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"THE DOOR THAT NEVER OPENS"?: CAPITAL PUNISHMENT AND POST- CONVICTION REVIEW OF DEATH SENTENCES IN THE UNITED STATES AND JAPAN

*Daniel H. Foote**

PREFACE

I begin this article with a short cautionary tale regarding the perils of legal scholarship in a constantly changing world. I started the research that led to this article in 1984, when I was in Japan on a Fulbright Fellowship. In earlier years, Japan's system governing criminal retrials was widely referred to as "the door that never opens (*akazu no mon*)";¹ the standards were interpreted so strictly that virtually no petitioner could obtain a new trial.² In 1975, however, the Japanese Supreme Court issued a decision relaxing the retrial standards;³ and in 1983 Menda Sakae, after spending nearly thirty-two years on death row, became the first death row inmate to bene-

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Except where citing to works published in English, throughout this article I have followed traditional Japanese order for personal names—*i.e.*, family name first, followed by given name. Unless otherwise noted, all translations from the original Japanese sources contained herein are mine. In citing to cases, I have included the names of the parties if the names appear in the case report.

1. See SAISHIN [RETRIALS] 1 (Nihon bengoshi rengōkai-hen [Japan Fed'n of Bar Ass'ns] ed. 1977).

2. See *infra* text accompanying notes 261-98.

3. See *infra* text accompanying notes 340-49.

fit directly from that relaxation by winning acquittal following a new trial.⁴ Thus, when I began my research Japan had just experienced a great liberalization in opportunities for post-conviction review. I described that liberalization in the first draft of this article, which I completed in 1986. In reviewing the impact of the change, though, I concluded that draft by observing that the "door" to retrials in Japan still remained much smaller than the "door" to federal habeas corpus in the United States.

Soon thereafter, I returned from Japan and joined private practice. Despite the best of intentions, I never finalized the article. By late 1988, when I entered academia and again began to think seriously about the topic, the balance had shifted. While the new retrial standards had taken root in Japan, the United States Supreme Court had begun a campaign to tighten the limits on habeas.⁵ When I re-examined my draft at that time, I envisioned a major revision in which I would describe how the two systems, despite very different underlying premises, seemed to be on a convergence course.

Other projects intervened, and by the time I was able to update my research and finalize this article for submission to law reviews, the balance had shifted yet again. Japan's standards had remained generally stable, and over the intervening years three other death row inmates had joined Menda in winning acquittals following new trials.⁶ Further decisions by the United States Supreme Court, however, threatened to render federal habeas "the door that never opens." Those decisions appeared to leave the door open at least a crack for cases involving vindication of "actual innocence."⁷ Yet as I was working on my final revisions prior to publication, the Rehnquist Court issued its decision in *Herrera v. Collins*,⁸

4. See *infra* text accompanying notes 372-81.

5. See *infra* text accompanying notes 112-226.

6. See *infra* text accompanying notes 382-409. For detailed descriptions of *Menda* and the other so-called death penalty retrial cases, see Daniel H. Foote, *From Japan's Death Row to Freedom*, 1 PAC. RIM L. & POL'Y J. 11 (1993).

7. See *infra* text accompanying notes 194-97.

8. 113 S. Ct. 853 (1993). See *infra* text accompanying notes 198-213.

closing even that gap and leaving federal habeas, more than ever, "the door that never opens."

This cautionary tale carries one simple and obvious lesson, which can be summed up by a slight variation on an old adage: never put off until tomorrow an article you could write today. The account, of course, carries a deeper lesson as well. At the same time that Japan moves away from use of the death penalty, along with most of the rest of the world, and toward ever greater care in those isolated instances when it is applied, the United States finds itself as a rare exception travelling in the opposite direction.

I. INTRODUCTION

In the field of capital punishment, the United States and Japan share many features. They are two of only a handful of developed nations in the world that retain the death penalty.⁹ In each nation, movements to abolish capital punishment gained strength in the 1960s and 1970s, and then faded. Moreover, in both the United States and Japan abolition advocates achieved initial success at the judicial level; but the Supreme Courts of both nations have since considered, and rejected, attempts to invalidate capital punishment as a system.

These losses by abolition advocates have not stopped individuals facing death sentences from seeking to prevent—or at least delay—their own executions in any way they can. Challenges to individual convictions and sentences abound. Both nations have witnessed the use of repeated requests for review and for clemency, in many cases apparently instituted whenever the possibility of execution draws near. This, in turn, has led to long delays in the execution of death sentences, with some convicts spending years or even decades on death row—on occasion even dying of natural causes before the executions can be carried out. Under these circumstances, the Supreme Courts of both nations have faced calls for reconsider-

9. See generally Joan Fitzpatrick & Alice Miller, *International Standards in the Death Penalty: Shifting Discourse*, 19 BROOK. J. INT'L L. 273 (1993).

ation and revision of the standards permitting review of capital sentences. With individual Justices playing key roles in instigating changes, both Supreme Courts have responded by altering the existing standards.

There the similarities end. In the United States, recent decisions by the Supreme Court involve a tightening of the limits on federal habeas corpus review of capital sentences. As a consequence, recent legislative attempts to limit capital review—attempts that Chief Justice William H. Rehnquist has actively promoted and vocally supported—seem almost redundant. In contrast, the Supreme Court of Japan has loosened the requirements for obtaining retrials, thereby enabling several death row inmates to obtain long-sought rehearings. In four highly celebrated cases over the last few years, these retrials in turn have resulted in the acquittal of four capital convicts, who collectively had spent well over one hundred years on death row.

The impact of those cases on the public consciousness has resulted in perhaps the most striking difference between the United States and Japan. In the United States in recent years, capital punishment has largely been staked out as an issue by the political right. Conservatives have stressed the image of death row inmates and their “do-gooder” attorneys “frustrating” the purposes of the law and the wishes of the community. In sharp contrast, the specter of these four wrongfully convicted individuals, each of whom spent virtually his entire adult life on death row before finally obtaining release, has had virtually the opposite impact in Japan. Those cases have spurred debate over numerous aspects of the criminal justice system and considerable soul searching by members of the procuracy and the judiciary. To date, there have been few concrete changes. Yet, as of this writing, the movement to abolish Japan’s death penalty has taken on new strength, in part due to the active involvement of a former Supreme Court Justice affected by his own experience in handling retrial cases.

The capital punishment system and current standards for collateral review of capital sentences appear quite similar in the United States and Japan. On a deeper level, though, the

systems are moving in very different directions. Given the extensive literature on capital punishment and capital habeas in the United States,¹⁰ this article focuses chiefly on Japan, examining the process by which the standards governing post-conviction review have been relaxed and the impact of that change. Japan's Supreme Court bears the image of being a highly conservative, passive institution resistant to dramatic change of any sort.¹¹ Yet this examination reveals that, in the area of post-conviction review of capital sentences, individual Japanese Justices were able to effectuate changes in standards they believed to be mistaken. At a broader level, this examination also discloses very different attitudes toward the adversary process, the role of courts in criminal proceedings, the notions of speed and finality, and punishment itself in the criminal justice systems of the two nations.

10. As one of the leading commentators on federal habeas has observed, "[a]ny exhaustive bibliography of habeas corpus would itself require an article, if not a book." Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 17 n.43 (1986) [hereinafter Berger, *Dead End*]. The same is true in spades with respect to capital punishment as a whole. For a partial listing of major works on habeas, see *id.*; Vivian O. Berger, *Justice Delayed or Justice Denied?—A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665, 1672 (1990) [hereinafter Berger, *Justice*]. With regard to capital punishment generally, see MICHAEL L. RADELET & MARGARET VANDIVER, *CAPITAL PUNISHMENT IN AMERICA: AN ANNOTATED BIBLIOGRAPHY* (1988).

11. See Yasuhiro Okudaira, *Forty Years of the Constitution and Its Various Influences: Japanese, American, and European*, 53 LAW & CONTEMP. PROBS. 17, 37, 38 (1990) ("[N]egativism in judicial review is one of the most characteristic features of the Japanese Supreme Court [T]here is a general tendency for the Supreme Court to avoid constitutional judgments as much as possible."); Nobuyoshi Ashibe, *Human Rights and Judicial Power*, in CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA 224-61 (Lawrence W. Beer ed., 1992) ("Judicial passivity has been too great in Japan. Too much modesty has been shown and too much deference has been paid to the policy makers of the legislative and executive branches."); HIROSHI ITOH, *THE JAPANESE SUPREME COURT: CONSTITUTIONAL POLICIES* 159-247 (1989) (chapters discussing the "self-restrained Supreme Court" and the "conservative Supreme Court").

II. CAPITAL PUNISHMENT IN THE UNITED STATES AND JAPAN

This section examines trends in the use of capital punishment and legal battles over the constitutionality of capital punishment in the United States and Japan, focusing on the two nations in that order. This account reflects significant parallels: wide use of the death penalty in earlier times, followed by a period of gradually declining use and increasing calls for abolition; and judicial decisions casting doubt on the death penalty's constitutionality, followed by stern re-affirmation of the constitutionality of capital punishment by the respective Supreme Courts. The description also reveals one important difference: whereas Japan's use of the death penalty continues on a downward trend today, death sentences and executions are both on the rise in the United States.

A. *The United States*

As with other aspects of substantive criminal law in the United States, capital punishment is primarily a creature of state law. A handful of states abolished capital punishment in the mid-1800s and a few more joined them in the early 1900s.¹² For most states, however, capital punishment has been a standard feature of the criminal justice system throughout much of their history. The roots of capital punishment in the United States can be traced back to the influence on the colonies of the English law in the eighteenth century,¹³ when over one hundred types of crimes—including a wide range of property offenses—were subject to the death penalty.¹⁴ Despite wide variations among the states, capital punishment was once the mandatory penalty for a wide range of crimes in most states.¹⁵ Over the years, the death penalty became dis-

12. See *THE DEATH PENALTY IN AMERICA* 21-23 (Hugo A. Bedau ed., 3d ed. 1982).

13. See *id.* at 6-9.

14. See WILLIAM J. BOWERS, *EXECUTIONS IN AMERICA* 169-72 (1974).

15. *THE DEATH PENALTY IN AMERICA*, *supra* note 12, at 6-9.

cretionary, the list of crimes punishable by death was gradually reduced, and the number of crimes for which the death penalty was actually imposed dropped sharply.¹⁶

Even though the United States was in the middle of a period of gradually declining use of the death penalty,¹⁷ as late as 1951 there were over one hundred executions¹⁸ in the United States. By the late 1950s, movements to abolish the death penalty legislatively had gained strength in many states.¹⁹ In the 1960s, attacks on the death penalty through the judicial process began. These litigational challenges initially stemmed from efforts by the NAACP Legal Defense Fund, Inc., to invalidate the death penalty for rape on the basis of racial disparity in application, but soon extended to attacks on numerous other fundamental aspects of capital punishment.²⁰ This litigation campaign resulted in a de facto moratorium on executions between 1967 and 1976,²¹ a period during which the Supreme Court issued several key rulings on the death penalty.

In *Witherspoon v. Illinois*²² in 1968, a majority of the Warren Court expressed doubts about the propriety of capital punishment but did not directly address its constitutionality.²³ Then, in the 1972 decision in *Furman v. Georgia*,²⁴ five Justices on the Burger Court agreed that the death penalty constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Although none of the five could agree on the rele-

16. See THE DEATH PENALTY IN AMERICA, *supra* note 12, at 6-12; BOWERS, *supra* note 14, at 4-12, 43-56.

17. See THE DEATH PENALTY IN AMERICA, *supra* note 12, at 22-26.

18. See THE DEATH PENALTY IN AMERICA, *supra* note 12, at 25.

19. See THE DEATH PENALTY IN AMERICA, *supra* note 12, at 22.

20. See, e.g., BOWERS, *supra* note 14, at 13-16; Jack Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908 (1982).

21. See THE DEATH PENALTY IN AMERICA, *supra* note 12, at 24; Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1745-46 (1987).

22. 391 U.S. 510 (1968).

23. See Burt, *supra* note 21, at 1746-50.

24. 408 U.S. 238 (1972).

vant grounds, advocates on both sides of the abolition debate saw *Furman* as effectively barring the death penalty for the foreseeable future.²⁵ The four dissenters were not so sure. Two of them indicated personal doubts about the death penalty,²⁶ but all agreed that the matter was for state legislatures to decide, not the Court. Moreover, as Chief Justice Burger stated in his dissent, the opinions of at least two members of the majority left a possible route open for state legislatures to enact constitutionally valid capital punishment schemes, "by providing standards for juries and judges to follow in determining the sentence in capital cases, or by more narrowly defining the crimes for which the penalty is to be imposed."²⁷

Furman was seen by many scholars and politicians as an unwarranted intrusion on legislative prerogatives.²⁸ Rather than serving as an affirmation of the trend toward abolition, the decision generated a strong backlash.²⁹ Within a year after *Furman* was announced, twenty states had adopted new death penalty statutes.³⁰ Although the Supreme Court invalidated schemes that sought to make capital punishment mandatory for certain specified crimes,³¹ in the 1976 decision in *Gregg v. Georgia*³² a seven member majority upheld the con-

25. See FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 37-38 (1986).

26. See 408 U.S. at 375 (Burger, C.J., dissenting) ("If we were possessed of legislative power, I would . . . at the very least, restrict the use of capital punishment to a small category of the most heinous crimes."); *id.* at 405-06 (Blackmun, J., dissenting) ("I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence for the death penalty . . .").

27. *Id.* at 400 (Burger, C.J., dissenting).

28. See ZIMRING & HAWKINS, *supra* note 25, at 38-45.

29. See ZIMRING & HAWKINS, *supra* note 25, at 38-45.

30. See THE DEATH PENALTY IN AMERICA, *supra* note 12, at 22.

31. See *Woodson v. North Carolina*, 428 U.S. 280 (1976) (for first-degree murder); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (same).

32. 428 U.S. 153, 157 (1976) (the Georgia scheme provided for a bifurcated procedure, with a penalty stage separate from the determination of guilt; permitted the sentencing jury to consider both mitigating and aggravating circumstances; required the jury to find one or more of certain specified aggravating circumstances to impose the death penalty; and called for automatic review of all death sentences by the state supreme court).

stitutionality of capital punishment statutes that contain properly drawn standards to guide juries and judges in their sentencing decisions. In announcing the judgment, Justice Potter Stewart stated that "[t]he death penalty is said to serve two principal social purposes: retribution and deterrence"³³ The Court then deferred to the state legislature's decision regarding whether the death penalty actually serves those purposes, and to the state's judgment on the social utility of capital punishment.³⁴

Since *Gregg* the Court has faced numerous issues regarding the permissible scope of capital punishment, and the cases have often generated great divisions among the Justices.³⁵ Nevertheless, a solid majority has been in agreement that the death penalty per se is not unconstitutional.³⁶ States may, of course, choose to abolish capital punishment if they wish, but under current case law that is a legislative matter, not a requirement of the United States Constitution.

In fact, the trend in the United States since *Gregg* has been toward ever greater use of the death penalty. Thirty-seven states now have a death penalty,³⁷ and Congress has recently reintroduced the death penalty for certain federal crimes.³⁸ Since 1984, the number of executions has been in the low double digits each year,³⁹ rising to a post-*Furman* high of thirty-one in 1992.⁴⁰ Yet the number of prisoners facing death sentences has been rising steadily. As of January 15, 1993, 2676 inmates were on death row throughout the United

33. *Id.* at 183.

34. *Id.* at 183-87.

35. See generally Burt, *supra* note 21.

36. See Burt, *supra* note 21.

37. See ZIMRING & HAWKINS, *supra* note 25, at 43.

38. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4387 (murders committed in connection with narcotics offenses).

39. See U.S. BUREAU OF JUSTICE STATISTICS, STATISTICAL ABSTRACT OF THE UNITED STATES 1992, Table 335, at 200 (between 1984 and 1990, number of executions ranging from low of 11 in 1988 to high of 25 in 1987).

40. Telephone Interview with John Lamson, Death Penalty Information Center, Washington, D.C. (Feb. 22, 1993).

States.⁴¹ For many of them, appeals and petitions for post-conviction collateral review have delayed executions for considerable periods.⁴² With the recent cutbacks in availability of federal habeas described in Section III(A) below,⁴³ however, it seems only a matter of time before far larger numbers of prisoners will be put to death.

B. Japan

The early history of capital punishment in Japan bears many striking parallels to that in the West. One of the earliest written records in Japan, the *Kojiki*, dating from the seventh century, contains references to the death penalty; records reveal use of the death penalty during each dynasty from then through the Nara period in the early ninth century. At that point, however, an unusual development occurred: executions ceased. Partly due to the influence of Chinese Buddhist teachings from 810 through 1156, the death penalty reportedly was imposed on only two occasions, both involving leaders of the defeated Taira clan.⁴⁴ Although the death penalty was never formally abolished, during that period all other cases in which the death sentence might legally have been imposed were commuted to exile or other lesser punishments.⁴⁵

As though to make up for lost time, during most of the succeeding seven centuries of samurai rule, stretching from the Kamakura period (beginning in the late twelfth century) through the Tokugawa era (ending in 1867), the death penalty seems almost to have become the punishment of choice in Japan. For much of that time, nearly all crimes from petty larceny and fraud to murder were punishable by death,⁴⁶ the

41. *Id.*

42. See *infra* text accompanying notes 109-19.

43. See *infra* text accompanying notes 96-226.

44. See ISHII RYOSUKE, HOSEISHI [LEGAL HISTORY] 76 (Taikēi Nihonshi sōsho 4 [4 Systematic Japan History Series], 1964); DANDŌ SHIGEMITSU, SHIKEI HAISHIRON [THE ABOLITION OF THE DEATH PENALTY] 152-53 (2d ed. 1991).

45. See DANDŌ, *supra* note 44, at 152-53.

46. See, e.g., Tsujimoto Yoshio, *Shikei seido no hajimari (Nihon)—jinshin no kōhai ni tomonau zankoku na keibatsu* [The Beginnings of the Death Penalty. Sys-

arsenal of execution methods was elaborate and severe, including boiling, burning, crucifixion, and several levels of beheading.⁴⁷

Numerous revisions to the penal standards accompanied the opening of Japan in the Meiji era, which began in 1868. These revisions included eliminating many of the most common crimes, including fraud and larceny, from the list of offenses punishable by death, as well as establishing hanging as the sole method for execution.⁴⁸ Still, during the early Meiji era hundreds of people were executed each year.⁴⁹

With the enactment of the current Penal Code in 1907,⁵⁰ the number of crimes punishable by death was further reduced to a total of thirteen—where the number stands today.⁵¹ The

tem (Japan)—Cruel Punishment Accompanying the Devastation of Human Feeling], in HOGAKU SEMINĀ ZŌKAN, SŌGŌ TOKUSHŪ SHIRIZU 46, SHIKEI NO GENZAI [HOGAKU SEMINAR EXTRA NUMBER, THE DEATH PENALTY TODAY] [hereinafter THE DEATH PENALTY TODAY] 236-37 (1990). During at least the latter half of the Tokugawa era, from the early eighteenth century through 1867, however, minor thefts were not punishable by death, and officials reportedly deliberately charged many offenders with lesser crimes than actually committed in order to avoid the death penalty, HIRAMATSU YOSHIRO, KINSEI KEIJISOSHŌHŌ NO KENKYŪ [RESEARCH ON CRIMINAL PROCEDURE OF THE RECENT ERA] 833-34 (1960), summarized and translated in part in *Summary of Tokugawa Criminal Justice*, 22 LAW IN JAPAN 105 (1989).

47. See Tsujimoto, *supra* note 46, at 236. Apart from simple beheading, the penalty of beheading could be enhanced by, for example, parading the convict through the streets before the execution or displaying the convict's head on a pike after the execution. See FUSE YAHÉJI, SHŪTEI NIHON SHIKEISHI [HISTORY OF THE DEATH PENALTY IN JAPAN] 44-45 (rev. ed. 1983).

48. See Tsujimoto, *supra* note 46, at 237.

49. See DANDŌ, *supra* note 44, at 280-81, 284-85; Miyazawa Setsuo, *Keiji seido o sūji de miru me* [Looking at the Criminal System Through Numbers], 427 HOGAKU SEMINĀ 32, 53 (1990).

50. KEIHŌ [PENAL CODE], Law No. 45 of 1907.

51. Tsujimoto Yoshio, *Shikei ni ataru tsumi—Nihon de wa satsujin, sekai de wa tasai* [Crimes Punishable by Death—in Japan Murder, Worldwide Varied] [hereinafter *Crimes Punishable by Death*], in THE DEATH PENALTY TODAY, *supra* note 46, at 238. The thirteen, with the respective articles in the Penal Code, Keihō, are: insurrection, art. 77(1); causing a foreign state to use armed force against Japan, art. 81; entering into military service of a foreign state against Japan, art. 82; arson of structure where persons are present, art. 108; destruction by explosives, art. 117(1); causing inundation of structure where persons are present, art. 119; causing death by overturning train, etc., art. 126(3); aggravated crime of endangering traffic, thereby causing death, art. 127; poisoning or polluting water,

Juvenile Act, enacted in 1948, exempts from the death penalty crimes committed by juveniles under eighteen years of age.⁵² Otherwise, the postwar legal reforms did not address the death penalty directly. Article 36 of the postwar Constitution, however, prohibits "cruel punishments."⁵³ Based in large part on this provision, defense counsel in an early postwar case argued that the death penalty was unconstitutional. In a 1948 judgment, the Supreme Court sitting *en banc* rejected that claim.⁵⁴ Early in its opinion, the Court stated, "Human life is precious. The life of a single person is worth more than the entire world."⁵⁵ But the Court went on to hold:

The death penalty, through its power of intimidation, provides general deterrence; the execution of death sentences eliminates a certain form of social evil; and in these ways the death penalty seeks to protect society. Moreover, the death penalty gives priority to a collective view of morality over an individual view of morality. We affirm the need for continuation of the death penalty system in order to promote the public welfare of society.⁵⁶

The decision was unanimous, although four of the fifteen justices joined in a supplementary opinion suggesting that the time might come when the death penalty would no longer be needed for deterrence, and that, at such time, capital punishment might be declared unconstitutional as a cruel punishment.⁵⁷

thereby causing death, art. 146; homicide, art. 199; killing an ascendant, art. 200; robbery causing death, art. 240; and robbery and rape causing death, art. 241. A few other crimes, such as causing death in the course of an airline hijacking and murdering a hostage, are specified as punishable by death under special penal statutes. See *Crimes Punishable by Death, supra*.

52. SHONENHO [JUVENILES ACT], Law No. 168 of 1948, art. 51.

53. KENPO [CONSTITUTION], art. 36.

54. Judgment of March 12, 1948 (*Murakami v. Japan*), Saikōsai [Supreme Court], 2 Keishū 191 (Grand Bench), translated in JOHN M. MAKI, COURT AND CONSTITUTION IN JAPAN 156 (1964).

55. *Murakami*, 2 Keishū at 193.

56. *Id.* at 194.

57. *Id.* at 196.

Despite these and other judicial pronouncements upholding the death penalty,⁵⁸ a movement to abolish capital punishment arose during the early postwar years.⁵⁹ This movement had its roots in the early Meiji era; however, from about 1910 through the end of World War II, it fell largely silent. Then, in part based on the view that abolition accorded with the spirit of freedom and democracy in postwar Japan, the movement redeveloped, taking on considerable strength after 1955.⁶⁰ In 1963 a panel considering revision of the Penal Code prepared a draft calling for further reductions in the number of crimes subject to the death penalty, and for special care in applying the death penalty.⁶¹ In 1967 the Legislative Council (*hōsei shingikai*) considered calling for abolition of the death penalty. While ultimately rejecting that position, in part on the basis of a public opinion poll showing that seventy percent of those questioned support the death penalty, the Council also recommended limiting the number of crimes punishable by death.⁶²

These proposals were never adopted by the Diet. However, during the postwar years, imposition of the death penalty in Japan has, in practice, been limited almost entirely to the

In 1955, the Supreme Court, in another *en banc* opinion, rejected a claim that Japan's sole method of execution—hanging—constituted cruel punishment. Judgment of April 6, 1955 (*Hirasawa v. Japan*), Saikōsai [Supreme Court], 9 Keishū 663 (Grand Bench).

58. For a list of key judicial precedents regarding the death penalty, see Yokomizo Hideki, *Jūyō hanrei gaido—shikei* [Guide to Important Precedent—The Death Penalty], in THE DEATH PENALTY TODAY, *supra* note 46, at 272.

59. The history of the abolition movement is described concisely in Fujioka Ichirō, *Nihon gyōkeishi no naka no shikei haishi no shisō to tatakai* [The Thinking and the Struggle for Abolition of the Death Penalty in Japan's Penal History] [hereinafter *Japan's Penal History*], in THE DEATH PENALTY TODAY, *supra* note 46, at 197, 200-04.

60. See *id.* See generally MIHARA KENZŌ, SHIKEI HAISHI NO KENKYŪ [RESEARCH ON ABOLITION OF THE DEATH PENALTY] [hereinafter ABOLITION OF THE DEATH PENALTY] (1990).

61. *Japan's Penal History*, *supra* note 59, at 203.

62. See DANDŌ, *supra* note 44, at 240-41 (describing his criticisms, as a member of the Legislative Council, of the manner in which the relevant questions in the opinion poll were posed).

crimes of murder, robbery-murder, and rape-murder.⁶³ Moreover, the number of convicts sentenced to death in Japan dropped steadily during most of the postwar period, from an average of over seventy a year between 1946 and 1950 to an average of under six per year between 1971 and 1980.⁶⁴ Similarly, the number of executions, which had reached as many as thirty-nine in both 1957 and 1960, dropped to only one each year from 1979 through 1984.⁶⁵

Given these circumstances, some critics of the death penalty voiced hope that a 1981 judgment by the Tokyo High Court might effectively signal an end to the death penalty's use in Japan.⁶⁶ In that case, the defendant, Nagayama Norio, had been charged with a series of four separate brutal murders, all committed in cold blood during a month-long period in late 1968.⁶⁷ The District Court found Nagayama guilty as charged and sentenced him to death.⁶⁸

Under sentencing practices that prevailed at the time, the District Court's sentence seemed foreordained.⁶⁹ On appeal, however, the Tokyo High Court reduced Nagayama's sentence to life imprisonment.⁷⁰ The court found various extenuating circumstances⁷¹ and concluded that "it is too harsh to apply

63. See *Crimes Punishable by Death*, *supra* note 51, at 238 (technically, the latter two crimes are "robbery resulting in death" and "rape resulting in death").

64. See DANDŌ, *supra* note 44, at 280-81.

65. See DANDŌ, *supra* note 44, at 284-85.

66. See, e.g., MURANO NOBORU, SHIKETTE NAN DA [WHAT IS THE DEATH PENALTY?] 98 (1992) (decision was seen as possible opportunity for ending the death penalty as a practical matter).

67. In each of the murders Nagayama allegedly had shot the victim multiple times in the face and head with a handgun—despite, in at least one case, pleas for mercy by the victim. See Judgment of July 8, 1983 (Japan v. N), Saikōsai [Supreme Court], 37 Keishū 609, 614 (2d Petty Bench).

68. Judgment of June 10, 1979, Chisai [District Court] (Tokyo) (unreported case).

69. At the time, multiple murders, especially if premeditated, were almost certain to warrant the death penalty. See, e.g., DANDŌ, *supra* note 44, at 254-55 (from District Court's perspective, the defendant may have had an unfortunate upbringing, but under the circumstances there was no question that the death penalty would apply).

70. Judgment of Aug. 21, 1981, Kōsai [High Court], 1019 HENREI JIHŌ [HANJI] 20 (Tokyo).

71. These included findings that Nagayama was only 19 at the time of the of-

the death sentence to defendant, and is more appropriate to have him devote the rest of his life to atoning for his offenses and praying for the repose of the victims' souls."⁷² The court formally based its reduction in Nagayama's sentence on the extenuating circumstances. But in its reasoning, the court as much as invited the Supreme Court to review the constitutionality of capital punishment.⁷³

Prosecutors immediately appealed the sentence, claiming it was too lenient.⁷⁴ That appeal was assigned to the Second

fenses; had been raised in a "very bad home environment" (with, the court strongly implied, the "government's insufficient social welfare policy" being one of the causes for his criminality), *id.* at 43; had undergone a "remarkable" transformation following his conviction, resulting in part from his marriage to a woman with whom he exchanged letters while in prison; and had sought to console the families of his victims by providing them with the royalties from books he wrote while in prison. *Id.*

72. *Id.*

73. After stating that "under established precedent of the Supreme Court, the death penalty is not in violation of any articles, including article 36 (the prohibition of cruel punishment) of the Constitution," *id.* at 42, the court added:

Assuming there are occasions on which courts should impose the death sentence on given defendants, we believe that such occasions should be limited to those in which the circumstances are of such a degree that any and every court would select the death sentence if faced with the same case. As a legislative matter, the view has been expressed that imposition of the death sentence should require the unanimous agreement of all judges. We believe that that same spirit should be accorded weight in the administration of the current system.

Id. at 43.

74. Prosecutors in Japan have the right to appeal acquittals and sentences they consider too lenient, *KELI SOSHŌHŌ* [CODE OF CRIMINAL PROCEDURE], Law No. 131 of 1948, arts. 351(1), 381, 382 (appeals from trial court decision) [hereinafter *KEISOHŌ*]. Grounds for appeal to the Supreme Court are limited, however. Such appeals normally must be framed either as presenting issues of constitutional error or conflict with prior Supreme Court precedent. *Id.* art. 405. The Supreme Court may, in its discretion, decide to review other cases if it feels that they contain important matters relating to statutory interpretation, *id.* art. 406, and may reverse lower court opinions if it concludes that they are "patently unjust," with one of the specified categories for such "injustice" being "grossly improper sentencing determinations." *Id.* art. 411. To date, the *Nagayama* case is the only one in which the Supreme Court has ever reversed a sentence for being too lenient. See *MAINICHI SHINBUN SHAKAIBU* [SOCIETY SECTION OF THE MAINICHI NEWSPAPER], *KENSHŌ—SAIKŌSAIBANSHO—HŌFUKU NO MUKŌ DE* [INVESTIGATIVE INSPECTION: THE SUPREME COURT—BEHIND THE JUDICIAL ROBES] 33 (1991).

Petty Bench of the Supreme Court.⁷⁵ Recognizing that the High Court decision cast doubt over the continued applicability of the death penalty, lower courts considering potential death penalty cases refrained from issuing judgments until the Supreme Court addressed the case.⁷⁶ Moreover, at the Supreme Court level, each of the three Petty Benches held all pending appeals in death penalty cases while the case was under review.⁷⁷ Thus, it is clear that the judiciary recognized *Nagayama* as a potential watershed decision.

Under the Court Organization Act,⁷⁸ if one Petty Bench is planning to issue an opinion that conflicts with prior Supreme Court precedent, it must refer the case to the so-called Grand Bench—the entire Court sitting *en banc*—for decision.⁷⁹ Even when a Petty Bench is not planning to diverge from established precedent, the Court's rules call for a Petty Bench to refer a case to the Grand Bench if it concludes that the case presents important issues worthy of consideration by the full Court.⁸⁰ In *Nagayama*, the Second Petty Bench took an intermediate course. It did not formally refer the case to the Grand Bench. Behind the scenes, however, the Justices from the two other Petty Benches were consulted as to their views on the case.⁸¹ Apparently, only after the Second Petty Bench had obtained consensus from the Court as a whole did it issue its decision in the matter.

75. The Japanese Supreme Court is composed of fifteen justices, separated into three Petty Benches of five justices each. Cases are normally assigned to the Petty Benches equally, without regard to the field of law involved. The Petty Benches decide most cases themselves, but, as described below, certain classes of cases are referred to the Court sitting *en banc*—the so-called Grand Bench—for decision by the entire Court. See ITOH, *supra* note 11, at 74-75.

76. See Iimuro Katsuhiko, *Nayamanaku natta saibankan* [Judges Who Stopped Worrying] [hereinafter *Judges Who Stopped Worrying*], in THE DEATH PENALTY TODAY, *supra* note 46, at 106-07.

77. See *id.*; MAINICHI SHINBUN SHAKAIBU, *supra* note 74, at 35.

78. SAIBANSHOHŌ [COURT ORGANIZATION ACT], Law No. 59 of 1947.

79. *Id.* art. 10, item 3.

80. SAIKŌSAIBANSHO SAIBAN JIMU SHORI KISOKU [SUPREME COURT RULES FOR HANDLING JUDICIAL MATTERS], S. Ct. R. 6, art. 9 (2), item 3 (1947).

81. See DANDŌ, *supra* note 44, at 248; MAINICHI SHINBUN SHAKAIBU, *supra* note 74, at 33-36, 50-51.

That decision reaffirmed the continued constitutionality of the death penalty. While agreeing with the High Court that capital punishment must be applied very carefully, the Supreme Court held that:

Under the current penal system, the death penalty can be imposed on a defendant whose culpability is so weighty as to necessitate that maximum penalty for the purposes of justice as well as general deterrence, taking into consideration the nature, motive and modus operandi of the offense (especially the persistency and brutality of the act of killing), the seriousness of the consequences (especially the number of murder victims), the feelings of the victims' families, the effect on society, the age and prior record of the defendant, and the circumstances subsequent to the commission of the offense.⁸²

After sharply criticizing most of the High Court's findings on extenuating circumstances,⁸³ the Supreme Court reversed

82. Judgment of July 8, 1983 (Japan v. N), Saikōsai [Supreme Court], 37 Keishū 609, 613 (2d Petty Bench).

83. In the view of the Supreme Court, the High Court was wrong to place weight on Nagayama's age. Given the motives—robbery or concealing other offenses—and persistency of the offenses, these were crimes of an adult, not a juvenile. *Id.* at 615. Nor was the Supreme Court convinced by the arguments concerning Nagayama's upbringing. Nagayama may have grown up in a bad environment, but so did his brothers, and they turned out fine. *Id.*

Furthermore, it is not proper to correlate the defendant's offenses directly with the governmental social welfare policy. The defendant has persisted in his buckpassing attitude, asserting before the courts as well as in his writings that it was not him, but his parents and brothers, the society and the government who should be blamed for the offenses.

Id.

The Court also found it improper to place much weight on Nagayama's marriage or his payments to the victims' families, observing, "Indeed, [two families] have rejected any consolation money from the defendant. [One family] even says that it would never forgive him for any reason whatsoever." *Id.* at 614.

As this reflects, views of victims may be considered in assessing penalties in Japan. Cf. JAPAN TIMES WEEKLY INT'L ED., Aug. 6-12, 1990, at 21 (translation of excerpts of article in which investigative writer argues that the amount of compensation money paid to victims' families is often the decisive factor in whether a murderer is sentenced to death in Japan); compare *Payne v. Tennessee*, 111 S. Ct. 2597, 2609 (1991) (overruling prior precedents and permitting reference to impact on victims in a proceeding considering imposition of death penalty).

and remanded for "further thorough consideration."⁸⁴ Given the Supreme Court's reasoning, it is hardly surprising that on remand the High Court sentenced Nagayama to death,⁸⁵ a decision that the Supreme Court later affirmed.⁸⁶

Although praised by a number of scholars for having clarified and somewhat tightened the standards for application of the death penalty,⁸⁷ the Supreme Court's reversal in *Nagayama* served as a forceful reaffirmation of the death penalty. After reaching a low of only two in 1981 (the year the High Court reduced Nagayama's sentence), the number of new death sentences rose to between five and ten each year from 1983 (the year the Supreme Court reversed) through 1988. The number of actual executions, which had dropped to one per year from 1979 through 1984, also rose slightly, to two or three each year from 1985 through 1988.⁸⁸ Any predictions of the demise of the death penalty after the 1981 Tokyo High Court decision were premature.

Despite these figures, and despite the judicial debate engendered by the High Court's decision in *Nagayama*, capital punishment is not a hotly contested, highly controversial issue in Japan. Death sentences are a matter of public record; currently such sentences are given wide press coverage. Yet the actual executions are not publicly announced in Japan, nor are they normally reported by the media. The only official announcement reflecting executions appears in the annual statistics.⁸⁹ Thus, the general public may know that a particular individual has been sentenced to death but is highly unlikely to know whether the execution has actually occurred. In part

84. 37 Keishū at 616.

85. Judgment of March 18, 1987 (Japan v. Nagayama), Kōsai [High Court], 1226 HANJI 142 (Tokyo).

86. Judgment of April 17, 1990 (Nagayama v. Japan), Saikōsai [Supreme Court], 1348 HANJI 15 (3d Petty Bench).

87. See Yokomizo, *supra* note 58, at 274; DANDŌ, *supra* note 44, at 249-50, 257 (expressing view that spirit of the Tokyo High Court's judgment was reflected in Supreme Court's reference to the necessity of applying the death penalty very carefully).

88. See DANDŌ, *supra* note 44, at 280-81, 284-85.

89. See MURANO, *supra* note 66, at 76-77.

because executions remain so completely hidden from public view, capital punishment has not been the kind of topic that generates great public sentiment. For this reason, although public opinion polls continue to show that a substantial majority of the Japanese people favor retaining the death penalty,⁹⁰ this support appears quite passive. In striking contrast to politicians in the United States, most Japanese politicians simply do not regard capital punishment as a significant election issue. In a 1985 survey of members of the Japanese Diet, only four percent of those responding felt that the death penalty issue would have any effect on voters.⁹¹

Since 1988, moreover, the number of death sentences has dropped again to just two or three per year.⁹² And, following just one execution in 1989,⁹³ Japan went over three years without any executions at all, until three prisoners were reportedly executed the same day in late March 1993.⁹⁴ Accordingly, while Japan's Supreme Court has reaffirmed the death penalty's *constitutionality*, and the number of prisoners on death row has gradually increased to fifty-eight,⁹⁵ in practice the imposition of the death penalty has slowed sharply.

90. See Fujiyoshi Kazushi et al., *Yoron chōsa ni okeru shikei* [*The Death Penalty in Public Opinion Polls*], in *THE DEATH PENALTY TODAY*, *supra* note 46, at 150.

91. See MURANO, *supra* note 66, at 70.

92. See DANDŌ, *supra* note 44, at 280-81 (two new death sentences at district court level each year in 1989 and 1990); SAIKŌSAIBANSHO JIMUSŌKYOKU, SHIHŌ TŌKEI NENPŌ, 2 KELJI-HEN, HEISEI 3-NEN [SUPREME COURT GENERAL SECRETARIAT, ANNUAL REPORT OF JUDICIAL STATISTICS FOR 1991, Vol. 2, CRIMINAL CASES] 202 (Table 36-1) (1991) (three new death sentences in 1991).

93. See DANDŌ, *supra* note 44, at 284-85.

94. See, e.g., Yoshiaki Itoh, *Reported Executions Revive Debate Over Capital Punishment: Opponents Decry End to Moratorium*, *THE NIKKEI WEEKLY*, Apr. 5, 1993, at 2 (noting that three executions were reportedly performed, but that Justice Ministry was holding to its policy of refusing to confirm or deny the reports).

95. See, e.g., *Number of Death-row Convicts in Japan Climbs to 58*, Kyodo News Service, Japan Economic Newswire, Feb. 19, 1993 [hereinafter *Number of Death-row Convicts*].

III. POST-CONVICTION REVIEW OF CAPITAL CASES

Despite the efforts of abolition advocates, capital punishment as a system remains in place in both the United States and Japan. Of course, that does not mean that convicts sentenced to death are always content to go quietly to their executions. To the contrary, challenges to the underlying conviction or to the death sentence abound in individual cases, with many capital convicts in each country seeking to prevent or delay their executions in any way they can. In both the United States and Japan, capital convicts and their representatives frequently file petitions for clemency with the appropriate governmental authorities. In addition, they often seek post-conviction review of their cases: in the United States, frequently in the form of petitions for writs of federal habeas corpus; in Japan, typically through requests for retrials. Both nations have witnessed repeated requests for review, at times seemingly instituted in a deliberate attempt to forestall execution. Moreover, courts in both nations have faced strikingly similar questions concerning what grounds are acceptable for such requests and what constitutes abuse of the process. Yet the responses in the two nations have differed dramatically.

