

THE NEW JAPANESE JURY SYSTEM: EMPOWERING THE  
PUBLIC, PRESERVING CONTINENTAL JUSTICE

INGRAM WEBER\*

*Japan's new mixed jury system (dubbed the saiban-in) is designed to democratize the criminal legal process. Many observers fear that professional judges will undermine this goal by using their influence to pressure lay persons into adopting the opinions of the court. This Article argues that fear of judicial domination has obscured a second set of objectives and that the saiban-in is also designed to maintain consistent and predictable decisions on verdicts and sentences and to ensure that those decisions reflect, but are not wholly determined by, the Supreme Court's vision of justice. These objectives indicate both an enduring commitment to the Continental legal tradition in which modern Japanese law originated and the persistence of a long-standing prejudice against lay opinion. Reviewing meeting minutes from the Justice System Reform Council, the text of the Lay Assessor Act, and subsequent decisions by the Supreme Court on saiban-in procedure, the Article shows that officials intended to create a jury system that would provide ample opportunity for laypersons to meaningfully participate in decisions without sacrificing the consistency, predictability, and elite notions of justice maintained in Japan's present approach to decision-making. The saiban-in may also stem a growing wave of public punitiveness and allow justice officials to continue to pursue policies focused on the rehabilitation of offenders. This Article concludes by speculating about factors that could disturb the saiban-in's delicate balance of lay and professional power.*

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## I. INTRODUCTION

Beginning in 2009, Japan will introduce juries into criminal trials.<sup>1</sup> Mixed panels of lay assessors and professional judges will hear serious criminal cases and jointly determine guilt and sentences. This jury system (dubbed the *saiban-in*) is designed to inject the opinions of the public into judicial decisions, increase public trust and understanding of the judiciary, and create a democratic base for the justice system.<sup>2</sup>

Despite a wave of enthusiasm for the jury system, a strong current of skepticism remains closely in tow. Legal professionals have long dominated Japanese criminal justice, and prior efforts to reduce their

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<sup>1</sup> Saiban-in no sanku suru keiji saiban ni kansuru hōritsu, Law No. 63 of 2004, translated in Kent Anderson & Emma Saint, *Japan's Quasi-Jury (Saiban-in) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials*, 6 ASIAN-PAC. L. & POL'Y J. 233 (2005) [hereinafter Lay Assessor Act] (setting forth the details of the new jury system).

<sup>2</sup> JUSTICE SYSTEM REFORM COUNCIL (JSRC), RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL: FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY (June 12, 2001) [hereinafter JSRC RECOMMENDATIONS], available at [http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612\\_e.html](http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html) (last visited May 10, 2009) (outlining the goals of the *saiban-in* system and how it should operate).

influence have largely failed. The role of lay participants in Japan's first jury system, which ran from 1928 to 1943, was narrowed into impotence by conservatives.<sup>3</sup> Post-war innovations intended to provide a democratic check on judges and prosecutors, such as prosecutorial review commissions<sup>4</sup> and a constitutional provision providing for electoral review of Supreme Court justices,<sup>5</sup> have had little to no impact. Thus, one of the principal questions surrounding the new mixed jury system is whether judges will exploit their role in the panels to marginalize the influence of laypersons on judicial decisions.

This Article argues that fear of judicial domination obscures a second objective of the *saiban-in* and has led to a misreading of the intended role of judicial power in the mixed jury system.<sup>6</sup> In addition to

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<sup>3</sup> See Takashi Maruta, *The Criminal Jury System in Imperial Japan and the Contemporary Argument for its Reintroduction*, 72 INT'L REV. PENAL L. 215, 216 (2001) (explaining that the conservative members of the Privy Council removed portions of the original draft of the Jury Act in order to protect judges' autonomy and supremacy in the courtroom). Cf. Anna Dobrovolskaia, *The Jury System in Pre-War Japan: An Annotated Translation of "The Jury Guidebook"* (Baishin Tebiki), 9 ASIAN-PAC. L. & POL'Y J. 231, 237-40 (2008) (discussing how the pre-war jury guidebook provides insight into the ultimate suspension of jury trials).

<sup>4</sup> See Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L.J. 315, 323-25 (2007) (noting that commissions, consisting of randomly chosen Japanese citizens who examine the appropriateness of non-indictment decisions, have had little influence on the actions of prosecutors). Fukurai argues, however, that recent reforms to the Prosecutorial Review Commission law may make it more effective and that the newly revised law may have a greater impact than the *saiban-in* in democratizing the criminal process. *Id.* at 328.

<sup>5</sup> KENPŌ [CONSTITUTION], art. 79, para. 2. See also Supreme Court of Japan, Overview of the Judicial System in Japan, <http://www.courts.go.jp/english/system/system.html> (last visited May 10, 2009) (noting that no Supreme Court judge has ever been dismissed through electoral action).

<sup>6</sup> See Colin P.A. Jones, *Prospects for Citizen Participation in Criminal Trials in Japan*, 15 PAC. RIM L. & POL'Y J. 363, 365-66 (2006) (reviewing TAKASHI MARUTA, SAIBAN-IN SEIDO [THE LAY JUDGE SYSTEM] (2004) (arguing that the lay judge system that emerged from the Diet was expressly designed to minimize the impact of lay participation while lending legitimacy to an institution that will continue to be governed by professionals)). See also JSRC 51st Meeting Minutes (Mar. 13, 2001), available at <http://www.kantei.go.jp/jp/sihouseido/dai51/51gaiyou.html> (last visited May 10, 2009) (summarizing discussion of an alternative *saiban-in* proposal, put forth by Tsuyoshi Takagi—supported only by himself and Kohei Nakabō—that would have provided lay jurors more power vis-à-vis judges by expanding the scope of cases heard by juries and

its democratic ambitions, the *saiban-in* is designed to maintain consistent and predictable decisions on verdicts and sentences and to ensure that those decisions reflect, but are not wholly determined by, the Supreme Court's vision of justice. Judges are expected to serve as legal specialists, teaching lay jurors complex legal concepts and explaining the rationale behind the judiciary's decision-making process, while still leaving that process open to contest and modification by lay jurors. These jurors in turn are expected to contribute common sense and diverse perspectives. A robust set of safeguards has been put in place, both in the text of the Lay Assessor Act and through guidelines on judicial behavior enforced by the Supreme Court, to allow lay jurors to meaningfully shape decisions in ways unavailable to their counterparts in mixed juries in Western Europe and even to American jurors.

