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From Japan's Death Row to Freedom

Daniel H. Foote
University of Washington School of Law

FROM JAPAN'S DEATH ROW TO FREEDOM

Daniel H. Foote†

Abstract: In 1975, the Japanese Supreme Court relaxed the standards governing the grant of retrials in criminal cases. Since then four death row inmates have obtained new trials and ultimate vindication through acquittals. The facts of the four cases are compelling: all involved highly publicized murders, rather harsh investigations leading to confessions that the defendants subsequently disavowed, and seemingly routine convictions followed by decades-long struggles by the convicted men to forestall their executions and secure retrials. Each of the men spent over 25 years on death row before the final determination that he had been unjustly convicted. In this article, Professor Foote examines these cases and their implications for criminal justice in Japan. While the gravity of the crimes and other circumstances render these cases—which all involve crimes committed over 35 years ago—atypical in some ways, in many other respects the cases reveal basic features in Japan's criminal justice system that continue to this day. Moreover, by providing a graphic reminder that—even in a system, such as Japan's, that prides itself on accuracy in fact-finding and provides investigators with a wise array of tools to ferret out the truth—individuals may be mistakenly convicted and executed for crimes they never committed, these cases have engendered much soul-searching by Japanese criminal justice officials, judges, attorneys and scholars and have led to numerous proposals for reform. This article explores these proposals and seeks to appraise their likely impact on Japan's criminal justice system.

In 1975 the Japanese Supreme Court relaxed the standards that convicts must satisfy to obtain new trials.[1] Since that time, four inmates on Japan's death row[2] have successfully obtained new trials. All four have gone

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† Assistant Professor of Law, University of Washington School of Law. A.B. 1976, J.D. 1981, Harvard. The author is grateful for the support of a GARIOA-Fulbright Alumni Award and a Council on Foreign Relations International Affairs Fellowship during work on this Article. The author also wishes to thank Professors Masahito Inouye, Hiraku Tanaka, Mark Ramseyer, John O. Haley, Arthur Rosett, Joan Fitzpatrick and Frank Upham for their helpful comments.

[1] For descriptions and analysis of the change in the governing standards, *see, e.g.*, Nihon Bengoshi Rengōkai-hen (Japan Federation of Bar Associations, ed), *Saishin (Retrials)* 3-6 (1977) ("Nichibenren, *Saishin*"); and *Zoku-saishin (Retrials, Continued)* 308-345 (1986) ("Nichibenren, *Zoku-saishin*"); Daniel H. Foote, *The Door That Never Opens?: The Death Penalty and Post-Conviction Review of Capital Cases in the United States and Japan*, Brooklyn J Intl L, Spring, 1993 (forthcoming).

[2] Japan continues to maintain the death penalty, although the numbers of both death sentences and executions have dropped sharply in recent years. Keihō (The Penal Code), Law No 45 of 1907 ("Keihō"), lists thirteen crimes punishable by death, and other special penal statutes list five more; but as a practical matter the death penalty is currently imposed only in certain murder and felony murder cases. As of this writing, over fifty inmates remain on death row in Japan. *See* Noboru Murano, *Shikei'tte nan da (What Is the Death Penalty?)* 33-35, 157-164 (1992). The term "death row," however, is not used as such in Japanese; the closest equivalent is probably "*shikeishū*"—"death penalty inmates," which carries roughly the same connotation.

on to win acquittal at retrial. This is the story of those cases, with reflections on their significance for Japan's criminal justice system.

In all four cases (the so-called "death penalty retrial cases"), men in their late teens or early twenties were charged with murder. All four confessed (although, as the following accounts vividly reveal, the investigators sometimes had to work quite hard to obtain those confessions), but then renounced the confessions either prior to or at trial. They have asserted their innocence ever since. All were convicted and sentenced to death, and over a period of many years the courts rejected all of their appeals and intervening petitions for retrial,[3] with the exception of one isolated ruling

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[3] In Japan, trials for serious crimes are held in District Court before a three-judge panel. Saibanshohō (Court Organization Law), Law No 59 of 1947, arts 24, item 2; 26(2), item 2. Both the defendant and the prosecution have the right to appeal the judgment to the appropriate High Court on both legal and factual grounds. Keijisoshōhō (Code of Criminal Procedure), Law No 131 of 1948, arts 351(1), 377-382 ("Keisohō"). Thereafter, each side also has the right to appeal the High Court decision to the Supreme Court. Grounds for appeal to the Supreme Court are limited to such matters as constitutional errors and violations of precedent (*id* art 405), but the Supreme Court has discretion to review other matters if it chooses to do so (*id* art 406) and may set aside a High Court judgment for "grave error in fact-finding" (*id* art 411(1), item 3). Each of the above types of appeal must be filed within two weeks following entry of the judgment being appealed (*id* arts 373, 414), or that judgment will become final. After the second level of appeal has been exhausted, the judgment ordinarily becomes final in ten days. *Id* art 418.

After a conviction has become final, the convict (and even the convict's heirs, if the convict has died) may file petitions for a retrial of the case (*id* arts 435, 439(1), 441) based upon a set of limited grounds contained in Article 435 of the Code of Criminal Procedure. The ground most commonly relied upon—and that relied upon in each of the four death penalty retrial cases discussed herein—is contained in item 6 of that article. It provides the right to a new trial "when clear evidence is newly discovered requiring the declaration of innocence of or dismissal of charges against one who has been found guilty, or a remission in penalty for one previously charged, or leading to the finding of a less serious offense than that found in the original judgment." *Id* art 435, item 6 (translation by the author). Prosecutors also have the right to seek retrials on behalf of an individual who was convicted (*id* art 439(1), item 1) but may not request retrials of a defendant who was acquitted. Prosecutors may, however, challenge rulings granting a retrial; each side has the right to two levels of challenges to rulings on retrial petitions. *Id* arts 450, 428(2),(3). As the death penalty retrial cases reflect, at each stage the courts may engage in a searching review into new evidence and the entire record of the case. For retrial petitions based on the grounds of new evidence, the relevant inquiry is not into guilt or innocence as such, but rather whether the new evidence raises a likelihood that the original judgment was in error (although in practice this does not appear to make a great difference in the nature of the inquiry).

A ruling granting a retrial does not end the process. Once such a ruling becomes final (and assuming the courts agree that a retrial is warranted), the retrial itself will commence. *Id* art 451(1). This is a full new trial of the case, focusing squarely upon whether guilt has been established beyond a reasonable doubt—with that principle applying in Japan in a form very similar to that in the United States. *See, e.g., Murakami v Japan*, S Ct, 1st P B, Ruling of May 20, 1975, 29 Keishū 177, 180. As in the original trial, each side has the right to two levels of appeals from the judgment. The prosecution elected not to appeal the acquittals in the death penalty retrial cases, but did fully contest the rulings granting the retrials in the first place.

For a more detailed discussion of the applicable standards for retrials and related issues, *see* Foote, *supra* note 1.

that was promptly reversed. Nevertheless, in part through a continuing series of retrial petitions and requests for clemency, all four were able to avoid execution until the relaxation of the retrial standards enabled them to achieve vindication. In the meantime, the four men ended up spending virtually all of their adult lives in confinement on the murder charges. The shortest period of confinement (including periods pending and during trial and the two levels of appeal permitted before the sentence became "final") lasted nearly twenty-nine years, and in two of the cases it extended for almost thirty-five years; the vast majority of that time was spent on death row.[4] Collectively, the four men spent over 130 years in confinement before they were acquitted.

These cases make interesting stories in their own right. More importantly, the four cases provide a vivid portrait of numerous aspects of Japan's criminal justice system. Prosecutors and other defenders of the existing system point to the fact that these four cases all occurred between 1948 and 1955, during a period of considerable social dislocation following World War II, and assert that it would be virtually impossible for such miscarriages of justice to occur today. Critics, on the other hand, argue that these cases reveal a common pathology that remains unchanged, making it inevitable that similar cases will arise in the future.

The cases are significant at another level. They include evidence of various improprieties by the investigators, and they have fueled a host of books and articles critical of many aspects of Japan's criminal justice system. These works have proposed reforms ranging all the way from relatively modest changes in procedures for processing cases to adoption of the jury system. Moreover, the thought that four innocent men could come so close to execution has raised concerns among the Japanese people and generated much public (and private) self-examination and soul-searching among judges and prosecutors. Later in this article I will discuss the nature of the concerns that have been identified and the scope and impact of the major reform proposals. Before doing so, let me examine the facts of the death penalty retrial cases.

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[4] In Japan, once the death sentence becomes final the inmate normally is confined in a special unit of one of the seven prisons that have facilities for executions (which are performed exclusively by hanging). *See* Murano, *supra* note 2, at 44-66. For capital inmates, contact with the outside world is strictly limited; some critics have charged that authorities are using these limits on contact to minimize publicity which might foster opposition to the death penalty. *See id* at 47-51.

I. THE RETRIAL CASES

A. *The Menda Case*[5]

During the night of December 29, 1948, an intruder entered the house of Kakuzo Shirafuku in Hitoyoshi City, Kumamoto Prefecture. The intruder murdered Kakuzo, a 76-year old prayer reader, and his 52-year old wife and seriously injured their two teenaged daughters with a hatchet (or similar object) and a knife.

At the time, as a result of postwar police system reforms,[6] the crime fell within the overlapping jurisdiction of both the regional branch of the National Rural Police and the local Hitoyoshi City police department. A special ten-man Hitoyoshi Police unit undertook the initial investigation, but found little to go on at first. In early January, however, the local police in the city of Yatsushiro, about thirty miles from Hitoyoshi, received a report that a man claiming to be a Hitoyoshi detective had told residents he was involved in the investigation of the Shirafuku murders.[7] After further investigation, the Yatsushiro police learned that the man had visited the home of a Yatsushiro woman whose daughter was working at an "inn"[8] named Marukoma in Hitoyoshi. After identifying himself as a detective from Hitoyoshi, the man had said he spent a night at Marukoma, met the woman's daughter and heard

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[5] The account of this case is based largely on the court opinion acquitting the defendant following his retrial, *Japan v Menda*, Kumamoto Dist Ct, Yatsushiro Div, Judgment of July 15, 1983, 1090 Hanrei jihō 21, along with prior court rulings on Menda's various retrial petitions, cited below. Other sources include Shingo Takasugi, *Kenryoku no hanzai* (*Crimes of Authority*) 9-48 (1985); Kōichirō Yokoyama and Itsuhiro Namazugoshi, *Menda jiken* (*The Menda Case*), *in* Yoshisuke Kamo, ed, Keiji saishin no kenkyū (Research on Criminal Retrials) 315 (1980); Tetsuharu Kurata, *Menda jiken* (*The Menda Case*), *in* Hōgaku seminā zōkan (Hogaku Seminar Extra Number), Nihon no enzai (Miscarriages of Justice in Japan) 224 (1983) ("Nihon no enzai"); Nichibenren, *Saishin*, *supra* note 1, at 343-46; Nichibenren, *Zoku-saishin*, *supra* note 1, at 8-69 (1986); and Jirō Nomura, *Menda jiken no muzai hanketsu* (*The Menda Acquittal*), 500 Hanrei taimuzu 44 (1983).

For a compilation of many of the relevant unpublished court rulings in *Menda* and the other retrial cases, *see* Keiji saishin seido kenkyūkai (Study Group on the Criminal Retrial System), Chōmei saishin jiken mikōkan saibanreishū daiisshū (Unpublished Court Decisions in Famous Retrial Cases, Vol 1) (1979) ("Mikōkan saibanreishū").

[6] *See, e.g.*, Walter Ames, *Police and Community in Japan* 11 (1981).

[7] 1090 Hanrei jihō at 84.

[8] The Japanese phrase used throughout the retrial opinion is *tokushu inshokuten*, which literally means "eating and drinking establishment of a special type." The scope of the term is broad and, as the facts of this case reveal, the term at times connotes something more than just eating and drinking.

about the daughter's situation, and wanted to help get the daughter out of that miserable environment.[9]

That man turned out to be Sakae Menda, the 23-year old son of a farmer from the town of Menda, which is about ten miles from the scene of the crime in Hitoyoshi. Following up on the report of his visit to Yatsushiro, the Yatsushiro police determined that Menda had been in Hitoyoshi on or about the day of the killing and resembled initial descriptions of the murderer. They notified the Hitoyoshi police on January 13 and a group of five armed policemen quickly left for a village in the mountains of Kumamoto Prefecture where Menda was then staying with friends. The police arrived there at 9:30 P.M. When Menda could not account for his whereabouts in late December,[10] the police, without arresting him, asked him to accompany them to the police station and he complied. The police escorted him down the mountain path on foot, about a two-hour walk, and then took him by car to the Hitoyoshi police station, where they arrived at about 2:30 the following morning.[11]

The police immediately began questioning Menda. He initially denied involvement in the Shirafuku murders, but, apparently to the surprise of the police, admitted having stolen some rice in two separate incidents in his hometown the month before. At 3 A.M., the police procured an arrest warrant in connection with those two thefts, dated back to the time he had been taken into custody. They formally arrested him and pursued more detailed questioning about those incidents. The following day, January 15, the police sent a report on the rice thefts to the Public Prosecutor's Office, along with a recommendation that no indictment be sought on those charges.[12]

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[9] 1090 Hanrei jihō at 84.

[10] As the retrial court later found, Menda may have been reluctant to admit the truth, since he had taken a large sum of his father's money without permission and spent much of it on his own enjoyment at a house of prostitution. *Id* at 97.

[11] *Id.*

[12] Under the Code of Criminal Procedure (Keisohō, *supra* note 3, art 203(1)), police must either release a suspect or send the suspect's case to the prosecutor's office for further investigation within 48 hours after an arrest. *See* text accompanying note 400 *infra*; *see generally* Daniel H. Foote, *Confessions and the Right to Silence in Japan*, 21 Ga J Intl & Comp L 415, 430-31 (1991) ("Foote, *Confessions*").

In this case, the police reported the thefts to the prosecutors but recommended a disposition known as "suspension of prosecution" (*kisо yūyo*). "Suspension of prosecution" is a major feature of the Japanese criminal justice system, utilized in some 40% of the Penal Code cases referred to the prosecutors. *See, e.g.*, Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 Calif L Rev 317, 346-50 (1992) ("Foote, *Benevolent Paternalism*"). It represents a determination that, while the suspect was in fact guilty of the crime in question, prosecution is not warranted because of such factors as the character and personal circumstances of the suspect, remorse, restitution, and the nature of the crime.

On the 15th Menda also gave a partial confession to the Shirafuku murders and said that he had used an axe. Yet when he accompanied police to the spot where he said he had hidden the axe, it was nowhere to be found, and Menda retracted his confession.[13]

At about noon on the 16th, the police let Menda go. However, they rearrested him on suspicion of the Shirafuku murders just two hours later, and recommenced questioning.[14] Late that evening, Menda gave a full confession in which he said he had used a hatchet that he had later left at a friend's house. At that point, he was allowed to go to bed. The following day, January 17, the police obtained warrants and seized the hatchet Menda had described, along with articles of clothing that he supposedly had worn when he committed the crime. On the 17th the police also resumed questioning Menda; during the course of that day and the next they prepared detailed statements in which Menda confessed to the crime.[15] In brief summary, the confession statements described the following sequence of events:

> I had been having family problems and was running short on money. I decided to wait for a lone passerby on a deserted street in Hitoyoshi and extort money by threatening the person with my hatchet. After I had waited for a couple of hours, though, no suitable target had appeared. I then recalled reports

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[13] *See* 1090 Hanrei jihō at 85.

[14] It is unclear why the police released Menda for the two hours, rather than immediately rearresting him.

[15] In Japan, it is rare for confessions before the police or prosecutors to be transcribed verbatim. Rather, the investigators—either the police or the prosecutors, depending on the stage of the investigation—prepare summaries of the suspect's statements. Typically, the investigators or their assistants take notes during the questioning. They then organize and summarize the suspect's account at the end of the questioning session, read it to the suspect, and have him or her acknowledge the statement. These police- or prosecutor-prepared confession statements are admissible at trial as statements against the interest of the defendant. Keisohō, *supra* note 3, arts 198(4), 322. A similar practice is followed when the investigators question witnesses, although stricter hearsay rules apply. *See generally* Shintarō Kawai, *Tokusō kenji nōto* (*Notes of a Special Crimes Prosecutor*) 100-05 (1986) ("In major cases I would investigate for two or three days, taking notes on the confession in my notebook, and then prepare a statement covering three days' worth of material. If you don't do that, you can't get an organized statement, and you run the danger of getting a statement that contradicts earlier or later statements of the same suspect or statements of co-suspects." *Id* at 102 (translation by the author)); *Zadankai, Bengonin ga kataru shikei saishin sanjiken muzai kakutei no igi* (*Round-table Discussion, Defense Counsel Discuss the Significance of the Final Acquittals in the Three Death Penalty Retrial Cases*) ("*Bengonin Zadankai*"), Jiyū to seigi 35-11-50, at 61-62 (1984) (discussing significance of difference between confessions and written records of confessions); Masahiro Hiratani, *Kyōjutsu chōsho no yakuwari—saiban no tachiba kara* (*The Role of Written Records of Statements—From the Standpoint of the Judiciary*), *in* 2 Keiji tetsuzuki (Criminal Procedure) 879 (Makoto Mitsui, et al, eds, 1988); Kazuo Kawakami, *Komento 1* (*Comment 1*), *in* 2 Keiji tetsuzuki 887 (from standpoint of prosecution); Masayoshi Tamura, *Komento 2* (*Comment 2*), *in* 2 Keiji tetsuzuki 890 (from standpoint of defense); Foote, *Confessions*, *supra* note 12, at 453-55.

> that the Shirafukus had a lot of money. I decided to break into their house and steal some. While I was inside, one of the Shirafukus woke up. At that point I struck all four numerous times with my hatchet and then made sure that Mr. Shirafuku was dead by slashing him with a knife that was lying nearby. I then fled on foot in the direction of my hometown, along the way washing my clothes in a stream and then burying the hatchet. When I reached my hometown, I turned around and went back to Hitoyoshi City without stopping at my parents' home. A few days later I returned, dug up the hatchet, washed the blade and then took the hatchet to a friend's house.[16]

Throughout the week-long interrogation by the police, Menda unquestionably was subjected to tough questioning. As discussed later, just how tough is a matter of some dispute.[17] At the very least, however, it appears that Menda was questioned night and day virtually without break from the time he was picked up on the night of the 13th until after he gave a full confession on the night of the 16th. He then got his first real sleep in over eighty hours.[18]

On January 19, the police took Menda to the Public Prosecutor's Office. During his questioning there, he—again—initially denied his guilt. After being shown the hatchet, though, he repeated his confession and the prosecutors prepared another confession statement.[19] The prosecutors then petitioned the court for permission to keep Menda in custody. At the court hearing on the petition, Menda repeated his confession yet again and the court granted the request for pretrial custody.[20]

While in custody, Menda met with relatives and with a defense attorney but did not assert his innocence to them.[21] It does not appear that he

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16 Translated and summarized by the author from the account contained in *Menda v Japan*, Kumamoto Dist Ct, Yatsushiro Div, Ruling of August 10, 1956, in Mikōkan saibanreishū, *supra* note 5, at 12, 42-44.

17 *See* text accompanying notes 73-86 *infra*.

18 Menda reportedly was already resting when the police picked him up on the evening of the 13th, but he presumably had at most a brief rest after working with his friend that day. On retrial, the Kumamoto District Court found that he had been subjected to continuous questioning, without any opportunity for sleep, from 9:30 that night, when he accompanied the police, until 11 p.m. on January 16, after he made a full confession. 1090 Hanrei jihō at 88-89.

19 *Id* at 86.

20 *Id* at 85.

21 *Id* at 93. As discussed later (*see* text accompanying note and notes 314-320 *infra*), indigent criminal defendants in Japan are entitled to appointed defense counsel only after they are indicted. In this

got much of a chance, however. Menda later testified that when his relatives came to see him they told him that his child had died and his wife had gone ahead with plans to divorce him. After that, he said, he had been too shocked to talk about his own case.[22] The defense lawyer later described his first, and apparently only, pretrial meeting with Menda in this way:

> I told Menda his father was very worried about him and had asked me to represent him. He said, "Oh, is that so?", nodded and just looked down . . . I looked at his face through the wire mesh at the detention facility for a few minutes. I thought that if he'd really committed the crime he would probably get the death sentence and I felt that was a shame. . . . I said, "You've really gone and done something terrible now," and he responded, "I'm very sorry." So I thought that there had been no mistake as I prepared to face the first day of trial.[23]

Menda later stated that at the time he didn't understand the distinctions among police, prosecutors, defense counsel and judges—a contention that the retrial court found highly believable.[24]

On January 28, 1949, the prosecutors charged Menda with trespassing, burglary murder, and attempted burglary murder.[25] The indictment described Menda's various personal problems: his natural mother died when he was young and he didn't get along with his stepmother and siblings; he didn't like the family farm and avoided working there by pretending to be sick; and his

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case. Menda's father hired an attorney to represent him. *See* Nichibenren, *Zoku-saishin*, *supra* note 1, at 14.

[22] 1090 Hanrei jihō at 93.

[23] *Id* at 94 (translation by the author). The lawyer testified that he couldn't remember whether he'd met Menda again before trial.

[24] "Even today," observed the court, "many people don't know the difference between the police and the prosecutors." *Id* (translation by the author).

[25] They later added charges for the two thefts of rice. This was largely in keeping with typical Japanese practice. When Japanese prosecutors interrogate a suspect, it is common for them to pursue all crimes that the suspect has committed, whether or not they are related to the crime for which he or she has been arrested; and if prosecutors decide to proceed with an indictment, they will normally charge all crimes that they can prove. *See, e.g.*, Kōya Matsuo, *Gendai kensatsuron (Discussion of Today's Procuracy)*, Hōgaku seminā zōkan (Hogaku Seminar Extra Number), *Sōgō tokushū shirīzu 16, Gendai no kensatsu (Comprehensive Special Series 16, Today's Procuracy)* ("*Gendai no kensatsu*") 2, 4-5 (1981). In this case, however, prosecutors did not add the theft charge until late in the murder trial, after Menda's counsel had introduced evidence supporting an alibi. *See* text accompanying note at 36-40 *infra*. This has been seen by some as representing a tacit admission by the prosecutors that they might not be able to win a conviction on the murder charges, and as reflecting their desire to at least secure a conviction on some crime. Nichibenren, *Zoku-saishin*, *supra* note 1, at 17.

wife had gone back to her own family in early December and on December 27 formally requested a divorce, leaving Menda feeling "as though he'd given up all hope."[26] The indictment went on to describe the crime in terms that very closely tracked the above summary of the confession statements.[27]

The trial commenced in the Yatsushiro Division of the Kumamoto District Court[28] on February 17, 1949. At the opening of the trial, Menda confessed to the charges and provided various details of his supposed actions in response to questioning by the presiding judge. The defense attorney announced that he would contest only the issue of whether Menda possessed the intent to commit murder and would not challenge the basic facts of the case.[29]

The first indication of a change in approach came on the second day of trial, March 24, 1949.[30] On that day, Fumiko Ishimura, the "hostess" at Marukoma (the "inn") whose mother Menda had gone to see,[31] testified as a prosecution witness. There was no question that Menda had spent one night with Fumiko in late December. She testified that it was definitely the night of the 30th. This, she said, was certain; she knew because she was going to spend the following night, New Year's Eve, entertaining Occupation soldiers,[32] and because she'd made the following entry in Marukoma's account book: "30th: 1100 yen, suspicious."[33] She said that entry reflected

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[26] *See* 1090 Hanrei jihō at 25 (translation by the author)

[27] *See* text accompanying note 16 *supra*; 1090 Hanrei jihō at 25.

[28] In Japan, the lowest level of the court system is the Summary Courts, of which there are some 575 throughout Japan. Although the Summary Courts may handle minor crimes, serious cases fall under the jurisdiction of the District Courts. There are 50 District Courts (one in each prefecture, the province of Hokkaido, and the cities of Tokyo, Osaka and Kyoto), plus nearly 250 branches of the District Courts (referred to herein as "Divisions" of the District Court). The next higher level in the judiciary consists of eight High Courts, covering the various regions of Japan, plus six branches of the High Courts. At the top of the pyramid is the Supreme Court, located in Tokyo.

The Supreme Court has fifteen Justices. They sit in three panels of five Justices each, the so-called "Petty Benches." Cases are normally assigned to the Petty Benches in the order in which they are docketed. If a case raises a previously undecided constitutional issue or the Petty Bench is planning to issue a decision that would conflict with prior precedent of the Supreme Court, the Petty Bench must refer the case for decision by all fifteen Justices sitting *en banc*—the so-called Grand Bench; and at its option the Petty Bench may refer other cases that it regards as important for decision by the Grand Bench. Saikōsaibansho saiban jimu shori kisoku (Supreme Court Rules for Handling Judicial Matters), Supreme Court Rules No 6 of 1957, art 9(2) item 3. Otherwise, the Petty Bench decides the case. For a summary of the judicial system, *see, e.g.*, Supreme Court of Japan, *Justice in Japan* 8-34 (1990).

[29] 1090 Hanrei jihō at 91.

[30] This trial, like most long criminal trials in Japan, was conducted on a non-continuous basis, with hearings held periodically, often one or more months apart.

[31] *See* 1090 Hanrei jihō at 97.

[32] *Id* at 46.

[33] *Id* at 46 (translation by the author).

the fact that "after Menda left, I thought he had seemed suspicious; he said he was a policeman but his clothes were odd."[34] At the end of Fumiko's testimony, the presiding judge asked Menda whether he had any comments.[35] Menda stated that he thought he had spent the night of the 29th with Fumiko, and not the 30th.[36] In other words, he claimed to have been with her *at the time of the crime.*

Nevertheless, the judges and other participants in the trial apparently believed that the third day of trial, April 14, would be the last.[37] On that day, though, Menda completely renounced his earlier confessions and stated unequivocally that he had in fact spent the night of the crime with Fumiko. This took not only the judges and prosecutors by surprise, but also the defense counsel, who later stated, "His testimony on the third day of trial was completely at odds with the actions described in the confession statements, so I was shocked."[38]

The trial ended up lasting nearly another year, thereafter focusing squarely upon Menda's alibi. Fumiko herself returned to the stand, retracted her earlier testimony, and agreed that Menda's recollection was accurate.[39] In addition, defense counsel introduced other witnesses and evidence supporting the alibi.[40] Otherwise, however, defense counsel does not appear to have taken a very aggressive stance. Although counsel pointed to certain alleged inconsistencies in the evidence and argued orally that Menda's confessions were not voluntary,[41] in reviewing the transcript a later court concluded that "it is no exaggeration to say that the alibi was not merely the most important, but the only, point of contention [at the original trial]."[42] In fact, that later court observed:

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[34] *Id* at 48 (translation by the author).

[35] It is common in Japanese trials for the judge to ask the defendant's views about a particular piece of evidence or testimony. Under Article 291(2) of the Code of Criminal Procedure (Keisohō, *supra* note 3), the presiding judge must notify the defendant of the right to be silent and to refuse to answer any question, but must also provide the defendant with the opportunity to make a statement concerning the case. The vast majority of defendants make statements. For such defendants, Article 311(2) of the Code permits the presiding judge thereafter to question the defendant "at any time . . . about necessary matters (arising during the trial)," although Article 311(1) permits the defendant to refuse to answer.

[36] 1090 Hanrei jihō at 92-93.

[37] *Menda v Japan,* Kumamoto Dist Ct, Yatsushiro Div, Ruling of Aug. 10, 1956, cited in note 5 *supra*, at 12, 42 (translated and summarized by the author.)

[38] 1090 Hanrei jihō at 94 (translation by author).

[39] *Id* at 46. Whereas Fumiko's original testimony was detailed and firm, though, her later testimony was halting. *See id* at 47.

[40] *See* Nichibenren, *Zoku-saishin, supra* note 1, at 16-17.

[41] *Id.*

[42] 1090 Hanrei jihō at 38 (translation by the author).