The following section examines those responses. It first summarizes important aspects of the United States Supreme Court's habeas jurisprudence, beginning by tracing the liberalization of standards, primarily by the Warren Court. This liberalization was followed by gradual cutbacks which culminated in widespread restrictions on the availability of habeas by the Rehnquist Court. The article then turns to an examination of trends in application of retrial standards in Japan, focusing particularly on the restrictive interpretation of those standards in the first three decades after World War II and the great liberalization engineered by the Supreme Court in decisions issued in 1975 and 1976.

A. *The United States*

The writ of habeas corpus—a legal process, widely referred to as the Great Writ, for reviewing the legality of a person's detention is a fundamental feature of United States law that was brought to the colonies from England and enshrined in the Federal Constitution.⁹⁶ Initially, the federal writ did not extend to prisoners held under state law, who constitute the vast majority of all criminal detainees in the United States.⁹⁷ Following the Civil War, the system of habeas corpus was greatly expanded. The Habeas Corpus Act of 1867, which, with certain procedural amendments, is still in effect today, provided federal courts the “power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States”⁹⁸

That statute plainly was designed to extend the right of federal habeas review to state prisoners in some cases. The precise parameters of review permitted under that statute have shifted significantly over the intervening 125 years, however, and remain the subject of great debate.⁹⁹

A major step in the development of the federal habeas remedy occurred in 1953 in *Brown v. Allen*.¹⁰⁰ Previously, the Supreme Court had recognized use of the writ to remedy certain constitutional violations,¹⁰¹ but had not directly addressed the question of whether federal courts could re-exam-

96. U.S. CONST. art. 1, § 9; see generally Herbert Wechsler, *Habeas Corpus and the Supreme Court: Reconsidering the Reach of the Great Writ*, 59 COLO. L. REV. 167, 168 (1988).

97. See *Ex parte Dorr*, 44 U.S. (3 How.) 103 (1845).

98. Act of February 5, 1867, ch. 28, § 1, 14 Stat. 385 (codified at 28 U.S.C. § 2241-2255 (1988)).

99. See, e.g., Wechsler, *supra* note 96, at 171; Berger, *Justice*, *supra* note 10, at 1672-73 n.47 and sources cited therein.

100. 344 U.S. 443 (1953).

101. See, e.g., Wechsler, *supra* note 96, at 171-75; Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 463-99 (1963); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 610-63 (1982).

ine all constitutional claims, even if the claims had received a prior "full and fair hearing" by a state court. Without intimating that it was expanding the scope of habeas, the Court in *Brown* concluded as a matter of course that the petitioner was entitled to review of his constitutional claims (alleged discrimination in the selection of jurors and admission of an allegedly coerced confession) in habeas. Justice Frankfurter treated this as an issue of statutory interpretation and clear congressional intent:

Congress could have left the enforcement of federal constitutional rights governing the administration of criminal justice in the States exclusively to the State courts. These tribunals are under the same duty as the federal courts to respect rights under the United States Constitution But . . . [Congress having vested jurisdiction to enforce those rights in the federal courts,] it is for this Court to give fair effect to the habeas corpus jurisdiction as enacted by Congress

. . . [I]t would be in disregard of what Congress has expressly required to deny State prisoners access to the federal courts.¹⁰²

A decade later, in *Fay v. Noia*,¹⁰³ the Supreme Court further expanded the scope of habeas by holding that a defendant's failure to exhaust available state remedies would not bar habeas review unless that failure constituted "an intentional relinquishment or abandonment of a known right or privilege . . . [amounting to a] deliberate by-passing of state procedures"¹⁰⁴ This and other Warren Court decisions favorable to habeas petitioners, coupled with that Court's expansion of constitutional rights for suspects and defendants (rights on which habeas petitioners were often entitled to rely), resulted in nearly a tenfold increase in the number of habeas

102. *Brown*, 344 U.S. at 499-500, 509-10 (opinion of Frankfurter, J.).

103. 372 U.S. 391 (1963).

104. *Id.* at 439.

petitions filed in the federal courts by state prisoners during the decade of the 1960s, to over 8400 per year.¹⁰⁵

Although the number of state prisoners has more than doubled since that time, the number of federal habeas petitions has only increased gradually and remains below 10,000 per year today.¹⁰⁶ Moreover, these petitions are by no means all from death row inmates.¹⁰⁷ Nonetheless, as a strong advocate for the rights of capital convicts has observed, "[death-sentenced prisoners] constitute the most serious, persistent, and controversial consumers of habeas corpus, and their efforts—and the efforts of other persons on their behalf—have elicited much attention and, at times, invective over the years."¹⁰⁸ Pointing to successive petitions and resultant delays in executions, conservative critics of the current state of capital punishment have argued that the existing system of habeas review in capital cases has been subject to widespread and deliberate abuse intended to frustrate the administration of justice through endless delaying tactics.¹⁰⁹ Despite counterarguments that the key problems with death penalty review in the United States today involve not delay but rather such matters as inadequacy of counsel, fundamental unfairness at the original trial, and inadequacy of review,¹¹⁰ the deliberate abuse view has taken center stage in the public debate, helping to spur various moves to tighten limits on habeas.¹¹¹

105. See Wechsler, *supra* note 96, at 180 (during the decade of the 1960s, increase from 868 to 8423 petitions per year).

106. See, e.g., Berger, *Justice*, *supra* note 10, at 1669 n.23 (9880 habeas petitions from state prisoners in 1988).

107. Berger, *Justice*, *supra* note 10, at 1665 n.1.

108. Berger, *Justice*, *supra* note 10, at 1667.

109. See, e.g., Berger, *Justice*, *supra* note 10, at 1668-69 and sources cited therein. According to a study conducted in the late 1970s, 30.6% of federal habeas corpus petitioners had previously filed at least one other habeas petition, and over 10% had filed at least two prior petitions. Karen M. Allen et al., *Federal Habeas Corpus and Its Reform: An Empirical Analysis*, 13 RUTGERS L.J. 675, 708-12 (1982). Given later restrictions on the availability of habeas, the figures today would likely be lower. See *The Supreme Court, 1990 Term*, 105 HARV. L. REV. 177, 324 n.41 (1991).

110. See Berger, *Justice*, *supra* note 10, at 1670-72.

111. See, e.g., *infra* text accompanying notes 117-23.

Members of the Supreme Court have been at the forefront of these moves. Over the years, nearly all the Justices in the conservative bloc have expressed frustration with successive petitions and other aspects of habeas.¹¹² The two Justices who have played the most visible roles in moves to restrict federal habeas are Chief Justice Rehnquist and former Justice Lewis F. Powell, Jr. In 1971, while serving as Assistant Attorney General prior to his appointment to the Court, Rehnquist argued for legislative restrictions on the scope of habeas.¹¹³ If anything, his opposition to any expansive interpretation of habeas, especially in capital cases, has hardened since that time.¹¹⁴ Following his appointment as Chief Justice, Rehnquist stepped up his efforts to modify the governing standards. In 1988, under the umbrella of the Judicial Conference

112. For example, Chief Justice Burger, prior to his retirement, commented that "abuse of the Great Writ needs to be curbed so as to limit, if not put a stop to, the 'sporting contest' theory of criminal justice so widely practiced today." *Kuhlmann v. Wilson*, 477 U.S. 436, 461 (1986) (Burger, C.J., concurring). Justice O'Connor, while serving as a state appeals court judge prior to her appointment to the Supreme Court, described federal collateral review of state criminal cases as a "strange" system worthy of reform. Sandra D. O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801 (1981). Justice O'Connor has continued to voice criticisms in judicial decisions since her appointment. See, e.g., *Coleman v. Thompson*, 111 S. Ct. 2546, 2563-64 (1991). And Justice Kennedy has flatly stated, "[i]t is well known 'that prisoner actions occupy a disproportionate amount of the time and energy of the federal judiciary,' . . . and that many of these petitions are entirely frivolous." *Harris v. Reed*, 489 U.S. 255, 282 n.6 (1989) (Kennedy, J., dissenting) (quoting *Rose v. Mitchell*, 443 U.S. 545, 584 (1979) (Powell, J., concurring in judgment)). Some of the harshest language to date came in *Gomez v. United States Dist. Court*, 112 S. Ct. 1652 (1992), where, in connection with an application for a stay by Robert Alton Harris, who previously had filed four federal habeas petitions, the Court in a per curiam opinion stated: "Equity must take into consideration the State's strong interest in proceeding with its judgment and Harris' obvious attempt at manipulation There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process." *Id.* at 1653.

113. See *Speedy Trial Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 264, 269 (1971) (letter from William Rehnquist, Ass't Att'y Gen., to Sen. Sam Irvin, Subcomm. Chair), quoted in Wechsler, *supra* note 96, at 181.

114. See generally Berger, *Justice*, *supra* note 10, at 1669, 1675-76; Alan I. Bigel, *Rehnquist on Capital Punishment*, 17 OHIO N.U. L. REV. 729 (1991).

of the United States, he appointed the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, "to inquire into 'the necessity and desirability of legislation directed toward avoiding delay and the lack of finality' in capital cases" ¹¹⁵ He named former Justice Powell to chair that committee (hence the committee's popular name). Rehnquist chose four judges from the deep South to serve as members. ¹¹⁶

In reporting back to the Judicial Conference, the Powell Committee criticized the "piecemeal and repetitive litigation of claims" under the existing system, noting that "many capital litigants return to federal court with second—or even third and fourth—petitions for relief."¹¹⁷ The Committee also noted the slow pace of executions in the United States, citing an average time lag between crime and execution of eight years and two months, with the longest case "cover[ing] a period of 14 years and six months," and attributed these delays in large part to

115. *Report on Habeas Corpus in Capital Cases*, 45 Crim. L. Rep. (BNA) 3239 (Sept. 27, 1989) [hereinafter *Powell Committee Report*].

116. The members were Chief Judge Clark of the Fifth Circuit, Chief Judge Paul H. Roney of the Eleventh Circuit, and District Judges William Terrell Hodges of Florida and Barefoot Sanders of Texas. *Id.*

The appointments surely were not the product of coincidence. Over his years on the Court, Powell had voiced increasing frustration with delays in capital cases resulting from repetitive habeas petitions. In his most frequently quoted criticism, Powell (joined by four other Justices) expressed the view that:

A pattern seems to be developing in capital cases of multiple review in which claims that could have been presented years ago are brought forward—often in a piecemeal fashion—only after the execution date is set or becomes imminent. Federal courts should not continue to tolerate—even in capital cases—this type of abuse of the writ of habeas corpus.

Woodard v. Hutchins, 464 U.S. 377, 380 (1984) (Powell, J., concurring in order vacating stay of execution).

The ostensible reason for the appointment of the other Committee members was their "extensive experience with federal review of capital cases." *Powell Committee Report*, *supra* note 115, at 3239. All four judges come from the regions with the greatest numbers of capital sentences. Critics have suggested, however, that the pattern of appointments reflected an aim of limiting habeas, arguing that all four members share "heavily conservative" outlooks. Berger, *Justice*, *supra* note 10, at 1675.

117. *Powell Committee Report*, *supra* note 115, at 3239.

the habeas review process.¹¹⁸ The Committee reserved some of its harshest criticism for the last-minute nature of much capital habeas litigation, concluding that, "[i]n most cases, successive petitions are meritless, and we believe many are filed at the eleventh hour seeking nothing more than delay."¹¹⁹ To meet these perceived problems, the Committee recommended a major overhaul of federal habeas corpus review in capital cases, so as to permit one full opportunity for federal review of claims but stringently limit any successive petitions.¹²⁰

Given the makeup of the Committee, its conclusions were hardly surprising. It did surprise many observers, however, that Rehnquist immediately forwarded the report to Congress, over the opposition of a majority of the Judicial Conference.¹²¹ By doing so, he triggered a fifteen-day period within which the chair of the Senate Judiciary Committee was required, by terms of the Anti-Drug Abuse Act of 1988, to introduce legislation modifying habeas corpus procedure.¹²² The Committee's chair, Senator Joseph Biden, complied by introducing a modified version of the Powell Committee's proposal; and Senator Strom Thurmond introduced a competing bill that reproduced the Committee proposal verbatim.¹²³ While those bills were before Congress, Rehnquist publicly declared his support for the Powell Committee's proposal. In doing so, he stated: "Reasonable people have questioned whether a criminal defendant ought to have as broad a 'second bite at the apple' in the Federal courts as he presently does, but *that is a question of policy for Congress to decide*."¹²⁴

118. *Powell Committee Report*, *supra* note 115, at 3239-40.

119. *Powell Committee Report*, *supra* note 115, at 3240.

120. For a summary of this and a major competing proposal, prepared by the American Bar Association's Task Force on Death Penalty Habeas Corpus, see Berger, *Justice*, *supra* note 10, at 1665 n.3.

121. See, e.g., Berger, *Justice*, *supra* note 10, at 1676 & nn.69-70.

122. See Berger, *Justice*, *supra* note 10, at 1676.

123. See Berger, *Justice*, *supra* note 10, at 1677.

124. William H. Rehnquist, Speech to the American Law Institute (May 15, 1990) reprinted in part in N.Y. TIMES, May 16, 1990, at A14 (emphasis added).

As of this writing, the bills that grew out of that proposal and other competing legislative packages¹²⁵ have yet to be enacted. However, rather than waiting for Congress to resolve this "question of policy," the Supreme Court, with its solidified conservative majority, has largely taken matters into its own hands through restrictive interpretations of several key elements of habeas procedure.¹²⁶ In one of the early decisions restricting federal habeas, *Wainwright v. Sykes*¹²⁷ in 1977, then-Associate Justice Rehnquist noted the sweeping nature in which the Warren Court had expanded the scope of habeas in *Fay v. Noia*. At the time, Rehnquist commented, "[w]e do not choose to paint with a similarly broad brush here."¹²⁸ A skeptic might wonder whether this "choice" was voluntary or was forced on Rehnquist by the absence of a majority willing to join a broader opinion. In any event, in the past few years, as the conservative majority has grown, the Court has begun repainting the world of habeas in broader and broader strokes. It has done so on a number of fronts, as discussed in the following section.

1. Substantive Scope of Reviewable Issues

In *Brown v. Allen*, the Supreme Court took the language of the Habeas Corpus Act at face value in concluding that habeas petitions could be filed with respect to any alleged constitutional violation.¹²⁹ Later, in *Stone v. Powell*,¹³⁰ the Supreme Court backed away from that position when it excluded from federal habeas review Fourth Amendment exclusionary rule claims that had been "fully and fairly litigated" in state court proceedings. Despite predictions by some commentators that *Stone* might represent the first wedge in a gradual restriction of the types of substantive constitutional claims that might be

125. See generally Berger, *Justice*, *supra* note 10.

126. See generally *infra* notes 171, 182-226 and accompanying text.

127. 433 U.S. 72 (1977).

128. *Id.* at 88 n.12.

129. See *supra* text accompanying notes 100-02.

130. 428 U.S. 465 (1976).

raised in habeas,¹³¹ and despite some subsequent proposals for such restrictions,¹³² neither the Powell Committee nor Rehnquist has yet urged such a change. In this context, Rehnquist publicly expressed his disagreement with a proposal by Senator Strom Thurmond that would have excluded from federal habeas review any case that had received a "full and fair adjudication" in state court—albeit while further commenting that "this approach might commend itself some years hence."¹³³ Moreover, in a 1991 decision, *McCleskey v. Zant*,¹³⁴ a solid conservative majority that included Rehnquist announced, "[w]ith the exception of Fourth Amendment violations that a petitioner has been given a full and fair opportunity to litigate in state court [citing *Stone*], the writ today appears to extend to all *dispositive* constitutional claims presented in a proper procedural manner."¹³⁵

Just a year later, the Court granted certiorari in *Withrow v. Williams*,¹³⁶ in which the petitioner warden argued that the scope of the *Stone* exception should be expanded beyond the Fourth Amendment arena to bar habeas review of Fifth Amendment *Miranda* claims that had been fully and fairly litigated in state court. In a five to four decision, the Supreme Court rejected that claim and expressly "declined to extend the rule in *Stone* beyond its original bounds."¹³⁷ It remains to be seen, moreover, how the key adjective "dispositive" in the statement from *McCleskey* quoted above may be interpreted in the future.¹³⁸

131. See, e.g., Peller, *supra* note 101, at 596-602.

132. See, e.g., OFFICE OF LEGAL POLICY, U.S. DEPT OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: FEDERAL HABEAS CORPUS REVIEW OF STATE JUDGMENTS 65-67 (1988) (proposal to exclude *Miranda* and *Massiah* claims from federal habeas review).

133. See Linda Greenhouse, *Rehnquist Urges Curb on Appeals of Death Penalty*, N.Y. TIMES, May 16, 1990, at A1, A18.

134. 111 S. Ct. 1454 (1991).

135. *Id.* at 1462 (citations omitted) (emphasis added).

136. 112 S. Ct. 1664 (1992).

137. *Withrow v. Williams*, 113 S. Ct. 1745, 1750 (1993).

138. Restrictive interpretations of the underlying constitutional rights themselves will of course also effectively limit the availability of habeas.

2. Retroactivity

Regardless of whether the Court further restricts the substantive grounds for habeas, cutbacks at the procedural level have abounded. One major debate has centered over whether prisoners should be permitted to seek habeas on the basis of constitutional standards announced after their convictions have become final.¹³⁹ Decisions dealing with this issue have largely been concerned with seeking to define the proper balance between protecting individual constitutional rights and ensuring finality of criminal proceedings—two themes that permeate the debate over the appropriate limits of habeas. The decisions on retroactivity also highlight two other recurrent themes relating to the proper role of habeas: federal/state comity and the degree of importance to be accorded to questions of factual innocence.

A complicated set of standards on retroactivity evolved under the Warren and Burger Courts.¹⁴⁰ More recent decisions from the Rehnquist Court have sought to simplify those standards, although it is surely not just coincidental that in the process those decisions have sharply limited the ability of habeas petitioners to rely on newly announced constitutional standards. In *Teague v. Lane*,¹⁴¹ Justice O'Connor characterized the purpose of federal habeas review of state proceedings as being one of deterring state courts from committing consti-

139. With the expansion of constitutional rights under the Warren Court, this issue of retroactive applicability took on great importance for defendants whose trials had commenced or whose cases were on direct appeal, as well as for prisoners seeking review in habeas. As the Rehnquist Court has cut back on certain constitutional rights, that issue is likely to decrease somewhat in importance for death-sentenced prisoners, but the converse situation has arisen—i.e., habeas claims based on rights that existed at the time of trial but have since been overturned. In *Lockhart v. Fretwell*, 113 S. Ct. 838 (1993), the Court held that habeas petitioners may not rely on such since-repudiated rights as a basis for ineffective assistance of counsel claims.

140. See generally WAYNE R. LAFAYE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 84-91 (2d ed. 1992).

141. 489 U.S. 288 (1989).

tutional errors.¹⁴² That purpose, she concluded, would not be served by permitting federal habeas courts to reverse prior state court judgments on the basis of a "new rule";¹⁴³ to the contrary, in her view, such reversal would represent an unwarranted intrusion into the state judicial process.¹⁴⁴ As one commentator has observed, subsequent decisions have defined "new rule" so broadly that a habeas petitioner appears to have little basis for a claim unless a state court has failed "to obey the most obvious federal constitutional precedents."¹⁴⁵

Teague and its progeny have recognized two exceptions to this standard: (1) new rules placing "certain kinds of . . . conduct beyond the power of the criminal law-making authority to proscribe"; and, (2) "new procedures without which the likelihood of an accurate conviction is seriously diminished."¹⁴⁶ The former is by its own terms very narrow. The Court has narrowly construed the latter as applying only to " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."¹⁴⁷ Accordingly, in the area of retroactivity the Court appears to have been charting a course that would largely reserve habeas for those claims where an innocent individual was wrongly convicted.¹⁴⁸

142. *Id.* at 306 (plurality opinion).

143. *Id.* at 307.

144. *Id.* at 310. See Joseph L. Hoffman, *Retroactivity and the Great Writ: How Congress Should Respond to Teague v. Lane*, 1990 B.Y.U. L. REV. 183, 204-06.

145. Hoffman, *supra* note 144, at 211 (referring to *Teague v. Lane*, 489 U.S. 288 (1989); *Penry v. Lynaugh*, 492 U.S. 302 (1989); and *Butler v. McKellar*, 494 U.S. 407 (1990)).

146. *Teague*, 489 U.S. at 311, 313.

147. *Saffle v. Parks*, 494 U.S. 484 (1990) (quoting *Teague*, 489 U.S. at 311).

148. See, e.g., Kathleen Patchel, *The New Habeas*, 42 HASTINGS L.J. 941, 993 (1991); *The Supreme Court, 1989 Term*, 104 HARV. L. REV. 43, 318-19 (1990); Bruce Ledewitz, *Habeas Corpus as a Safety Valve for Innocence*, 18 N.Y.U. REV. L. & SOC. CHANGE 415, 416-32 (1990-91).

3. Procedural Default

Another area of debate concerns the proper treatment of procedural default in state courts. In 1963's *Fay v. Noia*,¹⁴⁹ the Supreme Court held that even where a petitioner has failed to comply with reasonable state procedures requiring the assertion of claims, a federal habeas court must consider the merits of federal claims unless there was "an intentional relinquishment or abandonment of a known right or privilege" amounting to a "deliberate by-passing of state procedures."¹⁵⁰

This expansive interpretation has encountered great opposition. One frequently voiced concern is that the standard has undermined interests in finality of criminal proceedings and encouraged piecemeal litigation.¹⁵¹ A second line of attack is based on concerns of federalism and comity. The dissenters in *Fay* highlighted this argument,¹⁵² which recently has taken on increased prominence in opinions of the Supreme Court. The argument is based on a view that the "deliberate bypass" standard condones and even promotes nonutilization of state procedures and reflects a fundamental distrust of the ability and willingness of state court judges to uphold their constitutional duty to apply federal law faithfully.¹⁵³

149. 372 U.S. 391 (1963).

150. *Id.* at 439.

151. See, e.g., Henry Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142, at 160 n.91 (1970) (broad attack on scope of federal habeas generally, with specific reference to *Fay v. Noia* as a "fountainhead of . . . error"); *Wainwright v. Sykes*, 433 U.S. 72, 88-90 (1977).

152. See 372 U.S. at 446-47 (Clark, J., dissenting); *id.* at 464-67 (Harlan, J., dissenting).

153. See, e.g., *Wainwright v. Sykes*, 433 U.S. at 88-89; *Teague*, 489 U.S. at 311 (1989) (O'Connor, J., plurality opinion) (emphasizing intrusiveness on states in context of retroactive application of new constitutional precedents); *Coleman v. Thompson*, 111 S. Ct. 2546, 2565 (1991) ("*Fay* was based on a conception of federal/state relations that undervalued the importance of state procedural rules."); *Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1719-20 (1992) ("[E]ncouraging the full factual development in state court . . . advances comity by allowing a coordinate jurisdiction to correct its own errors Just as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner af-

The deliberate bypass standard did not survive under the Burger Court. In *Wainwright v. Sykes*,¹⁵⁴ the Court held that procedural default bars habeas review unless the petitioner can demonstrate "cause" for the default and actual "prejudice" resulting from it. In subsequent cases, the Court extended the cause-and-prejudice standard to other situations¹⁵⁵ and interpreted the cause requirement quite narrowly.¹⁵⁶ Without seeking to define that concept precisely, the Court provided the following examples of factors that will constitute cause: " 'interference by officials' that makes compliance with the state's procedural laws impracticable,"¹⁵⁷ "a showing that the factual or legal basis for a claim was not reasonably available to counsel,"¹⁵⁸ and "ineffective assistance of counsel."¹⁵⁹

In addition, the Court has announced one exception to its procedural default standard: such default will be excused if a "miscarriage of justice" would otherwise result.¹⁶⁰ In recent years, the Court has made clear that it regards such "fundamental miscarriages of justice" as being limited to "extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime."¹⁶¹ Again, this time in the procedural default area, the Court has largely tied federal habeas to the vindication of factual innocence.

ford the State a full and fair opportunity to address and resolve the claim on the merits.").

154. 433 U.S. 72 (1977).

155. See, e.g., *McCleskey v. Zant*, 111 S. Ct. 1454 (1991) (application to claims of abuse of the habeas writ); *Coleman v. Thompson*, 111 S. Ct. 2546 (1991) (application to failure to pursue right to appeal); *Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715 (1992) (application to failure to develop material facts in state court).

156. See, e.g., *McCleskey v. Zant*, 111 S. Ct. at 1470-72 (construing "cause" for application of "inexcusable neglect" standard).

157. *Id.* at 1470 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).

158. *Murray*, 477 U.S. at 488.

159. *McCleskey*, 111 S. Ct. at 1470 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).

160. *Wainwright v. Sykes*, 433 U.S. at 91.

161. *McCleskey v. Zant*, 111 S. Ct. at 1470; see *Murray v. Carrier*, 477 U.S. at 496 (miscarriage of justice where constitutional violation "has probably resulted in the conviction of one who is actually innocent.").

4. Successive Petitions

In the procedural default cases, comity between federal and state courts constitutes a central concern. That concern is muted when a prisoner has properly complied with all state procedural rules, but then files a series of habeas petitions in federal court following conviction. In some such successive petition cases, the petitioner may re-allege grounds already advanced in prior petitions. In others, the petitioner may raise new claims never before considered by the federal courts. Of course, in any such case a state court might be offended if a federal court disagrees with the state court's judgment on a federal constitutional claim. Yet that is an inevitable consequence of the current system permitting federal collateral review of state court constitutional determinations. It represents a quite different level of intrusion on federalism concerns than that presented in the procedural default situation, where the petitioner has not even accorded the state court an opportunity to consider the federal claims.

The successive petition cases present two additional concerns: 1) over finality, and 2) over piecemeal litigation. Where a petitioner alleges the same claims in successive petitions, she may be getting two or more "bites at the apple." Moreover, if new claims may be raised in subsequent petitions, a petitioner hoping to delay her execution might file a series of petitions, each alleging at most a few claims, rather than consolidating them all into the initial petition. In the new claim situation, as with procedural default, one can further identify two broad classes of cases: those where petitioners deliberately engage in piecemeal litigation by consciously withholding possible claims; and those where the initial failure to assert a claim arises from inadequate counsel, neglect, inadvertence, lack of knowledge, or some other cause. In any of these situations, permitting the successive petition will lead to delay and lessen the degree of finality of judgments.

In 1948 Congress enacted a statute dealing with successive habeas petitions.¹⁶² That statute directly addressed the same claim situation, providing that no federal court need consider an application for a writ of habeas corpus if a federal court previously rejected another habeas claim and the later petition "presents no new ground not theretofore presented and determined."¹⁶³ In its 1963 decision in *Sanders v. United States*,¹⁶⁴ the Supreme Court stated that a federal court might nonetheless be required to consider a subsequent petition asserting a claim that had previously been resolved on the merits if the "ends of justice" so require, giving as an example an intervening change in the law.¹⁶⁵ As noted above, recent Court decisions have virtually barred subsequent petitions seeking retroactive application of new rules.¹⁶⁶ In addition, a plurality of the Court has concluded that a second or successive petition based on a claim that has already been rejected on the merits should not be considered unless the petitioner "supplements his constitutional claim with a colorable showing of factual innocence."¹⁶⁷

Defining the proper standards for successive petitions presenting new claims has proven more problematic. The 1948 statute did not address such "new claim" petitions. Fifteen years later in *Sanders*,¹⁶⁸ the Warren Court established standards for such petitions that closely followed the standards it

162. 28 U.S.C. § 2244, as adopted in 1948, provided:

No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

28 U.S.C. § 2244 (1964).

163. *Id.*

164. 373 U.S. 1 (1963).

165. *Id.* at 17.

166. See *supra* text accompanying notes 139-48.

167. *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986) (opinion of Powell, J.).

168. 373 U.S. 1.

had announced for procedural default earlier that year in *Fay v. Noia*.¹⁶⁹ The Court concluded that federal courts normally must consider the merits of second or successive habeas petitions raising new claims. Based on equitable notions, however, the Court held that a federal court might refuse to entertain a subsequent habeas petition if the prisoner had abused the writ, giving as examples of abuse "deliberately withhold[ing] one of two grounds for federal collateral relief . . . in the hope of being granted two hearings rather than one or for some other such reason . . . [or] deliberately abandon[ing] one of his grounds at the first hearing."¹⁷⁰ The Court then added, "Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless, piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay."¹⁷¹

In 1966 Congress amended the governing statute to deal expressly with the new claim situation.¹⁷² Newly added language closely paralleled the *Sanders* standard, providing that a federal habeas court need not entertain a subsequent habeas petition raising a new claim if the petitioner had "deliberately withheld the newly asserted ground or otherwise abused the writ."¹⁷³ In 1976 Congress again considered the proper standard in the new claim situation when it reviewed a habeas rule proposed by the Supreme Court.¹⁷⁴ The proposed rule would have permitted a judge to dismiss a "new claim" petition

169. 372 U.S. 391 (1963).

170. 373 U.S. at 18; see John B. Morris, Jr., Note, *The Rush to Execution: Successive Habeas Corpus Petitions in Capital Cases*, 95 YALE L.J. 371, 374-76 (1985).

171. 373 U.S. at 18. In discussing the abuse of the writ doctrine, the Court also cited earlier decisions, including one which had referred to "inexcusable neglect" by the petitioner as a proper ground for denying a habeas petitioner an evidentiary hearing (although the *Sanders* Court itself never quoted the phrase "inexcusable neglect"). *Id.* at 18 (citing *Townsend v. Sain*, 372 U.S. 293, 317 (1963)).

172. Act of Nov. 2, 1966, Pub. L. No. 89-711, 80 Stat. 1104.

173. 28 U.S.C. § 2244(b) (1991) (emphasis added).

174. See Steven M. Goldstein, *Application of Res Judicata Principles to Successive Federal Habeas Corpus Petitions in Capital Cases: The Search for an Equitable Approach*, 21 U.C. DAVIS L. REV. 45, 70-73 (1987).

if "the judge finds that the failure of the petitioner to assert those grounds in a prior petition *is not excusable*."¹⁷⁵ Congress rejected the proposal, based on a concern that the highlighted phrase "created a new and undefined standard that gave a judge too broad a discretion."¹⁷⁶ In substituting the phrase "constituted an abuse of the writ," Congress explicitly indicated its intention to codify the *Sanders* standards.¹⁷⁷

That did not end the debate. *Sanders*, after all, did not set out precise standards, but rather used examples and case citations to explain "abuse of the writ." Over the years, conservative Justices have become increasingly vocal in criticizing successive capital habeas petitions raising new claims in a piecemeal fashion.¹⁷⁸ In fact, the Powell Committee recommended a flat ban on successive petitions unless "the facts underlying the [new] claim would be sufficient, if proven, to undermine the court's confidence in the jury's determination of guilt."¹⁷⁹ However, bills incorporating that¹⁸⁰ and other strict limits on successive petitions¹⁸¹ have yet to pass Congress.

In the meantime, the Court itself has established sharp limits on successive habeas petitions. In 1991 *McCleskey v. Zant*¹⁸² treated the issue as a matter of properly defining the doctrine of abuse of the writ in accordance with "a complex and evolving body of equitable principles."¹⁸³ Despite Congress'

175. See H.R. REP. NO. 94-1471, 94th Cong., 2d Sess. 8 (1976), reprinted in 1976 U.S.C.C.A.N. 2478, 2485 (emphasis added).

176. H.R. REP. NO. 94-1471, *supra* note 175, at 5, reprinted in 1976 U.S.C.C.A.N. at 2482.

177. H.R. REP. NO. 94-1471, *supra* note 175, at 5, reprinted in 1976 U.S.C.C.A.N. at 2482.

178. See, e.g., *supra* text accompanying notes 112-19 and sources cited therein.

179. *Powell Committee Report*, *supra* note 115, at 3243 (proposed § 2257(c)).

180. See *Berger, Justice*, *supra* note 10, at 1713-14 (bill proposed by Rep. Hyde).

181. H.R. REP. NO. 101-681, 101st Cong., 2d Sess., pt. 1, at 29 (1990), cited in *McCleskey v. Zant*, 111 S. Ct. 1454, 1482 (1991) (Marshall, J., dissenting) (requiring dismissal of second or successive claims by capital convicts unless the petition raised a new claim "the factual basis of [which] could not have been discovered by the exercise of reasonable diligence").

182. 111 S. Ct. 1454 (1991).

183. *Id.* at 1467.

explicit rejection of the Supreme Court's proposed "not excusable" language fifteen years earlier,¹⁸⁴ the Court concluded that these "complex and evolving . . . equitable principles" warranted defining abuse of the writ to include not only deliberate abandonment, but also "failing to raise a claim through *inexcusable* neglect."¹⁸⁵

The Court in *McCleskey* proceeded to define the term "inexcusable neglect" and concluded that it is governed by the same standards as procedural default.¹⁸⁶ Accordingly, as with the procedural default standards described above,¹⁸⁷ "[t]o excuse his failure to raise the claim earlier, [a habeas petitioner alleging a new claim in a second or successive petition] must show *cause* for failing to raise it and *prejudice* therefrom"¹⁸⁸ In line with the procedural default cases, the Court recognized one narrow exception to this standard: cases involving a "fundamental miscarriage of justice" in those "extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime."¹⁸⁹

The Court confidently described the concepts of cause and prejudice as "[w]ell-defined in the case law . . . [and] familiar to federal courts."¹⁹⁰ As though to minimize the risk that the lower courts might be overgenerous in interpreting those "well-defined" concepts, however, when the Court later applied those standards in its decision, it took the opportunity to elaborate on them. Adding its own emphasis to language from an earlier opinion, the Court stated, "[C]ause . . . requires a showing of some external impediment *preventing* counsel from constructing or raising a claim."¹⁹¹

184. See *supra* text accompanying note 176.

185. 111 S. Ct. at 1468 (emphasis added). As proof that this was not a radical change, the Court observed that *Sanders* itself had cited a decision applying the "inexcusable neglect" standard. *Id.*; see *supra* note 175.

186. 111 S. Ct. at 1468.

187. See *supra* text accompanying notes 149-61.

188. 111 S. Ct. at 1470 (emphasis added).

189. *Id.*

190. *Id.* at 1471.

191. *Id.* at 1472 (quoting *Murray v. Carrier*, 477 U.S. 478, 492 (1986)) (emphasis added by Court in *McCleskey*).

In applying that standard, the Court rejected McCleskey's habeas petition, which was based on a claim that the prosecution had infringed his right against self-incrimination by deliberately planting an informant in the adjoining cell. The Court accepted a district court finding that McCleskey did not know of a twenty-one page statement that the alleged informant had provided to the prosecutors and could not reasonably have discovered it when he filed his first habeas petition.¹⁹² Nonetheless, concluded the Court, that did not excuse McCleskey's failure to raise the claim in that petition. Since McCleskey himself had participated in the conversations with the alleged informant and knew that the informant had told the police about the conversations, McCleskey had all the information he needed to be on notice to pursue the claim in his initial habeas petition. His failure to do so constituted inexcusable neglect.¹⁹³

The Court further elaborated:

Abuse of the writ doctrine examines *petitioner's* conduct: the question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process [P]etitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition Omission of [a] claim will not be excused merely because evidence discovered later might also have supported or strengthened the claim.

Id. (emphasis in original).

192. 111 S. Ct. at 1472-73. The prosecutors had not included that document when they gave McCleskey's counsel a copy of the supposedly "complete" file in connection with an earlier proceeding; the document came to light only after a change in interpretation of the state "open records" law. *Id.* at 1487 n.11 (Marshall, J., dissenting).

193. *Id.* at 1473-74. In closing, the Court briefly considered whether the "mis-carriage of justice" exception might apply. Given the Court's view that that exception is limited to the wrongful conviction of the innocent, that issue did not detain the Court long. To the contrary, observed the Court, the Evans document simply confirmed McCleskey's guilt. *Id.* at 1474-75.

5. "Actual Innocence" Exception

In the course of its cutbacks, the Supreme Court has repeatedly referred to exceptions that would warrant a grant of habeas review, despite other procedural bars, where appropriate to vindicate claims of actual innocence. In the context of the relitigation of previously asserted claims, the Court spoke of an "ends of justice" exception;¹⁹⁴ in the procedural default and new claim areas, the Court set forth the "fundamental miscarriage of justice" exception;¹⁹⁵ and in the retroactivity situation, the Court announced an exception for cases involving "watershed rules of criminal procedure."¹⁹⁶ These "exceptions" all follow a common theme: each depends upon a showing that a constitutional violation probably resulted in the wrongful conviction of an innocent individual.¹⁹⁷

With most other bases for habeas review so firmly closed, the Court's references to these exceptions naturally led to the question of whether new evidence supporting a petitioner's actual innocence would be sufficient to obtain habeas review. In early 1993 the Rehnquist Court answered that question with a rather resounding "no" in another capital case: *Herrera v. Collins*.¹⁹⁸ Writing for the Court, Chief Justice Rehnquist stated:

Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding¹⁹⁹

The fundamental miscarriage of justice exception is available "only where the prisoner *supplements* his constitutional claim with a colorable showing of factual inno-

194. See *supra* text accompanying note 165.

195. See *supra* text accompanying note 160-61.

196. See *supra* text accompanying note 147.

197. See generally Patchel, *supra* note 148.

198. 113 S. Ct. 853 (1993).

199. *Id.* at 859.

cence." . . . We have never held that it extends to free-standing claims of actual innocence.²⁰⁰

This conclusion reflects the language of the Habeas Corpus Act, which defines federal habeas as a remedy for "any person . . . restrained of his or her liberty in violation of the Constitution, or laws or treaties of the United States."²⁰¹ Moreover, it is in keeping with prior precedent of the Court, including Chief Justice Warren's conclusion in *Townsend v. Sain*,²⁰² that "the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus."²⁰³

Herrera argued that his case involved more than simply new evidence concerning guilt or innocence. Characterizing his case as involving the execution of an innocent man, he asserted two independent constitutional claims: a violation of the Eighth Amendment's proscription of "cruel and unusual punishments" and a violation of due process under the Fourteenth Amendment. Rehnquist rejected Herrera's characterization of the case, stating that "petitioner does not come before the Court as one who is 'innocent,' but on the contrary as one who has been convicted by due process of law of two brutal murders."²⁰⁴ In the view of the Court, the fact that Texas law limits petitions for new trials based on newly discovered evidence to the first thirty days after conviction does not violate due process.²⁰⁵ The Court also rejected the Eighth Amendment claim, although the reasoning was a bit unclear.²⁰⁶

200. *Id.* at 862 (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986) (plurality op.)).

201. 28 U.S.C. § 2241 (1988).

202. 372 U.S. 293 (1963).

203. *Id.* at 317. As the dissent in *Herrera* observed, however, this holding is distinctly at odds with the rhetoric the Rehnquist Court used in first announcing the various "miscarriage-of-justice"-type exceptions, where the Court emphasized that habeas would remain available in the successive petition context for claims of innocence. See 113 S. Ct. at 880 (Blackmun, J., dissenting).

204. 113 S. Ct. at 860.

205. *Id.* at 864.

206. *Id.* at 863. The Court's Eighth Amendment analysis is a mishmash of

Perhaps to satisfy the concurring Justices,²⁰⁷ Rehnquist:

[A]ssume[d], for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim.²⁰⁸

However, this remaining "actual innocence" exception, if it exists at all, would be very narrowly circumscribed. According to the majority:

[B]ecause of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high.²⁰⁹

several themes: the refusal to treat capital cases differently from noncapital cases for habeas purposes (even though capital punishment has been treated far differently from other punishments for purposes of Eighth Amendment analysis, as the dissent observed, *id.* at 876 (Blackmun, J., dissenting), and the majority at least implicitly acknowledged, *id.* at 864); the assertion that a reexamination of the case would be no more reliable than the original trial; and a distinguishing of other cases granting more lenient review for capital punishment than non-capital cases. *Id.* The Court never directly explained why Herrera's Eighth Amendment claim failed to provide an independent constitutional basis for the habeas petition.

207. In a concurring opinion joined by Justice Kennedy, Justice O'Connor strongly implied her approval of the majority's approach of leaving open the possibility of an exception where the new evidence clearly establishes innocence. *Id.* at 870 (O'Connor, J., concurring).

208. *Id.* at 868.

