways in which a lawyer or other representative of the suspect may be able to participate in the prosecutorial decision-making process.[76] To understand how participation may be possible, in cases where a lawyer has been retained, it is common for the lawyer to be in contact with the prosecutor during the period preceding final disposition. This tends to be true whether or not the suspect has been detained, even where a statement of forgiveness is not at issue. At a minimum, the lawyer will need to keep the suspect's family informed about developments in the case.

The defense counsel may also be able to influence the decision to prosecute. One prosecutor in a panel on the topic of prosecutorial discretion listed the factors which influence this decision as follows: (1) whether the crime was committed with accomplices or alone; (2) whether the suspect was under the influence of drugs or alcohol at the time; (3) whether the crime was premeditated; (4) the strength or weakness of the evidence; (5) whether inappropriate or illegal methods were used in investigation.[77] In addition, this prosecutor also listed a number of factors to be considered in mitigation very similar to those appearing in the *Prosecutor's Manual.* Defense counsel may be able to use these factors to convince the prosecution to view certain facts or circumstances in a light more favorable to the suspect or less favorable to the possibility of conviction.

Probably because such a procedure may appear to smack of "bargaining," prosecutors almost universally deny that such discussions take place. At the same time, lawyers contend that they do sometimes discuss cases with the prosecutor. Although it is true that the lawyer has no right to demand that the prosecutor discuss

75. In special cases, such as the Lockheed case or a notorious murder incident, the defense will become actively involved.

76. *Symposium on Prosecution, supra* note 50, at 53.

77. *Id.* at 50-51.

the case with him, it seems logical that, as long as the lawyer can create an opportunity to meet with the prosecutor, the two sides will eventually discuss the case. Of course, there is no precise way to gauge the extent to which such discussions affect the outcome of any case. However, insofar as the process may give defense counsel an opportunity to inject a different point of view into the consideration of the evidence and circumstances, the practice seems to be one which increases the fairness of the system.

Some of the practices described may appear to eviscerate the actual laws. However, it must be borne in mind that the Japanese system, like any other system, is neither static nor one-dimensional. As in the United States, certain aspects of actual practice are not considered acceptable by scholars and lawyers and many of the practices or interpretations of law referred to here are topics of debate in Japan. Furthermore, prosecutors may take a different attitude when dealing with different types of cases.[78] The purpose of discussing these adjustments to the formal system is not to comment on the practices themselves but rather to increase the reader's insight into the actual process of prosecutorial decision-making.

B. The Suspension of Prosecution Decision

There are very few publicly available guides outlining the standards for the decision to suspend prosecution, and there is little systematic research in the area. In part, this may be attributable to a scholarly emphasis on theory or practice as it relates to legal theory, rather than on the everyday details of practice.

The research branch of the Ministry of Justice has written on the subject from time to time, but the standards they put forth are only ideals and are not intended to represent reality. The Prosecutor's Office is unwilling to elucidate its standards lest the clarification be interptreted as an official statement which might be binding on the Office.

In an attempt to clarify the manner in which such disposition decisions are made, Professor Mitsui Makoto of Kobe University undertook a statistical study using records from the Prosecutor's Office and from court records involving cases of larceny, "violence" and "bodily injury" from 1967 and 1968 in one geographical area.

In his unprecedented study, Mitsui set out specifically to test the generally accepted theory that the primary value of the practice of suspension of prosecution is its emphasis on "special prevention" or rehabilitation as opposed to "general prevention." In order to test this theory, Mitsui first elicited variables which might be used in determining whether or not to suspend prosecution. Mitsui then

78. *See infra*, discussion of so-called "public safety" and riot cases.

attempted to correlate these variables with the decision to suspend prosecution. The following factors showed significant levels of correlation:[79]

	Theft	Violence and Bodily Injury
1. Factors related to the nature of the crime itself (general prevention):	modus operandi; frequency of offenses; amount stolen; number of accomplices	motive; degree of responsibility; severity of injury
2. Factors related to the danger of recidivism (special prevention):	previous record; age at first offense; availability of a person to take responsibility for the criminal's future behavior if he is released	previous record; years of schooling; age at first offense
3. Others:	opinion of the police as to proper disposition	

Mitsui found that the prosecutors emphasized the "special prevention" factors for both property crimes and violent offenses in deciding whether to suspend prosecution.

Commentators often laud the suspension of prosecution system for allowing individualized treatment. Nevertheless, Mitsui argues that the emphasis on special prevention factors, rather than on the details of the crime itself, is unfortunate. In Mitsui's evaluation, detailed information concerning the facts of an incident, relevant to general prevention, is likely to be more easily obtained than is detailed information concerning the character and history of the suspect for special prevention purposes. Moreover, the highly personal investigation required to obtain detailed information concerning the individual is more likely to run the risk of interfering with the civil rights of the suspect than is an objective investigation of the facts. Since at that point the individual is not yet committed to the judicial process, Mitsui sees a detailed personal investigation as something to be avoided.[80]

Mitsui also discusses factors which may explain cases that departed from the general pattern of his study. For instance, in theft cases, he suggests that if the victim seeks severe punishment for the suspect or if the offense was committed while on parole or probation, this would militate in favor of prosecution. On the other hand, the existence of a mental or physical problem which could "explain" the crime might push the decision the other way. The payment of compensation to the victim in cases of violence would be a favorable circumstance that could result in suspension of prosecu-

79. *See* Mitsui, *Kensatsukan no Kisō Yūyō Sairyō pt. 4*, [*The Discretion of Prosecutors to Suspend Prosecution, pt. 4*], 91 HŌGAKU KYŌKAI ZASSHI 1693, 1736 (1974).

80. *Id.*

tion in a borderline case, as could the presence of a person to act as a guardian or mentor for the suspect if he was released. Similarly, if the victim was significantly at fault or the suspect was drunk at the time, these, too, would be factors for lenient treatment. Where both parties are at fault, as in an argument or a fist fight, prosecution might proceed on the theory that both parties should be punished equally.

Mitsui's study provides some very important information regarding the exercise of charging discretion in general. It shows that, at least on the face of the records, the decisions of most prosecutors are explicable by reference to certain standards. In addition, the study suggests some of the standards which are used.

Another source of information about charging decisions is the prosecutors themselves. The following cases elucidate, in a very practical context, the considerations prosecutors actually employ in decision-making.[81]

Case One

A mother placed a baby on a cushion on the floor and left the house for a few minutes. When she returned, she found that a stack of newspapers next to the cushion had fallen on top of the baby, smothering him to death.

If prosecuted, such an incident would fall into the category of "causing death through negligence," the penalty for which is only a fine. In spite of the minor penalty provided, the young prosecutor in charge of the case felt strongly that such carelessness was inexcusable. He reasoned that it was the mother's responsibility to protect the helpless baby. Thus, he determined that punishment was necessary and decided to prosecute.

COMMENTS: In every case the individual prosecutor must get approval of his decision from his superior. While in most cases the review by the superior is cursory, where there is a superior or a prosecutor new to the section, or where the case is important, it is less likely that approval will be granted on a pro forma basis.

The superior in this case believed that a decision to prosecute the mother would be outside the range of prosecutorial freedom, and he directed the young prosecutor not to prosecute. The superior explained that the mother had already suffered enough from the loss of her baby, and that this would be sufficient to alter her

81. The following case histories were derived from interviews with prosecutors in the Tokyo District Prosecutor's Office and from prosecutors assigned to administrative work in the Ministry of Justice. The prosecutors were asked to discuss cases in which they experienced difficulty or conflict in making a disposition decision. These discussions provide the opportunity to hear a prosecutor articulate his decision-making process, and to gain some insight into the attitudes with which prosecutors approach this portion of their work.

behavior in the future. To prosecute would be not only useless, but cruel, as it would only serve to etch the occurrence indelibly on the mother's mind. The prosecutor said he realized then that it was not always correct to adhere to the letter of the law. A prosecutor must think of other consequences of prosecution, and cannot always hold people up to the rigid standards the law provides.

Case Two

A mother was found lying on top of her newborn baby in the hospital, having strangled it. The child had been born with six fingers on each hand and six toes on each foot. The woman had previously borne a child with six fingers and toes, but that child had been operated on successfully. The mother explained that when she thought of the strain on the baby of the operation and of the strain on her marriage that another abnormal child would cause, she could not face the idea. Apparently on impulse, she killed the baby.

The mother had an IQ somewhat below normal, possibly indicating reduced responsibility. In addition, both her husband and the husband's family, who were construed by this prosecutor as representing the interests of the victim, expressed their wish that the mother not be prosecuted. Thus, the prosecutor decided to suspend prosecution. His decision was based in part on the desires of the husband and his family. He also relied in part on his own opinion that while the mother's judgment was incorrect, her psychological dilemma was unmistakable and pitiful. The prosecutor felt very strongly that because of the difficult family situation, he did not want to make circumstances worse by prosecuting the mother, but he was afraid that his superior would disagree and that he would be forced to prosecute. In the end, the case was dropped.

COMMENTS: There are arguments to be made in favor of prosecuting this case, as other prosecutors present during the discussion suggested. Although all agreed that the mother's dilemma was to be pitied, they pointed out that a prosecutor could not be put in the position of drawing lines to determine under what circumstances infanticide may be a permissible solution to such a dilemma.

According to these prosecutors, prosecution is rarely suspended in cases of infanticide, but suspended sentences are quite common. While the crime is too serious to be excused completely, they seemed to believe that it would be unfair to send the mother to prison when she was simply responding to the exigencies of her situation in the only way she knew. The prosecutors were uniformly of the opinion, however, that a suspended sentence represented a considerably more serious sanction than suspension of prosecution.

Case Three

A woman filed a complaint accusing a former lover of attacking her on the street, kicking and punching her and breaking three of her fingers. The injury was one which the doctor certified to be of three months' duration.

The man's story and the woman's story differed considerably. They both agreed that when they met on the street that day, the woman had demanded money from the man, saying that she needed it for her daily expenses. The woman claimed that he responded by giving her his watch, then changed his mind and attacked her in his rage to get it back. The man, on the other hand, contended that he refused to give her the watch, at which point she grabbed it from him. In the attempt to reclaim the watch, he admitted to using some necessary force but claimed it was not enough to break her fingers. The prosecutor's position was that, although the woman's fingers were broken, there were reasons to disbelieve both parties.

The prosecutor felt there was substantial reason not to prosecute. The incident involved a love affair and was, to some extent, a private matter. In addition, there were problems of proof in attributing all of the injuries to the man's actions; a prosecutor is obligated to interpret doubtful evidence to the benefit of the accused. While there was clearly enough evidence to prosecute on the fairly minor crime of "violence," if the woman's story was to be believed, the suspect may really have been guilty of a more severe crime. In that event, the woman would have been dissatisfied even if the case was prosecuted.

Rather than prosecute on the minor charge and run the risk that the woman would feel justice had not been done, the prosecutor's solution was to force the two to negotiate a possible settlement. The negotiations took approximately one month. The man agreed to pay the woman ¥400,000 (approximately $2,800) to settle the incident and formally end any relationship they might have had. He would then have no further obligation to her either for this incident or for monetary support in general. The woman withdrew her complaint, and both appeared to be satisfied.

COMMENTS: Because this was a case submitted by complaint, rather than on the initiative of the police, the victim-complainant had to be notified of the prosecutor's decision. If she was dissatisfied with a decision not to prosecute, she could lodge a complaint with the Inquest of Prosecution Board. Although this rarely occurs, the possibility means that the prosecutor may feel himself bound more by the wishes of the victim than in the typical case.

Settlement of this incident by negotiation did not appear to be outside the range of normal resolutions for the prosecutor. He felt that if the only two choices available were either to drop the inci-

dent for lack of proof or to engage in mediation, public opinion sympathetic to the victim would favor mediation. Even though mediation takes the case out of the public sphere and into the private sphere, he felt that this resolution would provide greater satisfaction to the victim and would serve to finally resolve a conflict which had demonstrated potential for erupting into violence. As the two were apparently unable to settle their differences by themselves, it became this prosecutor's job to help them.

Case Four

A twenty year old man was arrested on suspicion of robbery and attempted rape. The victim was hospitalized for at least a week due to injuries sustained. The incident occurred late one night when the suspect was riding his bicycle home after spending the evening drinking. He passed a woman who was walking, and, according to him, she threw a stone at him and, unprovoked, yelled at him, calling him a lecher. He continued along on his route, rather annoyed. When, shortly thereafter, he passed the victim and thought that she, too, had shouted a derogatory remark at him, he became enraged. In his fury, he attacked the woman, punching her and hitting her, and she fell to the ground. The woman claimed that he also attempted to pull off her clothes and touch her body. He claimed he did not intend to rape her but was only angry; the woman just fell in an akward posture with her clothing askew. The victim fought him off, and he fled. Before fleeing, however, the suspect took ¥50,000 from her pocketbook.

Thirty minutes after the incident, the suspect was arrested and returned the money. At the time of his interview, he had been detained for six days. During this time, the man's parents visited the victim to apologize for his behavior. In addition to apologizing, the parents paid the victim the equivalent of one month's salary, four days' salary for her husband due to work missed because of the incident, and damages in the amount of ¥150,000 ($1,070).

Having obtained as much information regarding the incident as he could from the suspect, the prosecutor then called the parents' to his office. They appeared worried, apologetic and shocked at their son's behavior. It appeared that although the prosecutor had from the beginning been inclined toward a charge of "bodily injury," punishable only by a fine in Summary Court, his appraisal of the parents' attitude convinced him of the appropriateness of this disposition. When the prosecutor advised the parents of his decision, they simultaneously burst into tears of gratitude and relief and thanked him profusely.

The suspect, who did not know of his parents' visit, was brought in for further questioning in order to produce a final state-

ment summing up the incident. In the statement which resulted, any facts supporting a charge of rape were minimized, and the chance nature of the taking of the money was emphasized. Thus, in the end, the statement produced was consistent with the charge of "bodily injury" and the requested penalty of a ¥75,000 fine.

COMMENTS: Discussions with the prosecutor in charge of the case indicated various factors that may have influenced the final charge. The payment and apologies made to the victim by the suspect's parents were one important factor. Further, it would have been difficult to ensure a conviction on a charge of attempted rape if the suspect had consistently maintained that he lacked the requisite intent. To secure a conviction it might have become necessary for the victim to appear as a witness, and in a rape case this can be a problem.

The fact that the suspect had no prior criminal record, and that he was in training for a career, may have led the prosecutor to believe that he was likely to stay out of trouble in the future. The concern of the suspect's parents, as well as their plans for his future, suggested that they would also take a strong hand in keeping him in line. Even though the prosecutor seemed to have some doubt about the suspect's innocence, he felt there were enough outside pressures to guarantee good behavior in the future. Finally, the prosecutor seemed to feel that the experience of six days of incarceration had probably frightened the suspect sufficiently to ensure his future self-control.

A particularly interesting aspect of this case was the behavior of the clerk toward the suspect. When the prosecutor left the room after informing the suspect of his disposition decision, the clerk, who had been silent until that time, spoke to the suspect. He explained that the suspect's parents had come to see the prosecutor and that the parents' appropriate and sincere attitude was one reason for the suspect's relatively lenient treatment. The clerk also pointed out to the suspect the financial and emotional burden he had imposed on his family. The guard assigned to the suspect, an older man, also spoke in a reproving, yet sympathetic and friendly manner. He inquired about the man's family, commenting that it was an unfortunate thing to place such burdens on one's family. The guard and the clerk chatted about other more serious cases which might have intimidated the suspect.

Case Five

A young man was accused of armed robbery in a private home. The prosecutor felt that the suspect was truly remorseful, but the incident, which involved threatening the householder with a knife, was too serious to ignore. The suspect had a record of several com-

mitments to a juvenile detention home, as well as prior arrests for theft.

COMMENTS: In discussion, the prosecutor commented that his decision to prosecute and request a sentence of four years, making a suspended sentence unlikely, was somewhat harsh. Given the prosecutor's obligation to protect society and discourage crime, this prosecutor felt that where a crime of this magnitude was committed by an individual with a prior record, a serious penalty was required.

Public Safety Cases

Another type of case important to the understanding of the exercise of prosecutorial discretion is the so-called "public safety" case. To the extent possible, each Prosecutor's Office is urged to create a section or designate an individual to specialize in these cases.[82] Thus, although there is no detailed definition of the term "public safety" case, and some argue that such cases are treated no differently from other types of cases,[83] it is clear that at least administratively they are considered a separate category.