Through this division of labor, I argue, the *saiban-in* seeks to glean some of the benefits of lay participation—strengthened public trust in the judiciary and a decision-making process more attuned to the complexities of life—without resigning the justice system to the presumed inconsistency or bias of lay opinion, or abandoning notions of desert and punishment held by an educated elite. Judicial power in the *saiban-in* may also stem a growing wave of public punitiveness and allow justice officials to continue to pursue policies focused on the rehabilitation of offenders.

The intended role of professional judges in the *saiban-in* reflects an enduring commitment to the Continental tradition in which modern Japanese law was birthed. This tradition strives for consistency and seeks to apply the adjudicatory standards of high authority throughout

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creating all-lay panels for hearing political crimes and crimes by public officials). Even those who are optimistic about the democratic potential of the *saiban-in* remain cautious. Scholars have been meticulously scanning the Lay Assessor Act and subsequent decisions on jury procedure, identifying potential avenues for influence by the elite and offering proposals to boost opportunities for meaningful lay participation. *See generally* Kent Anderson & Mark Nolan, *Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (saiban-in seido) from Domestic Historical and International Psychological Perspectives*, 37 VAND. J. TRANSNAT'L L. 935, 946 (2004) (reviewing different proposals for the Lay Assessor Act while exposing competing interests in the drafting process); Matthew Wilson, *The Dawn of Criminal Jury Trials in Japan: Success on the Horizon?*, 24 WIS. INT'L L.J. 835, 839 (2007) (examining different perspectives concerning the lay jury system and proposing suggestions for surmounting the new challenges posed by the system).

the justice system by entrusting the discovery of truth to trained professionals, obligating those professionals to provide reasons for their decisions, and ensuring the propriety of decisions through superior review. The *saiban-in* signals both a democratic advance and an affirmation of Japan's Continental tradition.

The Article is organized as follows: Part II reviews the historical development of the Japanese criminal justice system. It emphasizes a tension between the pre-WWII Continental legal tradition and post-war American reforms, and proposes that Japanese justice officials have resisted lay participation in the judiciary because they seek to administer the justice system according to the Continental tradition. Part III uses Mirjan Damaška's model of the hierarchical and coordinate ideals to illuminate the nature of this tradition and explain the operation of the Japanese criminal justice system.

Part IV explores the intended purposes of the *saiban-in* by analyzing the meeting minutes of the Justice System Reform Council (JSRC), the thirteen-member body responsible for proposing the new jury system. The minutes reflect that the system is a product of compromise between one group, which sought to create a more responsive judiciary by transferring judicial power from career judges to lay persons, and the Supreme Court and procuracy, which sought to uphold the consistency and presumed fairness of decisions achieved through fidelity to uniform standards. Part V explains how long-standing prejudice against lay opinion, held by both groups, strengthened the ability of judges to present the Court's vision of justice.

Part VI analyzes the Lay Assessor Act and subsequent decisions by the Supreme Court on *saiban-in* procedures to demonstrate that the new jury system provides ample opportunity for laypersons to meaningfully participate in decisions without sacrificing the consistency, predictability, and elite notions of justice maintained in Japan's present approach to decision-making. In the Conclusion, I speculate about factors that could disturb the *saiban-in*'s delicate balance of lay and professional power.

## II. HISTORY OF THE JAPANESE CRIMINAL JUSTICE SYSTEM

### A. Pre-WWII Inquisitorial Justice

Prior to the occupation, Japanese justice had been highly inquisitorial for over a century. Under the Tokugawa regime, responsibility for fact-finding lay with shogunate investigators who conducted detailed examinations of evidence<sup>7</sup> and intense questioning of suspects and witnesses in order to “state the truth” in their written record of the facts.<sup>8</sup> This, together with the suspect’s written confession, formed the centerpiece of the trial, which amounted to little more than a perfunctory confirmation of the written record.<sup>9</sup>

The 1880 Code of Criminal Instruction, which established the French inquisitorial system in Japan, introduced a more elaborate system of rules and procedures and, together with the 1889 Constitution, provided some minimal protections for the defendant, such as the right for counsel to participate in proceedings.<sup>10</sup> Nevertheless, these protections were never allowed to obstruct an official inquiry into the truth.<sup>11</sup> Under the Code, the examining judge was empowered to interrogate suspects, collect evidence for revealing facts concerning the case, and determine whether to send the case to trial.<sup>12</sup> In reality, procurators played a dominant role at this stage and possessed broad powers to arrest, detain, and interrogate suspects.<sup>13</sup> Defense lawyers were subordinate to procurators, who at trial stood on a raised platform alongside judges as representatives of the

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<sup>7</sup> See Yoshirō Hiramatsu, *Summary of Tokugawa Criminal Justice*, 22 LAW IN JAPAN: AN ANNUAL 105, 118 (Daniel H. Foote trans., 1989).

<sup>8</sup> *Id.* at 116.

<sup>9</sup> *Id.* at 117.