209. *Id.* Justice White, concurring in the judgment, and Justice Blackmun, joined by Justices Stevens and Souter in dissent, would have made this exception explicit; but they differed in the standards that would apply. For Justice White, "petitioner would at the very least be required to show that based on proffered newly discovered evidence and the entire record before the jury that convicted him, 'no rational trier of fact could [find] proof of guilt beyond a reasonable doubt.'" *Id.* at 875 (quoting *Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (White, J., concurring)). In the view of the dissenters, "a prisoner must show not just that there was probably a reasonable doubt about his guilt but that he is probably actually innocent." *Id.* at 878 (Blackmun, J., dissenting).

In the view of the majority, the standard remedy for a death row inmate alleging new evidence of actual innocence after the period permitted by state law for a new trial motion based on new evidence has expired—a period ranging from just ten to sixty days in seventeen states,²¹⁰ with only fifteen states permitting such motions more than three years after the conviction was entered²¹¹—does not lie in federal habeas, nor, indeed, in the courts at all. Rather, concluded Rehnquist, the proper avenue is “a request for executive clemency[,] . . . the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.”²¹² Thus, in *Herrera* the Court almost completely foreclosed use of federal habeas to raise claims that new evidence establishes a prisoner’s actual innocence, unless the new evidence *both* demonstrates an independent constitutional violation and provides “a colorable showing of factual innocence.”²¹³

Even in such a case, the “colorable showing” required by the Rehnquist Court is onerous. The Court first used the phrase “colorable showing of factual innocence” in 1986, in the plurality opinion in *Kuhlmann v. Wilson*.²¹⁴ There, the Court defined the term as requiring a showing that “the trier of the facts would have entertained a reasonable doubt of [the petitioner’s] guilt.”²¹⁵ When a petitioner actually tried to rely on the exception, however, the Court adopted a much stricter definition. Writing for the Court in 1992’s *Sawyer v. Whitley*, Rehnquist stated that “to show ‘actual innocence’ [for purposes of the ‘miscarriage of justice’ exception] one must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.”²¹⁶ To the

210. See *id.* at 866 n.8 (listing state time limits for motions).

211. See *id.* at 866 n.11 (same).

212. *Id.* at 866-67.

213. *Id.* at 862 (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986)).

214. 477 U.S. 436, 454 (1986) (plurality op.).

215. *Id.* at 454 n.17.

216. 112 S. Ct. 2514, 2517 (1992).

extent it still exists, the "actual innocence" exception is narrow indeed.

6. Overview of Habeas Developments

With these decisions, the Rehnquist Court has achieved virtually all of the limitations recommended by the Powell Committee, without the need to await Congressional action. Given the Court's restrictive interpretations of retroactivity, procedural default and abuse of the writ, coupled with the very high degree of "reasonable and diligent investigation" demanded at the time of the first federal habeas petition—a level that seems to presuppose not only competence but omniscience on the part of counsel (assuming petitioners are fortunate enough to be represented by counsel)—as a practical matter, prisoners are now virtually limited to one round of federal habeas review. Claims that are raised in the first federal petition may not be relitigated except in extraordinary circumstances. Claims based on existing law that are not raised in the initial petition are almost certain to be treated as waived on inexcusable neglect grounds, if not already barred by procedural default. And, to the extent the Rehnquist Court announces any new constitutional standards that might benefit petitioners, their reliance on such new standards will likely be barred on retroactivity grounds. Moreover, despite lip service to an "actual innocence" exception, "mere" proof of innocence alone is not enough to obtain habeas review.

Thus, through a relative handful of decisions in the span of only four years, the Rehnquist Court has vastly altered the world of federal habeas. In this new world, a habeas petitioner is entitled to one round of federal habeas review. Assuming the petitioner and her counsel, if any, have properly abided by all state procedural rules and have exhausted available remedies, the petitioner will be entitled to raise all federal constitutional claims except Fourth Amendment claims at that time—at least until the Court provides further guidance on the meaning of its reference to "dispositive" constitutional issues. The petitioner had better include any and all conceivable claims in that first

petition, though. Very few grounds will justify a second or subsequent petition in this new world of habeas.

Apart from the "actual innocence" exception discussed above,²¹⁷ one other possible ground referred to by the Court deserves note. In recent years, habeas petitioners have frequently raised ineffective assistance of counsel claims. On its face, *McCleskey* appears to preserve this ground as a possible basis for successive habeas petitions. In its discussion of procedural default, the Court observed that "constitutionally 'ineffective assistance of counsel . . . is cause.'"²¹⁸ Given *McCleskey's* adoption of the same standards to define "cause" in the "abuse of the writ"/"inexcusable neglect" setting, it thus might seem that ineffective assistance of counsel would constitute cause justifying a second or successive federal petition.

That is evidently not the case. First, the Court in *McCleskey* expressly emphasized that "cause" is limited to "constitutionally" ineffective assistance, adding that "[a]ttorney error short of ineffective assistance . . . does not constitute cause and will not excuse a procedural default."²¹⁹ The Court went on to add that "[a]pplication of the cause and prejudice standard . . . does [not] imply that there is a constitutional right to counsel in federal habeas corpus."²²⁰ Yet, in the absence of any constitutional right to counsel for one's first habeas petition, ineffective assistance by counsel in connection with that petition plainly will not rise to the level of "constitutionally 'ineffective assistance'" in this Court's view.²²¹ Furthermore, any claims of ineffective assistance at the trial or direct

217. See *supra* text accompanying notes 194-216.

218. 111 S. Ct. at 1470 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).

219. *Id.*

220. *Id.* at 1470-71.

221. This conclusion is confirmed by the Supreme Court's treatment of claims of ineffective assistance of counsel in state collateral review proceedings. Just two months after its decision in *McCleskey v. Zant*, the Supreme Court considered whether ineffective assistance of counsel in connection with a state habeas petition might constitute cause for procedural default. The Court rejected that claim. Since there was no constitutional right to counsel in state habeas, ineffectiveness at that level is not of constitutional dimension. *Coleman v. Thompson*, 111 S. Ct. 2546, 2567-68 (1991).

appeal levels would seem to be squarely within the ambit of the "reasonable and diligent investigation" required of petitioner in connection with the first habeas petition. Thus, ineffective assistance claims do not offer much promise as grounds for successive habeas petitions.

The issue of assistance by counsel, moreover, represents one key respect in which the standards developed judicially by the Rehnquist Court are less progressive than most legislative proposals. Both the Powell Committee Report and a competing study undertaken by the American Bar Association Criminal Justice Section's Task Force on Death Penalty Habeas Corpus²²² identified the lack of assistance and/or the ineffective assistance of counsel in the initial stages of capital litigation as a major problem area in the existing system of death penalty habeas.²²³ Although differing considerably in the details of their proposals, both reports recommended a two-pronged approach in which "death-sentenced prisoners would be accorded one full opportunity for state and federal review of their claims *with representation by adequate counsel.*"²²⁴ *McCleskey* and the other Supreme Court decisions provide no such trade-off. To the contrary, in the new world of habeas, death-sentenced prisoners may go without adequate representation in the initial stages of their review process.²²⁵ Yet if they file even a cursory single-issue federal habeas petition on a *pro se* basis, they are likely to find themselves barred from any further review in federal courts.²²⁶

222. TASK FORCE ON DEATH PENALTY HABEAS CORPUS, CRIMINAL JUSTICE SECTION, AMERICAN BAR ASS'N, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES, RECOMMENDATIONS AND REPORT OF THE ABA TASK FORCE ON DEATH PENALTY HABEAS CORPUS (1989).

223. See Berger, *Justice*, *supra* note 10, at 1673-74.

224. Berger, *Justice*, *supra* note 10, at 1674 (emphasis added).

225. By federal statute, death-sentenced prisoners are currently entitled to counsel in federal habeas proceedings, 21 U.S.C. § 848(q)(4) (1988). Even assuming this right survives legislative attack, it does not extend to prisoners under lesser sentences, nor are states constitutionally required to provide a similar system for state post-conviction review proceedings. Furthermore, the right to counsel, while of great importance, does not assure adequate representation at that stage. See *The Supreme Court, 1990 Term*, *supra* note 109, at 326-27.

226. See *The Supreme Court, 1990 Term*, *supra* note 109, at 326-27.

B. Japan

Wherever the death penalty exists, it is inevitable that many death-sentenced prisoners will attempt to delay their executions. Given the existence of a system for post-conviction collateral review in Japan, it is not surprising to find much the same phenomenon of successive, and often piecemeal, petitions for review of capital cases that one finds in the United States. In many cases, moreover, the delays in Japan far exceed those on this side of the Pacific. As examples of unacceptable delays in executions in the United States, the Powell Committee pointed to an average of eight years between commission of the crime and execution and noted that in one case the execution did not occur until over fourteen years after the crime.²²⁷ That Committee also observed that "many capital litigants return to federal court with second—or even third and fourth—petitions for relief."²²⁸ By comparison, it is by no means uncommon to find death-sentenced prisoners in Japan who have spent *two or three decades* on death row prior to their execution, acquittal, or death by natural causes. And in Japan the number of petitions for collateral review filed by a single prisoner may run to *ten, fifteen, or even more*.

In Japan, a death sentence becomes final either upon the exhaustion of direct appeals to the High Court and the Supreme Court, or upon a convict's failure to file an appeal within the statutory time limits.²²⁹ Once the sentence has become final, the only remaining procedural step necessary prior to execution is for the Justice Minister to stamp the execution

The legislative proposals also call for time limits on the filing of the initial federal habeas petition. See Berger, *Justice*, *supra* note 10, at 1695-97. To date, the Supreme Court has not announced any such limits. Given the Court's references to concerns over "erosion of memory," "dispersion of witnesses" and the like, see *McCleskey v. Zant*, 111 S. Ct. 1454, 1468 (1991) (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 453 (1986)), though, it would not be surprising if this Court were to declare that even initial petitions could be denied for "staleness."

227. Powell Committee Report, *supra* note 115, at 3239-3240.

228. Powell Committee Report, *supra* note 115, at 3241.

229. KEISOHO arts. 373, 415, 418.

order. Normally, the Justice Minister must do so within six months²³⁰ and the execution must be carried out within five days after that.²³¹ At least two postwar Justice Ministers have declined to stamp any such orders out of personal opposition to the death penalty.²³² Other Justice Ministers have not shared that view, and capital convicts have utilized two primary tools to forestall them from stamping the execution orders: requests for retrials and requests for pardons. In theory, neither provides great assurance for the convicts, since neither is legally sufficient to stay an execution or to prevent a Justice Minister from stamping an execution order. Yet whenever either type of request is pending, the six-month period during which the Justice Minister would otherwise be required to stamp the order is tolled,²³³ and in customary practice Justice

230. *Id.* art. 475(2). This provision was reportedly added at the "suggestion" of the allies during the Occupation. See DANDŌ, *supra* note 44, at 263-64. When one of the Japanese participants in the revision of the Criminal Procedure Code, Dandō Shigemitsu, inquired as to the reasons for this provision, he was told that it was out of concern that it is very cruel to leave a death-sentenced prisoner in limbo for a long period of time. Dandō's personal speculation, though, is that the allies were concerned over reports that right wing individuals who had been sentenced to death prior to and during the war had later been released in general amnesties and were again active in China, and that the allies wanted to be sure that the same situation would not recur in the future. See DANDŌ, *supra* note 44, at 264. In any event, the six-month rule is regarded as a precatory provision, rather than a binding limit. See DANDŌ, *supra* note 44, at 265. Moreover, as described below, the clock does not run when a request for either a retrial or for clemency is pending, see *infra* text accompanying notes 233-34.

231. KEISOHŌ art. 476. See Tsujimoto Yoshio, *Shikkō tetsuzuki—Nihon de mo shidai ni shinchō ni* [Procedures for Execution—Becoming More Careful Even in Japan], in THE DEATH PENALTY TODAY, *supra* note 46, at 244.

232. See Han o oshita daijin, osanakatta daijin [Ministers Who Stamped [Death Warrants], and Those Who Didn't], SHŪKAN YOMIURI [WEEKLY YOMIURI], Apr. 6, 1986, at 26 [hereinafter *Ministers Who Stamped Death Warrants*]; DANDŌ, *supra* note 44, at 266-67; MURANO, *supra* note 66, at 77-79; Inoue Yutaka, "Ninenkan shikkō zero" o dou kangaeru ka [What Should One Think of "Going Two Years with Zero Executions"?], 448 HŌGAKU SEMINĀ 46, (1992) (quoting Yomiuri shinbun, Nov. 16, 1991: former Justice Minister Satō Megumu stated that documents requesting execution orders had crossed his desk, but "I did not carry out executions, based on my own beliefs and creed.").

233. KEISOHŌ art. 475(2). That period is also tolled by requests for reinstatement of the right to appeal and extraordinary appeals, and until the sentence of any alleged accomplice becomes final. *Id.*

Ministers will not stamp an execution order if either a retrial request or a pardon request is pending.²³⁴

As a result, a continuing string of retrial petitions or requests for clemency may delay an execution for many years. On occasion, the petitions may raise doubts over guilt or the appropriateness of the death sentence in the particular case. Moreover, in some of the most highly publicized cases, the petitions have been accompanied by massive campaigns by supporters asserting miscarriages of justice. This popular pressure may have some effect in deterring Justice Ministers (who, although appointed to that post, invariably have been leading politicians in the ruling Liberal Democratic Party) from stamping the final death warrant.²³⁵ Yet some Justice Ministers have stated that in many cases they had no doubts whatsoever and were fully prepared to stamp the necessary execution orders, but were prevented from doing so by the repetitive filings of petitions for retrials and pardons.²³⁶

234. See, e.g., Okabe Yasuo, *Saishinhō no konnichiteki kadai* [Modern Day Issues in Retrial Law], *Jiyū to Seigi* 34-9-28, 31 (1983).

235. See generally *Ministers Who Stamped Death Warrants*, *supra* note 232.

236. *Ministers Who Stamped Death Warrants*, *supra* note 232. In the words of one observer:

Even if the authorities are unhappy with the current retrial system, they observe the "custom" of not executing anyone with proceedings pending. As a result, if they truly wish to execute a certain prisoner, the relevant authorities confer in advance. Then, to execute a prisoner who has been filing successive petitions, the Justice Minister issues the execution order as soon as the pending petition is rejected, or during the very brief window before the next petition is filed.

MURANO, *supra* note 66, at 73.

Since a prisoner may file petitions for retrial and for clemency simultaneously, that may not always be possible, even assuming that Justice Ministers truly want to stamp the execution orders. In fact, most Justice Ministers reportedly share the view that stamping execution orders is the most unpleasant aspect of the position. MURANO, *supra* note 66, at 75-76. One former Justice Minister commented, "When I learned that I had been appointed Minister the first thing that popped into my head was the job of stamping execution orders. I immediately became depressed. And thereafter I spent every day trembling, wondering when they would ask me to order someone's execution." MURANO, *supra* note 66, at 75-76 (statement of former Justice Minister Karasawa).

In the most highly publicized case of delay between sentencing and execution, the defendant, Hirasawa Sadamichi, was accused of murdering twelve employees of the Teikoku Bank in 1948 by deceiving them into drinking poison as a supposed protection against dysentery. Hirasawa was convicted and sentenced to death in 1950. Following two levels of appeals, the conviction and sentence became final in 1955. Yet Hirasawa was never executed. He died of natural causes in 1987, at the age of ninety-five, while still on death row. At the time of his death, his *seventeenth* retrial request and his fourth and fifth pardon requests were pending. During the *thirty-two years* from the time that his sentence became final until his death there reportedly were only *eighty-two days* on which neither a retrial petition nor a pardon request was pending.²³⁷

His case is simply the most dramatic example of a rather widespread phenomenon. In numerous other cases, Japanese prisoners have spent twenty or more years on death row, their executions forestalled in part by a continuing series of petitions for post-conviction review.²³⁸ Given these circumstances, it would probably come as little surprise to learn that the Japanese Supreme Court has instituted a major change in the standards governing the availability of post-conviction relief. To American observers, though, the direction of the change

237. See DANDŌ, *supra* note 44, at 265. Prior to his death, Hirasawa also sought to have the death sentence set aside on the theory that the execution had not been carried out within the 30-year statute of limitations, but that motion was rejected on the ground that the statute of limitations does not apply to those being held in prison. Judgment of July 19, 1985 (Hirasawa v. Japan), Saikōsai [Supreme Court], 1158 HANJI 28 (1st Petty Bench). See Fukuda Taira, *Shikei no jikō ni tsuite* [Regarding the Statute of Limitations for the Death Penalty], 1165 HANJI 3, 8 (1985). See generally Takezawa Tetsuo, *Teigin jiken* [The Teigin Case], HÔRITSU JIHŌ 57-10-60 (1985).

238. This was the case, for example, in each of the four celebrated death penalty retrial cases. See *infra* text accompanying notes 372-409. See MURANO, *supra* note 66, at 157-64 (list of prisoners on death row, showing date conviction became final, with references to pending retrial petitions; of the eleven death row inmates whose sentences became final prior to 1984, nine were pursuing retrial petitions); *Number of Death-row Convicts*, *supra* note 95 (26 of 56 inmates on death row either had filed or were currently preparing retrial applications).

may come as something of a shock. Quite unlike the Rehnquist Court, Japan's Supreme Court has loosened the requirements for obtaining retrials.

Japan has a system of habeas corpus. Adopted during the Allied Occupation, the so-called Habeas Corpus Act provides that "any person" may seek relief on behalf of one whose "personal liberty is restricted otherwise than in accordance with due process under law."²³⁹ The provisions of the law are rather narrowly drafted, though, and implementing rules state that the system is supplementary in nature and to be utilized only when no other means for relief exists.²⁴⁰ As Professor Hirano Ryūichi predicted in 1960,²⁴¹ the law has for all intents and purposes become a "dead letter."²⁴²

In contrast, the approach death-sentenced prisoners use most frequently in seeking post-conviction review is a request for a retrial. The standards governing that system have a much longer history than the Habeas Corpus Act, and one involving considerably more numerous developments, as discussed in the remainder of this section.

1. Statutory Standards

The first formal provision allowing retrials in Japan was contained in Decree No. 8 of January 31, 1876.²⁴³ That decree

239. JINSHIN HOGO HÔ [ACT FOR THE PROTECTION OF THE PERSON], Law No. 199 of 1948, arts. 2(1) and (2).

240. See HIRANO RYŪICHI, SÔSA TO JINKEN [INVESTIGATIONS AND HUMAN RIGHTS] 5-6 (1981) (reprint of an article published in 1960); JINSHIN HOGO KISOKU [HABEAS CORPUS RULES], Sup. Ct. R. 22, art. 4 (1948) ("Petitions . . . are limited to cases in which it is clearcut that confinement or the trial or disposition relating to confinement was made without authority or in clear violation of forms or procedures prescribed by law. Provided, however, that where another appropriate method exists for obtaining relief, petitions for habeas corpus shall not be granted unless it is clear that relief could not be obtained through such other method within a reasonable time.").

241. HIRANO, *supra* note 240, at 6.

242. See 1 SAIKÔSAIBANSHO JIMUSÔKYOKU, SHIHÔ TÔKEI NENPÔ, 1 MINJI-HEN, HEISEI GANNEN [SUPREME COURT GENERAL SECRETARIAT, ANNUAL REPORT OF JUDICIAL STATISTICS FOR CIVIL CASES] 7 table 1-2 (1989) (only between 60 and 110 petitions filed each year from 1980 to 1989; no figures given on success rate).

243. See Odanaka Toshiki & Ôde Yoshitomo, *Saishin hōsei no enkaku to*

provided that the Justice Ministry should have the Supreme Public Prosecutor's Office file an appeal, without regard to whether the normal time limits for appeal had run, if matters existed that rendered the original trial improper. Similarly, Decree No. 49 of 1877 allowed the Justice Ministry to have public prosecutors demand new trials in both civil and criminal cases if the original trial was thought to have been improper.²⁴⁴

The first provisions allowing private parties to petition for retrials were contained in article 439 of the *Chizaihō* (Criminal Procedure Code) of 1880.²⁴⁵ This Code was drafted largely by Professor Gustave Emile Boissonade, a French law professor who was invited by the government of Japan to help codify and modernize Japanese law.²⁴⁶ Not surprisingly, the *Chizaihō*—

mondai jōkyō [The History of the Retrial System and Related Issues], in KELJI SAISHIN NO KENKYŪ [RESEARCH ON CRIMINAL RETRIALS] 65, 66 (Kamo Yoshisuke ed., 1980).

The Odanaka and Ōde article provides a good overview of the history of the criminal retrial system in Japan from a progressive perspective. The most thorough article analyzing court rulings on the retrial system prior to 1963 is Usui Shigeo, *Saishin* [Retrials], in FUJII KAZUO ET AL., SŌGŌ HANREI KENKYŪ SŌSHO, KELJI SŌSHŌHŌ (14) [COMPREHENSIVE DECISIONAL RESEARCH SERIES, CRIMINAL PROCEDURE (14)] 87, 131 (1963). Usui, a prosecutor, was one of the first to take an active interest in the retrial issue and is one of the leading authorities on the issue.

For a compilation of later cases, as well as a bibliography on the issue, see Ōde Yoshitomo, *Saishin kankei shiryō* [Materials Relating to Retrials], 601 JURISUTO 79 (1975). Other bibliographies include: ZOKU SAISHIN [RETRIALS, CONTINUED] 444 (Nihon bengoshi rengōkai-hen [Japan Fed'n of Bar Ass'ns] ed., 1986); *Saishin ni kansuru bunken mokuroku* [Table of Literature Regarding Retrials], in KEIHŌ ZASSHI 20-1-141 (1974); Tanaka Terukazu & Ōde Yoshitomo, *Saishin kankei bunken mokuroku* [Table of Literature Relating to Retrials], in KELJI SAISHIN NO KENKYŪ, *supra*, at 613; MAEZAKA TOSHIYUKI, ENZAI TO GOHAN [MISCARRIAGES OF JUSTICE AND MISTAKEN JUDGMENTS] 260-68 (1982); *Shiryō/saishin kankei nenpyō* [Materials/Chronology on Retrials], in HŌRITSU JIHŌ 64-8-23 (1992).

The July 1992 issue of HŌRITSU JIHŌ, Vol. 64, No. 8, contains a symposium on the retrial issue, providing updates on recent developments and articles examining key doctrinal issues and major cases.

244. Odanaka & Ōde, *supra* note 243, at 66.

245. CHIZAIHŌ, Decree No. 37 of 1880.

246. Accordingly, the CHIZAIHŌ is sometimes referred to as the Boissonade Code, but that name threatens possible confusion with the Civil Code of 1890, which Boissonade also helped draft and which is often referred to by the same name. See generally, e.g., YOSIYUKI NODA, INTRODUCTION TO JAPANESE LAW 45-47

along with its retrial provisions—was based heavily on French law.

A new Criminal Procedure Code was promulgated in 1890.²⁴⁷ Although it revised the *Chizaihō* in a number of respects, the 1890 Code was also based heavily upon French law and the retrial provisions contained in article 301 of the 1890 Code remained virtually the same as those in the prior Code. As in the prevailing French law, new trials were only allowed for the benefit of the defendant; the prosecution could not seek a new trial after an acquittal.²⁴⁸ However, the conditions required to obtain a new trial were strictly limited.²⁴⁹ Those conditions were mainly of the so-called *falsa* type, in effect requiring proof of falsehoods or serious procedural improprieties in the original trial. For example, a prisoner could obtain a new trial in a murder case if she could show that the supposed victim was actually still alive after the murder was alleged to have taken place or that someone else had been

(A. Angelo trans., 1976).

247. Law No. 96 of 1890 [hereinafter the 1890 CODE].

248. See Odanaka & Ōde, *supra* note 243, at 67-69; Fujino Eiichi, *Saishin ni tsuite* [Regarding Retrials], 374 KEISATSU KENKYŪ [POLICE STUDIES] 87, 88 (1961).

249. Article 301 of the 1890 Code contained six items justifying the grant of a new trial: (1) proof, in a murder case, that the alleged victim was either still alive after he had supposedly been killed or already had died before that date; (2) the sentencing of someone else for the same crime (not applicable to conspiracies, of course); (3) proof, by means of an official document, that the defendant could not have been in the place of the crime when it took place; (4) the sentencing of a person for having secured the conviction of the convict by fraud; (5) proof, by means of an official document, that records in the original case were either forged or materially in error; and, (6) showing that a civil or other judgment on which the conviction rested had been overturned. John Gadsby, *Some Notes on the History of the Japanese Code of Criminal Procedure*, 30 L. Q. REV. 448, 460 (1914). See generally Kamo Yoshisuke, *Saishin no rironteki kiso* [The Theoretical Basis of Retrials], in HŌRITSU JIHŌ 37-4-14 (1965).

convicted of the crime.²⁵⁰ The provisions were seldom used and were dropped from the Code in 1908.²⁵¹

A new set of retrial provisions was included in the Criminal Procedure Code of 1922.²⁵² That Code was based primarily on German criminal procedure. With respect to the new trial provisions, this signified a shift to the so-called *nova* principle of allowing new trials where newly discovered evidence disclosed differences from the facts found by the original trial court. As interpreted by Japanese experts, the emphasis of the *falsa* approach embodied in the 1890 Code was upon protecting against procedural improprieties, whereas the *nova* approach adopted in 1922—and still in effect today—emphasizes the search for truth.²⁵³

Pursuant to the 1922 Code, both the defendant *and* the prosecution were free to seek a new trial.²⁵⁴ In addition, the 1922 Code modified and expanded the grounds justifying a new trial. In this respect, the most important change was the inclusion of a provision, item 6 of article 485 of that Code, specifying that a new trial may be granted “when clear (*akiraka na*) evidence is newly discovered (*arata ni hakken shita*) 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.”²⁵⁵ This

250. See *supra* note 249. Even as narrow as they were, the Japanese standards were broader than those in France at that time. In France, only the first three grounds were recognized. Odanaka & Ôde, *supra* note 243, at 67. The fourth and fifth grounds had been included in Japan in the CHIZAIHÔ; the final ground was added in the 1890 Code, apparently based on a similar German provision. Odanaka & Ôde, *supra* note 243, at 68.

251. See Gadsby, *supra* note 249, at 461.

252. KEIJSOSHÔHÔ [CRIMINAL PROCEDURE CODE], Law No. 75 of 1922 [hereinafter the 1922 CODE].

253. See, e.g., Tamiya Hiroshi, *Saishin no shidô rinen* [Guiding Concepts of Retrials], in KEIJI SAISHIN NO KENKYÛ, *supra* note 243, at 19, 31; Saitô Seiji, *Keiji saishin o meguru ikutsuka no mondai (I)* [A Few Problems Relating to Criminal Retrials, Part 1], in KEIHÔ ZASSHI 20-1-33, 38-69 (1974).

254. 1922 CODE, *supra* note 252, arts. 485, 486.

255. 1922 CODE, *supra* note 252, art. 485, item 6.

was quite different from the other grounds for a new trial, which all required proof, by means of a final judgment in an independent proceeding, of falsities in the evidence underlying the original conviction or certain other grave improprieties.²⁵⁶

Although the Criminal Procedure Code²⁵⁷ (the Code) enacted after World War II introduced numerous elements from United States law, the new trial provisions of that Code remained virtually unchanged in all but one respect. In keeping with article 39 of the postwar Constitution of Japan, which provides that "no person shall be held criminally liable for an act . . . of which he has been acquitted, nor shall he be placed in double jeopardy,"²⁵⁸ the current Code allows petitions for retrials only for the benefit of the defendant; the prosecution may not seek a new trial against a defendant who was previously acquitted.²⁵⁹ The only other changes are a renumbering

256. Thus, article 485, item 1, allowed a new trial if it was shown, by a final judgment, that documents or articles used as evidence had been forged or altered; item 2 for false testimony; item 3 if the defendant's accuser was subsequently convicted of having made a false accusation; item 4 if a decision used as evidence in the original judgment was subsequently altered; and item 5, in cases of infringement of patents, trademarks, etc., where the right allegedly infringed was later declared invalid or void. The final ground, item 7, allowed a new trial if a judge, prosecutor, or police officer was found to have committed an offense in connection with the handling of the case.

Article 489 provided an exception to the requirement of proof by a final judgment "when such a final judgment [could] not be obtained" and the matters in question were otherwise proven.

257. KEISOHÖ, *supra* note 74.

258. KENPÖ art. 39.

259. It should be noted, however, that this applies only to petitions for new trials *after the original acquittal has become final*. Provided appeals are taken in timely fashion, the proceedings do not become final until after adjudication by the Supreme Court. Accordingly, the prosecutors are allowed to *appeal* acquittals to the High Courts and the Supreme Court. See SHIGEMITSU DANDO, JAPANESE CRIMINAL PROCEDURE 410-13 (B.J. George, Jr. trans., 1965). It should also be noted that the prosecutor is both permitted *and* expected to seek a new trial *on behalf* of a convict if the convict's innocence becomes apparent after the conclusion of the original trial. See, e.g., Fujino, *supra* note 248, at 93.

of the relevant provisions;²⁶⁰ a reformulation in modern Japanese; and a few minor, mainly technical, changes.

2. Judicial Interpretations

Despite the nearly identical language of the two Codes, some commentators (including at least one prosecutor) have argued that the new Code should be interpreted more liberally than the relevant provisions of the old Code, in keeping with the spirit of respect for human rights underlying the postwar Constitution.²⁶¹ In fact, for most of the first three decades after the new Code came into effect, the retrial provisions were interpreted, if anything, more strictly than in prewar Japan.

The vast majority of retrial petitions are based upon item 6, the "newly discovered evidence" provision.²⁶² This is hardly surprising. The other items all set forth specific, rather limited grounds for the retrial request. Moreover, each of the other grounds calls for proof by means of a *final* judgment.²⁶³ In

260. The overall legal framework for retrials is contained in Book IV of the current Code, which extends from article 435 through article 453. The retrial provisions in the 1922 Code commenced with article 485.

261. See, e.g., Abe Haruo, *Saishin riyū to shite no shōko no shinkisei to meihakusei* (1) [Newness and Clarity of Evidence as a Ground for Retrial, Part 1] 374 KEISATSU KENKYŪ 45, 54 (1961) (author was a prosecutor). Cf. Fujino, *supra* note 248, at 90 (same language in both Codes, but new factors of human rights and the adversary system must be taken into account) (author was a judge).

262. See, e.g., Nishimura Sadamu, *Saishin jiken no un'yō jōkyō ni tsuite* [Regarding the Circumstances of Applications for Retrials], in KEIHŌ ZASSHI 20-1-81, 86 (1974) (of 242 petitions between 1952 and 1972, all but two relied on item 6).

263. This represents a substantial barrier, since if the parties elect to appeal the lower court decisions the judgment will not become final until the conclusion of review by both a High Court and the Supreme Court (or, in earlier times, the Daishin'in, the predecessor of the Supreme Court). A further constraint is provided by the fact that ordinarily the prosecutors must undertake the independent proceedings necessary to establish the falsities in the prior proceedings or other improprieties that would justify a new trial. Yet the prosecutors are likely to bring such proceedings only in very clearcut cases. In fact, in a few highly publicized cases, critics have contended that the prosecutors deliberately declined to institute such proceedings in order to protect either the previously secured conviction or their own reputations. See, e.g., Takezawa Tetsuo, *Seikyūsha no gawa kara mita saishin seido* [The Retrial System as Viewed from the Side of Petitioners], KEIHŌ ZASSHI 20-1-99, 112-14 (1974) (discussing the *Tokushima Radio Shop Case*; see

contrast, the "newly discovered evidence" standard contained in item 6 imposes no specific limits on the evidence which can be advanced by the petitioner. The statute refers broadly to "evidence," with no apparent limits on the type or nature of such evidence—provided, of course, that the evidence satisfies two key criteria: "newness" and "clarity." Furthermore, under item 6, a petition for retrial may be filed by the convicted person at any time after the original conviction has become final, without need for a separate judgment or any action by the prosecutors.²⁶⁴ Under these circumstances, it is only natural that the overwhelming majority of retrial petitions have been filed under item 6 and that the key debates in this area have focussed on the interpretation of that ground.

a. *Prewar Precedent*

The retrial provisions, and item 6 in particular, are frequently characterized in Japan as requiring a balance between the competing interests of respect for finality of judgments (sometimes phrased as the need to maintain "legal stability"²⁶⁵) and the search for truth.²⁶⁶ If one accepts that formu-

infra notes 322-28 and accompanying text). See generally Watanabe Yasuo, *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, 80-81 (1985) (even if prosecutors realize that the defendant may be innocent, once an indictment has been filed, the atmosphere of the Prosecutor's Office is hard-line and it is difficult for any prosecutor to speak out or back down).

As with the prewar Code, the current Criminal Procedure Code provides a narrow exception to the requirement of proof by a final judgment "when such final judgment cannot be obtained" and the matters are proven in another fashion, KEISOHŌ, *supra* note 74, art. 437.

264. In fact, such a petition can be filed even after the sentence has been completed, KEISOHŌ, *supra* note 74, art. 441. Compare *Maleng v. Cook*, 109 S. Ct. 1923 (1989) (federal habeas petition may not be filed after the sentence for the conviction in question has fully expired). In Japan, moreover, the emphasis on avoiding the stigma of a false conviction is so great that a convict's spouse and other relatives can file a retrial request even after the convict's death, KEISOHŌ art. 439(1)(iv). Ultimately, this proved to be the case in the *Tokushima Radio Shop Case*. See *infra* text accompanying notes 322-28.

265. Judgment of July 15, 1959 (*Yoshida v. Japan*), Kōsai [High Court], 1

lation, the leading prewar case leaned rather heavily toward the latter interest.

That case, a 1924 ruling by the *Daishin'in* (the highest regular court at that time),²⁶⁷ involved the prosecution of several defendants for stealing fish products.²⁶⁸ All were convicted on the basis of their own confessions in Hakodate Local Court (*ku saibansho*). All but one of the defendants allowed their convictions to become final. The single defendant who elected to appeal was acquitted after the person responsible for storing the fish testified that the supposedly stolen goods had in fact been awarded to the defendants as incentives.

At that point the previously convicted defendants all sought retrials, relying on this new evidence. The local and district courts rejected their petitions.²⁶⁹ When the case reached the *Daishin'in*, that court reversed and granted a new trial.²⁷⁰ The court took a flexible approach, stating simply that "the relevant provision places no limit on the nature or type of the new evidence, and it is therefore appropriate to conclude that there is a basis for a new trial if this evidence would affect the determination of facts underlying the original decision."²⁷¹ The court went on to say that a new trial was justified because "under the new evidence, one might *also* find that the [defendants] had received the [fish] . . . and sold them . . . , *or something of the like*."²⁷² While this statement is rather opaque, the court seems to have been requiring only a substantial possibility of the defendants' innocence.²⁷³

Kakeishū 1550, 1552 (Nagoya).

266. See, e.g., Judgment of May 27, 1958 (Ueno v. Japan), Saikōsai [Supreme Court], 12 Keishū 1683, 1685 (3d Petty Bench); Fujino, *supra* note 248, at 88.

267. That court is often referred to as either the Great Court of Cassation or the Great Court of Adjudication. I will simply use the Japanese name.

268. Judgment of Sept. 6, 1924, *Daishin'in*, 3 Daihan keishū 663, *discussed and reprinted in part in* Usui, *supra* note 243, at 138-39.

269. See Judgment of Sept. 6, 1924, 3 Daihan keishū at 666-67 (listing the decisions of the lower courts, which were not reported, in summary of the case).

270. *Id.*

271. *Id.* at 667.

272. *Id.* at 667-68 (emphasis added).

273. See, e.g., Abe Haruo, *Saishin riyū to shite no shōko no shinkisei to*

b. *Judicial Standards: 1945-1975*

In contrast to this rather flexible approach, for many years after the war, courts interpreted item 6 very narrowly, placing primary emphasis on the importance of the finality of judgments. In a 1950 en banc ruling, the Supreme Court stated, "The need to respect final judgments can be perceived from the provisions of article 39 of the Constitution Accordingly, the grounds for retrials attacking final judgments must be interpreted clearly and strictly."²⁷⁴ Article 39 of the Constitution, on which the Court relied, is the double jeopardy provision referred to above.²⁷⁵ By its terms that provision applies only when a defendant has been acquitted, not when a defendant is seeking a new trial after being convicted. Nonetheless, the Grand Bench made clear its view that, by analogy, a private petitioner must satisfy a heavy burden in seeking to overturn a prior final conviction.²⁷⁶

meihakusei (2) [*Newness and Clarity of Evidence as a Ground for Retrial, Part 2*], 375 KEISATSU KENKYŪ 25, 32-33 (1961); Usui, *supra* note 243, at 139.

This case bears interesting parallels to *Fay v. Noia*, 372 U.S. 391 (1963). See *supra* text accompanying notes 103-04. Noia and two co-defendants had been convicted of felony murder. The two co-defendants appealed and eventually won release on the ground that their confessions—the sole evidence against them—had been coerced. Noia had been convicted on the basis of his own confession, which the state stipulated had been no less coerced than those of the other defendants; but he decided not to appeal, partly out of fear that the life sentence he had received after the first trial might be increased to the death penalty if he was convicted in a second trial. As in the Japanese case, after Noia saw that his co-defendants had won their release, he sought the same treatment. While a strict interpretation of the relevant standards would probably have led to a denial of relief in both instances, the equities favored both sets of petitioners and may have influenced the respective courts' interpretations of the standards. See Wechsler, *supra* note 96, at 178-79.

274. Judgment of April 21, 1950 (Kanai v. Japan), Saikōsai [Supreme Court], 4 Keishū 666, 668-69 (Grand Bench) (construing art. 485 of the 1922 Criminal Procedure Code).

275. See *supra* text accompanying note 258.

276. In a similar vein, in 1959 the Nagoya High Court stated:

(i) "Newly Discovered" Requirement

This strict approach was reflected in three major ways. First, most courts placed limits on the nature of evidence that would be deemed "newly discovered."²⁷⁷ Holding that the evidence must be "new" not only to the court, but also to the defendant, those courts rejected efforts to rely on evidence that the petitioner had been aware of at the time of trial. In the leading decision on this issue, the Supreme Court in 1954 stated, "When a defendant knows of evidence and fails to present it at trial, but then relies on that evidence in seeking a retrial after his conviction has become final, that evidence does not constitute 'newly discovered evidence' within the meaning of article 435(6) of the Criminal Procedure Code."²⁷⁸

Legal conditions finalized by opinion must be respected. Once a decision has become final, the concept of legal stability demands that the propriety of the judgment is not open to challenge and cannot be modified. Of course, the law does not provide that judgments are absolutely immutable The law recognizes that, in specified circumstances, the interest in [protecting human rights] requires a compromise on the interest in [the finality of judgments]. This is the so-called system for retrials. Inasmuch as the retrial system seeks to guarantee justice and human rights even at the expense of upsetting the finality of judgments and sacrificing the demand for legal stability, the grounds for requesting retrials must be limited, and those grounds must be so strong that the prior judgment simply cannot be tolerated Accordingly, it is of course natural that retrial requests cannot be allowed in cases where the factfindings of the original judgment are merely questionable, or where the petitioner's assertions simply seem somehow plausible.

Judgment of July 15, 1959 (Yoshida v. Japan), Kōsai [High Court], 1 Kakyū keishū 1550, 1552 (Nagoya).

277. See, e.g., cases discussed in Usui, *supra* note 243 at 118-22.

278. Judgment of Oct. 19, 1954 (Aoyama v. Japan), Saikōsai [Supreme Court], 8 Keishū 1610, 1612-13 (3d Petty Bench).

That case involved a rather typical Japanese pattern known as the *migawari hannin* (stand-in criminal) situation. Such cases most commonly involve relatively minor crimes, especially prosecutions arising out of traffic accidents. An innocent individual deliberately confesses, usually to protect a superior from prosecution (and often on the request of the superior). If no prison sentence is imposed, the case may well end there; but when prison looms the "stand-in" often has a change of heart and seeks a retrial. See, e.g., Nishimura, *supra* note 262, at 83, 87-88; Takada Takuji, *Migawari yūzai to saishin seikyū* [Guilty "Stand-ins" and

This and similar decisions generated considerable controversy, with the opposing positions resting on contrasting views of the proper function of retrials. On one side were those who put primary emphasis on the search for truth and supported reopening trials whenever new evidence was presented of which the original court was unaware.²⁷⁹ On the other were those who emphasized the finality of judgments and argued that the adversary system requires rejection of evidence if the defendant deliberately withheld it or was negligent in not discovering it.²⁸⁰

As reflected by the Supreme Court decision quoted above, actual decisions for the most part fell between these two extremes. Judges typically excluded evidence that a defendant had intentionally hidden from the court,²⁸¹ but allowed the introduction of evidence that a defendant could have discovered with diligence but negligently failed to find.²⁸² As with

Retrial Requests], in HIRABA YASU HARU HAKUSHI KANREKI SHUKUGA, GENDAI NO KELJI HOGAKU (GE) [COLLECTION OF WORKS DEDICATED TO DR. HIRABA YASU HARU ON THE OCCASION OF HIS SIXTY-FIRST BIRTHDAY, MODERN-DAY CRIMINAL LAW STUDY, VOL. 2] 287 (1977).