> There were many instances in which not only the presiding judge, but defense counsel, as well, asked questions attacking the defendant. . . . [T]here were absolutely no probing and detailed questions about the circumstances of the questioning or defendant's pain at the time of questioning. A sense of one-sidedness is very apparent.[43]

Following the original trial, the District Court found Menda guilty as charged on March 23, 1950, in a relatively brief opinion that did not address the proffered alibi or the other defense contentions.[44] In addition to Menda's confessions, key evidence supporting the judgment included the clothing that Menda supposedly wore on the night of the crime, the hatchet, and an expert opinion that there was a drop of type O blood—the blood type of the victims, but not of Menda himself—on the hatchet.[45] The District Court sentenced Menda to death. The Fukuoka High Court affirmed both the verdict and sentence on March 19, 1951, in an opinion that expressly rejected Menda's asserted alibi.[46] The Supreme Court upheld the verdict and sentence on December 25th,[47] thereby ending the direct appeals process and rendering the conviction and sentence "final."[48]

Menda[49] then began filing a series of petitions for retrial[50] of the case. His first two tries, in 1952 and 1953, were wholly unavailing—not

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[43] *Id* at 90 (translation by the author).

[44] *Japan v Menda*, Kumamoto Dist Ct, Yatsushiro Div, Judgment of March 23, 1950, *reprinted in* Mikōkan saibanreishū, *supra* note 5, at 1.

[45] This opinion had been prepared by an expert appointed by the prosecution. Pursuant to Article 223 of the Code of Criminal Procedure (Keisohō, *supra* note 3), the prosecutors and the police may engage experts when necessary for criminal investigations, and the reports of these experts may be introduced at trial, so long as the experts are available for examination at trial (or the defense consents to introduction of the reports). The defense may, of course, challenge such matters as the qualifications of the expert, the nature of the evidence examined, the methods utilized, and the ultimate findings; and it is up to the court to determine what weight, if any, to give to the expert reports. Although the defense and the prosecution may request appointment of other experts (and may recommend particular experts and even commission people to conduct studies and then ask the court to appoint them as experts), the appointment of all other experts is left to the court's discretion *Id* art 165. *See generally* Tomoo Araki, *Kantei—saiban no tachiba kara* (*Expert Opinions—From the Standpoint of the Judiciary*), 2 Keiji tetsuzuki, *supra* note 15, at 685; Mutsuo Tahara, *Kantei—bengo no tachiba kara* (*Expert Opinions—From the Standpoint of the Defense*, 2 Keiji tetsuzuki, *supra* note 15, at 699; Shin'ichi Tsuchiya, *Komento* (*Comment*), 2 Keiji tetsuzuki, *supra* note 15, at 710 (from the standpoint of the prosecution).

[46] Fukuoka H Ct, Judgment of March 19, 1951, *reprinted in* Mikōkan saibanreishū, *supra* note 5, at 3.

[47] S Ct, 3d P B, Judgment of Dec. 25, 1951, *reprinted in* Mikōkan saibanreishū, *supra* note 5, at 5.

[48] For a definition of the term "final" (*kakutei*) judgment, *see* note 3 *supra*.

[49] Menda was represented at the initial trial and on his second retrial petition by local counsel from Kumamoto Prefecture. He filed the first and third retrial petitions on his own, apparently with some advice from another prisoner who had studied some law. Beginning with his fourth retrial petition in

surprisingly, since neither petition satisfied procedural standards or contained new evidence as required by the relevant statutory provision.[51] On the third attempt, however, a three-judge District Court panel led by Judge Nishitsuji found numerous problems in the case.[52] The court ordered the prosecutor to provide documents relating to the investigation of the case and examined over forty witnesses, including Fumiko. It conducted this review almost entirely on its own, without prosecutors, defense counsel, or Menda present.[53] In 1956, in a long and detailed opinion commonly known as the Nishitsuji Ruling,[54] the panel traced Menda's actions around the time of the crime and concluded that there was a valid basis for Menda's alibi. The court accordingly ordered a new trial.

On an immediate appeal by the prosecutor, the Fukuoka High Court reversed that order, in the process sharply rebuking the District Court for its handling of the case. In what seems a bit of overkill, the High Court announced that "the factual investigation [undertaken by the lower court in this case] exceeds the permissible scope for such investigations by a court reviewing a petition for retrial, unjustifiably impairs the stability of judicial

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1961, he was represented by a team of attorneys under the aegis of the Committee for the Protection of Human Rights (Jinken Yōgo Iinkai) of the Japan Federation of Bar Associations. Nichibenren, *Zoku-saishin*, *supra* note 1, at 25-27. For a description of the involvement of that Committee in the retrial movement, *see generally* Nichibenren, *Saishin*, *supra* note 1, at 164-207.

[50] As summarized in note 3 *supra*, those convicted of crimes in Japan may seek retrials any time thereafter. The grounds permitted by law, however, are limited. Most focus on such serious improprieties as fabrication of documentary evidence or testimony introduced at the original trial. Keisohō, *supra* note 3, art 435, items 1 and 2. As discussed in note 3, the most commonly relied upon ground, and that asserted in each of the death penalty retrial cases, calls for "newly discovered" "clear evidence . . . requiring the declaration of innocence of . . . one who has been found guilty." *Id* art 435, item 6.

[51] The first petition, filed in Fukuoka High Court, was rejected for having been filed in the improper court; such petitions normally must be filed in District Court. The Yatsushiro Division of the Kumamoto District Court rejected the second petition as having set forth no applicable basis for a retrial, and for procedural errors; this ruling was upheld on appeal. *See* summary of petitions, 1090 Hanrei jihō at 22.

[52] At the time the court undertook its review, the file on the case had been sent to the Ministry of Justice in Tokyo. This presumably was for preparation of the final report on the case prior to requesting the Minister of Justice to stamp the execution order—the final procedural step prior to execution. *See* Nichibenren, *Zoku-saishin*, *supra* note 1, at 21.

[53] *See id* at 21-23. While it lies within the authority of the court considering a retrial petition to undertake its own review of the case, it is unusual for the court to proceed entirely on its own in doing so. The defense bar, which in other respects has very high praise for the Nishitsuji Panel, is critical of this aspect of its handling of the case. *Id* at 22.

[54] *Menda v Japan*, Kumamoto Dist Ct, Yatsushiro Div, Ruling of Aug. 10, 1956, *reprinted in* Mikōkan saibanreishū, *supra* note 5, at 12; *reprinted in part in* Shigeo Usui, *Saishin (Retrials)*, *in* Kazuo Fujii, Michio Sumiya, Shigeo Usui, and Hiizu Hiraide, *Sōgō hanrei kenkyū sōsho, Keiji soshōhō* (14) (*Comprehensive Decisional Research Series, Criminal Procedure* (14)) 87, 131 (1963).

decisions, and jeopardizes the existence of the justice system."[55] Menda appealed the reversal, but in December 1961 the Supreme Court upheld the High Court[56] and the Nishitsuji Ruling went down in history as the so-called "phantom retrial order."

Just ten days after the Supreme Court ruling, Menda filed his fourth petition, with the help of two attorneys hired by his father.[57] Shortly thereafter, the Committee for the Protection of Human Rights of the Japan Federation of Bar Associations (JFBA) designated Menda's case for support and provided a team of attorneys to assist Menda.[58] That team aided in all subsequent legal actions, which included the remaining proceedings on the fourth petition, followed by a fifth petition filed in 1964 and a sixth in 1972. Despite the additional assistance, the District Court rejected each of those petitions as groundless and/or for failing to satisfy the procedural requirements for a retrial. In considering the fourth and sixth petitions, the court reexamined and rejected the alibi defense, as well. The rulings on the fourth and fifth petitions were upheld by the High Court and the Supreme Court.[59]

In 1975, however, while the sixth petition was pending, the Supreme Court relaxed the retrial standards.[60] When Menda appealed the District Court's rejection of that petition, the Fukuoka High Court reversed and ordered a retrial. In this case, as in each of the other death penalty retrial cases, the inmate relied on a provision of the Code of Criminal Procedure that requires the petitioner to present "newly discovered" "clear evidence . . . requiring the declaration of innocence of . . . one who has been found guilty."[61] Although the High Court found it difficult to assess the alibi defense, it upheld the claim for a new trial on the ground that petitioner Menda had produced new, clear evidence that cast serious doubt on the original conviction and that, in fact, would have made it impossible to reach the conclusion that Menda was guilty.[62] The "new, clear evidence" in question consisted of two opinions by experts who had been consulted and

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[55] Fukuoka H Ct. Ruling of April 15, 1959, *reprinted in* Mikōkan saibanreishū, *supra* note 5, at 52; *reprinted in part in* Usui, *supra* note 53, at 132-34.

[56] Ruling of Dec. 6, 1961, *reprinted in part in* Usui, *supra* note 54, at 134.

[57] *See* Nichibenren, *Zoku-saishin*, *supra* note 1, at 24, 63.

[58] *See id* at 25-27.

[59] *See* summary of petitions, 1090 Hanrei jihō at 22.

[60] For a summary of how the Court modified its interpretation of the governing statutory language, *see* text accompanying notes 280-283 *infra*.

[61] Keisohō, *supra* note 3, art 435, item 6 (translation by the author).

[62] *Menda v Japan*, Fukuoka H Ct, Ruling of Sept. 27, 1979, 32 Kōsai keishū 186, at 214-15, *also printed in* 939 Hanrei jihō 13, at 22.

recommended to the court by the defense team (one concluding that the test leading to the original identification of type O blood on the hatchet was flawed, another concluding that the order of the wounds was different from that originally charged and to which Menda had confessed) and a reenactment of Menda's supposed route of flight (showing that it would have been nearly impossible for someone in Menda's condition at the time of the crime to walk the entire distance—over twenty miles—in the time and under the conditions to which Menda had confessed). The prosecutor's office asked the Supreme Court to set aside the retrial order, contending that some of the defense evidence was not new and that the newly submitted evidence was insufficient to create doubts about the original conviction. But on December 11, 1980, the Court rejected that appeal and finally opened the way to Menda's retrial.[63]

On retrial, the Yatsushiro Division of the Kumamoto District Court undertook a detailed reexamination of the case.[64] The court held sixteen hearing sessions and examined Menda and sixteen witnesses, including Fumiko; the court also undertook two inspections of the scene of the crime and supposed route of flight. For the most part, the evidence presented was the same as that introduced at the hearings on the retrial petition. In addition, during the retrial the prosecution called a surprise witness who claimed to have seen Menda at his parents' home at about 6:30 A.M. on the morning after the killing, in wet clothes covered with mud, absentmindedly warming himself in front of a stove. If accepted, this testimony would have provided strong support for the prosecution's position. The defense sought to keep out the testimony altogether, arguing that it was barred by the statute of limitations; the defense also challenged its credibility.[65] While the court allowed the witness to testify, it completely rejected his testimony, citing numerous nearly incredible (in the words of the court, "unnatural") points in his account, as well as the questionable accuracy of his recollections of events thirty-three years earlier and the absence of a sufficient explanation for why it had taken him so long to come forward.[66]

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63 S Ct. 1st P B, Ruling of Dec. 11, 1980, 34 Keishū 562, *also printed in* 984 Hanrei jihō 41.

64 This stage represents a full new trial of the case, where the focus is squarely upon whether the prosecution has proven the defendant's guilt beyond a reasonable doubt. *See* note 3 *supra*. Thus, in principle the object of the review differs somewhat from that for the petitions seeking retrials, where the inquiry focuses on whether the petitioner has presented new, clear evidence raising significant doubts about the original conviction. In practice, however, in this and each of the other death penalty retrial cases the focus has been very similar in both the proceedings considering the petitions for retrial and the retrial itself.

65 1090 Hanrei jihō at 55.

66 *Id* at 55-61.

In a long and detailed opinion, the court fully exonerated Menda of the murders.[67] At the outset, the court upheld Menda's alibi. The evidence clearly established that he had spent the night of either the 29th or the 30th with Fumiko. Other objective evidence convinced the court that Menda had stayed at a friend's house on the night of the 30th, so Menda must have spent the night of the 29th with Fumiko and could not have committed the murders that night.[68]

In the face of the other evidence, the court found that Fumiko's initial statements that Menda had spent the night of the 30th with her could not be accepted. Concededly, noted the court, her statements to the police and her original testimony to that effect were, on their face, detailed and concrete, whereas her later retraction and subsequent testimony were halting and imprecise.[69] Yet it turned out that her detailed original testimony was, it turned out, at odds with other evidence. She'd said she remembered Menda had spent the 30th with her because she was going to entertain Occupation forces the next night. But other records indicated that there was no such engagement the following night.[70] She also had claimed to have written "30th: 1100 yen, suspicious" in the account book—but there was no such entry in the only account book the proprietor kept.[71] Moreover, there were other reasons to doubt Fumiko's testimony: she was sixteen at the time of the events and had been working underage after lying and saying she was eighteen, so she may have felt vulnerable to the police,[72] and she was of low intelligence, had a bad memory and was easily excitable.[73] Her questionable initial testimony could not overcome the other evidence establishing that Menda had really spent the 29th with her.

Menda's alibi, the court observed, was conclusive, and thus obviated the need to reexamine such other issues as the reliability of his confessions or the expert analysis of the blood stain on the hatchet. Nonetheless, since those issues had been strongly contested, the court felt it appropriate to consider them. In doing so, the court sharply criticized many of the investigators' activities. First, the court found a number of improprieties in the procedures

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67 The retrial did not extend to Menda's convictions for the two thefts of rice. Needless to say, by the time of his ultimate acquittal Menda had easily satisfied the maximum sentence for those thefts.

68 1090 Hanrei jihō at 26-40.

69 *Id* at 47.

70 *Id* at 48.

71 *Id* at 48-49. Nor, found the court after careful consideration, was there any reason to believe that the proprietor was hiding a second account book. *Id.*

72 *Id* at 54.

73 *Id* at 46.

the police had used to obtain Menda's confession. Although the court rejected a claim that Menda's arrest on the charges of stealing rice was an illegal pretext for an investigation on the more serious murder charges,[74] it found that the investigators had committed various procedural illegalities in connection with the arrest and detention. When the police initially asked Menda to accompany them after they met him at the mountain village, their actions exceeded the proper bounds of a "voluntary accompaniment"[75] and in effect constituted a warrantless arrest. Therefore, the subsequent confinement was also illegal. Moreover, because the police signed an official statement that Menda had been released on January 15th, it was illegal for them to hold and question him until the 16th.[76]

Even more significant were allegations about other aspects of the questioning. According to Menda, the police questioned him night and day virtually without break, and without the opportunity for sleep, from the time he was picked up on the night of January 13th until after he gave a full confession on the evening of the 16th. After that one night of sleep, he asserted, the police questioned him continuously from the morning of the 17th until 3 A.M. on the 19th, when he took another nap while handcuffed to a police detective. He claimed that throughout the ordeal he was surrounded by up to five policemen, who took turns questioning him. Menda also alleged that he was browbeaten, "forced to do pushups," "grabbed by the neck and pushed into the desk and told to stop lying," "forced to kneel without moving for thirty or forty minutes at a time," "prodded with nightsticks," "deprived of my jacket and questioned in an unheated room with only my shirt on," "pushed down and stepped on," and threatened "with being turned over to the Occupation forces, with their rifles."[77] In addition, he claimed that on the night of the 18th, the police assured him that if he told the prosecutors (with whom he was to meet the following day) the same thing he'd told the police, he might be forgiven and let off with a suspended sentence, but the police threatened that if he denied the crime to the prosecutors he would "go back to hell."[78]

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[74] *Id* at 90. For a discussion on the issue of utilizing arrests for minor crimes as a pretext for the investigation of major crimes, *see* text accompanying notes 385-390 *infra*; Foote, *Confessions*, *supra* note 12, at 440-45.

[75] For discussion of the "voluntary accompaniment" issue, *see* text accompanying notes 382-384 *infra*; Foote, *Confessions*, *supra* note 12, at 445-53.

[76] 1090 Hanrei jihō at 85.

[77] *Id* at 85-90 (examining in detail the assertions and evidence concerning the nature of the questioning) (translations by the author).

[78] *Id* at 86 (translation by the author).

The police painted a very different picture of the questioning. As the retrial court stated, "[They] denied that they used any violence or threatening words whatsoever and denied that they forced Menda to take off any clothing. . . . The four police who handled the questioning all said the same thing: 'Menda confessed amid tears of remorse.'"[79]

Given the sharply conflicting stories and the virtual absence of any other evidence, the retrial court found it impossible to get to the heart of most of Menda's contentions. However, one policeman had testified as follows:

> January 16th was the day Menda was arrested. I don't know what time, but that was the night the detective who arrested him finished questioning him. . . . I took Menda down for a nap in the telephone operator's room. It was extremely cold. Menda said he was tired and asked me to let him sleep a long time. [We] were handcuffed [together.] . . . I put one blanket and one futon on him. But Menda was still shaking, so I put on another . . . After a while he began snoring. There is no question that it was the night he was [formally] arrested when we had him take the nap. . . [80]

Based on that testimony and the absence of any contrary evidence, the court found confirmation for Menda's claims that he had been questioned continuously without the chance to sleep from the night of the 13th until 11 P.M. on the 16th.[81] The court also upheld Menda's claim that he had been questioned in unheated rooms without his coat for at least part of the time, since the police would have taken away the coat at some point to examine it for blood stains.[82]

For lack of corroboration, the court held that it could not accept Menda's other claims of physical compulsion and intimidation, but it most assuredly did not uphold the police denials as true. According to the court:

> Inconsistencies [in the accounts of two of the police] reflect the tendency of the police who conduct questioning to exaggerate. This shows that it would be risky to accept at face value the

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[79] *Id* at 88 (translation by the author).
[80] *Id* (translation by the author).
[81] *Id.*
[82] *Id* at 89.

> claim, voiced by all four interrogators, that "Menda confessed amid tears of remorse."[83]
>
> We cannot say for certain that Menda's contentions are exaggerations or lies; and the police testimony cannot dispel suspicions that there was physical compulsion of the degree Menda has described.[84]

Furthermore, observed the court, Menda was not of great intelligence nor in the best of health at the time of his questioning, leaving him especially vulnerable to suggestion.[85]

Despite these findings, the court withheld judgment on Menda's claim that his confessions were not voluntary, ruling that there was insufficient evidence to judge that issue more than thirty years after the events in question.[86] At the same time, the retrial court emphasized that the failure of the judges and defense counsel at the original trial even to inquire into the circumstances of the questioning "suggests that concerns over procedural guarantees and the voluntariness of confessions were held in very light regard in criminal trials at that time, back in 1949."[87]

Instead of ruling on the voluntariness claims, the retrial court rejected Menda's confessions on the alternative ground of unreliability. The court stated that, while the confessions at first glance appeared detailed and concrete, on closer examination they proved to be unreliable for a number of reasons. First, the confessions contained numerous inconsistencies and were unnatural in many respects. For example, Menda's account of his actions before the crime was odd: there are strong doubts whether he even knew where the Shirafuku house was located,[88] much less the layout of the house; and his account of the order of the blows, while matching the *initial* police reports of the crime, proved contrary to the actual order as established by further tests. Furthermore, his description of his actions after the murders was nearly incredible—walking several hours back to the area of his family home, then turning around and going right back to the vicinity of the crime without even stopping at his home; and burying the hatchet the night of the

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[83] *Id* at 89 (translation by the author).
[84] *Id* at 90 (translation by the author).
[85] *Id* at 89.
[86] *Id* at 90-91.
[87] *Id* at 90.
[88] It was set back, off a narrow alley, in a location where Menda, who was not from Hitoyoshi City, probably never would have walked by chance.

crime in a place where it almost certainly would never be found, then returning a couple of days later, digging it up, and taking it to a friend's house. In addition, Menda's statements on key points changed several times. Second, the confessions left out various key facts that the real criminal would know and that one would expect to find in a thorough confession. For example, the confessions did not reveal a sufficient motive for the son of a farmer, with no prior criminal record, suddenly to commit such a heinous crime. Finally, the confessions contained no new facts that were not already within the knowledge of the police—what Japanese courts frequently refer to as "secrets." To the contrary, the court voiced strong suspicions that the police, after jumping to the conclusion that Menda was the murderer, led him to confessions that fit the facts as the police knew them, in the process papering over numerous weaknesses.[89] For all of these reasons, the confessions lacked credibility and could not be relied on as a basis for Menda's conviction.

In addition, the court concluded that the major piece of material evidence against Menda, the "drop of blood" on the hatchet, was also flawed. The prosecutor's office either lost or disposed of the hatchet by 1955 (which, coincidentally—or, according to Menda's supporters, not so coincidentally[90]—was precisely the time the Nishitsuji Panel was considering the case). Those who had seen the hatchet, however, testified that there was only a small brownish stain "that looked as though it might be blood."[91] The expert report relied on at the original trial simply concluded that there was type O blood on the hatchet, without explaining the size of the spot or how the determination was made. Yet subsequent experts (who had been consulted and recommended by the JFBA team of attorneys) testified that, given the state of the art of blood-typing as of 1949, it would have been impossible to identify the blood type from a stain of the size that the other witnesses had described. Accordingly, held the court, that evidence also lacked reliability.[92]

In a detailed opinion spanning eighty-five large pages, the retrial court thus firmly concluded that Menda had been elsewhere at the time of the murders and rejected all of the important evidence against Menda. On July

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89 *See, e.g.*, 1090 Hanrei jihō at 63, 67, 70, 72-73, 76, 78, 81.

90 *See, e.g.*, Tsutomu Manabe, *Menda saishin hanketsu* (*Menda Retrial Judgment*), 34 Jiyū to seigi 12, 18 (1983).

91 1090 Hanrei jihō at 102 (translation by the author).

92 *Id* at 104.

15, 1983, the court declared Menda innocent of the Shirafuku murders.[93] The prosecution elected not to appeal the verdict, and Menda was released on July 29, 1983, over 33 years after he was first sentenced to death.

B. *The Saitakawa Case* [94]

At about two o'clock on the morning of February 28, 1950, an intruder murdered Shigeo Kagawa, a 62-year old black market rice dealer, while he was sleeping in his home in Saitamura, Kagawa Prefecture. The intruder, who apparently was after Kagawa's money, stabbed him about thirty times with a sashimi knife and stole some ¥13,300.

The police initially assembled a team of about fifty policemen, who investigated people involved in black market rice dealings in Kagawa and neighboring prefectures, as well as vagrants and other suspicious people in the local area. Although the police reportedly identified over 130 total suspects, they initially were unable to come up with firm evidence against any of them.[95]

Just over a month after the crime, on April 3rd, Shigeyoshi Taniguchi, an unemployed nineteen year old who previously had been involved in several minor incidents (and had been on the police list of local vagrants), was arrested on charges relating to the April 1 robbery of the nearby office of an agricultural cooperative association. According to the allegations in that case, when one of the employees of that association found Taniguchi and an accomplice robbing the office, they injured the employee with a sashimi knife they were carrying.

Upon arresting Taniguchi, the police took him to a police station for questioning.[96] Taniguchi confessed to the agricultural cooperative robbery and was indicted for that crime on April 19. On June 15 he was convicted and sentenced to three and a half years in prison; when he did not appeal, that sentence became final on June 30. By then, Taniguchi had been in

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[93] *Japan v Menda*, Kumamoto Dist Ct, Yatsushiro Div, Judgment of July 15, 1983, 1090 Hanrei jihō 21.

[94] The account of this case is based largely on the Takamatsu District Court decision on retrial, *Japan v Taniguchi*, Judgment of March 12, 1984, 1107 Hanrei jihō 13, and other court opinions cited below. Other sources include Rokurō Kitayama, *Saitakawa jiken (The Saitakawa Case)*, in Nihon no enzai, *supra* note 5, at 216; Atsushi Fukui, *Saitakawa jiken (The Saitakawa Case)*, *in* Kamo, *supra* note 5, at 344; Nichibenren, *Saishin*, *supra* note 1, at 346-49; Nichibenren, *Zoku-saishin*, *supra* note 1, at 70-142; and Takasugi, *supra* note 5, at 49-77.

[95] *See* Nichibenren, *Zoku-saishin*, *supra* note 1, at 72.

[96] *See id* at 73, 133.

confinement for nearly three months, ever since his arrest. For all but three weeks of that period (when he had been moved to a detention facility administered by corrections officials), he had been kept in holding cells at police stations, where he was readily available for questioning.[97] There is little doubt that the police questioned him about the Kagawa murder during at least part of that time, but he did not confess.[98]

Under normal circumstances, when Taniguchi's sentence became final on June 30 he would have been sent to prison, outside the ready reach of the police. Instead, on June 29 the police arrested him on a separate theft charge and kept him in confinement at a small police station for investigation of that charge (and continued questioning on the Kagawa murder) until July 11. When the authorized period for detention on that charge expired on July 11, the police rearrested him on battery and intimidation charges stemming from another relatively minor incident. They continued to hold him at the police station for investigation of that charge, and used the ensuing period of detention on the battery and intimidation charge to pursue questioning on the Kagawa murder. After Taniguchi finally confessed to the murder in late July, the police arrested him for that crime on August 1. They continued to hold and question him at the same police station throughout the period of detention authorized for the murder investigation, until after his indictment for the murder on August 23.[99]

Policemen involved in the murder investigation testified that they began full-scale interrogation on the murder in June.[100] They stated that early in the questioning Taniguchi admitted that he and his accomplice in the agricultural cooperative incident had broken into Kagawa's house together and stolen about ¥10,000 nearly one year earlier, during the summer of 1949. He denied having had any part in the February 1950 robbery and murder. However, the investigators said that during several weeks of questioning they found various inconsistencies in his denials. After they pressed him on these points, Taniguchi began to confess in the latter part of July. Still, they said, this initial confession was riddled with inconsistencies and it was impossible to tell whether it was true or not.[101] According to the police, Taniguchi gradually began to provide more details of the crime itself, including a

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97 *See id* at 73-74, 133-34.

98 *See id* at 73-74.

99 *See id* at 135-38. On August 29, Taniguchi was finally moved from the police station to a formal detention facility, *id* at 138.

100 *See* 1107 Hanrei jihō at 15-16.

101 *Id.*

description of how he had finished Kagawa off with "two thrusts" to the heart. Then on July 26 (after nearly four months in confinement), Taniguchi gave his first detailed confession to the Kagawa murder. He subsequently withdrew the confession, but in the face of further questioning he soon returned to it. Taniguchi then provided even more details and reportedly volunteered five statements in his own handwriting.[102] At this point, the police said, they were convinced that they finally had a true confession.[103] Shortly thereafter, they finally arrested Taniguchi for the Kagawa murder and robbery, the crime they presumably had been after all along. They then held him for yet another twenty-three days of questioning, obtaining additional confessions and firming up their case further before the prosecutors indicted him on August 23.

Taniguchi and the police disagree about the nature of the questioning. Taniguchi has claimed he was interrogated under harsh conditions, including "being given little food and questioned without regard to whether it was night or day," "having my hands bound in two pairs of handcuffs so the blood couldn't get through," and "being forced to kneel with my legs bound with rope."[104] The police, on the other hand, said that "there was absolutely no compulsion of the confessions through inducement, prompting, physical coercion or any other such improper questioning."[105] However, there is no dispute that Taniguchi was kept in confinement from the time of his arrest on April 3 through his indictment for the murder over four and a half months later (during all but three weeks of which he was kept at police stations) and was questioned for much of that time. During that period, family members visited him twice.[106] Taniguchi apparently was unable to retain counsel and only became entitled to appointed counsel upon indictment. Consequently, he

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[102] *Id.* As described below, Taniguchi and his attorneys later challenged the authenticity of these handwritten statements.

[103] *Id.* The police felt that the reliability of the confession was established by Taniguchi's description of details that only the true murderer would have known—especially the "two thrusts" detail—and by the "regret and remorse" he showed during his final confession, when he broke down in tears. This was in marked contrast to his attitude during the earlier interrogation on the agricultural cooperative incident, when he had remained adamant in his denials even though his accomplice had admitted everything.