<sup>10</sup> See Petra Schmidt, *Law of Criminal Procedure*, in HISTORY OF LAW IN JAPAN SINCE 1868, at 681, 693 (Wilhelm Röhl ed., 2005) (citing article 266 of the 1880 Code of Criminal Instruction). See also *id.* at 688–94.

<sup>11</sup> See Kuk Cho, *The Japanese “Prosecutorial Justice” and its Limited Exclusionary Rule*, 12 COLUM. J. ASIAN L. 39, 46–47 (1998) (arguing that in the pre-war legal regime, restrictions on rights were deemed constitutional as long as those restrictions had a statutory basis). For example, the constitutional prohibition against investigators entering a person’s home without consent could be relaxed by legislation. *Id.* at 46 n.39.

<sup>12</sup> Schmidt, *supra* note 10, at 692.

<sup>13</sup> KEISOHŌ [CODE OF CRIMINAL PROCEDURE], Law No. 75 of 1922, arts. 123, 255, cited in Cho, *supra* note 11, at 45.

state.<sup>14</sup> Although the system operated formally under the principle of the presumption of innocence, the decision by the examining judge to send the case to trial was widely considered sufficient evidence of guilt.<sup>15</sup> Subsequent changes to the criminal code saw the rising influence of German law, culminating in the Criminal Code of 1907.<sup>16</sup> In sum, during this period, Japanese criminal justice was inquisitorial, with a special role for procurators in uncovering the truth.<sup>17</sup>

### B. *Post-War Occupation Reforms*

Following World War II, occupation authorities sought to de-inquisitorialize the justice system and reform it in the image of American law. First, they reorganized the justice system to secure the independence of the judiciary from political and investigatory bodies.<sup>18</sup> The newly formed Supreme Court (previously subordinate to the Ministry of Justice) was handed administrative control over the judiciary, which remained a unitary system.<sup>19</sup> The preliminary investigation stage was eliminated and the role of the examining judge abolished.<sup>20</sup> Trial judges were stripped of their investigatory powers and given the role of impartial referees.<sup>21</sup> Free evaluation of evidence was limited by rules

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<sup>14</sup> Schmidt, *supra* note 10, at 693.

<sup>15</sup> *Id.*

<sup>16</sup> Wilhelm Röhl, *Generalities*, in *HISTORY OF LAW IN JAPAN SINCE 1868*, at 26 (Wilhelm Röhl ed., 2005).

<sup>17</sup> See Shigemitsu Dandō, *System of Discretionary Prosecution in Japan*, 18 AM. J. COMP. L. 518, 518-21 (1970) (discussing the development of discretionary prosecution in the pre-war era).

<sup>18</sup> See John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust*, in *LAW IN JAPAN: A TURNING POINT* 99, 118-20 (Daniel H. Foote ed., 2007) (portraying judicial independence as a central concern of post-war judicial reforms).

<sup>19</sup> See *id.* at 117-18 (discussing the debate over whether this action was necessary to promote accountability).

<sup>20</sup> MERYLL DEAN, *JAPANESE LEGAL SYSTEM* 125 (2d ed., 2002).

<sup>21</sup> See KEISOHŌ, Law No. 131 of 1948, art. 297 (maintaining one vestige of trial judges' former power by empowering them to "determine the scope, order, and method of examination of evidence"), translated as amended at [http://www.cas.go.jp/jp/seisaku/hourei/data/COCP\\_1-2.pdf](http://www.cas.go.jp/jp/seisaku/hourei/data/COCP_1-2.pdf) (last visited May 10, 2009).

excluding hearsay.<sup>22</sup> The right to cross-examine was handed to the prosecution and the newly strengthened defense.<sup>23</sup>

Among the most important reforms was the multitude of procedural protections guaranteed by the new Constitution. These included the privilege against self-incrimination,<sup>24</sup> the right to a public trial,<sup>25</sup> and access to a competent attorney paid by state funds if necessary.<sup>26</sup> Investigators now had to obtain a warrant for searches<sup>27</sup> and arrests,<sup>28</sup> and suspects had to be informed of the charges against them immediately following their apprehension.<sup>29</sup> Confessions made under compulsion or prolonged arrest could no longer be admitted as evidence and no one could be convicted on the basis of their confession alone.<sup>30</sup>

Despite their efforts, occupational authorities did not transform Japanese criminal justice into an adversarial system. The Code of Criminal Procedure was a product of compromise between the Supreme Commander of the Allied Powers (SCAP) and Japanese officials, and the document retained many of its inquisitorial features.<sup>31</sup> John O. Haley observes that while the procedural protections included in the post-war Constitution and revised Code of Criminal Procedure reflect the influence of American law, the reliance on detailed legal codes and an inquisitorial approach to justice reflect the country's Continental heritage. An important exception is the discretion enjoyed by police and prosecutors in disposing cases, which differs sharply from Continental practice.<sup>32</sup>

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<sup>22</sup> *Id.* art. 320, para. 1.

<sup>23</sup> KENPŌ, art. 37. *See also* ALFRED C. OPPLER, *LEGAL REFORM IN OCCUPIED JAPAN: A PARTICIPANT LOOKS BACK* 142 (1976) (considering the extent of changes under the revised Code of Criminal Procedure).

<sup>24</sup> KENPŌ, art. 38.

<sup>25</sup> *Id.* art. 37.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* art. 35.

<sup>28</sup> *Id.* art. 33.

<sup>29</sup> *Id.* art. 34.

<sup>30</sup> *See id.* art. 38. Despite the inclusion of these protections in the Constitution, the Supreme Court interprets them in a way that renders them ineffective in practice. *See infra* notes 103-110 and accompanying text.

<sup>31</sup> *See generally* KEISOHŌ.

<sup>32</sup> *See* JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER* 126 (1994) (citing figures to illustrate the discretion enjoyed by police and prosecutors).