279. See, e.g., Mitsudō Kageaki, *Saishin shōkohō* [Law of Evidence for Retrials], HORITSU JIHŌ 37-6-22 (1965); Suzuki Shigetsugu, *Shōko no shinkisei* [The "Newness" of Evidence], in KELJI SAISHIN NO KENKYŪ, *supra* note 243, at 127, 131-32.

280. See, e.g., Abe, *supra* note 261, at 59-60.

281. See, e.g., Usui, *supra* note 243, at 118-22. These decisions do not preclude the prosecutors from requesting retrials in such cases. In fact, prosecutors are thought to have a duty to bring such requests if they discover that the original trial was in error, and petitions from prosecutors in such cases have traditionally constituted the single largest group of retrial requests, Nishimura, *supra* note 262, at 83 (data for 1956-1972 period); see Konishi Hidenobu, *Saishin—saiban no tachiba kara* [Retrials—From the Standpoint of the Judiciary], in 2 KELJI TETSUZUKI [CRIMINAL PROCEDURE] 1011, 1011-12 (Mitsui Makoto et al. eds., 1988) (vast majority of retrials granted between 1970 and 1984 came at request of prosecutors, in *migawari hannin* and automobile accident cases).

In a few cases, courts have even permitted petitioners to introduce evidence that they had deliberately withheld from the trial court. See, e.g., cases cited in Fujino, *supra* note 248, at 95 & n.10.

282. See cases discussed in Usui, *supra* note 243, at 118-25. In a typical formulation, one lower court reasoned:

[T]o attack the defendant's *negligence* and reject the relief of a new trial would run counter to the true meaning of criminal trials, that being the discovery of essential truth and the achievement of justice; [but] evidence

Fay v. Noia and *Sanders* in the United States, the crucial question was whether the defendant deliberately withheld matters from the court.

that the defendant deliberately did not present at the original trial . . . already had been discovered from the start and cannot be called "newly discovered evidence" [as required by article 435(6)].

Judgment of February 20, 1959 (Matsumoto v. Japan), Kan'i saibansho [Summary Court], 1 Kakyū keishū 499, 501-02 (Shinjuku) (emphasis added).

A research judge (*chōsakan*) at the Supreme Court who apparently worked on the Supreme Court's 1954 decision, *see supra* text accompanying note 278, expressed similar views. Discussing that decision in an article he wrote four years later, he stated that "under the new Criminal Procedure Code, with its strengthened adversary system, . . . responsibility should be placed [upon the defendant] for his *deliberate* trial activities," but did not suggest that the adversary system might also require the defendant to bear responsibility for negligent failure to discover exculpatory evidence. Takada Yoshifumi, *Keiji hanrei kenkyū* (102) [*Research on Criminal Precedents* (102)], 339 KEISATSU KENKYŪ 93, 97-98 (1958) (emphasis added). The position of *chōsakan* is most closely analogous to that of law clerk in the United States, although nearly all *chōsakan* are judges with many years of experience who are posted as research assistants at the Supreme Court for three to five year periods. *See generally* TABARU GIEI, SAIKŌSAI HANKETSU NO UCHIGAWA [THE INSIDE OF SUPREME COURT JUDGMENTS] 210-20 (1965). *Chōsakan* serve the Court as a whole, rather than an individual Justice; and typically one *chōsakan* will have primary responsibility for a particular case. For many significant cases, a *chōsakan* (usually the one who had primary responsibility for the case) will write a semi-official commentary (a so-called *kaisetsu*). Their commentaries, which examine key legal points in the Court's opinions and often provide additional analysis and support, appear in the journal HOSŌ JIHŌ and are compiled into a special annual volume. Although the commentaries have no precedential effect, they are widely regarded as rather reliable indicators of the Court's views, as well as a clear sign of which *chōsakan* had primary responsibility. *See* SAIKŌSAIBANSHO [THE SUPREME COURT] 152-53 (Nihon bengoshi rengōkai-hen [Japan Fed'n of Bar Ass'ns] ed., 1980). Judge Takada's *kaisetsu* on the 1954 ruling, SAIKŌSAIBANSHO HANREI KAISETSU, KEMI-HEN, SHŌWA 29-NENDO [COMMENTARIES ON SUPREME COURT PRECEDENT, CRIMINAL VOLUME] 301 (Saikōsaibansho chōsakanshitsu-hen [Supreme Court, Clerks' Chambers] ed., 1954), was quite neutral, mainly describing what points had and had not been resolved. He discussed his own views in more detail in the later article cited *supra*).

In a few cases, courts went further and concluded that evidence would not qualify as "newly discovered" if the defendant should have known of it at the time of the original trial, but failed to present it, apparently through negligence or neglect. *See, e.g.*, Judgment of June 17, 1954 (Fukuzawa v. Japan), Kōsai [High Court], 7 Kōkeishū 805, 809 (Tokyo); Abe, *supra* note 261, at 59-62.

(ii) *Scope of Review*

The second barrier concerned the scope of review. Virtually all commentators agreed that a court considering a retrial petition should not simply consider the new evidence in isolation. Rather, they reasoned, the reviewing court should combine the new evidence with the evidence adduced at the original trial and then engage in a comprehensive re-examination of all the evidence to determine whether the new evidence would affect the earlier judgment.²⁸³ Courts were split on this issue, however, with many courts requiring that the new evidence *alone* be sufficient to overturn the earlier conviction.²⁸⁴ By the mid-1960s, most courts had begun to follow the so-called "comprehensive evaluation" (*sōgō hyōka*) approach;²⁸⁵ however, some still appeared to be looking only at the new evidence in isolation.²⁸⁶

(iii) *Level of Proof and Reasonable Doubt Standard*

The third barrier, which related to the level of proof required to obtain a new trial, was the most difficult to satisfy. That barrier had two major aspects. First, the actual level of proof required was high. In contrast to the 1924 Daishin'in decision, which had indicated that new evidence would suffice if it "affect[ed] the factual findings underlying the original decision," a 1958 Supreme Court ruling stated that "the term 'clear evidence' means evidence having both evidentiary capacity (*shōko nōryoku*) and a *high degree* of persuasive effect (*shōmeiryoku*)."²⁸⁷ Similarly, in defining the term "clear evi-

283. See, e.g., Morinaga Eisaburō, *Saishinhō kaisei mondai to saishin seikyū no jissai* [The Actual State of the Retrial Law Revision Issue and Retrial Requests], HÖRITSU JIHŌ 37-6-12, 15 (1965); Mitsudō, *supra* note 279, at 23.

284. E.g., Judgment of March 12, 1957, Kōsai [High Court], Kōtō saibansho keiji saiban tokuhō 4-6-21 (Tokyo). See Usui, *supra* note 243, at 141-43.

285. See Odanaka & Ōde, *supra* note 243, at 113; Ōde, *supra* note 243 (summaries of cases numbered 28, 29, and 41).

286. This appears to have been the case, for example, in the district court's decision rejecting the second retrial petition in the *Matsuyama* case. See *infra* text accompanying notes 389-97.

287. Judgment of May 27, 1958 (Ueno v. Japan), Saikōsai [Supreme Court], 12

dence," High Courts used such terms as "evidentiary value of a high degree of reliability"²⁸⁸ and "evidence sufficient to create a high probability for supposing the petitioner's innocence."²⁸⁹

The latter quote also reveals the second key aspect of the debate over the level of proof: the inapplicability of the "reasonable doubt" standard.²⁹⁰ Courts required that the petitioner establish her actual innocence, and not simply the existence of a reasonable doubt about guilt. This issue aroused much controversy among practitioners and scholars. As early as 1938, several scholars—including two of the leading younger authorities in the criminal procedure field, Dandō Shigemitsu and Kishi Seiichi—had argued that the reasonable doubt standard should be applied in determining whether a petitioner had presented sufficient evidence to warrant a new trial.²⁹¹

Keishū 1683, 1685 (3d Petty Bench) (emphasis added). A commentary on this case, written by then-*chōsakan* Aoyagi Fumio, noted the difference between the Daishin'in stance and the 1958 ruling and attributed it to changes in the law relating to evidentiary capacity. See SAIKŌSAIBANSHO HANREI KAISETSU, KELJI-HEN, SHŌWA 33-NENDO [COMMENTARIES ON SUPREME COURT PRECEDENTS, CRIMINAL VOLUME] 383, 384 (Saikōsaibansho chōsakanshitsu-hen [Supreme Court, Clerks' Chambers] ed., 1958).

288. Judgment of June 29, 1954 (Une v. Japan), Kōsai [High Court], 5 Tōkyō kōtō saibansho hanketsu jihō 311, 313.

289. Judgment of July 15, 1959 (Yoshida v. Japan), Kōsai [High Court], 1 Kakyū keishū 1550, 1556 (Nagoya).

290. The popular term in Japanese, "*utagawashiki wa hikokunin no riei ni*," has a somewhat different nuance from the term "reasonable doubt." The Japanese term is based upon the Latin phrase "*in dubio pro reo*," and the Japanese expression literally means something along the lines of "doubts are to be resolved in the defendant's favor." Under Japanese Supreme Court precedent, however, the standard is defined as proof beyond a reasonable doubt. See, e.g., Judgment of May 20, 1975 (Murakami v. Japan), Saikōsai [Supreme Court], 29 Keishū 177, 180 (1st Petty Bench). See *infra* text accompanying note 347.

291. KELJI HANREI HYŌSHAKUSHŪ DAINIKAN [COMMENTARY ON CRIMINAL PRECEDENTS, Vol. 1] 373 (Keiji hanrei kenkyūkai-hen [Criminal Precedent Study Group] ed., 1938) (case comment by Dandō Shigemitsu) [hereinafter Dandō Case Comment]; KELJI HANREI HYŌSHAKUSHŪ DAINIKAN [COMMENTARY ON CRIMINAL PRECEDENTS, Vol. 2] 143 (Keiji hanrei kenkyūkai-hen [Criminal Precedent Study Group] ed., 1939) (case comment by Kishi Seiichi). See generally Odanaka & Ōde, *supra* note 243, at 77-81, and authorities cited therein. Although these comments were addressed to the 1922 Code, numerous commentators and practitioners have echoed the criticism with respect to the identical language in the current Code. See, e.g., KISHI SEIICHI, 2 KELJI SOSHŌHŌ YŌGI [KEY POINTS OF CRIMINAL PROCEDURE

In this connection, Dandō observed that "[Article 485(6) of the 1922 Code] requires 'clear evidence requiring the *declaration of innocence*,' and from that statutory language we can see that 'clear evidence of *innocence*' is not required."²⁹²

This view was far from uniform. In fact, in 1961 one commentator declared, "I would venture to state that no one would disagree with the proposition that the reasonable doubt standard does not apply."²⁹³ As far as academics and practitioners are concerned, he was plainly wrong.²⁹⁴ But his view enjoyed nearly complete support in the courts. The first clear signs of a shift in this judicial attitude apparently did not come until 1975, when the Tokyo District Court indicated—albeit in the course of a ruling rejecting a retrial petition—that the law did not require positive proof of innocence, but rather that clear evidence of a reasonable doubt as to guilt would suffice.²⁹⁵

Accordingly, under prevailing interpretations of article 435(6), to obtain a new trial a petitioner was in effect required to establish her *actual innocence clearly* on the basis of *new evidence standing alone*.²⁹⁶ This standard obviously placed a

LAW] 404 (1962); Mitsudō, *supra* note 279, at 23-25. See generally TAMIYA HIROSHI, KELJI SOSHŌHŌ NYŪMON [INTRODUCTION TO CRIMINAL PROCEDURE LAW] 300-04 (3d ed. 1982).

292. Dandō Case Comment, *supra* note 291, at 375. Interpretation of the statutory language is made more difficult by the fact that the same word, *muzai* [literally, absence of guilt], is used in Japanese for both "innocent" and "not guilty." The statute reads, "*muzai o iiwatasubeki*" (should be declared innocent, or, should be acquitted).

293. Abe, *supra* note 273, at 27. This overstatement can perhaps be attributed to the fact that the author was a prosecutor, but for years he was also one of the most vocal proponents of a liberalization in attitudes toward retrials.

294. He found agreement at least among prosecutors, though, with German thinking on the same issue cited in support. See, e.g., Usui, *supra* note 243, at 134-37; *Saishin o meguru jakkan no mondai* [A Few Problems Relating to Retrials], JIYŪ TO SEIGI 14-5-11 (1963).

295. Unreported ruling of March 31, 1975, quoted in part in Ōde, *supra* note 243, at 86 (Case No. 49).

296. As one commentator noted, though, the petitioner was not required to establish his innocence beyond a reasonable doubt. Abe, *supra* note 273, at 28-31. Even though the Nagoya High Court opinion quoted in note 276 *supra* went almost that far, most rulings seemed to adopt the view that proof of innocence by a preponderance of the evidence would be sufficient.

heavy burden on the petitioner. Some critics argued that the courts had interpreted article 435(6) so strictly that in practice the standards were no different from those of the highly restrictive 1890 Code. For all intents and purposes, they claimed, a petitioner could obtain a new trial only if she could show that someone else had committed the crime or that, in a murder case, the supposed victim was still alive.²⁹⁷ Hence, the right to petition for a retrial was widely referred to as "the door that never opens."²⁹⁸

c. *Application of Standards Prior to 1975*

(i) *Successful Petitions*

This does not mean that no retrials were granted in the 1950s and 1960s. In a number of cases, prosecutors themselves petitioned for retrials on behalf of improperly convicted persons.²⁹⁹ As far as petitions by private parties go, however, there were two high points.

The first came in 1956 in the case of Menda Sakae. Menda, who many years later became the first death row inmate to win ultimate acquittal following a retrial, was convicted in 1950 of murdering a husband and wife and injuring their two daughters in connection with a robbery. After his conviction became final in 1951, Menda began filing a series of retrial requests. The first two were summarily dismissed.³⁰⁰ On his third attempt, a three-judge panel of the Yatsushiro Division of the Kumamoto District Court, led by Judge Nishitsuji, undertook an extensive re-examination of the case and ordered a new trial in 1956 after concluding that Menda had a valid

297. See, e.g., Morinaga, *supra* note 283, at 14-15.

298. See, e.g., SAISHIN, *supra* note 1, at 1.

299. See generally Nishimura, *supra* note 262. As discussed earlier, most of these were so-called *migawari hannin*-type cases involving relatively minor crimes. See *supra* notes 278-81 and accompanying text.

300. See Foote, *supra* note 6, at 21-22, and sources cited therein.

alibi.³⁰¹ On an immediate appeal by the prosecution, the Fukuoka High Court reversed, sharply rebuking the district court in the process for its handling of the case.³⁰² The High Court announced that "the factual investigation [undertaken by the District Court] exceeds the permissible scope for such investigations by a court reviewing a petition for retrial, unjustifiably impairs the stability of judicial decisions, and jeopardizes the existence of the justice system."³⁰³ Menda appealed, but the Supreme Court upheld the High Court³⁰⁴ and the Nishitsuji Ruling went down in history as the so-called "phantom retrial order."³⁰⁵

The second high point occurred in 1961 when a retrial was granted to Yoshida Ishimatsu.³⁰⁶ That decision and the re-

301. Judgment of Aug. 10, 1956 (Menda v. Japan), Chisai [District Court] (unreported case) (Kumamoto Dist. Ct., Yatsushiro Div.), *reprinted in* KELJI SAISHIN SEIDO KENKYŪKAI, CHOMEI SAISHIN JIKEN MIKŌKAN SAIBANREISHŪ DAISSESHŪ [STUDY GROUP ON THE CRIMINAL RETRIAL SYSTEM, UNREPORTED COURT DECISIONS IN FAMOUS RETRIAL CASES, VOL. 1] 12 (1979) [hereinafter MIKŌKAN SAIBANREISHŪ]; *reprinted in part in* Usui, *supra* note 243, at 131.

302. Judgment of April 15, 1959 (Japan v. Menda), Kōsai [High Court] (unreported case) (Fukuoka), *reprinted in* MIKŌKAN SAIBANREISHŪ, *supra* note 301, at 52.

303. Japan v. Menda, *reprinted in* MIKŌKAN SAIBANREISHŪ, *supra* note 301, at 53. The High Court further observed:

[T]he retrial system seeks a balance between the contradictory demands for pursuing the substantive truth and for maintaining concrete legal stability represented by a judgment. Naturally, the demand for concrete legal stability represented by a judgment should be subject to considerable compromise in the face of the pursuit of substantive truth. Yet to permit, as did the lower court in this case, evidence already evaluated by the original trial court to serve as newly discovered evidence for a retrial petition, would demonstrably undermine the normal procedural structure established by the [postwar] Criminal Procedure Code, which, unlike the old Criminal Procedure Code, contains strict rules of evidence and prescribes rather strict standards for appeals, and would further render it virtually impossible to maintain the legal stability of final judgments.

Japan v. Menda, *reprinted in* MIKŌKAN SAIBANREISHŪ, *supra* note 301, at 53.

304. Judgment of Dec. 6, 1961 (Menda v. Japan), Saikōsai [Supreme Court] (unreported case), *reprinted in part in* Usui, *supra* note 243, at 134.

305. Menda ended up spending 27 more years on death row before he gained his ultimate acquittal, on grounds virtually identical to those identified in the Nishitsuji Judgment, after his sixth retrial request was granted. *See infra* text accompanying notes 372-81.

306. Judgment of April 11, 1961 (Yoshida v. Japan), Kōsai [High Court], 14

sulting retrial represented a more significant—and at the time much more highly publicized—episode in the history of retrials. Yoshida was convicted of robbery murder in 1914, on the basis of testimony by two alleged co-conspirators.³⁰⁷ Although his accusers both recanted, over the years the courts rejected four petitions for retrial. Finally, on Yoshida's fifth petition, following considerable public outcry and the formation of a special subcommittee within the Japan Federation of Bar Associations to help represent him, the Nagoya High Court in 1961 concluded that at least one of the accusations had been fabricated and ordered a new trial.³⁰⁸ Nearly fifty years after he was first convicted,³⁰⁹ this new trial ultimately led to Yoshida's acquittal.³¹⁰

Yoshida was the first major case in postwar Japan in which a private petitioner had secured a retrial. His success led to a so-called "retrial boom" in which the Legal Affairs Committee of the Japanese House of Representatives established a special subcommittee to investigate the retrial system.³¹¹ At the same time, the *Yoshida* decision generated a backlash, which intensified after three supporters of another retrial petitioner were arrested for having instigated perjury in connection with that petition.³¹² As it turned out, only one other retrial was granted in a major case in the next twelve years.

Kōkeishū 589 (Nagoya).

307. For a relatively concise summary of this case, see Kawasaki Hideaki, *Yoshida jiken* [*The Yoshida Case*], in *KELJI SAISHIN NO KENKYŪ*, *supra* note 243, at 289-301.

308. Judgment of April 11, 1961 (*Yoshida v. Japan*), Kōsai [High Court], 14 Kōkeishū 589 (Nagoya).

309. Unlike Menda, Yoshida did not spend the entire period on death row—or even in prison. Although Yoshida was originally sentenced to death, on direct appeal the sentence was reduced to life imprisonment, and he was released on parole in 1935. See Kawasaki, *supra* note 307, at 289.

310. Judgment of Feb. 28, 1963 (*Yoshida v. Japan*), Kōsai [High Court], 16 Kōkeishū 88 (Nagoya).

311. See, e.g., Odanaka & Ōde, *supra* note 243, at 100-03.

312. Odanaka & Ōde, *supra* note 243, at 102-03.

(ii) *Controversial Denials*

In a few celebrated cases, retrials were denied even after other individuals confessed to having committed the crimes or all the key witnesses recanted their testimony. One such case, the *Yonetani* case, involved the 1952 attempted rape and killing of a fifty-seven year old woman in Aomori City.³¹³ A thirty year old with no fixed employment, Yonetani Shirō, was convicted of having caused the woman's death in the course of an attempted rape and was sentenced to ten years in prison.³¹⁴ In 1966, eight years after Yonetani was released on parole, the victim's nephew confessed to the crime and provided a rather detailed account of it.³¹⁵ The prosecutors then reinvestigated the incident and indicted the nephew. He withdrew his confession and was acquitted by the Tokyo District Court.³¹⁶ The prosecutors appealed, but while the appeal was pending in 1970, the nephew committed suicide. In the meantime, Yonetani, after learning of the nephew's confession, filed a retrial petition in 1967. Yet under the prevailing standards, that confession did not provide sufficiently clear new evidence, and the Aomori District Court rejected the retrial petition in 1973.³¹⁷

313. Hence a popular name for the case: the Case of the Murder of the Old Lady in Aomori. For concise summaries of this case, see Tanaka Terukazu, *Yonetani jiken* [The Yonetani Case], in KEIJI SAISHIN NO KENKYŪ, *supra* note 243, at 372; Usui Shigeo, *Kinji no saibanrei kara mita sōsa shorijō no mondaiten (jō), (chū), (ge)* [Problems with Regard to the Handling of Investigations, as Seen in Recent Court Decisions (Parts 1, 2, and 3)], KEISATSUGAKU RONSHŪ [THE JOURNAL OF POLICE SCIENCE] 36-2-20, 36-3-88, and 36-4-51, at 36-2, 24-26 (1983).

314. Judgment of Dec. 5, 1952, Chisai [District Court] (unreported decision of Aomori Dist. Ct., discussed in sources cited in *supra* note 313), *aff'd*, Judgment of Aug. 22, 1953, Kōsai [High Court] (unreported decision of Sendai H. Ct., discussed in sources cited in *supra* note 313).

315. See Judgment of July 31, 1978 (Japan v. Yonetani), Chisai [District Court], 905 HANJI 15 (Aomori) (ultimately acquitting Yonetani after retrial).

316. Judgment of July 2, 1968, Chisai [District Court] (unreported decision of Tokyo Dist. Ct., discussed in sources cited in *supra* note 313).

317. Judgment of March 30, 1973 (Yonetani v. Japan), Chisai [District Court], 5 Keiji saiban geppō [Keisai geppō] 377 (Aomori).

A second case in which a later confession by someone else was not enough to warrant a retrial was the so-called *Murder of the Hirosaki University Professor's Wife*, which occurred in 1949. Police arrested Nasu Takashi, a twenty-six year old local resident. Although the authorities held him and presumably subjected him to intense questioning for over two full months,³¹⁸ he never swayed from his absolute denial. He was initially acquitted for lack of evidence,³¹⁹ but on appeal by the prosecutors, the Sendai High Court reversed, convicted him, and sentenced him to fifteen years in prison.³²⁰

After Nasu had completed his sentence and the statute of limitations on the original crime had run, another man came forward and confessed to having committed the murder, providing numerous details that appeared to confirm his story. The Sendai High Court nevertheless rejected Nasu's subsequent retrial petition, suggesting that the man may have obtained his knowledge of the crime from contemporary newspaper accounts and other reports on the case.³²¹

After the Supreme Court relaxed the retrial requirements, as discussed below, *see infra* text accompanying notes 343-61, Yonetani won a new trial, Judgment of October 30, 1976 (Yonetani v. Japan), Kōsai [High Court], 29 Kōsai keishū 557 (Sendai). Following the retrial, Yonetani was ultimately acquitted in Aomori District Court on July 31, 1978, 905 HANJI 15.

318. After being held for 20 days on the murder charge, he was confined for observation of his mental condition for another month, then arrested on other charges and held for another ten days before his rearrest and indictment on the murder charges. *See* Tanaka Terukazu, *Hirosaki jiken* [The Hirosaki case], in KEIJI SAISHIN NO KENKYŪ, *supra* note 243, at 331, 339. *See generally* Usui, *supra* note 243, 36-2, at 22-24.

319. Judgment of Jan. 12, 1951, Chisai [District Court] (unreported decision of Aomori D. Ct., Hirosaki Div.). *See* Tanaka, *supra* note 318.

320. Judgment of May 31, 1952 (Nasu v. Japan), Kōsai [High Court], 22 Kōtō saibansho keiji hanketsu tokuhō 133, *aff'd*, Judgment of Feb. 19, 1953 (Nasu v. Japan), Saikōsai [Supreme Court], 7 Keishū 305 (1st Petty Bench).

321. Judgment of December 13, 1974, Kōsai [High Court] (unreported decision of Sendai H. Ct.), *reprinted in* MIKOKAN SAIBANREISHŪ, *supra* note 301, at 57.

Here too, as soon as the retrial standards changed, Nasu promptly won a retrial and eventual acquittal. The Sendai High Court granted a motion for reconsideration and ordered a retrial. Judgment of July 13, 1976 (Nasu v. Japan), Kōsai [High Court], 29 Kōkeishū 323. In an opinion acquitting Nasu after the retrial, the Sendai High Court expressly concluded that the man who later confessed was in fact the real murderer and that there was not one piece of evidence

Finally, one of the most publicized and controversial cases was the *Tokushima Radio* case, in which the two central witnesses both later stated that their testimony had been false. In that 1953 case, the owner of a radio store was murdered in his room behind the shop.³²² Eight months after the crime, following a long and largely fruitless investigation, prosecutors began questioning two youths, aged sixteen and seventeen, who had worked in the shop and had been living in a shed behind the building on the night of the murder. The police arrested the boys on minor charges and held them for twenty-seven and forty-five days, respectively, questioning them intensively during that time.³²³

It turned out that the prosecutors' main target was not the boys themselves,³²⁴ but rather Fuji Shigeko, the twice-divorced common law wife of the victim. The boys eventually stated that they had seen the couple fighting on the morning of the murder and that Fuji had requested them to help her hide evidence. The police then arrested Fuji. She was convicted of

sufficient to show that Nasu was involved in the crime. Judgment of Feb. 15, 1977 (Nasu v. Japan), Kōsai [High Court], 30 Kōkeishū 28. That opinion intimated that one of the key items of evidence linking Nasu to the crime, blood on his shirt, may not even have been there at the time it was seized—and thus implied that the investigating authorities may have fabricated that piece of evidence. *Id.* at 45.

322. The following account of this case is based primarily on the decision ultimately acquitting the defendant, Fuji Shigeko, on retrial, Judgment of July 9, 1985 (Japan v. Fuji), Chisai [District Court], 1157 HANJI 3 (Tokushima); Takada Akimasa, *Tokushima jiken* [The Tokushima Case], in KEIJI SAISHIN NO KENKYŪ, *supra* note 243, at 386; and Hayashi Nobuhide, *Tokushima rajio-shō jiken* [The Tokushima Radio Shop Case], HŌGAKU SEMINĀ ZŌKAN, SHIRIZU [SHIN—KENRI NO TAME NO TŌSŌ], NIHON NO ENZAI [HOGAKU SEMINAR EXTRA NUMBER, [NEW—STRUGGLE FOR RIGHTS] SERIES, MISCARRIAGES OF JUSTICE IN JAPAN] [hereinafter NIHON NO ENZAI] 220 (1983). See generally Nishijima Katsuhiko, *Tokushima jiken saishin kōhan no kadai* [The Issues Raised by the Retrial of the Tokushima Case], HŌRITSU JIHŌ 55-10-41 (1983). Among the highly critical accounts of the investigation in this case is Aochi Shin, *Kensatsu kenryoku to enzai jiken* [Prosecutorial Power and Cases of Miscarriages of Justice], HŌGAKU SEMINĀ ZŌKAN, SŌGŌ TOKUSHŪ SHIRIZU 16, GENDAI NO KENSATSU [HOGAKU SEMINAR EXTRA NUMBER, COMPREHENSIVE SPECIAL SERIES 16, TODAY'S PROCURACY] 146 (1981).

323. See Takada, *supra* note 322, at 393.

324. In fact, despite the extensive interrogation of the youths, they were not indicted for any crimes. See Takada, *supra* note 322, at 393.

murder, in large part on the basis of the youths' statements, and sentenced to thirteen years in prison.³²⁵

In 1958 both youths confessed to having fabricated their statements under pressure from the prosecutors.³²⁶ Both also testified in Fuji's behalf at the time of her second and subsequent petitions for retrial. Their disavowals were not enough. In considering the second petition the Tokushima District Court accepted the disavowals as "new" but found insufficient evidence to determine whether the youths had lied originally or later when they recanted their testimony.³²⁷ By the time of the third petition their testimony was no longer "new."³²⁸

325. Judgment of April 18, 1956, Chisai [District Court] (unreported decision of Tokushima D. Ct.), *aff'd*, Judgment of Dec. 21, 1957, Kōsai [High Court] (unreported decision of Tokushima H. Ct.). See Takada, *supra* note 322.

326. They turned themselves in to police for having committed perjury and were questioned by prosecutors and by an inquiry panel of the Tokushima prosecutors' office. The inquiry panel concluded that there was sufficient evidence to indict the youths for perjury in connection with their earlier testimony against Fuji. See Takada, *supra* note 322, at 394. Subsequently, one of the youths held firm to his confession of perjury, but one shifted back and forth, depending on whether he was talking to the prosecutors or to friends and representatives of the defendant. See 1157 HANJI at 10.

327. Judgment of Dec. 9, 1960, Chisai [District Court] (unreported decision of Tokushima D. Ct.). See Takada, *supra* note 322.

328. Judgment of March 9, 1963, Chisai [District Court] (unreported decision of Tokushima D. Ct.). See Takada, *supra* note 322. Thereafter, in reviewing the fourth petition, the court accepted the continuing disavowals by the youths as "new" evidence, but again found them insufficiently "clear" to warrant a new trial. Judgment of July 20, 1970 (Fuji v. Japan), Chisai [District Court], 2 Keisai geppō 760 (Tokushima).

After the Supreme Court relaxed the standards for consideration of retrial petitions, Fuji filed a fifth petition, but that petition terminated with her death in 1979. Finally, on Dec. 23, 1980, the Tokushima District Court granted a posthumous petition, filed on her behalf by her siblings, 990 HANJI 20 (1981), and a retrial was opened in 1983, after the Takamatsu High Court rejected the prosecutors' appeal, Judgment of March 12, 1983, 1073 HANJI 3. Following the retrial, Fuji was acquitted in 1985, Judgment of July 9, 1985 (Japan v. Fuji), Chisai [District Court], 1157 HANJI 3 (Tokushima), the first posthumous acquittal in Japan.

d. *Pressure for Change*

Over the years, cases like these generated considerable publicity and led to various movements for change in the retrial standards. Although many of the most famous cases date from the early 1950s, the petitions for retrials, for the most part, didn't occur until some years later; and the retrial issue attracted relatively little notice until the late 1950s.³²⁹ The first real attention came from the Supreme Public Prosecutor's Office, which in 1954 undertook a survey of cases involving mistaken indictments.³³⁰ The Japan Federation of Bar Associations (JFBA), through its Committee for the Protection of Human Rights, first took up the issue in 1959, when it established teams to assist in the retrial petitions in *Menda*, *Tokushima Radio*, *Yoshida* and other cases.³³¹ At about the same time, the first articles began to appear,³³² however, initially only practitioners, prosecutors and judges wrote about the issue. It had not yet reached the academic world.

Thereafter, JFBA kept pressing the issue, continuing to organize and fund defense teams to pursue retrials in cases it deemed worthy.³³³ With the publicity surrounding the *Yoshida* case, the retrial issue began to attract much wider attention. The Legal Affairs Committee of the House of Repre-

329. Nonetheless, public concern over the general issue of fair trials was high during the mid-1950s, spurred on by allegations that Communist sympathizers had been unjustly prosecuted or framed in the so-called *Matsukawa* case and several other incidents. See generally CHALMERS JOHNSON, *CONSPIRACY AT MATSUKAWA* (1972).

330. Hōmu kenshūjo [Justice Research Office], *Kisogo shinhannin no arawareta jiken no kentō* [Consideration of Cases in Which the Real Criminal Was Discovered after the Indictment], Parts 1, 2 & 3, published in KENSATSU KENKYŪ SŌSHO [PROSECUTORIAL RESEARCH SERIES] 14, 15 (1954) & 17 (1955).

331. See SAISHIN, *supra* note 1, at 164-207.

332. For a chronological bibliography, see *Saishin ni kansuru bunken mokuroku*, *supra* note 243.

333. See SAISHIN, *supra* note 1, at 164-207. See generally *Tokushū, Saishin to Nichibenren* [Special Issue, Retrials and Nichibenren], JIYŪ TO SEIGI 34-9 (1983).

sentatives of the Japanese Diet organized a special subcommittee to investigate the retrial system, which held a series of meetings with academics, defense attorneys, prosecutors, and judges in 1962 and 1963.³³⁴ Moreover, by this time the retrial issue had become a popular issue among academics. The Japanese Criminal Law Society took up the topic in 1962,³³⁵ and by the mid-1960s a steady stream of academic articles had begun to appear. Finally, across Japan supporters of several petitioners organized separate movements for retrials in those specific cases.³³⁶

While the legislative efforts stalled, the other activities steadily expanded. But the next major developments did not occur until the early 1970s. In 1972 JFBA established an internal group to study the actual operation of the retrial system. In 1973 a national coordinating committee was established, bringing together JFBA, interested academics, and the various separate support groups. In November of that year the committee invited Professor Karl Peters of Tübingen University, the leading expert on retrials in West Germany, to visit Japan and speak on retrial reform in West Germany.³³⁷ Professor Peters's visit appears to have placed the imprimatur of an established and respected movement on the retrial efforts. In early 1974 the Criminal Law Society established a study group on the retrial system and later that year devoted an issue of its journal to the topic, leading off with an article by Professor Peters on retrial reform.³³⁸

Very soon thereafter, in a landmark ruling by its First Petty Bench, the Japanese Supreme Court greatly revised the standards governing grants of retrials.³³⁹ If one looks only at

334. See Odanaka & Ôde, *supra* note 243, at 100-01.

335. Odanaka & Ôde, *supra* note 243, at 97.

336. Odanaka & Ôde, *supra* note 243, at 109. See generally Nomura Jirô, *Menda jiken no muzai hanketsu* [The Menda Acquittal], 500 HANREI TAIMUZU [HANTA] 44, 46 (1983).

337. Odanaka & Ôde, *supra* note 243, at 109-10.

338. Karl Peters, *Saishinhô no kaikaku* [Reform of Retrial Law], KEIHÔ ZASSHI 20-1-1 (1974).

339. See *infra* notes 346-61 and accompanying text.

the timing involved, it would seem that the various efforts described above had paid off. Yet a closer examination suggests that that may not have been the case at all. Rather, the crucial factor appears to have been a series of chance events relating to the workflow and composition of the Supreme Court.

e. 1975 and Beyond: The Supreme Court's Shiratori and Saitakawa Rulings

In 1971 Murakami Kuniyasu filed an appeal in the Supreme Court from a Sapporo High Court ruling rejecting his retrial petition in a controversial case known as the *Shiratori* case.³⁴⁰ Presumably by chance, that case was assigned to the First Petty Bench. That same year Kishi Seiichi, then a judge at the Tokyo High Court, was appointed to fill a vacancy on the First Petty Bench. In 1974 Justice Kishi was still a member of the First Petty Bench, and the *Shiratori* case was still pending,³⁴¹ when Dandō Shigemitsu, previously a professor at

340. That case involved the 1952 murder of a Sapporo policeman named Shiratori Kazuo (hence the popular name of the case), who was shot while riding home on a bicycle. Nine months after the murder, Murakami, a local Communist Party official, was arrested. After being held in confinement for nearly three years on a series of arrests and indictments on a total of 14 other charges, he was finally arrested and indicted in late 1955 for conspiring to murder Shiratori. He was convicted on that and other charges in Sapporo District Court in 1957 and sentenced to life imprisonment. In 1960 the Sapporo High Court affirmed the conviction but reduced the sentence to 20 years. The First Petty Bench of the Supreme Court rejected Murakami's appeal in 1963. Judgment of Oct. 17, 1963 (Murakami v. Japan), Saikōsai [Supreme Court], 17 Keishū 1795 (1st Petty Bench). Two years later Murakami filed a retrial request in Sapporo High Court. That petition was rejected in 1969. Judgment of June 18, 1969 (Murakami v. Japan), Kōsai [High Court], 558 HANJI 14 (Sapporo). Soon after the same court rejected a motion for reconsideration, Judgment of July 16, 1971 (Murakami v. Japan), Kōsai [High Court], 3 Keisai geppō 869 (Sapporo), Murakami filed his appeal in the Supreme Court. Particularly because of allegations that Murakami had been singled out for his political affiliation, this case was controversial. See generally Matsuoka Masaaki, *Shiratori jiken* [The Shiratori Case], in KEIJI SAISHIN NO KENKYŪ, *supra* note 243, at 357. Over 1.4 million people reportedly signed a petition in Murakami's support. Odanaka & Ōde, *supra* note 243, at 115.

341. Currently, the average criminal case takes about five months between

the University of Tokyo, was appointed to the Court and joined the same Petty Bench. As a reader with a very good memory for names might recall, those same two Justices, while both young criminal law specialists, had each written commentaries in the late 1930s critical of Daishin'in rulings refusing retrials. At that time, both had criticized the Daishin'in for failing to apply the "reasonable doubt" standard in considering retrial petitions. In 1962 Kishi (then a Tokyo District Court judge) had repeated this very point.³⁴² Plainly, the two had not forgotten these views when they reached the Supreme Court. Arguably, the *Shiratori* case should have been referred to the Grand Bench for decision.³⁴³ Nonetheless, the First Petty Bench retained the case.³⁴⁴ In view of the fact that there

filing at the Supreme Court and decision by that Court, but more difficult or controversial cases may take much longer, with occasional cases taking five, seven or even more years after filing before the Supreme Court renders a decision. See SAIKŌSAIBANSHO JIMUSŌKYOKU, SHIHŌ TŌKEI NENPŌ, 2 KEIJI-HEN, HEISEI 2-NEN [SUPREME COURT GENERAL SECRETARIAT, ANNUAL REPORT OF JUDICIAL STATISTICS FOR 1990, VOL. 2, CRIMINAL CASES] 21 (table 27) (average of 5.4 months), 358 (table 67) (two cases between five and seven years, two cases over seven years).

342. See KISHI, *supra* note 291, at 404.

343. As noted earlier, the Court Organization Act requires a Petty Bench to refer a case to the Grand Bench for decision if the Petty Bench's decision would conflict with a prior ruling of the Court; and the Court's rules call for a Petty Bench to refer a case to the Grand Bench if the Petty Bench deems that decision *en banc* would be appropriate, see *supra* notes 78-79 and accompanying text. In prior rulings, including rulings by the Grand Bench itself, the Supreme Court had taken a rather strict stance toward retrials, and a committee of the Diet had considered but declined to adopt a proposal to modify the retrial standards legislatively. Although, narrowly speaking, the ruling ultimately entered in *Shiratori* did not directly conflict with the Supreme Court's prior rulings, one might think that under these circumstances a decision announcing broad new standards considerably more liberal than traditional judicial attitudes would have warranted review by the entire Court.

344. It should be noted, however, that the full Court has sometimes been reluctant to accept discretionary referrals from the Petty Benches, on occasion sending back to the Petty Bench cases that the members of that Petty Bench had thought were important enough to warrant *en banc* consideration. See *Purakutisu kenkyūkai, Saikōsai no purakutisu ni tsuite (III)* [Practice Study Group, Regarding Supreme Court Practice, Part 3], 40 HŌ NO SHIHAI 57, 88 (1979) (comments of former Justice Iwata). The informal polling of Justices on other Petty Benches conducted in connection with the *Nagayama* case, see *supra* text accompanying note 81, represents one way of ensuring consensus on important decisions without con-

were two leading criminal law experts on that Petty Bench,³⁴⁵ both of whom felt very strongly about the need for change and agreed on the proper standard, it is hardly surprising that the *Shiratori* case resulted in a major revision in retrial standards. Without intimating that it was doing anything more than restating the existing law, the unanimous panel set out the following standard at virtually the outset of its ruling, which it announced on May 20, 1975:³⁴⁶

The phrase "clear evidence requiring the declaration of innocence" should be deemed to refer to evidence that gives rise to a reasonable doubt concerning the factfindings of the original judgment and that is sufficient to give rise to a probability that those findings would be overturned. The judgment of whether evidence is "clear evidence" within this meaning should be based on a comprehensive evaluation of the new evidence along with all the other evidence, from the standpoint of determining whether the factual findings contained in the original judgment would have been reached had the new evidence been presented during the deliberations of the court that entered the original judgment. In making that

vening the *en banc* Court.