[104] *Id* at 39 (translations by the author).

[105] *Id* at 15 (translation by the author).

[106] Nichibenren, *Zoku-saishin*, *supra* note 1, at 78. Critics have suggested that even these meetings may have been sought by the police in order to undermine Taniguchi's asserted alibi of having been asleep with his family at the time of the crime. *Id.* After the prosecutors indicted Taniguchi, they sought and obtained a court order prohibiting Taniguchi from meeting with any visitors, except defense counsel. This ban included family members and remained in effect until after Taniguchi was convicted and sentenced to death. *See id.*

did not meet a lawyer until August 29, after the investigation was concluded and he had been indicted.[107]

At the start of his trial, Taniguchi completely denied his involvement in the Kagawa incident, and he has maintained his innocence ever since. At trial, defense counsel challenged the sufficiency of the evidence and attacked various asserted weaknesses in the prosecution's case, including doubts about blood stains on the clothing Taniguchi allegedly had been wearing[108] and the failure to account for the murder weapon and Taniguchi's shoes.[109] At this stage, though, the defense did not mount a serious attack on the nature and circumstances of the questioning process.[110]

The evidence against Taniguchi included various items of clothing he was allegedly wearing at the time of the crime, along with an expert opinion that type O blood—the victim's type—had been found on the trousers. (A second expert had concluded that there was human blood on the trousers, but not in a sufficient quantity to determine the blood type.) Yet the heart of the case against him consisted of fifteen confession statements prepared by the investigators,[111] plus the five handwritten statements allegedly written independently by Taniguchi himself.

The confession statements were generally consistent regarding Taniguchi's motive: he had substantial debts and was short on cash; he knew that the victim, Kagawa, was a black market rice dealer who lived in a deserted area and usually had a lot of money; and he had in fact broken into that very house and stolen money with an accomplice the year before, so he was familiar with the layout of the house. Yet Taniguchi's statements, while becoming gradually more detailed, shifted frequently and contained numerous discrepancies in virtually all other particulars. For example, Taniguchi gave various accounts of where he had obtained the knife that was supposedly the murder weapon and of what he had done with it after the crime. His

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107 *Id.*

108 As discussed below, prosecutors introduced a study identifying type O blood on a pair of trousers they alleged Taniguchi had worn when he committed the crime. At trial, Taniguchi testified that the trousers belonged to his brother and that he himself had not worn them and did not know how the blood got on them. *Id* at 79-80. In addition, defense counsel argued that the absence of blood stains on the jacket and shoes Taniguchi supposedly had been wearing was inexplicable and undermined the prosecution's case. *Id* at 85.

109 *Id* at 84-85.

110 *Id* at 80-81; 1107 Hanrei jihō at 39 (Taniguchi first alleged torture and other abuses on his direct appeal to the Supreme Court).

111 Of these, eight had been taken by the police and six by the prosecutors; the remaining statement was made before the District Court at the time of the prosecutor's request for continued confinement. For a general description of confession statements, *see* note 15 *supra* and sources cited therein.

description of having thrown it into the Saitakawa—the Saita River—was given the most credence by investigators and gave rise to the popular name of this case.[112] Yet, despite thorough searches of the river, the murder weapon was never discovered.[113]

Taniguchi provided various other details that later attracted considerable attention. He told investigators that he had washed out his clothing in the river shortly after the murder and had also washed the clothing with soap two weeks later—thereby supposedly accounting for the near absence of bloodstains on the clothing. He gave varying accounts of the clothing he had worn, but consistently stated that he had worn a pair of black leather shoes. In fact, investigators found a pair of black leather shoes buried in a field Taniguchi's father had cultivated, but chose not to submit those shoes as evidence because they "lacked probative value."[114] Finally, he claimed to have used part of the stolen money on food and drink and to have secretly thrown the remainder out of the police vehicle after he was taken into custody in connection with the agricultural cooperative robbery.[115]

Taniguchi's early confessions were vague and inconsistent in key respects with the crime scene as found by the police. During the course of the interrogation, however, the confessions became more detailed and more accurate, culminating with his final confession to the prosecutors on August 21, 1950, which was very detailed and highly consistent with the evidence discovered at the scene of the crime.[116] One key element of that final confession was the so-called "two thrusts" testimony, in which Taniguchi stated that, to make sure Kagawa was dead, he thrust his knife sharply into the victim's upper left chest, but when no blood came out he realized he had missed the heart and made a second thrust.[117]

Despite the various discrepancies and shifts in Taniguchi's accounts, the court concluded that the confessions were voluntary and reliable and accepted the prosecutors' version of the crime in all significant respects. It

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[112] In Japan it is relatively rare for a case to be referred to by the name of the defendant, due to concern over the stigma involved. Citations normally include only the court, date, and reporter page number; names of the parties are not included. By the retrial stage, the convict's name has often become publicly known. Thus, *Menda* and a few of the other retrial cases are referred to by the name of the petitioner. Most cases, though, take their popular names either from a place name—e.g., *Saitakawa*—or from a concise description of the crime—e.g., the *Case of the Murder of the Kagoshima Couple*.

[113] *See* 1107 Hanrei jihō at 35-36.

[114] *Id* at 34-35 (translation by the author).

[115] *Id* at 37-38.

[116] *Id* at 21-22.

[117] *Id* at 20-21.

sentenced Taniguchi to death on February 20, 1952.[118] The Takamatsu High Court[119] affirmed the judgment and verdict on June 8, 1956. In doing so, the High Court expressly rejected Taniguchi's claims that his confessions lacked reliability and that he had been subjected to an illegal and improper investigation. On January 22, 1957, the Supreme Court rejected Taniguchi's subsequent appeal and the death sentence became final.[120]

The District Court rejected Taniguchi's first request for a retrial, filed on March 30, 1957.[121] Although the court informed Taniguchi of his right to appeal that ruling, Taniguchi, who was acting on his own without legal counsel, did not do so. In March 1964, however, Taniguchi sent the District Court a letter asserting his innocence and asking the court to have a new blood analysis performed.[122] The letter apparently lay in the court's files for a few years until a newly transferred judge, Judge Ikichi Yano, noticed it and concluded that it should be treated as a request for a retrial.[123] A new round of proceedings commenced in June 1969.

Initially under presiding judge Yano and, after he resigned from the judiciary and became a lawyer in August 1970, under presiding judge Ochi,[124] the District Court undertook a detailed review of the case, much as the Nishitsuji Panel had in *Menda*.[125] The court appointed a handwriting expert to examine the five handwritten statements (which Taniguchi claimed the investigators had prepared themselves), reexamined many of the

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[118] *Japan v Taniguchi*, Takamatsu Dist Ct, Marukame Div, Judgment of Jan. 25, 1952, *reprinted in* Mikōkan saibanreishū, *supra* note 5 at 127. For a summary of the facts as found by the district court, *see* S Ct, 1st P B, Ruling of Oct. 12, 1976, 30 Keishū 1673, 1675 ("Ruling of Oct. 12").

[119] *Taniguchi v Japan*, Takamatsu H Ct, Judgment of June 8, 1956, *reprinted in* Mikōkan saibanreishū, *supra* note 5 at 128, *summarized in* Ruling of Oct. 12, *supra* note 118 at 1676-77.

[120] S Ct, 3d P B, Ruling of Jan. 22, 1957, *reprinted in* Mikōkan saibanreishū, *supra* note 5, at 131.

[121] Taniguchi filed this request himself, without assistance of counsel. *See* Nichibenren, *Zoku-saishin*, *supra* note 1, at 87. In contrast to most of the other retrial requests in these cases, in which the petitioners asserted the existence of new clear evidence raising doubts over the original judgment, in this request Taniguchi relied on grounds authorizing a retrial if it is shown that articles of evidence were forged or altered or false testimony was presented at the original trial. Keisohō, *supra* note 3, art 435, items 1 and 2; *see* Ruling of Oct. 12, *supra* note 118, at 1677-78 (summarizing Taniguchi's arguments). Without seeking clarification from Taniguchi as to exactly which ground he was relying on, the court undertook a thorough review of both new evidence and the evidence introduced at the original trial, before ultimately concluding that the case did not meet any of the possible grounds for a retrial. *See id* at 1680.

[122] *See* Fukui, *supra* note 94, at 345.

[123] *See* Nichibenren, *Zoku-saishin*, *supra* note 1, at 88.

[124] In this case, the panel changed when Judge Yano resigned from the bench, but even under normal circumstances it is not uncommon for the presiding judge to change part way through a proceeding, particularly in a long and complex case. This is a natural consequence of the fact that Japan has a career judiciary in which judges are rotated through various postings, typically transferring from one position to another every three to five years.

[125] *See* Nichibenren, *Zoku-saishin*, *supra* note 1, at 89-91.

witnesses who had testified at the first trial, and conducted a searching review of the evidence. Throughout the bulk of the District Court proceedings, including most of the examination of witnesses and other evidence, Taniguchi was not represented by counsel; as with the Nishitsuji Panel, the court itself took the lead.[126] During the latter stages of the District Court review, Taniguchi retained one attorney to assist him; that attorney filed a final brief.[127]

In its ruling, the District Court began by observing that numerous doubts remained concerning the case. These included the failure of the prosecutors to mention the existence of bloody footprints at the scene of the crime or to introduce the shoes supposedly worn by Taniguchi, doubts as to the voluntariness and reliability of Taniguchi's confessions, the absence of an explanation for why the victim's money belt had no bloodstains on it, and the unnaturalness of Taniguchi's statement that he disposed of the stolen money by throwing it out the police car window. The court also noted that most of the undisclosed investigative records in the case had been lost or disposed of some time prior to May 1959, when the Criminal Affairs Bureau of the Ministry of Justice requested the entire file so it could conduct a final review prior to Taniguchi's execution.[128] The court characterized this loss of records as a "truly regrettable" matter that "would be most extraordinary as a mere oversight in the handling of records, making it inevitable that petitioner's side should have doubts and should suspect that evidence may have been deliberately destroyed."[129] The loss of records, the court added, made it impossible to get to the heart of some of its doubts. Moreover, the new handwriting analysis raised questions about whether Taniguchi had really written the confessions.[130]

Despite these concerns, the court rejected Taniguchi's retrial request. It ruled that the handwriting analysis did not establish that the handwritten confessions were forged, there was no evidence to prove that the prosecutors had fabricated other evidence or deliberately destroyed or hidden the investigative records, and the evidence did not establish Taniguchi's alibi or

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126 Unlike proceedings under the Nishitsuji Panel, prosecutors were given the opportunity to participate in most of the proceedings on this retrial petition. *See id* at 89-90.

127 *See id.*

128 This review is one of the last steps in the ordinary process for handling death penalty cases, prior to sending the case to the Minister of Justice with a request for the Minister to stamp the execution order. *See* Murano, *supra* note 2, at 67-78.

129 Takamatsu Dist Ct, Marukame Div, Ruling of Sept. 30, 1972, *reprinted following* the Ruling of Oct. 12, *supra* note 118, 30 Keishū 1793, 1840 (translation by the author).

130 *Id* at 1812-13.

other claims.[131] Accordingly, the court held that there were insufficient grounds for a new trial. In closing, though, the court left no doubt that it had grave regrets about this conclusion, but felt compelled to reject the petition given the state of the existing records and the state of the law:[132]

> In sum, as a court we believe that we have examined everything we could think of that might be considered in proceedings on a retrial petition as provided for in the Code of Criminal Procedure . . . , and we dare say that we have gone beyond what would be necessary in judging this case. In doing so, we have been conscious of the fact that over twenty-two years have passed since the events in question and over fifteen years since the death penalty became final, as well as the fact that, during the period when we were investigating the facts of this case, no defense counsel participated on behalf of the petitioner who is asserting his innocence. Accordingly, we felt that it was the duty of this court to treat the retrial request as an opportunity to reinvestigate the truth. Yet, after extensive examination, our powers proved inadequate and in the end we were still far from having elucidated the true facts.[133]

As the Supreme Court later observed, this was tantamount to a request for the Takamatsu High Court to conduct its own critical review of the case.[134] In doing so, the High Court would have help. Following the District Court's rejection of the retrial request, six more attorneys, including former judge Yano, who had become convinced of Taniguchi's innocence while presiding over the retrial request proceedings, joined the defense team.[135] Despite their concerted efforts, on December 5, 1974, the Takamatsu High Court affirmed the District Court's denial of a new trial.[136]

The defense team, which was joined in mid-1976 by additional attorneys from the JFBA Committee for the Protection of Human Rights,

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131 *Id* at 1809-1840, *and summarized in* Ruling of Oct. 12, *supra* note 118, at 1680-83.

132 At the time of this ruling, the court was still operating under strict interpretations of the new clear evidence requirements. *See* text accompanying notes 281-283, *infra*.

133 *Reprinted in* 30 Keishū at 1840-41 (translation by the author).

134 Ruling of Oct. 12, *supra* note 118, at 1701.

135 *See* Nichibenren, *Zoku-saishin*, *supra* note 1, at 90-91; Toshiyuki Maezaka, *Enzai to gohan* (*Miscarriages of Justice and Mistaken Convictions*) 75 (1982).

136 Takamatsu H Ct, Ruling of Dec. 5, 1974, *summarized in* Ruling of Oct. 12, *supra* note 118, at 1683-84, *and reprinted following that opinion, at* 1841.

mounted a vigorous appeal to the Supreme Court.[137] On October 12, 1976, the Supreme Court reversed, in a unanimous opinion by the First Petty Bench.[138] The Supreme Court ruled that the High Court had erred when it summarily affirmed, "even though the District Court took the unusual step of setting out many doubts and requesting the higher court to conduct a critical review."[139] The Supreme Court found that the District Court, despite the extensive review it had undertaken, still had not considered the case sufficiently.[140]

In reaching this conclusion, the Supreme Court pointed out that three critical doubts remained concerning the evidence: the absence of blood on the money belt; the failure to consider why no bloody footprints were found that would correspond to Taniguchi's description of the crime; and the incredible account that Taniguchi disposed of the money by throwing it out the window of the police vehicle, despite the fact that he was in handcuffs and there were seven or eight policemen in the vehicle with him. The Court stated that unless these three issues could be resolved, doubts would inevitably remain as to the reliability of Taniguchi's confessions.[141] The Court set out five additional concerns, including the strong possibility that investigators knew the murderer had made two thrusts to the area of the victim's heart *before* Taniguchi so confessed, that they might have led Taniguchi to this statement, and that it thus could not be regarded as a secret known only by the actual murderer.[142]

The Supreme Court noted that the only new evidence presented in the proceedings on the retrial request was the handwriting analysis ordered by the District Court. As in the other death penalty retrial cases, the retrial provision most favorable to Taniguchi requires the petitioner to present clear new evidence undermining the original conviction.[143] Some later observers have questioned whether the handwriting analysis really amounted to "clear" new evidence,[144] but the Supreme Court found that the handwriting analysis

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137 *See* Nichibenren, *Zoku-saishin*, *supra* note 1, at 91-92.

138 Ruling of Oct. 12, *supra* note 118. For a description of the Petty Bench system, *see* note 28 *supra*.

139 Ruling of Oct. 12, *supra* note 118, at 1684-85 (translation by the author).

140 *Id.* By concluding that the error lay in the lower courts' failure to investigate sufficiently, rather than in mistaken fact-finding, the Supreme Court characterized its conclusions as issues of law, not of fact.

141 *Id* at 1690-93.

142 *Id* at 1693-97.

143 Keisohō, *supra* note 3, art 435, item 6.

144 *See, e.g.*, Hidenobu Konishi, *Saishin--saiban no tachiba kara (Retrials--From the Standpoint of the Judiciary)*, in 2 Keiji tetsuzuki, *supra* note 15, at 1011, 1017-18.

provided a sufficient basis to warrant closer examination of the retrial request by the lower courts. The key evidence underlying the original conviction had been the final confession statement prepared by the prosecutors, rather than the handwritten statements. Yet, as the Supreme Court observed, the five handwritten statements may have served as significant corroboration for the voluntariness and reliability of Taniguchi's other confessions, including the final confession statement. While upholding the lower courts' finding that the evidence did not establish the handwritten confessions had been forged,[145] the Supreme Court noted that the new handwriting analysis had concluded it was "difficult to say that the five handwritten statements had been written by [Taniguchi]."[146] The doubts thus raised by the new handwriting analysis, concluded the Court, might in turn create doubts about the validity of all of Taniguchi's confessions and accordingly about the conviction itself. The Court therefore quashed the lower court rulings and remanded the case to the District Court, expressly leaving it up to that court whether to study the handwriting issue further or instead to proceed directly to a reexamination of the substance of Taniguchi's confessions and an investigation into all the facts of the case.[147]

In preparing for the proceedings on remand, the team of attorneys assisting Taniguchi retained new experts to consider even further possible issues relating to the blood type determinations, handwriting analysis and autopsy report. In addition, with the aid of the court the defense team obtained disclosure of several previously undisclosed investigation documents.[148] In the remand proceedings, the Takamatsu District Court chose not to pursue the handwriting issue in great detail and instead concentrated on the blood analyses and the newly disclosed documents.[149] A close examination of the blood analyses led the court to entertain serious doubts about the original conclusion that type O blood was on Taniguchi's trousers.[150] Moreover, the newly disclosed documents revealed that the

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145 *See* Ruling of Oct. 12, *supra* note 118, at 1687-88.

146 *Id* at 1697 (translation by the author).

147 *Id* at 1698-1701.

148 *See* Nichibenren, *Zoku-saishin*, *supra* note 1, at 93-95. As noted earlier, much of the case file had been lost or destroyed many years before (*see* text accompanying note 128 *supra*), but it turned out that some relevant documents still existed.

149 Takamatsu Dist Ct. Ruling of June 7, 1979, 11 Keisai geppō 700; 929 Hanrei jihō 37, 43-44.

150 The court noted doubts as to the validity of the original expert's analysis that there was type O blood on the trousers, in that the spots may not have been large enough for a reliable test; several samples, possibly including even animal blood, were mixed together; a graduate student, rather than the expert himself, had performed the tests; and problems existed with the method employed. 929 Hanrei jihō at 44.

autopsy finding of the "two thrusts" was widely known among the investigators long before Taniguchi so confessed. Accordingly, the confession on that point could no longer be treated as the recital of a secret.[151] Without specifically addressing the handwriting issue or the voluntariness of the confession, the court concluded that numerous doubts as to the reliability of the confession, together with the new evidence on the blood tests and the newly submitted documents, clearly established a reasonable doubt about the original finding of guilt.[152] Thus, on June 7, 1979, the court ordered a new trial. After an unsuccessful appeal by the prosecutors,[153] a new trial commenced in Takamatsu District Court in the spring of 1981.

During the new trial, the District Court thoroughly reexamined the evidence. After over thirty hearings spanning more than two years,[154] the court issued a comprehensive opinion acquitting Taniguchi on March 12, 1984.[155] The court noted that the two key items of evidence against Taniguchi were his own confessions and the determination that there was type O blood on the trousers. Although the court accepted the original expert's conclusion on the blood type, it nevertheless rejected the trousers as evidence, noting that they were old trousers that Taniguchi and his two brothers all had used and that it was unclear when the blood had appeared on them or if Taniguchi had even worn them on the night in question.[156]

The court next considered the voluntariness of the confessions. The court rejected as vague and unsubstantiated Taniguchi's assertions that the confessions had been coerced, stating, "Defendant's assertions, other than the claims that he was not given enough food and that he was subjected to interrogation without regard to whether it was day or night, cannot be accepted."[157] The court also rejected defense counsel's claims that the

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If they had been detected at the original trial stage, these deficiencies all presumably would have affected the credibility of the blood type determination.

151 929 Hanrei jihō at 53-54. The court did not specifically address other newly submitted documents from the investigation records. Taniguchi's counsel claimed that these documents showed, among other things, that the documents supposedly written by Taniguchi himself had in fact been based on prior drafts composed by the investigators. *See* summary of arguments, *id* at 40.

152 *Id* at 54.

153 Takamatsu H Ct, Ruling of March 14, 1981, 995 Hanrei jihō 3.

154 *See* Nichibenren, *Zoku-saishin*, *supra* note 1, at 98-102.

155 Takamatsu Dist Ct, Judgment of March 12, 1984, 1107 Hanrei jihō 13.

156 1107 Hanrei jihō at 31, 33, 34. Taniguchi had presented evidence that one of his brothers, who had been a policeman, had investigated a railroad suicide at about the same time, and argued that the blood spots might have gotten on the trousers then. *See* 929 Hanrei jihō at 40.

157 1107 Hanrei jihō at 39 (translation by the author). The court found it likely that the claims of torture were deliberate fabrications. *Id.*

confessions had been made after an improperly long period of detention,[158] observing that Taniguchi's fifty-five day confinement in police holding cells *after* his conviction on the agricultural cooperative incident (which followed eighty-seven days in confinement prior to and during that trial) had been based on a series of arrests on various crimes.[159] In some ways, the court observed, Taniguchi's confessions appeared as though he had simply said whatever he thought would please the investigators. Nevertheless, the court concluded that it was impossible to determine the circumstances under which the confessions were obtained, and rejected the claims that they were not voluntary.[160]

As in *Menda*, however, the court dismissed the confessions on the alternative ground of unreliability, emphasizing nearly the same doubts about the confessions' contents and inconsistencies with other evidence that the Supreme Court had identified in remanding the case.[161] These included the frequent shifts in Taniguchi's accounts of the crime, the absence of blood stains on the victim's money belt, and the strange explanation of Taniguchi's disposal of the money.[162] The court found other evidence cited by the prosecutors, including the handwritten statements and the "two thrusts" testimony, insufficient to establish the reliability of the confessions. The written statements simply tracked what Taniguchi had already told the investigators and did not answer any of the doubts regarding the substance of the confessions.[163] Furthermore, the prosecutors already knew of the "two thrusts" and may have led him to that aspect of the confession.[164]

Accordingly, the court rejected both of the main pieces of evidence against Taniguchi. While acknowledging (and, in fact, describing with some

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158 For a discussion of confessions obtained after improperly long confinement, *see* text accompanying notes 391-392 *infra*.

159 Since Taniguchi had already been sentenced to prison for the agricultural cooperative robbery, he would not have been set free even if the police had not re-arrested him for the other crimes. In the normal course of events, though, he would have been moved to prison, where it would have been more difficult for police and prosecutors to question him. Moreover, under prevailing interpretations of the relevant legal provisions it is legitimate to use periods of arrest and detention prior to indictment—but not periods of imprisonment for correctional purposes after conviction and sentencing—for the criminal investigation, including questioning of the suspect. *See* text accompanying notes 375-376 *infra*.

160 1107 Hanrei jihō at 39.

161 *Id* at 17-39.

162 The court also emphasized the investigators' failure to find the murder weapon, despite Taniguchi's detailed descriptions of where he supposedly disposed of it, and the prosecutors' failure to introduce Taniguchi's shoes, which left a strong doubt that those shoes did not match the footprints of the murderer. *Id* at 34-36.

163 1107 Hanrei jihō at 38, 40.

164 *Id* at 25, 38.

specificity) numerous grounds for suspecting that Taniguchi may in fact have committed the crime, the court did not find evidence sufficient to establish his guilt. The court therefore concluded that Taniguchi must be acquitted because the prosecution failed to prove guilt beyond a reasonable doubt.[165] However, in summing up the court expressly stated that harsh criticism of the original investigation was unwarranted. The court noted that under the old Code of Criminal Procedure,[166] which was replaced by the current Code of Criminal Procedure during the Occupation following World War II, there were no restrictions on voluntariness of confessions, and the court suggested that it was inappropriate to criticize a thirty-year old investigation "based on our perceptions of today, now that investigators have become skilled in use of the new Code of Criminal Procedure."[167]

Taniguchi was acquitted on March 12, 1984, and released immediately thereafter, nearly 34 years after he was first arrested and over 27 years after his death sentence had become final.

C. *The Matsuyama Case*[168]

At about 3:30 on the morning of October 18, 1955, someone broke into the house of Chūbei Ohara, located in the town of Matsuyama, in Miyagi Prefecture. The intruder brutally murdered Ohara, his wife, and their two children with a log splitter or some similar object, and then set the house on fire.

The prefectural police established a sixty-five member team to investigate the case. That team initially checked vagrants and other suspicious persons in the surrounding area but could not come up with the killer. The investigators believed that the motive was probably love and not money, because Ohara was a day laborer with only a small farm who did not appear to have much money, there were indications that his wife had relationships with a number of other men, and the slayings and arson were particularly brutal. The police came up with a list of six suspects: five men

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165 *Id* at 41.

166 Keijisoshōhō (Code of Criminal Procedure (1922)), Law No 75 of 1922.

167 1107 Hanrei jihō at 41 (translation by the author).

168 The account of this case is based primarily on the decision after retrial, *Japan v Saitō*, Sendai Dist Ct. Judgment and Ruling of July 11, 1984, 1127 Hanrei jihō 34, and prior court opinions. Other sources include Yoshitomo Ōde, *Matsuyama jiken* (*The Matsuyama Case*), *in* Kamo, *supra* note 5, at 413; Masayoshi Aoki, *Matsuyama jiken* (*The Matsuyama Case*), *in* Nihon no enzai, *supra* note 5, at 212; Nichibenren, *Saishin*, *supra* note 1, at 311-15; Nichibenren, *Zoku-saishin*, *supra* note 1, at 143-204; and Takasugi, *supra* note 5, at 77-105.

who had relationships with Ohara's wife, and Sachio Saitō, the twenty-four year old son of a local lumber dealer.[169]

They had several reasons to suspect Saitō. He had associated with a group of delinquents for three or four years, drank frequently, had been in fights, had once yelled that he'd burn down the theater when a movie suddenly stopped, and was rumored to have used drugs. He apparently also needed money to settle tabs at various bars. There were indications he had seen the victim's wife when she came to order construction materials at Saitō's family business and thus knew that Ohara had recently received money for a construction job. In addition, he lacked an explanation for his whereabouts on the night of the crime, had departed suddenly for Tokyo without informing his parents just a week after the incident, and subsequently wrote his younger brother telling him to study hard and "not grow up to be like me."[170]

The police decided to arrest Saitō on charges relating to a fight he had been involved in a few months earlier and then interrogate him about the Ohara murders. To that end, they obtained a warrant for his arrest on the battery charge from a judge at the local Yoshikawa Summary Court on November 26, 1955. The following week they left for Tokyo, where Saitō was working at a meat shop, to arrest him. Saitō voluntarily accompanied the police to a local Tokyo police station on the evening of December 2, where they executed the arrest warrant and began questioning him about his actions on the night of the murders.[171] The following day they took him back to the Yoshikawa police station, where they continued to interrogate him. On December 5th Saitō was formally detained,[172] purportedly for investigation of the initial battery charge. The police interrogated Saitō further about the murders, and he confessed to the murders and arson sometime after eight o'clock the following evening. After he followed that up with a more complete confession, the police rearrested him on the murder charges on December 8th and he was formally detained on those charges on December 12th. During the investigation Saitō accompanied investigators to the site of

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169 1127 Hanrei jihō at 38.

170 *Id* at 38-39 (translation by the author).

171 *Id* at 38.

172 As discussed below (*see* text accompanying notes 400-403 *infra*), arrest and detention are distinct legal concepts under the Japanese Code of Criminal Procedure. for which separate warrants must be obtained. As a practical matter, however, suspects may be kept in confinement and questioned under essentially identical conditions whether technically under arrest or in detention.

the crime and explained his supposed actions there, wrote out an explanation of the crime in his own words, and repeated his confessions on tape.[173]

On the evening of December 15th, however, Saitō renounced his confessions and wrote two statements asserting his innocence. Although he briefly reaffirmed his confession on the 16th, thereafter he completely denied any involvement in the crime.[174] In the meantime, on December 11, Saitō's father retained an attorney to represent his son.[175] It is not clear when the attorney first met Saitō,[176] but the attorney mounted a vigorous defense at trial. Among other claims, the defense counsel argued that Saitō's confessions were unreliable and that some of the evidence against him may have been fabricated.[177]

At trial the Yoshikawa Division of the Sendai District Court ruled that Saitō's confessions were valid, holding them both voluntary and reliable.[178] The confessions were supported by one other key piece of evidence: a futon cover from Saitō's bed, which was stained with a large quantity of type A blood (the blood type of the victims, but not Saitō). In listing the futon cover as evidence corroborating its findings of fact, the court implicitly accepted the prosecutors' argument that this blood must have passed to the futon cover from Saitō's head and hair, which would have become bloody during the killings, and rejected defense contentions that the evidence may have been fabricated.[179] Although the court did not refer to it in its decision, another piece of evidence supporting the voluntariness and reliability of Saitō's confessions may have been testimony by Kan'ichi Takahashi, a suspect in another crime who had shared a cell with Saitō when Saitō was being questioned by the police.[180] According to Takahashi, on the day that Saitō

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173 1127 Hanrei jihō at 38.