The public safety prosecutors in Tokyo did not recount any specific cases, but numerous interesting points appeared in discussions with prosecutors. Loosely defined, public safety section cases include all crimes of riot, many of which are simply minor incidents of violence connected with strikes or demonstrations; criminal incidents related to labor disputes, including prohibited public employee strikes; and any other crimes against civil order, such as posting bills illegally. Special legal expertise consists of knowledge of such areas as labor law and constitutional law, while the factual expertise required is a familiarity with the radical groups and groups of protesters active in Japan.[84]

While the average suspect responds to police or prosecutorial questioning in spite of notification of the right to silence, public safety suspects are more apt to make full use of their rights. Since political activists purposely put themselves in situations where they may be arrested, it may be that they are better prepared for their arrest and are more aware of their rights than the typical criminal

82. The section is actually called the "Public Safety-Labor Section," but the term "public safety" will be used here to refer to both types of cases.

83. Indeed the very classification of a case as a public safety case is politically charged. There are likely to be differences of opinion between prosecutors, moderate lawyers and left-wing lawyers as to whether a case should be treated as a public safety case. For this reason, defendants treated as public safety defendants by prosecutors may not be viewed by others as harboring the same degree of anti-establishment feeling. Generally, "public safety cases" involve political "radicals," who pose a threat to the state. Not everyone has the same opinion as to who is a radical.

84. For instance, prosecutors are supplied with a handbook containing a "genealogy" of the radical groups, identified by the helmet color used by the group in demonstrations.

suspect. Furthermore, they may sometimes view the interrogation process as a continuation of political struggle. Accordingly, political radicals or labor activists may be willing to be detained for longer periods in order to prove a point or gather support.

Because the public safety suspect's involvement in a crime is often considered to be part and parcel of involvement in anti-establishment political activity or politically-colored labor activities, the prosecutor has a particular image of the public safety suspect. This image tends to be different from his image of the average individual arrested for a violent crime. He may consider them to be serious, thinking individuals, deeply committed to their ideology, who have simply become caught up in group actions that went too far. This is not the criminal personality which has no moral sense to guide it. Rather, the deep commitment and sense of honor toward one's group and one's goals that characterizes radicals would be viewed by a prosecutor as a model for the strong, principled Japanese citizen. Yet somehow the radical has become estranged from the thinking of a normal Japanese person, and his energies have been turned in the wrong direction.

Accordingly, one approach that may be used in public safety cases is to make the suspects see the difficulties with their views. A prosecutor might point out that it is a fine thing to have an ideology, a conviction around which one leads one's life, but when this leads to committing a crime or causing injury, it is no longer correct. Given the opportunity to separate the radical from his group and talk with him as one principled individual to another, prosecutors have found that a change of heart (*tenkō*) sometimes occurred.[85]

Such a change in thought was viewed not only as an investigatory tactic but also as a way of "rehabilitating" the suspect. Since many of the crimes dealt with in the public safety sector originate in political ideas, there is little danger of recidivism once the ideas change. Therefore, the prosecutor indicated that if a suspect was willing to discuss the incident and appeared truly repentant, suspension of prosecution was likely unless the crime was too serious.

C. Implications of Prosecutorial Discretion as Actually Practiced

1. Functional Significance of Suspension of Prosecution as a Disposition

Originally, suspension of prosecution was justified as a more humane substitute for a suspended sentence. The idea was that a

85. *Tenkō* is an old word indicating a conversion. It denotes a permanent change of outlook that could be expected to alter the individual's convictions, as distinguished from a temporary or superficial change for utilitarian purposes.

suspect who would in any case have escaped formal punishment through the mechanism of a suspended sentence, could now be spared the embarrassment and trauma of a public trial as well.[86] Over time, however, while suspension of prosecution rates continued to increase, rates of suspended sentences were hardly affected.[87] The advent of suspension of prosecution thus not only affected the stage of the proceedings at which leniency was shown but actually led to lenient treatment for increased numbers of individuals.

Over time, suspension of prosecution has become more than a time and money-saving device for an overworked prosecutorial bureaucracy. It has become a positive disposition with its own significance. Suspension of prosecution represents a sanction which lies somewhere between a release with a warning by a police officer and a suspended sentence following a guilty verdict adjudicated by a court.

For both suspects and the prosecution, suspension of prosecution is understood as a determination of guilt, but with an agreement that the incident will be treated lightly "this once." It adds one more step to the schedule of sanctions, from simple police warning to imprisonment, that exists in most criminal justice systems. With each successive step, the sanction confers more social disadvantages on the criminal and makes it harder for him to regain his place in society. From a criminal justice point of view, something may be said for increasing the number of chances an individual is given before he is removed from society, so long as each step is seen to represent progressive approbation against the individual's acts, rather than a victory over the system. Moreover, it appears that suspension of prosecution is a prerogative highly valued by prosecutors, not only because of the tremendous power it gives their organization but also because they enjoy the opportunity to set aside their adversarial role and act benevolently.

On the other hand, one possible problem in the use of suspension of prosecution as a type of guilty verdict is the danger that it may be used as a sanction where the prosecutor may be convinced of the suspect's guilt but is unsure whether he will be able to convince a court. In theory, review by a superior should ensure that non-prosecution in these cases is ascribed to such reasons as "insufficient proof" or "facts not constituting a crime." However, given the various pressures on prosecutors, it appears possible that cases which belong in the simple non-prosecution category may sometimes be inappropriately swept into the suspension of prosecution group.

With an expected rate of conviction of more than ninety-nine

86. *See* Mitsui, *supra* note 25, at 1058.
87. *Id.* at 1049. *See also*, Mitsui, *supra* note 24, at 934-37.

percent, the major pressure on prosecutors is not to pursue losing cases. It was also suggested by prosecutors that where the stated reason for declining prosecution is insufficient evidence, peers or superiors may feel that not enough effort was expended in investigation. For a prosecutor caught between these demands, a suspension of prosecution disposition may well become a very attractive option. At the same time, the significance of review by a superior of the classification of a non-prosecution decision may be diluted where the superior does not expect investigation to be as exhaustive when prosecution is to be suspended as when a case is pushed to trial.

Another issue in suspension of prosecution is the impact of illegally obtained but probative evidence. One prosecutor suggested that under a "clean hands" theory, he might suspend a prosecution if illegal investigation procedures had been used. He emphasized that such treatment would be limited to minor crimes.[88] If this approach is actually used, it would strike a compromise between letting an individual off completely despite the existence of probative evidence of guilt, as for example under the exclusionary rule, and willingness to make use of probative evidence, regardless of how obtained.

The disadvantage to the suspect mistakenly classified as a case of suspension of prosecution is that if he appears before a prosecutor again, he will be treated as if he had already had his one opportunity for lenient treatment. Evaluated in terms of procedural purity, *i.e.*, the fact that an individual is considered guilty although guilt beyond a reasonable doubt is never actually determined by a court, all suspensions of prosecution are the same. In terms of factual accuracy, the possibility that suspension of prosecution may be used when guilt could not be proven poses a particularly serious problem.[89] Nevertheless, the advantages of a system which includes this option for disposition seem to outweigh the problems, especially when compared to the unexplained prosecutorial decision-making which is common in the United States.

2. *Analysis of the Suspension of Prosecution Decision*

Looking back to the case studies discussed above, there are certain common threads in the decisions by the prosecutors to suspend prosecution. Of course, the most obvious is the seriousness of the crime. Where the victim actively discourages prosecution of the suspect or does not object to a non-prosecution determination, there may also be an increased chance of suspension of prosecution.

88. *Symposium on Prosecution*, *supra* note 50, at 63.

89. Not surprisingly, the Japanese bureaucracy, which prides itself on producing factually accurate outcomes in criminal cases, does not admit that such confusion could occur.

The absence of a prior record of wrongdoing is also a factor in lenient treatment. Conversely, the existence of a significant prior record is a factor against such treatment.

Cases suggest that when the crime arises in the context of a familial or personal relationship and many factors peculiar to the relationship have contributed to the crime, preference should be given to solving the problem within the relationship, rather than in the public arena. Another way in which personal relationships have a place in suspension of prosecution decisions is the consideration given to whether or not there is an employer, parent, or other family member who can act as a guarantor for the individual's future behavior.

Any combination of the above circumstances or others cited in Mitsui's studies or the *Prosecutor's Manual* will help a suspect's case, but no one of these factors is essential. It is most unlikely, however, that lenient treatment will be accorded an individual who does not show remorse (*hansei*) for the deed. This remorse is normally expected to take the form of an admission, a verbal expression of sorrow or shame, and restitution in the case of theft or reparations where the victim sustained bodily injury.

Finally, the substantive facts of a case must be considered. The less sympathetic the facts, the more compelling the mitigating factors must be to result in lenient treatment. In cases too serious to be disposed of by suspension of prosecution, a recommendation of a less severe sentence may be accorded.

All of the standards for leniency mentioned, including the seriousness of the acts charged, necessarily involve value judgments. In the United States, one of the major topics of debate regarding prosecutorial discretion is the proper source of value judgments on which to base prosecutorial decision-making, *i.e.* whether these judgments can be left to the bureaucracy or whether they should be controlled by the legislature.[90] In Japan, the law specifically delegates this responsibility to the prosecutors. However, Japanese prosecutors are sensitive to the tension involved in the pseudo-legislative act of establishing prosecutorial standards. Ironically, they remark that if the Prosecutor's Office were to set standards for prosecution, this would be akin to creating new legislation, an act for which the Prosecutor's Office lacks authority.

Nevertheless, the Prosecutor's Office is convinced that its lack of law-making ability does not imply that the result in each case is simply given over to each prosecutor's individual sense of justice. In Japanese, the term *shakai tsūnen* describes ideas which are held in common by all members of society. The Prosecutor's Office be-

90. K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1971).

lieves that it is able to intertwine the various factors relevant to prosecutorial decisions in a manner which is acceptable to society and sufficiently understandable by the populace, in spite of the Office's refusal to clarify its decision-making models publicly. Although the Prosecutor's Office does not employ the phrase, it seems to base its belief on a conviction that it is capable of discerning and employing ideas that are *shakai tsūnen*—ethical or behavioral constructs which comprehend the essence of what "Japanese society" believes. Thus, prosecutors contend, their judgments are not random, haphazard judgments, or, worse still, the product of an authoritarian bureaucracy imposing its will on the people. Rather, they have taken ideas from within society and are simply using them as standards by which to measure behavior in that same society.[91]

3. *Implication of the Standards For Suspension of Prosecution*

Bearing in mind the concept of *shakai tsūnen*, one of the most interesting factors in determining the propriety of lenient treatment is the emphasis on remorse.[92] This emphasis in criminal justice tends to be justified by reference to the Japanese sense of morality and ideas reminiscent of *shakai tsūnen*. The fundamental notion of repentance in the Japanese context contains two elements. First, the wrongdoer admits his act either to the person harmed by the act or to the authorities, expressing his heartfelt regret. Second, in exchange for the wrongdoer exposing himself to the victim's wrath, it is incumbent upon the individual hearing these expressions of remorse to soften his own attitude.

Purely inward remorse cannot satisfy the demands of this scheme. A large part of the meaning of repentence is to signify recognition of the proper order by placing oneself at the mercy of the very society whose rules one has violated. To refuse to take responsibility for one's conduct and express regret for it can only be explained by an inability to appreciate the proper order or to appreciate how one's act has offended this order. It is generally believed that there is little chance for rehabilitation of an individual who does not know enough to show repentance when he is guilty. Consequently, prosecutors argue, it is only natural that repentance should be one of the factors used to determine whether or not to show leniency.

This emphasis on repentance indeed approaches a *shakai tsūnen*. For instance, one tactic embraced by radical political

91. It is not suggested that the reader accept this contention precisely as the Prosecutor's Office conceives of it. *See* discussion, *infra*.

92. More literally, *shakai tsūnen* means ideas which are held in common throughout the society.

protesters is the *kyūdan*, a type of struggle session wherein the individual who is the object of the struggle is expected to listen quietly and remorsefully to all the accusations being shouted at him. To attempt to defend his actions would only enrage his opponents more. When one is wrong, they believe one is obligated to recognize that fact.

Another example is the civil suit brought by Minamata disease victims against the chemical company responsible for the mercury pollution which caused the disease. Although the plaintiffs were pleased with their legal victory, they were profoundly dissatisfied that the president of the company merely sent his representatives and did not appear in court personally to bow his head before the victims and take responsibility. Failure to show personal remorse was considered to be proof that the company did not regret its actions.[93] A Japanese psychiatrist writes that the Japanese believe that to say "*sumimasen*" ("I am sorry") expresses one's repentance sufficiently. By saying "*sumimasen*," a Japanese further expects to receive forgiveness from the individual to whom he has expressed his regret.[94]

Against this background, spokesmen for Japanese prosecutors find it easy to extol the peculiar Japanese character of such repentance. Japanese criminals, they claim, want to confess. When a suspect is encouraged to confess, he may be told that he will feel better if he "comes clean." But, the spokesmen say, this is not simply a means of obtaining more confessions. Rather, it is a genuine expression of the prosecutor's understanding of Japanese human nature. This understanding also enables the prosecutor to determine whether repentance is sincere or artificial.

Certainly, viewing the willingness to confess as an indication of repentance and a remnant of good character is not unique to the Japanese system. It is not uncommon in other countries to favor more lenient treatment for those who confess.[95] At least one American commentator has written that confession "may be the first step in the rehabilitative process and is indicative of the defendant's desire to purge his guilt and to seek the earliest application of the process of rehabilitation."[96]

On the other hand, it would be naive to focus on the spiritual

93. Upham, *Litigation and Moral Consciousness in Japan: An Interpretative Analysis of Four Japanese Pollution Suits*, 10 LAW & SOC. REV. 579 (1976).

94. *See generally*, T. DOI, AMAE NO KOZO [THE ANATOMY OF DEPENDENCE] (1971).

95. For an English view, *see* Cooper, *Plea-Bargaining: A Comparative Analysis*, 5 N.Y.U.J. INT'L L. & POL. 427, 441 (1972); for Germany, Italy, and France, *see* Goldstein & Marcus, *supra* note 7.

96. Davis, *The Guilty Plea Process: Exploring the Issues of Voluntariness and Accuracy*, in THE PROSECUTOR'S SOURCEBOOK 224 (B. George ed. Supp. 1972).

aspects of encouraging repentance to the exclusion of the benefits of this practice for the criminal justice system. An emphasis on repentance as a standard for lenient treatment inevitably means an emphasis on obtaining confessions. In Japan, a conviction cannot be based on a confession alone, but requires corroborating evidence.[97] Nevertheless, a confession makes the prosecution's job considerably easier.

The combined effect of the evidentiary rules discussed above[98] and of customary practice is to make a confession function like a guilty plea. Most suspects who confess also admit to the facts before the court. The general knowledge that sentencing will be more severe if the defendant denies acts for which evidence clearly shows his guilt cannot be discounted as a factor in this phenomenon.[99] In addition, the evidence rule which permits a confession to be introduced as substantive evidence is important.[100] Once the defendant decides to admit to the facts charged, there is little point in refusing to allow the statements made before the prosecutor to be admitted as evidence. Small points may then be contested, but the bulk of the trial will consist of the prosecution's affidavits.[101] Since the prosecutor will presumably have based his charge on these affidavits, a guilty verdict is then virtually assured.

In the United States, the exchange of a guilty plea for lenient treatment—plea bargaining—has been criticized for a number of reasons.[102] The situation created by the encouragement of confessions in Japan is not without its similarities. It is true that because no bargain is actually struck and no promises are made on either side, a number of the difficulties in the American system are avoided. Nevertheless, one of the major issues remains—the extent to which it is proper to accord differential treatment to individuals based on whether they have waived their right to have the state prove its case against them. It seems quite likely that the hope of

97. KENPŌ, *supra* note 37, art. 38, sec. 3.

98. *See* Part 1(II)(A), *infra*.

99. Of course, if the court believes there was actually an issue of interpretation, for instance, the defendant would not be penalized simply for causing the court trouble.

100. KEIHŌ, *supra* note 8, arts. 321(1)(2), 322.

101. Statistics show that in 1978 and 1979, the average number of witnesses called for a criminal case in which a confession had been obtained was 0.9 for the district court, while for cases without full confessions, the average was five witnesses in 1978 and 6.6 witnesses in 1979. MINISTRY OF JUSTICE (Japan), 1981 WHITE PAPER ON CRIME.