C. *Two Perspectives on Japanese Criminal Justice and Support for Lay Participation*

The competing influence of inquisitorial and adversarial legal ideas has given rise to a passionate debate among Japanese legal observers on the nature of contemporary Japanese criminal justice. The debate centers around two theories.<sup>33</sup> The first, championed by Shigemitsu Dandō, holds that the essential inquisitorial nature of the justice system did not change under the occupation and that the prosecutor remains a neutral representative of the state.<sup>34</sup> Dandō's rival, Ryūichi Hirano, sees the occupation reforms as transformative and seeks to move the operation of the justice system in line with American adversarial justice.<sup>35</sup> Judges and prosecutors tend to subscribe to the inquisitorial view, which expects legal professionals to discover the truth. Generally, defense lawyers and activists support the adversarial perspective, which calls for greater restrictions on the activities of investigating officials.

This division causes much friction between defense attorneys and justice officials (particularly over the right to silence) and it also explains the Supreme Court's intense opposition to lay participation.<sup>36</sup> During the JSRC debates,<sup>37</sup> the Court resisted almost every argument jury advocates presented. Where jury supporters saw juries as the fulfillment of the Japanese Constitution's democratic ambitions, the Court saw a violation of the document's prescribed role for the judiciary. Where supporters

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<sup>33</sup> See generally Cho, *supra* note 11, at 48-50 (providing a more extensive discussion of these theories).

<sup>34</sup> See SHIGEMITSU DANDŌ, JAPANESE CRIMINAL PROCEDURE 82-83 (B.J. George, Jr. trans., 1965) (“[O]ne may well say that criminal procedure comprises the adversary party system in form and the concept of officially-controlled proceedings in substance.”).

<sup>35</sup> RYŪICHI HIRANO, KEIJI SOSHŌHŌ GAISETSU [OUTLINE OF CRIMINAL PROCEDURE LAW] 11-14 (1968).

<sup>36</sup> Not all defense attorneys support the new jury system. Shunkichi Takayama, an attorney who has unsuccessfully run for the presidency of the Japan Federation of Bar Associations (JFBA) five times, opposes the *saiban-in*. He argues that the Japanese public is not ready for such a drastic reform. Takayama likens the jury summons to general conscription during WWII and suspects that jury reform is part of an effort to militarize Japanese society. See generally SHUNKICHI TAKAYAMA, SAIBAN-IN SEIDO WA IRANAI [WE DO NOT NEED THE SAIBAN-IN SYSTEM] (2006).

<sup>37</sup> The Justice System Reform Council held sixty-three meetings from 1999 to 2001. Meeting minutes are available at <http://www.kantei.go.jp/jp/sihouseido/index.html> [hereinafter JSRC Meeting Minutes] (last visited May 10, 2009).

perceived an international trend toward jury trials, the Court saw an international retreat. Where they charged that the increasing complexity of cases required more diverse adjudicators, the Court championed the importance of professional expertise. And where jury advocates viewed lay Japanese as superior fact-finders, judges saw only illogical reasoning and unpredictable decisions.<sup>38</sup> So opposed was the Court to popular participation in the judiciary that even after the decision to introduce juries had become a *fait accompli*, the Court lobbied the ruling Liberal Democratic Party to prevent an all-lay jury from being approved.<sup>39</sup> This was an extraordinary move in light of the judiciary's long-standing tendency to avoid overt displays of political participation.<sup>40</sup>

Part of the Court's opposition undoubtedly rested in naked occupational interest. In the context of seeking to improve the justice system, any transfer of power from judges to lay persons implied some fault on the part of the professional judiciary and threatened to diminish the prestige of its officials. But members of the judiciary and procuracy have also opposed juries because their approach to justice depends on professionally trained adjudicators and consistent and predictable decision-making. To understand why justice officials viewed lay participation as a danger to be contained, one must first understand the nature and assumptions of Continental justice and how it has been institutionalized in Japan.

### III. CONTINENTAL JUSTICE IN JAPAN

The first sub-section introduces Mirjan Damaška's model on the hierarchical and coordinate ideals (abstracted from the European Continental and Anglo-American justice systems, respectively). It provides a theoretical understanding of Continental justice and illustrates

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<sup>38</sup> See Jones, *supra* note 6, at 366-67 (discussing the Court's opposition to an all-lay jury).

<sup>39</sup> *Id.* at 367. *But cf.* JSRC 30th Meeting Minutes (Sept. 12, 2000), available at <http://www.kantei.go.jp/jp/sihouseido/dai30/30gaiyou.html> (last visited May 10, 2009) (putting forth the Supreme Court's proposal to have two laypeople and three judges decide criminal cases, but the laypeople would provide only opinions and not votes).

<sup>40</sup> Haley, *supra* note 18, at 116 (discussing judges' tendency to refrain from engaging in political activity).

why its principles differ from the assumptions behind lay participation.<sup>41</sup> Next, I explain the core features of the Japanese criminal justice system by showing how it conforms to Damaška's hierarchical ideal.