174 *Id.*

175 *See* Nichibenren. *Zoku-saishin*, *supra* note 1, at 154.

176 After indicting Saitō, the prosecutors obtained a court order banning him from seeing any visitors other than defense counsel. This ban, which applied even to family members, remained in effect until Saitō's conviction by the District Court. *See id.* at 157.

177 *See id* at 157, 197-98. The court granted a defense request for the appointment of a second expert on the blood-type analysis. As it turned out, however, the second expert was a mentor of the first expert. *Id* at 156. In reviewing the case, other defense lawyers have noted that it would have been preferable for the initial attorney to obtain his own scientific experts. *Id* at 198. They have also noted that he left the questioning of Saitō to the judges and did not develop a basis for challenges to the voluntariness and reliability of the confessions through his own questioning. *Id.*

178 For a discussion of the issues of voluntariness and reliability, *see* text accompanying notes 370-423 *infra*.

179 *Japan v Saitō*, Sendai Dist Ct, Yoshikawa Div, Judgment of Oct. 29, 1957, *reprinted in* Mikōkan saibanreishū, *supra* note 5, at 153, 156.

180 *See* Nichibenren. *Zoku-saishin*, *supra* note 1, at 155.

first confessed, he told Takahashi, "My luck has run out, so I may as well confess."[181] The court convicted Saitō and sentenced him to death on October 29, 1957.[182] The Sendai High Court[183] and the Supreme Court rejected appeals.[184]

While Saitō's case was on appeal to the Supreme Court, another prisoner, who was a defendant in the *Matsukawa* case, the most highly-publicized criminal case of the time, introduced Saitō to the defense team in that case, and thereafter several of the *Matsukawa* lawyers formed a team with Saitō's attorney to defend Saitō.[185] With their assistance (and new expert reports that the defense team arranged), Saitō filed his first request for a retrial on March 30, 1961. In it, he claimed that his former cellmate's testimony was perjured and asserted the existence of new evidence indicating, among other things, that the blood stain on the futon cover had been fabricated and that there had never been any blood on the clothing he allegedly wore on the night of the crime. The courts rejected this first petition.[186]

On June 7, 1969, Saitō's defense team filed another retrial petition. This petition raised many of the same issues as the first petition, relying largely on several new opinions by experts in blood analysis. The District Court rejected this petition, as well, noting that several of the claims had already been considered and rejected at the time of the first retrial petition and thus were no longer "new." While the court implied that there were weaknesses in the original evidence, it found itself without authority to order a new trial, stating:

> In deciding whether to reopen a trial, the role of the court is not to form its own independent impression of the evidence, but rather to accept the evaluation contained in the guilty verdict and determine whether that evaluation can be overturned on the basis

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181 *See* Sendai Dist Ct, Judgment of July 31, 1991, 1393 Hanrei jihō 19, 41 (translation by the author).

182 *Japan v Saitō*, Sendai Dist Ct, Yoshikawa Div, Judgment of Oct. 29, 1957, *reprinted in* Mikōkan saibanreishū, *supra* note 5, at 153.

183 Judgment of May 26, 1959, *reprinted in* Mikōkan saibanreishū, *supra* note 5, at 157.

184 S Ct, 3d P B, Judgment of Nov. 1, 1960, *reprinted in* Mikōkan saibanreishū, *supra* note 5, at 170.

185 *See* Nichibenren, *Zoku-saishin*, *supra* note 1, at 159. The *Matsukawa* case is described in detail in Chalmers Johnson, *Conspiracy at Matsukawa* (1972).

186 Sendai Dist Ct, Yoshikawa Div, Ruling of April 30, 1964, *reprinted in* Mikōkan saibanreishū, *supra* note 5, at 171, *aff'd*, Sendai H Ct, Ruling of May 13, 1966, *reprinted in* Mikōkan saibanreishū, *supra* note 5, at 193, *aff'd*, S Ct, 3d P B, Ruling of May 27, 1969, *reprinted in* Mikōkan saibanreishū, *supra* note 5, at 212.

> of new evidence. It would represent an intrusion on the evaluation of the evidence contained in the original opinion, and thus lie beyond the authority of this court, for us to judge whether facts revealed in the defendant's confessions, such as the motive for the crime, the defendant's actions immediately before and after the crime, and the return route after the crime should be deemed unnatural on the basis of common human experience.[187]

During the District Court proceedings, the defense team sought and obtained a ruling providing for testimony by three new experts, and dates were set for testimony by all three. Without withdrawing the ruling, the court later canceled the hearing date on which one of the three was to be heard and proceeded to issue its opinion without receiving that witness' testimony.[188] On appeal, the defense argued that this constituted a serious procedural error. The Sendai High Court agreed and, on September 18, 1973, remanded the case to the District Court.[189]

While the case was on remand, the Supreme Court relaxed the retrial standards,[190] and, in 1979, the District Court granted Saitō's petition for a new trial.[191] While rejecting Saitō's claim that the blood stain on the futon cover was fabricated, the court found serious questions about the manner in which the blood type had been determined. The court also found a strong likelihood that there may never have been blood on the clothing Saitō allegedly had worn the night of the crime, despite his confession that his clothes had been covered with blood. In addition, the court undertook a careful reexamination of the confessions themselves and expressed serious concerns about the conditions under which they had been obtained.[192] This finding was based particularly on the fact that the cellmate, Takahashi, had advised Saitō that the best approach was to confess to the police, who wouldn't believe his denials in any event, and then tell the truth during his first appearance in court.

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187 Sendai Dist Ct, Yoshikawa Div, Ruling of Oct. 26, 1971, 301 Hanrei taimuzu 133, 137-38 (1974).

188 *See* Sendai H Ct, Ruling of Sept. 18, 1973, 721 Hanrei jihō 104, 105; 301 Hanrei taimuzu 131, 132 (1974).

189 *Id.*

190 *See* text accompanying notes 280-83 *infra*.

191 Sendai Dist Ct, Ruling of Dec. 6, 1979, 949 Hanrei jihō 11 (1980).

192 949 Hanrei jihō at 41.

On January 31, 1983, the Sendai High Court affirmed the District Court's decision.[193] Although it held that the District Court had been wrong in rejecting the methods used for testing the blood on the futon cover, the High Court agreed that there probably had never been blood on the clothing in question and concluded that a new trial was warranted.

In contrast to the limited holding of the Sendai High Court in ordering the retrial, the decision of the District Court at the conclusion of the retrial in 1984 represented a sweeping victory for Saitō.[194] First, the court agreed that, in light of expert opinions on blood testing, it was highly probable that there had never been blood on the clothing Saitō allegedly had been wearing on the night of the crime. This in turn cast considerable doubt on the reliability of Saitō's confessions, which included statements that his clothes had been sticky with the victims' blood.[195]

The court next examined the key piece of physical evidence, the futon cover. While accepting the identification of the blood as type A, the court completely rejected the evidentiary value of the blood stains in an opinion that came very close to saying the evidence had been fabricated. The court noted that the pattern of the stains made it unlikely they could have come from Saitō's hair; most of the blood was on the side of the cover that would have faced *away* from Saitō's head, not on the side that would have been next to his head; and there was much blood on the cover but none on either the top or bottom futon, so the blood had not seeped through the cover as one might have expected if Saitō had slept with bloody hair. The court found these points "difficult to explain unless one assumes that the blood was deposited on the futon cover after it was removed from the futon itself."[196]

The court also expressed doubts regarding the manner in which the futon cover was seized, stored and handled. According to official documents, police seized the futon and cover on December 8, 1955, and the next day entrusted them to Professor Miki of Tōhoku University for analysis. A police detective testified that the futon cover never left Miki's possession until after Miki completed his formal report in March 1957, with its finding that the blood on the cover matched the blood type of the victims.[197] But other official records and testimony showed that the futon and cover had been transferred to the analysis section of the Miyagi Prefectural Police

193 Sendai H Ct, Ruling of Jan. 31, 1983, 1067 Hanrei jihō 3.
194 Sendai Dist Ct, Judgment and Ruling of July 11, 1984, 1127 Hanrei jihō 34.
195 *Id* at 44-47.
196 *Id* at 51 (translation by the author).
197 *Id* at 55.

Headquarters for examination during late December of 1955. At that time, a specialist in that section had found no blood at all on the futon and *only a few small spots* on the cover. Yet when Professor Miki did his analysis, and later when the futon cover was introduced as evidence, it had blood stains all over it. The court observed that this discrepancy "gives rise to the inference that the blood was deposited on the futon cover sometime after it was sent to [the police lab]."[198]

In an attempt to combat that inference and prove that the blood stains had been on the futon cover from the start of the investigation, the prosecution submitted photos of the futon and cover—photos that the prosecution claimed had been taken when the futon was seized. Yet the court expressed doubt as to the time and place where the photographs were taken, as well as the identity of the photographer. The court flatly rejected the testimony of the detective who had allegedly taken the photographs, stating: "This witness has evaded testimony regarding key issues concerning the storage and transfer of the futon, and he claims to have 'lost' the negatives of the crucial photographs. . . . [H]is testimony is not very credible."[199]

The court found it impossible to state positively whether the blood had been placed on the futon cover after it was seized, given the absence of clear records. For this it held the prosecution accountable:

> In order to make an inference [in this regard] with greater certainty, it is essential that we have clarification of when, where and in what manner the futon cover was stored and moved after it was seized and taken to the . . . police station, exactly what day it was taken to the prefectural police headquarters, what day it was photographed, and the real reason why the additional analysis [at the police lab] was conducted. Yet these points all remain unclear. We can only say that this state of affairs results from the failure of the investigators to preserve evidence and to fulfill their duty of clarification, or at least from the fact that they have continued at all times to exhibit a negative attitude toward attempts to get at the truth. (In fact, they failed to introduce the . . . photographs or the [police lab] analysis at the original trial, and the very fact that two analyses of the futon were performed was . . . kept hidden for many

198 *Id* at 57 (translation by the author).
199 *Id* at 54 (translation by the author).

> years, up to and including the proceedings on the request for a retrial.) Given these circumstances, the burden of clarifying these points and of showing that the inference [that the blood was deposited on the futon cover after it was sent to the police lab] is unreasonable should rest with the prosecutors, who after all bear a responsibility to produce [relevant] evidence.[200]

Since the prosecutors had presented no evidence to rebut the inference, the court held that the futon cover provided no support for the case against Saitō.[201]

The court then turned to an extended discussion of Saitō's confessions. Defense attorneys had asserted seven separate areas of illegal and/or improper actions in the examination leading up to the confessions. The court either fully or partially accepted several of these contentions. For example, the court found that the police action of arresting Saitō on a completely unrelated charge of simple battery as a pretext in order to question him about the Ohara murders constituted an "illegal or improper" act.[202] The police had also acted improperly by placing Takahashi in Saitō's cell as a spy to provide daily reports to the police on Saitō's statements and actions.

The court found that the police had questioned Saitō for rather long periods, generally from 9 A.M. until the evening, and that the questioning may have extended until late into the night during the initial stages of the investigation. Although the court found that the investigators had "intensely demanded" a confession, it rejected claims of physical coercion, beyond perhaps some "small pokes" during the questioning.[203] The court concluded that, while investigators may have led Saitō to parts of his confession, they did not induce all of it.[204] Finally, the court found that Saitō's decision to confess had been influenced by Takahashi's repeated urgings that he should tell the police whatever they wanted to hear and then tell the truth once he got to court.[205]

Notwithstanding these findings, the court rejected claims that Saitō's confessions were not voluntary. In finding that the initial arrest on the battery charge was improper, the retrial court adopted the position that arrest for a

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200 *Id* at 57 (translation by the author).

201 *Id* at 59.

202 *Id* at 60.

203 *Id* at 60, 61 (translations by the author).

204 The court further observed, "In any event, leading [a suspect) to a confession does not automatically make the confession involuntary." *Id* at 61 (translation by the author).

205 *Id* at 61-63.

minor crime as a pretext aimed at questioning on a serious crime violates the warrant requirement of the Code of Criminal Procedure.[206] This position had been developed in judicial decisions in the late 1960s and 1970s, though, long after the investigation in *Matsuyama;* [207] and the retrial court held that it would be unduly harsh to declare the original investigation illegal based on these later standards.[208] Nor, observed the court, would illegality in the arrest necessarily mean the resulting confessions were involuntary.[209] Moreover, the court noted that Saitō had steadfastly denied his involvement, despite severe questioning, until his cellmate counseled him to confess regardless of whether he had committed the crime or not. The court found that Takahashi's advice was not attributable to the investigators, because Takahashi had given the advice on his own initiative, not in collaboration with the investigators. Thus the court held that it did not bear on the voluntariness of the confessions, but rather on their reliability.[210]

After closely examining the substance of the confessions, the court held that they were unreliable for numerous reasons. First, not only did the confessions contain no secrets that only the real murderer would have known, but a careful examination of their contents revealed an almost unbelievable difference between the detailed description of circumstances that the investigators already knew (such as the location of the bodies and the wounds) and the very vague statements regarding other matters (such as the reactions of the victims). Secondly, according to the court, numerous shifts in key points of the confessions could not be explained as simple lapses in memory, but may well have resulted from Saitō's attempts to come up with a story that would satisfy the investigators. The court found it significant that Saitō's testimony kept changing as to matters that the investigators could check out and determine to be inconsistent with the facts, but remained constant on points that the investigators could not ascertain one way or the

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206 *Id* at 60.

207 For further discussion of the arrest on other crimes issue, *see* text accompanying notes 385-390 *infra.*

208 *Id* at 60.

209 *Id.*

210 *Id* at 63. In litigation following his acquittal, Saitō and his mother sought damages of ¥143 million (somewhat over $1 million at ¥135=$1) from the Government of Japan under Kokkabaishōhō (National Compensation Act), Law No 125 of 1947. They claimed that they had been injured by illegal acts by the police, prosecutors and judges in investigating, indicting and convicting Saitō. In connection with that litigation, the Sendai District Court reexamined in detail the claims of illegal arrest on other charges, illegal use of Takahashi to spy on Saitō and convince him to confess, illegal coercion and inducement of confessions, and fabrication of the blood stains on the futon cover. The court rejected the claims, concluding that the plaintiffs had failed to establish that the authorities had acted illegally in any of those respects. *Saitō v Japan,* Sendai Dist Ct, Judgment of July 31, 1991, 1393 Hanrei jihō 19.

other. Finally, the confessions lacked concreteness or a sense of reality in a number of respects.[211] These points, coupled with the improprieties in the investigation and indications that Saitō had given the confession in reliance on his cellmate's advice, led the court to reject the confessions' reliability.[212]

Having thus rejected all of the key evidence, the court acquitted Saitō on July 11, 1984, nearly 27 years after he was first sentenced to death. In contrast to the *Menda* and *Saitakawa* cases, where the release of the defendants was left to the discretion of the prosecutors, who chose not to appeal and to let the defendants go free, in *Matsuyama* the court itself ordered the release of the defendant in a separate ruling accompanying its decision.[213] This,. as well as the court's decision to allow still and live photographers into the courtroom prior to announcement of the decision,[214] presumably symbolized the strength of the court's conviction that Saitō had been unjustly condemned to death.

D. *The Shimada Case*[215]

The so-called *Shimada* case involved another brutal incident. On March 10, 1954, a kindergarten run by a temple located in Shimada City, Shizuoka Prefecture, had a school festival at the temple grounds. Many of the two hundred students were participating in games, and the temple grounds were filled with children, their parents and relatives, and other spectators. The festival also attracted many small refreshment stands and other vendors.

That morning, Hisako Sano, a six year old student at the kindergarten, went to the festival. When she did not come home that afternoon, her mother

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211 These included Saitō's extremely simple description of the manner in which he had committed the murders and his vague statements about the reactions of the victims. *Id* at 79.

212 *Id* at 78-79.

213 *Id* at 79.

214 *See* Yoshitomo Ōde, *Kaimei sareta gohan no kōzō* (*The Structure of Mistaken Judgments Revealed*), 28 Hōgaku seminā 16, 17 (1984). Although Japanese courts have the discretionary authority to permit cameras in courtrooms, it is rare for them to do so. They sometimes provide the opportunity to take still photographs of judges or Justices sitting at the bench prior to the first hearing date or the issuance of major decisions. They never, however, permit the photographing of criminal defendants in courtrooms. For one judge's view on the opening of Japanese courtrooms to the public, *see* Mitsuo Funada, *The Public Opening of Trials, the Right to Know, and the Attainment of Fair Trials: On the Occasion of the Supreme Court Grand Bench Judgment In the Courtroom Note-Taking Case*, 22 Law in Japan 65 (1989).

215 The description of this case is based primarily on the decision of the Shizuoka District Court acquitting the defendant following the retrial, *Japan v Akabori*, Judgment of Jan. 31, 1989, 1316 Hanrei jihō 21, and earlier opinions in the Shimada case cited below. Other accounts include, *e.g.*, Nichibenren, *Zoku-saishin*, *supra* note 1, at 264-74; Takasugi, *supra* note 5, at 106-29; and Ken Murakami, *Shimada jiken* (*The Shimada Case*), in Kamo, *supra* note 5, at 399.

began to worry. Her worrying undoubtedly increased when one of Hisako's playmates reported that someone had taken Hisako from the temple grounds during the day. Two days later, the police located other witnesses who reported having seen Hisako with a man on the day of the festival; and the following morning the police discovered Hisako's body, with her clothing in disarray, in a wooded area on the outskirts of Shimada. An autopsy concluded that Hisako had died of strangulation on March 10, and also disclosed serious cuts and damage to her pelvic region, as well as other cuts and bruises on her body.[216]

The police immediately began investigating the known delinquents in the area. They also composed a montage photo of the suspect, questioned witnesses, and investigated other clues, such as footprints near the scene of the crime.[217]

At that time, Masao Akabori was 24 years old. He was of low intelligence and had a slight mental defect. Following World War II, he committed a series of thefts and was sentenced to prison. After his release in 1953 he returned to his brother's home near Shimada, where he helped around the house and had a series of day jobs. He frequently wandered off for several days at a time; these travels included two trips to Tokyo between late January and late February of 1954.[218]

Akabori was added to the list of suspects on March 20th after a local resident reported that he had waved at an elementary school girl at a shrine in Shimada. The total list of suspects ran to between 200 and 300, though, and he was not arrested at that time. A number of other suspects were arrested on other charges and questioned about the murder in the weeks following the crime, and some of them even admitted to having murdered the girl.[219] Yet the police, apparently unable to find corroborating evidence, disbelieved these confessions, and none of the suspects was charged.[220]

Some two and a half months after the crime, on May 24th, a policeman in neighboring Gifu Prefecture stopped Akabori on the street at six in the morning and asked him to identify himself. Because Akabori's name appeared on a list of important witnesses in connection with Hisako's

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216 1316 Hanrei jihō at 27-29.

217 *Id* at 30.

218 *Id* at 24.

219 *Id* at 30.

220 Some critics have cited the fact that these other, presumably innocent, individuals confessed to the crime as evidence that the police must have utilized harsh interrogation practices. *See* Kōki Abe, *Kōkin nihōan no shōten (14)* (*Key Points Concerning the Two Prison Bills (14)*), 40 Jiyū to seigi 100 (1989).

abduction, the Gifu police contacted the Shimada police. That afternoon, Akabori was taken to a police station in Gifu Prefecture, and at four o'clock the following morning the Shimada police took him back to Shimada and questioned him about the murder.[221]

On the following day, May 26, a local newspaper reported that Akabori had admitted to three thefts, for which he had been arrested at 4:30 A.M. on the 25th, and that he had been questioned further about the kidnapping and murder. According to the newspaper account, the police had tentatively concluded that Akabori was in Tokyo on the day of the killing and could not have been involved.[222] In fact, Akabori was not formally arrested on May 25th. The police had taken Akabori to the police stations and questioned him pursuant to a so-called "voluntary accompaniment," to which Akabori presumably had consented.[223]

The police released Akabori on the evening of the 25th. Three days later they arrested him on suspicion of having stolen 45 items, including articles of clothing, from students at a girls' high school in Shimada. In addition to questioning Akabori about that incident, the police questioned him carefully concerning his whereabouts on March 10. On May 30, after another two days of questioning, Akabori confessed to having raped and murdered Hisako; on June 1 he was arrested on those charges.[224]

From June 2 through June 9 Akabori was confined in a holding cell at the Shimada police station. During that time, the police collected several items of defendant's clothing as well as a flat triangular-shaped rock, which they reportedly discovered at the site of the crime based on Akabori's description of the rock he had used. On June 9th the police moved Akabori to the Shizuoka Prison. The prosecutors continued to question him there; and on June 17 they indicted him on charges of rape resulting in injuries and murder.[225]

During this period, Akabori gave a series of detailed confessions. These were summarized in nineteen confession statements prepared by the investigators between May 30 and June 17. The substance of those statements is as follows:

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221 1316 Hanrei jihō at 30.
222 *Id.*
223 *Id.* For a discussion of "voluntary accompaniment," *see* text accompanying notes 382-384 *infra.*
224 *Id* at 31.
225 *Id.*

> After being released from prison in July of 1953, I moved about from place to place and job to job. I spent February 1954 living at my brother's house in Shimada. On March 3rd I left and traveled about from town to town by train and on foot until the 10th,[226] getting food from farmers and sleeping in small huts and temples and in open fields.
>
> On the morning of March 10th, I returned to Shimada. Thinking I could find some offerings, I entered the grounds of the temple. When I saw many children starting to assemble, I began to watch them. I like children, and when I saw girls playing I wanted to join in. I walked around the grounds of the temple, looking for a nice girl. Two girls were playing by some steps. I invited the girl in the green dress to join me, bought her some candy, and then led her out of the temple.

The confession statements then go into great detail about the route Akabori took with the girl, whom he said he carried on his back much of the way.

> After arriving at a secluded location near a mountain road, I lifted the girl's clothing, pulled off her light pink knit panties and mounted on top of her. The girl began to scream, but I covered her mouth with one hand, then thrust my penis into her vagina. It would not go in all the way, but only went in about halfway. When the girl continued to scream, I grabbed a rock somewhat smaller than my fist and struck her with all my might several times in the chest. She then began to moan loudly. Fearful that someone might hear her and discover us, I decided to kill her; I put both hands around her throat and grasped with all my might until she seemed dead.
>
> I left her body there and took only the panties with me. I threw them towards a river while retracing my steps, then hid in a grassy field. After nightfall, I returned to Shimada, where I spent the night in a farm shed. The next morning I went to [a nearby town], where I spent the night at a temple.[227]

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226 Author's Note: March 10th was the day of Hisako's abduction.

227 1316 Hanrei jihō at 31-32 (translated and summarized by the author).

The confession statements included a description of the clothing Akabori was wearing on the 10th. They also included a statement that Akabori himself had confessed, and that the police had not beaten, kicked or otherwise subjected him to "coercive questioning" (*muri-na torishirabe*).[228]

At trial in Shizuoka District Court the prosecution introduced into evidence autopsy reports, the rock allegedly used to strike Hisako, and statements of witnesses who claimed to have seen Akabori in Shimada at about the time of the crime and of witnesses who said they had seen him, or someone resembling him, with Hisako after she had been lured from the temple grounds. In addition, of course, the prosecution relied heavily on Akabori's confession statements.

Akabori recanted his confessions at the trial and denied his involvement in the crime. In addition, he asserted an alibi. He claimed that at the time of the crime he had been walking from Tokyo to Yokohama, begging along the way, and that he had been nowhere near Shimada when the crime was committed. Defense counsel also challenged the reliability of the testimony of the witnesses who claimed to have seen Akabori in Shimada.

The defense raised several other challenges. In contending that the investigators had induced the confession, defense counsel pointed out that the various confession statements covering the events of the day of the crime were highly consistent, whereas the statements covering the days before and after the crime shifted frequently and included accounts that were clearly at odds with known facts.[229] Counsel argued that the confession statements reflected only information that the investigators already could have known from their prior investigation and asserted that the investigators had improperly pressured Akabori into giving a false confession. The defense argued for acquittal on the basis of insufficient evidence.[230]

After a trial that lasted nearly four years, the trial court rejected these arguments and convicted Akabori in a decision that very closely paralleled

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228 *Id* at 32 (translation by the author).

229 *See id* at 25. For example, Akabori told investigators he had spent the night of March 5th at his brother's house and that his brother's mother-in-law was also there to help because his brother's wife was ill. But uncontested testimony by the brother, his wife and the mother-in-law established that Akabori had not stopped by or stayed at the house at any time between March 3rd and March 10th, nor had the mother-in-law come to help at that time. Akabori also told investigators that he had spent the night of March 12 in a farm shed in Shimada. In fact, that night he was picked up for questioning about a fire by police in the town of Oiso, nearly 100 miles from Shimada. *Id* at 46.

230 *Id* at 25.

the contentions of the prosecutors and the confessions.[231] With respect to Akabori's proffered alibi, the court noted that two witnesses had testified to talking with Akabori in Shimada sometime around March 7 to March 9. It found their testimony credible, unlike Akabori's account of walking in the Tokyo area. Accordingly, the court rejected Akabori's claim that he had not been in the Shimada vicinity at that time.[232]

The court also rejected the defense challenges to Akabori's confession statements. The court recognized that the statements about the events of March 10 were far more consistent than those covering the other days. Accepting *arguendo* that this may have resulted from greater efforts to jog Akabori's memory about the day of the crime or even from corrections of the confession statements themselves, the court rejected the argument that the investigators had induced the confessions based on information already in their possession. To the contrary, the court observed that the confessions included certain items, including a description of the time at which Akabori struck Hisako with the rock, that differed from the conclusions of the autopsy. If the investigators had led Akabori to the confessions, the court reasoned, they presumably would not have permitted such an important discrepancy. In the view of the court, the confessions had been made voluntarily.[233]

The court also rejected the defense challenge to the reliability of the confessions. The content of the confession statements was consistent with court-ordered expert opinions about the physical evidence. The rock had been identified only after Akabori described it. Moreover, Akabori had trembled when shown Hisako's clothing and had expressed remorse while in custody. Each of these factors, the court concluded, supported the confessions' reliability.[234]

The court convicted Akabori on May 23, 1958, and sentenced him to death.[235] On February 17, 1960, the Tokyo High Court upheld the District Court's judgment, on similar reasoning.[236] The Supreme Court rejected Akabori's appeal on December 15 of that year.[237]

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231 *Japan v Akabori*, Shizuoka Dist Ct. Judgment of May 23, 1958, *reprinted in* Mikōkan saibanreishū, *supra* note 5, at 133.

232 *See* 1316 Hanrei jihō at 25.

233 *Id.*

234 *See id.*

235 *Japan v Akabori*, Shizuoka Dist Ct. Judgment of May 23, 1958, *reprinted in* Mikōkan saibanreishū, *supra* note 5, at 133.

236 Judgment of Feb. 17, 1960, *reprinted in* Mikōkan saibanreishū, *supra* note 5, at 144.

237 1st P B, Judgment of Dec. 15, 1960, *reprinted in* Mikōkan saibanreishū, *supra* note 5, at 151.