102. It is possible that an acquittal could be rendered in spite of all these factors. For instance, the court could find that the written evidence does not sufficiently support the charge, even where the defendant failed to contest it, or that a specific affidavit is unreliable. However, given the prosecution's control over the investigation, the high level of technical skills within the organization, and its internal supervisory structure, when the defendant has confessed, there is little likelihood of finding flaws in the prosecutor's case.

lenient treatment or the fear of harsh treatment causes many individuals to admit their crime to the court, thereby forfeiting their right to silence and the "right" to insist that the state prove their guilt.

It could also be argued that the emphasis on confession has a detrimental effect on the accuracy of the criminal justice system, beginning at the investigatory stage. Despite the general belief that suspects feel better after confession, prosecutors report that at least some severe questioning is generally required to bring out the facts. Even if a suspect admits to the incident, he may deny the more incriminating aspects. During questioning, a suspect is naturally aware of the importance of defending his own position as to the circumstances of the incident. At the same time, he is conscious that a co-operative attitude will make him seem more repentant and may be advantageous.

While in this frame of mind, the typical suspect is presented with a written deposition summarizing his testimony; because the prosecutor hopes to use the statement at trial, it often contains phraseology which is legally significant. However, the defendant must decide whether or not to sign the statement without consulting with his lawyer. He is thus unable to weigh rationally the value of a co-operative attitude[103] against the potential damage to his interests presented by the deposition. Under these circumstances, it seems likely that most suspects would choose to end the questioning process by signing the statement rather than refusing to sign until apparently minor distinctions in the phraseology of the deposition are resolved.

In most cases, the distinction in phraseology will actually be trivial, but in some cases a seemingly trivial distinction can determine the severity of the crime charged.[104] With an abstract issue such as intent, shades of meanings can be crucial, and the defendant usually does not possess sufficient expertise to grasp the implications of subtle differences in wording. Thus, there is potential for the distortion of facts, even where there is no intent to distort them.

After an information is filed, the defendant may meet freely with his counsel. However, even if the lawyer is thorough and astute enough to recognize that the defendant has mistaken a trivial distinction for an important one when agreeing to a written statement, it may be difficult to remedy the situation at that point. If the written confession is contested, it will almost certainly be admitted

103. Since the benefits of co-operativeness are not guaranteed in any case, a totally rational calculation is never possible, but the focus here is on the unknown nature of the opposite factor.

104. For example, consider the differences between manslaughter, voluntary and involuntary, second-degree and premeditated murder in the American system.

into evidence. When the issue is not subject to proof by concrete evidence, rebuttal of the confession may be difficult. Moreover, when the responsible prosecutor has acted in good faith, he will not be aware that the defendant has decided to compromise his version of the truth in signing the confession, so the safeguard of internal review within the Prosecutor's Office will be ineffective. Thus, in combination with the one-sided nature of the investigation process, the emphasis on repentance has the potential to undo many of the safeguards built into the criminal justice system and permit the distortion of the truth even where all parties are acting in good faith.

There is ample evidence that repentance is an appropriate factor to be considered when granting lenient treatment, given Japanese moral sensibilities. However, the above discussion demonstrates that even when prosecutorial standards conform to popular values, problematic issues may remain.

Another example is the practice of gauging an admitted criminal's sincerity by whether or not reparations were made to the victim. Along with a verbal apology, such payments are widely considered to be the proper way to show one's regret.[105] It may be sound criminological policy to encourage the restoration of private order while simultaneously dealing with the violation of public law. Still, it may be desirable to consider whether the payment of money is an appropriate basis for lenient treatment, since not all suspects have equal access to funds for reparations. However, the general consensus seems to be that any person would be able to gather sufficient funds to demonstrate his sentiments.

Some of the factors emerging from Mitsui's research into suspension of prosecution should also be cited. Whereas factors concerning living environment, education and occupation can be legitimately linked to rehabilitative prospects, they may also be viewed as merely a reflection of socio-economic status. Even if these standards have wide public support, one may question whether this support is enough to justify the use of these potentially discriminatory standards.

Prosecutorial standards which are based on sentiments lacking wide public support are yet a separate issue. Such standards could come into use if the prosecution developed mistaken perceptions of *shakai tsūnen*. Public safety cases and the standards used to deal with them are fraught with this danger. Such cases require prosecutors, who are themselves a part of the governing order, to evaluate the danger to society from attacks on that order, either by political opponents or by labor unions. Thus, they may be incapable of divining *shakai tsūnen* in this arena. Furthermore, since prosecutors

105. G. KOSHI, THE JAPANESE LEGAL ADVISOR: CRIME AND PUNISHMENT (1970).

tend to be surrounded by other prosecutors, they may hold a skewed view of public opinion in politically-related matters. In addition, discussion of such a case with superiors will not help to broaden their views.

The prosecution's position is that public safety and labor cases are treated no differently than other cases. It is suggested that any appearance of different treatment is simply due to the extra press attention such cases attract.[106] However, the fact that special Public Safety Divisions exist and the comments of public safety prosecutors suggest that this is not a full explanation.

Two rather broad standards for the exercise of prosecutorial discretion which have been enunciated in such cases are the suspect's comprehension of the antisocial nature of his act (repentance) and the impact of the act on society. A suspect's refusal to recant his political beliefs or even a staunch refusal to respond to interrogation could easily be interpreted as a failure to recognize the antisocial nature of his acts. It has also been suggested that some public safety incidents may appear to be treated more harshly than the objective criminal facts would mandate because of the severe impact they have on society.[107]

On the other hand, at least some prosecutors recognize that the public does not entirely share the prosecution's sense of crisis about public safety cases. One commentator notes that the shared concept of justice which normally exists between the people and the prosecutors may break down for certain types of crimes. Attributing the low level of public interest in public safety cases to the influence of the press, he makes it clear that the prosecution will follow its own view of justice for what it believes is the public good.[108]

In this difficult area, prosecutorial discretion runs the risk not only of making disposition unpopular with the public, but of oppressing those who hold minority political viewpoints.[109] Because of the political and value differences involved in public safety cases, cases classified as such have formed the nucleus of demands for control of prosecutorial discretion.

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106. *Symposium on Prosecution*, *supra* note 50, at 56.

107. *Id.*

108. Kawakami, *Shakai Seigi to Kensatsu* [*Social Justice and the Prosecution*], in GENDAI NO KENSATSU 19, 26 (1981).

109. This is not to suggest that such "oppression" is actually a common occurrence, but merely that the manner of dealing with public safety cases, without more, may be seen to pose this danger.

PART 2. DEVELOPMENTS IN THE CONTROL OF PROSECUTORIAL DISCRETION

I. Defining the Problem

It is commonly recognized that the manner in which any law is administered determines its practical meaning, regardless of what the law may say on its face. In this way, it is possible to assure necessary flexibility which cannot be incorporated into written law, and to permit law enforcement agencies to allocate their resources effectively. However, some type of control over prosecutorial discretion is clearly necessary. While it is a benefit to the system to entrust certain decisions to those who deal most intimately with each individual case and who can therefore presumably best judge the situation, the public must also be confident that the prosecutor's decisions do not result in an unjust legal regime.

As alluded to above, scholars in Japan have argued for narrowing the scope of prosecutorial discretion in a number of areas, many in the sphere of investigation. However, some of the most interesting developments relate to attempts to control discretion over whether or not prosecution should be suspended. Heretofore, it has been assumed that charging decisions are so subtle and situation-specific that discretion in that realm cannot be controlled, only eliminated. Naturally, control mechanisms for the charging decision must proceed along different lines than the traditional efforts to limit prosecutorial or police investigatory power. However, for this very reason, these developments are of broad-ranging significance for the system as a whole.

The prospect of developing new controls for the charging decision is also significant due to the importance of this particular prosecutorial decision. For the suspect, it has been said, "the suspension of prosecution decision is the difference between heaven and hell."[110] Traditional theory has it that once the prosecutor has decided to pursue the case to trial, the court must convict unless the evidence presented is insufficient to prove guilt. However, if the prosecutor suspends prosecution, an individual is beyond the court's reach. Moreover, these decisions have great meaning for law enforcement as a whole. In the aggregate, they determine which individuals will be subjected to public approbation and possibly deprived of their freedom and which will not.[111]

II. Existing Controls Over Prosecutorial Discretion

With respect to the decision to prosecute, certain controls were

110. The choice of which charge to file is less important. Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1521-37 (1981).

111. *See* discussion at the end of Part 1, *supra*.

built into the system from the outset. It was not envisioned that each individual prosecutor would simply make arbitrary decisions on each case. Rather, as discussed above, the bureaucratic structure within which the prosecutor functions, as well as his training, influences his decision-making. In the event that these structures fail, the two institutions described above, the inquest of prosecution and the analogical institution of prosecution, are to take over. To this extent, it has always been accepted that control of prosecutorial discretion is possible. The issue is, of course, whether this degree of control is enough.

There is disagreement over whether or not the inquest of prosecution and the analogical institution of prosecution effectively control prosecutorial discretion.[112] Some argue that the scant use of these mechanisms by the populace reflects contentment with the way the system works.[113] While lack of objections is one possible explanation, there is no particular evidence to contradict the opposite conclusion that the system does not serve the purpose for which it was established.[114]

Another limitation of the inquest of prosecution and analogical institution of prosecution mechanisms is that they can only address a claim that a prosecution was improperly dropped. When the belief develops that in certain cases it is actually unjust to prosecute, although conviction may be certain, inquest of prosecution and analogical institution of prosecution can no longer provide sufficient control, no matter how perfectly those institutions function.

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112. For all of Japan, from 1975-1979, Inquest of Prosecution Boards handled between 1,600 and 1,700 cases per year. In the vast majority of cases—ranging from 89.6% to 94.3%—the decision not to prosecute was found to be proper.

Of the cases in which the Inquests recommended prosecution, only a portion were actually prosecuted:

Year	Prosecutions Filed of Those Recommended
1975	34.5% 50 cases
1976	25.8% 23 cases
1977	16.7% 28 cases
1978	16.5% 20 cases
1979	14.1% 23 cases

MINISTRY OF JUSTICE (Japan), 1981 WHITE PAPER ON CRIME, 188-189 (1981).

113. Dando, *supra* note 23, at 528.

114. Significant criticisms have been raised by such prominent scholars in the field as Professors Mitsui and Odanaka. *See* Oide, *Kensatsu Shinsakai no Genzai to Shōrai*, [*The Current and Future Status of Prosecutorial Inquests*], in JURISUTO ZŌKAN KEIJI SOSHŌ HŌ NO SOTEN (K. Matsuo ed. 1979). *See also*, Zenshihō Rōdō Kumiai Shihō Seido Kenkyū Iinkai, KENSATSU SHINSAKAI NO GENJŌ TO KADAI [*Prosecutorial Inquests: Current Status and Issues*], in GENDAI NO KENSATSU 114 (1981).

The rules which are to ensure that prosecutions are suspended in proper cases and suspects prosecuted in other cases are described in Part 1. Review by superiors, customary practice emerging from tradition and experience in dealing with cases, as well as the principle of the unity of the procuracy (*kensatsu dōittai no gensoku*) are relied on by the Prosecutor's Office to produce uniformity between individual prosecutors and among regions.[115]

Mitsui's findings suggest that the system is successful in achieving uniformity.[116] Mitsui's conclusion is also consistent with sociologist Max Weber's theory on the functioning of a bureaucracy. Weber believed that a hierarchical bureaucratic organization, as he defined it, would treat individual incidents uniformly because of the internal demands of the system.

In a hierarchical bureaucracy, offices are filled by specifically trained personnel appointed on the basis of technical qualifications rather than personal qualifications. The holder of an office regards his position as his career. Normally, he enters the organization directly after completing his training and remains until retirement, being promoted along the way based on his superior's evaluation.[117] The primary reason for the predictability of individual actions within such a system is that career success depends on conformity to the expectations of superiors, who have themselves succeeded by conforming to those around them. In addition, all personal elements are removed from job performance requirements.[118]

It is evident from the descriptions of the Prosecutor's Office in Part 1 that the Japanese prosecutorial bureaucracy is a hierarchical bureaucracy similar to the archetype constructed by Weber.[119] The promotion system is rather complex. Seniority is the most important single determinant of position, but among those of similar tenure, there is differential progress according to performance.

All personal elements are considered removed from the prosecutor's job in the Japanese system by the principle of the unity of the procuracy. This principle suggests that the individual prosecutor dealing with any specific case is faceless. Only the organization as a whole holds opinions. The fact that the responsible prosecutor actually may be switched in the middle of a case reinforces the ideal

115. *Symposium on Prosecution*, *supra* note 50, at 51.

116. Since Mitsui's findings are based on written records only, it is possible that standardization actually comes about in the process of compiling the required written information, rather than in evaluating the cases for disposition.

117. M. WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 333-34 (T. Parsons ed. 1947).

118. *Id.* at 484.

119. One small loophole in the closed nature of the system for the Japanese prosecutor is the fact that he can have a quite comfortable career as a lawyer if he quits the prosecutorial organization. Still, most prosecutors hope to succeed within the system first.

since, in a very practical way, prosecutors are forced to carry out their work in such a way that it can be taken over and easily understood by the next prosecutor.

It has been suggested that uniformity is also fostered in a more practical way by circulating formally articulated rules or a system of points for assessing cases within the Prosecutor's Office. Since the system does provide for internal memoranda in every agency (*tsūtatsu*), which are generally not made public,[120] it would not be at all surprising if such rules did exist. Although it cannot be proved conclusively that dispositions within the prosecutorial system are uniform, it seems likely that the combination of the bureaucratic system, the emphasis placed on uniformity in prosecutorial ideology, and the checks and balances within the prosecutorial organization actually do lead to a high degree of uniformity in treatment.

Even if internal uniformity is actually achieved by the prosecutorial organization, discretion may simply be pushed up to higher levels.[121] Applying Weberian models to the European criminal justice hierarchies, Mirjan Damaška has constructed a "hierarchical model" which emphasizes certainty of decision-making.[122] In this model, importance is placed on making rules so concrete that an individual's particular reaction to a specific case cannot modify the outcome determined by the rules.[123] Conversely, there is little control over the content of the rules themselves.

In the Japanese system, it is important that rules not be so concrete that flexibility in individual cases is prevented. Yet, dispositions cannot be left to the personal predilections of individual prosecutors. It is possible to satisfy both of these requirements by taking as the rules of the system those guides described earlier as *shakai tsūnen*. The proclaimed use of *shakai tsūnen* as standards has the advantage of encouraging public trust in the correctness of the system's judgments, while allowing the system to preserve flexibility and secrecy. At the same time, however, the Ministry of Justice, by refusing to make public any statements of actual standards, is unwilling to bind itself to particular standards or to open itself to

120. As a caution it should also be remembered that the individual prosecutor's decisions influence to a large degree the depositions and other records of a case which are open to others within the Prosecutor's Office. Since in any particular case, it is unlikely that a superior will go so far as to meet with a suspect or witnesses himself, prosecutors still possess a certain domain of independence. At the same time, it may be hypothesized that actual use of this independence in a manner that runs counter to general institutional beliefs is unlikely simply because of the surrounding individual's influence on each prosecutor's thinking.

121. Vorenberg, *supra* note 110, at 1545.

122. Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 483-85 (1981).

123. *Id.* at 485.

possible criticism by lawyers, protest groups, or the general public. The result is that the only control on the discretion of the organization as a whole is its own perception of the values held by society in general.

In spite of the success the Japanese system seems to have had in producing uniformity of treatment, there is clearly still room for mistakes in judgment as to who should be prosecuted and who should be treated leniently. There is always the possibility that the Prosecutor's Office as a whole may have made an incorrect appraisal of the values society wishes enforced. It is also possible that a decision, justifiable from one point of view by *shakai tsūnen*, violates other important values, such as the values guaranteed by the Constitution.[124] Finally, it is possible that, despite all the safeguards, an individual prosecutor will make an incorrect judgment regarding the societal value to be applied and that this will, for some reason, bypass his superior. The problem in relying exclusively on the internal bureaucratic order for control is that the present system provides no mechanism to address these problems, where they result in excessively or unevenly harsh, rather than excessively lenient, treatment.