#### A. *Mirjan Damaška's Hierarchical and Coordinate Ideals*

According to the hierarchical ideal, justice is entrusted to permanently placed legal professionals organized in a hierarchy.<sup>42</sup> Those at the top are responsible for articulating the law and its legal terms and conventions in order to advance the organization's vision of justice. Terms like "reckless driving" and "self-defense" acquire such precise definitions that someone unschooled in the language of the court would be unable to fully capture. In the hierarchical ideal, high ranking officers hold long terms in office, thus creating conditions where legal analysis becomes routinized.<sup>43</sup> Issues that come before the professional adjudicator are not regarded as unique.<sup>44</sup> Cases are typified<sup>45</sup> and in the process some factors consistently influence decisions, while others fade from view with equal regularity. Officials take a "legalistic" approach to decision-making in which they are expected to render a particular judgment whenever facts are found that are specified under a normative standard.<sup>46</sup> The propriety of decisions is then judged by their fidelity to this standard.<sup>47</sup>

The operation and organization of the justice system is structured to ensure that the standards set by those of the highest authority are applied consistently at all levels of the hierarchy.<sup>48</sup> Because decision making in the hierarchical ideal requires not only knowledge of the written law, but also mastery of its officially sanctioned interpretations, adjudication lies with professionals trained in the ways and conventions of the organization. The influence of outsiders who do not necessarily share the organization's vision of justice is limited or, when possible,

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<sup>41</sup> See generally Mirjan Damaška, *The Faces of Justice and Authority* 16-46 (1991).

<sup>42</sup> *Id.* at 18-19.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 19.

<sup>45</sup> *Id.* at 20.

<sup>46</sup> *Id.* at 21.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 19-21.

excluded.<sup>49</sup> Superior review of lower-level decisions is routine and comprehensive.<sup>50</sup> Additionally, the power of those in authority is further emphasized by the probability that lower-level decision-makers who stray from the convention are unlikely to receive promotions.<sup>51</sup>

In the hierarchical ideal, democratic accountability lies at the top. Elected leaders signal the values and ambitions of the general public to appointed officials who then construct and enforce standards for the operation of justice that they believe will advance the public's desires. In the coordinate ideal, which Damaška extrapolates from the Anglo-American adversarial system, justice rests with lay persons.<sup>52</sup> Decisions need not adhere to any technical standard and can follow from "prevailing ethical, political, or religious norms," or common sense.<sup>53</sup> Contrary to the hierarchical ideal, lay adjudicators, typically holding a single term in office or residing in their positions for a limited period, regard issues in their cases as unique.<sup>54</sup> No official guidelines indicate which factors should receive probative weight or when a critical threshold of evidence has been reached. The definition of terms such as "reckless driving" and "self-defense" fluctuate from community to community and person to person, and no external standard exists to determine which is right. Interpretative differences among a set of adjudicators are resolved internally through the deliberative process. Because decision-making need not conform precisely to any pre-determined process, superior review is limited.<sup>55</sup>

In the coordinate ideal, accountability lies at the bottom. Lay persons are presumed to embody the public's will and inject the values of their communities into the deliberative process. Under the hierarchical model, definitions of legal terms and notions of justice are adjudicated solely at the top. By contrast, in the coordinate ideal, this type of deliberation occurs anew for each case, allowing for more individualized justice. This also creates an environment more tolerant of diverse values and visions of justice, including those of minority sub-cultures. Because

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<sup>49</sup> *Id.* at 19.

<sup>50</sup> *Id.* at 20.

<sup>51</sup> *Id.* at 21.

<sup>52</sup> *Id.* at 24.

<sup>53</sup> *Id.* at 27.

<sup>54</sup> *Id.* at 24.

<sup>55</sup> *Id.* at 26.

each case is regarded as unique and each set of lay persons brings different values to bear on the issues, predictable decisions are not expected.

Robert Kagan observes that the hierarchical and coordinate ideals adopt different defenses against different injustices.<sup>56</sup> The coordinate ideal fears that government authorities will use the criminal code as a means of repression or create laws that are excessively rigid and unresponsive to minority opinion.<sup>57</sup> Politically independent defense lawyers serve as a check against these tendencies by disputing evidence and questioning the fairness of laws.<sup>58</sup> Decision making is entrusted to lay persons who are neither rewarded nor disciplined for their judgments. Accountability is enforced by those external to the system.

In contrast, the hierarchical ideal fears the “corrupt local police chief, the ideological judge who disregards national policies he dislikes, and the jury that acquits or convicts because of the defendant’s race.”<sup>59</sup> By enforcing a uniform standard, the hierarchical ideal attempts to “minimize the inconsistency, bias, and injustice that can stem from local, parochial influences on criminal justice system officials.”<sup>60</sup>

The hierarchical official will seek to exclude outsiders from the adjudicatory process because the system in which he was reared defines justice as fidelity to conventions and explicit standards. Persons ignorant of these standards, and possibly unsympathetic to the goals they advance, will adopt their own criteria in their evaluations. This will lead to decisions that are inconsistent and, to the eyes of the hierarchical judge, incorrect. Disparate responses to similar cases will appear to the coordinate official as a proper individualization of cases executed by adjudicators familiar with the complexities of life. To the hierarchical official, this difference represents a failure to categorize cases with similar circumstances, caused perhaps by an ignorance of standards, or irrationality, excessive emotional investment, or bias. Japanese justice

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<sup>56</sup> ROBERT A. KAGAN, *ADVERSIAL LEGALISM: THE AMERICAN WAY OF LAW* 71 (2003).

<sup>57</sup> See *id.* (emphasizing the need for “fragmentation of power and grassroots democratic responsiveness”).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

officials opposed juries because the justice system over which they preside closely conforms to the hierarchical ideal.

### B. *The Post-War Japanese Judiciary*

The Japanese judiciary is a unitary national system. Small claims and minor criminal offenses are overseen by summary courts, which are typically staffed by retired judges and prosecutors or former court administrative officials. District and high court positions are the exclusive province of an individual who has spent his career within the judicial system.<sup>61</sup> District courts serve as the courts of first instance.<sup>62</sup> In all but very minor cases, district court judges sit in panels of three.<sup>63</sup> They are responsible for deciding all matters of fact and law.<sup>64</sup> Criminal judgments can be appealed to one of the eight high courts.<sup>65</sup> The Supreme Court, which functions as a constitutional court and court of last resort, sits atop this hierarchy.<sup>66</sup> By law, Supreme Court justices are appointed by the cabinet.<sup>67</sup> In practice, however, the judiciary selects who will fill a vacancy on the Court and the cabinet rubber-stamps the decision.<sup>68</sup>

In keeping with its civil law origins, legislation is the primary source of law. There is only one jurisdiction and criminal procedure is uniform throughout Japan. Criminal law is compiled in two documents, the Code of Criminal Procedure and the Penal Code, which are the primary

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<sup>61</sup> Haley, *supra* note 18, at 103.