Akabori filed his first retrial request with the Shizuoka District Court on August 17, 1961, claiming that new evidence would confirm his alibi. He claimed that he had traveled together with an individual named Satarō Okamoto on March 12, and asked the court to question Okamoto as a new witness. On February 28, 1962, the court rejected this request as inappropriate, noting that Okamoto's whereabouts were unknown. Akabori did not appeal this ruling.[238]

On June 6, 1964, Akabori filed another retrial request with the Shizuoka District Court. He asserted that new evidence existed which established that the footprints at the scene of the crime were not his and that the rock introduced at trial was completely unrelated to the case and had not even been located at the scene of the crime. In a ruling dated October 3, 1964, the court rejected this request for failure to present clear new evidence as required by the Code of Criminal Procedure.[239] Appeals were rejected by the Tokyo High Court on November 25, 1965, and by the Supreme Court on February 8, 1966.[240]

A little over two months later, on April 15, 1966, Akabori filed his third retrial request. On June 8 of that year, the Shizuoka District Court rejected the request as improper in form. Akabori did not appeal that ruling.[241]

On May 9, 1969, Akabori, assisted this time by a team of attorneys with support from the JFBA,[242] filed his fourth retrial request in Shizuoka District Court. Relying heavily upon new expert medical studies, this petition contended that the attack described in Akabori's confessions differed from Hisako's actual injuries in three critical respects: (1) According to Akabori's confessions, he had thrust his penis in halfway, but had not been able to penetrate further. Based on the later medical studies the defense argued that Hisako's pelvic injuries were too severe to have been caused in that manner. (2) The rock police claimed to have found based on Akabori's description was hard and flat, but the studies concluded that Hisako's chest injuries could not have been caused by that rock (but instead were consistent with blows by a softer rock, this conclusion resting largely on the fact that none of her ribs had been broken). (3) Akabori confessed to having strangled Hisako after striking

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238 *See* 1316 Hanrei jihō at 25-26.

239 *See id* at 26 (summarizing the proceedings). For a discussion of the retrial standards, *see* text accompanying notes 280-83 *infra*.

240 *See* 1316 Hanrei jihō at 26.

241 *See id.*

242 *See* Nichibenren. *Zoku-saishin*, *supra* note 1, at 312-13; Nichibenren, *Saishin*, *supra* note 1, at 335.

her with the rock, but the new reports concluded that Hisako had been strangled before the chest injuries were inflicted. The defense claimed the new medical evidence showed that Akabori's confessions were not credible. In addition, the defense asserted the existence of new evidence corroborating Akabori's alibi.[243]

After an extensive review of the case spanning nearly eight years (and including the consideration of reports from new medical experts recommended by the prosecution, as well), the Shizuoka District Court rejected this retrial request on March 11, 1977.[244] In that ruling, the court rejected the defense claims regarding the pelvic and chest injuries, but found a reasonable doubt concerning the order of the injuries. However, the court did not feel that this discrepancy undermined the credibility of Akabori's confessions. It noted other evidence supporting the confessions' reliability, including Akabori's expressions of remorse, testimony that he had trembled when shown Hisako's clothing and had stated he couldn't sleep at night because he had the feeling that she'd come back to life, evidence that the rock had been discovered as a result of his description, and testimony of the two witnesses who claimed they saw Akabori in Shimada on the day of the crime. The court also rejected the alibi claim, observing that some of the proffered new evidence even weakened the alibi.[245]

On appeal, the Tokyo High Court agreed with the District Court that there was a reasonable doubt about the order of the injuries, but questioned the District Court findings that Hisako's pelvic and chest injuries matched the confessions. The High Court also noted that objective evidence clearly showed that Akabori's actions after the crime differed from those set forth in his confessions.[246] It observed that the eyewitness accounts were not so certain as to eliminate any doubt about Akabori's identity and in any event did not establish with certainty that he committed the crime. For these reasons, the High Court concluded that the District Court had been hasty in finding that the only elements of Akabori's confessions lacking reliability were those relating to the order of the injuries. The High Court also suggested that further consideration of new evidence relating to the discovery of the rock, the possible existence of blood or other bodily fluids on that rock, and the characteristics of the footprints might raise additional doubts about the original guilty verdict. Accordingly, on May 23, 1983, the Tokyo High Court

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243 *See* 1316 Hanrei jihō at 26.
244 Ruling of March 11, 1977, 348 Hanrei taimuzu 125.
245 *See* 1316 Hanrei jihō at 26 (summarizing the ruling).
246 *See* note 229 *supra.*

overturned the ruling rejecting the retrial request and remanded the case to Shizuoka District Court for further investigation.[247]

On remand, after considering additional studies from medical experts recommended by both sides, the Shizuoka District Court granted Akabori's request for a retrial on May 29, 1986.[248] The court rejected defense counsel's claims relating to the footprints and the alibi, but repeated its earlier doubts about the order of the injuries and noted additional concerns relating to the pelvic and chest injuries. Given these doubts, the court concluded that there was no sufficient basis to uphold the confessions' reliability. Since the confessions constituted the crucial evidence in the case, the court ordered a retrial.

The prosecution immediately appealed the District Court ruling, so the case went back to the Tokyo High Court again (to a different panel of judges). The High Court previously had questioned whether the pelvic injuries were consistent with Akabori's confessions, but on this appeal the prosecutors (armed with additional medical testimony) convinced the court that Akabori could have inflicted the pelvic injuries in the manner he had described. The High Court therefore rejected the District Court's findings that the medical studies of the pelvic injuries raised doubts about Akabori's confessions. But the High Court upheld the District Court findings concerning the chest injuries and the injury order. Accordingly, in a ruling dated March 25, 1987, the court affirmed the holding that Akabori's confessions lacked reliability and approved the retrial order.[249] When the prosecution did not pursue a further appeal, the retrial order took effect—some eighteen years after the defense filed the fourth retrial request.

As in each of the other cases, the order granting the retrial did not end the process; it simply triggered the start of the new trial on the original charges.[250] At this new trial, the prosecution sought to overcome the doubts concerning the chest injuries and the injury order by introducing even more new expert medical studies on both issues. The defense countered with new studies of its own which it used along with the older studies. In addition, the defense advanced numerous arguments, most of which had been raised in one or more of the retrial petitions. Thus, for example, the defense argued that both the chest injuries *and the pelvic injuries* must have followed the girl's

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247 Ruling of May 23, 1983, 1079 Hanrei jihō 11; *see* 1316 Hanrei jihō at 26 (summarizing the ruling).

248 Ruling of May 29, 1986, 1193 Hanrei jihō 31.

249 Tokyo H Ct, Ruling of March 25, 1987, 1227 Hanrei jihō 3.

250 *See* notes 3 and 63 *supra*.

death from strangulation, rather than preceding it as stated in the confessions; that Akabori's confessions were not only unreliable but involuntary; and that Akabori had a valid alibi.

After a trial that lasted nearly two years, the Shizuoka District Court examined each of the main points of contention in a detailed opinion.[251] The court acquitted Akabori, but its rulings were by no means all in favor of the defense.

Akabori's alibi, as at the original trial and all subsequent proceedings, was that he had been wandering in the Tokyo area at the time of the crime. While the retrial court found corroboration for numerous other parts of Akabori's account of how he had spent the periods before and after the date of the crime, the court was less impressed with his attempts to explain his whereabouts on the crucial date, March 10. His accounts of where he spent that night had shifted, his description of the weather in the Tokyo area at the time was wrong, and his testimony contradicted that of the witnesses who testified to seeing him in Shimada on March 10. The court accordingly rejected the alibi.[252]

The voluntariness of Akabori's confessions was also at issue. The defense claimed that the police had coerced him to confess through threats, beatings, and other abuse. In addition, the defense argued that the confessions contained no new facts known only to Akabori, but were comprised mainly of facts already in the possession of the investigators. Thus, the defense contended, it was clear that Akabori had been led and pressured into giving the confessions.[253]

The court rejected these arguments as well. At the original trial and again in connection with the fourth retrial request, Akabori had testified about being pressured by the police. The police flatly denied this in their testimony, instead stating that Akabori had wished to talk out of remorse. According to the investigators, on the day of his first confession Akabori told one of the jailers, "I've committed a major crime," and broke down in tears. And when shown Hisako's clothing during his questioning, Akabori began trembling and exclaimed, "Take it away. When I hear girls playing outside this police station, I get the awful feeling that girl is going to come back to life. Please send me to prison soon."[254] In the court's view, Akabori's later attempts to

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251 Judgment of January 31, 1989, 1316 Hanrei jihō 21.
252 *Id* at 47-49.
253 *Id* at 32.
254 *Id* (translation by the author).

explain that statement were weak and unconvincing.[255] Moreover, before the police began questioning Akabori they already had received the autopsy report disclosing that Hisako's chest injuries had been inflicted after she died, yet in his confessions Akabori said he had struck her chest while she was still alive. The police surely would have been aware of the major autopsy findings, and this discrepancy on an important factual point, concluded the court, revealed that the police did not coerce a confession fitting all of the information in their possession.[256]

Furthermore, the court found Akabori's accounts of coercion unpersuasive. Early in the original trial Akabori had said that the police refused to believe the truth and led him into lies by promising him food and other benefits, but that they had not physically beaten him. Over time Akabori's accounts of physical coercion had gradually escalated until, by the time of the fourth retrial request, he was saying that the police had held down his arm, thrust a pen in his hand, and made him sign a confession by moving his arm. In the view of the court, this series of statements appeared to reflect a deliberate attempt to exaggerate the facts.[257]

The court further noted that Akabori had confessed after only a short period of questioning. He was arrested on May 28 and confessed on the afternoon of May 30, only a very short time after learning that the alibi he first offered for his whereabouts on March 10—being questioned by police in Hiratsuka, a city about 100 miles from Shimada, concerning a fire—did not check out. This, the court emphasized, did not necessarily mean that Akabori was telling the truth when he confessed. To the contrary, his initial alibi was not without some basis. He *had* been questioned by police on March 12 concerning a fire—not in Hiratsuka, but in the neighboring town of Oiso.[258] The court reasoned:

> In view of a medical examination revealing that Akabori is of low native intelligence and is highly emotional and unstable, . . . along with studies showing that persons of his type are more susceptible to suggestion than those of normal intelligence . . . , it is entirely possible that he gave up on his alibi when people would not believe him even when he was telling the truth and that, without realizing the gravity of the situation, he quickly

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255 *Id.*
256 *Id.*
257 *Id* at 32-33.
258 *Id.*

started to give the police the confession that he thought they wanted from him.[259]

However, the court concluded that even if that was the case, it did not mean that his confession was involuntary. To the contrary, the court found that there had not been "physical or mental coercion of an illegal nature, nor other inducement rising to an equivalent level, during [his] questioning,"[260] and upheld the confessions' voluntariness.

The heart of the opinion lies in its treatment of the reliability of the confessions. One of the key grounds for reopening the trial was the discrepancy between the original autopsy finding that the injuries to Hisako's chest had been inflicted after her death and Akabori's statement that he beat her with the rock *before* strangling her. After a searching review of the prior medical and pathological evidence and the new expert evidence presented by the parties, the retrial court concluded that the injuries to Hisako's chest had occurred before death after all. The autopsy finding had been based primarily on the absence of internal bleeding in the area of the primary chest injuries, but the prosecution's new expert testimony showed that the combination of the bleeding and shock from the pelvic injuries could account for the absence of internal bleeding in the chest. Moreover, other autopsy findings of internal bleeding in the area of one lung could only be explained by blows to that area prior to the girl's death.[261]

After having thus rejected defense arguments regarding the order of the injuries, thereby disposing of the one concern all the courts that considered the fourth retrial petition had been able to agree upon, the retrial court turned to the debate over Hisako's chest injuries. The court expressed doubts about whether Akabori could have beaten Hisako in the manner he described without breaking any of her ribs, using the rock the police claimed to have found based on his confession. Nonetheless, the court concluded that such a result was at least possible and held that it could not make a definitive ruling on this point.[262]

The court next turned to two sets of contentions regarding the pelvic injuries. Based on the autopsy and medical testimony, the court rejected the long-asserted defense claim that those injuries could not have been caused by

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[259] *Id* (translation by the author).

[260] *Id* (translation by the author). For further discussion of voluntariness of confessions, *see* text accompanying notes 371-398 *infra*.

[261] 1316 Hanrei jihō at 33-38.

[262] *Id* at 38-41.

the degree and nature of penetration to which Akabori had confessed.[263] The court also flatly rejected the newly raised claim that the pelvic injuries had been inflicted after the girl was strangled.[264]

To this point, the decision contained little to raise Akabori's hopes. To the contrary, it either sided with the prosecution or withheld judgment on all the key points that had led the courts to grant the retrial request in the first place. However, the decision was not much kinder to the prosecution's attempts to prove the confessions' reliability. First, the court rejected the prosecution's argument that the discovery of the rock following Akabori's confession constituted discovery of a secret known only to the perpetrator. Since the girl's body was discovered in an area with many rocks, the court noted that it would not take much imagination to conclude that a rock might have been used to strike her. Moreover, there was no proof that the rock in question was really the one used in the attack.[265]

Nor did Akabori's statements about the appearance of the victim's body after the attack establish that the confessions were reliable. To the contrary, his statements about her appearance shifted frequently and differed in certain respects from the actual conditions, leading to concerns that those statements may have been false.[266]

As further support for the reliability of the confessions, the prosecution noted Akabori's expressions of remorse and his trembling when shown Hisako's clothing, as well as a detailed confession he gave to a judge who had held a detention hearing and his admission of the crime to his own brother. The court treated all of these instances as simply additional confessions, rather than corroborating evidence. The court then noted the danger of relying solely on the contents of the confessions themselves and the attitude of the confessing individual. This danger, observed the court, is even more pronounced when dealing with "an emotional and unstable individual with a slight mental defect, . . . prone to adverse mental reactions when held in confinement" and "more susceptible to suggestion than normal individuals."[267] Rather, the court stated, "the probative value of confessions should by nature be determined on the basis of other evidence and must be

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263 *Id* at 42-43.
264 *Id* at 41-42.
265 *Id* at 43-44.
266 *Id* at 44.
267 *Id* (translations by the author).

examined and evaluated by comparing the confessions to more concrete facts."[268]

Thereupon, the court reiterated the existence of strong suspicions that Hisako's chest injuries, consisting of numerous tears in the flesh without any fractured ribs, had been caused by a soft rock with jagged edges, rather than the hard flat rock Akabori described. In light of these and related doubts, coupled with evidence that Akabori's confessions were inconsistent with a number of known facts and had shifted in several respects, the court held the confessions to be of little reliability. Finally, given Akabori's limited mental capacity, the court found Akabori's expressions of remorse and other such statements to be of little probative value.[269]

Having discounted the confessions, in the final section of its opinion the court considered whether there was sufficient evidence apart from the confessions to establish Akabori's guilt. The court concluded that the testimony of witnesses claiming to have seen Akabori or someone who resembled him walking away with the victim established only that the suspected offender was someone whose build and walking style resembled Akabori's. That testimony did not establish Akabori's identity beyond doubt; in any event, none of the witnesses had actually witnessed the crime, so that testimony alone could not establish that Akabori was the offender. Nor could Akabori be identified as the criminal through the footprint found near the crime scene, the stone, or his clothing.[270] Accordingly, the court could find no evidence linking Akabori to the crime other than his own confessions. Having found those confessions to be of little reliability, the court acquitted Akabori on grounds of insufficiency of evidence of guilt.[271] The prosecutors did not appeal this decision, and Akabori was released in early 1989, nearly 31 years after he was first sentenced to death.

II. SIGNIFICANCE OF THE CASES

A. *General Patterns*

These four cases occurred over a seven-year span in four different regions of Japan. Yet they bear a number of striking similarities. In each, a town or small city was shaken by a brutal crime. The police undoubtedly

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268 *Id* (translation by the author).
269 *Id* at 44-46.
270 *Id* at 49-51.
271 *Id* at 51.

faced great pressure to apprehend the perpetrator, and devoted much manpower to the investigations. Still, the police found themselves with few solid leads (although in all except *Menda* they had plenty of suspects) and initially were at something of a loss.

In each case, a later event helped focus attention on the man who was ultimately convicted: Menda posed as a detective, Taniguchi was apprehended for an unrelated robbery, Saitō suddenly departed for Tokyo, and Akabori was stopped while wandering in a neighboring prefecture and subsequently arrested for stealing clothing from a girls high school. Initially, the police had insufficient evidence to arrest the men for the murders. Instead, they used two techniques to bring the men to the police stations and keep them there for questioning. In *Menda* and *Shimada* the police asked the suspects to "voluntarily accompany" them to the stations. In *Saitakawa* and *Matsuyama* the police arrested the suspects for unrelated crimes and then went on to question them about the murders.

In fact, the technique of arresting on other crimes appears in all four cases. In *Menda* and *Shimada*, after the police learned of other crimes during the initial voluntary questioning, they proceeded to arrest the suspects for those crimes and then interrogate them about the murders. In *Saitakawa*, moreover, the police strung together a series of arrests on other crimes until they finally obtained a confession to the murders. Finally, in all four cases, after the suspects confessed to the murders, the police rearrested them on the murder charges and undertook still more questioning.[272]

Throughout most of the time prior to their indictment for the murders, the suspects were confined in holding cells at police stations, where they were readily available for questioning (and presumably more vulnerable to pressure) by police. Moreover, the questioning, at times harsh, extended for days, weeks and, in *Saitakawa*, even months. Menda was questioned nearly continuously for some eighty hours without the opportunity for sleep; Taniguchi was questioned over a period of at least fifty-five days (and perhaps as long as four months) in *Saitakawa*, at times "without regard to whether it was day or night"; and both Saitō in *Matsuyama* and Akabori in *Shimada* were questioned from morning till late into the evening and undoubtedly subjected to psychological pressure. Saitō apparently suffered at least "small pokes," as well.

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[272] In each case, after the police had obtained confessions and largely completed their investigation, the prosecutors conducted their own questioning.

The resulting confessions were not taken down verbatim[273] but rather were embodied in so-called "confession statements"—summaries of the confessions, prepared by the investigators conducting the questioning (the police and, later in the investigations, the prosecutors), typically at the end of one or more interrogation sessions.[274] In each case, the investigators prepared several confession statements in the course of the questioning. These statements contained numerous shifts and inconsistencies, but the final confession statement in each case was detailed and consistent with other known evidence.

Under Japanese law, a confession must be supported by corroborating evidence before a defendant may be convicted.[275] In each of these cases, the key corroborating evidence consisted in large part of forensic studies: identification of the type of blood on the hatchet in *Menda*, on trousers in *Saitakawa*, and on the futon cover in *Matsuyama*; and autopsy results in *Saitakawa* (the "two thrusts" finding) and *Shimada* (the manner of the rape and murder).

All the suspects later withdrew their confessions and mounted defenses. Yet the activities of defense counsel at trial and on direct appeal occupy only a small portion of the accounts of the cases, in large part because those proceedings were dominated by the prosecution and its evidence. As discussed later,[276] the right to appointed counsel accrues only upon indictment, after police and prosecutors have firmed up their case and collected the relevant evidence. Even where, as in *Menda* and *Matsuyama*, the suspect (or his family) is able to retain private counsel prior to indictment, the activities of defense counsel would naturally have been circumscribed. The authorities could (and still can) restrict meetings between defense counsel and suspects; attendance by defense counsel at interrogation sessions

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273 In *Saitakawa* and *Matsuyama*, though, the suspects also provided written confessions, presumably in their own words and writing, and in *Matsuyama* Saitō also gave a taped confession.

274 Such statements may be introduced at trial as statements against the interest of the defendant. Keisohō, *supra* note 3, arts 198(4), 322. *See generally* text accompanying notes 424-428 *infra*, and sources cited therein.

Ordinarily, the police and prosecutors, or their assistants, each prepare their own confession statements. In *Menda*, however, the prosecutors did not prepare a confession statement of their own and instead utilized confession statements prepared by the police, which are widely regarded as less reliable than those prepared by the prosecutors. *See* Gohan mondai kenkyūkai (Study Group on the Issue of Mistaken Convictions), *Shōkai, Saikō kensatsuchō "Saishin muzai jiken kentō kekka hōkoku—Menda, Saitakawa, Matsuyama kakujiken" ni tsuite (Book Review: Concerning the Supreme Public Prosecutor's Office "Report on the Results of the Examination of the Retrial Acquittal Cases—The Menda, Saitakawa and Matsuyama Cases")*, 61 Hōritsu jihō 85, 89 (1989) (*"Shōkai"*).

275 Kenpō (Constitution), art 38(3); Keisohō, *supra* note 3, art 319(2).

276 *See* text accompanying notes 315-20 *infra*.

was (and still is) out of the question; and with no effective right to discovery, defense counsel did not have access to the files of the prosecutors. Moreover, there is some doubt about how aggressive defense counsel were in the early stages of these cases. Menda's counsel, in particular, appears to have assumed that Menda was guilty from the time of their first meeting, did relatively little to promote Menda's case at trial, and at times even attacked his own client.[277]

The trial courts in all four cases adopted the prosecution's positions in their entirety, in all except *Shimada* doing so in brief opinions that scarcely addressed defense arguments. The courts accepted the forensic evidence and fully upheld the validity of the confession statements. Their attitude seems to have been that a truly innocent individual would not have confessed to brutal crimes of this type. In fact, former judge Yano, who had treated Taniguchi's letter as the second retrial petition in *Saitakawa*, presided over part of those proceedings before leaving the bench, and worked on Taniguchi's behalf in later proceedings, admitted to having had just such a mindset when he first heard that case:

> At the start, I figured that it's a common ploy for a perpetrator to deny the crime and feign innocence in an attempt to garner sympathy, and that murderers, in an attempt to save their own skins, often claim that their confessions were coerced through torture. Taniguchi resisted [the questioning] so strongly that he may have been treated somewhat roughly. But I didn't think it was conceivable that a truly innocent person would confess to a crime of robbery and murder that would lead to the death penalty.[278]

The four men were never executed, in part as a result of their continued efforts to obtain retrials. A pending retrial petition does not bar an execution in Japan, but Ministers of Justice traditionally refrain from stamping the required execution order when either a retrial request or a request for clemency is pending.[279] Furthermore, over the years, special defense teams,

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[277] Given those circumstances. Menda's claim that he did not understand the difference between defense counsel and the prosecution (*see* text accompanying note 24 *supra*), seems all the more plausible.

[278] Maezaka, *supra* note 135, at 75 (1982) (quoting Ikichi Yano, *Saitakawa ankoku saiban* (*The Dark Saitakawa Trial*)) (translation by the author). *See generally* Yasuo Watanabe, *Muzai no hakken* (*Discovering Innocence*) 241-44 (1992) (former judge Watanabe describing similar attitude toward confessions in another case).

[279] *See, e.g.*, Murano, *supra* note 2, at 67-73.

assembled primarily by the JFBA, intensified their efforts to obtain retrials for these men.

In 1975 the Japanese Supreme Court relaxed the standards governing the grant of retrials.[280] The statutory provision relied upon by each of the defendants in the death penalty retrial cases and most other retrial petitioners in Japan calls for "newly discovered" "clear evidence . . . requiring the declaration of innocence of . . . one who has been found guilty."[281] In the most extreme cases prior to 1975, some courts in effect had insisted that new evidence (defined in a narrow fashion, so as to exclude evidence presented in prior retrial petitions or evidence that the petitioner or defense counsel should have discovered previously) standing alone must clearly and convincingly establish the petitioner's actual innocence. The Supreme Court's First Petty Bench, in its so-called *Shiratori Ruling*,[282] followed by its October 12, 1976, ruling in *Saitakawa*,[283] in effect held that the statutory requirements would be satisfied if the petitioner could show, by a preponderance, through new evidence coupled with any prior evidence, that a reasonable doubt about guilt existed.

Under this relaxed standard, all four men obtained retrials. In each case, the key new evidence deemed to raise doubts about the earlier conviction consisted in large part of new scientific studies casting doubt on the original forensic studies or other elements of the original case. These new studies included the handwriting analysis in *Saitakawa*, the challenges to the blood type determinations in *Menda* and *Matsuyama*, and the autopsy findings on the nature and order of injuries in *Menda* and *Shimada*.

The decisions granting the retrial requests and the decisions ultimately acquitting the defendants at the conclusion of the retrials[284] also bear great similarities. Despite the harshness of the questioning and despite illegalities in the *Menda* and *Matsuyama* investigations, all the courts were in agreement that the confessions could not be deemed involuntary. In marked contrast to the attitude of the original trial courts, however, these courts fully accepted

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280 An extended discussion of the relaxation of standards lies beyond the scope of this article. For a more detailed discussion, *see* Foote *supra,* note 1. As discussed therein, the relaxation may have been influenced by the efforts of the JFBA and other supporters of the inmates but appears to have resulted primarily from the influence of two individual Justices on the Japanese Supreme Court.

281 Keisohō, *supra* note 3, art 435, item 6 (translation by the author).

282 *Murakami v Japan*, Ruling of May 20, 1975, S Ct, 1st P B, 29 Keishū 177.

283 Ruling of Oct. 12, *supra* note 118.

284 As noted earlier, *see* note 3 *supra*, the retrial system consists of a two-stage process: first the consideration of the request for a retrial; then, if the retrial is granted, the actual retrial of the case. The same courts usually have jurisdiction over both stages, but different judges would normally be involved (as was true in each of the death penalty retrial cases).

the possibility that, under the circumstances in question; innocent persons might well have confessed to crimes they did not commit. The final judgment in *Shimada*, in particular, went to great lengths in describing Akabori's susceptibility to suggestion.

All the later courts demanded strong indicia of reliability for the confessions. They placed relatively little weight on external circumstances such as the fact that Menda and Akabori repeated their confessions to family members and defense counsel and that Akabori trembled and expressed remorse. Rather, the courts examined the contents of the confessions in great detail, making it clear that they expected confessions to be consistent both internally and with other known facts, to reveal secrets known only to the actual perpetrator, and to reflect a "sense of reality." What they found were confession statements that continually shifted on important points, described almost unbelievable events, were riddled with inconsistencies, and either were at odds with other objective evidence or revealed only facts already known by the investigators. Under the new, more critical scrutiny, these shortcomings gave rise to serious suspicions that the investigators, consciously or unconsciously, may have led the suspects to confessions fitting the evidence in the investigators' possession. It turned out that even the "secret" of the "two thrusts," on which the prosecutors had placed great weight in *Saitakawa*, reflected an autopsy finding that had been widely known by the police when Taniguchi confessed. Moreover, this prior knowledge by the police, like other exculpatory evidence in *Menda* and *Matsuyama*, had remained hidden in prosecutors' files until disclosure during the retrial proceedings.

B. *Evaluating the Cases and Their Significance*

The similarities in the circumstances that led to the mistaken death sentences perhaps should come as little surprise. The brutal nature of the crimes would have made the cases likely candidates for the death penalty, no matter how sympathetic the defendants might have been,[285] and the defendants in these cases were by no means sympathetic. All had personal or family problems, character weaknesses, mental defects, or past criminal histories. Moreover, by denying the crimes, the defendants lost whatever

285 *See* Murano, *supra* note 2, at 37-38.

chance at sympathy they might have garnered through displays of contrition and remorse.[286]

In addition, the police undoubtedly faced great community pressure to solve the crimes. Although initially acting on rather limited circumstantial evidence or even mere hunches, the police likely became convinced of the suspects' guilt early in their questioning. Particularly given Menda's weak physical and mental condition (not to mention the three days of continuous questioning), Akabori's susceptibility to suggestion, Saitō's cellmate's advice to confess, and the sheer length of time during which Taniguchi was questioned while being held virtually incommunicado, it is not surprising that the police were able to obtain confessions from all four men. Finally, once armed with the confessions and seemingly conclusive forensic and pathological studies, the prosecutors would have faced little difficulty in convincing the courts of the men's guilt, especially given the limited defense role and the nondisclosure of exculpatory evidence.[287]

1. *Scope of the Problem*

To date, these are the only four capital cases in which retrials have been granted, but they are not the only mistaken convictions for murder and other major crimes in Japan.[288] Moreover, as one former judge observed:

> A principle akin to the "Heinrich principle" applicable to airplane accidents and the like—according to which, before a major accident occurs there will have been twenty-nine minor accidents of the same type and three hundred petty "incidents" that have remained hidden—presumably applies to mistaken

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286 *See, e.g.*, John O. Haley, *Confession, Repentance and Absolution, in Mediation and Criminal Justice: Victims, Offenders and Communities* 195, 207-08 (Martin Wright & Burt Galaway eds, 1989); Hiroshi Wagatsuma and Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 Law & Soc'y Rev 461, 481-83 (1986).