Certain institutions have functioned informally to bring a straying Prosecutor's Office back into line. For instance, some liberal bar associations and radical lawyers expend a great deal of their energy opposing actions taken by the government. According to some lawyers, these habitual protesters are ignored because they represent only a tiny minority of lawyers. While radical lawyers are certainly not representative of all lawyers, they do protest against many government actions with which more moderate lawyers might also disagree. Therefore, with regard to certain matters, the more vocal, more radical lawyers may be said to speak with a degree of authority.

Scholars may also pick up and publicize dangerous trends in criminal justice, spurring opposition in the academic community. Together with lawyers, they may sometimes succeed in frustrating the passage of legislation which would have arrogated excessive power to the government.[125] Similarly, the press, which often takes an anti-government stance relative to domestic affairs, has a role to play in awakening the public—often content to leave matters of law and administration to the government—to particular injustices.[126]

To the extent these outsiders to the government are successful in influencing the government's operations, it is because the

124. *See* discussion in Part 1(II)(c) regarding public safety.

125. Suzuki, *The Politics of Criminal Law Reform in Japan*, 21 AM. J. COMP. L. 287 (1973).

126. *Id.*

prosecutorial apparatus' great freedom is based on a general atmosphere of public trust. So long as the criticisms directed toward the government are regarded as largely those of radicals, the Prosecutor's Office need not be concerned. However, when discontent spreads to the less radical as well, the Prosecutor's Office must take notice lest it lose its privileged position of trust. While these mechanisms should not be ignored, they are, by nature, passive controls which must await the attention of the Prosecutor's Offices.

III. New Bases for Controlling Prosecutorial Discretion

A. Sources of Discontent

In spite of the controls on prosecutorial discretion which do exist, there are nonetheless times when the public becomes dissatisfied with prosecutorial performance. One example of widespread dissatisfaction is the *Kawamoto* case, which arose in the context of what has been described as the biggest, most sensational pollution incident in Japanese history—the Minamata mercury poisoning disease.

In prosecuting *Kawamoto*, the Prosecutor's Office either misjudged or purposely ignored the public's conception of justice.[127] It is virtually unheard of to withdraw an information once it has been filed, but public reaction may not become clear until after the prosecution decision has been made. Thus, it is possible that the prosecution may have unwittingly been trapped into defending an unpopular decision. Nevertheless, it is unlikely that the Prosecutor's Office was unaware of the furor surrounding the mediations and negotiations in the civil suits seeking compensation for Minamata disease victims.[128] The Prosecutor's Office must also have been aware that public sentiment was running very strongly against the government and the company responsible for the pollution. Yet prosecution policy was unaffected. In such a situation, it is inevitable that public opinion will turn against the prosecution. However, under traditional views, the most a court can do is to address the issue and give a light sentence, leaving the public as frustrated as before.

In the end, it is such simple, non-theoretical public frustration which gives support to defense counsel's demands for more controls on prosecutorial discretion. The result is a search for a mechanism to enable a defendant to retain some control over the determination

127. Kawakami Kazuo, a prosecutor who participates actively in the academic debates concerning prosecutors' work, contends that the Prosecutor's Office was correct in refusing to suspend Kawamoto's prosecution, but admits that the citizenry was generally opposed. Kawakami, *Shakai Seigi to Kensatsu [Social Justice and Prosecution]*, in GENDAI NO KENSATSU 19, 23 (1981).

128. For an excellent discussion *see* Upham, *supra* note 93.

of his fate, rather than being forced to remain passive in the face of a seemingly all-encompassing prosecutorial power.[129] So long as no such mechanism exists, it is inevitable that any mistakes of judgment or inequities in the prosecutor's choices will be reproduced in the courts' decisions.[130]

The 1977 High Court opinion in the *Kawamoto* case was a landmark decision. The court dismissed the criminal charges against the defendant, Kawamoto, on the ground that the prosecution incorrectly weighed the factors for suspension of prosecution and should in fact have suspended it. This decision has spurred much academic discussion on the subject of controlling prosecutorial discretion. One scholar described the decision as opening the "second round" in the debate over the theory of abuse of prosecutorial discretion. Since that time, numerous scholars, lawyers and prosecutors have engaged in voluminous written and oral commentary about both the general theory and the *Kawamoto* case in particular.[131]

Although the *Kawamoto* case has certainly widened interest in prosecutorial discretion, there is a long history of dissatisfaction in parts of the legal profession with the manner in which prosecutorial discretion has been executed. For example, one object of criticism is the prosecutor's conviction that the power to give lenient treatment is just that—a power, and not a duty. One commentator holds this prosecutorial assertion of powers of grace responsible for placing pressure on suspects to confess, not to consult with a lawyer, and to respond to interrogation without making use of the right to silence.[132]

Historically, the most common objections to the exercise of prosecutorial discretion are raised by lawyers based on cases they have actually handled, especially in the public safety area. It has been charged that, at least in the past, when labor disputes escalated into physical fights, the authorities regularly closed their eyes to criminally prosecutable conduct by management while ruthlessly prosecuting union activists.[133] For instance, in one 1959 case, an employee involved in a dispute over firings in a department store

129. *See* K. MATSUO, 1 HEIHŌ SOSHŌHŌ [1 CRIMINAL PROCEDURE LAW], 143-44 (1979).

130. Isayama, *Seijiteki Ito ni Motozuku Futo Kiso to no Tatakai [Arguments Concerning Improper Foundations Based on Political Considerations]*, 557 ROTO HORITSU JUNPŌ 17, 18 (1965).

131. *See* the following special journal issues: 49 HORITSU JIHŌ no. 12 (1977); 354 HANREI TAIMUZU (1978). For a prosecutor's viewpoint, *see* Kawakami, *Kōsoken Ranyō no Ranyōteki Tekiyō ni tsuite [Concerning the Abuse of the Abuse of Prosecution Doctrine]*, 30 KEISATSUGAKU RONSHŪ (1977).

132. Morinaga, *Birahari Torishimari to Kōsoken Ranyō [The Control of the Abuse of Prosecution]*, 389 JURISUTO 47 (1968).

133. Roundtable Discussion, *Kawamoto Jiken Saikōsai Kettei o Megutte [Discussing*

kicked a guard in the shin. The defendant was charged with "bodily injury," in causing a wound from which it took five days to recover. The doctor testified that he could find no specific damage, but since he could not disprove the guard's claim of pain, the doctor was forced to certify an injury. The defendant was found guilty, but the lawyer citing this case argues that a minor injury such as this would not have been prosecuted had it not occurred in the context of a labor dispute.[134]

Objections have also frequently been raised regarding prosecutions for the illegal posting of bills—normally left-wing political notices. Such acts may be prosecuted under one of two laws: the Minor Offenses Law (*keihanzaihō*), which seeks to protect against damage to property by the posting of bills, or various local regulations promulgated under the authority of the Outdoor Advertising Law (*okugai kōkokubutsuhō*) to protect the aesthetic quality of an area.[135] Although the Outdoor Advertising Law permits somewhat higher fines than the Minor Offenses Law, it is difficult to view a breach of either one, particularly an isolated breach, as a serious violation of law endangering public order.

Normally, violations of these laws are dealt with in Summary Court by an assistant prosecutor, an individual not trained as a lawyer. Yet, according to one author, in cases involving such political notices, full prosecutors of the Public Safety Division often appear. In one very old case, a suspect was kept in detention for more than ten days before being charged with a violation carrying a maximum fine of ¥1,000.[136] In another case where political notice was posted illegally on a utility pole, the witness for the utility company testified that his company had not initiated a complaint in the case, nor had they ever heard of a person being prosecuted for such a crime. Another individual reported that his organization does not complain to the police about such postings, but when the posters relate to Communist Party activities, the police initiate an inquiry on their own.[137]

Traditionally, criticism of the exercise of prosecutorial power has centered around charges of political bias and excessive representation of establishment interests. In particular, some critics charge that what is known as "public safety policy" is in actuality merely the government's attempt to maintain its power against opposition.

The Supreme Court's Kawamoto *Decision*], JURISUTO 214 (April 1, 1981) [hereinafter cited as Roundtable Discussion].

134. Isayama, *supra* note 130.

135. KEIHANZAIHŌ (Minor offenses law), Law No. 39 of 1948, art. 1 sec. 33; OKUGAI KOKOBUTSUHŌ (Outdoor advertising law), Law No. 189 of 1949.

136. Morinaga, *supra* note 132, at 48.

137. Idota, *Kōsoken Ranyōron Jōsetsu [Introduction to the Abuse of Prosecution Doctrine]*, 49 HŌRITSU JIHŌ 8, 16 (1977).

These critics argue that more attention should be devoted to true "public safety"—the protection of the majority of the populace from injury to life, limb, freedom and property.[138] They criticize the prosecutors for the practice in the 1960's of arresting and prosecuting large numbers of people who participated in political demonstrations for very minor crimes,[139] and claim that even more recently, proponents of opposition political views are subject to very high bail or a refusal to grant release pending trial, recommendations of high sentence and inflated charges.[140]

Government opposition engages in more than just petty mischief. Bombs have been planted in the buildings of establishment opponents, and internecine strife in radical groups results in a number of homicides every year.[141] These events might justifiably be classified as relating to the public safety.[142] Furthermore, the dark picture of prosecutorial discretion painted above is not universally shared.[143]

B. New Methods for the Control of Prosecutorial Discretion

In the post-*Kawamoto* rush to comment on methods to combat so-called abuses of prosecutorial discretion, the one point on which lawyers and scholars agree is that the system is in need of some mechanism to deal with discriminatory prosecutions.[144] Thus far, almost all commentators have called for judicial review of one type or another.

One practical reason for the emphasis on judicial review as a remedy for errors in prosecutorial discretion is that it was practitioners who first called attention to the problem. They were faced with the necessity of resisting prosecutions which had already been filed. While wholesale reform of the prosecutorial system might eliminate future problems, the only forum remaining for their clients was the courts. Thus, without judicial review, there was no remedy. Other defense counsel sought to use the judicial forum to continue the political protest which originally led to their client's arrest. In such cases, numerous supporters of the defendant would

138. Sawanobori, *Kōun Rōdō Jiken to Kensatsu [Public Prosecutors and Public Safety Cases]*, in GENDAI NO KENSATSU 234, 236 (1981).

139. *Id.* at 234, 240.

140. *Id.*

141. *Id.*

142. Komatsu, *Kensatsu no Katsudō to Jinken Hōshō [Prosecution and the Protection of Human Rights]*, in GENDAI NO KENSATSU 80 (1981).

143. In contrast, Professor Matsuo suggests that in spite of such practices, the average citizen is more apt to view the prosecutor as "waving the sword of righteousness which destroys all wickedness in its path." Matsuo, *Gendai Kensatsuron [Contemporary Prosecution]*, in GENDAI NO KENSATSU 5 (1981). *See* Roundtable Discussion, *supra* note 133.

144. *See* Roundtable Discussion, *supra* note 133.

appear and essentially carry out a demonstration in the courtroom, much as occurred during the Chicago Seven trial in the United States. Here, the demand for judicial review of prosecutorial decisions was serving a political purpose.

A judicial determination that a prosecution was improper may also be desired for the moral force such a statement brings. From the point of view of legal theory, as well, it may be argued that the courts should oversee the exercise of discretion in the suspension of prosecution, since it is the courts which review other prosecutorial judgments, such as detention and bail decisions.[145]

There have been some proposals for internal change in the system of suspension of prosecution itself. For instance, Mitsui believes that many evils, especially the necessity of a very intensive investigation procedure, stem from the grant of such broad discretion not to prosecute. Mitsui also believes that the much-touted benefits of the system in saving the reputation of suspects and increasing prospects for rehabilitation are illusory. However, the heavy Ministry of Justice influence on the formulation of criminal justice legislation in the Diet and the generally positive attitude of the public toward prosecutors make reform of the system through legislation extremely unlikely. Nor would it be realistic to expect voluntary internal reform, influenced by the comments of those outside the organization in the near future.[146]

C. Proposed Theories to Guide the Judicial Review of the Exercise of Prosecutorial Discretion

Attempts to save a defendant from a guilty verdict once he has been prosecuted have centered primarily around two theories—the theory of "punishable illegality" (*kabatsuteki ihōsei*) and the so-called "theory of abuse of prosecutorial discretion" (*kōsoken ranyō ron*).

1. Punishable Illegality

The idea of punishable illegality, which appeared prior to the theory of abuse of prosecutorial discretion,[147] was originally conceived as a theory of substantive criminal law. Relying on this the-

145. Idota, *supra* note 137.

146. Matsuo suggests that the problem may take care of itself without judicial or legislative intervention. With increasing demands for due process over the search for truth in various facets of investigation, he proposes, the present balance of strict investigation but lenient prosecution decisions may shift, so that fewer prosecutions are actually suspended. Fewer suspensions of prosecution would mean less discretion to be exercised by prosecutors. *See* Matsuo, *supra* note 129.

147. At least one scholar traces the beginnings of this theory to a paper published by Professor Saeki in 1963. *See* for details H. FUJIKI, KABATSUTEKI IHŌSEI [PUNISHABLE ILLEGALITY] 10 (1975).

ory, the lawyer could argue that, in spite of the fact that his client behaved very much as the prosecutor charged, and in spite of the fact that the acts charged seemed technically to violate the law, because the acts were lacking in punishable illegality, the client must be acquitted. Such claims have been made quite often in cases involving illegal posting of bills, and have met with a fair degree of success in lower courts.

Another important context for the development of the concept of punishable illegality has been prosecution of participants in illegal public employee strikes. It is illegal, though not a criminal violation, for public employees to strike, and they can be disciplined in various ways for strike action.[148] In addition, striking public employees are often prosecuted under the rubric of crimes such as the failure to perform official duties[149] and incitement to criminal action.[150] Defendants convinced that these penal provisions were not intended to have application to such activity, and that they have been arrested on a technicality, argue for acquittal based on the lack of punishable illegality.

Punishable illegality theory is not limited to these two types of cases.[151] It is a theory which can encompass any incident which would not appear to the average citizen to be a criminal act, but which technically fits the definition of a crime. The most common use is to avoid punishment for violations which are normally considered so unimportant that they can be overlooked by the authorities. It has been proposed that punishable illegality is also useful for incidents in which there is a defense to certain aspects of the crime, but where the defense is insufficient to entirely relieve the defendant of responsibility.[152] Described broadly, the theory can be used to support a claim of innocence where, in the context of the incident, the illegal act appears trivial or lacking in culpability.[153]

Japanese legal scholars have debated the proper explanation for the seeming contradiction inherent in the punishable illegality concept. Japanese criminal theory requires proof of three things in order to find a defendant guilty of a crime: the elements of the crime specifically prescribed in the law, the illegality of the act, and responsibility for the act.[154] There are two basic schools of punish-

148. *See, e.g.*, KŌKYŌ KIGYŌ TAITŌ RŌDŌ KANKEI HŌ (Public Enterprise Labor Law), Law No. 257 of 1948.

149. KEIHŌ, *supra* note 8, art. 95.

150. *Id.* art. 61.

151. It could also have application in such areas as crimes of negligent omission and white collar crimes. *See* FUJIKI, *supra* note 147, at 165.

152. *See* Shinomura, *Kabatsuteki Ihōsei no Riron to Kiso Mukō [The Theory of Punishable Illegality and Basic Elements of Crimes]*, in 48 KEIJI HANREI KENKYŪ 25, 26 (1972).

153. *Id.*

154. *Id.*

able illegality theory. One, that of Professor Fujiki, interprets punishable illegality as an implicit additional element of every crime.[155] Professor Saeki's theory, the more popular of the two, holds that where there is no punishable illegality, the requirement of illegality is not met.[156] Under Professor Saeki's theory, lack of punishable illegality functions as a defense, much as proof of self-defense renders otherwise illegal actions permissible.

The concept of punishable illegality has also come in for its share of scholarly criticism. One argument questions how a single act can be sufficiently illegal to be punishable civilly and yet be regarded as legal under criminal law, insisting that the definition of illegality must be uniform throughout the law. Punishable illegality has also been criticized for confusing the quantitative issue of the degree of culpability with the qualitative issue of the legality of the act. Others decry the lack of concrete standards for determining punishable illegality, claiming that the theory simply allows the court to balance the totality of the circumstances in the case. For the defense attorney, however, the major failing of the theory is that courts do not widely support the theory, despite its general acceptance in academic circles.