<sup>62</sup> *Id.* at 100.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 100-01.

<sup>65</sup> *Id.* at 101.

<sup>66</sup> *Id.* at 102.

<sup>67</sup> *Id.* at 106 (citing Saibansho hō [Court Organization Act], Act No. 59 of 1947, art. 41).

<sup>68</sup> There is significant disagreement over the meaning of this process. *Compare id.* at 106-07 (stating that the practice is a sign of the extraordinary autonomy of the judiciary and its independence from the political branches), with J. MARK RAMSEYER & ERIC B. RASMUSEN, MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN 9 (2003) (arguing that the cabinet has no need to interfere in appointments because the judiciary only nominates candidates who will be acceptable to the ruling party).

references for criminal adjudication.<sup>69</sup> Case law is of only secondary importance. The Supreme Court determines how various codes and statutes should be interpreted and establishes conventions for adjudicating cases.

In addition to exercising judicial power, the Supreme Court is the highest authority on judicial administration. This authority is exercised through the Court's General Secretariat, the most powerful organ of the judiciary. Even among bureaucratic civil law systems, the Japanese judiciary is distinguished by the General Secretariat's persistent regulation and manipulation of judicial careers.<sup>70</sup> Staffed by over a hundred career judges, the Secretariat uses its power to ensure that all aspects of the judiciary, such as fact-finding, application of the law, and sentencing, conform to the standards established by the Supreme Court.<sup>71</sup>

The first instrument in the Supreme Court's arsenal to achieve this conformity is education. Candidates for the three branches of the legal profession—the private bar, the procuracy, and the judiciary—are determined by a national exam, and all receive uniform and mandatory training at the Supreme Court's Legal Training and Research Institute (LTRI).<sup>72</sup> Until recently, the LTRI was the sole post-graduate professional school for law in Japan.<sup>73</sup> While future prosecutors and attorneys are further educated in legal norms and practices by the professional organizations that they join after graduation (the procuracy and private bar, respectively), all future members of the legal profession are inculcated in a common vision of justice determined by the Supreme Court.

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<sup>69</sup> See generally HIROSHI ODA, *JAPANESE LAW* 35 (2d ed., 2001) (providing an overview of the Japanese legal system).

<sup>70</sup> See Frank K. Upham, *Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary*, 30 *LAW & SOC. INQUIRY* 421, 453 (2005).

<sup>71</sup> See generally Setsuo Miyazawa, *Administrative Control of Japanese Judges*, 25 *KOBE U. L. REV.* 45, 46-48 (1991) (summarizing how the Japanese Supreme Court oversees the judiciary). See also Upham, *supra* note 70, at 439-40 (debating whether the General Secretariat also uses its authority to punish judges who are sympathetic to causes that go against the interests of the ruling party).

<sup>72</sup> Haley, *supra* note 18, at 99.

<sup>73</sup> See Kahei Rokumoto, *Legal Education*, in *LAW IN JAPAN: A TURNING POINT* 190, 219-22 (Daniel H. Foote ed., 2007) (explaining the general principles and organization of the new law school system).

The Court also possesses exclusive control over the appointment, reappointment, rotation, and promotion of career judges through the personnel office of the General Secretariat.<sup>74</sup> This authority is primarily used to create incentives for hard work and to reward achievement. Judges whose work is favored by the Secretariat receive prestigious appointments in Tokyo and within the Secretariat itself. This inevitably produces a strong incentive for judges to conform their opinions to the legal interpretations of the Supreme Court.

Elite judges connected to the Court, including experienced judges who work as Supreme Court clerks and judges that work in the General Secretariat, also use judicial conferences to present the Court's legal interpretations in complex or politically sensitive cases to lower court judges. Once a forum for free discussion among judges, by 1970 the conferences came under the control of the General Secretariat.<sup>75</sup> Lower courts send a judge who is handling a case that involves a specific issue being discussed at a conference.<sup>76</sup> Judges from the bureau of the General Secretariat responsible for that issue present their opinions on how the issue should be handled.<sup>77</sup> The attending judge then returns to her court and conveys the opinion to her colleagues.<sup>78</sup> Uniformity in decision-making is further enforced by a special rotation system. Judicial careers do not follow a linear path. A prestigious posting in the Supreme Court's Secretariat may be followed by a series of assignments in district courts.<sup>79</sup> This practice "ensures the continuous and pervasive influence of senior judges as monitors and mentors throughout the judicial system."<sup>80</sup> Monitoring of judicial decisions is made easy by the comparatively tiny number of career judges. Today, roughly two thousand career and assistant judges work in district, family, and high courts, as well as the Supreme Court's General Secretariat.<sup>81</sup> Despite Japan's economic growth in the post-war period, from 1950 to 1989 the

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<sup>74</sup> Haley, *supra* note 18, at 99.

<sup>75</sup> See Miyazawa, *supra* note 71, at 53 (describing the evolution of judicial conferences).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Haley, *supra* note 18, at 104.

<sup>80</sup> *Id.* at 105.