287 A comparison of these cases with miscarriages of justice in capital cases in the United States lies beyond the scope of this article, but it is interesting (albeit not particularly surprising) to find that several similar factors—including coerced or false confessions, suppression of exculpatory evidence, and misleading circumstantial evidence—have been identified as causes of erroneous convictions in potentially capital cases in the United States. *See* Hugo Adam Bedau and Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan L Rev 21, 57 (1987). In a further similarity, Professors Bedau and Radelet observe, with respect to the United States, "In no case was . . . the defendant alone [able to expose the error]; without exception the defendant needed the help of others." *Id* at 64 (note omitted). In Japan's case, the efforts of the organized bar and individual judges in exposing the errors bear particular note.

288 *See, e.g.*, Konishi, *supra* note 144, at 1012-15.

> verdicts, as well. A considerable number of mistaken convictions in minor cases probably lie hidden in the shadows of the retrial acquittals in the major cases.[289]

Some critics go further, arguing that the death penalty retrial cases are "just the tip of the iceberg."[290] Still, even after the relaxation in the standards the overall number of retrials has been modest.[291] The same former judge has observed that "[s]ince there is no fundamental dispute in over 99.5% of the everyday cases, this problem has not . . . undermined the general faith in the justice system as a whole."[292]

In any event the very nature of the four death penalty retrial cases makes it impossible to dismiss them simply as four isolated mistakes from a time long past. First and foremost, in each of the four cases a presumably innocent man was condemned to death and spent virtually his entire adult life in the shadow of the gallows. Furthermore, the facts of the investigations and prosecutions are dramatic. Judging even from the typically understated judicial accounts, and not from the sometimes sensationalistic journalism that has surrounded these cases,[293] these were not cases in which reasonable mistakes were made. Rather, each of the cases involved, at best, lax investigations in which the police and prosecutors jumped to the unsupported conclusion that the respective defendants—who, perhaps not coincidentally, were young, rather poor men with various personal problems—had committed the crimes, and then, either wittingly or not, apparently induced

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289 Watanabe, *supra* note 278, at 400 (translation by the author).

290 *See, e.g., Bengonin Zadankai*, *supra* note 15, at 73 (translation by the author).

291 On average, only 15-20 retrials have been granted annually in recent years, and the vast majority of those retrials have involved rather minor crimes handled by Summary Courts. *See* Konishi, *supra* note 144, at 1011-13.

292 Yasuo Watanabe, *Tokushima rajio-shō jiken saishin muzai to shihō no kago no bōshisaku (The Retrial Acquittal in the Tokushima Radio Shop Case and Measures for Preventing Errors in Justice)*, 846 Jurisuto 76, 81 (1985) (translation by the author).

293 In this connection, in 1976 the Supreme Court sharply criticized former judge Yano, who by then was one of the attorneys representing Taniguchi in *Saitakawa*, for his efforts to influence the case through the media:

> In addition to filing a brief with this Court, attorney Yano has asserted the petitioner's innocence to the public through a series of publications and writings, many of which have also been sent to this Court. As a matter of professional ethics, an attorney should refrain from seeking to stir up public opinion in an attempt to obtain the desired decision on a case currently pending before a court. In some countries the bar associations have established such a rule in their codes of ethics. Yano's aforementioned writings about this case include matters without a firm foundation that needlessly threaten to lead the public to harbor misunderstandings and mistrust about trials.
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> S Ct, 1st P B, Ruling of Oct. 12, 1976, 30 Keishū 1673, 1685 (translation by the author).

confessions to fit the existing evidence. At worst, they involved suppression of exculpatory evidence and perhaps even actual fabrication of evidence to ensure the convictions.

The performance of the courts has not escaped criticism. In all four cases, the trial courts accepted the prosecutors' contentions across the board, and numerous reviewing courts over the years routinely rejected the defendants' various appeals and petitions—with the notable exception of the Nishitsuji Ruling. However, the fate of that ruling has further reinforced the impression of great judicial deference to the prosecutors and slavish adherence to the then-prevailing strict interpretation of the retrial standards. Even though the Nishitsuji Panel undertook a detailed reexamination of all the evidence and concluded that an innocent man was facing a death sentence, the higher courts reversed that decision on purely legal grounds[294] and left Menda to suffer on death row for another thirty years until another court reached the same conclusion *for virtually identical reasons.* Based on prevailing legal standards of the time the High Court may well have been correct in rejecting the Nishitsuji Ruling as judicial overstepping. Under the circumstances, though, that has done little to diminish the impression of an insensitive judiciary.

These cases have occasioned much comment on both the retrial system and Japan's criminal justice system as a whole from a broad spectrum of Japanese society—including academics, defense attorneys, prosecutors, judges, and the mass media. The JFBA has published two books and devoted special issues of its magazine to the death penalty retrial cases and their implications,[295] and the Supreme Public Prosecutor's Office has prepared an extensive study of the cases and their lessons for the prosecution.[296] The commentators argue that these cases reflect the need for everything from a jury system and restrictions on the procurement and use of confessions to even more thorough interrogation of suspects to ensure more precise and complete confessions.[297]

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294 *See* text accompanying note 55 *supra.*

295 *See* Nichibenren, *Saishin, supra* note 1; Nichibenren, *Zoku-saishin, supra* note 1; Jiyū to seigi vol. 34, no. 9 (1983); *id.* vol. 35, no. 11 (1985).

296 This report was prepared as an internal document and was not released publicly, but a group studying the retrial cases obtained a copy of the report through a newspaper that had received the report. The study group published the table of contents and several key excerpts from the report. This is the summary cited as *Shōkai, supra* note 274.

297 Needless to say, the latter suggestion came from prosecutors, not defense counsel. *See, e.g.,* Keiji Yonezawa, *Higisha no torishirabe (The Questioning of Suspects),* 537 Hanrei taimuzu 61, 64 (1984) (stating that interrogation has been criticized in connection with the retrial cases, but "investigators will in fact meet the people's trust by devoting themselves ever more earnestly to the questioning of suspects"

Before turning to those issues, a few words are in order with regard to whether these cases are simply aberrations from an earlier time or whether similar cases could recur in the future. Some observers note that when these cases occurred, during the first decade after World War II, the police forces were going through considerable upheaval and investigators were still relatively unfamiliar with the requirements of the current Code of Criminal Procedure, enacted in 1948.[298] This position implies that police used questionable tactics in these cases that they would not think of using now that they are more familiar with the requirements of the Code. Yet, as I discuss below, there is almost nothing in intervening interpretations of the requirements of the Code of Criminal Procedure or the Constitution to prevent investigators today from undertaking interrogations and investigations virtually identical to those that the authorities are willing to admit occurred in these cases.[299]

Other observers, including the Supreme Public Prosecutor's Office, voice a related theme concerning the prosecutors' supervision of the investigations. Although Japanese police enjoy a very good reputation internationally[300] the prosecutors are widely regarded within Japan as more expert, more professional, and less likely to engage in abuse or questionable activities than the police.[301] The Supreme Public Prosecutor's Office report on the death penalty retrial cases observed that in each of the cases the local police dominated the investigations, with little oversight by the

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(translated by the author)); *see also* Toshiyuki Hyōtani, *Saikin no saikōsai hanketsu ni tsuite—jihaku no shin'yōsei o chūshin ni* (*Regarding Recent Supreme Court Judgments—Focusing on the Reliability of Confessions*), Part 2, *Sōsa kenkyū* (Oct. 1984) 1, 4.

298 *See, e.g.*, Shigemitsu Dandō, *Saikōsaibansho to Nihon no saiban* (*The Supreme Court and Trials in Japan*), *in* Hōgaku seminā zōkan (Hogaku Seminar Extra Number), Sōgō tokushū shirīzu 27, Gendai no saiban (Special Comprehensive Series No 27, Today's Trials) ("Gendai no saiban") 2, 14 (1984) (Former Justice Dandō does not completely rule out the possibility of miscarriages of justice today, though. To the contrary, precisely because of the possibility of mistakes, Dandō has recently become a leading advocate for abolition of the death penalty. *See, e.g.*, Shigemitsu Dandō, *Shikei haishiron* (*Abolition of the Death Penalty*) (1991)); Jirō Nomura, *Enzai to saishin no rekishi to kōzō* (*The History and Structure of Miscarriages of Justice and Retrials*), 338 Hōgaku seminā 68, 71-72 (1983). The ultimate acquittals in both *Saitakawa* and *Matsuyama* also emphasized the fact that the investigations in those cases had occurred when investigators were unfamiliar with the requirements of the postwar Code of Criminal Procedure. *See* text accompanying notes 167, 207-08 *supra*.

299 *See* text accompanying notes and notes 370-416 *infra*. For a more extended discussion of this issue, *see* Foote, *Confessions*, *supra* note 12.

300 *See, e.g.*, Ames, *supra* note 6; David Bayley, *Forces of Order: Policing Modern Japan* (New ed 1991); L. Craig Parker Jr., *The Japanese Police System Today* (1984).

301 *See, e.g.*, *Zadankai, Gendai Nihon no kensatsu* (*Round-table Discussion: Japanese Prosecutors Today*), *in Gendai no kensatsu*, *supra* note 25, at 46, 59-61.

prosecutors.[302] The report also noted that the cases came under the jurisdiction of thinly staffed local branch prosecutor's offices, which apparently handled the matters on their own with little communication to the central prosecutor's office, and apparently exercised little supervision over the police.[303] The report states that due to improvements in communications and the adoption of procedures to ensure prompt reports to the central offices on major cases, prosecutors today are able to respond promptly and appropriately to such cases—thus suggesting that cases of this sort should not recur today.[304] Nonetheless, the report concludes that the cases are a reminder of the ever-present need in difficult cases for coordination between local and central prosecutor's offices to assure adequate manpower and guidance, and for coordination between the prosecutors and the police to ensure proper supervision of investigations from their initial stages.[305] The report emphasizes, "Although we are repeating something that is always talked about, the prosecutors must demand that the police consult in advance with the prosecutor's office concerning the conduct of investigations in this sort of case."[306]

If followed,[307] these coordination procedures should provide a check that did not exist in the four death penalty retrial cases. But other characteristics of the Japanese criminal justice system that are reflected in the cases still exist today. The roles of the police, prosecutors, defense counsel and judges; the emphasis on confessions and the methods of obtaining them; the circumstances of confinement; and the use of expert witnesses have all been the subject of reform proposals. Some of these proposals have been

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302 *See Shōkai*, *supra* note 274, at 87-90 (dealing with *Menda*, *Saitakawa* and *Matsuyama* cases).

303 *See id* at 89-90.

304 *See id* at 89.

305 *See id* at 87-90.

306 *Id* at 90 (translation by the author).

307 This of course depends in part on prompt notification and consultation from the police to the local prosecutor's office, and from that local office to the main office. Although the prosecutors have the legal authority to direct police in investigations. See Keisohō, *supra* note 3, art 193, both the police and prosecutors have authority to conduct investigations (*id*, arts 189, 191), and in practice police normally conduct the initial investigation. The relationship sometimes results in tension and unclear demarcation of roles. *See, e.g.*, B. J. George Jr., *Discretionary Authority of Public Prosecutors in Japan*, 17 Law in Japan 42, 50-54 (1984); Akira Itoda, *Sōsa ni okeru kensatsu no yakuwari—keisatsu to kensatsu no kankei (The Role of Prosecutors in Investigations—The Relationship between Police and Prosecutors)*, *in Gendai no kensatsu*, *supra* note 25, at 88. In view of the fact that the Supreme Public Prosecutor's Office report felt the need to reemphasize the importance of demanding that the police consult in advance with the prosecutors on difficult cases, "[a]lthough [that point] is always talked about" (*see* text accompanying note 306 *supra*), it seems clear that the prosecutors are not satisfied that the police always do so.

embodied in draft provisions or bills prepared by academics,[308] the defense bar,[309] a minority party,[310] and, in one noteworthy instance discussed below, the Ministry of Justice and the National Police Agency.[311] To date, none of the proposals has been enacted into law. Moreover, since the Japanese Diet seems unlikely to enact major criminal justice reforms unless consensus on a bill can be achieved between the defense bar and the prosecutors,[312] and since such consensus is virtually inconceivable at present, there is little prospect of meaningful legislative reform in the near future. Nonetheless, the retrial cases have engendered discussion that provides a valuable overview of key issues currently facing the Japanese criminal justice system.

2. *Issues and Reform Proposals*

a. *Roles of the Key Participants*

The prosecutors play the dominant role in Japan's criminal justice system.[313] They have authority to supervise the police in the investigative process,[314] and together with the police, they have nearly exclusive control over the investigation. Indigents such as Taniguchi and Akabori receive the

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308 *See, e.g.*, Akira Gotō, *Jihaku hōsoku to hokyō hōsoku* (*Rules on Confessions and Rules on Corroboration*), Hōritsu jihō 61-10-35 (1989); Toshikuni Murai, *Enzai bōshisaku* (*Strategies to Prevent Miscarriages of Justice*), Hōritsu jihō 61-10-39 (1989); Yūji Shiratori, *Baishin* (*The Jury*), Hōritsu jihō 61-10-43 (1989); Morikazu Taguchi, *Keiji bengo no jūjitsuka* (*Strengthening Criminal Defense*), Hōritsu jihō 61-10-55 (1989).

309 *See, e.g.*, Yasuo Okabe, *Saishinhō kaisei mondai no genjō* (*The Current Status of the Issue of Amendment of the Law on Retrials*), Hōritsu jihō 57-10-40, 42-43 (1985) (describing JFBA proposals for amendment of retrial law).

310 *See id* at 43-44 (describing Socialist and Communist Party proposals for amendment of retrial law).

311 *See* text accompanying notes 411-14 *infra*.

312 *See* Yoshio Suzuki, *Japan: The Politics of Criminal Law Reform*, 21 Amer J Comp L 287 (1973). *Cf.* Okabe, *supra* note 308, *passim* (discussing efforts to reform the statutory standards governing grants of retrials: ruling Liberal Democratic Party announced basic stance of waiting for Ministry of Justice to complete review, Ministry of Justice on several occasions between 1977 and date of article in 1985 announced that it was still studying the issue carefully; in the meantime certain leading prosecutors began arguing for new limitations on retrials, leading to fears that new legislation, if ever enacted, would represent a retreat rather than an advance from the existing standards); *Kenkyūkai, Saishin no rironjō, rippōjō no shomondai* (*Study Group, Various Theoretical and Legislative Issues Concerning Retrials*), Hōritsu jihō 57-10-46, 51-52 (1985) (discussing efforts to enact new legislation on retrial standards). Suzuki's observations on the need for and absence of consensus with respect to reform of criminal procedure law, although written nearly two decades ago, appear to be equally true today.

313 *See, e.g.*, Foote, *Benevolent Paternalism*, *supra* note 12, and sources cited therein.

314 As noted earlier, though (*see* note 307 *supra*), police typically conduct the initial stages of most investigations on their own.

right to appointed counsel only upon indictment, not upon arrest.[315] Yet by the time the indictment is filed and counsel appointed, the investigation normally will have been completed and the prosecutors will have prepared confession and witness statements and assembled the key physical evidence. In cases involving serious crimes, the period of confinement typically extends from arrest through indictment, especially if the suspect denies the charges. If he or she can afford to do so, a suspect may retain counsel during that period[316] and has the right to meet with counsel.[317] Under the Code of Criminal Procedure, however, prosecutors and police may, "when necessary for the investigation, designate the place, date and time" of meetings with counsel.[318] In contested cases police and prosecutors frequently use this so-called "designation" authority to sharply limit meetings with counsel until they have obtained a confession and firmed up their case.[319] Defense counsel are not permitted to attend interrogation sessions. Allowing counsel into the interrogation room, the prosecutors contend, would destroy the close one-on-one questioning that they claim is essential for obtaining true confessions and remorse.[320] Moreover, defense counsel have virtually no right to compel discovery of even exculpatory material in the prosecutors' files.[321]

The prosecutors control the decision whether to indict.[322] By all accounts, the careful manner in which they exercise this authority represents the most important reason for a conviction rate approaching 99.9%.[323] They also dominate the trial, to the extent that many respected observers

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315 Keisohō, *supra* note 3, arts 36, 272.

316 *Id* art 30.

317 *Id* art 39(1).

318 *Id* art 39(3) (translation by the author).

319 For a more detailed discussion of this issue, *see* Foote, *Confessions*, *supra* note 12, at 432-34.

320 *See, e.g.*, Ryūichi Hirano, *Diagnosis of Current Criminal Procedure*, 22 Law in Japan 129, 136 (1989) (describing this attitude on the part of investigators).

321 *See, e.g.*, Foote, *Confessions*, *supra* note 12, at 477-480, and sources cited therein (if the defense shows a concrete need for specific evidence, the court, in its discretion, may order disclosure if it determines, *inter alia*, that the evidence is especially important to the defense). *See generally* Tadashi Sakamaki, *Keiji shōko kaiji no kenkyū* (*A Study of Criminal Discovery*) (1988).

322 Keisohō, *supra* note 3, art 248. *See generally* Yasuo Watanabe, Setsuo Miyazawa, Shigeo Kisa, Shōsaburō Yoshino and Tetsuo Satō, *Tekisutobukku gendai shihō* (*Textbook: Japanese Judicial System*) 101-08 (1992).

323 *See, e.g.*, Masahito Inouye, *Keiji saiban ni taisuru teigen* (*Suggestions for Improving the Administration of Criminal Justice*), 85 Shihō kenshūjo ronshū (*Collection of Works for the Legal Training and Research Institute*), at 93, 100 (1991); Kōichirō Yokoyama, *Gohan no kōzō—Nihongata keiji saiban no hikari to kage* (*The Structure of Mistaken Convictions—The Bright and Dark Sides of Japanese-Style Criminal Trials*) (1985), at 5-11, 14-15.

characterize Japan's system as "prosecutorial justice"[324] involving "trial by prosecutors" rather than "trial by the court."[325] Even in contested cases, the trial is likely to consist largely of the introduction of the written confession statements and witness statements prepared by the prosecutors (but signed by the defendant or the witness)[326] and other materials from the prosecutors' files. For reasons discussed herein,[327] the role of defense counsel is typically quite limited. And while judges may question the defendant or other live witnesses and may request the parties to clarify documents and other matters, they are not likely to demand production of other evidence. In the words of one former judge, the role of the courts is limited to "confirm[ing] . . . the results of the [prosecutor's] investigation."[328] In the wake of the retrial cases, the roles of all the key participants in this process have come under scrutiny.

i. *The Prosecutors and Police*

Defense counsel and other critics argue that these cases show that police and prosecutors play too dominant a role in the criminal justice process: outright abuses can go unchecked, and when the investigators proceed on hunches they can put together a case that seems watertight but turns out to be riddled with hidden holes.[329] Some critics further contend that these cases reflect a tendency among the prosecutors to close ranks and refuse to acknowledge mistakes once a prosecution has been instituted, even if it turns out to have been in error.[330]

As mentioned earlier, the prosecutors have undertaken an extensive review of the retrial cases, but the resulting report apparently does not acknowledge that the prosecutors were wrong in prosecuting the

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[324] *See, e.g.*, Yoshifusa Nakayama, *Nihon no keiji shihō no tokushoku—saiban no tachiba kara (The Characteristics of Japanese Criminal Justice—From the Standpoint of the Judiciary)*, 1 Keiji tetsuzuki, *supra* note 15, at 2.

[325] *See* Takeo Ishimatsu, *Are Criminal Defendants in Japan Truly Receiving Trials by Judges?*, 22 Law in Japan 143 (1989).

[326] Although defense counsel have the right to require witnesses to appear, even in contested cases they typically permit the prosecutor to use the prepared witness statements in lieu of live testimony for most witnesses.

[327] *See* text accompanying notes 315-21, *supra*, 335-42 *infra*.

[328] Ishimatsu, *supra* note 325, at 150.

[329] *See, e.g.*, Yokoyama, *supra* note 323, at 11-22 and sources cited therein (in great majority of cases, system works well, but absence of effective checks for problem cases).

[330] *See, e.g.*, Nichibenren, *Saishin*, *supra* note 1, at 139-41. In actuality, the great majority of retrials come at the request of prosecutors, but those typically involve relatively minor matters. *See* Konishi, *supra* note 144, at 1011-12.

defendants.[331] In fact, many prosecutors would undoubtedly argue in private that some, if not all, of the four defendants really were guilty.[332] Nonetheless, the prosecutors acknowledge that the cases provide certain lessons, including the need for careful supervision of the police in serious and potential problem cases and the importance of greater care in the prosecutors' own review and preparation of cases.[333] Notably, these recommendations involve internal steps that would only expand the role of the prosecutors. Not surprisingly, the prosecutors are resistant to any fundamental changes that might reduce their authority or strengthen external checks on their activities.

ii. *Defense Counsel*

Some observers also point a finger of blame at the defense bar. Although not specifically in connection with the retrial cases, some

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[331] *See Shōkai*, *supra* note 274. Although the report itself was not made public and the available summary of the report includes only isolated excerpts, the overview of the report makes no reference to any such admission, and the general tenor of the excerpts that are reproduced suggests that the prosecutors feel the convictions might not have been overturned if the prosecutors who handled the cases had exercised more care.

[332] In this vein, excerpts from the Supreme Public Prosecutor's Office report suggest ways in which the prosecutors could have strengthened their positions in each of the three retrial cases it covers—*Menda*, *Saitakawa* and *Matsuyama*. One such excerpt implies considerable skepticism about Menda's exoneration, stating that when the prosecutors provided the Nishitsuji Panel with the investigative records, they should also have considered whether they could argue that the individuals who testified in support of Menda's alibi "were very close friends of Menda's father and had given questionable testimony." *Id* at 91 (translation by the author).

Notwithstanding this statement, the decisions acquitting Menda, Taniguchi and Saitō seem very convincing. Yet one can understand why prosecutors might be a bit puzzled by the developments in *Shimada*. In the last five decisions in that case (the four decisions concerning the fourth retrial request, followed by the final acquittal), the courts all agreed that something about the record was troubling, but they couldn't agree what it was. In fact, it seems as though just about every time a court identified a problem with the record, the prosecutors were able to convince the next court that the prosecution's original contentions had been right all along, only to have the defense and that next court find new problems. Moreover, while I would not question the finding that the supposed eyewitness testimony (of having seen Akabori or someone who resembled him with the girl) was too vague and indefinite to be given any probative weight, if I had been prosecuting the case I would undoubtedly have been upset by the court's additional comment about the eyewitness testimony. After rejecting the eyewitness testimony, the court went on to say, in effect, "[e]ven if the eyewitness testimony is accurate, it only shows that Akabori was the person who lured Hisako away from the temple grounds, not that he killed her." *See* text accompanying note 269-70 *supra*. Admittedly, a positive identification of the person who had led Hisako away would only be circumstantial evidence of the murder—but, if accurate and credible, such an identification would seem to me to be extremely strong circumstantial evidence.

[333] *See Shōkai*, *supra* note 274, at 87-91.

prosecutors argue that defense counsel complain too much about prosecutorial dominance and do not do enough themselves.[334]

Many defense counsel agree with the latter half of that statement. However, most argue that this state of affairs results not from the personal proclivities of the lawyers, but from shortcomings in the system that do not leave the defense bar with sufficient tools to respond effectively to the strength of the prosecutors.[335] In this connection, they and other critics urge at least three important reforms: (1) a right to appointed counsel for indigents at the time of arrest, rather than the time of indictment;[336] (2) complete freedom of access, or at least vastly expanded access, for meetings with suspects who are in detention;[337] and (3) a right of discovery that would permit examination of the entire prosecution file, or at least the right to discover potentially exculpatory evidence in that file.[338]

Many observers echo those concerns. One leading scholar suggests that without tools such as these, even "skilled and zealous lawyers may lose the will to handle criminal matters. . . . If things go on as they are, truly conscientious, topnotch lawyers may move away from criminal practice. This, in my view, is where the true crisis [in Japan's criminal justice system] lies."[339]

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334 *See, e.g.*, Kazuo Kawakami, *Nihon no keiji shihō no tokushoku—kensatsu no tachiba kara (Characteristics of Japanese Criminal Justice—From the Standpoint of the Prosecution)*, *in* 1 Keiji tetsuzuki, *supra* note 15, at 11, 16-17.

335 *See, e.g.*, Mikio Akiyama, *Higisha, bengonin no bōgyo katsudō (sōsa dankai)—bengo no tachiba kara (The Defense Activities of Suspects and Defense Counsel (at the Investigation Stage)—From the Standpoint of the Defense)*, *in* 1 Keiji tetsuzuki, *supra* note 15, at 347; Masayoshi Tamura, *Nihon no keiji shihō no tokushoku—bengo no tachiba kara (Characteristics of Japanese Criminal Justice—From the Standpoint of the Defense)*, *in* 1 Keiji tetsuzuki, *supra* note 15, at 26, 30-33; Nichibenren, *Zoku-saishin*, *supra* note 1, at 222-24.

336 *See, e.g.*, Akiyama, *supra* note 335, at 349-50; Taguchi, *supra* note 308, at 57-59; Makoto Mitsui, *Keiji soshōhō no kongo—kaizensaku no gutaiteki teigen (The Future of Criminal Procedure Law—Concrete Proposals for Improvement)*, Hōritsu jihō 7 61-10-6, 6 (1989). Defense counsel also voice the need for funding for more than just one lawyer in complex cases. *See, e.g.*, Nichibenren, *Zoku-saishin*, *supra* note 1, at 224.

337 *See, e.g.*, Taguchi, *supra* note 308, at 55-57; Keiichi Muraoka, *Sekken kōtsū—bengo no tachiba kara (Meetings with Suspects—From the Standpoint of the Defense)*, 1 Keiji tetsuzuki, *supra* note 15, at 329; Masataka Taniguchi, *Gohan o fusegu tame no ichiteigen (One Proposal for Preventing Mistaken Convictions)*, 934 Jurisuto 37, 40 (1989) (comments by former Supreme Court Justice); Nichibenren, *Zoku-saishin*, *supra* note 1, at 384-88.

338 *See, e.g.*, Yasukuni Yoneda, *Shōko kaiji—bengo no tachiba kara (Disclosure of Evidence—From the Standpoint of the Defense)*, 2 Keiji tetsuzuki, *supra* note 15, at 515; Nichibenren, *Zoku-saishin*, *supra* note 1, at 366-74.

339 Inouye, *supra* note 323, at 111. Similar views have been expressed by, among others, a former Supreme Court Justice (*see* Taniguchi, *supra* note 337, at 39-41), and a former judge (*see* Watanabe, *supra* note 278, at 270, 276).

Yet, aside from modest modifications by the prosecutors in their internal guidelines governing meetings between defense counsel and suspects (significantly, modifications that are unlikely to apply to cases the prosecutors regard as difficult),[340] the proposed reforms do not seem likely to be adopted any time soon. While acknowledging that providing counsel for indigents during the investigation phase "may be a matter worth considering at some point in the future," a leading prosecutor has stated that, "from a simple calculation of the number of attorneys in Japan it is clear that implementation of such a system at present would be impossible—not to mention the many other problems it presents, including matters of quality and cost."[341] The prosecutors, moreover, bitterly oppose any expansion in the right of discovery, thereby virtually eliminating any prospects for legislative adoption of that right.[342]

iii. *Judges*

Finally, the performance of the judiciary in the retrial cases has drawn much attention. As former Supreme Court Justice Masataka Taniguchi has observed:

> In the view of members of the ordinary public, these [death penalty retrial] cases were all cases that unquestionably should have resulted in acquittals. The public is shocked to find that the defendants were not acquitted, but instead that all the trial courts, appeals courts and courts reviewing subsequent retrial petitions time after time reached the same guilty verdicts. If these were cases in which truly new and clear evidence was presented of which the original trial courts could not have been aware . . . , it would be unfair to talk of the responsibility of the courts that entered the guilty verdicts. Yet in each of the death penalty retrial cases, the grounds on which the retrials were based had in fact been raised right from the original trial proceedings.[343]

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340 *See* Foote, *Confessions*, *supra* note 12, at 433-34.