At one time, the Japanese Supreme Court seemed to have accepted a type of punishable illegality theory. In a labor dispute, the Court declared that while the strikers' acts clearly violated the civil prohibitions against public employee strikes, it was possible that the acts were not serious enough to justify criminal liability.[157] In later cases, the courts brought the standards for imposing criminal penalties on public employee strikers closer to the less strict standards which were applied to strikers in the private sector. This was accomplished by moderating the criminal law through construction of the constitutional right to labor activities. Punishable illegality could not exist where the activities were protected by the Constitution.[158]

Within a few years, however, the Japanese Supreme Court began to reverse direction.[159] The *Nagoya Post Office* case is considered by some to have finally rejected the concept of punishable illegality. The court stated that actions violating civil prohibitions were also illegal under the criminal law. However, it emphasized that criminal penalties should not be lightly imposed. In dictum, the court stated that legislative history suggested the intent of the

155. *Id.*

156. *See*, for Saeki's position generally, FUJIKI, *supra* note 147.

157. *See* Tōkyō chuō yubinkyoku jiken [The Tokyo Central Post Office Case], KEISHŪ 20.8.901 (1966).

158. KENPŌ, *supra* note 37, art. 28; Tōkyōso jiken [The Tokyoso Case], KEISHŪ 23.5.305 (1969).

159. Zen norin jiken [The Zen Norin Case], 292 HANREI TAIMUZU 178 (1973).

criminal provision involved was not to punish mere participants, but only leaders of illegal strikes. Therefore, despite the fact that the actions of participants were also illegal, no criminal penalties should be imposed on them.

Based on the Supreme Court's dictum in the *Nagoya Post Office* case, some commentators question whether the Court has rejected the theory of punishable illegality completely. Many lower courts also seem to prefer simply to handle the situation quietly by rendering a guilty verdict, but imposing an extremely light sentence or no sentence at all when they believe culpability is lacking.[160] Prosecutors also find this solution more palatable, since it does not signal an outright failure on their part.[161]

2. *Abuse of Prosecutorial Discretion Theory*

In some cases, a judge may find a rule which precludes comment on the prosecutor's decision to prosecute to be unpalatable. In one case, an individual challenging the interruption of his welfare benefits became involved in a heated discussion with a welfare office employee. In frustration, he kicked the welfare worker's chair. Based on this act, the welfare recipient was prosecuted for interference with the carrying out of official duties. The judge imposed only half the minimum one month sentence. When the time spent in pretrial detention was subtracted, the defendant served no time. The judge commented that while he believed the criminal law forced him to find the defendant guilty, he found the initial decision to prosecute the case inexcusable.[162]

The theory of abuse of prosecutorial discretion would permit a judge to dismiss a prosecution which he believed was improperly brought. Like the theory of punishable illegality, this theory developed out of the arguments of practitioners. In contrast to punishable illegality, however, abuse of prosecutorial discretion theory permits a court to dismiss on procedural grounds without ever considering the substance of the offense. Isayama, a criminal defense lawyer and frequent commentator, was one of the first to frame the theory in its modern form.[163] Since then, both scholars and practitioners have added their interpretations. The acceptance of the theory by the High Courts in the *Akasaki* and *Kawamoto* cases has spurred the hopes of those who would like the judiciary to comment on prosecutors' use of discretion.

Prosecutors generally dislike all forms of this theory, in part

160. Isayama, *supra* note 130; Morinaga, *supra* note 132.

161. *See* statements of Suzuki Yoshio in Roundtable Discussion, *supra* note 133.

162. Isayama, *supra* note 130, at 18.

163. A. IDOTA, KŌSOKEN RANYŌ RON [THE ABUSE OF PROSECUTION THEORY] 38-40 (1978).

because in its inception it was clearly intended to criticize the prosecutorial bureaucracy.[164] There is also a natural resistance to the limits on prosecutors' freedom of action which would attend the theory's full-scale acceptance. Recently, however, prosecutors have tended to phrase their objections moderately, assuring the populace that due consideration is given to each indictment decision, in order to foster trust rather than controls.[165] Some prosecutors have admitted that judicial review of truly abusive prosecutions may be appropriate.[166] However, they regard such abuses as virtually impossible.[167]

Moderate lawyers insist that, while prosecutors are trusted, the great significance of the prosecutor's decision for the defendant makes it imperative that the judiciary review these prosecutorial decisions. Less conciliatory proponents of the theory point out that since the prosecutor is an adversary, objectivity in prosecutorial decision-making cannot be assured without the participation of the courts as an objective third party.[168]

Like punishable illegality, the theory of abuse of prosecutorial discretion is actually many different theories. Each commentator on the subject sees the justification for and application of the theory somewhat differently.

Although the Japanese term *kōsoken ranyō* is translated as "abuse of prosecutorial discretion," the literal meaning of the words makes clear that the discretion referred to is not limited to the decision whether or not to prosecute a "guilty" individual. The theory divides possible abuses into three types. Type 1 is abuse by filing an information without sufficient evidence to convict. Some scholars contend that a substantive acquittal, rather than a dismissal of the indictment under the theory of abuse of discretion is the proper remedy in such a case.[169] Type 2 includes discriminatory prosecutions and those described as an abuse of the suspension of prosecution discretion. Type 3 claims that the indictment is invalid because of illegalities in the investigation process.[170]

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164. Odanaka, *Kōso Yokusei no Riron [Theories of Appellate Reform], 26 Hōgaku Seminar* 2, 4 (1982).

165. *See* statements of Professor Tamiya in Roundtable Discussion, *supra* note 133.

166. *Id.*

167. *See* Suzuki, *cited in* note 161, *supra*. *See also* Kawakami, *Kōsoken Ranyōron no Shōen [The Appearance of the Abuse of Prosecution Doctrine]*, 428 HANREI TAIMUZU 1 (1981).

168. *See* Davis, *supra* note 90, and Vorenberg, *supra* note 110 for the American situation.

169. Shiria, *Kōsoken Ranyōron—Hihan Pt. 2 [A Critique of the Abuse of Prosecution Doctrine, Pt. 2]*, 342 HANREI KENKYŪ 45, 47 (1977).

170. This general categorization is described in Tamiya, *Kōsoken Ranyōron ni tsuite [Concerning the Abuse of Prosecution Doctrine]*, 2 LAW SCH. MAG. (Special Issue) (1979).

Type 1 will not be discussed here, since it is at present of much greater interest to theorists than to courts. Much of the debate on Type 2 abuse of prosecutorial discretion centers around how a dismissal can be justified by statutory interpretation. The dilemma is posed by the fact that articles 247 and 248 of the Criminal Procedure Code have traditionally been interpreted to give the Prosecutor's Office virtually complete freedom in deciding whom to prosecute.

One argument contends that since prosecutors could certainly not be given the freedom to violate the constitutional guarantee of equality before the law, any indictment which is unequal is invalid as violative of due process guarantees. Others see judicial review as the natural consequence of judicial oversight of prosecutorial discretion.

Another approach construes article 248 as forming an implicit requirement that the prosecutor establish the absence of a basis for suspending the prosecution before actually prosecuting a case. Thus, an information filed without proper consideration of suspension of prosecution factors would not conform with prescribed procedures. The prosecution could therefore be dismissed under article 338(4) of the Criminal Procedure Code. Under this theory, the courts would be expected to determine whether or not proper reasons to suspend the prosecution existed, and judicial review of prosecutorial decisions would be justified.

Proponents of Type 3 abuse of prosecutorial discretion theory, which would provide relief for victims of illegal investigatory tactics, are split into two groups. One group insists that a certain degree or type of illegal investigation acts to impair the litigation (*soshō shōgai jiyū*) and automatically invalidates prosecution, mandating its dismissal.[171] One subgroup justifies this approach on the same policy grounds as the exclusionary rule is justified in the United States. However, it would be a mistake to interpret Type 3 as a substitute for an exclusionary rule since a type of evidence rule which allows individual items of illegally obtained evidence to be excluded is already in use by the courts. Rather, Type 3 is intended to provide additional needed relief of a greater magnitude.

The other group of Type 3 proponents subscribes to what is called the "indirect theory." This group identifies illegal investigatory tactics as one factor to be considered in deciding whether or not to suspend a prosecution. They claim that it would violate the prosecutor's "duty of objectivity"[172] to prosecute without considering the fact that some of the evidence to support his case was ob-

171. Odanaka, *Ihō Taiho to Kōsoteiki no Kōryoku. [Illegal Arrest and the Validity of an Appeal]*, SOSHŌHŌ TAIKEI 1 207 (H. Kumagai ed. 1972).

172. Sawanobori, *supra* note 138, at 240-41.

tained illegally.[173] The failure to give weight to the occurrence of the illegal investigation could then be an improper use of charging discretion.[174] At least one commentator believes both Type 2 and Type 3 abuses are necessary to distinguish whether the wrongdoing is found in investigation or purely in decision-making.[175]

Recently, some proponents of abuse of prosecutorial discretion theory have moved away from their insistence on portraying the issue as one of abuse of power by prosecutors. Instead, they now focus on the existence of an unjust situation which demands a remedy without focusing on the issue of fault. In part, this new view stems from practical considerations. Some were concerned that if courts were required to directly criticize the prosecutor in order to dismiss a prosecution, very few cases would ever be recognized as appropriate for relief.[176] By turning the focus away from the prosecutor, this approach also obviates the necessity of proving the "subjective intent" of the prosecutor to discriminate or treat a suspect improperly. Most proponents of this approach, which include the more radical sectors of the profession, expect it to expand the role courts play in limiting prosecutorial decision-making.

a. The Chisso-Kawamoto *Case*

The *Kawamoto* case cannot be understood without an explanation of the context in which the case arose. The defendant, Kawamoto, was one of many victims of "Minamata disease," a type of mercury poisoning caused by industrial effluents which contaminated the ocean around Minamata on Japan's southern island, Kyushu. The Chisso Chemical Company was found to be responsible for the pollution. The Minamata disease was one of the localized pollution diseases which suddenly brought pollution to the public consciousness in Japan in the 1960's. Some others were Yokkaichi asthma from air pollution and the "Ouch-Ouch Disease" (*itai-itai byō*) of Niigata, resulting from contaminated water.[177] These catastrophes prompted the first backlash against the single-minded emphasis on economic development which had moved Japan in the post-war years. Although it was some time before resistance to these side effects of economic progress became acceptable, public

173. The duty of objectivity requires a prosecutor to take note of facts which benefit the defendant as well as facts which would benefit his case.

174. Okabe, *Kōsoken no Ranyō to sono Yokusei [The Abuse of Prosecution and Reform]*, in GENDAI NO KENSATSU 104, 109 (1981).

175. *Id.*; Idota, *supra* note 137, at 18-20.

176. Suzuki, *Kōsoken no Ranyō to Kabatsuteki no Riron [The Theories of Abuse of Prosecution and Punishability]*, 354 HANREI TAIMUZU 31, 41, 43 (1978).

177. *See* Upham, *After* Minamata: *Current Prospects and Problems in Japanese Envirnomental Litigation*, 8 ECOLOGY L.Q. 213 (1979). *See also* Upham, *Litigation and Moral Consciousness in Japan*, *supra* note 93.

opinion gradually shifted to a sense of betrayal by government and industry.

Even after the shift in public opinion, it was no easy matter for the pollution victims to secure compensation for their injuries. The government established standards to certify victims and mediation boards to calculate compensation, but many victims and their relatives were dissatisfied with the results. In the case of Minamata disease, a rift developed between the victims. Although all felt they should be more fully compensated, some chose to pursue court action, while others chose to negotiate directly with Chisso.

The court faction was eventually successful in obtaining a landmark decision in their favor from the Kumamoto District Court. Meanwhile, the negotiation faction attempted unsuccessfully to convince the president of Chisso to negotiate some kind of recovery. The company preferred a formal setting mediated by an objective third party, while the victims insisted that the president had a moral duty to meet with them personally and negotiate directly. The victims brought pressure through sit-ins and camp-outs at the company's headquarters in Tokyo. In response, the company called in its employees to act as guards and keep the victims away. During the twenty-two months of negotiations, this led to numerous fracases and many injuries on both sides.[178]

There was widespread public support for the victims. Nevertheless, in all the skirmishes between the employees and the victims, no Chisso employee was ever prosecuted. The only prosecutions to come out of the skirmishes were those of Kawamoto, who was charged with five counts of "bodily injury," and one other protester.[179]

Under Japanese law, the severity of injuries is measured according to the time required to recover from them, as certified by a doctor. None of the injuries with which Kawamoto was charged required more than one treatment by a doctor or two weeks time for recovery. Common sense would suggest that in the context of the pollution dispute it was fundamentally unjust that after all the skirmishes, only Kawamoto was to stand trial.

Outraged defense counsel called for the case to be dismissed as an abuse of prosecutorial discretion. They undertook a mission to convince the court that the prosecution must be stopped. Counsel first argued that there was insufficient evidence to support prosecution. They claimed that one of the incidents charged was unsub-

178. Most of the injuries were minor. There was, however, at least one serious injury, the blinding of an American photographer, Eugene Smith. Smith, who later published a book on Minamata and the disease, was a supporter of the victims, but was not actively engaged in the struggle with Chisso.

179. Japan v. Kawamoto, 321 HANREI TAIMUZU 186, 188 (Tokyo Dist. Ct., Jan. 13 1975).

stantiated, and the others were either too trivial to possess punishable illegality or were not actually illegal because, when taken in context, they were not in violation of the legal order. Counsel averred further that the prosecution had abused its charging discretion in pursuing the case against Kawamoto while making no moves either to prosecute the company for causing injuries through its pollution or to prosecute any of the Chisso employees for their roles in the fracases. Finally, Kawamoto's counsel argued that even if the prosecution had been supportable at one time, the fact that Chisso and the victims later reached an agreement providing for compensation and that the president then submitted a letter requesting lenient treatment for Kawamoto rendered the indictment no longer permissible.[180]

i. The District Court Decision

The District Court rejected each of the defense's claims and found Kawamoto guilty. However, the court's dissatisfaction with the prosecution was reflected in the sentence.[181] The court came close to agreeing with the defense on many specific points. The opinion criticized Chisso severely for refusing to meet with the pollution victims. The court found it perfectly acceptable for the victims to press their demands for such negotiations and approved of the results finally reached. But the court determined that the steps taken to force negotiations were somewhat more than necessary under the circumstances.

As for discrimination in the decision to prosecute, the court rejected the possibility of dismissing the case based only on a comparison of treatment of similar cases, without proof of gross negligence or actual malice on the part of the prosecution.[182] Nevertheless, it stated rather strongly that the treatment given Chisso and its employees cast doubt on the fairness of the prosecutorial organization and the government at large. The court felt obligated by law to find Kawamoto guilty, even though it disapproved of the prosecution and surrounding events.

ii. The High Court Decision

The High Court held for dismissal. Its decision is much more complex than that of the District Court.[183] Although the court de-

180. *Id.*

181. The sentence was a ¥50,000 ($333) fine, suspended for one year, virtually unheard of for its leniency.

182. 321 HANREI TAIMUZU at 187. KEIHŌ, *supra* note 8, art. 27 provides that where a sentence has been suspended, if the defendant is not arrested for the period of suspension, both the sentence and the record of conviction are cleared.

183. Japan v. Kawamoto, 348 HANREI TAIMUZU 179 (Tokyo High Ct., June 14, 1977).

picts the injustice of Kawamoto's situation masterfully from various points of view, the intended legal basis of the opinion is not entirely clear. What is clear is the court's assertion of its power to review the exercise of prosecutorial discretion and to grant relief from an improper decision.

While the High Court recognized that article 248 of the Criminal Procedure Code grants prosecutors very broad discretion, it stated that the significance of the decision to prosecute, both to the individual and to the national polity, means that this discretion must be limited. Furthermore, according to the court's interpretation, article 81 of the Constitution, providing for judicial review of the constitutionality of administrative dispositions, authorizes the judiciary to inquire into the extent of this limitation on prosecutorial discretion. The court also stated that where prosecutorial discretion has exceeded its proper bounds, it is incumbent on the court to find a remedy. A prosecution which violates an individual's fundamental human rights, such as the right to equal protection before the law, is a violation of article 248.