<sup>81</sup> *Id.* at 101.



per capita number of judges *decreased*.<sup>82</sup> Since the Court can unilaterally determine the number of people who enter the legal profession and become judges, this may represent an attempt to ensure a tightly knit judiciary that is easy to supervise and regulate.<sup>83</sup> Consistency and uniformity are also maintained through a robust system of superior review. Judges must provide a full written statement of their findings and application of the law. Because the judiciary is primarily concerned with enforcing established standards and ensuring consistency throughout the judicial system, these statements are necessary for superiors to determine whether or not rulings in lower courts correctly adhered to precedent. This belief that justice rests on fidelity to Court standards is also why both convictions and acquittals can be appealed in criminal trials. This is consistent with the Continental understanding of double jeopardy, in which a case is not considered finalized until all appeals have been exhausted.<sup>84</sup>

In sum, the Japanese judiciary provides career judges with little incentive, let alone opportunity, to act on individual initiative and remains a conformist institution tightly regulated by the General Secretariat. Given its vertical ordering, the judiciary exemplifies the hierarchical ideal with its strict enforcement of consistency in decision-making and trust in professional adjudicators. Judges, however, have only a partial influence on the outcome of cases.

More than any other actor in the Japanese justice system, prosecutors determine the fates of reported suspects. Japanese prosecutors exercise a near perfect monopoly on prosecutorial power.<sup>85</sup> They can reduce

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<sup>82</sup> Shigeo Kisa, *Saibankan no senmonsei to dokuritsusei (ichi): nishi doitsu no jimu to hikaku shite* [*Professionalism and Independence of Judges (1): A Comparison with Practice in West Germany*], 40 HOKUDAI HÖGAKU RONSHŪ 1443, 1456 (1990), cited in Miyazawa, *supra* note 71, at 59.

<sup>83</sup> *Id.* at 59.

<sup>84</sup> Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 4, Nov. 22, 1984, Europ. T.S. No. 117, as amended by Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, May 11, 1994, Europ. T.S. No. 155.

<sup>85</sup> See DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN* 222-24 (2001) (describing the ineffectiveness of various external controls on prosecutors). Several mechanisms outside the procuracy exist to control prosecutorial activity, but they have little impact. The impotence of the prosecutorial review

charges and divert cases to summary courts for more lenient sentences or suspend prosecution entirely. For instance, in 2005, of the 367,025 non-traffic penal code offenses the procuracy received, 36.4% were transferred to Family Court, 5.9% were sent for summary trial procedure, 21.0% received suspensions of prosecution, 12.8% were closed for other reasons including insufficient evidence and 23.9% reached district court.<sup>86</sup>

Prosecutors capitalize on the judiciary's consistency to shape decisions that are formally under the exclusive purview of the courts. Fully aware of the evidence required by the judiciary to convict, prosecutors indict only those cases likely to end in conviction, yielding the country's 99% conviction rate.<sup>87</sup> Prosecutors also can determine sentencing. By tracking sentencing decisions through computer software, prosecutors know how to adjust their sentencing requests to produce the desired result.<sup>88</sup> In sum, prosecutors do not merely prosecute cases; they determine outcomes. It is for this reason Japanese justice is often called "prosecutorial justice." In seeking to determine how suspects are treated, Japanese prosecutors find themselves in a quasi-judicial role. And, like the Japanese judiciary, the Japanese procuracy exemplifies Damaška's hierarchical ideal.

### C. *The Japanese Procuracy*

As with the judiciary, the Japanese procuracy is a single, national, centralized, and hierarchical career bureaucracy. Prosecutors form an elite corps of uniformly trained professionals, organized under the Ministry of Justice. Prosecutors do not perceive their role as partisan actors in the adversarial tradition. Rather, they see themselves as

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committees has already been mentioned. See Fukurai, *supra* note 4. The "analogical institution of the prosecution" (*fushinpan seikyū*) allows complainants in a narrow range of cases to ask judges to indict suspects when prosecutors refuse. *Id.* at 223. Complaints of this kind are rare. Likewise, civil suits do little to discourage prosecutors from indicting. *Id.* at 223–24.

<sup>86</sup> See MINISTRY OF JUSTICE, WHITE PAPER ON CRIME 2006: NEW TRENDS OF CRIMINAL POLICY app. 2-2, available at <http://hakusyo1.moj.go.jp/en/55/nfm/mokuji.html> (last visited May 10, 2009).

<sup>87</sup> See JOHNSON, *supra* note 85, at 216-18 (disputing this number, though still finding a relatively high conviction rate).

<sup>88</sup> *Id.* at 66.

impartial officials dedicated to discovering the truth.<sup>89</sup> Veteran prosecutors inculcate their subordinates in this mission through lectures, training sessions, and informal discussions.<sup>90</sup>

The procuracy dominates the pre-trial phase of the criminal process. Prosecutors direct the police to find new evidence, interview witnesses and interrogate suspects, summarize statements in words of their choosing, and compile all evidence, incriminating as well as exculpatory, in a dossier.<sup>91</sup> Prosecutorial decisions on how to dispose of a suspect are based on this document, which, in the case of an indictment, is submitted to the court and often forms the only proof offered at trial.<sup>92</sup>

As in the judiciary, decision-making follows precise standards set and enforced by superiors. Individual prosecutors lack the independence of their American counterparts. Prosecutors are held together by the principle of prosecutorial unity in which superiors command and subordinates obey.<sup>93</sup> Specific criteria for charging and sentencing decisions are communicated through written manuals and guidelines.<sup>94</sup> Charging decisions and sentencing requests are determined collectively.<sup>95</sup> Subordinates must secure the approval of two or three superiors before making a decision.<sup>96</sup> An acquittal, being rare, is understood as a disgrace resulting from a departure from proper procedure. Prosecutors responsible for such “errors” are required to carefully document their mistakes<sup>97</sup> and will be subject to unfavorable job assignments.<sup>98</sup>

Because prosecutors view themselves as impartial officials and rely on internal mechanisms for discipline and accountability, the role of the defense lawyer is largely eclipsed. Indeed, to the Japanese prosecutor, defense activities inhibit the procuracy’s pursuit of the truth. For much of the post-war era, prosecutors tightly regulated the actions of defense

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<sup>89</sup> *Id.* at 98.