345. In Japan, judges at the District Court and High Court levels are usually classified into either civil or criminal panels, and most lower court judges specialize in one field or the other. At the Supreme Court level, Justices handle all issues, although the *chōsakan* who assist them are divided into three chambers: civil, criminal, and administrative and labor. Of the other Justices on the *Shiratori* panel, Presiding Justice Kishigami was a career judge with a background primarily in the fields of civil law and judicial administration; Justice (later Chief Justice) Fujibayashi had been a practicing lawyer and had also served on the Central Labor Commission; and Justice Shimoda was a former diplomat.

346. That opinion was unsigned, in keeping with the Japanese practice that only separate opinions at the Supreme Court level are signed. It seems safe to assume that Justice Dandō was the primary author, however. Although Dandō is known as "the great dissenter," in an article after his retirement from the Court he emphasized that he had written majority opinions as well, and went on to describe *Shiratori* as a decision in which his views were reflected fully in the majority opinion. See Dandō Shigemitsu, *Saikōsaibansho to Nihon no saiban* [*The Supreme Court and Japanese Trials*], in HOGAKU SEMINĀ ZOKAN, SŌGŌ TOKUSHŪ SHIRIZU 27, GENDAI NO SAIBAN [HOGAKU SEMINAR EXTRA NUMBER, SPECIAL COMPREHENSIVE SERIES NO. 27, TODAY'S TRIALS] 2, 13 (1984) [hereinafter GENDAI NO SAIBAN].

determination, the hard and fast rule of criminal trials that "doubts are to be resolved in favor of the defendant" should be applied, in the sense that if a reasonable doubt is raised as to the factual findings contained in the original judgment, that will be a sufficient basis for ordering a retrial.³⁴⁷

In this one matter-of-fact paragraph containing no references to earlier decisions or to the vigorous debate over the issues involved, the *Shiratori* decision adopted both the "comprehensive evaluation" and "reasonable doubt" standards for which critics of the retrial standards had been fighting for fifteen years. The Court also appears to have relaxed the level of proof required—from the "high probability" that some other courts had demanded to a simple "probability" that the prior findings would be altered.

Despite this rather sweeping success, retrial supporters were not entirely satisfied, for one simple reason: the above statement was, technically speaking, dictum. Even under the new, more liberal standard, the Court concluded that the new evidence in *Shiratori*—scientific analyses raising doubts about two bullets used as key evidence against the defendant—was insufficient to warrant a new trial.³⁴⁸ In this respect, as well as in its broad expansion of existing rights to review without referring to the ongoing debate or intimating that it was doing anything more than restating settled principles, this opinion thus bears great similarity to the United States Supreme Court's expansion of federal habeas in its 1953 ruling in *Brown v. Allen*.³⁴⁹

While welcoming the new formulation in *Shiratori*, critics expressed concern over whether it would really be applied in actual cases.³⁵⁰ The First Petty Bench (of which Justices

347. Judgment of May 20, 1975 (Murakami v. Japan), Saikōsai [Supreme Court], 29 Keishū 177, 180 (1st Petty Bench).

348. *Id.* at 192-94.

349. See *supra* text accompanying notes 100-02.

350. See, e.g., Mitsudō Kageaki, *Saishin ni kansuru jakkan no mondai* [A Few Issues Concerning Retrials], 601 JURISUTO 22, 28 (1975); Matsuoka Masaaki, *Saishin riyū toshite no shōko no "meihakusei"* ["Clarity" of Evidence as a Ground

Kishi and Dandō were still members) wasted little time in making clear its intention that the *Shiratori* standard should not be ignored.

In late 1974 a death row inmate, Taniguchi Shigeyoshi, had asked the Supreme Court to review the Takamatsu High Court's rejection of his second retrial request in the so-called *Saitakawa* case.³⁵¹ This was another of the controversial re-

for Retrials], 593 JURISUTO 42, 44-46 (1975).

This concern was not wholly unwarranted. In a number of other cases, the Japanese Supreme Court has announced fairly broad and rather liberal standards that it says are to apply in the proper case, yet has rejected the appeals in the cases before it. Thus, the decision whether to actually allow relief under the broad standards is left for the lower courts; and the new standards often go little used or even unused. One example is the exclusionary rule. In a 1978 decision by the First Petty Bench, the Japanese Supreme Court indicated that "evidentiary capacity should be denied in cases where there is major illegality of the sort that involves disregard for the spirit underlying the warrant requirement . . . and where permitting the use of the evidence would be inappropriate from the standpoint of deterring illegal searches in the future." Judgment of Sept. 7, 1978 (Hashimoto v. Japan), Saikōsai [Supreme Court], 32 Keishū 1672, 1682-83 (1st Petty Bench). Although the Court found that the police had acted illegally in searching the pocket of a person they had stopped for questioning, it concluded that the illegality was slight and did not rise to the level warranting exclusion of the evidence. *Id.* Subsequently some lower courts have excluded evidence under the above standard, see, e.g., Judgment of Jan. 23, 1981, Kōsai [High Court], 998 HANJI 126 (Osaka), but such decisions have been rare. See INOUE MASAHITO, KEIJISOSHŌHŌ NI OKERU SHŌKO HALJO [EXCLUSION OF ILLEGALLY OBTAINED EVIDENCE IN CRIMINAL PROCEDURE] 539-88, 595-602 (1985).

In this instance, a few lower courts—including the Sendai High Court in the *Hirosaki University Professor's Wife* case, Judgment of July 13, 1976 (Nasu v. Japan), Kōsai [High Court], 29 Kōsai keishū 323 (Sendai)—were quick to rely on *Shiratori* in ordering the opening of retrials. But other courts remained reluctant to grant retrials. One notable example of the latter is the *Menda* case, in which the District Court recited the *Shiratori* standard word for word, yet went on to reject Menda's retrial petition in its first ruling on that petition after *Shiratori*. Judgment of April 30, 1976 (Menda v. Japan), 828 HANJI 95, 100-01, 114 (Kumamoto D. Ct., Yatsushiro Div.).

351. The trial court judgment convicting Taniguchi and sentencing him to death, Judgment of Jan. 25, 1952 (Japan v. Taniguchi), Chisai [District Court] (unreported decision of the Takamatsu Dist. Ct., Marukame Div.); the High Court decision, Judgment of June 8, 1956 (Taniguchi v. Japan), Kōsai [High Court] (unreported decision of the Takamatsu H. Ct.) (rejecting appeal); and the Supreme Court decision, Judgment of Jan. 22, 1957 (Taniguchi v. Japan), Saikōsai [Supreme Court] (unreported decision of the 3d Petty Bench) (rejecting appeal), all are reprinted in MIKŌKAN SAIBANREISHŪ, *supra* note 301, at 127, 128, and 131, respec-

trial cases. Largely on the basis of a confession that investigators obtained after holding and questioning him for nearly four months, Taniguchi was prosecuted for murdering and robbing a black-market rice dealer in 1950. Prior to trial Taniguchi recanted his confession, but he was convicted and sentenced to death in 1952. His appeals to the High Court and Supreme Court were rejected, as was his first request for a retrial filed in 1957.³⁵² In 1969 the Takamatsu district court decided to treat a letter Taniguchi had written five years earlier as a new retrial petition and undertook an extensive review of the case.³⁵³ In a long and detailed ruling,³⁵⁴ the district court outlined several doubts concerning the conviction. The court nonetheless held that Taniguchi had raised no claims sufficient to obtain a new trial under the existing standards, but expressly requested the High Court to conduct a critical review of the case. Despite this plea, the High Court summarily affirmed the district court's denial of a new trial.³⁵⁵ Taniguchi appealed.

Presumably by chance, that appeal came to the First Petty Bench. It was still pending when that panel issued its *Shiratori* ruling a few months later. *Saitakawa* thus provided the panel with a perfect opportunity to reinforce the views it had announced in *Shiratori*.

tively. A summary of the case to that point is set forth in Judgment of Oct. 12, 1976 (Taniguchi v. Japan), Saikōsai [Supreme Court], 30 Keishū 1673, 1675-84 (1st Petty Bench). For other summaries, see Kitayama Rokurō, *Saitakawa jiken* [The *Saitakawa* case], in NIHON NO ENZAI, *supra* note 322, at 216; ZOKU SAISHIN, *supra* note 243, at 70-142; and TAKASUGI SHINGO, KENRYOKU NO HANZAI [CRIMES OF POWER] 3-25 (1980). The popular name of the case derives from the Saita River, Saitakawa in Japanese, into which Taniguchi was alleged to have thrown the knife used in the killing.

352. For details of this case, see Foote, *supra* note 6, at 30-42.

353. The court, on its own initiative, reexamined many of the original witnesses and appointed a handwriting expert to examine five statements Taniguchi had allegedly written voluntarily while in confinement. See Foote, *supra* note 6, at 35-36.

354. Judgment of Sept. 30, 1972 (Taniguchi v. Japan), Chisai [District Court] (unreported decision of the Takamatsu Dist. Ct., Marukame Div.), *reprinted in* 30 Keishū 1793.

355. Judgment of Dec. 5, 1974 (Taniguchi v. Japan), Kōsai [High Court] (unreported decision of the Takamatsu H. Ct.), *reprinted in* 30 Keishū 1841.

The Court's precise ruling in its October 1976 decision in *Saitakawa* was that the High Court had acted illegally by summarily affirming the lower court's decision without giving sufficient consideration to the case, "notwithstanding the district court's unusual step of setting out many doubts and requesting the higher court to conduct a critical review," and that the district court, as well, had erred by not considering the case sufficiently.³⁵⁶ In reaching that conclusion, the First Petty Bench carefully applied the rules governing requests for retrials based on new evidence. The court cited *Shiratori* and set forth the controlling standard in almost identical language,³⁵⁷ then re-emphasized that the reasonable doubt standard applies and that the petitioner does not bear the burden of establishing his or her own innocence.³⁵⁸ Turning to the facts, the court noted that the only new evidence presented in the proceedings on the retrial request was a handwriting analysis that the district court *itself* had ordered.³⁵⁹ The court held that this satisfied the statutory requirement of "newly discovered" "clear evidence," since the handwriting analysis might cast doubt on the reliability of handwritten confessions Taniguchi had supposedly written voluntarily, and that in turn might raise doubts about his final, more detailed, confession and thus his conviction.³⁶⁰ The court remanded the case for further consideration of the retrial request, in the process leaving little doubt as to its belief that the lower court should grant that request.³⁶¹

356. 30 Keishū 1673, 1684-85. In this manner, the Court characterized its conclusions as issues of law, not of fact.

357. See *supra* text accompanying note 347.

358. The Court stated that "it is . . . sufficient that there be doubts . . . as to the propriety of the factual findings of the prior judgment. Accordingly, the above principle will apply if it is clear that there is insufficient proof of the crime." The Court went on to state, though, that "this does not constitute approval for a court . . . to intrude recklessly on the views of the original court, in the absence of special circumstances." 30 Keishū at 1698-99.

359. *Id.* at 1697.

360. *Id.* at 1697-98, 1700-01.

361. See Foote, *supra* note 6, at 38-39.

f. The Impact of Shiratori and Saitakawa

Through the *Saitakawa* ruling, the Supreme Court unequivocally demonstrated its commitment to the new standards. The Court also made clear that even relatively limited new evidence might be enough to tip the scale in favor of a new trial. As with the judicially developed standards for habeas in the United States, these new Japanese standards are not limited to the cases of death-sentenced prisoners. In theory, the precedential effect of a Japanese Supreme Court decision is confined to subsequent proceedings in that particular case. In practice, however, Supreme Court rulings typically have great impact on later decisions by courts at all levels, and nothing in *Shiratori* or *Saitakawa* suggested that the Court intended to limit the principles it announced in those cases to capital prisoners. In fact, Murakami, the defendant in *Shiratori*, had never been under a death sentence at all.

Japan's Criminal Procedure Code expressly provides that petitions for retrials may be filed after a person's sentence has been completed,³⁶² and that a spouse or other relative may request a retrial even if the one who was convicted has died.³⁶³ If successful, moreover, petitioners are entitled to compensation from the government under the Criminal Redress Act³⁶⁴—compensation that may be very substantial, since it is calculated on the basis of the number of days spent

362. KEISOHŌ art. 441.

363. *Id.* art. 439(1)(item 4).

364. KELJI HOSHŌ HŌ [CRIMINAL REDRESS ACT], Law No. 1 of 1950, art. 1(1) ("One who has been acquitted in normal criminal proceedings [or] on retrial . . . and who has been confined pending judgment or has been imprisoned . . . may claim compensation . . . from the state."). Heirs, including those who have obtained posthumous acquittals on behalf of a family member, may also file demands for compensation under the Act. *Id.* art. 2. This Act implements article 40 of the Constitution, which provides that "[a]ny person who is acquitted after he has been arrested or detained may sue the State for redress as provided by law."

in confinement.³⁶⁵ Thus, the range of potential retrial petitioners is vast.

Once the Court had so plainly indicated its intention that the retrial provisions should be interpreted broadly, lower courts (several of which had previously made clear their desire that the Supreme Court reconsider the standards) showed themselves more than willing to comply. Later during the very month that the Supreme Court issued its decision in *Saitakawa*, the Sendai High Court ordered a new trial in *Yonetani*. Then, in 1979, retrials were ordered in *Saitakawa* itself on remand, in *Menda*, and in the so-called *Matsuyama* case,³⁶⁶ another case involving a death row inmate. These were followed in subsequent years by a gradual stream of reopenings in other major cases.³⁶⁷

It would nonetheless be an overstatement to suggest that *Shiratori* and *Saitakawa* led to a flood of retrials. In 1976, the year after *Shiratori* was decided, the number of retrial requests jumped by nearly fifty percent and the number of retrials granted nearly tripled, but the absolute numbers were still

365. *Id.* arts. 4(1) (amount of compensation to be between ¥1000 and ¥9400 per day of confinement or imprisonment), 4(3) (amount of compensation for one who was wrongly executed to be no more than ¥25 million, plus actual monetary damages if proven).

Article 5(1) of the Criminal Redress Act specifically states that relief thereunder does not bar claims under the National Compensation Act, KOKKA BAISHO HO, Law No. 125 of 1947. Accordingly, individuals who are acquitted either at trial, on direct appeal, or on retrial may have a claim against the state under the National Compensation Act, based on illegality by governmental authorities in pursuing the prosecution or in entering the original conviction. Although it is not uncommon for individuals acquitted at their original trials to obtain compensation through this latter route, to date no one has succeeded in such a claim following acquittal on retrial. See 1393 HANJI 19, 20 (1991) (comment accompanying Judgment of July 31, 1991, of Sendai Dist. Ct.) (claims granted at District Court level in two cases, but both were reversed on appeal).

366. Judgment of Dec. 6, 1979 (*Saitō v. Japan*), Chisai [District Court], 949 HANJI 11 (1980) (Sendai), *aff'd*, Judgment of Jan. 31, 1983 (*Japan v. Saitō*), Kōsai [High Court], 1067 HANJI 3 (Sendai).

367. These include the *Hirosaki University Professor's Wife* and *Tokushima Radio* cases discussed earlier. See generally *Saishin kankei nenpyō-chizu* [Chronology and Map of Retrial-Related Events], JIYŪ TO SEIGI 34-9-49 (1983); Konishi, *supra* note 281, at 1014-15.

modest: petitions rose from ninety-three to one hundred thirty-five, and retrials granted rose from twenty to fifty-two.³⁶⁸ The numbers have never been that high since,³⁶⁹ and even during that year almost all of the retrials granted—forty-six of the fifty-two—were relatively minor matters handled by Petty Courts.³⁷⁰ Furthermore, just as in the period prior to *Shiratori*, the vast majority of the granted retrials have come at the request of the prosecutors.³⁷¹

Yet the impact of *Shiratori* and *Saitakawa* goes far beyond these bare numbers. The retrials that have been granted have included some of the most highly publicized cases in Japan, and the facts and implications of those cases are troubling. Needless to say, the most troubling are the four cases involving mistaken death sentences.

The Menda Case.³⁷² This case stemmed from a 1948 robbery in Hitoyoshi City, Kumamoto Prefecture, in which the robber murdered a husband and wife and injured their two daughters. Following a tip that a suspicious person had said he was investigating the case, the police picked up Menda Sakae, the twenty-three-year-old son of a local farmer. After questioning him for nearly three full days and nights, apparently without letting him sleep, police obtained a full confession. During the trial, Menda withdrew the confession and asserted an alibi.³⁷³ The court rejected the alibi and convicted him, largely on the basis of his confession and a spot of type O blood (that of the victims, not Menda) on a hatchet found at the home of one of his friends.

368. See Konishi, *supra* note 281, at 1012.

369. See Konishi, *supra* note 281, at 1012 (figures through 1985); SAIKŌSAIBANSHO JIMUSŌKYOKU, *supra* note 341, at 5 (table 2-3 for District Court filings through 1990, table 2-4 for Petty Court filings).

370. See Konishi, *supra* note 281, at 1012.

371. Konishi, *supra* note 281, at 1012.

372. For details of this case, see Foote, *supra* note 6, at 14-30.

373. Menda claimed that he had spent the night of the crime with a prostitute. She gave conflicting testimony, first stating that Menda had spent the night after the crime with her but later agreeing with Menda's account.

After his conviction became final in 1951, Menda began filing a series of retrial petitions.³⁷⁴ As described earlier, on Menda's third petition, the district court ordered a new trial after finding a valid basis for his alibi, but the Fukuoka High Court reversed on the ground that the district court had overstepped proper bounds.³⁷⁵ After the Supreme Court relaxed the standards, Menda finally won a retrial in 1980, on his sixth request.³⁷⁶

Following the retrial, the court fully exonerated Menda.³⁷⁷ It upheld his alibi,³⁷⁸ rejected his confession on credibility grounds,³⁷⁹ and found that, given the level of blood testing techniques in 1951, the identification of type O blood was unreliable.³⁸⁰ Accordingly, the court acquitted Menda in

374. Menda was represented during the initial trial and direct appeals, and on his second retrial petition, by local counsel from Kumamoto Prefecture. He filed the first and third petitions on his own, apparently with some advice from another prisoner who had studied some law. Beginning with his fourth retrial petition in 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 (JFBA). See ZOKU SAISHIN, *supra* note 243, at 25-27. In a striking contrast with the United States, the organized bar in Japan has played an active role in most of the major retrial cases and in the movement to relax the governing standards. See SAISHIN, *supra* note 1, at 164-207 (activities of JFBA through 1976); ZOKU SAISHIN, *supra* note 243, at 479-93 (activities of JFBA through 1985); Okabe Yasuo, *Nichibenren kara mita saishin seikyū* [Retrial Requests, as Viewed by JFBA], HORITSU JIHŌ 64-8-60 (1992) (activities of JFBA since 1986; explaining that JFBA's activities fall into three main categories: providing support in individual retrial cases, compiling and exchanging information and providing interchange among the individual groups, and pressing for revision of the law governing retrials).

375. See *supra* text accompanying notes 300-05.

376. Judgment of Dec. 11, 1980 (Menda v. Japan), Saikōsai [Supreme Court], 34 Keishū 562 (1st Petty Bench). The "new evidence" presented at that time included an expert opinion challenging the blood analysis.

377. Judgment of July 15, 1983 (Japan v. Menda), Chisai [District Court], 1090 HANJĪ 21 (Kumamoto Dist. Ct., Yatsushiro Div.).

378. The court found that evidence clearly established that Menda had spent either the night of the crime or the following night with the prostitute, but other objective evidence showed that he had spent the latter night with another friend. So, by a process of elimination, Menda must have spent the night of the murders with the prostitute. See *id.* at 36.

379. *Id.* at 90-91.

380. *Id.* at 102.

an opinion that flatly declared him innocent of the murders and sharply criticized many of the investigators' activities, including their three days of nonstop questioning.³⁸¹ The prosecution elected not to appeal this verdict, and Menda was released on July 29, 1983, over thirty-three years after he was first sentenced to death.

*The Saitakawa Case.*³⁸² Taniguchi Shigeyoshi was convicted in 1952 of murdering a black-market rice dealer two years earlier. At the time of the crime, Taniguchi was nineteen years old and had a police record for minor crimes. He was convicted of the murder largely on the basis of a series of confessions, including five handwritten statements, obtained by investigators during more than four months that he was held in confinement. One of the key indicia of reliability for these confessions was his description of how he had finished off the victim—with two knife thrusts to the heart. This was supposedly a "secret" that only the real offender would have known.³⁸³

When it remanded the case after applying the *Shiratori* standard, the Supreme Court listed a series of doubts concerning the evidence that it felt the lower courts should re-examine.³⁸⁴ One of these was the possibility that the investigators had known of the two thrusts to the heart from an autopsy report *before* Taniguchi so confessed, and thus might have induced that part of the confession. On remand, the district court obtained previously undisclosed prosecution records which showed that the autopsy finding was in fact widely known among the investigators long before Taniguchi confessed to that aspect of the crime. In part for that reason, the court found a reasonable doubt as to guilt and ordered a new trial.³⁸⁵

381. *See id.* at 83-91.

382. For details of this case, see Foote, *supra* note 6, at 30-42.

383. Other evidence included various items of clothing he was supposedly wearing at the time of the crime, along with an expert opinion that Type O blood—the blood type of the victim—had been found on the trousers.

384. Judgment of Oct. 12, 1976 (Taniguchi v. Japan), Saikōsai [Supreme Court], 30 Keishū 1673, 1700-01 (1st Petty Bench).

385. Judgment of June 7, 1979 (Taniguchi v. Japan), Chisai [District Court],

After a new trial spanning numerous sessions over a two-year period, the district court acquitted Taniguchi on March 12, 1984.³⁸⁶ The court rejected the confessions on credibility grounds³⁸⁷ and also rejected a blood analysis that had served as corroborating evidence.³⁸⁸ While acknowledging—and in fact describing with some specificity—numerous grounds for suspecting that Taniguchi may in fact have committed the crime, the court could find no evidence sufficient to establish his guilt. The court therefore acquitted for failure to prove guilt beyond a reasonable doubt. The prosecution did not appeal, and Taniguchi was released on March 12, 1984, nearly thirty-four years after he was first arrested and over twenty-seven years after the death sentence had become final.

*The Matsuyama Case:*³⁸⁹ This case involved the brutal 1955 murders of a day laborer, his wife and their two children in Matsuyama, Miyagi Prefecture. Police included Saitō Sachio, the twenty-four-year-old son of a local lumber dealer, on the list of suspects largely because of his reputation as a delinquent and because he apparently knew that the day laborer had just received payment for a construction job. They arrested Saitō for a fight he had been in a few months earlier and proceeded to question him about the murders. He confessed on the fifth day of questioning. He renounced that confession about a week later, but was convicted in 1957 primarily on the basis of the confession and a futon cover from his bed, which was stained with a large quantity of type A blood (the victims' blood type).³⁹⁰

929 HANJI 37 (Takamatsu), *aff'd*, Judgment of March 14, 1981 (Japan v. Taniguchi), Kōsai [High Court], 995 HANJI 3 (Takamatsu).

386. Judgment of March 12, 1984 (Japan v. Taniguchi), Chisai [District Court], 1107 HANJI 13 (Takamatsu).

387. *Id.* at 38-39.

388. The court accepted the blood type identification, but found it lacked relevance, since the blood was on old trousers that Taniguchi and his two brothers had all used and it was unclear when the blood had gotten on them or even if Taniguchi had been wearing them on the night of the crime. *Id.* at 31, 33-34.

389. For details of this case, see Foote, *supra* note 6, at 42-51.

390. Judgment of Oct. 29, 1957 (Japan v. Saitō), Chisai [District Court] (unreported decision of Sendai Dist. Ct., Yoshikawa Div.), *aff'd*, Judgment of May 26,

In his first retrial request, filed in early 1961, Saitō claimed that he had been convicted on the basis of perjured testimony by a cellmate and asserted that new evidence would show that the blood stain on the futon cover had been fabricated. Over three years later, the district court rejected that petition; two years after that, the High Court affirmed that ruling; and after another three years, the Supreme Court also affirmed.³⁹¹

Less than two weeks after the Supreme Court's ruling, Saitō filed a second retrial petition relying on new opinions by experts in blood analysis. After another two years, 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 implying that there were weaknesses in the original evidence, the court 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 of new evidence."³⁹²

Two years later, the Sendai High Court vacated this ruling on procedural grounds.³⁹³ The case was thus on remand at the district court when the Supreme Court announced its *Shiratori* and *Saitakawa* decisions. In its 1979 decision on

1959 (Saitō v. Japan), Kōsai [High Court] (unreported decision of Sendai H. Ct.), *aff'd*, Judgment of Nov. 1, 1960 (Saitō v. Japan), Saikōsai [Supreme Court] (unreported decision of the 3d Petty Bench). These are reprinted in MIKOKAN SAIBANREISHŪ, *supra* note 301, at 153, 157, and 170, respectively.

391. Judgment of April 30, 1964 (Saitō v. Japan), Chisai [District Court] (unreported decision of Sendai Dist. Ct., Yoshikawa Div.), *aff'd*, Judgment of May 13, 1966 (Saitō v. Japan), Kōsai [High Court] (unreported decision of Sendai H. Ct.), *aff'd*, Judgment of May 27, 1969 (Saitō v. Japan), Saikōsai [Supreme Court] (unreported decision of the 3d Petty Bench). These rulings are reprinted in MIKOKAN SAIBANREISHŪ, *supra* note 301, at 171, 193, and 212, respectively.

392. Judgment of Oct. 26, 1971 (Saitō v. Japan), Chisai [District Court], 301 HANTA 133, 137-38 (1974) (Sendai Dist. Ct., Yoshikawa Div.).

393. Judgment of Sept. 18, 1973 (Saitō v. Japan), Kōsai [High Court], 721 HANJI 104 (Sendai).

remand, the district court granted a new trial, finding doubts about the blood analyses and other elements of the case.³⁹⁴

Following the retrial, the district court completely exonerated Saitō.³⁹⁵ It rejected his confessions on credibility grounds,³⁹⁶ and rejected the evidentiary value of the blood-stained futon cover, in an opinion that came very close to saying that the evidence had been fabricated.³⁹⁷ Having thus rejected all the key evidence, the court acquitted Saitō on July 11, 1984, nearly twenty-seven years after he was first sentenced to death.

*The Shimada Case:*³⁹⁸ In early 1954, a man lured a six year old girl away from a school festival being held at a temple in Shimada City, Shizuoka Prefecture. Her body was found three days later; she had been beaten, raped and strangled.

Akabori Masao was twenty-four years old at the time. He had been raised on a local farm, was of low intelligence, and had served time in prison for a series of thefts after his return from World War II service. Following his release from prison he had drifted around, returning from time to time to his brother's home in the area. Two and a half months after the

394. Judgment of Dec. 6, 1979 (Saitō v. Japan), Chisai [District Court], 949 HANJI 11 (Sendai), *aff'd*, Judgment of Jan. 31, 1983 (Japan v. Saitō), Kōsai [High Court], 1067 HANJI 3 (Sendai).

395. Judgment and Judgment of July 11, 1984 (Japan v. Saitō), Chisai [District Court], 1127 HANJI 34 (Sendai).

396. *Id.* at 60.

397. The new expert studies raised numerous doubts about the manner in which the blood was deposited on the futon cover. *Id.* at 51. Other evidence suggested that the investigators had covered up an earlier analysis of the blood stains conducted by the police laboratory. That analysis found only a few small spots of blood, in sharp contrast to the large amounts found in the *later* examination by an outside expert. *Id.* at 57. The court found insufficient evidence to establish fabrication conclusively, but rejected the evidence in part because the prosecution was unable to rebut the inference that blood was placed on the futon cover after the police seized it. *Id.*

The court also sharply criticized the police and prosecutors for numerous illegalities and improprieties in connection with the investigation, including Saitō's arrest on an unrelated minor charge as a pretext to pursue questioning about the murders and the use of another detainee to spy on Saitō. For a description of these issues, see Foote, *supra* note 6, at 47-50.

398. For details of this case, see Foote, *supra* note 6, at 51-64.

crime, police began questioning him about the crime when he was stopped in a neighboring prefecture early one morning.³⁹⁹ Police questioned him for two days, then released him, but arrested him three days later for stealing clothing from a local girls' high school and again began questioning him about the girl's abduction. After two more days of questioning, Akabori confessed. He subsequently provided a series of detailed confessions. Based on the confessions, police collected the rock he supposedly used to beat the girl.

At trial, Akabori recanted his confessions and claimed to have been walking from Tokyo to Yokohama on the day of the crime, but he was convicted and sentenced to death.⁴⁰⁰ After the conviction and sentence were affirmed, he began filing retrial petitions. Courts summarily rejected the first three. The fourth—which relied largely on new expert opinions challenging the order and nature of the injuries that his confessions described, and thereby the reliability of the confessions themselves—received a more extensive review; but in early 1977, after *Shiratori* and *Saitakawa* had both been handed down, the district court rejected the petition, saying it remained convinced that the confessions were reliable.⁴⁰¹

The Tokyo High Court undertook its own careful review of the case and, six years later, reversed and remanded for further investigation.⁴⁰² After another thorough review, the district court finally granted Akabori's retrial request three years

399. His name had been placed on a list of suspects ten days after the crime, when a local resident reported that he had waved to an elementary school girl at a shrine, but police did not question him at that time. See Foote, *supra* note 6, at 52.

400. Judgment of May 23, 1958 (Japan v. Akabori), Chisai [District Court] (unreported decision of Shizuoka Dist. Ct.), *aff'd*, Judgment of Feb. 17, 1960 (Akabori v. Japan), Kōsai [High Court] (unreported decision of Tokyo H. Ct.), *aff'd*, Judgment of Dec. 25, 1960 (Akabori v. Japan), Saikōsai [Supreme Court] (unreported decision of 1st Petty Bench). These decisions are reprinted in MIKOKAN SAIBANREISHU, *supra* note 301, at 133, 144, and 151, respectively.

401. Judgment of March 11, 1977 (Akabori v. Japan), Chisai [District Court], 348 HANTA 125 (Shizuoka).

402. Judgment of May 23, 1983 (Akabori v. Japan), Kōsai [High Court], 1079 HANJI 11 (Tokyo).

later, in 1986, primarily on the basis of concerns over the reliability of the confessions.⁴⁰³ The prosecutors again appealed this decision to the Tokyo High Court, which affirmed the decision ten months later.⁴⁰⁴ When the prosecutors elected not to pursue a further appeal to the Supreme Court, the retrial order took effect—some eighteen years after this fourth retrial request was filed.

The new trial itself, which included extensive new medical testimony from both sides, spanned an additional two years. Despite rejecting the alibi and several other defense contentions, the court acquitted Akabori.⁴⁰⁵ While upholding the voluntariness of his confessions, the court found them highly unreliable, noting that "Akabori is of low native intelligence and is highly emotional and unstable" and may simply have told the police what he thought they wanted to hear.⁴⁰⁶ The primary corroborating evidence was the rock, yet there was no proof that it was really the rock used to beat the girl, and medical studies suggested that it was more likely that another rock had been used.⁴⁰⁷ Given these and related doubts, and the absence of other solid corroborating evidence,⁴⁰⁸ the court acquitted for failure to prove guilt beyond a reasonable doubt.⁴⁰⁹ As in the other death penalty retrial cases, the prosecution waived its right to appeal. Akabori was released in

403. Judgment of May 29, 1986 (Akabori v. Japan), Chisai [District Court], 1193 HANJI 31 (Shizuoka).

404. Judgment of March 25, 1987 (Japan v. Akabori), Kōsai [High Court], 1227 HANJI 3 (Tokyo).

405. Judgment of Jan. 31, 1989 (Akabori v. Japan), Chisai [District Court], 1316 HANJI 21 (Shizuoka).

406. *Id.* at 33.

407. The autopsy findings and medical studies suggested that the rock used was probably soft with jagged edges, rather than hard and flat, as was the rock Akabori identified. *Id.* at 38-41.

408. As corroborating evidence, the prosecution also pointed to eyewitness accounts of having seen Akabori or someone who resembled him walking away from the temple grounds with the girl; however, the court rejected the identifications as being too vague and noted that, even if accurate, the identifications would only establish that Akabori had left with the girl, not that he had murdered her. *Id.* at 49-51.

409. *Id.* at 50-51.

early 1989, nearly thirty-one years after he was first sentenced to death.

Common Features: These four cases share a number of features. Although they occurred in four distinct regions of Japan, each involved one or more rather gruesome murder in a rural area. Pressures to apprehend the killer were undoubtedly strong, yet in each case the police were initially unable to identify a clear suspect. The suspects the authorities ended up prosecuting were all young and quite poor. Three of the four had previously committed minor offenses, and at least two were of rather low intelligence. The prosecutions were all based primarily on confessions obtained after rather long and intensive interrogations. Although the confessions described the crimes in considerable detail, they contained no new details that the police and prosecutors had not already known. Moreover, there was relatively little corroborating evidence in any of the cases. Most of what did exist consisted of blood type analyses, which later were shown to be of doubtful validity (and in at least one case may have been based on fabricated evidence). Accordingly, in each case it was possible that the police may have picked up a suspect on a hunch (in some cases legally, in others illegally), and then induced a confession that fit the facts as they knew them at the time.

The subsequent proceedings in all four cases also show great similarities. In each case, the convicted individual was able to forestall execution in part by filing a series of retrial requests. In two of the cases, *Menda* and *Saitakawa*, district courts reviewing retrial requests undertook careful re-examinations of the cases and identified serious doubts about the original convictions. In the former, the district court actually ordered a new trial; in the latter, the court declined to do so but outlined its doubts in requesting the High Court to review the case carefully. In each of those cases, the High Court firmly rejected the retrial requests, finding that the new evidence asserted was insufficient to justify a new trial under the existing standards.

With the Supreme Court's *Shiratori* and *Saitakawa* rulings, the situation changed dramatically. Apart from the

Shizuoka district court's first post-*Saitakawa* ruling, all subsequent decisions in these four cases went in favor of the death-sentenced prisoners. As in *Saitakawa* itself, the new evidence presented was at times rather limited, and in each of the cases the new evidence for the most part consisted of new expert opinions relating to blood type analyses and/or autopsy findings which were often based on new scientific techniques. Given the Supreme Court's adoption of the "comprehensive evaluation" standard,⁴¹⁰ the reviewing courts were willing to undertake a thorough re-examination of the evidence in each of the cases. Apart from a careful review of the original trial record, this included questioning surviving witnesses and considering new evidence from both sides. In addition, many of the reviewing courts undertook examination of new matters on their own initiative.

Given the passage of two or more decades from the original trials, many witnesses inevitably were no longer available and certain key pieces of evidence had been disposed of or lost. Although the reviewing courts occasionally referred to the difficulty of getting at the truth so many years after the fact, they were not critical of the prisoners in this regard. To a large extent, this is understandable. The defendants had not, after all, been sitting on their claims. Rather, the strict manner in which the governing standards were interpreted had precluded earlier relief. Yet none of the reviewing courts even directly addressed such issues as whether the evidence presented to support the retrial petition was truly "new" or simply a rehash of claims raised earlier or whether the petitioners had been negligent in not raising the claims at an earlier date. In sharp contrast, in *Matsuyama* the retrial court was openly critical of the prosecution's failure to preserve evidence (although suspicions of deliberate attempts to cover up exculpatory evidence may account for the vehemence of that opinion).⁴¹¹

410. See *supra* text accompanying note 347.

411. Judgment and Ruling of July 11, 1984 (Japan v. Saitō), Chisai [District Court], 1127 HANJÍ 34, 57 (Sendai).

Moreover, the courts considering the retrial requests in these cases were willing to undertake their own thorough re-evaluations of the evidence, rather than simply examining the original trial courts' evaluations for obvious errors. This is particularly true with regard to the issue of reliability of the confessions. In all four cases, the reviewing courts highlighted inconsistencies, gaps and unnatural aspects in the confessions and emphasized that, despite their detailed nature, the confessions failed to disclose any secrets that only the true offender could have known and that were subsequently corroborated by concrete physical evidence. Ultimately, none of the confessions was able to withstand this level of scrutiny—despite, at least in *Shimada*, the existence of such circumstantial evidence as eyewitness testimony to having seen Akabori or someone who resembled him walking away from the festival with the young victim.

In these cases, and in every other retrial case to date, the ruling granting the retrial has been followed by acquittal of the defendant in the subsequent retrial. This has led some defense counsel to argue that the statutory retrial provisions should be revised to eliminate prosecution appeals from decisions granting retrials or otherwise to conserve time and resources.⁴¹²

412. See, e.g., Okabe, *supra* note 234, at 34-35 (limits on appeals by prosecution); Kitayama Rokurō, *Saitakawa jiken, saishin bengo no genba kara* [*The Saitakawa Case: From the Frontlines of Retrial Defense*], *Jiyū to Seigi* 34-9-21, 21 (1983) (limits on evidence); Manabe Tsutomu, *Menda saishin hanketsu* [*Menda Retrial Judgment*], *Jiyū to Seigi* 34-9-12, 16 (1983) (limits on evidence).

In each of the death penalty retrial cases, much of the delay between the original trial and the ultimate acquittal was consumed by the period preceding the Supreme Court's relaxation of the applicable standards. Nonetheless, the current system practically guarantees that a substantial period will elapse between the first trial and retrial in any case. In addition to the possibility of two levels of appeals by *either* side from the original judgment, each side may also pursue two levels of appeal from rulings on retrial requests. A retrial will commence only after these appeals have concluded. In addition, either side may take two levels of appeal from the district court's judgment following the retrial. Since hearings are often scheduled a month or more apart, it is not uncommon for proceedings at each level of each of these stages to take two to three years or even more. Accordingly, even under normal circumstances well over a decade might easily pass between the original conviction and the grant of a new trial, followed by a few

The defense bar and some academics, cognizant of the fact that a Supreme Court ruling is inherently vulnerable to modification by a later decision, have also argued for codification of the *Shiratori* standards.⁴¹³ On the other hand, critics from the side of the prosecution have argued that the relaxed standards go too far and in the process have rendered the supposedly extraordinary remedy of a retrial into the equivalent of just another level of appeal.⁴¹⁴ At least for the time being, however, frontal attacks on the *Shiratori/Saitakawa* standards seem unlikely to succeed at either the legislative or judicial level.

This does not necessarily mean that the standards will continue to be interpreted in quite such a generous manner. Without ever intimating that they are modifying the *Shiratori/Saitakawa* standards, Japanese courts might subtly revise them by treating the initial group of retrial cases that followed *Saitakawa* as rare exceptions and requiring a higher level of new evidence to win retrials in the future. In this con-

more years in the retrial proceedings and subsequent appeals. In each of the death penalty retrial cases to date the prosecutors have appealed the ruling granting the retrial but have chosen not to appeal the acquittal on retrial.

413. See, e.g., *Kenkyūkai, Keiji saishin no genjō to rippō mondai* [Study Group, *The Current Situation for Criminal Retrials and the Issue of Legislation*], HÖRITSU JIHŌ 51-11-8, at 18 (1979) (comment of Prof. Odanaka Toshiki); Okabe Yasuo, *Saishinhō kaisei mondai no genjō* [The Current Status of the Issue of Amendment of the Retrial Law], HÖRITSU JIHŌ 57-10-40 (1985); Okabe, *supra* note 374, at 61. For a side-by-side comparison of existing law and separate sets of amendments proposed by JFBA and the Socialist Party, see *Kenkyūkai, supra*, at 30-35, and for another JFBA proposal, see ZOKU SAISHIN, *supra* note 243, at 429-38.