It is significant for the development of the abuse of prosecutorial discretion theory that the court found that the prosecution's subjective intent to discriminate, a purported requirement, could be inferred from an accumulation of objective facts, such as a lack of a rational explanation for the decision. Perhaps most significant is the court's statement that, in a case such as the *Kawamoto* case, the court runs the risk of mistaking the true character of the issue before it by an overly narrow focus on the defendant's specific acts.[184]

In the macroscopic view, Kawamoto's suffering from Minamata disease makes him the victim, rather than the aggressor. Chisso is seen as the party responsible for his injuries, and the employee "guards" injured by Kawamoto become representatives of the injuring party. The government is also partially responsible for the events because of its fifteen year failure to take administrative or criminal steps against Chisso, or even to formally recognize the Chisso effluents as the cause of the disease.

In order to determine whether there was evidence of improper prosecution discrimination, the court compared the prosecution's assessment of Kawamoto's acts to the decisions reached in other cases. The court undertook comparisons in a number of different directions. Beginning with a comparison between the two sides in the skirmishes, Kawamoto and the Chisso employees, the court concluded that because both sides acted to defend legitimate interests, and because injuries occurred on both sides, the government

184. *Id.* at 187.

unfairly took sides in the dispute by prosecuting only protesters.[185]

Next, the court took one step back to consider the treatment given the Chisso corporation, as compared to that given Kawamoto. Once again, the court concluded the government had been unfair. The transgressions of the Chisso corporation were virtually ignored until after the District Court opinion in the *Kawamoto* case. In contrast, Kawamoto's comparatively minor offenses affected far fewer people than Chisso's, but were pursued swiftly and efficiently by the criminal justice system.

Taking a still broader view of the incident, the court found that the government must be held partly responsible for this result. National and local governments had numerous opportunities to take action which would have prevented the Minamata tragedy or at least lessened its scope. Because the government refused to act, the residents concluded that they could avert future injury only by taking action themselves. The court concluded that the government could not now attack the people it had failed to protect for attempting to protect themselves.[186] The legal basis for this conclusion is not made clear by the court.

The court hastens to add that it does not suggest the injured Chisso employees should be deprived of a remedy for their injuries because their employer had wronged the Minamata victims. Still, the employees were attempting to frustrate the rightful demand of the protesters to meet with company executives. Although the court believed the protesters might have gone a little too far in their efforts to force negotiations, it was most inappropriate to seek criminal punishment for their efforts.

The High Court decision was a great victory for the defense and their view of the proper exercise of prosecutorial discretion. Not only did the High Court rule that the case should be dismissed, it also adopted almost all the claims made by the defense, including their insistence that the matter be judged in the larger context of the Minamata disease situation.[187] The opinion was well-received in general by laymen and legal professionals. The legal community, however, noted that more strict legal reasoning than plain common sense would be desirable. While some commentators hailed the High Court's willingness to infer the necessary subjective intent for a finding of abuse from objective facts, the defense team and some others were disappointed that the court had not completely adopted an objective standard. The objective standard is preferable for these critics not only on practical grounds, as subjective intent is much

185. *Id.* at 189.

186. *Id.* at 188.

187. Nishikiori, *Hirakazu Tobira a Aita Toki [When the Shut Door is Opened]*, 428 HANREI TAIMUZU 18 (1981).

more difficult to prove than the objective standard, but also because a shift to an objective standard of intent would signify a move away from the emphasis on the intentional "abuse of discretion" and towards a focus on the results of the discretion exercised.

Not surprisingly, the most severe criticisms of the opinion come from the prosecutorial side. There are the typical general objections to judicial inquiry into the substance of prosecutorial decision-making and to the granting of relief to one individual based on comparisons to the treatment of others. Others have argued more specifically that Chisso's pollution crime and Kawamoto's crime of concrete violence are on such different planes that they cannot possibly be compared, and that the High Court opinion supports the conscious use of violence to resolve social issues. Stated differently, these critics assert that it was incumbent upon the court to render a condemnation of Kawamoto's acts—*e.g.*, at least a guilty verdict—in order to preserve the social order and prevent the substitution of violence for other means of dispute resolution.

iii. The Supreme Court Decision

On prosecution appeal, the *Kawamoto* case was heard by the First Petty Bench of the Japanese Supreme Court, generally considered to be the most liberal of the three petty benches. Typically, the opinion was terse. Under Japanese law, appeal to the Supreme Court is available only on constitutional issues,[188] and the prosecution argued intensively that the High Court's interpretation of article 14 of the Constitution was incorrect. However, the Supreme Court rejected the appeal three to two and found all such arguments irrelevant. The Court declared that the High Court's opinion was not based on the Constitution, but on an interpretation of the Criminal Procedure Code provision that grants prosecutorial discretion. Even when the Court finds no proper grounds for appeal, it is authorized to overturn the appealed decision if it would obviously offend justice to refuse to do so.[189] Therefore, the Court proceeded to consider this issue.

While recognizing that the law envisions a broad scope of discretion for the prosecution, the Supreme Court for the first time affirmed that prosecution could be invalidated by misuse of this discretion. Not all deviations from a proper exercise of discretion will invalidate the prosecution, but only an extreme deviation, such as filing of an information which would in itself constitute a crime. Thus, the Court recognized the principle of dismissal as a remedy

188. *See* KEIHŌ, *supra* note 8, art. 405(1). Appeal may also be taken when a high court judgment is considered to be contrary to Supreme Court precedent. *Id.* art. 405(2)(3).

189. *Id.* art. 411.

for prosecution errors or misconduct, but limited its application to very rare and ill-defined cases.

The Court decided easily that the *Kawamoto* case did not constitute such an extreme case.[190] According to the Court, Kawamoto's acts were not so trivial as to make their prosecution obviously improper. If there was an issue anywhere, it was in the application of article 248 to Kawamoto's case. According to the factors listed in article 248, the decision to prosecute should not be based only on the surface facts of a case; the surrounding circumstances must also be considered.[191] In considering these circumstances, the Court stated it is impermissible for it to lightly compare the case before it to other cases not before it, which may not have been prosecuted. Since such a comparison was the primary basis for the High Court's conclusion that the indictment was improper, the Court could not approve the decision as such.[192]

On the other hand, the Supreme Court ruled that justice did not require that the High Court's decision be reversed and the District Court's decision be reinstated.[193] The Supreme Court based this determination on a number of factors. First, it pointed out that the prosecution did not appeal the extremely light sentence given by the District Court.[194] Second, it cited the unique background of the case, the fact that agreement had been reached and that it could not imagine that those injured by Kawamoto still sought criminal punishment, and the fact that Kawamoto had lost his father and his own health due to Minamata disease.[195]

The Supreme Court's decision was a solomonic one. Newspapers and general lay opinion reacted favorably to this "split the difference" approach. They seemed to believe that such a solution was in the interests of harmony and approximated justice much more closely than would a black or white solution.[196] In the legal community, some, including one of the dissenting Supreme Court Justices, criticized the Supreme Court opinion for its inconsistency in refusing to vacate the High Court's opinion while rejecting almost entirely that Court's application of the abuse of prosecutorial discretion theory.[197]

The solomonic aspect of the opinion makes its significance as precedent unclear. Predictably, some on each side claimed victory, while others complained about the portions they had lost. The fact

190. Japan v. Kawamoto, 428 HANREI TAIMUZU 69 (S. Ct. 1st P.B., Dec. 17, 1980).
191. KEIHŌ, *supra* note 8, art. 248.
192. *Id.* art. 411.
193. 428 HANREI TAIMUZU at 71.
194. *Id.*
195. *Id.* at 72.
196. *Id.*
197. *See* Opinion of Justice Fujisaki in dissent, *id.*; Kawakami, *supra* note 167, at 9.

that the Court accepted the possibility of a prosecution being invalidated as a result of an abuse of prosecutorial discretion was of course a great victory for the defense. Although some prosecutors continued to insist that no review of their work was possible, those willing to accept court intervention, in the unthinkable event that an abuse of prosecutorial discretion should occur, received this portion of the Supreme Court opinion with equanimity.[198]

What perplexed and disappointed both sides was the Court's only indication as to the type of cases it might consider to be an abuse. In their uncertainty, both sides resolved to interpret the Court's terminology of "extreme cases" to their own benefit. The Supreme Court's silence on the issue of intent required for such an "extreme case" may also be exploited in this way.[199]

The prosecution also objected to the Court's ruling that justice did not require that a guilty verdict be imposed on Kawamoto. Supporters of the High Court's opinion were pleased that the Supreme Court seemed to agree with the High Court's weighing of the equities in the case. The Court's warning to judges not to lightly undertake comparisons with cases not before them was a disappointment to the abuse of prosecutorial discretion theory proponents, while it was welcomed by the prosecution.

The Supreme Court's comment on the comparison of various cases was seen as a positive step toward ending fruitless and time-consuming debate in the vast majority of cases where the Court believes abuse of prosecutorial discretion charges to be purely ideological challenges, totally lacking in legal foundation. Nevertheless, the Court's insertion of the qualifier, "lightly," suggests that comparisons between cases are not always improper so long as they are not undertaken "lightly."

b. The Akasaki *Case*

When the Hiroshima High Court dismissed an indictment for abuse of prosecutorial discretion in 1980, it was in a very different kind of case. There were no unique circumstances drawing national attention as there had been in the *Kawamoto* case.

The defendant, Fukumoto, was accused of a violation of the Public Election Law.[200] The incident occurred in a small town in Western Japan during a campaign for the mayoral election.

198. The following comments are drawn from the discussion in *Kawamoto Jiken Saikōsai Kettei o Megutte [Concerning the Supreme Court's Decision in the* Kawamoto *Case]*, 737 JURISUTO 32 (1981).

199. Both sides were further chagrined by the court's failure to address the constitutional issue of equal protection at all.

200. The Hiroshima High Court decision is reported at 409 HANREI TAIMUZU 56 (Hiroshima High Ct., Feb. 4, 1980). This crime is relatively common. The election law forbids the giving or acceptance of anything of value in return for activities to support

Although the defendant had originally supported the incumbent mayor in the election, he later decided to support another candidate. The mayor won re-election and thereafter Fukumoto heard that the mayor intended to retaliate against those who had failed to support him during the recent election. Fukumoto, whose business relied in part on contracts with the city, was angered and went to the police to complain of illegal election activities. He implicated a number of individuals, including the mayor and his family.

The police began their investigation. However, because the police never took any of the suspects into custody and were rather lenient in the process of interrogation, those interrogated had the opportunity to consult with each other and make their testimony consistent. Furthermore, when the police finally did question the mayor, they neglected to pursue inconsistencies and questionable assertions. As a result, the police never gathered enough evidence to file charges against the mayor, his son-in-law or his campaign manager. Instead, Fukumoto and others were prosecuted in Summary Court. Fukumoto was charged with: (1) accepting a payment of ¥30,000 (approximately $200) when he first volunteered to help in the campaign; (2) accepting a free dinner at a banquet given for the campaign workers, and (3) accepting two shirts from the candidate's wife—one for himself and one for another campaign worker. While the others were apparently content to pay their fines and let the matter drop, Fukumoto demanded a trial and contested the legitimacy of the indictment the prosecution filed against him.

i. The District Court Decision

At the trial, the defense argued that the police investigation discriminated against Fukumoto on the basis of social standing, i.e., by treating those of higher social standing—the mayor and his relations—more favorably. The defense also argued that, under the theory of abuse of prosecutorial discretion, the illegal discriminatory investigation rendered the filing of the information invalid and required dismissal. The District Court rejected this claim, found the defendant guilty, and fined him ¥120,000.

Recounting the process of investigation, the District Court pointed out various areas of police incompetence and admonished that the local police, under the direction of the prefectural police, could well be accused of "picking on the weak and ignoring the strong," based on such an investigation. However, the court found that there was insufficient evidence, direct or indirect, to confirm that the failings of the police or prosecutors went beyond mere incompetence to purposeful discrimination. The District Court held

any candidate, including, of course, voting. *See* KŌSHOKU SENKYŌ HŌ (Public Election Law), Law No. 100 of 1950, sec. 22.

that since the defendant's acts, considered by themselves, were serious enough to warrant punishment, it need not even consider whether the failure to prosecute others rose to the level of abuse.[201]

ii. The High Court Decision

The High Court, in contrast, found that the police investigation did discriminate in favor of the socially prominent. The High Court recognized the fact that the prosecution is not normally expected to review decisions by the police not to investigate certain potential suspects. Thus, although the High Court was clearly suspicious of the prosecutor's behavior, it concluded that the fact that the prosecution did not correct the police errors in the investigation was not enough to support a finding of prosecutorial discrimination.[202] The High Court intimated that on some points, police incompetence had resulted in the destruction or alteration of evidence which made it impossible for the prosecution to redeem the situation.[203] With this fact-finding, the High Court did not have the option of declaring the indictment to be Type 2 abuse of prosecutorial discretion through intentional discrimination. The High Court also rejected the idea that Fukumoto's wrongdoings were so insignificant that it was an impermissible deviation from suspension of prosecution standards for the prosecutors to refuse to suspend the prosecution.[204]

The High Court found that the police had violated the constitutional guarantee of equal protection under the law in their investigation process.[205] In making this finding, the High Court stated that inconsistent treatment of individuals is discriminatory and therefore impermissible, regardless of whether the inconsistency results from treating one individual comparatively unfavorably or others comparatively favorably.[206] The High Court then found it a violation of constitutional due process rights to file an information based on an unconstitutional investigation. Since the law provides no concrete remedy for such unconstitutional acts, the High Court then considered the appropriate remedy.[207]

In general, the High Court points out that two objections may be raised to its preferred remedy of dismissing the prosecution. One is that under a literal reading of the statute, the only proper basis for dismissing a prosecution is a failure to follow the technical pro-

201. *See generally* the holding in 409 HANREI TAIMUZU 56.
202. *Id.*
203. *Id.*
204. *Id.*
205. KENPŌ, *supra* note 37, art. 14(1).
206. 409 HANREI TAIMUZU 56, *supra* note 200.
207. KENPŌ, *supra* note 37, art. 31.

cedural requirements for filing an information.[208] While recognizing that all violations of criminal procedure law cannot be redressed directly within the criminal proceeding, the High Court countered this objection by citing a number of well-known cases for the proposition that where the law provides no remedy, and refusal of a remedy would be a violation of fundamental human rights, a court is empowered to create an appropriate remedy.[209]

The other objection is that an individual who is guilty of a crime does not have "clean hands" and therefore cannot argue for his own release by pointing to another guilty person who was not punished. Again, the High Court emphasized that there are doubtless many reasons why one individual's crime may be investigated while another's is not; that the resources of the investigatory organs are insufficient to pursue all cases; and that it is very difficult to second-guess comparative judgments made with regard to the actions of two individuals involved in crime. Nevertheless, the High Court found that, in this particular case, where a single agency undertook the investigation of numerous individuals involved on opposite sides of the same incident, comparison was possible.

The High Court stated that Fukumoto's acts were not trivial, but in terms of injury to the democratic process, the mayor's acts were much more serious. Therefore, discrimination in favor of the mayor because of his social prominence must be judged even more offensive than if the two had committed the same acts. Further, comparing the magnitude of the constitutional violation to the magnitude of Fukumoto's crime, the High Court felt it obvious that relief must be provided. The High Court dismissed the prosecution, giving as the basis for its decision an analogy to article 338(4) of the Criminal Procedure Code, which authorizes procedural dismissals of indictments.[210]

Naturally, this decision was welcomed by proponents of the theory of abuse of prosecutorial discretion, as a fitting sequel to the *Kawamoto* case, and was denounced by those supporting broad criminal justice discretion. Kawasaki Hideaki applauded the method set forth by the High Court for determining whether or not discrimination exists. In particular, he pointed to what he read as the High Court's use of a presumption of discriminatory intent by the police when there is no rational basis for differences in treatment, as opposed to requiring proof of subjective intent to discriminate.[211]

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208. KEIHŌ, *supra* note 8, art. 338(4).

209. 409 HANREI TAIMUZU 56, *supra* note 200.

210. *Id.*

211. *See generally*, Kawasaki, *Kōsoken Ranyō no Hōri to Mondaiten [The Abuse of Prosecution and Its Problems]*, 715 JURISUTO 44, 48 (1980).

Inevitably, even those supporting the decision were displeased with portions of the High Court's reasoning. Some scholars, interpreting the opinion quite differently from Kawasaki, criticized the High Court's use of a subjective standard of intent. In their view, this was one factor which prevented the Court from finding an impermissible exercise of discretion on the part of the prosecutors. They felt that the prosecution had ample opportunity to prevent unequal treatment by using its own investigative powers and sufficient notice in this case that the police investigation should be scrutinized carefully.