341 Kazuo Kawakami, *Komento 2 (Comment 2)*, 1 Keiji tetsuzuki, *supra* note 15, at 367, 369 (translation by the author).

342 *See, e.g.*, Kazuo Kawakami, *Komento 2 (Comment 2)*, 2 Keiji tetsuzuki, *supra* note 15, at 531.

343 Taniguchi, *supra* note 337, at 37.

It is this aspect of the cases, above all, that has caused concern over the judiciary's role.

Japanese law contains both the presumption of innocence and the requirement of proof beyond a reasonable doubt.[344] However, the conviction rate has been well over 99% for decades, and for most of the past decade it has hovered between 99.8 and 99.9%.[345] Japan has a career judiciary, and most judges spend the bulk of their nearly forty-year careers specializing in either civil or criminal matters. Yet, in the estimate of one former judge, some criminal judges may participate[346] in fewer than ten acquittals during their entire careers.[347]

Under these circumstances, observers suggest, even the most conscientious judges may find it difficult to avoid the tendency to assume that defendants are guilty.[348] Given the overwhelming conviction rate, moreover, issuing an acquittal may entail considerable determination and effort. One former judge who worked on several retrial cases as a lawyer after leaving the bench described the typical judicial mindset in the following way:

> In general there is a feeling from the outset that the defendant is guilty. On top of that, when there is a long trial focusing on whether or not the defendant is guilty, it's troublesome for judges, who face demands to dispose of cases promptly and will have to fill out reports to their superiors and to the Supreme Court [concerning the length of the trial and the reasons the trial took so long]. Moreover, when a judge issues an acquittal, the faces of his superiors and the displeased faces of prosecutors with whom he's become friendly will appear in his mind. Those sorts of psychological pressures exist at the subconscious level,

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344 *See, e.g.*, Kōya Matsuo, 1 Keiji soshōhō (Criminal Procedure Law) 210-13 (1979) ("Although the 'presumption of innocence' is not expressly stated in the written law, it has been regarded as a natural principle since the Meiji Era." *Id* at 213) (translation by the author); S Ct, 1st P B, Ruling of May 20, 1975, 29 Keishū 177, 180 (noting the "hard and fast rule of criminal trials that 'doubts are to be resolved in favor of.the defendant'," and describing that rule in reasonable doubt terms) (translation by the author).

345 Saikōsaibansho jimusōkyoku keijikyoku (Criminal Affairs Bureau, General Secretariat, Supreme Court of Japan) *Heisi ninen ni okeru keiji jiken no gaikyō (jō) (Overview of Criminal Cases in 1990, Part I)*, 44 Hōsō Jihō 85, 142 (1992); *see, e.g.*, Watanabe, *supra* note 278, at 399; *Zadankai, Keiji saiban wa yomigaeru ka (Round-table Discussion, Will Criminal Trials Come Back to Life?)*, 441 Hōgaku seminā 24, 26-27 (1991) ("*Zadankai*").

346 Trials for minor crimes may be considered by a single judge, but three-judge panels handle serious criminal matters.

347 Watanabe, *supra* note 278, at 400. At the other end of the scale, he estimates that some judges may be involved in fifty or more acquittals in their careers, *id.*

348 *See, e.g.*, *id* at 402-06; Inouye, *supra* note 323, at 105-06.

> and there's a psychological brake at work that leads judges to issue as few acquittals as possible.[349]

In a similar vein, a sitting judge has described the task of issuing an acquittal in the following terms:

> [When acquitting a defendant,] there must not be any mistakes in one's memory of testimony or reading of written statements, and if there is any looseness in logic, the prosecutors will unquestionably attack it. To issue an acquittal . . . , the opinion must be one that will withstand critical review by the higher court.[350]

This mindset, critics argue, may have affected the judgments in the retrial cases.[351] The judges may have been swept along by the assumption that the prosecutors' account was accurate and that the defendants must have been lying. Some observers suggest that additional elements may strengthen the same basic mindset: a tendency for some judges to identify with the prosecutors, whose training and career patterns resemble their own,[352] and a tendency for the career judges to lead rather sheltered existences and have little "real-world" experience. This in turn, the critics suggest, may lead to a lack of sympathy for and understanding of the typical defendant.[353]

As one response to the retrial cases, judges have recognized the need for constant vigilance and ever greater care in reviewing evidence.[354] Although it is impossible to show a direct link to the retrial cases, some

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[349] *See* Maezaka, *supra* note 135, at 200 (quoting attorney Hidegorō Aoki) (translation by the author).

[350] Akira Kitani, *Saibankan no shokumu* (*The Duties of Judges*), *in* Gendai no saiban, *supra* note 298, at 243, 247-48 (translation by the author).

[351] *See, e.g.*, Watanabe, *supra* note 278, at 398-419.

[352] *See, e.g.*, *id* at 415-17; Maezaka, *supra* note 135, at 204.

[353] *See, e.g.*, Watanabe, *supra* note 278, at 267 (quoting statement by another former judge who, after practicing as a lawyer for about two years following his retirement from the judiciary, commented, "Now that I've gotten to know the world after retiring, I'd like to try handling criminal trials again. If I could, my trials would be much different now.") (translation by the author).

[354] *See, e.g.*, *Gendai saiban no kadai kaiketsu o mezashite, Zenkoku chihankan konwakai hōkoku (1), Gōdō hōkoku: Jihaku no nin'isei o meguru shomondai* (*Seeking Solutions to Issues for Today's Trials, Report of the National Gathering of District Court Judges (1), Joint Report: Various Problems Regarding the Voluntariness of Confessions*), 1310 Hanrei jihō 5, 6 (1989) ("*Gōdō hōkoku*"); Ishimatsu, *supra* note 325, at 152-53; Sukeyasu Koizumi, *Shikeishū saishin muzai hanketsu o kangaeru* (*Thoughts on the Retrial Acquittals of Death Row Inmates*), *in* Gendai no saiban, *supra* note 298, at 276, 277 (in order to prevent mistaken convictions "we [judges] must regard the development of measures to check the excesses of the adversary system as a necessary task") (translation by author).

observers have noted signs of a recent change in judicial attitudes. After reaching a low of 0.10% in 1988, the acquittal rate nearly doubled in 1989 (albeit to a still minuscule 0.19%).[355] More significantly, the recent acquittals have involved a number of highly publicized cases in which the courts, as in the death penalty retrial cases, probed carefully into the evidence and the substance of confessions and then rejected the prosecution's contentions.[356] In another parallel to the death penalty retrial cases, in some of these recent acquittals the Supreme Court itself has reviewed the confessions and other evidence in painstaking detail before reversing convictions.[357] These recent acquittals have drawn even more attention to the need for continued vigilance by the courts, and have also been cited as a reflection of the ongoing need for many of the other reforms discussed here.[358]

In another recent development, the Supreme Court has begun to appoint some judges from among the ranks of private attorneys.[359] The numbers remain modest, however, and the judiciary still is overwhelmingly based on a career model.

In connection with the role of the judiciary, one proposal has generated far more discussion than any other: reinstatement of the jury system. I use the word "reinstatement," rather than "adoption," for Japan in fact had a jury system between 1928 until it was discontinued in 1943 with the proviso that it would be reinstated "after the conclusion of the war."[360] Over the past decade there have been widespread calls for reintroduction of the jury to guard against mistaken convictions.[361] Those calls received a considerable boost in 1987 when then-Supreme Court Chief Justice Kōichi Yaguchi instructed the Criminal Bureau of the Supreme Court's General Secretariat

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355 *See Zadankai*, *supra* note 345, at 26.

356 *See Tokushū, Keiji saiban wa yomigaeru ka* (*Special Issue, Will Criminal Trials Come Back to Life?*), 441 Hōgaku seminā 24 (1991).

357 *See Zadankai*, *supra* note 345, at 24-25.

358 *See id* at 38-43.

359 *See, e.g., Zadankai, Shakai ga kitai suru hōsōzō* (*Roundtable Discussion, The Image of Jurists Expected by Society*), 984 Jurisuto 14, 28 (1991) (comments of Ryūji Hori, Kahei Rokumoto).

360 *See* Tetsuharu Kurata, *Ima koso, baishin saiban o* (*Now, Especially, Is the Time for Jury Trials*), *in* Gendai no saiban, *supra* note 298, at 126, 128 (translation by the author). *See generally* Mamoru Urabe, *Wagakuni ni okeru baishin saiban no kenkyū* (*Research on Trial by Jury in Japan*), *Shihō kenshūjo chōsa sōsho* (*Research Bulletin of the Legal Training and Research Institute*), No 9 (1968), *translated and reprinted in part in* Hideo Tanaka, *The Japanese Legal System* 483-91 (1976).

361 *See, e.g.*, Kurata, *supra* note 360; *Tokushū, Baishin* (*Special Issue, The Jury*), Jiyū to seigi 35-13 (1984); Watanabe, *supra* note 278, at 420-21. *See generally* Watanabe, et al, *supra* note 322, at 157-64 and sources cited therein.

(the Court's administrative arm) to study the feasibility of introducing the jury system into the Japanese criminal justice system.[362]

Reintroduction of the jury would have profound implications for criminal trials in Japan. Live witnesses presumably would replace the heavy reliance on written witness statements, and questioning of the defendant likely would take on greater formality. Moreover, long trials, in which court sessions currently are often held weeks apart, presumably would have to be held on a continuous basis. This in turn would affect how the parties prepare for trial. Furthermore, use of the jury system would undoubtedly have some effect in increasing public awareness of how the courts and criminal justice system actually work.[363]

But would the jury system really eliminate mistaken convictions? Proponents argue that jury members would be better able to apply the presumption of innocence and the concept of proof beyond a reasonable doubt than career judges imbued, consciously or not, with the notion that prosecutors are right 99.9% of the time.[364] In claiming that juries would be more likely to give defendants the benefit of the doubt in borderline cases, they also point to the performance of the jury system when it was utilized in Japan.[365] Although the types of cases that could be taken before a jury were limited, a simple majority vote by the jury was sufficient for conviction, and other provisions limited the attractiveness of jury trials,[366] 611 defendants chose jury trials during the fifteen years that the option existed, of whom ninety-four were acquitted. This amounts to an acquittal rate of 15.4%, as compared to acquittal rates of between 1.3% and 3.7% for cases tried to judges during those same years.[367]

Notwithstanding the uproar surrounding the recent verdict in the Los Angeles police abuse case, I have faith in the jury's overall performance in fact-finding. Nor do I share the sentiment that I have heard expressed in some circles in Japan that the Japanese people are somehow not suited to act as jurors. To the contrary, my personal sense is that Japanese would take the

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362 Megumi Yamamuro, *On the Introduction of the Jury System in Japan*, Speech at Santa Clara University Law School, April 1990 (copy on file with author).

363 *See, e.g.*, Watanabe, et al, *supra* note 322, at 157-64.

364 *See, e.g.*, Watanabe, *supra* note 278, at 421.

365 *See, e.g., id.*

366 These included requirements that guilty defendants pay all or part of the expenses of the jury, as well as provisions allowing a judge to set aside a verdict and assign the case to another jury, Nobuyoshi Toshitani, *Nihon no baishinhō* (*Japan's Jury Law*), Jiyū to seigi 35-13-4, 5-7 (1984).

367 *Id* at 11.

responsibility very seriously and would deliberate conscientiously.[368] And it seems almost inevitable that a switch to a jury system would lead to a somewhat higher acquittal rate; after all, it would be rather hard for any other fact-finding system to match the current conviction rate.[369] None of this means, however, that reinstatement of the jury system in Japan would necessarily weed out all mistaken accusations. In fact, in light of the shocking nature of the murders, the unsympathetic nature of the defendants, and the suspicious circumstances in the *Menda*, *Saitakawa*, *Matsuyama* and *Shimada* cases, juries might well have reached the same verdicts as the trial courts, given the same evidence.

A switch to the jury system would also have profound implications for review of convictions. Under the current system, defendants (and the prosecution) may pursue one level of full review of both facts and law, and even on the second level of appeal the courts may inquire into factual issues. Moreover, as the death penalty retrial cases reflect, the key ground for post-conviction review expressly focuses on factual questions. All of this factual review is far easier under the current system than it would be under a jury system. Currently, trial courts have a duty to make specific findings of fact which would not exist with a jury verdict. Moreover, both in theory and in practice reviewing courts would probably feel more justified in reversing factual determinations made by another judge than those made by a jury.

Consequently, if a jury system is adopted, defense counsel might well find their opportunities for appeal and post-conviction review on factual grounds far more limited than it is today. Given the stated desire of the defense bar for precision in fact-finding and elimination of all mistaken convictions, many defense counsel who support the use of a jury on the belief that it would be a superior fact-finder would probably find themselves rather frustrated unless a system was adopted that required specific factual findings by the jury and retained all of the avenues currently available for review of those factual findings. In any event, in view of all the other elements of the criminal justice system that would be affected by reintroduction of the jury system, not to mention widespread skepticism of the jury among judges and prosecutors (as well as some segments of the defense bar), it seems unlikely that any jury system will be adopted in Japan in the near future.

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[368] This does not mean that jurors necessarily would be free of a tendency to place considerable faith in prosecutors. Given the high levels of public trust in prosecutors, some degree of that mindset seems inevitable. But I believe that most Japanese would do their best to keep any such sentiments out of their deliberations.

[369] Whether or not that means the results would be more accurate is, of course, another question.

b. *Confessions*

Given the central role played by confessions in all four cases and in Japan's criminal justice system as a whole, the topic of confessions has attracted by far the most attention. Articles and books have focused on virtually the full range of issues relating to confessions, including the emphasis on confessions, techniques for questioning, and concerns over voluntariness, reliability, and the use and accuracy of prepared "confession statements."[370]

i. *Detentions, Confessions, and Voluntariness*

The Japanese Constitution and Code of Criminal Procedure both contain an express right to silence.[371] Both also stipulate that involuntary confessions and confessions obtained after prolonged arrest or detention are inadmissible as evidence.[372] In fact, article 319 of the Code of Criminal Procedure prohibits introducing into evidence any confession "suspected not to have been made voluntarily."[373] Thus, in contested cases courts frequently face challenges to the voluntariness of confessions.

Notwithstanding these provisions, however, an emphasis on obtaining confessions remains at the heart of Japan's criminal justice system.[374] Under the Code, suspects may be held for up to twenty-three days between arrest and indictment,[375] and it is standard practice for police and prosecutors to use

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370 *See, e.g.*, Zadankai, *Enzaijiken o meguru keiji shihō no kadai* (*Round-table Discussion, Criminal Justice Issues Surrounding the Miscarriage of Justice Cases*) ("*Enzaijiken Zadankai*"), in Nihon no enzai, *supra* note 5, at 158, 164-68, 171-72; Terukazu Tanaka, *Gohan to saishin* (*Mistaken Judgments and Retrials*), 852 Jurisuto 120, 124-27 and materials cited therein (1986); Nomura, *supra* note 298, at 72-73; *Nihon bengoshi rengōkai dai-24-kai jinken yōgo taikai, Shinpojiamu kichō hōkokusho, Keiji saiban to gohan gen'in* (*The Japan Federation of Bar Associations' 24th Convention on Protection of Human Rights, Keynote Symposium Report, The Reasons for Criminal Retrials and Mistaken Convictions*), Jiyū to seigi 32-8-81, 105-06 (1981); Shōichirō Niwayama, *Jihaku—bengo no tachiba kara* (*Confessions—From the Standpoint of the Defense*), *in* 2 Keiji tetsuzuki, *supra* note 15, at 818; *Gōdō hōkoku*, *supra* note 354.

371 *See* Kenpō, *supra* note 275, art 38(1) ("No person shall be compelled to testify against himself."); Keisohō, *supra* note 3, art 198(2) ("[T]he suspect shall, in advance, be notified that he is not required to make a statement against his will.").

372 Kenpō, *supra* note 275, art 38(2) ("Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence"); Keisohō, *supra* note 3, art 319(1) ("Confession made under compulsion, torture or threat, or after prolonged arrest or detention, or which is suspected not to have been made voluntarily shall not be admitted in evidence").

373 Keisohō, *supra* note 3, art 319(1) (translation by the author).

374 *See* Foote, *Confessions*, *supra* note 12, *passim*.

375 *See* text accompanying notes 399-402 *infra*.

some (and, on occasions, most) of that time for questioning. Suspects have no duty to answer questions during that period, but under prevailing interpretations of a provision in the Code of Criminal Procedure relating to questioning of suspects,[376] they have a duty to "submit" to questioning—*i.e.*, at least to sit and listen.

The retrial cases reveal that investigators, both then and now, have used two techniques, "voluntary accompaniment" and "arrest on other charges," for questioning suspects when they lack probable cause or for other reasons decline to arrest the suspect on the main crime. As the retrial cases suggest, the "voluntariness" of the former is not always entirely clear; in *Menda*, for example, five armed policemen conveyed the request. With the latter technique the 23-day periods of detention on several minor charges may be cumulated, as in *Saitakawa*, resulting in confinement and possible questioning over a span of months.

In the wake of the retrial cases, many critics have argued that confessions are overemphasized in Japan.[377] They contend this has led to a tendency on the part of investigators to rely on the suspect to lead them to other relevant evidence instead of conducting a thorough investigation of other evidence on their own before questioning. In turn, they argue, this presents the danger of miscarriages of justice based on false confessions when police undertake intensive questioning largely on the basis of a hunch about the suspect's guilt, as they apparently did in the retrial cases. As remedies, few would go so far as to suggest banning questioning or use of confessions altogether.[378] Instead, most have urged much greater scrutiny of the voluntariness of confessions, accompanied by strict limits on the use of tactics such as "voluntary accompaniment," "arrest on other charges," and lengthy questioning.[379]

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[376] Keisohō, *supra* note 3, art 198(1), reads: "A public prosecutor . . . or police official may ask any suspect to appear in their offices and question him, if it is necessary for pursuing a criminal investigation. However, the suspect may, *except in a case where he is under arrest or under detention*, refuse to appear or, after he has appeared, withdraw at any time." (emphasis added; translation by the author). The key debate concerns the highlighted language. Despite arguments by some academics and defense counsel that all suspects should have the right to refuse to appear for questioning, the courts have accepted the literal reading of the provision, by which suspects "under arrest or under detention" have no such right. For a discussion of this debate, *see* Foote, *Confessions*, *supra* note 12, at 435-36.

[377] *See, e.g.*, sources cited in note 370 *supra*.

[378] *See, e.g.*, Takayuki Shiibashi, *Higisha torishirabe* (*Questioning of Suspects*), Hōritsu jihō 61-10-16, 16 (1989) (noting existence of an argument for a total ban but rejecting that approach).

[379] *See, e.g.*, *id*; Niwayama, *supra* note 370; Norimichi Kumamoto, *Higisha no torishirabe—bengo no tachiba kara* (*Questioning of Suspects—From the Standpoint of the Defense*), *in* 1 Keiji tetsuzuki, *supra* note 15, at 187; Fumio Takemura, *Bekken taiho, kōryū—bengo no tachiba kara* (*Arrest and*

In the *Menda*, *Saitakawa* and *Matsuyama* acquittals, the courts emphasized that the investigations in those cases occurred soon after the Constitution and Code of Criminal Procedure had come into force. This, they suggested, provided an explanation, if not an excuse, for perceived excesses by the police. Yet would the questioning tactics employed by the police in the death penalty retrial cases be illegal even today? In recent years a few decisions have indeed excluded confessions on voluntariness grounds,[380] perhaps in part because of concerns stemming from the retrial cases.[381] But a brief review reveals that on the whole, the currently prevailing standards would permit police to utilize most of the same practices followed in the retrial cases.

"Voluntary accompaniment"—In *Menda*, five armed policemen went to the mountain village where Menda was staying and requested him to accompany them to the police station. He "consented," in what the police treated as a "voluntary accompaniment." In the decision ultimately acquitting Menda, the Kumamoto District Court concluded that under standards in effect at the time of that decision in 1983, the consent was not "voluntary" under the circumstances and thus the police request would have constituted an illegal arrest.[382]

Subsequent decisions by the Supreme Court, though, lead one to wonder whether the police activities in *Menda* really would be illegal even today. In 1984, the Supreme Court upheld a "voluntary accompaniment" in which four armed policemen went to a man's room at his company dormitory one morning, asked him to go with them to the station in a police car, and proceeded to question him from morning to night for four consecutive days, keeping him under watch on the intervening nights in lodgings the police arranged, until his mother came from the countryside and signed a statement saying she would watch him.[383] As recently as 1989, the Supreme Court upheld another confession obtained after police asked a man to accompany them to the police station at about eleven o'clock at night and proceeded to question him virtually without break for twenty-two hours, until nearly 9:30

Detention on Other Charges—From the Standpoint of the Defense), *in* 1 Keiji tetsuzuki, *supra* note 15, at 216.

380 *See* Hideaki Kawasaki, *Muzai jirei no igi to kore kara no kadai* (*The Significance of the Acquittal Cases and Tasks for the Future*), 441 Hōgaku seminā 44, 45-49, and cases cited therein (1991).

381 *See Gōdō hōkoku*, *supra* note 354 (judges reflecting on concerns over voluntariness of confessions as a factor in mistaken judgments).

382 *See* text accompanying note 76 *supra*.

383 *Ikuhara v Japan*, S Ct. 2d P B, Ruling of Feb. 29, 1984, 38 Keishū 479.

the following evening.[384] Aggressive use of "voluntary accompaniment" plainly is not something that happened only in a bygone era.

"Arrest on other charges"—Although the Supreme Court has not ruled definitively on the permissibility of the practice, over the past two decades occasional lower court decisions have declared "arrest on other charges" illegal under the circumstances of individual cases.[385] However, even the standards followed in those decisions still allow wide use of this tactic.[386]

The manner in which the final decisions in the four death penalty retrial cases treated this issue is representative of the currently prevailing judicial approach. According to the decision ultimately acquitting Saito in *Matsuyama*, in that case the police realized that they lacked probable cause to arrest Saitō for the murders. They deliberately arrested him for an unrelated minor incident—a charge of battery stemming from a fight he'd been in months earlier, then began questioning him about the major crime immediately, apparently without any pretense of questioning him about the fight. The retrial court had no trouble finding that under today's standards this would be impermissible as a pretext to evade the warrant requirement.[387]

Yet if the arrest was for another serious offense, or the crimes were related, or the police in fact spent a significant period of time at the outset questioning the suspect about the crime on which the arrest was based, it is much less likely that the courts would deem the arrest on other charges

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384 *Miyauchi v Japan*, S Ct, 3d P B, Ruling of July 4, 1989, 43 Keishū 581.

385 *See, e.g.*, Takemura, *supra* note 379, and cases cited therein.

386 *See id.*

387 *See* text accompanying note 202 *supra*. Some courts might disagree even with this conclusion. As noted earlier (*see* note 210 *supra*), after Saitō was acquitted, he filed litigation seeking damages from the government. Saitō included the arrest on the battery charge as one of the assertedly illegal acts on which he based his complaint. In this subsequent proceeding, the Sendai District Court, after taking evidence on the circumstances of the arrest and questioning, described the facts in a somewhat different fashion from the retrial acquittal. It found that the battery in question "was not necessarily a minor crime"; that, while the battery had occurred four months earlier, the police had only known about it for somewhat over a month before they arrested Saitō; and that the police had questioned Saitō about the battery on the day they arrested him and prepared a confession statement on that charge the following day before turning their full attention to questioning him about the Matsuyama murders. Based on these findings, the court held,

> [I]t is clear that the arrest and detention on the battery charge were conducted primarily for the purpose of questioning him about the Matsuyama incident, but we cannot conclude that the arrest and detention were undertaken *solely* for questioning about the Matsuyama incident. Accordingly, we cannot say that these actions constituted illegal arrest and detention on other charges.

Saitō v Japan, Sendai Dist Ct, Judgment of July 31, 1991, 1393 Hanrei jihō 19, 39 (emphasis added; translation by the author).

illegal. As one example of this approach, in the ultimate acquittal in *Menda* the court stated of the initial arrest for the rice thefts:

> Although the police intended to question [Menda] about the [murder] case [when they arrested him for the thefts] and did question him about the [murder] case while he was under arrest on those other charges, they [also] questioned him about the thefts and prepared a confession statement on those charges . . . We cannot say that the investigators confined [Menda] on the theft charges simply for the purpose of the investigation of the Shirafuku murders, and accordingly cannot say that it was illegal as a so-called "arrest on other charges."[388]

Similarly, the retrial courts in *Shimada* and *Saitakawa* did not deem the arrests on other charges in those cases—the thefts of girls' clothing in *Shimada* and the robbery, theft, and battery and intimidation charges in *Saitakawa*—to have been improper.

A finding that the arrest was illegal, moreover, will not necessarily bar admission of the confession. After finding that the arrest in *Matsuyama* would be illegal today, the retrial court in that case added:

> We cannot say that a confession based upon an illegal or improper arrest on other charges automatically lacks voluntariness. Rather, we must determine the issue of voluntariness through an overall evaluation of such matters as the duration of the period of confinement, the methods utilized for questioning during that period, the substance, the gravity of the matter that is the [true] target of the investigation, and the degree of impact on the testimony of the defendant.[389]

As this statement reflects, a finding of illegality does not automatically require exclusion of the illegally obtained evidence.[390]

Prolonged confinement—As noted above, both the Constitution and Code of Criminal Procedure bar admission of confessions made after prolonged arrest or detention. The holding on this point by the retrial court in *Saitakawa* is typical of judicial treatment of the issue:

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388 1090 Hanrei jihō at 90 (1983) (translation by the author).

389 1127 Hanrei jihō at 60 (1984) (translation by the author).

390 *See, e.g.*, Kōtarō Ono, *Jihaku–kensatsu no tachiba kara* (*Confessions–From the Standpoint of the Prosecution*), 2 Keiji tetsuzuki, *supra* note 15, at 807, and cases cited therein.

> Defense counsel assert that . . . [Taniguchi's] confession is a confession after improperly long detention . . . . However, the trial [for the robbery] became final on June 30, 1950, and [Taniguchi] was arrested and confined thereafter successively on theft, battery, intimidation, and then the robbery murder charges in this case. The series of confessions he made starting on July 26 cannot be said to be confessions after improperly long arrest or detention.[391]

Although the reasoning is not entirely clear, the court in effect seems to say that the confinement and questioning was not improperly long because each of the periods of detention was legally authorized. This approach is consistent with leading cases on the prolonged confinement issue.[392]

Manner of questioning—An additional issue affecting the voluntariness of confessions is the manner in which the questioning is performed. Both the Constitution and the Code of Criminal Procedure expressly provide that confessions obtained through "compulsion, torture or threat" are inadmissible.[393] As noted above, the Code also prohibits use of evidence "suspected not to have been made voluntarily," but this leads to the question of what is regarded as "voluntary."[394] The dividing line between "voluntariness" and "compulsion" remains vague. The *Shimada* retrial court followed a typical formulation of the voluntariness inquiry by examining whether there had been "physical or mental coercion of an illegal nature, or other inducement rising to an equivalent level, during [Akabori's] questioning."[395] In interpreting the Code proscriptions, courts have ruled that confessions obtained while keeping a suspect in handcuffs during questioning[396] or through promises of leniency[397] may be involuntary.[398] On the other hand, as the ultimate acquittals in the death penalty retrial cases

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391 1107 Hanrei jihō at 39 (1984) (translation by the author).

392 *See* Foote, *Confessions*, *supra* note 12, at 456-57, and cases cited therein.