414. See, e.g., Yonezawa Keiji, *Saishin—kensatsu no tachiba kara* [Retrials—From the Standpoint of the Prosecution], in 2 KELJI TETSUZUKI, *supra* note 281, at 1026; Usui Shigeo, *Hijō kyūsai tetsuzuki to tsūjō soshō tetsuzuki to no fuchōwa* [The Disharmony between Procedures for Extraordinary Relief and Normal Litigation Procedures], in 2 KELJIHŌ NŌTO [NOTES ON CRIMINAL LAW, VOL. 2] 173 (Usui Shigeo & Kawakami Kazuo eds., 1983). Somewhat ironically, Usui was among the first to detail just how strictly the standards were applied in the years prior to *Shiratori*. See *supra* note 243. While retrial proceedings were pending in each of the four death penalty retrial cases, a former judge, Aoyagi Fumio, at a hearing before the Legal Affairs Committee of the House of Representatives of the Japanese Diet in June of 1979, expressed similar concerns about the possibility that retrials might become just another level of appeals. See Takezawa Tetsuo, *Saishin—bengo no tachiba kara* [Retrials—From the Standpoint of the Defense], in 2 KELJI TETSUZUKI, *supra* note 281, at 1036.

nection, one judge recently noted that the Supreme Court's *Saitakawa* ruling rested on very little new evidence and might be viewed as "extraordinary (*irei*) in its reconsideration of the factfinding of a prior final judgment solely on the basis of old evidence, without considering new evidence."⁴¹⁵ If this interpretation of *Saitakawa* is correct, the judge concluded, that ruling should be regarded as highly exceptional in nature. Even if a subsequent reviewing court is convinced that an earlier final conviction was wrong, he stated, it should not substitute its judgment for that of the prior court by ordering a new trial in the absence of new and clear evidence.⁴¹⁶ If these comments are reflections of a widespread skepticism of retrial petitions shared by most other judges, the direct impact of *Shiratori* and *Saitakawa* on retrial standards may prove to be more limited than it would at first appear.

Even if Japanese courts are not as generous hereafter as some were in the immediate wake of *Shiratori* and *Saitakawa*, it seems inconceivable that in the foreseeable future the applicable standards will ever become as strict as they were before those decisions. Moreover, those decisions, and the miscarriages of justice that they helped bring to light, have had a broader influence over attitudes toward criminal justice, reflected in part by more careful scrutiny of contested cases the first time around.⁴¹⁷

IV. COMPARATIVE EVALUATION

As the preceding account reveals, the United States and Japan have witnessed the same types of debates over capital punishment and post-conviction review of death sentences. With respect to the constitutionality of capital punishment, the response has been much the same. Decisions in each nation called into question the continued constitutionality of the death penalty, in part based on notions of changing values; but the

415. Konishi, *supra* note 281, at 1017-18.

416. Konishi, *supra* note 281, at 1017-18.

417. See Foote, *supra* note 6, at 82-83, and sources cited therein.

respective Supreme Courts subsequently reaffirmed capital punishment's constitutionality as a valid legislative choice.⁴¹⁸ Patterns of application of the death penalty tell a different story, with death sentences having slowed dramatically in Japan but currently on the rise in the United States.⁴¹⁹

The differences between the two nations are even more striking with respect to post-conviction review of death sentences. Over the past few years, the Rehnquist Court has sharply tightened limits on habeas review⁴²⁰ and has frequently voiced concern that death row inmates are abusing the judicial process through repetitive, last-minute habeas petitions filed to stave off execution.⁴²¹ In contrast, the Japanese Supreme Court has relaxed the standards petitioners must satisfy to obtain post-conviction review and has scarcely seemed troubled by the phenomenon of repetitive, piecemeal petitions for review, sometimes filed decades after the original conviction.⁴²²

These differences, I believe, reflect fundamental differences in the ideological underpinnings of the two criminal justice systems and in attitudes toward the factfinding process and punishment—topics to which I turn in the second half of this section. Before doing so, I wish to consider the process of change in the legal standards in the two nations.

A. *The Process of Legal Change*

A common stereotype of the Japanese judiciary is that it is conservative and passive.⁴²³ While the Supreme Court's treatment of capital punishment itself provides some support for this image, the retrial issue reveals a far different side, one of progressive activism. First, though, a brief re-examination of the factual background is in order.

418. See *supra* text accompanying notes 32-34, 82-86.

419. See *supra* text accompanying notes 37-41, 92-95.

420. See *supra* text accompanying notes 130-226.

421. See, e.g., *supra* note 112 and accompanying text.

422. See *supra* text accompanying notes 340-417.

423. See, e.g., sources cited *supra* note 11.

1. Factual Background

In the United States, state death penalty legislation has gone through many changes over the past century, some in response to judicial rulings—most notably the backlash to *Furman v. Georgia*,⁴²⁴ but primarily as a result of political pressures. Since the enactment of the Habeas Corpus Act of 1867, however, statutory provisions governing federal habeas corpus review of state cases have remained quite stable. In 1948 and again in 1967 Congress enacted procedural amendments, but the underlying substantive standards have remained unchanged.

In Japan, the statutory standards governing both the death penalty and petitions for retrials have been even more stable. Postwar legislation eliminated the death penalty for minors, but otherwise left the substance of the capital punishment provisions as it has been since their enactment in 1907. And the statutory framework governing retrials in Japan has remained virtually unchanged since its adoption in 1922.

Over the years, however, judicial interpretations of the relevant provisions have gone through various phases in both nations. In the United States, the issue of capital punishment has produced some of the sharpest divisions on the Supreme Court over the past quarter century. Individual Justices have held strong and widely differing views on the constitutionality of the death penalty. Hence, from *Furman*,⁴²⁵ through *Gregg*⁴²⁶ and its companion cases, down to *McCleskey v. Kemp*⁴²⁷ and subsequent decisions, changes in the membership of the Court have been accompanied by sharp shifts in judgments on capital punishment issues. These developments have led one observer to comment that “judicial disrespect for [the value of *stare decisis*] has been especially pronounced [in

424. 408 U.S. 238 (1972). See *supra* text accompanying notes 28-30.

425. 408 U.S. 238 (1972).

426. *Gregg v. Georgia*, 428 U.S. 153 (1976).

427. 111 S. Ct. 1454 (1991).

this area]. Each phase of the Court's work apparently has been viewed by the Justices not as an end to the battle, hardly even as a formal truce, but more as a momentary pause in the pursuit of irreconcilable hostilities.⁴²⁸

Much the same can be said of the Court's habeas corpus jurisprudence. With *Brown v. Allen*⁴²⁹ and *Fay v. Noia*,⁴³⁰ the Vinson and Warren Courts greatly relaxed the standards governing federal habeas review of state court convictions. The Burger Court gradually tightened some of the relevant standards, and the Rehnquist Court has since followed with sharp limitations spanning numerous aspects of habeas.⁴³¹

On the judicial front in Japan, the constitutionality of capital punishment has generated some controversy, but considerably less than in the United States. The Supreme Court's unanimous *en banc* decision in 1948 upholding the death penalty⁴³² seemed to resolve any doubts on that score. The Tokyo High Court effectively reopened the question in *Nagayama* in 1981,⁴³³ but the Supreme Court promptly reversed.⁴³⁴ Although that decision clarified and somewhat tightened standards for application of the death penalty, the Japanese Supreme Court has remained consistent and united in upholding the constitutionality of capital punishment.

The Japanese judiciary's treatment of the retrial standards provides a marked contrast. For the first three decades after World War II, the lower courts utilized very strict criteria in reviewing retrial petitions. Although the Supreme Court never

428. Burt, *supra* note 21, at 1741-42.

429. 344 U.S. 443 (1953).

430. 372 U.S. 391 (1963).

431. See *supra* text accompanying notes 130-226; Joseph L. Hoffmann, *Starting from Scratch: Rethinking Federal Habeas Review of Death Penalty Cases*, 20 FLA. ST. U. L. REV. 133, 134-35 (1992). See generally Franklin E. Zimring, *Inheriting the Wind: The Supreme Court and Capital Punishment in the 1990s*, 20 FLA. ST. U. L. REV. 7 (1992).

432. Judgment of March 12, 1948 (Murakami v. Japan), Saikōsai [Supreme Court], 2 Keishū 191 (Grand Bench).

433. See *supra* text accompanying notes 66-73.

434. Judgment of July 8, 1983 (Japan v. N), Saikōsai [Supreme Court], 37 Keishū 609 (2d Petty Bench).

explicitly upheld those criteria, it never questioned their use until 1975. Then, in *Shiratori*,⁴³⁵ followed the next year by *Saitakawa*,⁴³⁶ the Court relaxed the standards, thereby greatly widening the door to post-conviction review.

2. Analysis

While cast in terms of the Court's traditional role in interpreting a "complex and evolving body of equitable principles,"⁴³⁷ the Rehnquist Court's decisions on habeas reflect judicial activism from the right just as surely as any decisions of the Warren Court may have represented judicial activism from the left. The vehemence that some Justices, most notably Rehnquist himself, have displayed on the issue is striking. Moreover, the speed of the change, and the manner in which it was engineered in a handful of opinions at the same time that Congress was seriously considering legislative efforts that Rehnquist himself had actively supported and promoted, have undoubtedly left some observers with mouths agape. Yet the fact that the United States Supreme Court has played an active role comes as no great surprise. That, after all, is simply part of a longstanding tradition for that Court.

In contrast, the widespread image of Japan's Supreme Court is one of fundamental conservatism: resistance to dramatic change in any direction, with the Court's actions characterized by judicial restraint and great deference to precedent.⁴³⁸ The Japanese Supreme Court has held statutory provisions unconstitutional in only five cases in its history of over forty-five years.⁴³⁹ Moreover, for more than ten years the Supreme Court has convened the Grand Bench (*en banc* panel)—as it must if it is to consider unresolved constitutional

435. Judgment of May 20, 1975 (*Murakami v. Japan*), Saikōsai [Supreme Court], 29 Keishū 177, 180 (1st Petty Bench).

436. Judgment of Oct. 12, 1976 (*Taniguchi v. Japan*), Saikōsai [Supreme Court], 30 Keishū 1673, 1675-84 (1st Petty Bench).

437. *McCleskey v. Zant*, 111 S. Ct. 1454, 1467 (1991).

438. See, e.g., sources cited *supra* note 11.

439. See, e.g., Okudaira, *supra* note 11, at 37.

issues or overturn prior precedent—for an average of only one or two cases each year.⁴⁴⁰

A former Justice once told me that the reason the Court now hears so few cases *en banc*, in contrast to an average of about twenty Grand Bench cases each year through the mid-1960s,⁴⁴¹ is that most of the major questions relating to the Constitution and other basic laws have already been resolved.⁴⁴² The judiciary's treatment of the constitutionality of capital punishment provides support for that statement, while at the same time reflecting greater dynamism and complexity in the judicial review process than the stereotype assumes. True, the Supreme Court affirmed the death penalty's constitutionality in 1948 and has neither overturned that decision nor even convened the Grand Bench to reconsider it since. Yet this

440. See Naya Hiromi, *Saikōsai daihōtei* [*The Supreme Court's Grand Bench*], 149 HOGAKU KYŌSHITSU 6, 7 (1993) (between 1979 and 1991, four years in which the Grand Bench heard no cases, five years in which it heard one, and two years in which it heard two; figures show 32 cases in 1983 and 46 in 1985, but all except one of those cases involved the same constitutional issue: disparities in the weight of votes, with challenges from numerous electoral districts handled together).

441. See *id.* (figures through 1953 are not available; very high figures for 1954 (90 cases) and 1955 (236 cases) are distorted by large numbers of cases relating to violations of Occupation-era statutes; between 1956 and 1965, Grand Bench heard between low of eight and high of 26 cases, averaging 19.7 cases per year during that decade).

442. Interview with Nakamura Jirō, former Justice, in Tokyo, Japan (June 19, 1984). See also Naya, *supra* note 440, at 7 (“[B]y about 1965, the Supreme Court had largely completed reviewing constitutional issues surrounding the postwar establishment, revision and abolition of laws Since then, the Petty Benches have been able to apply [the laws] in a businesslike fashion [*jitsumuteki ni*], within the bounds established by the Grand Bench's earlier constitutional decisions.”).

To some extent this state of affairs may also reflect the fact that the conservative Liberal Democratic Party and its conservative predecessor were in power from 1948 through 1993 and had ultimate say over all appointments to the Supreme Court except for the very first group of Justices. In practice, the Prime Minister typically chooses a new Justice following discussion with the Chief Justice. See generally Itoh, *supra* note 11, at 24; SAIKŌSAIBANSHO, *supra* note 282, at 122-23; Nomura Jirō, *Hanji kōsei saikentō no toki* [*A Time to Reassess the Makeup of the Justices*], ASAHI SHINBUN, Oct. 27, 1985, at 1. It remains to be seen how differently appointments may be made now that a non-LDP coalition has come into power or how such appointments may affect the Court's attitude toward precedent.

does not mean that the judiciary has never revisited the issue. Many lower court judges undoubtedly engaged in a re-examination of the constitutionality of capital punishment during the judiciary's self-imposed moratorium on issuing death sentences during the period between the Tokyo High Court's decision in *Nagayama* and the Supreme Court's reversal. And even though the Grand Bench of the Supreme Court did not convene to consider *Nagayama*, the informal polling of the Justices on the other Petty Benches that the Second Petty Bench undertook before issuing its decision in that case⁴⁴³ ensured that the entire Court reconsidered the issue at that time. Moreover, the High Court's decision ultimately led to clarification and some tightening of the standards for imposing the death penalty.⁴⁴⁴

Judicial treatment of the retrial standards contrasts even more sharply with the stereotype of a conservative, passive Supreme Court. As discussed earlier,⁴⁴⁵ prosecutors and judges were among the first to focus attention on the strictness of the limits on retrials. During the 1960s and early 1970s the Diet held hearings on the topic and groups advocating the innocence of various petitioners coalesced into a national movement demanding relaxation of the standards. Yet change in the standards did not come about through action by the prosecutors, the bureaucracy, or the Diet. Instead, the judiciary played the key role. Moreover, the judicial change came about not from the bottom up, through the accretion of progressive lower court rulings,⁴⁴⁶ but rather from the top down, through two

443. See *supra* text accompanying note 81.

444. See *supra* text accompanying note 87.

445. See *supra* text accompanying notes 330-32.

446. For an argument that this is the more common pattern of legal change at the judicial level in Japan, with the courts becoming steadily more conservative as one moves from the district court level to the High Courts, and then to the Supreme Court, see USHIOMI TOSHITAKA, SHIHÔ NO HÔSHAKAIGAKU [THE SOCIOLOGY OF LAW OF THE JUSTICE SYSTEM] 58-60 (1982). But see Hiroshi Itoh, *Judicial Review and Judicial Activism in Japan*, 53 LAW & CONTEMP. PROBS. 169, 170-74 (1990) (describing several celebrated instances in which progressive lower court rulings have been reversed on appeal, but also noting that the Supreme Court has been more activist than lower courts in some instances; ultimately finding "no empirical verification" for the contention that a conservative Supreme Court has

rather sweeping decisions by the Supreme Court. In keeping with Japanese practice, these decisions were not signed; however, other evidence leaves little doubt that they resulted from the efforts of two individual Justices who had long harbored concerns over the strictness of the existing standards.

In these latter respects, the process of change in the retrial standards bears a striking resemblance to the process by which the federal habeas standards have been modified in the United States. The retrial situation provides a clear example that, just as in the United States, there are instances in Japan in which individual Justices come to the Supreme Court with a firm desire to modify particular legal standards and are able to effectuate those changes during their years on the Court.

The greater judicial activism with regard to retrial standards than capital punishment undoubtedly derived from a number of factors apart simply from the personal views of Justices Kishi and Dandō⁴⁴⁷—and I discuss some of the other factors below. But the issue of capital punishment differs from the retrial standards in one obvious yet important respect: the former involves the Constitution of Japan, whereas the latter is purely a matter of statutory interpretation.⁴⁴⁸ Unlike the United States Supreme Court, which, as reflected by the capital punishment debate, frequently questions the constitutionality of state and federal statutes, the Japanese Supreme Court has been very reluctant to declare statutes unconstitutional.⁴⁴⁹ Yet the Japanese judiciary has on numerous occasions proven much more willing to develop important new standards at the statutory level.⁴⁵⁰ The retrial standards pro-

constrained reform-minded lower courts).

447. See *supra* text accompanying notes 291-92, 341-42.

448. Moreover, the latter relates to a statute regulating the courts' workload, a matter that would seem to be squarely within the Supreme Court's own expertise.

449. See, e.g., sources cited *supra* note 11.

450. See, e.g., Okudaira, *supra* note 11, at 38-41; FRANK UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 28-77, 124-65 (1987) (describing judiciary's role in developing new standards in the environmental law and equal employment opportunity contexts).

vide one more example of progressive change through statutory interpretation.

Finally, the role of foreign opinion in this history also warrants mention. In recent years, there has been much talk in Japan of *gaiatsu*—"foreign pressure."⁴⁵¹ For virtually every issue on which foreigners have expressed opinions about the desirability of change in Japan—and even for issues on which most foreigners have expressly declined to take a position—the topic of *gaiatsu* arises. To Japanese supporters of the change in question, the existence of *gaiatsu* serves as confirmation of the need for change: either so that Japan will "rise" to the level of other nations or in order to satisfy foreign demands or expectations. To Japanese opponents of the change, in contrast, the *gaiatsu* represents inappropriate meddling by foreigners in Japanese affairs and provides all the more reason to resist the sought-after change.⁴⁵²

If the retrial debate occurred today, the involvement of Professor Peters undoubtedly would be characterized as *gaiatsu*. Yet as that episode reflects, there are really several different patterns to so-called *gaiatsu*. In some cases, foreign parties truly do press for change of a sort that very few Japanese have focused on or would support. (While some might disagree, I would put calls for elimination of *keiretsu*—business groupings—into this category.⁴⁵³) In other cases, concerns that may have been identified independently by foreign parties in fact are virtually identical to concerns already widely shared

451. In a sense, this is nothing new. For most of the nearly century and a half since the arrival of Admiral Perry's "black ships," Japan has been sensitive to foreign views and criticism. Yet, in my view, based on close personal observation of Japan over the past twenty years, the tendency to characterize virtually all foreign comment as *gaiatsu* is a recent phenomenon.

452. For a recent example, see David E. Sanger, *U.N. Chiefs Advice Stirring Japanese Criticism*, N.Y. TIMES, Feb. 7, 1993, at A17 (describing reaction in Japan to U.N. Secretary General Boutros Boutros-Ghali's suggestion that Japan should amend its Constitution to eliminate any question over the constitutionality of Japan's participation in U.N. peacekeeping operations).

453. See, e.g., U.S.-JAPAN WORKING GROUP ON THE STRUCTURAL IMPEDIMENTS INITIATIVE, JOINT REPORT, at V-1 to V-4 (1990) (report by the Japanese delegation responding to concerns raised regarding *keiretsu* relationships).

by groups within Japan. (In this category I would include numerous consumer rights issues.⁴⁵⁴) In still others, however, the "foreign pressure" never really originated abroad at all. Rather, groups seeking change within Japan have themselves actively promoted their causes outside Japan in an attempt to generate international sentiment, and then have sought to use that international opinion to strengthen their own calls for reform.⁴⁵⁵ Professor Peters' involvement plainly falls into this last category.

In marked contrast, foreign opinion typically plays far less of a role in the process of legal change in the United States. Amnesty International's attempts to influence attitudes toward the death penalty by reference to international trends⁴⁵⁶ have largely fallen on deaf ears in the United States. Moreover, it is

454. See, e.g., *id.*, at III-1 to III-16 (report by the Japanese delegation responding to concerns raised regarding the distribution system).

455. In the criminal justice field, examples include access to counsel and the issue of "substitute confinement" of suspects in police holding cells where they are readily available for questioning. See, e.g., Kazuo Itoh, *On Publication of the "Citizens' Human Rights Reports,"* 20 LAW IN JAPAN 29, 54-63 (1988) (describing report to the U.N. Human Rights Committee decrying use of "substitute prisons," which was part of an effort to focus foreign attention on the issue); Lawrence Repeta, *The International Covenant on Civil and Political Rights and Human Rights Law in Japan*, 20 LAW IN JAPAN 1, 2-3 (1988) ("Always aware of the great power of the national media . . . and . . . of the media's hypersensitivity toward criticism from abroad . . . citizens activist groups and activist attorneys looked to the International Covenant as a *deus ex machina* with the potential to rescue them . . . through heavy media campaigns including resort to international opinion."). In the labor field, *karōshi*—death from overwork—provides another example; those advocating greater recognition of *karōshi* have actively sought to focus foreign attention on the issue. See, e.g., NATIONAL DEFENSE COUNSEL FOR VICTIMS OF KAROSHI, KAROSHI: WHEN THE "CORPORATE WARRIOR" DIES (1990).

456. See, e.g., John G. Healey, *Keeper of the Flame*, in AMNESTY INTERNATIONAL, A PUNISHMENT IN SEARCH OF A CRIME: AMERICANS SPEAK OUT AGAINST THE DEATH PENALTY 371, 373 (1989) ("South Africa and the United States are the only 'Western' nations that continue to kill their own people.").

This attitude of placing little importance on international views and trends may be seen even among the five Justices who voted against the death penalty in *Furman v. Georgia*, 408 U.S. 238 (1972). Although the petitioners in that case emphasized the worldwide trend toward abolition, see *id.* at 434 (Powell, J., dissenting), in the five opinions authored by the five Justices who voted against the death penalty, that trend garnered only a brief mention by Justice Marshall at the very end of his opinion, *id.* at 371 (Marshall, J., concurring).

hardly conceivable that the current United States Supreme Court would regard foreign opinion or foreign experiences as relevant factors in determining the proper scope of federal habeas, notwithstanding Chief Justice Rehnquist's confident reference to comparative experience in asserting that, "This system is unique to the United States; no such collateral attack is allowed on a criminal conviction in England, for example, where the writ of habeas corpus originated."⁴⁵⁷

B. The Standards Governing Collateral Review of Death Sentences

Turning to a comparative examination of developments in the United States and Japan, substantive differences in the chief mechanisms for post-conviction review and prevailing interpretations of the relevant standards reflect deepseated differences between the two nations. Part of the explanation for the contrasting approaches lies in structural differences relating to federalism and to the judicial system itself. Yet fundamental differences in attitudes toward the factfinding process and punishment play important roles as well. Japan's reliance on a "new evidence" provision as the primary tool for post-conviction review appears to reflect a greater faith than exists in the United States that the judiciary truly can determine the "actual facts." And Japan's willingness to reopen criminal cases years and even decades after the original conviction, as well as the current decline in the use of capital punishment, are not simply luxuries that Japan can afford as a nation with low and stable crime rates.⁴⁵⁸ Rather, they rest

457. Rehnquist, *supra* note 124. It is unclear whether Rehnquist meant that the U.S. system is unique in the fact that it permits review of state proceedings by federal courts, or whether he also meant that it is unique in sanctioning long delays through post-conviction collateral proceedings. If he had the latter in mind, he clearly did not take the Japanese experience into account. In any event, there seems little doubt that his statement was a rhetorical flourish, rather than a serious proposal to look to England or any other nation for guidance on the scope of modern-day habeas.

458. See, e.g., RESEARCH AND TRAINING INST., MINISTRY OF JUSTICE, GOV'T OF JAPAN, SUMMARY OF THE WHITE PAPER ON CRIME 1989, 3-11 (1989) [hereinafter

in part on Japan's characteristic approach to punishment—one based on rehabilitation and specific prevention, rather than general deterrence. Before examining these themes in more detail, however, a preliminary matter must be considered: Are habeas corpus and the retrial system really comparable?

1. Comparability

On the surface, of course, habeas corpus and the retrial system appear similar. Both provide means for post-conviction collateral review of sentences. Similarly, the two systems respectively represent key means by which many death-sentenced prisoners in the United States and Japan have challenged their convictions and thereby delayed their executions.

Yet the two systems serve quite different functions in theory. The retrial provision used in the vast majority of cases in Japan—article 435, item 6, which provides for review based on “new evidence”—goes squarely to the accuracy of the conviction and sentence. Other retrial provisions, and Japan's Habeas Corpus Act itself, provide mechanisms for challenges based on certain types of investigative and procedural abuses.⁴⁵⁹ But item 6 is above all a tool for attacking determinations of fact, based on the discovery of new evidence undermining the earlier findings.

In contrast, the United States Habeas Corpus Act of 1867 is not concerned primarily with the weight of the evidence. The express purpose of federal habeas corpus review of state cases, as set forth in the terms of the statute, is to remedy violations

WHITE PAPER ON CRIME].

459. See *supra* notes 239-40, 255-56 and accompanying text. Despite the Habeas Corpus Act's broad reference to violations of “due process,” as interpreted there is no provision authorizing challenges for constitutional violations in general. The various retrial provisions other than item 6 are specifically limited to narrow and extreme types of violations, such as falsification of evidence. Given the Japanese Supreme Court's narrow interpretation of constitutional and statutory rights that might warrant relief from conviction, see, e.g., Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317, 332-39 (1992) [hereinafter Foote, *Paternalism*], the absence of such a provision may not have great practical significance, in any event.

of the federal Constitution and laws. In 1963's *Townsend v. Sain*,⁴⁶⁰ Chief Justice Warren observed: "Where newly discovered evidence is alleged in a habeas application, . . . such evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus."⁴⁶¹ Earlier this year, in *Herrera v. Collins*,⁴⁶² Chief Justice Rehnquist reaffirmed that view, firmly stating that federal habeas is not simply a substitute for a "new evidence" standard.⁴⁶³

Despite these differences in the fundamental purposes of the two schemes, decisions in recent years have heightened similarities between the two systems, and at one time even seemed to place them on a convergent course. No Japanese court has yet granted an item 6 retrial based on a finding of a constitutional or legal violation; nor, where retrials have been granted, has any court conducting the actual retrial acquitted a defendant on the basis of such a violation.⁴⁶⁴ At an implicit level, however, the Japanese courts considering retrial petitions appear to be affected by evidence of constitutional and legal violations. In granting retrials, some courts—including those in *Menda* and *Matsuyama*—have referred to illegal or improper activities by the investigative authorities with evident disapproval, and the decisions following the retrials in those cases have been even more explicit in their condemna-

460. 372 U.S. 293 (1963).

461. *Id.* at 317.

462. 113 S. Ct. 853 (1993).

463. *Id.* at 859 ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.").

464. As the most striking example of this sort, no retrial court has excluded a confession on voluntariness grounds, which would rest on a finding of a violation of either the Constitution or the Criminal Procedure Code. Rather, the courts invariably have rejected confessions on the alternative ground of reliability, which focuses squarely on an evaluation of the weight of the evidence. For a discussion of this issue, see Daniel H. Foote, *Confessions and the Right to Silence in Japan*, 21 GA. J. INT'L & COMP. L. 415 (1991) [hereinafter Foote, *Confessions*].

tion of those activities.⁴⁶⁵ Thus, while the liberalized interpretation of the item 6 "new evidence" standards has fallen far short of creating a generalized right in Japan to review of constitutional or legal violations that may have occurred in connection with the original conviction, some retrial courts have highlighted concerns over such violations in the process of granting relief.

Until recently, apparent signs of convergence were even more pronounced on the United States side. There is still a right to raise most "dispositive" federal constitutional claims in the *first* round of federal habeas, assuming the petition is not otherwise barred on procedural grounds.⁴⁶⁶ Yet in rulings over the past few years, the United States Supreme Court has effectively restricted virtually all subsequent habeas petitions to "fundamental miscarriages of justice." Given the strictness with which the Court has construed the duty to raise all foreseeable claims in one's first habeas petition, only a truly new and unforeseeable development might justify a second or successive petition. In theory, such new developments might be of either a legal or factual nature. Yet the Court's restrictive holdings on retroactivity have virtually precluded habeas petitioners from relying on new legal rules. That would appear to have left new factual evidence as the only remaining viable ground for a second or successive federal habeas petition, just as in the Japanese retrial system.

This focus appeared to be matched by a fundamental change in the thinking of the United States Supreme Court. The Warren Court regarded federal habeas corpus review of state convictions as a key mechanism for vindicating the constitutional rights of the innocent and guilty alike. In contrast, despite rhetorical deference to the role of habeas in deterring constitutional errors by state courts,⁴⁶⁷ the Rehnquist Court seemed to regard habeas—at least in the second and successive

465. See *supra* text accompanying note 381 and note 397 and accompanying text.

466. See *supra* text accompanying notes 129-37.

467. See *supra* text accompanying note 141.

petition context—as an extraordinary device to provide the wrongfully convicted innocent with a remedy for mistaken convictions. Again, the Court's approach seemed to parallel the philosophy of Japan's system.

Early in 1993, however, *Herrera v. Collins*⁴⁶⁸ dashed any notions of convergence. That decision flatly held that federal habeas is not a remedy for mistaken factfinding, but rather for violations of rights under federal law and the Constitution. Every petitioner must establish such a violation. In the second and successive petition context, the Rehnquist Court has superimposed upon that duty the additional requirement that the petition also establish her factual innocence.⁴⁶⁹ This is not an either/or proposition; the successful petitioner must show both, except perhaps in extreme and very rare circumstances.⁴⁷⁰ As Rehnquist stated in *Herrera*, "[A] claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."⁴⁷¹ While not technically inconsistent with prior holdings of the Rehnquist Court, *Herrera* differs sharply from the "actual innocence" rhetoric in the cases that preceded it.⁴⁷² As Justice Blackmun observed in his *Herrera* dissent: "[H]aving held that a prisoner who is incarcerated in violation of the Constitution must show he is actually innocent to obtain relief, the majority . . . now hold[s] that a prisoner who is actually innocent must show a constitutional violation to obtain relief."⁴⁷³ In

468. 113 S. Ct. 853 (1993).

469. See *id.* at 861. Whether even that will be sufficient remains to be seen. Although *Herrera* elaborated on prior precedent in explaining the requirements of the "fundamental miscarriage of justice exception," *id.* at 862, the Court did not actually apply that exception and might well impose additional restrictions if it is ever faced with a case posing the exception squarely.

470. See *id.* at 869 (assuming "for the sake of argument" that "in a capital case a truly persuasive demonstration of 'actual innocence' . . . [might] warrant federal habeas relief if there were no state avenue open to process such a claim," but stating that "the threshold showing for such an assumed right would necessarily be extraordinarily high").

471. *Id.* at 861.

472. See *supra* text accompanying notes 146-48, 157-58, 164.

473. 113 S. Ct. at 881 (Blackmun, J., dissenting). Blackmun added, "The only

this key respect, therefore, the Rehnquist Court's vision of federal habeas differs sharply from both that of the Warren Court, where it was usually sufficient to establish a violation of federal law or the Constitution, and Japan's retrial system, where new evidence of innocence is all that matters.⁴⁷⁴

principle that would appear to reconcile these two positions is the principle that habeas relief should be denied whenever possible." *Id.*

474. The standards adopted by the Rehnquist Court are narrower than those applied in Japan in several other respects as well. The courts of both nations agree that a petitioner may not rely on evidence that she deliberately failed to disclose at trial; in fact, even the Warren Court agreed on this point. *See supra* text accompanying note 170. Under the "inexcusable neglect" standard, however, the Rehnquist Court, unlike the Japanese courts, would not treat evidence as "new" if petitioner or her counsel could have discovered it through greater diligence at an earlier stage. Nor, except perhaps in extreme circumstances, would the United States Supreme Court allow a petitioner to assert a new claim or reassert an earlier claim following the discovery of new evidence that simply provided further support for evidence that was available earlier. As the Court emphasized in *McCleskey v. Zant*, "If what [a] petitioner knows or could discover upon reasonable investigation supports a claim for relief in a federal habeas petition, what he does not know is irrelevant. Omission of the claim will not be excused merely because evidence discovered later might also have supported or strengthened the claim." 111 S. Ct. 1454, 1472 (1991). In contrast, the Japanese courts, through their "comprehensive evaluation" approach, have permitted petitioners to cumulate evidence relating to the same claim over the span of two or even several petitions. As the Japanese Supreme Court's own ruling in *Saitakawa* made clear, even very limited new evidence, when coupled with evidence adduced at trial and in subsequent appeals and petitions, may be sufficient to tip the scale and convince the reviewing court that there is now a likelihood of acquittal. *See supra* notes 359-60 and accompanying text.

The role prescribed for reviewing courts is also far narrower under the new habeas than it is in Japan. Without expressly overruling the Warren Court's conclusion in *Sanders v. United States*, 373 U.S. 1, 18 (1963), that decisions on the disposition of successive writs "are addressed to the sound discretion of the federal trial judges," the Rehnquist Court sharply limits that discretion by defining virtually any largesse by a reviewing court as an abuse of its discretion, *see, e.g.,* *McCleskey v. Zant*, 111 S. Ct. at 1462-71, discussed in *The Supreme Court, 1990 Term, supra* note 109, at 324. Given this restrictive approach, the Rehnquist Court would undoubtedly be aghast at the thought that a district court might on its own initiative undertake investigations into issues never even raised by the petitioner, as the Takamatsu District Court did in *Saitakawa*, *see supra* note 351; Foote, *supra* note 6, at 35-36. If a petitioner sought to rely on expert opinions about a blood type analysis undertaken decades earlier, even though the piece of evidence in question had long since been lost, as was the case in *Menda*, *see supra* text accompanying note 380; Foote, *supra* note 6, at 29, the Rehnquist Court surely would look askance, given its comments on the "prejudice [to] the government,"

Thus, while the rhetoric of "actual innocence" employed by the Rehnquist Court and the frequent references in the major Japanese retrial cases to illegal or improper acts by the police and prosecutors suggest close comparability between federal habeas and Japanese retrials, in the final analysis, that rhetoric masks fundamental differences between the systems. Federal habeas, even after the restrictive interpretations of recent years, currently still provides one level of federal review for most kinds of alleged constitutional violations—and, following *Herrera*, virtually no opportunity for relief once the first petition has been disposed of. Item 6 retrials in Japan, in contrast, do not focus on constitutional violations at all, but instead provide a mechanism for factual review of convictions based on new evidence, whenever it is discovered.

McCleskey v. Zant, 111 S. Ct. at 1468, of re-litigation so long after the original trial and the "enormous burden [of] having to retry cases based on . . . stale evidence." *Herrera v. Collins*, 113 S. Ct. 838, 869 (1993). And the Rehnquist Court would likely regard the thorough reweighing of evidence that Japanese courts have undertaken in reviewing at least some of the retrial petitions as improper second-guessing of the original factfinder.

A final aspect in which the "fundamental miscarriage of justice" exception in the new habeas is far stricter than Japanese retrials relates to the degree of proof required to obtain relief. Under *Shiratori* and *Saitakawa*, in Japan a retrial petitioner need not establish actual innocence, but only the probable existence of a reasonable doubt of guilt. In the United States, under *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992), "to show 'actual innocence' [for purposes of the 'fundamental miscarriage of justice' exception, a petitioner] must show *by clear and convincing evidence* that but for a constitutional error, *no reasonable juror* would have found the petitioner eligible for the death penalty under the applicable state law." *Id.* at 2517. As discussed earlier, *see supra* text accompanying note 209, it is unclear whether a petitioner alleging new evidence going solely to the question of guilt or innocence would be entitled to any relief at all under *Herrera*, no matter how compelling the new evidence. If such an exception ever exists, though, the *Herrera* majority clearly contemplates that the "extraordinarily high" degree of proof necessary to justify federal relief would exceed that required by *Sawyer*. *See Herrera*, 113 S. Ct. at 869. In fact, even the dissenters in *Herrera* conceded that such a petitioner should have to establish "not just that there was probably a reasonable doubt about his guilt but that he is probably actually innocent." *Id.* at 878 (Blackmun, J., dissenting). This is the standard that most courts followed in Japan prior to *Shiratori*.

2. Factors Underlying the Differences in the Basic Approach to Post-Conviction Review

Given these fundamental differences in approach, direct comparison of the specifics of the two schemes would be difficult and would not be particularly instructive. Yet this does not mean that attempts at comparison on a broader level are pointless. To the contrary, the sharply contrasting manner in which the two nations approach post-conviction review point the way toward basic differences in numerous aspects of the criminal justice systems.

In comparing the two nations' experiences, one confronts two major elements: the differences in the basic statutory framework for post-conviction review, and the sharply contrasting trends in interpretation of the respective standards over the past two decades. This section examines the first of these topics; the next section considers reasons for the changing trends.

A partial explanation for the difference in approaches may lie in the historical influence in Japan of the German criminal justice system, with its reliance on the "new evidence" standard.⁴⁷⁵ Yet in 1948 the Occupation introduced into Japan a Habeas Corpus Act expressly based on United States principles.⁴⁷⁶ It has languished, while the new evidence approach has dominated. By the same token, habeas corpus is not the only post-conviction remedy in the United States. State and federal statutes and rules permit motions for new trials based on various grounds, including new evidence.⁴⁷⁷ Yet this approach traditionally has been regarded with great skepticism in the United States;⁴⁷⁸ as the Court observed in *Herrera*, seventeen states still limit new trial motions based on new evi-

475. See *supra* text accompanying notes 252-53.

476. See *supra* text accompanying note 239.

477. See generally DONALD E. WILKES, JR., *FEDERAL AND STATE POSTCONVICTION REMEDIES AND RELIEF* 7-9, 17-20 (1992 ed.).

478. See *id.* at 18-20.

dence to no more than the first sixty days after a conviction, and only fifteen states permit such a motion after more than three years have passed.⁴⁷⁹ Thus, despite the existence of alternatives in each nation, the new evidence standard represents the approach of choice in Japan, whereas habeas—despite the recent cutbacks—remains the key avenue for post-conviction review in the United States.

Structural factors may account for part of this difference. Numerous aspects of the trial process in Japan facilitate post-conviction evidentiary review there, whereas the United States trial process militates against such review. Moreover, the federal structure of the United States has had an important influence over federal courts' willingness to undertake searching review of state cases, whereas no such constraint operates in Japan.

In addition, the contrasting approaches reflect certain basic attitudinal differences between Japan and the United States, among them: the level of respect for (or distrust of) authority; the degree of faith (or lack thereof) in the possibility of true factfinding accuracy; and views regarding the proper role of the punishment process. These factors help explain the difference in the basic approaches to post-conviction review in the two nations. And, as I will explore in the next section, differences in the degree to which the Supreme Courts of the two nations have evaluated the various factors help explain the recent shifts in interpretations of the relevant standards.

479. *Herrera v. Collins*, 113 S. Ct. 838, 865 (1993) (cataloguing state standards).

a. *Trial Process*

The trial process in the United States is premised on factfinding by a jury.⁴⁸⁰ Trials are conducted mainly through in-court testimony by live witnesses, with one of the jury's important functions being to evaluate the credibility of those witnesses. At the conclusion of the trial, which is ordinarily conducted in a continuous proceeding, the jury deliberates and then announces its verdict, typically without elaborating on the grounds for its decision. Appeal of the decision is normally limited to issues of law. With the exception of clear error, the jury has the final say on questions of fact.

Based on a continental model, the Japanese trial process is very different.⁴⁸¹ There is no jury; depending on the gravity of the case, either a single judge or a panel of judges will decide. Minor matters are normally concluded in one court session, but in other cases weeks—and on occasion even months—may pass between court sessions, with the entire trial sometimes lasting several years. Given a career judiciary in which judges are reassigned approximately every three to five years, the composition of the panel hearing a case may even shift during the proceedings. Although defendants have the right to demand the presentation of live witnesses, the vast majority of testimony is introduced in documentary form, in the form of written statements prepared by the prosecutors and attested to by the witness. At the conclusion of the trial, the court considers the record and then drafts an opinion setting forth its verdict, findings of fact and conclusions of law. Particularly in major or

480. Even where the case is tried by a judge sitting without a jury, the basic procedures are governed by structures established with the jury in mind.