Both sides found points to criticize in the High Court's search for an appropriate remedy. Kawasaki criticized the High Court for balancing the extent of the constitutional violation with the extent of the crime. In his view, the right to due process should always taks precedence over the need to punish wrongdoing.[212] Others read the High Court opinion as invalidating the prosecution based directly on the police illegalities, rather than on the so-called "indirect" approach to Type 3 abuse of prosecutorial discretion. On the other hand, the Supreme Court decision may be interpreted to provide support for the indirect theory.

The main prosecutorial objection to the High Court decision was to its interpretation of what constitutes discrimination in prosecution and the proper redress for such discrimination. Representatives of the prosecution have repeatedly emphasized that the fact that one guilty individual is prosecuted while another goes free cannot be interpteted as discrimination. In the prosecution's view, any decision which suggests that the term "guilty" may be a relative factor rather than an absolute concept, or that just treatment for a guilty individual may relate to the treatment given other guilty individuals must be opposed.

iii. The Supreme Court Decision

On prosecution appeal, the Second Petty Bench of the Supreme Court totally rejected the High Court's approach, vacating the decision, and reinstated the District Court's judgment.[213] First, the Supreme Court disagreed with the High Court's definition of discrimination. According to the Supreme Court, in the investigatory phase, a violation of article 14 of the Constitution may be found only where the subject individual's treatment compares unfavorably with a hypothetical average case. The fact that others may have received lenient treatment inappropriate to the situation, even if proved, has no constitutional significance. Further, the Court expressed doubt as to whether such inappropriate treatment had actu-

212. *Id.* at 49.

213. *See* the report in 444 HANREI TAIMUZU 55 (S.Ct., 2nd P.B., June 26, 1981).

ally been demonstrated in the *Akasaki* case.[214]

Next, the Court considered whether the prosecution would have been deprived of validity if, in fact, the mayor and the others had been favored inappropriately by the police, as charged. It concluded that, because the High Court did not find discrimination or an improper use of suspension of prosecution discretion during the prosecution stage, the prosecution need not be declared invalid simply because the police may have directed such lenient treatment towards some of those involved.[215]

Although the Supreme Court rejected nearly every one of the High Court's findings, the Court's own intentions on certain points remain somewhat unclear. For instance, the Court gave no indication of the proper role of the judiciary where a defendant's treatment would violate equal treatment protections even in comparison to the hypothetical average. The opinion could be read to hold out hope for judicial relief in such a case. However, given the Court's negative attitude towards judicial inquiry into the administrative aspects of the criminal justice system, it seems more likely that the Court would find no type of investigatory violation sufficient to require the invalidation of a prosecution. Nevertheless, some commentators suggest that under the opinion the Court might permit a balancing test in individual cases to determine if a prosecution should be declared invalid as a matter of discretion.[216]

The Court's opinion of the proper application of article 14 of the Constitution to criminal procedure, perhaps the most significant point in the decision, is ambiguous at best. Commentators have expressed different views as to the meaning of the Court's enunciated standard—the hypothetical "average" case. In fact, the term "average" may be misleading. A literal translation of the Court's language would require that the defendant be disadvantaged in comparison to the "general case."

The Court's language leaves open the question of whether concrete proof of the "average" is to be permitted or whether the courts are to compare only to an idealized construction of "general" treatment. A further issue is whether the defense may offer proof of the "average" or "general" case, or whether the prosecution's assertions are to form the basis of the court's consideration. Finally, it is unclear whether there is to be one "average" or "general" standard which is to apply to all types of cases, or whether each type of case requires that the courts divine an "average" or "general" case for comparison in that type of case.

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214. *Id.*

215. *Id.*

216. Odanaka, *Kōso Yokusei no Riron to Tembō [Appellate Reform Doctrines and Prospects], 26* HŌGAKU SEMINAR 2, 15 (1982).

Probably the most important aspect of the High Court decision was its willingness to afford relief to Fukumoto on the basis of discrimination despite the fact that, viewed in a vacuum, the prosecution's treatment of him may not have been "incorrect." Only because the prosecution treated many others with leniency while refusing such leniency to Fukumoto because of his social status did the issue of discrimination arise. The High Court recognized that the denial of leniency may constitute adverse treatment just as surely as does the imposition of harsh treatment, and that this may be true even though there is no right to lenient treatment. It is unclear whether this recognition can survive under the application of the "average" or "general" case standard.

IV. Evaluation of the New Control Mechanisms

A. Objectives of Control

At some point, every criminal justice system recognizes that to punish each violation is neither feasible, due to limitations on resources, nor desirable for reasons of social or criminal policy. The obligation of a just system becomes, then, not only to separate the innocent from the guilty, but also to exert its best efforts to insure that those lawbreakers who are selected for punishment are the "right" individuals. Conversely, those dealt with leniently must also be the "right" individuals. Any controls over prosecutorial or police choices are directed toward this goal.

Traditionally, direct control over prosecutorial power, for instance by grand juries, prosecutorial guidelines, or discipline within the prosecutorial agencies, was viewed both in Japan and in the U.S. as the only possible method of insuring the correct choices. Selectivity by police was not even discussed. In Japan dissatisfaction with the results of existing controls led to the development of the punishable illegality and abuse of prosecutorial discretion theories, as a means of appealing to the courts.

Clearly, the right choices cannot be determined simply by allowing the courts to review each prosecutorial or police decision based on their own conceptions of "right." One purpose of leaving discretion to prosecutors is to permit considerations of criminal justice enforcement policy to influence decisions. Another is to provide individualized treatment in applying the law. Excessive judicial oversight would defeat both of these purposes, and further, it is impractical. Therefore, in constructing judicial controls over the selection of cases to be pursued, their proponents must determine not only the conception of justice by which "right" is to be defined, but also the extent to which the courts can or should be

responsible for insuring that this justice is realized.[217] Outside of these limits, it must be accepted that a "wrong" choice may be left standing.

B. The Basis for Judicial Control

It is necessary to evaluate the manner in which the present theories and court opinions have dealt with the complaints of those inside and outside the system, as well as the possibilities these theories hold for minimizing "wrong" choices and maximizing "right" choices by the criminal justice system in the future. The variety of proposals for abuse of prosecutorial discretion theories has led to a great deal of confusion in certain areas. However, on other basic issues there is consensus.

For instance, it would have been impossible for a theory of abuse of prosecutorial discretion to develop without agreement that article 248 of the Criminal Procedure Code did not establish suspension of prosecution as a privilege to be granted as a matter of grace by the prosecutor. So long as such an interpretation was accepted, it was very difficult to argue that a court should inquire into a refusal to give suspension of prosecution treatment. Naturally, the prosecution was not prepared to give up without a fight what it had always assumed to be its exclusive perogative. Therefore, efforts were devoted to refining a rationale to support such judicial inquiry.

In reaction to prosecution claims, one theory not only rejected the concept of suspension of prosecution as a privilege, but argued that suspension of prosecution was actually mandatory when the conditions of article 248 were met. Although no court has adopted this interpretation, such extreme arguments do seem to have softened resistance to the idea of reviewing prosecutorial choices. Justification for judicial review of prosecutorial dispositions can arguably be found in many places, including the Constitution, but traditionally, the claim that article 248 grants complete license to the prosecution would end the discussion. Article 248 no longer appears to be such a formidable obstacle.

A variety of views continues to exist concerning the most appropriate basis for judicial review in these cases. Nevertheless, the Supreme Court's admission of the possibility of illegal prosecutorial selectivity in the *Kawamoto* case was a recognition that the courts are in fact entitled to comment on such matters, and that article 248 is not a total shield for the prosecution. Such a recognition appears

217. Only when both of these issues have been settled will we be able to answer the question of which "wrong" choices will the system correct. For the practitioner, this may be the only relevant issue.

to be all that is necessary for a court to engage in an inquiry into prosecutorial behavior.

Even many prosecutors have accepted the necessity of a limited degree of oversight where intentional discrimination is at issue. The fact that the original abuse of prosecutorial discretion theory was modeled on the "abuse of right" theory, which itself included a requirement of actual intent to use the right in an illegal manner, also helped make subjective intent a natural requirement for applying the theory. Furthermore, the early attacks on prosecutorial discretion depicted the prosecution as purposely persecuting those engaged in anti-establishment activities. There was no doubt in the minds of those such as Isayama that prosecutors in such cases acted with the requisite subjective intent.

In recent years, both academic and legal supporters of the abuse of prosecutorial discretion theory have come to believe that only objective proof of illegality is necessary, and that the intent of the individual prosecutor involved is irrelevant. If this change is accepted by the courts, it will represent a significant increase in the court's ability to check prosecutorial discretion.

The advantages of an "objective intent" standard for those desiring more intensive judicial review are numerous. First, subjective intent is virtually impossible to prove without a "confession" from the prosecutor, a rather unlikely prospect. Second, the comparison of different cases becomes relevant for the first time under an objective standard. Finally, if the focus of the objective standard shifts from objective proof of the fact that an individual was prosecuted for illegal purposes to proof of the fact that the prosecution creates an objectively impermissible enforcement situation, a considerable broadening of the judicial scope of inquiry will have been accomplished.

The objective standard has not yet been fully established in the courts. The *Kawamoto* High Court took a middle position, using objective evidence to infer discriminatory subjective intent. In that opinion, the High Court looked not to the intent of the individual prosecutor responsible for prosecuting Kawamoto, but to the "intent" of the prosecutorial organization as a whole. The *Akasaki* High Court did not make its position on this issue clear. The Supreme Court did not address the issue of subjective or objective intent directly in either the *Kawamoto* or the *Akasaki* case. Thus, the courts are not precluded from adopting an objective standard.

The current emphasis on objective factors has begun to affect not only the standard of proof, but the overall form of abuse of prosecutorial discretion theory as well. The move is away from direct attacks on the government's actions and towards an emphasis

on a judicial remedy of the defendant's position, similar to the demand made in the *Kawamoto* case.

Some have found this approach particularly useful in the area of discriminatory prosecutions, which they distinguish from other illegal uses of suspension of prosecutorial discretion.[218] Goto Takanori, one of the attorneys for Kawamoto, views the objective approach as all-encompassing. Accordingly, though the object of his attacks remains government wrongdoing, he has dropped the term "abuse of prosecutorial discretion theory" in favor of the less accusatory "cutting the trial short" theory (*saiban uchikiri ron*). In his view, any governmental act which results in injury to the rights of an individual may form the basis for a procedural dismissal of the case. Goto is thus able to include under the same rubric the issue of speedy trial violations, illegal investigations, and discriminatory or otherwise unjust prosecutions.

This pattern of evolution appears to be a mixed blessing for the development of effective judicial control of criminal justice discretion. Calling on the courts to refuse to enter a judgment which would confirm an injustice is far more likely to be successful than a demand that the prosecution be actively condemned. In this respect the objectification of the theory is productive. However, the tendency of these new proposals to lump discriminatory prosecutions together with illegal investigation techniques seems to be ill-advised. The argument for the dismissal of a prosecution as a remedy for illegal investigations and other illegalities is much more tenuous than when the offensive act is the actual decision to pursue the prosecution.

Of course, the justifications offered for applying "abuse of prosecutorial discretion" to such cases are not entirely unconvincing. Yet the Supreme Court clearly found it easier to resist these arguments, which appeared in the *Akasaki* case, than it did the arguments made by the *Kawamoto* defense. One reason is probably the fact that the Japanese legal system has traditionally emphasized the determination of substantive truth (*jittaiteki shinjitsu shugi*).[219] While the courts endeavor to prevent this principle from interfering with due process concerns, they resist the mandatory applications of such principles as the exclusionary rule which result in the loss of evidence which would assist in the determination of truth. Like the exclusionary rule, the application of Type 3 abuse of prosecutorial discretion theory to investigative abuses results in freeing a defendant whom the system would otherwise punish.

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218. Odanaka, *supra* note 216, at 7.

219. This is one of a number of reasons for the scorn heaped on the practice of plea bargaining. The criticism, not unknown in the U.S. either, is that the "truth" is ignored in favor of a game of wits.

It is quite possible that the courts will eventually agree to weigh the presence of illegal government actions when reviewing the propriety of prosecution decisions. Nevertheless, if the goal is early court acceptance of the necessity of rejecting certain prosecution decisions, it seems unwise to link discretion problems affecting the disposition of cases too closely with the issue of remedies for other types of illegal actions.[220]

C. *The Significance of the High Court Opinions*

At first glance, the *Kawamoto* High Court opinion is a complex and puzzling one. It is clear that by applying the abuse of prosecutorial discretion theory the court managed to reach a convincing and just solution to a difficult problem, but it is not clear why it chose to reason as it did. The case involved a highly questionable example of prosecutorial decision-making. It also featured the political and social drama of the plaintiff's difficult fight against the government and large corporations to gain relief for pollution-related injuries. The defense sought to make the criminal case an integral part of the pollution issue, and the court accepted this characterization.

The fact that the criminal case and the pollution issues were tied together is a source of confusion in the opinion. From the point of view of the defense team, the opinion provided a valuable boost to the anti-pollution social protest movement and established a useful precedent condemning the government's improper use of its authority to prosecute criminal cases.

Further, the fact that the abuse of prosecutorial discretion doctrine was first established in a case that appeared so clearly unjust to the average citizen is significant for the future of the theory. It should be much more difficult for the courts to retrench on this decision than it would have been to qualify a finding involving a more technical type of violation.[221]

The court relied on article 248 to support its finding of an improper use of prosecutorial discretion. Yet, its article 248 analysis consisted largely of an examination of the socio-political context of the *Kawamoto* case. Based on the concepts of equity and the principle of equality before the court underlying the Constitution and "law" in general, the court ruled that the prosecutor's decision was

220. Further, both in terms of the injury and in terms of the problems which must be addressed in analyzing illegality, discrimination by police bears more similarity to discrimination in suspension of prosecution than it does to illegal investigations.

221. The facts of the *Kawamoto* case seem to provide ample basis for establishing the kind of constitutional inquiry which has been adopted by certain circuit courts of appeal in the United States. It is worth taking note that the defense lawyers specifically chose not to make use of this theory, although they were aware of its existence.

not in accordance with justice. Thus, the decision was in violation of article 248.

Because of the particularity of this finding, the case is not likely to have much impact on the development of the abuse of prosecutorial discretion theory. The use of article 248 to make a broad inquiry into the justice of a prosecutorial disposition and to correct a clearly mistaken appraisal of the societal conception of justice in a particular case may have some value, but the impact is likely to be limited by the fact that the court did not articulate the proper scope of cases in which this approach could be applied.

The *Kawamoto* case did make several concrete contributions to the theory of abuse of prosecutorial discretion. The court's use of article 81 of the Constitution to conclude that it has the power to inquire into the use of prosecutorial discretion represents a landmark ruling which helps create the basis for judicial review under the abuse of prosecutorial discretion doctrine. In addition, the court's rejection of a purely subjective standard of intent, and its ruling that intent should instead be judged by the actions of the authorities, is an important step permitting courts to review a wider range of prosecutorial actions. But despite these contributions, the overall impact of the *Kawamoto* case is somewhat limited.

In contrast, the *Akasaki* case, though a much less emotionally compelling case of injustice, provides much more extensive guidance to courts interested in making use of the abuse of prosecutorial discretion theory in the future. The court's recognition that an individual is discriminated against whether he is treated disadvantageously or others are treated advantageously is crucial for the development of the doctrine. Further, this approach is applicable to both prosecutorial and police discrimination. Although the Supreme Court later rejected the court's view of discrimination, the High Court ruling is nevertheless important because it sets a precedent in which at least one court applied such a standard.

The *Akasaki* High Court also proposes a concrete interpretation of the constitutional guarantee of equality when examining a criminal prosecution. The meaning of the ideal of equal treatment is a subject that needs further development, but again it is important that one court broached such issues in the context of prosecutorial discretion.

The court's balancing test is also a significant contribution to adjudicating cases in which it is determined that the dismissal of prosecution is not mandatory. The court compared the public harm resulting from the dismissal of the indictment against the overall injustice created by the police discrimination. This is a simple, rational balancing test which could be adopted easily in other cases. Furthermore, the test could conceivably be applied as well in cases

when the unfairness of police action does not reach the constitutional level.