393 Kenpō, *supra* note 275, art 38(2) ("Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence."); Keisohō, *supra* note 3, art 319(1).

394 Keisohō, *supra* note 3, art 319(1).

395 1316 Hanrei jihō at 33 (1989) (translation by the author).

396 S Ct, 2d P B, Judgment of Sept. 13, 1963, 17 Keishū 1703 (keeping suspect in handcuffs during questioning would normally raise doubts as to voluntariness, but questioning was not involuntary in this case because it took place "in a calm atmosphere").

397 S Ct, 2d P B, Judgment of July 1, 1966, 20 Keishū 537 (promising not to indict in return for confession undermined voluntariness of the confession).

398 While these are regarded as leading cases, even they do not represent absolute standards, as reflected by the fact that the Supreme Court upheld the voluntariness of the confession in the handcuffing case.

reveal, making "small pokes," providing the suspect with little food, questioning "without regard to whether it was day or night," and questioning a suspect wearing only light clothing in a very cold room are not likely to convince a court that a confession was involuntary.

Moreover, as all four retrial cases vividly reflect, it is typically impossible for a court to discover the truth about the manner of the questioning. The questioning goes on behind closed doors, and in contested cases it is virtually certain that the defendant and the police will disagree about what occurred. As the decisions reflect, in the absence of other proof, the police are likely to get the benefit of the doubt.

ii. "*Substitute Prison*"

The interrogation practice that has generated the most controversy in recent years is the long-standing Japanese use of so-called "substitute prisons," through which police keep suspects in police station holding cells until indictment rather than delivering them to formal detention centers under the oversight of corrections officials.[399] By law, police must either release a suspect or transfer the case to the prosecutors within 48 hours after an arrest.[400] Prosecutors then have 24 more hours to seek a warrant to detain the suspect.[401] If they obtain a warrant, they may hold the suspect for ten more days, followed by a possible ten-day extension before the suspect must either be released or indicted.[402]

It is unsurprising that police keep the suspect in their own holding cell for the first 48 hours, after which they are required either to release the

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399 The extensive commentary on this issue includes Futaba Igarashi, *Daiyō kangoku* (*Substitute Prisons*) (Iwanami Booklet 1991); *Joint Committee of the Three Tokyo Bar Associations for the Study of the Daiyo-kangoku* (*Substitute Prison*) *System, Torture and Unlawful or Unjust Treatment of Detainees in Daiyo-kangoku* (*Substitute Prisons*) *in Japan* (1989); Reiichi Miyazaki, *Taiho, kōryū no basho (fu, daiyō kangoku)—kensatsu no tachiba kara* (*The Place of Arrest and Detention (including Substitute Prisons)—From the Standpoint of the Prosecution*), *in* 1 Keiji tetsuzuki, *supra* note 15, at 273; Yoshikazu Ishii, *Taiho, kōryū no basho (fu, daiyō kangoku)—bengo no tachiba kara* (*The Place of Arrest and Detention (including Substitute Prisons)—From the Standpoint of the Defense*), *in* 1 Keiji tetsuzuki, at 281; Yoshifusa Nakayama, *Komento* (*Comment*), *in* 1 Keiji tetsuzuki, at 289 (comment by judge); and other sources cited below.

400 Keisohō, *supra* note 3, art 203(1).

401 *Id* art 205(1).

402 *Id* art 208(2). Technically speaking, during the period of up to 72 hours before the detention warrant is obtained, the suspect is "under arrest"; after the detention warrant is obtained and executed, the suspect is "under detention."

suspect or send the matter to the prosecutors.[403] It might appear that if the police do not wish to release the suspect at that point, they should transfer him either to the prosecutors' custody or to a formal detention center administered by corrections officials. However, this is not required by law. The Code of Criminal Procedure provides only that the *case*, not the suspect, must be transferred to the prosecutors. Although control over disposition of the case shifts to the prosecutors, the police may continue to hold the suspect at the police station.[404] Moreover, the Prison Act expressly permits authorities to confine suspects during the subsequent detention period, either in formal detention centers within the corrections system or in "substitute prisons"—police holding cells serving as "substitutes" for the detention centers.[405]

As the term "substitute prison" implies, when the Prison Act was enacted in 1908, that option was regarded as a provisional measure, apparently necessitated because there were not enough detention centers to hold all suspects.[406] Yet the use of substitute prisons continues to this day. As the *Shimada* case reflects,[407] some suspects are transferred to prisons during the detention period, but it remains a widespread practice for police to keep a suspect in the police holding cell for much or all of the period prior to indictment. When prosecutors conduct questioning in such cases, they typically either do so in a room at the police station or have the suspect transported to the prosecutors' offices during the day and then returned to the holding cell at night.

Defense counsel and critics assert that this practice is rife with problems: suspects are readily available for questioning by the police at any time, day or night; abuses cannot easily be prevented or detected and proven; and, as a result, even if a suspect feels that he or she has been pressured into a false confession in initial questioning by police and wishes to recant the confession and tell the truth to prosecutors, he or she may be deterred from

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403 Some question whether it is so clear that even this practice should be permitted under existing law, however. *See, e.g.*, Osamu Niikura, *Kōkin nihō wa naze hitsuyō na no ka* (*Why Are the Two Prison Bills Necessary?*), 410 Hōgaku seminā 14, 15 (1989); Toshikuni Murai, *Pre-Trial Detention and the Problem of Confinement*, 23 Law in Japan 85 (1990) (arguing that police should be permitted to hold suspects only for as long as necessary to transfer the suspect to the prosecutors).

404 *See, e.g.*, Frank Bennett, Jr., *Introductory Note on Pre-Trial Detention in Japan*, 23 Law in Japan 67 (1990).

405 Kangokuhō (Prison Act), Law No 28 of 1908, art 1(3).

406 *See, e.g.*, Bennett, *supra* note 404; Maezaka, *supra* note 135, at 101.

407 *See* text accompanying notes 224-25 *supra*.

doing so by fears of retribution after being returned to police custody.[408] Another concern is that the police holding cell may be less accessible to defense counsel (in those cases where the suspect has retained counsel), thereby making it more difficult for counsel to consult with the suspect.[409]

Although the experience in the retrial cases—"substitute prisons" were used in all—is cited by critics of the practice,[410] the main reason for the recent controversy over the system is not the debate over the retrial cases. Rather, the key reason for the controversy is proposed legislation, supported by the Ministry of Justice (MOJ) and the National Police Agency (NPA), that would formally institutionalize substitute prisons.[411] On several occasions over the past decade, the Japanese Cabinet has submitted bills to that effect to the Diet.[412] With the endorsement by the Cabinet (which normally signifies support by the ruling Liberal Democratic Party[413]) and the Ministry of Justice, this proposed legislation has gone much further than any of the recent legislative reforms advanced by academics and the defense bar.[414] Yet it, like the other proposals, is mired down by the lack of consensus among the key constituencies in the criminal justice field.[415]

Meanwhile, use of substitute prisons continues. Prosecutors have recognized, however, that use of substitute prisons throughout the pre-indictment phase may lead to doubts over the voluntariness or reliability of confessions. Accordingly, they have concluded that, "in serious cases where significant issues exist and in cases where there have been complaints about police questioning, the suspect should be moved from the substitute prison to the detention facility at an appropriate time and prosecutors should take over

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[408] *See, e.g.*, Maezaka, *supra* note 135, at 100-16; Nichibenren, *Zoku-saishin*, *supra* note 1, at 393-99; *Shōkai*, *supra* note 274, at 87 (prosecutors' report on retrial cases noting possibility that courts may discredit confessions because of concerns such as these over substitute prison); Masaki Yamamoto, *Daiyō kangoku riyō no sōsa hōhō o kibishiku hihan (Harsh Criticism of Investigative Methods Utilizing Substitute Prison)*, 441 Hōgaku seminā 68 (1991) (describing 1991 Tokyo High Court decision rejecting a confession because of improper use of substitute prison—reportedly the first judgment of this type).

[409] *See, e.g.*, Akira Gotō, *Bengonin to no sekken o meguru mondaiten (Issues Relating to Meetings with Defense Counsel)*, Hōritsu jihō 60-3-43 (1988). Many of the above criticisms, it bears note, reflect a lack of trust for the police by the critics, at least where serious and difficult cases are concerned.

[410] *See, e.g.*, Abe, *supra* note 220 (discussing problems with use of substitute prison in the *Shimada* case).

[411] *See, e.g.*, Bennett, *supra* note 404; Murai, *supra* note 403; Toshiki Odanaka, *The Prison Institution Bill and the Detention Institution Bill: Basic Perspectives in Evaluating Both Bills—With Special Concern for the Substitute Prison Problem*, 23 Law in Japan 72 (1990).

[412] *See, e.g.*, Odanaka, *supra* note 411; Abe, *supra* note 220.

[413] *See* Mamoru Seki, *The Drafting Process for Cabinet Bills*, 19 Law in Japan 168 (1986).

[414] *See* sources cited in notes 308-310 *supra*.

[415] *See* Odanaka, *supra* note 411; *Tōron, keiji, ryūchi shisetsu hōan no kentō (Discussion, Examination of the Criminal and Detention Facility Bills)*, Hōritsu jihō 60-3-6, 6-8 (1988).

the central role in the interrogation."[416] As that statement reflects, transferring a suspect from a police holding cell to a formal detention center or true prison does not mean that the interrogation will cease. For example, in the *Shimada* case prosecutors continued to interrogate Akabori after he was transferred to prison. Nor is there any prohibition against police continuing to interrogate a suspect who has been moved to prison during the detention period.

For these reasons, I cannot help wondering whether abolition of the substitute prison system, even if it were to occur, would be as much of a panacea as some critics seem to assume. Elimination of that system would probably have a substantial impact on handling of routine cases. But given the emphasis placed on achieving confessions in Japan, I can only believe that, at least for serious cases in which police and prosecutors feel a need for intense questioning, even if substitute prisons were eliminated, the new system would promptly be adapted to meet those felt needs—by, for example, devoting one building on prison grounds (or one wing at smaller detention centers) to investigation of suspects, and leaving that building (or wing) under the effective control of police authorities. In any event, for the time being calls for abolition of the substitute prison system function primarily as a counterweight to the MOJ and NPA attempts to institutionalize the system further; abolition has much less chance of legislative passage than permanent institutionalization.

iii. *Reliability*

Even if a court concludes that a confession is voluntary and admits it into evidence, the court must also evaluate its credibility. This is the issue of "reliability," and probably the most significant recent development in the law of confessions is the extent to which courts have probed into concerns over reliability. In each retrial case, the decision granting the retrial and the decision ultimately acquitting the defendant upheld the voluntariness of the confessions but then reviewed their substance very carefully in an attempt to determine whether they were reliable.

This is not so much a matter of change in the relevant standards as a change in the mindset of the judiciary, and this phenomenon is not limited to the retrial cases. In a number of recent highly publicized acquittals, courts at all levels (including the Supreme Court) have examined confessions carefully

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[416] *Shōkai*, *supra* note 274, at 87 (translation by the author).

and concluded that they could not be trusted.[417] Moreover, in numerous recent books and articles, judges and former judges have reinforced the importance of careful scrutiny by writing at length about methods for determining whether a confession is reliable.[418]

In connection with this inquiry, the circumstances of the questioning (including police use of voluntary accompaniment, arrest on other charges, and use of substitute prison) may again become relevant. Although courts are unlikely to exclude a confession on voluntariness grounds, evidence of questionable interrogation techniques may lead to greater skepticism about its reliability. This attitude, too, is reflected in the retrial cases, where the final acquittal decisions pointed to questionable practices in the investigations and to the nature and duration of the interrogation—not as proof that the confessions had been involuntary, but as explanations for why the defendants may have given false confessions.[419]

This apparent trend toward closer scrutiny of the substance of confessions, if it continues, could make a considerable difference in borderline cases. But the ability of judges to scrutinize the reliability of confessions effectively, and the likelihood of their doing so, are affected by the activities of other participants in the trial process. Obviously, defendants and defense counsel influence that inquiry. If the defendant admits his or her guilt to the court and does not contest the charges,[420] the judges are unlikely to spend much time carefully reexamining the confessions. Moreover, even without an effective right of discovery,[421] defense counsel can play an important role in directing the court's attention to inconsistencies and other weaknesses in the confession statements, and in raising allegations of questionable interrogation practices.

Yet the prosecutors, by paying closer attention to the contents of the confession statements they prepare, may be able to exercise even greater influence on the reliability determination than defendants and defense counsel. In fact, one of the important lessons that prosecutors have drawn from the retrial cases is the need for greater care in obtaining confessions and

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417 *See* Kawasaki, *supra* note 380, and cases cited therein.

418 *See, e.g.*, Watanabe, *supra* note 278, at 3-73; Katsuhiko Moriya, *Jihaku no bunseki to hyōka (Analysis and Evaluation of Confessions)* (1988).

419 *See* text accompanying notes 74-89, 157-64, 202-12 and 253-69 *supra*.

420 There are no guilty pleas as such in Japan, but in most cases guilt is uncontested. *See, e.g.*, Yokoyama, *supra* note 323, at 21 (fewer than 20% of defendants challenge the factual contentions of the prosecution).

421 *See* text accompanying notes 321 and 338 *supra* and sources cited therein.

preparing confession statements. The Supreme Public Prosecutor's Office report on the cases concludes:

> It is important for prosecutors to make clear that in the course of their investigation they have acted as a check on the police investigation, both as to procedural and substantive matters. Thus, for example, it is important to prepare [confession] statements that make clear that the prosecutors are not simply swallowing whole the statements prepared by police, but rather are acting as a check by conducting questioning from their own independent perspective. By doing so, the independence of the prosecutors' [confession] statements should be preserved and courts should regard these [prosecutor-prepared statements] as more reliable than the statements prepared by police.[422]

Assuming that this approach involves a truly independent reexamination of the case, accompanied by a willingness to drop charges in problem cases, it should translate into a decrease in mistaken prosecutions (although it may mean an extension of the period of intense questioning). There is a danger, however, that this heightened attention to the preparation of confession statements may not result in a true attitudinal change, but instead may simply engender greater technical skill among prosecutors in drafting confession statements that appear reliable. Prosecutors might, for example, prepare seemingly thorough and convincing confession statements that nonetheless paper over inconsistencies or other weaknesses in the suspect's actual accounts. If this proves to be the case, in the end this greater care in preparing confession statements may enable prosecutors to survive heightened judicial scrutiny of reliability and may thereby perpetuate the danger of mistaken convictions despite any heightened scrutiny. Without verbatim transcripts, and in the absence of an effective discovery right, the key will continue to lie in the trustworthiness and care of the prosecutors themselves.[423]

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422 *Shōkai*, *supra* note 274, at 87 (translation by the author).

423 *See, e.g.*, Foote, *Confessions*, *supra* note 12, at 454-55 (describing concerns that carefully prepared confession statements may hide doubts about a case).

iv. *Confession Statements and other Investigative Records*

A closely related issue is the reliance on confession statements prepared by the investigators, rather than on verbatim transcripts or tape recordings. Under current practice, the questioning process lies shrouded in secrecy. Questioning takes place behind closed doors, with no right for counsel to attend. Confessions (and, for that matter, statements of witnesses) normally are not transcribed verbatim or taped; instead they are set forth in written summaries prepared by the investigators, typically at the close of one or more questioning sessions.[424]

A common refrain of defense counsel, academics and some former judges is that this lack of openness makes it very difficult, if not impossible, to evaluate accurately the voluntariness and reliability of confessions. If, as in each of the retrial cases, the defendant claims that he was threatened or improperly induced into confessing and the police or prosecutors deny it, who is telling the truth? Does a confession statement that looks clear, logical and thorough truly reflect the defendant's own testimony, or is it a sanitized document that the investigators, consciously or not, have crafted to fit their understanding of the facts?

Critics have proposed various reforms designed to achieve greater openness, including establishing a right for defense counsel to attend interrogation sessions, taping or even video recording interrogations, and more critical questioning of the investigators by the courts in contested cases.[425] On some recent occasions, courts have probed into the circumstances of questioning, demanding, for example, that police and prosecutors provide records reflecting the duration and frequency of interrogation sessions.[426] In some serious cases prosecutors have voluntarily taped part of the questioning, in order to help rebut any later challenges to the voluntariness or reliability of the confessions.[427] These steps remain highly exceptional, however. In fact, the Supreme Public Prosecutor's Office report on the retrial cases strongly implies that tape recording is risky, since it may backfire if there are gaps in the tape or if it looks as though the defendant was simply repeating a statement prepared by investigators; the report implies that

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424 *Id* at 453-55.

425 *See, e.g.*, sources cited at note 370 *supra*; Ishimatsu, *supra* note 325, at 152-53.

426 *See Gōdō hōkoku*, *supra* note 354, at 11-13; Akimasa Takada, *Chōsho o utagau, soshite chōsho saiban o utagau (Doubting (Confession) Statements, Then Doubting Trials Based on Such Statements)*, 441 Hōgaku seminā 64 (1991) (describing case in which Osaka District Court acquitted 146 defendants of charges of receiving money from a political candidate, because of doubts over confession statements).

427 *Shōkai*, *supra* note 274, at 87-88.

tape recording is a thing of the past.[428] Nor have any of the other major proposals been adopted. The questioning process remains the hidden province of police and prosecutors, and confession and witness statements prepared by the investigators continue to dominate the later trial proceedings in most cases.

c. *Expert Evidence*

A final set of issues surrounds the use of expert evidence. Expert studies provided key evidence in each of the retrial cases. The blood analyses, autopsy reports, and other medical and scientific studies served as important support for the confessions at trial. In the proceedings seeking retrials, on the other hand, this evidence proved the most vulnerable to attack. As with confessions, defense counsel, prosecutors, judges and others have identified a wide range of concerns regarding expert evidence.[429] There is much greater consensus, however, about the appropriate steps in the handling of such evidence.

Several concerns have been raised about the manner in which the tests are performed, including the identification of relevant issues, the choice of experts, the testing methods utilized, and the preparation of the expert reports.[430] There is widespread agreement that greater care should be exercised in each of these regards to ensure that the tests are as accurate and relevant as possible.[431]

There is also widespread recognition of a tendency in each of the death penalty retrial cases toward uncritical acceptance of the experts' findings—a tendency that judges, prosecutors and defense counsel acknowledge in nearly identical language. In the words of one former judge, "[W]hen an expert opinion is introduced, judges tend to rely on its conclusions without much

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428 Before discussing the risks entailed by tape recording, the report states, "*At one time in the past* [*katsute wa*] [this] approach was taken." *Id* (emphasis added; translation by the author).

429 *See, e.g.*, Araki, *supra* note 45; Tahara, *supra* note 45; Tsuchiya, *supra* note 45; Shirō Sasaki, *Keiji kantei no jitsumujo no shomondai* (*Practical Issues concerning Expert Opinions in Criminal Cases*), *in Keiji saiban no shomondai, Iwata Makoto Sensei sanju shukuga* (*Issues Concerning Criminal Trials, Commemoration of the Eightieth Birthday of Professor Makoto Iwata*) 257 (1982) and other sources cited below.

430 *See, e.g.*, *Shōkai*, *supra* note 274, at 88; Nichibenren, *Zoku-saishin*, *supra* note 1, at 224-37; Hideo Niwayama, *Saishin to kantei* (*Retrials and Expert Opinions*), *in* Kamo, *supra* note 5, at 209; *Tokushū, keiji kantei no genjō to kadai* (*Special Issue, The Current Status and Issues Surrounding Expert Opinions in Criminal Cases*), 694 Jurisuto (1979).

431 *See* sources cited in preceding note.

thought."[432] Conceding that problems existed in the prosecutors' handling of expert evidence in the retrial cases, the Supreme Public Prosecutor's Report acknowledges that "it is essential to conduct a proper evaluation of the results of expert studies, and not just accept those results at face value."[433] Finally, the defense bar also has been criticized for its failure to investigate expert evidence aggressively in the early stages of the retrial cases[434] and has recognized its responsibility to undertake careful evaluation of expert opinions and to make appropriate challenges at the trial stage.[435] As a report by the defense bar concludes in reference to the *Menda* case, "[This case] serves as a painful reminder of how important it is for defense counsel to carefully examine reports by experts in fields in which the lawyers are not skilled, rather than accepting those reports unconditionally."[436]

Japanese law follows the Continental model in providing that experts are appointed by the court and serve as experts on behalf of the court[437] (akin to special masters in the United States), rather than the Anglo-American system under which experts are normally retained by the respective parties.[438] In theory, the one exception to this rule is for experts retained by the police and prosecutors during the investigation phase, when the trial court has not yet become involved in the case.[439] Thereafter, appointment of experts is left to the court's discretion. In many cases, however, the system has come to resemble that of the United States; the courts frequently appoint experts based upon parties' requests for specific experts.[440] Moreover, as the retrial cases reflect, where the parties have sufficient resources they may consult with experts before formally requesting the court to appoint them. Although most prosecutors, defense counsel, judges and scholars appear to agree that experts should be truly neutral representatives of the court and of the interest in justice, and not hired guns,[441] the perception remains widespread that "experts requested by the prosecution will go against the defendant and experts requested by the defense will favor the defendant."[442] A judge, after emphasizing that expert witnesses should be fair and neutral, observed that

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432 Watanabe, *supra* note 278, at 207 (translation by the author).
433 *Shōkai*, *supra* note 274, at 88 (translation by the author).
434 *See, e.g.*, Niwayama, *supra* note 430, at 235.
435 *See, e.g.*, Tahara, *supra* note 45, at 708-09.
436 Nichibenren, *Zoku-saishin*, *supra* note 1, at 60 (translation by the author).
437 Keisohō, *supra* note 3, arts 165-174.
438 *See* Niwayama, *supra* note 430, at 215-18.
439 Keisohō, *supra* note 3, art 223(1).
440 *See* Niwayama, *supra* note 430, at 215.
441 *See* sources cited in notes 429 and 430 *supra*.
442 Tahara, *supra* note 45, at 707 (translation by the author).

courts should carefully examine experts proposed by the parties to be sure that the experts are appropriate; but no new structure has been adopted to assure greater neutrality.[443]

A final concern about expert studies is the proper storage and preservation of the relevant underlying evidence.[444] In *Menda*, *Saitakawa* and *Matsuyama*, key items of evidence were misplaced or disposed of over the years. It is true that over twenty years passed between the end of the direct appeals process and the grant of the retrial in each of those cases. Yet the key piece of physical evidence in *Menda*, the supposedly bloodstained hatchet, had disappeared by the time the Nishitsuji Panel undertook its review, only four years after the conviction became final. In *Saitakawa*, a substantial number of undisclosed documents from the investigation were lost or destroyed by the time the Ministry of Justice commenced its final review of the case prior to forwarding the execution order to the Minister of Justice, only about two years after Taniguchi's death sentence became final.[445] Given the role in the retrial cases played by previously undisclosed documents, such as the records showing that investigators had known about the "two thrusts" before Taniguchi confessed to that "secret" in *Saitakawa* and the records concerning the second, largely exculpatory examination of the futon cover in *Matsuyama*, it is understandable that the defense bar is concerned about the storage and preservation not only of the evidence introduced at trial, but of the remainder of the investigative file as well. Proposed reforms include extending the required periods for preservation of evidence,[446] which currently are contained in internal standards of the prosecutors' office;[447] formally embodying such standards in binding statutory form;[448] and expanding and improving storage facilities.[449] There appears to be wide agreement, however, on an important first step: assurance of proper observance of the existing internal standards,[450] which, for example, call for permanent storage of records in death penalty cases.[451]

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443 Sasaki, *supra* note 429, at 285-86.

444 *See, e.g.*, Nichibenren, *Zoku-saishin*, *supra* note 1, at 234-37, 352; Niwayama, *supra* note 430, at 233.

445 *See* Maezaka, *supra* note 135, at 155-56.

446 *See, e.g.*, Sasaki, *supra* note 429, at 283-84; Shigetarō Kamiyama, *Hōigaku kantei no genkai to mondaiten* (*The Limits and Problems of Pathological Expert Evidence*), Hōritsu jihō 51-11-72, 72-73 (1979).

447 *See, e.g.*, Okabe, *supra* note 309, at 42.

448 *See id* (describing JFBA legislative proposal).

449 *See* Sasaki *supra* note 429, at 282-83; Kamiyama, *supra* note 446, at 72-73.

450 *See, e.g.*, Kamiyama, *supra* note 446, at 72-73. The table of contents of the Supreme Public Prosecutor's Office report on the retrial cases indicates that report discusses the storage of evidence, but

III. CONCLUSION

As the preceding discussion reflects, most of the commentary concerning the retrial cases and most of the reform proposals aim at the total elimination of mistaken convictions.[452] In a further reflection of that aim, a number of observers have suggested that convicts whose sentences are later overturned should be able to claim compensation from the government relatively easily under the National Compensation Act, which authorizes claims against the national government and other public bodies "when, in performing their official duties, public officials have illegally harmed other people through an intentional act or negligence." Some observers have even referred to the possibility of holding judges and prosecutors personally liable.[453]

Neither these nor the various other reform proposals have resulted in many concrete changes. Prosecutors have loosened the rules for meetings between defense counsel and suspects a bit, and some court decisions have scrutinized investigative practices more closely. In all fundamental respects, though, the system remains unchanged. Thus, to date the most important effect of the retrial cases and the attention they have received lies in the apparent impact on the attitudes of key participants in the criminal justice process: the police, the prosecutors, the defense counsel and the judges. I say "apparent impact" because, notwithstanding the extensive public and private soul-searching that has accompanied the retrial acquittals, I am in no position to assess the extent to which fundamental attitudes truly have changed. Attitudinal change, I might add, has a way of proving temporary once the wave of publicity has receded into the past. It may be worth keeping in mind that, just as prosecutors recently have argued that the problem cases are limited to the *early postwar years*, so in 1961 a prosecutor—discussing another then-controversial retrial case—asserted that the problem cases were

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the publicly available excerpts from the report do not include that section. *See Shōkai*, *supra* note 274, at 86. It seems likely, though, that the report would have affirmed the importance of following the prosecution's own internal standards.

451 *See, e.g.*, Nichibenren, *Zoku-saishin*, *supra* note 1, at 352.

452 Two other topics have generated much discussion: the retrial standards themselves and possible abolition of the death penalty. A detailed examination of those topics lies beyond the scope of this Article. They are discussed in Foote, *supra* note 1.

453 Watanabe, *supra* note 278, at 414 (but rejecting the need for such a step).

confined to the *prewar era*.[454] Only time will tell if we find ourselves repeating the cycle thirty years hence.

In at least one vital respect, however, matters have changed greatly. During the decade from 1951 through 1960, when the Supreme Court rejected the final direct appeals in all four retrial cases, 250 prisoners were sentenced to death and 254 were executed.[455] In contrast, over the decade from 1982 through 1991 only thirty-nine prisoners were sentenced to death and only thirteen were executed, with none at all executed in either 1990 or 1991.[456] If these trends continue, and if courts continue to carefully and conscientiously review retrial petitions filed by death row inmates,[457] one can at least have some confidence that innocent individuals will not be executed in Japan.

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[454] Haruo Abe, *Saishin riyū to shite no shōko no shinkisei to meihakusei (2)* (*Newness and Clarity of Evidence as a Ground for Retrial, Part 2*), 32 Keisatsu kenkyū 25, 47 (1961)(discussing the Yoshida Ishimatsu case). Similarly, in 1965 another prosecutor stated that he did not think any more retrials would ever be granted in major cases, "because it is inconceivable that a court would convict an innocent person." Masamitsu Takeyasu, *Saishin to kensatsukan no ryōshin* (*Retrials and the Conscience of Prosecutors*), 18 Hōritsu no hiroba 34 (1965).

[455] *See* Murano, *supra* note 2, at 71. The higher number of executions than final death sentences reflects executions of prisoners who were on death row when the decade began.

[456] *Id* at 71, 168-69.

[457] For a comparison of judicial treatment of retrial petitions in Japan with treatment of federal habeas corpus in the United States, *see* Foote, *supra* note 1.