481. For an excellent discussion of the role of the courts in criminal cases in Japan, see Atsushi Nagashima, *The Accused and Society: The Administration of Criminal Justice in Japan*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 297, 313-21 (Arthur T. von Mehren ed., 1963). Despite the passage of thirty years, the debate in Japan over most of the issues discussed by Nagashima, who later became a Justice of the Supreme Court, remains virtually unchanged.

contested cases, the decision will often go into considerable factual detail. In the first level of appeals, the defendant may challenge both the legal and factual findings of the original trial court, and the appeals court may, and on occasion must, hear additional evidence.⁴⁸² That court's decision may also go into great factual detail. Subsequent appeal by right to the Supreme Court is limited to issues of constitutional error, violations of precedent and the like,⁴⁸³ but the Supreme Court may also choose to review other matters.⁴⁸⁴ When the Supreme Court does review a case, one of the grounds under which it may set aside a lower court judgment is "grave error in factfinding."⁴⁸⁵ Based on this authority, on occasion the Supreme Court itself undertakes a thorough review of the factual record.⁴⁸⁶

These differences help explain the differing approaches to post-conviction review. Given respect for the jury as ultimate factfinder, coupled with the importance placed on directly evaluating the credibility of witnesses, there is great reluctance to reassess issues of fact in the United States. Moreover, when the factfinder has issued a general verdict without further elaborating on its reasoning or findings, it is impossible to know exactly what facts it found. Accordingly, the United States system is premised on a single round of factfinding with limited opportunity for subsequent review of the facts, unless the verdict is clearly contrary to the weight of the evidence.

482. KEISOHŌ arts. 382-2, 393(1) (court may examine whatever facts it deems necessary to investigate matters raised in the appeal, and must examine evidence if it is essential for determining errors in factfinding or in sentencing and if it could not have been presented prior to the close of trial in the first instance).

483. KEISOHŌ art. 405.

484. *Id.* art. 406 (in addition to cases of types specified in art. 405, the Court may review cases deemed to involve important matters of statutory interpretation).

485. *Id.* art. 411(1)(iii).

486. This was the case, for example, in its review of *Saitakawa*. See *supra* text accompanying notes 351-61. For a summary of three recent cases in which the Supreme Court has undertaken careful review of the entire factual record on direct appeal, see Kadono Hiroshi, *Jijitsu nintei—saiban no tachiba kara* [Factfinding—From the Standpoint of the Judiciary], in 2 KEIJI TETSUZUKI, *supra* note 281, at 773-78.

This approach is reflected in the substantive standards for habeas.

In contrast, under the Japanese trial system—with its heavy use of documentary evidence, its reliance on judges as factfinders, its use of verdicts containing specific factual findings, and its repeated opportunities for factual review during the direct appeals process—post-conviction review of the facts does not face many of the obstacles found in the United States. To the contrary, post-conviction review based on new evidence fits quite cleanly into the overall pattern of Japan's trial system. In view of these structural differences, it should not be surprising that Japanese courts are more willing to review evidentiary issues raised in retrial petitions than their United States counterparts in habeas.

b. Federalism

The federal system in the United States constitutes another basic structural difference between the two nations that may help to explain the difference in approaches to post-conviction review. In Japan, the court that reviews the retrial petition is typically the same court that entered the original conviction. Given Japan's system of rotating judges among various postings throughout their careers, it is unlikely that the same judges will hear the case; however, the court is likely to be the same. In contrast, in federal habeas, members of one judicial system—the federal—sit in after-the-fact judgment on decisions made by members of a coordinate but separate judicial system—the state's. Even if one accepts the argument that federal courts are more appropriate bodies than state courts to decide issues relating to the United States Constitution and federal laws, and thus are entitled to substitute their views on those issues for good-faith decisions by state courts, the suggestion that federal courts may second-guess the *factfinding* of state courts runs counter to notions of federal/state comity and respect for state court decisionmaking.

c. *Attitudes Toward Authority*

A basic difference underlying the contrasting approaches to post-conviction review may be found in societal attitudes toward authority. Concern for the potential for abuse of authority lies at the root of numerous aspects of the Anglo-American criminal justice system, including habeas corpus.⁴⁸⁷ Historically, the Great Writ of Habeas Corpus in England represented a classic example of protection of the individual against the arbitrary or unlawful exercise of central authority;⁴⁸⁸ and the federal Habeas Corpus Act sought to extend that protection to victims of the exercise of authority by the states in violation of federal law.⁴⁸⁹ Thus, distrust of authority is one of the animating premises of the United States approach to post-conviction review.⁴⁹⁰

A high degree of deference to authority in Japan provides one reason for the limited impact of the Habeas Corpus Act⁴⁹¹ and the statutory retrial grounds focusing on procedural improprieties or the abuse of authority,⁴⁹² as opposed to the "new evidence" standard contained in item 6 of article 435 of the Criminal Procedure Code.⁴⁹³ Arguably, deference to au-

487. For an excellent exposition of this theme, comparing Anglo-American and Continental criminal procedure, see Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480 (1975).

488. See, e.g., WILKES, *supra* note 477, at 41-45.

489. See Wechsler, *supra* note 96, at 168-71.

490. On the other hand, that same distrust of concentrated, centralized authority represents one reason for the reliance on the jury as factfinder in the Anglo-American system. See, e.g., HARRY KALVEN JR. & HANS ZEISEL, *THE AMERICAN JURY* 6-9 (1966); Damaška, *supra* note 487, at 507-10; Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 505-06 (1992). The ideal of a jury verdict as the collective judgment of one's peers constitutes an important reason for the traditional reluctance to intrude upon that determination except where a conviction is clearly contrary to the facts.

491. See *supra* notes 239-42 and accompanying text.

492. See *supra* note 256 and accompanying text (describing the other retrial grounds).

493. In fact, the other retrial grounds are so closely circumscribed by statute

thority might imply an unwillingness to recognize new evidence claims, as well. Yet in that context the courts in theory are implying no criticism of anyone's performance: no abuse of authority has occurred; rather, the discovery of new evidence has simply altered the equation.⁴⁹⁴ Through use of the new evidence standard, rather than habeas corpus or other conceivable alternatives, the courts have provided remedies for wrongly convicted individuals without directly intruding on other authorities and without significantly expanding available constitutional or statutory rights.

d. Attitudes toward Truth and the Factfinding Process

Another important attitudinal difference concerns factfinding and the "search for truth." To a certain extent, this factor parallels the earlier observations about the trial process. In the United States, for example, the dominant role played by testimonial evidence makes it especially important that the

that it is difficult to mount an effective challenge thereunder, *see supra* note 256 and accompanying text, and Supreme Court Rules implementing the Habeas Corpus Act reserve its use to cases in which there is a "clearcut" absence of authority or "clear violation of procedures prescribed by law" and no other reasonable remedy exists. *See supra* text accompanying notes 240. At least as to the latter, the Supreme Court presumably could amend the relevant rule or modify interpretations of the applicable standards so as to expand the availability of habeas corpus relief. To do so, however, would place the Court in the position of permitting more direct challenges to the exercise of authority by police and prosecutors. Judging from its stance in other criminal justice areas, the judiciary appears reluctant to take such a step. *See, e.g.,* SETSUO MIYAZAWA, *POLICING IN JAPAN: A STUDY ON MAKING CRIME* 16-25 (1992); Foote, *Confessions*, *supra* note 464, at 455-62 (describing judicial reliance on issue of credibility, rather than voluntariness, in invalidating confessions, thereby avoiding direct criticism of investigative practices); Foote, *Paternalism*, *supra* note 459, at 332-39 (describing extensive discretion and deference accorded to prosecutors and apparent reluctance to significantly expand available constitutional and statutory protections).

494. In practice, of course, the grants of retrials and subsequent acquittals in Japan have carried implicit—and at times even explicit—criticism of earlier proceedings in those cases. Yet the stated reason for granting the new trial—the discovery of new evidence—carries no direct criticism of the criminal justice authorities' performance of their duties.

factfinder be able to observe the demeanor of witnesses and heightens concerns over stale evidence.

Yet two further aspects appear to be at work in the United States: a belief that the absolute truth is unknowable and a belief that the results arrived at through the adversary process should be treated as the best approximation one is likely to achieve.⁴⁹⁵ Expressing the former sentiment, in *McCleskey v. Zant*⁴⁹⁶ the Court quoted the following language from Professor Paul Bator: "A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice"⁴⁹⁷ The Court sounded the same theme in *Herrera v. Collins*,⁴⁹⁸ stating, "[T]here is no guarantee that the guilt or innocence determination [at a second trial following discovery of new evidence] would be any more exact [than at the first trial]."⁴⁹⁹ As these quotes reflect, for many in the United States criminal justice system, the search for absolute truth is a "vain"⁵⁰⁰ undertaking.

Moreover, the system itself is firmly premised on the assumption that the adversary process is a superior means of determining the facts.⁵⁰¹ The system is (or at least pretends to be) troubled by elements that prevent the adversary process from functioning properly in that regard—hence the expressions of concern over ineffective assistance by counsel⁵⁰²—and

495. An excellent analysis of this point is contained in Patchel, *supra* note 148, at 943-58.

496. 111 S. Ct. 1454 (1991).

497. *Id.* at 1469 (quoting Bator, *supra* note 101, at 452).

498. 113 S. Ct. 838 (1993).

499. *Id.* at 862.

500. *McCleskey v. Zant*, 111 S. Ct. at 1469 (quoting Bator, *supra* note 101, at 452).

501. See, e.g., *Strickland v. Washington*, 466 U.S. 668, 675 (1984) (The "very premise of our adversary system . . . is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free") (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)); LaFave & Israel, *supra* note 140, at 35-37; Mirjan Damaška, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1091-95 (1975).

502. See, e.g., *Strickland v. Washington*, 466 U.S. at 685 (1984) ("The Sixth Amendment . . . envisions counsel's playing a role that is critical to the ability of

is uncomfortable with the possibility that the adversary system at times may actively hamper the search for truth.⁵⁰³ Yet, in a world in which ultimate certitude is impossible to achieve, the United States criminal justice system is content to treat the results obtained through the adversary process as conclusive in most instances. Reopening criminal proceedings to remedy violations of the Constitution or laws may be appropriate, but reopening proceedings simply to reconsider issues of fact is viewed with considerable skepticism.⁵⁰⁴

Japanese courts and scholars seem far more optimistic about the possibility of attaining the "truth" yet far less convinced of the effectiveness of the adversary process for doing so. Japanese judges surely would not claim the ability to achieve absolute certainty, but clearly do believe that by carefully reviewing the existing record and considering new evidence they may be able to come to a better understanding of the facts than earlier courts. In recent years, courts at all levels in Japan have undertaken very detailed investigations into factual issues in many major contested cases—both on direct appeal and in collateral review.⁵⁰⁵

the adversarial system to produce just results."). In fact, a major issue presented by many capital cases in the United States relates to the adequacy of representation at the original trial. Defendants who are sentenced to death are typically poor and rely on counsel provided by the state, and tales abound of shockingly weak representation. See, e.g., Vivian Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 245 (1990-91). For many of these defendants, it is only when the execution date looms near, if even then, that counsel experienced in capital defense becomes involved. Despite the Supreme Court's recognition of constitutionally ineffective assistance of counsel as "cause" excusing procedural default at the state trial level, see *McCleskey v. Zant*, 111 S. Ct. 1454, 1470 (1991), the Court's strict standards for ineffective assistance, see *Strickland v. Washington*, 466 U.S. at 689-96; Berger, *Dead End*, *supra* note 10, at 76-77, 88-96, coupled with the unavailability of this ground for claims of ineffective assistance in the post-conviction review process, see *supra* text accompanying notes 218-21, render this a narrow exception.

503. See, e.g., *Nix v. Whiteside*, 475 U.S. 157, 168-71 (1986); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975). See generally Van Kessel, *supra* note 501, at 447-59.

504. See, e.g., Eric M. Freedman, *Innocence, Federalism, and the Capital Jury: Two Legislative Proposals for Evaluating Post-Trial Evidence of Innocence in Death Penalty Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 315, 316-18 (1990-91).

505. The Supreme Court itself has instituted a searching review of the factual

In this process, the courts do not evince great faith in the operation of the adversary process. Despite the adoption of the adversary system during the Occupation, in Japan the judges themselves are the ultimate factfinders and continue to have the authority to investigate relevant evidence on their own initiative.⁵⁰⁶ When convinced that the parties themselves have not developed the relevant evidence sufficiently, judges regard it as proper to push the parties to do so and, where necessary, to investigate the evidence themselves.⁵⁰⁷ This attitude has carried over to the retrial arena. In several major cases, when reviewing courts became concerned that the original proceedings may have been in error, the courts instituted a searching re-examination of the entire case, at times even undertaking new lines of investigation on their own initiative.⁵⁰⁸ Viewed in this way, the "new evidence" approach to retrials followed in Japan reflects the following: a basic faith that the "real truth" can be determined; a belief that judges have a right and duty to ferret it out; a mistrust that the adversary system will always do so properly; and a confidence that, through careful re-examination and development of relevant new evidence, later courts can come closer to the absolute truth than earlier courts.

record in a number of direct appeals from convictions, even though the cases presented no significant legal issues. On occasion, the Supreme Court has reversed on purely factual grounds even though both the district and High Court agreed that the defendant was guilty. *See, e.g.,* Kadono, *supra* note 486, at 775-78 (describing two such cases).

506. KEISOHŌ art. 298(2). Moreover, the Criminal Procedure Code expressly authorizes judges considering retrial petitions to undertake investigations of the evidence on their own. *Id.* art. 445.

507. *See, e.g.,* Kadono, *supra* note 486, at 785 (Judges "must make parties aware of concerns and push both sides for proof of the key issues . . . Cooperation by the parties is important, but the court's own zeal and effort must be even greater.").

508. *See supra* text accompanying notes 340-414.

e. Attitudes Toward Punishment: The Roles of Speed and Finality

A final set of attitudinal differences relates to views concerning the proper role of punishment—and indeed of the criminal justice system itself. In the United States these days, one is hard-pressed to identify a single dominant theme for that system. After a brief heyday for rehabilitation—or at least for rhetoric about the rehabilitative ideal⁵⁰⁹—notions of general deterrence and retribution now appear to pervade debate over the goals of the United States criminal justice system.⁵¹⁰ To many observers, achieving these goals depends in part upon ensuring the speed and finality of convictions and sentences for all offenders (at least all offenders who are actually apprehended), to assure swift and certain punishment.⁵¹¹ This attitude, in turn, militates against recognition of any broad rights to post-conviction review, including review based on the discovery of new evidence.⁵¹²

In contrast, as I have discussed elsewhere,⁵¹³ the dominant goal of the Japanese criminal justice system is clear: specific prevention, with an emphasis on reintegration and rehabilitation.⁵¹⁴ The interest in general deterrence, it is thought, is served largely by maintaining swift and sure apprehension

509. For excellent accounts of the rise and fall of the rehabilitative ideal, see Francis A. Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 226 (1959); FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* (1981).

510. See, e.g., ALLEN, *supra* note 509, at 1-9; Comment, *Calculating Injustice: The Fixation on Punishment as Crime Control*, 27 HARV. C.R.-C.L. L. REV. 575, 590-645 (1992).

511. Herbert L. Packer has provided the classic statement of this view in his "crime control" model. See HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 158-165 (1968).

512. See *id.* at 160.

513. See Foote, *Paternalism*, *supra* note 459.

514. Others who have expressed similar views include JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* 61-65 (1989), and JOHN O. HALEY, *AUTHORITY WITHOUT POWER* 121-35 (1991).

of offenders (or at least the perception that apprehension is virtually certain).⁵¹⁵ Following apprehension, however, the primary focus normally shifts to reintegrating the offender and utilizing the least intrusive means appropriate to the circumstances—ideally, without having to resort to formal punishment at all.⁵¹⁶ The system is premised upon individualized determinations, based on the personal circumstances of each offender. Accordingly, while speed and certainty of apprehension are important, speed and finality of convictions and sentences are not such vital aspects of the Japanese criminal justice system.⁵¹⁷ Given this situation, post-conviction review based on the discovery of new evidence does not offend basic attitudes regarding punishment and deterrence in Japan in the same way it does for some in the United States.

3. Factors Underlying the Changes in Standards

The preceding factors help explain the fundamentally different approaches to post-conviction review in the United States and Japan: in the United States the primary focus is on abuse of authority and violation of the Constitution and laws, with a great reluctance to reopen issues of fact; in Japan it is

515. See Foote, *Paternalism*, *supra* note 459, at 389-90, and sources cited therein.

516. See Foote, *Paternalism*, *supra* note 459, at 341-60.

Capital punishment, of course, represents the other extreme. While one might view the death penalty as simply the ultimate expression of a system premised on special prevention, reserved for those cases in which rehabilitation is deemed truly inconceivable, that rationale has not prevailed in Japan. In *Nagayama*, the Tokyo High Court premised its reduction of the death sentence largely on Nagayama's "remarkable transformation" while in prison. See *supra* notes 70-72 and accompanying text. In reversing, the Supreme Court disagreed with the High Court over the true extent of the asserted "transformation," but also expressly referred to the interests in general deterrence and retribution as valid grounds for capital punishment. See *supra* text accompanying notes 82-83. In light of the absence of any formal announcement or, except in rare instances, any publicity when executions are actually carried out in Japan, however, the speed and ultimate certainty of execution would appear to play relatively limited roles in general deterrence in Japan. See *infra* text accompanying note 608-09.

517. See Foote, *Paternalism*, *supra* note 459, at 340-41.

precisely the converse. But what accounts for the changes in judicial interpretations of the collateral review standards that have occurred in both nations?

One rather obvious factor is simply the difference in the numbers of petitions filed in the two nations. As noted earlier,⁵¹⁸ some death row inmates in Japan have forestalled execution through repeated piecemeal retrial petitions; and in some of those cases the numbers of petitions and the extent of delay prior to execution has been far greater than for any cases in the United States. Yet such cases remain rare exceptions in Japan. Despite the vast range of potential retrial petitioners (which includes individuals who have completed their sentences and even family members of deceased individuals⁵¹⁹) and the evident incentives for seeking retrials (which include the possibility of substantial monetary awards⁵²⁰), the total number of retrial petitions peaked at 135 in 1976; on average fewer than 100 petitions have been filed each year since then.⁵²¹ In contrast, in the United States the federal courts face nearly 10,000 habeas petitions each year.⁵²²

This vast disparity would provide an interesting focus for further research as part of the debate over relative litigiousness in the United States and Japan. Whatever the reasons for it, however, the sheer difference in numbers of petitions may help explain the differing judicial attitudes toward post-conviction review in the two nations. In the United States, the large number of petitions has given rise to concerns over judicial economy⁵²³ and to expressions of frustration by several Justices—some of whom have reviewed successive petitions from a

518. See *supra* text accompanying notes 235-36.

519. See *supra* text accompanying notes 361-63.

520. See *supra* text accompanying notes 363-65.

521. See *supra* text accompanying notes 367-68. Approximately a third of these cases, moreover, relate to such relatively minor matters as traffic violations, see Konishi, *supra* note 281, at 1011-1013. Most such cases are filed by the prosecutors, rather than the convict, typically after the prosecutors find that a subordinate has assumed responsibility for an offense actually committed by his or her superior, see *supra* notes 278 and 281 and sources cited therein.

522. See *supra* note 104 and accompanying text.

523. See, e.g., Keeney v. Tamayo-Reyes, 112 S. Ct. 1715, 1719-20 (1992).

number of death row inmates and appear to have begun to lose patience—over perceived abuse of the process.⁵²⁴ On the other hand, in Japan the retrial system has been treated as a special remedy, to be used sparingly, and the rarity of retrial petitions may enhance the level of care they are accorded.

Public perceptions in the United States to the contrary notwithstanding, the number of habeas petitions has remained relatively stable during the past quarter century.⁵²⁵ This does not necessarily mean that the frustration the Justices have described is any less real. Yet this stability in the number of habeas petitions, coupled with a similarly stable pattern for retrial petitions in Japan (ranging from approximately fifty to slightly more than one hundred petitions each year since the 1950s⁵²⁶), suggests that something apart from the number of petitions lies behind the shift in judicial treatment. A partial explanation may be found in exactly the same factors identified in the previous section: changing views within the judiciary—particularly among the Justices of the respective Supreme Courts—regarding the weight to be accorded to factors relating to the trial process, federalism, attitudes toward authority, the search for truth, and the role of punishment.

a. The United States

Over the past four decades, while the scope of federal habeas has expanded and then contracted again, the basic contours of the trial process in the United States have remained generally stable. On each of the other factors, however—federalism, deference to authority, the “search for truth,” and the role of punishment—the prevailing views of the Supreme Court have shifted, in some cases rather dramatically.

524. See *supra* notes 110-14 and accompanying text.

525. See *supra* text accompanying note 106.

526. See SAIKŌSAIBANSHO JIMUSŌKYOKU, *supra* note 341, at 5 (table 2-3 for District Court filings through 1990, table 2-4 for Petty Court filings).

Federalism and Deference to Authority: In 1953's *Brown v. Allen*,⁵²⁷ Justice Frankfurter drew a clear distinction for federal habeas purposes between issues of fact, as to which state court decisions would govern, and questions of federal law, as to which federal courts should have the last word:

Unless a vital flaw be found in the process of ascertaining [the basic] facts in the State court, the [federal judge considering a habeas application] may accept their determination in the State proceeding On the other hand, State adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding. It is precisely these questions that the federal judge is commanded to decide.⁵²⁸

Similarly, for the Warren Court in *Fay v. Noia* just over a decade later, federal habeas represented a "precious heritage . . . of Anglo-American civilization"⁵²⁹ essential for vindicating the constitutional rights of state prisoners. To Justice Brennan, writing for the Court, comity concerns simply were not relevant: "[t]he availability of the Great Writ of habeas corpus . . . offends no legitimate state interest in the enforcement of criminal justice or procedure."⁵³⁰

Over twenty years later, again writing for the Court, albeit for a very different group of Justices, Brennan was not nearly so one-sided in his approach. While continuing to characterize the purpose of federal habeas as being to "provid[e] a federal forum for the vindication of the constitutional rights of state prisoners," Brennan acknowledged the existence of a second set of concerns: "the State's interest in the integrity of its rules and proceedings and the finality of its judgments."⁵³¹ For Brennan, this state interest revolved around ensuring the proper functioning of the adversary system and the judicial process, "channeling, to the extent possible, the resolution of

527. 344 U.S. 443 (1953).

528. *Id.* at 506 (opinion of Frankfurter, J.).

529. 372 U.S. 391, 441 (1963).

530. *Id.* at 440.

531. *Reed v. Ross*, 468 U.S. 1, 10 (1984).

various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently.⁵³²

To several members of the Rehnquist Court, the state's interests are of an even higher magnitude. Chief Justice Rehnquist and other members of the current Court display far greater trust than did Justice Frankfurter that state court judges will properly execute their duty to uphold the federal Constitution; they appear to regard it as a considerable affront and intrusion for federal court judges to second-guess good faith decisions made by state court judges. As early as 1977, in *Wainwright v. Sykes*,⁵³³ the Court criticized *Fay* for failing to accord state procedural rules the respect they deserve, a point the Court reiterated in 1991's *Coleman v. Thompson*.⁵³⁴ In 1992 Justice White described the comity concerns at length in *Keeney v. Tamayo-Reyes*,⁵³⁵ stating:

[The cause-and-prejudice standard] advances comity by allowing a coordinate jurisdiction to correct its own errors It reduces the 'inevitable friction' that results when a federal habeas court 'overturn[s] either the factual or legal conclusions reached by the state-court system.' . . .

. . . Just as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits.⁵³⁶

Hence, concerns over federal or state comity and respect for state court decision making constitute one ideological strand in the reasoning of many of the Court's recent habeas decisions.⁵³⁷ In numerous opinions and other writings, members

532. *Id.*

533. 433 U.S. 72, 88 (1977).

534. 111 S. Ct. 2546, 2565 (1991).

535. 112 S. Ct. 1715 (1992).

536. *Id.* at 1719-20 (quoting *Sumner v. Mata*, 449 U.S. 539, 550 (1981)).

537. Whether reliance on federalism concerns constitutes the true motivation for the Supreme Court's decisions, or simply a convenient justification, has been subject to debate. See Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 907 (1984); Patchel, *supra* note 148, at 1024-25 & n.497.

of the Rehnquist Court have also displayed considerable deference to and trust in the actions of state authorities.⁵³⁸

Factfinding and Punishment—The Role of Finality: In *Fay v. Noia*, Justice Brennan dismissed concerns over finality in the habeas context by flatly declaring that “conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review.”⁵³⁹ On the other hand, finality is of paramount importance to the Rehnquist Court. In the words of *McCleskey v. Zant*, “One of the law’s very objects is the finality of its judgments Perpetual disrespect for the finality of convictions disparages the entire criminal justice system.”⁵⁴⁰

This talismanic reference to finality embraces a number of separate concerns. Some of these relate to factfinding and to ensuring the proper functioning of the trial process and the adversary system. Recognizing exceptions to the principle of finality, the Court concluded in *McCleskey*, “places a heavy burden on scarce federal judicial resources, . . . threatens the capacity of the system to resolve primary disputes[,] . . . may give litigants incentives to withhold claims for manipulative purposes and may establish disincentives to present claims when evidence is fresh.”⁵⁴¹ Similarly, in *Engle v. Isaac* the Court stated, “Liberal allowance of the writ . . . degrades the prominence of the trial itself . . . by suggesting to the trial participants that there may be no need to adhere to . . . safeguards [for the accused] during the trial.”⁵⁴² These state-

538. See, e.g., *McCleskey v. Zant*, 111 S. Ct. 1454, 1471 (1991) (“Abuse of the writ may undermine the orderly administration of justice and therefore weaken the forces of authority that are essential for civilization.”) (quoting *Brown v. Allen*, 344 U.S. 443, 512 (1953) (opinion of Frankfurter, J.)); Charles J. Ogletree, Jr., *The Supreme Court—Comment, Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 170-71 (1991), and sources cited therein (examining Rehnquist’s views).

539. 372 U.S. 391, 424 (1963).

540. 111 S. Ct. at 1468-69.

541. *Id.* at 1469.

542. 456 U.S. 107, 127 (1982).

ments reflect a concern that recognition of broad rights to habeas would encourage piecemeal assertions of claims.

In addition, the Rehnquist Court has expressed the view that, if the habeas petition results in a new trial, the delay between the crime and the new trial will render it more difficult to determine the facts accurately. In *McCleskey* the Court stated, "[W]hen a habeas petitioner succeeds in obtaining a new trial, the 'erosion of memory and dispersion of witnesses that occur with the passage of time' prejudice the government and diminish the chances of a reliable criminal adjudication."⁵⁴³ And in *Herrera v. Collins* Rehnquist flatly concluded, "[T]he passage of time only diminishes the reliability of criminal adjudications."⁵⁴⁴ Thus, in the Rehnquist Court's view, finality plays an important role in ensuring the proper functioning of the adversary system and accuracy of the factfinding process.

To the Rehnquist Court, finality serves another important purpose: deterrence. As noted above, in *Fay v. Noia* Justice Brennan declared that federal habeas "offends no legitimate state interest in the enforcement of criminal justice."⁵⁴⁵ Despite later acknowledging the importance of finality in ensuring the proper functioning of the judicial process, he never suggested that finality might play a legitimate role in deterring crime. Other Justices, however, gradually elevated the status of deterrence as a basis for concern over finality⁵⁴⁶ un-

543. 111 S. Ct. at 1468 (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 453 (1986) (plurality opinion)).

544. 113 S. Ct. 838, 862 (1993).

545. 372 U.S. 391, 440 (1963).

546. In *Engle v. Isaac* in 1982, Justice O'Connor in a footnote observed that "Judge Friendly and Professor Bator suggest that [the] absence of finality also frustrates deterrence" 456 U.S. 107, 127-28 n.32 (1982). (In that same footnote, though, she listed the interest in rehabilitation on an apparently equal level with deterrence.) In 1986, Justice Powell, writing for a plurality in *Kuhlmann v. Wilson*, 477 U.S. 436, 452 & n.14 (1986), quoted from Justice O'Connor's earlier footnote in elevating the interest in deterrence to the body of the opinion. Then, in 1989, for another plurality in *Teague v. Lane*, 489 U.S. 288, 309 (1989), Justice O'Connor placed deterrence concerns first in the list of interests served by finality, this time treating the matter as a self-evident proposition that needed no further

til 1991 when Justice Kennedy, writing for a six-member majority in *McCleskey v. Zant*,⁵⁴⁷ implied that deterrence had become *the* leading interest served by finality. In that opinion, Kennedy stated, "Without finality, the criminal law is deprived of much of its deterrent effect."⁵⁴⁸ As though to drive the point home, he later added, "[T]he power of a State to pass laws means little if the State cannot enforce them."⁵⁴⁹

These majority opinions have phrased the deterrence issue as one of finality, without expressly drawing a link between finality and *speed*. In separate opinions and private remarks, however, some Justices explicitly highlighted that connection.⁵⁵⁰ Then, in 1992 the Court in a *per curiam* opinion referred to an interest in prompt punishment, expressing concern that "the State . . . has sustained severe prejudice by [a] two-and-a-half year stay of execution."⁵⁵¹ The Court added: "The stay has prevented [the State] from exercising its sovereign power to enforce the criminal law, an interest we found of great weight in *McCleskey* when discussing the importance of

support.

547. 111 S. Ct. 1454 (1991).

548. *Id.* at 1468 (quoting *Teague v. Lane*, 489 U.S. at 309 (plurality opinion)).

549. *McCleskey*, 111 S. Ct. at 1469.

550. Not surprisingly, Rehnquist has been the most outspoken in this regard. In 1981, in announcing his intention (on which he did not subsequently follow through) to vote to grant certiorari in all capital cases so as to dispose of all federal claims at once and thereby enable prompt executions, Rehnquist asserted, "[T]his Court . . . has made it virtually impossible for States to enforce with reasonable promptness their constitutionally valid capital punishment statutes. When society promises to punish by death . . . and the courts fail to do so, the courts . . . lessen the deterrent effect of the threat of capital punishment" *Coleman v. Balkcom*, 451 U.S. 949, 959 (1981) (Rehnquist, J., dissenting from denial of certiorari). Since then Rehnquist has continued to emphasize the "delay" in executions and its presumed effect on deterrence. *See, e.g.*, Burt, *supra* note 21, at 1782-92; Rehnquist, *supra* note 124 ("[s]tates seeking to carry out the [death] sentence . . . should not have to wait eight years to do that."). Justice Powell and the Powell Committee have echoed those views. *See, e.g.*, Lewis F. Powell, Jr., *Review of Capital Convictions Isn't Working*, CRIM. JUST. 10, 13 (Winter 1989) ("[D]eterrence may be significantly weakened by the delay of repetitive review"); *Powell Committee Report*, *supra* note 115, at 3241 ("[S]ociety is rightfully entitled to have the penalty prescribed by law carried out without unreasonable delay").

551. *In re Blodgett*, 112 S. Ct. 674, 676 (1992) (*per curiam*).

finality . . . ,” and went on to observe that if a federal court orders a stay of execution in a capital case, it has a “duty to take all steps necessary to ensure a prompt resolution of the matter.”⁵⁵² The Court has now closed the circle: for the Rehnquist Court, delays occasioned by habeas review undermine both speed and finality, thereby reducing the deterrent effect of the criminal law.

In sum, the increasingly strict limitations on habeas over the past few years reflect shifts in the views of the Supreme Court (accompanying shifts in the membership of that body) on such fundamental issues as the importance of federalism concerns, trust for authority, and the role of finality in both the factfinding and deterrence realms.

b. Japan

An emphasis on finality is of course not uniquely limited to members of the Rehnquist Court. On the other side of the Pacific, the Fukuoka High Court expressed a similar view in 1959 in *Menda* when, in reversing the Nishitsuji Panel’s grant of a retrial, it stated that the district court’s review “unjustifiably impairs the stability of judicial decisions and jeopardizes the existence of the justice system.”⁵⁵³ That same year the Nagoya High Court voiced similar sentiments, stating, “Once a decision has become final, the concept of legal stability demands that the propriety of the judgment not be open to challenge and that the judgment cannot be modified . . . [unless the grounds for a retrial are] so strong that the prior judgment simply cannot be tolerated.”⁵⁵⁴ The contrast between those statements and the Supreme Court’s position in *Shiratori* and *Saitakawa* is stark. What brought about that change?

In Japan’s unitary system, federalism concerns do not exist. Yet postwar changes in the trial process and, most im-

552. *Id.*

553. See *supra* note 303 and accompanying text.

554. See *supra* note 276 and accompanying text.

portantly, key Justices' attitudes toward the search for truth help account for the shift (with attitudes toward authority and punishment perhaps playing a tangential role).

Japanese scholars and judges frequently characterize the retrial system as reflecting a tension between the competing interests of respect for the finality of judgments and the search for truth, and sometimes rephrase this as a balance between the adversary system and the search for truth.⁵⁵⁵ One may question whether this rephrased characterization is appropriate. After all, the search for truth is also one of the primary goals of the adversary system.⁵⁵⁶ Still, using this characterization one can construct a plausible scenario for the trends in Japanese retrial standards by focusing on the impact of Japan's postwar adoption of the adversary system.

That formulation would run as follows: In the prewar era, the emphasis was heavily on the search for truth and judges bore responsibility to investigate all relevant evidence and elucidate the true facts. In keeping with that attitude, they granted retrials rather liberally whenever new evidence warranted. In contrast, after World War II, Japan, under the influence of the Occupation, adopted an adversary system in which the parties themselves bear responsibility for collecting and presenting the evidence. Early enthusiasm for the adversary system led to greater emphasis on the finality of judgments—presumably the product, right or wrong, of the efforts of the adversaries—and away from the pure search for truth. Then, after the first flush of excitement about the adversary system faded, things settled down. While the respective sides bear initial responsibility for presenting evidence under the current system, the judge remains ultimately responsible for making sure that all relevant facts are developed. Accordingly,

555. See *supra* notes 265-66, 279-82 and accompanying text; Foote, *Confessions*, *supra* note 464, at 471-82.

556. See, e.g., LAFAYE & ISRAEL, *supra* note 140, at 33-35. Some Japanese scholars have also acknowledged this point. See, e.g., Tamiya Hiroshi, *Menda muzai hanketsu ni miru gohan no kōzō* [The Structure of Mistaken Judgments, as Seen in the Menda Acquittal], 799 JURISUTO 29, 34 (1983).

the balance has shifted back to the side of the pure search for truth, again resulting in a more liberal judicial approach favoring the grant of retrials where the ultimate objective of discovering the truth would be served.

This scenario provides a nice theory and certainly has many elements of truth. Prewar courts did bear responsibility for elucidating all relevant facts⁵⁵⁷ and a flush of excitement did surround adoption of the adversary system.⁵⁵⁸ In the words of one judge, "[Y]ounger judges, particularly those educated in the immediate postwar years, tended to embrace the adversary philosophy."⁵⁵⁹ Moreover, at least certain influential judges thought that the shift to the adversary system necessitated changes in the attitude toward retrials.⁵⁶⁰ In fact, in rejecting the Nishitsuji Ruling that would have reopened the *Menda* case in 1956 (rather than twenty-four years later when *Menda* finally won retrial), the Fukuoka High Court emphasized that the postwar Code established stricter standards on evidence and the appeals process than the 1922 Code.⁵⁶¹ Finally, it is clear that among courts today there is a strong sense that the judge remains ultimately responsible for making sure that all relevant facts are developed if the judge feels that the adversary system is not working.⁵⁶²

557. See, e.g., Fujino, *supra* note 248, at 89.

558. See, e.g., Kohji Tanabe, *The Process of Litigation: An Experiment with the Adversary System*, in *LAW IN JAPAN*, *supra* note 481, at 71, 82-83 (with respect to civil trials).

559. Tanabe, *supra* note 558, at 92.

560. As noted earlier, in 1958 a Supreme Court *chōsakan* who had worked on one of that Court's key retrial rulings wrote that stricter interpretation of the term "new evidence" was a natural consequence of the "new Criminal Procedure Code, which has strengthened the adversary system structure." Takada, *Keiji hanrei*, *supra* note 282, at 98. Similarly, in 1961 Judge Fujino of the Fukuoka District Court wrote that, while the relevant language of the 1922 Code and the postwar Code is identical, "under the old Criminal Procedure Code retrials were regarded as reflecting a harmonization of the stability of judgments with the search for substantive truth, whereas under the new Code the two additional factors of protection of human rights and respect for the results of the adversary system . . . should also be taken into consideration." Fujino, *supra* note 248, at 90.

561. See *supra* notes 303-04.

562. See, e.g., Koizumi Sukeyasu, *Shikeishū saishin muzai hanketsu o kangaeru*

Yet the above explanation is too facile and ignores certain facts. First, even prior to World War II some Japanese courts had taken a restrictive view of the retrial provisions, notwithstanding the rather liberal stance taken by the Daishin'in in the 1924 decision quoted earlier.⁵⁶³ In fact, decisions by that same court in 1938 and 1939, taking a much narrower view of the "new evidence" provision and declining to apply the reasonable doubt standard, were what first attracted the attention of Justices Dandō and Kishi to this issue.⁵⁶⁴ Thus, characterizations of the prewar courts as liberal on this issue are overly simplistic.

Perhaps even more importantly, postwar courts, even in the early years after the war, can scarcely be characterized as having plunged headlong into the adversary system. Notwithstanding articles praising the adversary system, many judges expressed skepticism about relying too heavily on it, fearing that it would impede their search for truth.⁵⁶⁵ Accordingly, although the adversary system may have had real meaning for some people as a ground for narrowly construing the retrial provisions, it would probably be overstating its impact to attribute overall trends in attitudes toward retrials to the adversary system alone.

In any event, the ultimate relaxation of the standards derived largely from attitudes relating to the search for truth. The *Shiratori* and *Saitakawa* decisions reflect the view that, when meaningful new evidence is presented, the reviewing court will be able to determine the facts more accurately than the original trial court, even if substantial time has passed in

[*Thoughts on the Retrial Acquittals of Death Row Inmates*], in GENDAI NO SAIBAN, *supra* note 346, at 276, 277 (in order to prevent mistaken convictions "we must regard the development of measures to check the excesses of the adversary system as a necessary task").

563. See *supra* text accompanying notes 267-73.

564. See *supra* notes 290-92 and accompanying text.

565. Thus, even Judge Fujino, at the same time that he was arguing for the need to respect the results of the adversary system, emphasized that judges have no choice but to take personal responsibility for ferreting out the truth. Fujino, *supra* note 248, at 89-90.

the interim. Those decisions also reflect a belief that the search for truth should outweigh whatever interest in finality may exist.⁵⁶⁶

Of course, those decisions did not occur in a vacuum. Although Justices Kishi and Dandō expressed their views regarding the proper interpretation of the "new evidence" standard long before they were appointed to the Court,⁵⁶⁷ their task of convincing other Justices to go along with the change may well have proven easier because of the publicity surrounding the retrial issue and the efforts of the nationwide movements asserting the innocence of various death row inmates.⁵⁶⁸ The new interpretation announced in *Shiratori* was not limited to capital cases. In fact, *Shiratori* itself was not even a capital case. Nonetheless, publicity suggesting that innocent men were facing death because of the restrictive standards may have had a psychological impact on the Supreme Court's ruling. Thus, to the extent that narrow interpretations of the retrial standards in the name of the adversary system precluded earlier relief for Menda and other death row inmates, those rulings may indirectly have helped to spur greater liberalization in the end. At the very least, as I discuss in the next section, the miscarriage-

566. One might argue that shifting attitudes toward punishment also played a role in the revised interpretation. In doing so, one could point to declines in Japan's crime rates from the late 1940s and early 1950s, a period of great dislocation following the war, to the mid-1970s when *Shiratori* and *Saitakawa* were decided. See, e.g., WHITE PAPER ON CRIME, *supra* note 458, at 23 (Table 1, *supra*, at 21, showing decrease in crimes per 100,000 inhabitants from high of 2,000 in 1948 to low of 1,091 in 1973, followed by gradual increases) and argue that the perceived need for finality to promote general deterrence has also diminished. I have seen nothing in the *Shiratori* and *Saitakawa* decisions themselves or the commentary about those cases to suggest that that was a significant factor for the change, however.

In a similar vein, several of the retrial proceedings that have occurred since the standards were relaxed have contained revelations of illegal or improper activities by police and prosecutors, and those revelations may have led courts to be a bit more skeptical of criminal justice authorities, see Foote, *supra* note 6, at 88, 95-96. Yet nothing in *Shiratori* or *Saitakawa* suggests that distrust of authorities was a substantial reason for the relaxation, either.