The *Kawamoto* and *Akasaki* cases represent only the start of the practical articulation of the abuse of prosecutorial discretion theory. Neither case settles many issues. However, together they increase the incentive for other courts to adopt the theory, while providing initial guidelines for future practitioners and theorists.

D. The Substance of Judicial Control

The greatest confusion concerning the control of prosecutorial discretion surrounds the issues of defining "right" choices in disposition decisions and determining the proper role for the judiciary to play in ensuring that such choices are made. These issues are the essence of the problem of control of prosecutorial discretion, but legal theory presents no obvious answer to them. It is even tempting to believe that prosecutors have been allowed such broad discretion precisely so that such difficult choices would not have to be made publicly.

The issue of prosecutorial control may be somewhat more manageable in the American context, because the courts have only the Constitution on which to base their review of prosecutorial choice. In Japan, the additional presence of article 248 of the Criminal Procedure Code, which seeks to provide some guidance for prosecutorial decision-making creates the possibility of a two-layered system of control.

Confusion is further fostered by the fact that proposals for the control of prosecutorial discretion in Japan have come from many different directions, and are frequently submitted to promote a particular, narrow purpose. For example, as described above, abuse of prosecutorial discretion claims first arose in the context of public safety cases. Prosecutors in public safety cases tend to see themselves as acting on behalf of the entire populace to uphold the established order against a small band of outlaws determined to destroy that order. The defense lawyer in turn may see his case as the last hope for popular rights which are in immediate danger of being crushed by an authoritarian government. The battle between the prosecution and the defense lawyer rather than the legal issues thus becomes the object of the trial. Consequently, in public safety cases, the abuse of prosecutorial discretion theory is often reduced to simply providing the defense with a pretext for imposing on the court lengthy diatribes against the government and the prosecution. Such settings do not provide a useful context for developing and refining the doctrine itself.[222]

222. The sources of these observations are in part the author's conversations with lawyers and prosecutors.

In light of this problem, other practitioners have emphasized the importance of carefully selecting the cases in which abuse of prosecutorial discretion will be charged so as to foster the doctrine's growth. While the primary object of these practitioners is not to disrupt the courtroom, they too, often see the prosecution as a philosophical enemy.

Another source of support for the control of prosecutorial discretion theory is the academic community. Academic proposals are distinguished by the fact that they need not be tailored to meet the requirements of any particular case and by the fact that scholars are at least nominally unaffected by normal attorney-prosecutor antagonism. But scholarly commentary is limited by the responsibility to put forth proposals which lead to the development of consistent legal theory and preserve the integrity of the legal system as a whole.

As a result, once it became generally accepted that there was a sufficient theoretical basis for judicial review of prosecutorial choices, scholars began to focus on delineating the types of cases in which it would be proper for a court to override the prosecutor's decision by dismissing the case on procedural grounds. Voluminous scholarly discussion on this issue has failed to distill the varying approaches of practitioners into a single, consistent theory on which to base the review of prosecutorial discretion. The apparent confusion may be due in part to the failure of theorists to distinguish between the issue of defining the "right" prosecutorial decisions and the issue of the degree to which it would be practical or advisable for courts to review these choices.

"Right" choices can be defined only by reference to a concept of justice, or by reverse inference from a concept of injustice.[223] If all parties hold a common definition of justice, then theorists need only consider the practical aspects of judicial review in order to determine which of the "wrong" prosecutorial decisions the court will remedy, and which must be left standing. However, it is probably the case that varying concepts of justice coexist in Japan as elsewhere; at least, it is clear from the variety of proposals for prosecutorial control put forth that the various advocates are arguing from rather different concepts of injustice. It is necessary to refine these views of justice before procedural or practical matters can be addressed.

Three different orientations toward injustice inform the debate concerning the control of prosecutorial discretion. One approach focuses on claims of improper conduct by the criminal justice authorities, prosecutors and police. The conduct attacked runs the gamut from illegal investigations, to indictments which depart ex-

223. *See* IDOTA, *supra* note 163.

cessively from established prosecution standards, to prosecutions filed for malicious or other improper reasons. The most radical view supports this approach because it provides the approbation of the prosecutorial bureaucracy which the radical view desires. However, many non-radical scholars and practitioners as well continue to emphasize the correction of improper prosecutorial behavior as the object of judicial control. In fact, even many prosecutors seem to have accepted the idea that correcting abuses should be the rationale for judicial review, since they feel the likelihood of true prosecutorial wrongdoing is rather slim and review would therefore be limited.

The second and third orientations come from the newer "objective" theories, which reject the notion that it is crucial to place the blame on the prosecution. Instead, such theories hold that judicial oversight should focus on relieving violations of rights irrespective of whether the prosecution was at fault. Yet among the objective theories different perspectives coexist. One view proposes that the courts hold each individual case up to an abstract standard of substantive "justice" and then determine the correct disposition of the case. In this view, abuse of prosecutorial discretion theory is like a safety valve which enables the court to avoid an unjust result when a substantive ruling would require a guilty verdict. The High Court decision in the *Kawamoto* case is probably the best example of this approach.

The other perspective calls on the courts to oversee the decisions made by prosecutors and police to make sure that the enforcement of the law is fair. Thus, review would be important, even when the judgment sought by the prosecution in a particular case is not obviously unjust or even unusual, in a case in which the pattern of enforcement may suggest discrimination in prosecution decisions. In order to support egalitarian enforcement of the law, the courts must be prepared to dismiss such prosecutions. The High Court opinion in the *Akasaki* case illustrates in part the application of this perspective.

In spite of the lack of agreement on the "right" way to exercise discretion to suspend prosecution or to pursue a case, there is at least some consensus with regard to cases of purposeful prosecutorial wrongdoing. All parties, including the Supreme Court, appear to agree that malicious prosecutions can and should be stopped by the courts. However, because of the generally high level of prosecutorial integrity and the existence of substantial internal controls, prosecutions filed in bad faith are not likely to be a problem in a large number of cases.

The consensus, however, does not provide a means for dealing with other problems. None of the following undesirable results of the suspension of prosecution disposition depend on the bad faith of

the prosecutor: the possibility of mistaken judgment in a particular case; the possibility that the result of the prosecution will be discrimination against the defendant; and the possibility of the use of prosecution standards which violate constitutional guarantees or are otherwise lacking in public support. A different theory from that of bad faith must guide judicial review in these cases.

Most recent theories argue that discriminatory prosecutions should be remedied by the courts, but generally neither theorists nor practitioners have taken up the issues in sufficient detail.[224] One problem, for instance, is that proving that the result of prosecution will be discrimination against an individual clearly requires a comparison to other cases. But, in the *Akasaki* case, the Supreme Court ruled that guilty individuals cannot support a claim of unjust treatment by pointing to others, who, while guilty, were treated leniently. The Court found that unjust treatment can only be asserted when the individuals can distinguish themselves and demonstrate discrimination by comparison to others who were also prosecuted.

The Court's view was informed by the idea that discrimination problems are to be understood in relation to an abstract standard of substantive justice.[225] One approach to expanding the independent recognition of discrimination abuses might be to start with clarifying the distinction between "justice" and "fairness." If the courts could be convinced of the importance of "fairness" as an objective at least as important as substantive outcomes, review of discrimination cases would be facilitated.

The High Court in the *Akasaki* case, in ruling that disparate treatment can be discrimination whether the individual in question is treated worse than others or whether others are treated better, recognized the importance of some of the basic principles of "fairness." Such a view does not fit well with the idea of substantive "justice," but because large numbers of suspects are given suspension of prosecution dispositions, equal treatment cannot be ensured by looking solely at those who were prosecuted. The fact that defendants have no right to lenient treatment in no way affects their

224. Suzuki, *supra* note 176; Odanaka, *supra* note 216. Other commentators have taken notice that discrimination can occur as a result of consistently applied prosecution standards for decision-making and need not result only from the prosecution's pattern of applying neutral standards.

225. Let us conceptualize this standard as a line. This line is not put in place by the court. Rather, it is divined. Once it is drawn, the court knows that all cases above the line can be prosecuted, and all cases below it must be dropped. Alternatively, the court draws the line at the cases which it considers to fulfill the minimum requirements for a conviction of a crime to be just. Above that line, it makes no difference to the court whether the case is prosecuted or dropped. In either case, the defendant can attack his own treatment only by arguing that he is below the line. An argument that others above the line were not prosecuted will be of no avail.

right to have the decision as to whether or not lenient treatment will be offered made in a fair and nondiscriminatory manner.

If courts are eventually to review cases of discrimination in relation to the total pattern of enforcement of the law, theory must provide guidance as to which differences in treatment are impermissible. The only remedy for an indictment which embodies impermissible differences in treatment is to dismiss the case. Scholars and practitioners agree that when a conviction would result in a denial of the constitutional guarantee of equality before the law, the difference in treatment is impermissible.

However, the meaning of constitutional guarantees in the context of prosecutorial discretion remains unclear. Indeed, the *Akasaki* case represents the failure of theory to provide a satisfactory definition of the proper sphere of comparison for equal treatment. The defendant argued that, as a recipient of a bribe, it was improper that he was treated less favorably than the offerors of the bribe. In colloquial usage, this is clearly "unfair," but theory does not tell us whether the Constitution guarantees a defendant equality on this level, or whether more fundamental unfairness must be shown. Further, even if there were no violations of constitutional rights, it is necessary to determine whether the courts would be automatically obliged to give a substantive verdict or whether abuse of prosecutorial discretion theory permits the consideration of "subconstitutional" types of unfairness as well.

Another issue remaining after the *Akasaki* case is that of the proper view of discrimination by police. Thus far, both scholars and practitioners have viewed such discrimination as simply one of many kinds of investigative abuses which can violate the rights of suspects. In fact, it is quite distinctive. To remedy typical investigative abuses, the court has the option of excluding the improperly obtained evidence, but where discrimination in investigation has affected the totality of evidence accumulated, a remedy cannot be addressed to specific items of evidence.[226]

In order to treat discrimination in police investigations effectively and fairly, it seems important that theorists explore the relationship between police and prosecutorial discrimination and the possibility of controlling both. The complex problem of undesirable dispositions due to the use of undesirable standards by the prosecution in making leniency determinations also demands more atten-

226. Furthermore, in the case of a discriminatory police investigation, the harm caused by the violation is the distortion of the pattern of enforcement. Therefore, the prosecution itself is the harm. Investigative abuses cause such harms as violations of privacy or of bodily integrity. The harm itself has no direct relationship to the decision to prosecute the case, and need not in theory vitiate the substantive guilty verdict. On the other hand, if a remedy is to be provided for discriminatory investigations, the only remedy is to undo the result, the prosecution which is being pursued.

tion. Standards which are clearly discriminatory in the constitutional sense do not pose a difficult problem. For instance, a hypothetical finding that nationwide, virtually all prosecutions for bill-posting have involved posters with communist content would be evidence of a discriminatory standard.

However, the system has yet to address the issue of prosecutorial standards which may be defensible from the point of view of criminal justice policy, but at the same time result directly in a pool of defendants which is biased by economic class or otherwise. Those theorists who refer to the issue of prosecution standards describe the standards which need to be corrected as "slanted." However, they do not explain precisely what they intend by this term, and neither scholars nor practitioners suggest how to decide whether the real basis for the distinctions made is to be considered the criminal policy, or whether it is to be regarded as discrimination. In the interests of insuring a just system of law enforcement, surely this is an issue which should be settled.

A further issue is correcting prosecutorial standards which do not reflect social consensus, or do not accord with the court's sense of justice, but which also do not result in a pattern of discriminatory enforcement. Some commentators have implied that the courts should review such standards perhaps under the authority of article 248.[227] This notion, however, is not very realistic. It would be extremely difficult for the defense to demonstrate the existence of a standard, let alone to prove its content. Thus, an attack on standards will be a difficult gambit for defense lawyers.

In a sense, however, the High Court's decision in *Kawamoto* could be viewed as a rejection of the prosecution's standards of decision. The court pointed out many factors which should have been considered in the suspension of prosecution decision but were not, implying that the standards which were employed by the prosecution were insufficient. Since the court did not describe any specific prosecutorial standard that it found to be unacceptable, the *Kawamoto* decision may more accurately represent simply a rejection of the specific prosecutorial decision-making process in that case. Thus, criticizing the factors underlying the prosecutorial decision in a particular case may be the only practical manner in which courts can review prosecutorial standards they believe to be inappropriate.

The development of prosecutorial abuse doctrines also must consider practical issues. Though it is important to refine theories of when prosecutorial decision-making is "wrong" and to build a coherent approach to rejecting such choices, no court will welcome proposals which involve lengthy fact-finding procedures and prom-

227. Odanaka, *supra* note 216, at 11.

ise mammoth efforts to uncover only isolated cases which require a remedy.

Courts are reluctant to expand their caseload. In Japan, the courts' natural desire to enhance their efficiency is fortified by the tendency to identify claims of abuse of prosecutorial discretion with radicals and with "courtroom battles." Both prosecutors and judges have decried the waste of time and disruption attributable to apparently groundless claims of abuse of prosecutorial discretion.

As the Supreme Court opinions demonstrate, the judiciary is in search of limitations on its dealings with this issue. Certain commentators as well have explicitly recognized the necessity of limiting both the range of cases and the aspects of discretion which are to be committed to judicial review. For instance, Tamiya advocates that prosecutorial discretion be overturned only in cases where the information is filed in bad faith, the incident is extremely trivial or the prosecution violates the principle of equality before the law.[228] Mitsui limits his proposals even more stringently and would permit dismissal only when a "clearly" trivial incident has been pursued in accordance with an illegal objective.[229] Apart from the desire not to unduly burden the courts, these commentators seek to avoid the specter of broader and more detailed investigation by the prosecution in order to defend against potential challenges to their choices.

Of course, many practitioners do not share such restrictive views, since the courts provide the only immediate avenue of relief. Indeed, many scholars believe that the courts should play a large role in controlling prosecutorial discretion. These scholars argue that prosecutorial investigation is already long and detailed, and that the present system provides no possibility of relief other than the courts. Odanaka, for example, argues that while judicial oversight may not always be the optimal solution, review of prosecutorial choices should be permitted since this is the only means for relief. It appears that this is another issue which must await further resolution.

E. Conclusion

The theory of abuse of prosecutorial discretion was born out of perceived injustices in the Japanese criminal field. In the end, its utility will depend on the changes it brings to the real world of criminal justice. Scholars and practitioners together have succeeded in creating a theoretical underpinning for judicial review of

228. *Id.*

229. The "illegal aim" required by Mitsui is different than the indictment filed in bad faith, cited by Tamiya. Presumably, since it is unrelated to the maliciousness of the prosecutor, "illegal aim" covers a somewhat broader range of cases.

prosecutorial choices; the Supreme Court opinion in the *Kawamoto* case, however limited, represented confirmation of this success.

There is ample room in Japanese legal theory to support the availability of judicial relief for many of the problems inherent in the broad discretion prosecutors in the country presently enjoy. However, in order to persuade the courts to provide relief for specific problems, further theoretical development is essential. In particular, clarification of the goals of control of prosecutorial discretion deserves more attention. Nevertheless, even at the present stage of theoretical development, the Japanese criminal justice system has the resources to rectify widely recognized cases of prosecutorial misjudgment such as those which appear in the *Kawamoto* decision.

Beyond such cases, the future of abuse of prosecutorial discretion theory is difficult to predict. Problems of judicial efficiency may combine with the courts' distrust of radicals and fear of becoming involved in a moral or political debate to severely limit the growth of abuse of prosecutorial discretion theory. However, the judiciary may find that a willingness to establish more concrete, but less restrictive, standards for review, through abuse of prosecutorial discretion theory, would permit the separation of the "true radical" from the attorney who sincerely needs to inquire into the prosecutor's judgment.

Finally, it is possible that insistent pressure on the courts to grant relief in the absence of any other remedy may force the government to create some other means of controlling prosecutors. Such control might be attempted through the establishment of an independent organ for the review of prosecutorial choices, through legislation dictating prosecutorial standards in more detail, or through increased openness to publicizing internal prosecutorial guidelines or procedures. If any of these should occur, the debate over the proper definition of "right" choices will not have been wasted. Hence, even if the abuse of prosecutorial discretion theory were to be supplanted by legislative or administrative responses, its further development would still contribute to ensuring the continued refinement of a consistent criminal justice system in Japan.