567. See *supra* notes 290-92 and accompanying text.

568. See *supra* text accompanying notes 333-36.

es of justice that have been revealed by the retrials that followed the relaxation of standards have strengthened the commitment within Japan to provide thorough opportunities for review of new evidence claims in the future.⁵⁶⁹

C. Attitudes toward Capital Punishment in the Aftermath of the Changes

1. The United States

As discussed in the preceding section, there are various strands to the thinking underlying the United States Supreme Court's recent cutbacks on habeas, and there is no reason to think that all of the Justices who have supported the cutbacks are ardent supporters of capital punishment. To the contrary, as Professor Franklin Zimring has suggested, the dominant desire for many of the Justices may simply be to "disengage" the Court from the divisive issue of capital punishment.⁵⁷⁰

Yet the end result of the cutbacks is a review structure that bears close resemblance to the "crime control" model of Herbert Packer: a system "that throws off at an early stage those cases in which it appears unlikely that the person apprehended is an offender and then secures, as expeditiously as possible, the conviction of the rest, with a minimum of occasions for challenge, *let alone post-audit*."⁵⁷¹ This, in turn, bears a striking resemblance to the political right's law and order agenda. Against a backdrop of frustration over high and rising crime rates and low apprehension rates,⁵⁷² to some conservatives the only possible answer seems to lie in increas-

569. See *infra* text accompanying notes 646-47.

570. Zimring, *supra* note 431, at 13, 15.

571. PACKER, *supra* note 511, at 160 (emphasis added).

572. See, e.g., U.S. DEPT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1991 at 372 (Table 3.127: estimated crime rates from 1960 through 1990), 464 (Table 4.22: clearance rates from 1972 through 1990), 195 (Table 2.26: attitudes toward crime rate), and 211 (Table 2.45: attitudes toward the death penalty); WHITE PAPER ON CRIME, *supra* note 458, at 3-11 (international comparisons for crime and apprehension rates).

ing general deterrence by ensuring that those who are caught are subjected to swift, sure, and harsh punishment.⁵⁷³

Whatever the motivations of the individual Justices, this crime control mind set now constitutes a major theme in the debate over the proper scope of federal habeas review. Given that mindset, an average period of eight years between commission of the crime and execution has come to represent an unthinkable long delay, and, except in extraordinary circumstances, anything more than a single round of federal habeas is an impermissible intrusion that "disparages the entire criminal justice system."⁵⁷⁴ The fact that twenty-five or more judges have reviewed a given case shows that the death row inmate must not have had a valid claim in the first place.⁵⁷⁵ And studies showing that very high percentages of death sen-

573. See, e.g., Leigh Dingerson, *Reclaiming the Gavel: Making Sense Out of the Death Penalty Debate in State Legislatures*, 18 N.Y.U. REV. L. & SOC. CHANGE 873, 875-82 (1990-91); James Alan Fox et. al., *Death Penalty Opinion in the Post-Furman Years*, 18 N.Y.U. REV. L. & SOC. CHANGE 499, 508-513 (1990-91); Glenn L. Pierce & Michael L. Radelet, *The Role and Consequences of the Death Penalty in American Politics*, 18 N.Y.U. REV. L. & SOC. CHANGE 711, 720-25 (1990-91).

Chief Justice Rehnquist gave voice to the frustration over crime a dozen years ago, stating, in an opinion decrying the long delays in execution of death sentences:

When our system of administering criminal justice cannot provide security to our people in the streets or in their homes, we are rapidly approaching the state of savagery In Atlanta, we cannot protect our small children at play. In the Nation's Capital, law enforcement authorities cannot protect the lives of employees of this very Court who live four blocks from the building in which we sit and deliberate the constitutionality of capital punishment.

Coleman v. Balkcom, 451 U.S. 949, 962 (1981) (Rehnquist, J., dissenting from denial of certiorari). Cf. Payne v. Tennessee, 111 S. Ct. 2597, 2627 (1991) (Stevens, J., dissenting) (characterizing majority's decision overruling prior precedents and permitting reference to impact on victims in death penalty sentencing as "[having] been moved by an argument that has strong political appeal but no proper place in a reasoned judicial opinion.").

574. McCleskey v. Zant, 111 S. Ct. 1454, 1469 (1991).

575. See, e.g., Woodard v. Hutchins, 464 U.S. 377, 380 n.4 (1984) (Powell, J., concurring) (noting that case had been reviewed by more than 25 judges, in voting to vacate stay of execution); Gray v. Lucas, 463 U.S. 1237, 1239 (1983) (Burger, C.J., concurring) (noting that 26 different state and federal judges had reviewed the case, in voting to vacate stay of execution).

tences⁵⁷⁶ are reversed either on appeal or subsequent collateral review do not establish a need for heightened care. To the contrary, they may simply reflect the need for stricter limits on review: after all, enterprising lawyers, given "so many bites at the apple,"⁵⁷⁷ are bound to be able to get someone off on a technicality. Finally, for those truly extraordinary cases—which nonetheless seem to recur with disturbing regularity⁵⁷⁸—in which a truly innocent person has been sentenced to death, executive clemency, "the 'fail safe' in our criminal justice system,"⁵⁷⁹ will always remain. That is, it will remain if the inmate or her supporters can convince the governor and/or board of pardons or other responsible officials⁵⁸⁰ to take the political risk of issuing a pardon, a risk that can be great indeed in some states today.⁵⁸¹

Despite their close connection in many cases, the debate over the proper contours of federal habeas and the debate over the constitutionality and propriety of capital punishment are of course distinct matters. Yet for ardent advocates of capital punishment, broad federal habeas has proven a popular target. As one group of commentators has observed:

576. See, e.g., Burt, *supra* note 21, at 1792-93 (citing 1982 finding of reversals in 60 to 75% of cases); AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA, THE DEATH PENALTY 89 (1987) (36% of death sentences imposed between 1977 and 1984 reversed on state or federal appeal).

577. *Coleman v. Balkcom*, 451 U.S. at 957 (Rehnquist, J., dissenting from denial of certiorari).

578. See, e.g., Peter Applebome, *Alabama Releases Man Held On Death Row for Six Years*, N.Y. TIMES, Mar. 2, 1993, at 1 (describing case of Walter McMillian); MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE (1992); Jill Smolowe, *Must This Man Die?*, TIME, May 18, 1992, at 40 (describing case of Roger Keith Coleman).

579. *Herrera v. Collins*, 113 S. Ct. 838, 866 (1993).

580. Depending on the state, the clemency power may be vested in the governor or in an advisory board, or may require the joint action of both the advisory board and the governor. See *id.*

581. See, e.g., Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255, 268-72 (1990-91); Pierce & Radelet, *supra* note 573, at 720-26. For an examination of the capital punishment issue in the context of President Bill Clinton's political career, see Marshall Frady, *Annals of Law and Politics: Death in Arkansas*, THE NEW YORKER, Feb. 22, 1993, at 105.

To [some], . . . federal habeas is a constant irritant—an expensive, time-consuming, and redundant enterprise that frustrates law enforcement and needlessly injects the federal courts into matters better left to the states. By this . . . account, habeas is the paradigm of all that was *wrong* with the Warren Court—namely that Court's asserted failure to appreciate the societal threat posed by crime and its palpable distrust of the states and state courts.⁵⁸²

For crime control advocates sharing these views, federal habeas has served as something of a rallying point.

Opponents of capital punishment, for their part, have been united by concern over the recent limitations on habeas.⁵⁸³ So far, though, the cutbacks appear to have had only modest impact on the abolition movement in the United States.⁵⁸⁴ It is possible that, as the cutbacks take effect and executions previously delayed by habeas become a regular occurrence in the United States, public revulsion to the death penalty will rise and the abolition movement will take on new steam. Yet to date, federal habeas has served as a much more potent focal point for death penalty advocates than for opponents.⁵⁸⁵

2. Japan

The contrasts with Japan could not be more striking. Japan enjoys low crime rates—including some of the lowest violent crime rates of any developed nation—and high apprehension rates for those who do commit crimes.⁵⁸⁶ Moreover, few

582. Richard Faust et al., *The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate*, 18 N.Y.U. REV. L. & SOC. CHANGE 637, 638 (1990-91) (emphasis in original; footnote omitted).

583. See, e.g., symposia on the death penalty in 18 N.Y.U. REV. L. & SOC. CHANGE 243-949 (1990-91); 20 FLA. ST. U. L. REV. 7-228 (1992).

584. See, e.g., Dingerson, *supra* note 573, at 874 (discussing need, given cutbacks on habeas and other legal devices for blocking executions, for the "abolitionist community to redirect its strategy . . . [and develop] a coherent legislative and political strategy for abolition").

585. See Dingerson, *supra* note 573, at 875-83.

586. See, e.g., WHITE PAPER ON CRIME, *supra* note 458, at 3-11.

offenders go free on what crime control advocates in the United States would consider "technicalities," since the exclusionary rule and the constitutional and procedural rights of suspects and defendants are narrowly construed in Japan.⁵⁸⁷ Given this backdrop, Japan does not face great pressure to achieve heightened general deterrence by punishing offenders more strictly. To the contrary, Japan has maintained very lenient levels of sentencing, largely based on an ethos of specific prevention and rehabilitation.⁵⁸⁸ To the extent that the death sentence is seen as an extreme form of specific prevention, life imprisonment without parole is a true option in Japan. Moreover, parole is never mandatory, nor is prison overcrowding likely to be a problem for the foreseeable future. And while the vast majority of cases are processed quickly,⁵⁸⁹ lengthy proceedings are by no means rare.⁵⁹⁰ When one includes periods for direct appeals, it is not uncommon for proceedings to last five or ten years or even longer before the original conviction becomes final.⁵⁹¹ These prolonged proceedings may be regarded as exceptional, but they are not treated by the prosecutors—much less by the courts themselves—as an affront to interests in deterrence.⁵⁹²

587. See, e.g., Foote, *Paternalism*, *supra* note 459, at 332-39.

588. See Foote, *Paternalism*, *supra* note 459, *passim*.

589. See, e.g., Iida Yoshinobu, *Jinsoku saiban to soshō sokushin—saiban no tachiba kara* [Speedy Trials and Speeding Up Proceedings—From the Standpoint of the Judiciary], in 2 KELJI TETSUZUKI, *supra* note 281, at 497, 503-06. The degree of speed and finality is even higher if one takes into consideration cases that are closed with the prosecutors' decision to suspend prosecution despite evidence of guilt. See Foote, *Paternalism*, *supra* note 459, at 340 n.150, 346-50.

590. Somewhat over one percent of the criminal trials in Japanese district courts last more than two years. SAIKŌSAIBANSHO JIMUSŌKYOKU, *supra* note 341, at 11 (table 14). This represents a great increase in speed over the past two decades. As of 1974, nearly two percent of district court criminal trials lasted over two years. See Iida, *supra* note 589, at 504.

591. See Niwayama Shōichirō, *Komento* 2 [Comment 2], in 2 KELJI TETSUZUKI, *supra* note 281, at 511, 512 (citing earlier study showing 29 cases in which 10 or more years elapsed from the date of the indictment through final judgment). In a case in which the Supreme Court recently upheld death sentences for two members of the Japanese Red Army, some 21 years elapsed between the crimes and conclusion of the direct appeal process. See *Death Sentence Upheld for 2 Japan Radicals*, L.A. TIMES, Feb. 20, 1993, at A4.

592. Cf. *Death Sentence Upheld for 2 Japan Radicals*, *supra* note 591 (quoting

The retrial cases themselves provide an even more graphic contrast between the two nations. In the United States, the "problem" of multiple, piecemeal, and last-minute habeas corpus petitions lies at the heart of legislative proposals for habeas reform and most of the Rehnquist Court's restrictive decisions. In Japan one can identify a similar phenomenon, with even longer delays, yet it is scarcely treated as a "problem." Multiple successive petitions, often raising claims in a piecemeal fashion and frequently filed in apparent attempts to forestall the possibility of execution, are accepted as a matter of course under the Japanese system, despite delays in many executions of twenty years or more.⁵⁹³

Since *Shiratori* and *Saitakawa*, judicial decisions have contained few references to the interest in finality. Even the earlier decisions emphasizing finality did so in terms of judicial stability and the proper functioning of the adversary process, not by reference to deterrence or the state's desire to enforce its sentences promptly. There simply does not seem to be a substantial concern in Japan that deterrence or public confidence in the criminal justice system will be undermined if some prisoners—apparently including a substantial majority of those facing the death penalty—are able to delay their executions for a decade or more.

In what might come as one of the biggest shocks to American readers, this attitude appears to extend even to politicians. In a 1985 survey, members of the Japanese Diet were asked their views about the proper timing of executions for prisoners whose death sentences had become final. Forty-eight percent of those responding stated that executions should be delayed "as much as possible, giving absolutely thorough [*jūnibun*] consideration to retrial requests and other proceedings"; only eight

Justice Minister Gotoda Masaharu as saying, upon affirmation of death sentences 21 years after crime, "Trials just last too long. I must offer my condolence to the families of the victims.").

593. *But see supra* text accompanying notes 521-24 (noting difference in sheer numbers of petitions, with some 10,000 habeas petitions each year in the United States but only approximately 100 retrial petitions annually in Japan).

percent expressed the view that, "given the existence of the death penalty, executions should be carried out promptly."⁵⁹⁴ In another contrast to the United States, in Japan the fact that some of the death penalty retrial cases had been reviewed by fifty or more judges over the years has served as a sobering reminder that, when it comes to judicial review, numbers do not necessarily guarantee accuracy.⁵⁹⁵

An important reason for the great difference in current attitudes between the United States and Japan rests with the four death penalty retrial cases themselves. In the United States, reports that innocent individuals have been wrongly sentenced to death appear from time to time.⁵⁹⁶ These reports often attract widespread attention and concern initially,⁵⁹⁷ but then quickly recede into the background. One reason for this phenomenon may simply be that Americans have become inured to such reports because they appear so often. Another reason may be the sense that, however regrettable such cases are, they are an inescapable consequence of a factfinding process in which absolute certainty can never be attained.⁵⁹⁸ The criminal justice system, as *Herrera* acknowledged, is "fallible."⁵⁹⁹

In contrast, in Japan the prosecutors have long enjoyed a reputation for only indicting suspects when the evidence of guilt is overwhelming,⁶⁰⁰ and criminal convictions have been regarded as nearly infallible.⁶⁰¹ Given these popular percep-

594. See MURANO, *supra* note 66, at 70.

595. See, e.g., MURANO, *supra* note 66, at 108-09 (a total of 67 judges and justices reviewed *Menda* case, 56 of whom upheld the death penalty).

596. See, e.g., RADELET ET AL., *supra* note 578.

597. See, e.g., Smolowe, *supra* note 578; Applebome, *supra* note 578.

598. See *supra* text accompanying notes 495-500.

599. *Herrera v. Collins*, 113 S. Ct. 838, 868 n.15 (1993).

600. See, e.g., Ryūichi Hirano, *Diagnosis of the Current Code of Criminal Procedure*, 22 LAW IN JAPAN 129, 130 (1989) ("mass media and the great majority of the Japanese people" think that prosecutors should only indict "if, through the questioning, their suspicions have been confirmed fully (*jūbun ni*)—or even more than fully (*jūnibun ni*)").

601. See, e.g., Nagashima, *supra* note 481, at 315 ("It is generally thought in Japan that the trial judge is not only an impartial umpire of the trial but also a personification of justice, in that he is able to discern the true from the false so as

tions, the revelation that four innocent men spent the bulk of their adult lives on death row following miscarriages of justice has led to increased concern and willingness to accept extensive delays and repeated review in order to ensure against mistaken executions.

Under these circumstances, and in view of the relatively passive public support for capital punishment,⁶⁰² the key question may not be why the courts and criminal justice authorities are willing to accept the repeated petitions and long delays in executions. After all, there is very little public pressure to carry out executions;⁶⁰³ but if any execution was performed and then later discovered to have been in error, every prosecutor, judge and Ministry of Justice official involved would likely be subject to criticism.⁶⁰⁴

The more intriguing question may be why the death penalty survives at all. In marked contrast to the Tokugawa Era, when executions were staged publicly and the heads of those executed for certain crimes were paraded through the streets to serve as forceful reminders of the consequences of crime,⁶⁰⁵ executions in Japan today are performed behind closed doors and normally are not publicly reported.⁶⁰⁶ This does not necessarily mean that there is no general deterrent effect, since the original death sentences are publicly announced. But the deterrence message is certainly more muted now. Statistics

to convict the real offender and discharge the innocent.") (emphasis added).

602. See *supra* text accompanying notes 90-91.

603. See MURANO, *supra* note 66, at 70 (in a 1985 survey of Diet members, only four percent of those responding felt that the death penalty issue would have any effect on voters).

604. As a practical matter it seems highly unlikely that a subsequent court would grant a retrial for or acquit someone who had already been executed, unless overwhelming new evidence of innocence were discovered. Theoretically, however, it is entirely possible, since family members may request retrials after the convicted individual has died, see *supra* note 364 and accompanying text.

605. See ISHII, *supra* note 44, at 11-12.

606. As described *infra* text accompanying notes 639-40, the mass media gave wide coverage to executions that were carried out in late March 1993. This was an exceptional development, presumably reflecting the heightened recent attention to capital punishment in Japan.

lead one to wonder, moreover, just how much of a general deterrent effect the death penalty has in Japan. As noted earlier, violent crime rates are low, and they have remained low and even decreased over the past thirty years, at the same time that the numbers of death sentences and executions have plummeted.⁶⁰⁷ Given the availability of true life imprisonment without parole if needed for specific deterrence purposes, retribution would seem to be the primary remaining concern in Japan.

One might expect that, in the wake of the retrial cases, the movement to abolish the death penalty would have gained strength in Japan. In fact, the Tokyo High Court's decision reducing Nagayama's sentence to life imprisonment came in 1981, following the wave of publicity that accompanied decisions granting retrials in three of the death penalty cases.⁶⁰⁸ Yet the Supreme Court's decision reversing the High Court and reaffirming the constitutionality of the death penalty came just a week before Menda was acquitted following his retrial, the first of the retrial acquittals. The Supreme Court's *Nagayama* ruling clearly foreclosed prospects for abolition by judicial fiat.

It has not stopped efforts at abolition through political means, however. Since 1980 Japan has witnessed a steady stream of books, articles, and activities aimed at ending the death penalty.⁶⁰⁹ Again, one can find elements of "foreign pressure." Amnesty International is active in Japan, just as in other nations around the world.⁶¹⁰ In addition, abolition advo-

607. See, e.g., RESEARCH AND TRAINING INST., MINISTRY OF JUSTICE, GOV'T OF JAPAN, SUMMARY OF THE WHITE PAPER ON CRIME 1989, at 27 (1989) (homicide rate declining steadily from 3.0 to 1.3 per 100,000 population over period from 1960 to 1987); WHITE PAPER ON CRIME, *supra* note 458, at 10 (further decline to rate of 1.2 per 100,000 in 1988); DANDŌ, *supra* note 44, at 280-81 (death sentence statistics) and 284-85 (execution statistics).

608. See MURANO, *supra* note 66, at 97-98 (noting apparent impact of the retrial cases on death sentences).

609. See, e.g., MURANO, *supra* note 66, at 145-51 (bibliography); Sakai Yasuyuki, *Bunken gaido—shikei o hangaeru tame ni* [Bibliographic Guide—For Thinking about the Death Penalty], in SHIKEI NO GENZAI, *supra* note 46, at 282.

610. See, e.g., AMNESTY INTERNATIONAL, JAPAN: THE DEATH PENALTY AND THE

cates within Japan point to the approval of the "Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty" (conveniently shortened in references by most such advocates to simply the "Treaty for Abolition of the Death Penalty") by the United Nations General Assembly in December 1989⁶¹¹ and to the strong trend toward abolition within developed nations⁶¹² as reasons for abolition by Japan. Yet the abolition movement is not an example of *gaiatsu*—foreign pressure—per se. Rather, as with the movement for reform of the retrial standards, it is primarily a domestic movement in which foreign experiences and views have helped to bolster reform efforts.⁶¹³

Interestingly enough, former Justice Dandō has recently taken a prominent role in this movement as well. In December of 1990, at the invitation of four of the leading organizations in the abolition movement, he presented a speech at the so-called "Forum '90 Demanding the Ratification of the Treaty for Abolition of the Death Penalty."⁶¹⁴ Drawing on his own judicial experiences in the retrial and death penalty cases, he delivered an impassioned plea for abolition.⁶¹⁵

NEED FOR MORE SAFEGUARDS AGAINST ILL-TREATMENT OF DETAINEES 44-48 (1991).

611. See, e.g., Abe Kōki, *Kaisetsu—shikei haishi jōyaku* [Commentary—*The Treaty for Abolition of the Death Penalty*], in *SHIKEI NO GENZAI*, *supra* note 46, at 205.

612. See, e.g., *id.* at 212-14.

613. See, e.g., DANDŌ, *supra* note 44, at 113-50, 203-21, 274-78.

614. See DANDŌ, *supra* note 44, at 1.

615. Dandō's remarks included the following:

The problem of mistaken convictions came under close examination only after the Supreme Court's First Petty Bench, of which I was a member, issued the *Shiratori* ruling relaxing the retrial standards in 1975. Since that time there have been four acquittals in retrials of death penalty cases . . . Appeals in two of those cases, *Menda* and *Saitakawa*, by chance were assigned to the First Petty Bench. To be frank, in reading through the files of those two cases I could not help feeling that the factfinding was strained. Yet even that sort of case could not make it past the retrial barriers prior to *Shiratori*. That means there is a strong possibility that individuals previously may have been put to death for crimes they never committed, without being able to obtain retrials. Moreover, the number of such mistaken executions since the Meiji Era may be fairly large. When I think of that it makes my heart ache.

Since then, Dandō has published a major book—already entering its third edition—arguing for abolition,⁶¹⁶ and has been active in other activities aimed at that goal.⁶¹⁷ Will the movement to abolish the death penalty have as much success as the retrial movement? At the judicial level, surely not. Standards for retrials in Japan, like those for federal habeas in the United States, may have great meaning for individual death row inmates, but first and foremost they are statutory matters relating to the regulation of the courts' own dockets. Accordingly, it is relatively easy for the Supreme Court in either nation to modify those standards. In contrast, to abolish the death penalty the Supreme Court of Japan would have to issue

Now the path to retrials has become somewhat wider, and it seems that the original trial and appeals courts are being even more careful, so there is no question that the number of mistaken convictions should decrease. But no one can say with certainty that mistaken convictions will disappear

. . . When I was on the Supreme Court, in one death penalty appeal, no matter how closely I read the record I could not conclude that there was a reasonable doubt. Yet, when I asked myself whether I could be certain, I could not help feeling somewhat uneasy [P]olice had searched half the town and found a suspicious person [who fit the circumstantial evidence they had collected] If they had searched the other half of the town, they may have found someone else who fit the evidence too

The day for our decision came, and the presiding Justice read the judgment rejecting the appeal. As we turned to walk out of the courtroom, members of the defendant's family screamed the word "murderers" after us. To this day those voices remain etched into my conscience

For years people have been saying, "When you make a mistake with the death penalty, there's no way of going back." I knew of this expression and thought I understood what it meant. But I never truly did. When I was on the Supreme Court and had to handle death penalty cases myself, for the first time I truly realized what a heavy weight factfinding bears in death penalty cases. Now I firmly believe that in that old saying lies the key for abolition of the death penalty.

DANDŌ, *supra* note 44, at 7-12.

616. DANDŌ, *supra* note 44.

617. See, e.g., *Intabyū, Naze, shikei haishi e no ketsui o tsuyoku shita no ka* [Interview, Why Did You Strengthen Your Resolve for Abolition of the Death Penalty?], in SHIKEI NO GENZAI, *supra* note 46, at 30 (interview with Dandō Shigemitsu); Yomiuri Shinbun, Nov. 18, 1991, at 9 (promoting abolition cause in profile article).

a constitutional ruling overturning long-established and recently reaffirmed precedent. If every other developed country had already abolished the death penalty and there were widespread international judicial consensus that capital punishment is cruel and unusual, Japan's Supreme Court might well follow suit.⁶¹⁸ With thirty-seven of the states in the United States and the Rehnquist Court to serve as counter-examples, however, one can be sure that that situation will not arise for a long time to come.

Even Dandō himself does not hold out much hope that Japan's Supreme Court will declare the death penalty unconstitutional.⁶¹⁹ Rather, he envisions the route to abolition as lying first in administration of the current system: the courts should issue virtually no death sentences and those prisoners who have been sentenced to death should not be executed.⁶²⁰ Then, in his scenario, after a trial period without executions, the entire system could be abolished.⁶²¹

618. If it wanted to justify such a decision, the Supreme Court could use logic set forth by Justice Shima in his supplementary opinion to the 1948 decision declaring the death penalty constitutional. While agreeing with the majority that the death penalty could not be considered "cruel" under views then prevailing, Justice Shima (joined by three of his colleagues) went on to state:

The Constitution was established in reflection of the feelings of the public at the time it was created. It cannot be regarded as having approved of the death penalty for all time A punishment that was not regarded as cruel at one point in time may become cruel at some later point. Accordingly, if the time comes when the national culture has advanced to a higher level and a peaceful society based on fairness and order has been achieved, and it is no longer felt that the death penalty's deterrent effect is needed to prevent crime and thereby promote the public welfare, surely the death penalty will then be rejected as a cruel punishment in the view of the public.

Judgment of March 12, 1948 (*Murakami v. Japan*), Saikōsai [Supreme Court], 2 Keishū 191, 196 (Grand Bench) (Shima, J., *supp. op.*). See DANDŌ, *supra* note 44, at 16-17 (arguing that this approach could be used by the Japanese courts to declare the death penalty unconstitutional).

619. See DANDŌ, *supra* note 44, at 16-17.

620. See DANDŌ, *supra* note 44, at 18.

621. See DANDŌ, *supra* note 44, at 19 n.28 (citing others who have proposed such a phase-out process).

At first glance, that process seems to have derailed on the first step. For only the second time in two decades, the number of defendants sentenced to death by district courts reached double digits (albeit at exactly ten) in 1988.⁶²² Thereafter, though, the numbers again dropped sharply, to only two each in 1989 and 1990, and three in 1991.⁶²³

A potentially far more important development relates to the second step: execution orders. Over the years, most Justice Ministers have regarded stamping execution orders as an unpleasant task.⁶²⁴ As a result, a custom developed in which the sitting Justice Minister would order at least one execution every year.⁶²⁵ In this way, it was believed, the Justice Ministers and others involved in the process could maintain the fiction that this was simply one more routine administrative function.⁶²⁶ During a period of more than three years, however, following an execution in November 1989,⁶²⁷ the pattern was broken. It is unclear whether any execution orders were sought during the following year; but no execution was performed.⁶²⁸ Former Justice Minister Satō Megumu, who served in 1991, has confirmed that officials within the Ministry of Justice completed preliminary paperwork for ordering an execution that year and sent the papers to him for his final stamp; but "I am also the chief priest of a [Buddhist] temple and, based on my deep appreciation of the value of human life, I refused to sign [the order]."⁶²⁹

When Justice Minister Tawara Takashi took office in late 1991, following the formation of the Miyazawa Cabinet, attention turned to whether he would restore the custom. During

622. See DANDŌ, *supra* note 44, at 281.

623. DANDŌ, *supra* note 44, at 281.

624. See MURANO, *supra* note 66, at 74-78.

625. See MURANO, *supra* note 66, at 70.

626. MURANO, *supra* note 66, at 70.

627. See Inoue, *supra* note 232, at 46 (quoting Yomiuri Shinbun, Nov. 16, 1991).

628. See, e.g., Inoue, *supra* note 232, at 46.

629. See Satō Masako, *Shikei haishi o uttaeru higaisha izoku no fukuzatsu* [The Complex Situation for Victims' Bereaved Families Calling for Abolition of the Death Penalty], *FUJIN KŌRON*, March 1993, at 352, 355 (quoting Justice Minister Satō).

his tenure as Minister, before his replacement by Gotoda Masaharu in December 1992, Tawara did not stamp any execution orders, either,⁶³⁰ and as of the end of that year, Japan had gone more than three years with no executions—very possibly the longest period without executions in Japan since the twelfth century.⁶³¹

The Justice Ministry continued to take the official position that, in view of a 1989 survey indicating that 66.5% of the Japanese people opposed and only 15.7% favored abolition, it would be inappropriate to abolish capital punishment at the time.⁶³² Still, it could only have given abolition advocates hope when a report appeared in February 1993 indicating that the Ministry was seriously considering conducting a new opinion poll on the issue.⁶³³ Assuming the report was accurate, abolitionists might well have hoped that the *de facto* moratorium on executions would hold at least until the new poll could be conducted.⁶³⁴ They might further have hoped that if, by chance, the new poll revealed a shift in public opinion to opposition to capital punishment, pressure would mount for the Justice Minister to delay further executions at least until the Diet had a chance to reconsider the death penalty.

Any such hopes would have turned out to be short-lived. When Gotoda, the former Director General of Japan's National Police Agency,⁶³⁵ was appointed as Justice Minister in December 1992, he reportedly indicated his support for capital

630. See, e.g., *Japan's 1st Execution in 3 Years*, THE DAILY YOMIURI, March 27, 1993, at 1.

631. See *supra* text accompanying notes 44-95.

632. See Satō, *supra* note 629, at 355 (quoting Ministry official's testimony before Diet).

633. See *Number of Death-row Convicts*, *supra* note 95 (citing "Ministry sources").

634. Given the attention that Dandō and other abolition advocates have paid to the importance of the wording of questions on this topic and the manner in which surveys are conducted, see DANDŌ, *supra* note 44, at 12-13, 31-33; Fujiyoshi, *supra* note 90, at 151-54, it seems likely that the methodology of any such poll would be carefully examined and debated.

635. See, e.g., *Japan: Secret Policemen on the Beat*, THE ECONOMIST, Apr. 24, 1993, at 34.

punishment.⁶³⁶ He left no doubt on that score by proceeding to authorize not just one, but three executions, which were performed on the same day—March 26, 1993.⁶³⁷ This action plainly was intended to send a message that the abolitionists have not won and that Japan remains solidly in the capital punishment camp. In the words of one senior Justice Ministry official, Japan “executed a multiple number of death row inmates to demonstrate to society the state’s strong determination to keep the capital punishment legal.”⁶³⁸

Notwithstanding that statement, the Justice Ministry, in keeping with its established policy, did not publicly announce the March executions and has refused to officially confirm or deny whether they took place.⁶³⁹ In sharp contrast to prior executions, however, these executions were widely reported by the press, apparently based on information released by the families or lawyers of the condemned prisoners.⁶⁴⁰ The widespread media coverage presumably reflects the heightened recent attention to capital punishment in Japan; and Dandō and other opponents of the death penalty have sought to channel publicity over the executions into stronger opposition to capital punishment.⁶⁴¹

Only time will tell whether those efforts are successful. Recent reports indicate that the abolition movement has gradually gained strength in the Diet, with 182 Diet members—including former Justice Minister Satō—reportedly favoring abolition as of early 1993.⁶⁴² That still represented less than one-quarter of the Diet’s total 764 members,⁶⁴³ how-

636. See, e.g., *Japan’s 1st Execution in 3 Years*, *supra* note 630.

637. See, e.g., Itoh, *supra* note 94.

638. Senior Justice Ministry official speaking on condition of anonymity, quoted in Mutsuo Fukushima, *The Hangman’s Noose—Japan Ponders Deterrent Value*, Kyodo News Service, Japan Economic Newswire, June 3, 1993, available in LEXIS, ASIAPC Library, ALLNWS File.

639. See, e.g., Itoh, *supra* note 94.

640. See Itoh, *supra* note 94.

641. Letter from Professor Inouye Masahito, University of Tokyo Faculty of Law, to Daniel H. Foote, Professor of Law, University of Washington School of Law (June 29, 1993) (on file with author).

642. See *Number of Death-row Convicts*, *supra* note 95.

643. See STATISTICS BUREAU, MANAGEMENT AND COORDINATION AGENCY, GOV’T

ever, and within the then-majority Liberal Democratic Party (LDP), a much lower percentage of members supported abolition.⁶⁴⁴ As this Article goes to press, the LDP had just lost its first lower house election in nearly forty years.⁶⁴⁵ Yet capital punishment was not a major campaign issue; and the general public appears content with that aspect of the status quo.⁶⁴⁶ Regardless of the LDP's defeat, unless a new public opinion poll is conducted and reveals a major shift in attitudes toward capital punishment, formal Diet action abolishing the death penalty seems unlikely in the near future. At the same time, there is no significant public clamor for any expansion in use of capital punishment. Accordingly, the most likely scenario is that the recent pattern will continue, with a few new death sentences and at most a few executions in Japan each year (although the Justice Minister under the new coalition government may well fall into the nonstamping camp).

V. CONCLUSION

For the time being, Japan and the United States share the death penalty. Each also maintains a system for post-conviction collateral review of death sentences. Yet the key review mechanisms in the two nations are very different. In the United States, federal habeas provides a potential remedy for violations of the Constitution or federal laws, but not for claims based solely on new evidence relating to guilt or innocence. In

OF JAPAN STATISTICAL ABSTRACT OF JAPAN 1992, 707 (512 members in House of Representatives, 252 members in House of Councillors).

644. See Satō, *supra* note 629, at 354 (support for abolition gaining even within Liberal Democratic Party, "albeit slowly").

645. See, e.g., Robert Delfs, *Reform or Else . . .*, FAR E. ECON. REV., July 29, 1993, at 10.

646. See, e.g., Fujiyoshi, *supra* note 90, at 150-51 (describing heavy weight placed by the Government of Japan on "public opinion" as a reason for maintaining the death penalty, and noting 66.5% support shown by 1989 survey); *Two Thirds of Japanese Back Death Penalty—Poll*, The Reuter Library Report, June 1, 1993, available in LEXIS, ASIAPC Library, ALLNWS File (poll conducted by Yomiuri Shinbun in May 1993 found more than 80% approval for March 1993 executions and nearly two-thirds support for retaining the death penalty).

contrast, the most frequently used provision in Japan focuses expressly on new evidence claims.

There is no sign of any movement in Japan to expand the availability of post-conviction claims based on violations of the Constitution or laws. Yet one can say with some confidence that, in the wake of *Menda* and the other death penalty retrial cases, no death-sentenced prisoner in Japan who wants to contest her conviction or sentence⁶⁴⁷ on evidentiary grounds will die without the opportunity to mount thorough challenges both at the appeals stage and after conviction. Under current case law, where new and potentially probative evidence exists, the prisoner will be allowed to raise it, even if she could and should have discovered it earlier; even if the evidence relates to a claim that was raised and rejected previously; even if the new evidence was derived through technology that did not exist at the time of the original trial;⁶⁴⁸ even if she is filing a second or successive retrial petition many years after the conviction became final; and even if the new evidence simply raises a reasonable doubt as to guilt, rather than firmly proving innocence.

647. In cases in which death-sentenced prisoners have knowingly and willingly decided not to press appeals, the Japanese courts have rejected attempts by counsel and other third parties to press appeals on behalf of prisoners. See DAILY YOMIURI, Feb. 4, 1992, at 2 (reporting on Tokyo High Court ruling approving prisoner's request to withdraw appeal of conviction and death sentence, over objections of counsel). At least six of the prisoners on Japan's death row voluntarily withdrew their appeals, see MURANO, *supra* note 66, at 258-64, although three of them did so in 1988, perhaps out of the hope that they might benefit from an anticipated general amnesty as a result of the enthronement of Emperor Akihito, see MURANO, *supra* note 66, at 124. As it turned out, there was no such general amnesty.

In one case, over 16 years have elapsed since the prisoner withdrew an appeal filed by his counsel, saying he would prefer death over life imprisonment, see MURANO, *supra* note 66, at 157 (Ohama case).

648. Compare the ready willingness to utilize results of new testing techniques in the death penalty retrial cases in Japan, *supra* text accompanying notes 378-408, with *O'Dell v. Thompson*, 112 S. Ct. 618 (1991) (Blackmun, J., writing with respect to the denial of certiorari, noting that the state appeals court had denied state habeas relief, "specifically holding that the fact that current [blood type] testing methods would have produced a different result does not justify the issuance of a writ of habeas corpus").

Many of the Rehnquist Court's cutbacks on habeas relief affect first-time petitioners, as well as those filing second or subsequent petitions. Yet in principle a first-time petitioner in the United States currently remains entitled to assert most constitutional violations without regard to whether or not she is innocent of the underlying offense.⁶⁴⁹ In the second or successive petition context, however, the Court increasingly has been reserving habeas for those able to establish their actual innocence. In *Herrera v. Collins*,⁶⁵⁰ the Court smothered any notion that habeas might develop into a broad mechanism for reviewing new evidence claims, similar to Japan's retrial system. Rather, the "actual innocence" exception exists only if a second or successive petitioner can establish *both* a constitutional violation *and* actual innocence. And *Sawyer v. Whitley*⁶⁵¹ made clear that the burden such a petitioner faces in establishing actual innocence is high indeed: "clear and convincing evidence that . . . no reasonable juror would have found the petitioner eligible for the death penalty."⁶⁵² Federal habeas will most assuredly not replicate Japan's retrial system anytime soon.

Given the fundamental differences in the purpose and structure of the two systems, the debates over the retrial standards in Japan are of limited direct relevance in considering the proper scope for federal habeas.⁶⁵³ The Japanese experience nonetheless provides valuable lessons—lessons that may be of even greater importance in the coming days of the now-solidified conservative majority on the Rehnquist Court. Japan's criminal justice system is in many respects the ideal model for crime control advocates;⁶⁵⁴ it provides investigators with most of the tools they might want, construes the exclusionary rule very narrowly, and treats many of the consti-

649. *But see supra* text accompanying notes 129-37

650. 113 S. Ct. 838 (1993).

651. 112 S. Ct. 2514 (1992).

652. *Id.* at 2517.

653. Many of the same issues recur at the state level, however, in connection with post-conviction collateral remedies based on newly discovered evidence.

654. *See* PACKER, *supra* note 511, at 158-62.

tutional rights of criminal defendants as in essence being reserved for the factually innocent.⁶⁵⁵ Notwithstanding widespread respect for the relative quality and integrity of Japanese police and prosecutors,⁶⁵⁶ Japan's experience plainly reveals that mistakes of life and death dimensions can and do occur in that system. Currently in the Japanese setting, the relaxed retrial standards, the emphasis on certainty, and numerous other aspects of the criminal justice system provide some measure of assurance against conviction—and execution—of the innocent.⁶⁵⁷

Even if one does not believe that broad protection of the constitutional rights of the guilty is important in its own right, or is valuable for ensuring respect for the rights of the innocent, if the United States were to permit the same latitude to criminal justice authorities that is recognized in Japan—as there are some indications the Rehnquist Court may already be doing⁶⁵⁸—yet at the same time restrict opportunities for post-conviction review, the consequences could be grave even for the innocent. One can only hope that Justice Marshall was overly pessimistic when, in one of his last impassioned dissents in a capital case, he concluded that in the process of erecting

655. See, e.g., Foote, *Paternalism*, *supra* note 459, at 332-39; Foote, *Confessions*, *supra* note 464, at 429-64.

656. See, e.g., DAVID H. BAYLEY, *FORCES OF ORDER: POLICING MODERN JAPAN* 1-4 (2d ed. 1991).

657. In one popular characterization of the respective criminal justice systems, it is frequently said that guilty individuals would prefer to have their cases handled in the United States and innocent individuals in Japan. I have my doubts about the accuracy of this statement as a general matter. After all, as the retrial cases reflect, innocent individuals may be convicted—and even sentenced to death—in Japan, as well as the United States. Moreover, with the now-strengthened conservative majority on the United States Supreme Court it remains to be seen how many of the constitutional rights of suspects and defendants will continue to provide protection against conviction where strong evidence of guilt exists. See generally Ogletree, *supra* note 538. At least with regard to post-conviction collateral review, however, there seems little doubt that an innocent individual would prefer Japan's retrial system over federal habeas corpus in the United States.

658. See, e.g., *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991); Ogletree, *supra* note 538.

restrictions on habeas the current Court has "valued finality over justice [and] . . . expediency over human life."⁶⁵⁹

659. *McCleskey v. Bowers*, 112 S. Ct. 37, 38 (1991) (Marshall, J., dissenting from denial of stay of execution).