<sup>90</sup> *Id.* at 126-127.

<sup>91</sup> *Id.* at 51.

<sup>92</sup> See Takeo Ishimatsu, *Are Criminal Defendants in Japan Truly Receiving Trials by Judges?*, 22 *LAW IN JAPAN* 143, 145-50 (Daniel H. Foote trans., 1989) (describing the content and importance of dossiers).

<sup>93</sup> JOHNSON, *supra* note 85, at 121.

<sup>94</sup> *Id.* at 128.

<sup>95</sup> *Id.* at 128-32.

<sup>96</sup> *Id.* at 130.

<sup>97</sup> *Id.* at 228-29.

<sup>98</sup> *Id.* at 226.

lawyers at the pre-trial stage. Prosecutors determined the time and duration of meetings between lawyers and detained suspects.<sup>99</sup> The post-war Code of Criminal Procedure also did not require prosecutors to turn over all documents and evidence to the defense.<sup>100</sup> The prosecutor only had to disclose the evidence he submitted to the court. These restrictions, coupled with the prosecutorial habit of indicting only those cases likely to end in conviction, fostered a model of defense work that, in the pre-trial phase, centered on persuading the prosecutor to suspend prosecution or send the case to summary court and, in the trial period, on securing leniency, not an acquittal.<sup>101</sup>

Constitutionally prescribed obstacles to evidence collection also do not hinder prosecutorial activities at either the pre-indictment or trial stages. Evidentiary barriers evolved within the adversarial system and serve two functions: to exclude evidence “on the theory that its impact on the trier of facts may be stronger than its actual probative weight”<sup>102</sup> and to check the corruption of overzealous government authority.<sup>103</sup> Civil law jurists, however, tend to reject both rationales. Professional triers of facts are presumed capable of properly weighing all evidence, and their duty to uncover the truth overrides extraneous considerations.<sup>104</sup>

In the same fashion, the Japanese procuracy and judiciary share a trust both in the ability of highly trained professionals to uncover the truth and in the efficacy of organizational mechanisms to ensure accountability and discipline. As a result, Japanese judges exercise their warrant-granting authority and interpret the Constitution in ways that

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<sup>99</sup> *Id.* at 36.

<sup>100</sup> *Id.*

<sup>101</sup> Masayuki Murayama, *The Role of the Defense Lawyer in the Japanese Criminal Process*, in *THE JAPANESE ADVERSARY SYSTEM IN CONTEXT: CONTROVERSIES AND COMPARISONS* 42, 49-52 (Malcolm M. Feeley & Setsuo Miyazawa eds., 2002) (summarizing that the main goal of pretrial defense work is to make the prosecutor dismiss the charge or to get a summary conviction and arguing that both retained counsel and court-appointed counsel’s work focuses on mitigating circumstances to obtain lenient sentences rather than challenging the charge and arguing for a different legal construction of the alleged facts).

<sup>102</sup> Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 514 (1972).

<sup>103</sup> See, e.g., *id.* at 521-22 (discussing how some evidence will be rejected if testimony has been obtained from defendants illegally).

<sup>104</sup> *Id.* at 514.

render procedural protections moot. The methods and legal justifications that allow investigators to override these protections are by now well documented.<sup>105</sup>

A brief discussion of how the constitutional privilege against self-incrimination is treated will be sufficient to illustrate the inquisitorial nature of the system. In total, suspects in Japan can be detained without indictment for up to 23 days.<sup>106</sup> Seventy-two hours after an arrest, prosecutors must either release the suspect or apply to a judge for a ten-day detention warrant, renewable once.<sup>107</sup> These requests are routinely granted.<sup>108</sup> The right against self-incrimination<sup>109</sup> is interpreted in a way that obligates suspects to endure interrogation during their detention.<sup>110</sup> In 1993, the Supreme Court denied a man's claim that investigators had violated his constitutional right against self-incrimination by detaining him incommunicado for days, denying him access to a lawyer, and ignoring his refusals to speak.<sup>111</sup> The Court responded that while he had no duty to respond to questions, attendance at interrogation sessions was

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<sup>105</sup> See Cho, *supra* note 11, at 50-72 (discussing restrictions on constitutional requests in the Code of Criminal Procedure and the Policy Duty Law and the Japanese Supreme Court's limited exclusionary rules); Daniel H. Foote, *Confessions and the Right to Silence in Japan*, 21 GA. J. INT'L & COMP. L. 415 (1991) (arguing that, for historical reasons, the Japanese public is willing to accept intensive questioning, and the impressive record and relative leniency of the country's justice system as well as the role of confessions in enhancing prospects for rehabilitation of offenders makes it difficult to advocate a change toward the American model); Futaba Igarashi, *Forced to Confess, in DEMOCRACY IN CONTEMPORARY JAPAN* 195, 195-213 (Gavan McCormack ed. & trans., 1986) (asserting that the conditions under which suspects are held, e.g. little food and hours of endless interrogation, pressure them to confess).

<sup>106</sup> See Foote, *supra* note 105, at 429-30 (describing the importance of long detention times in procuring confessions).

<sup>107</sup> See *id.* at 430 (noting that prosecutors usually request extra detention time).

<sup>108</sup> In 2004, detention requests were granted 99.6% of the time. See MINISTRY OF JUSTICE, WHITE PAPER ON CRIME 2005: JUVENILE DELINQUENCY, pt. 2, ch. 2, sec. 3 [hereinafter WHITE PAPER ON CRIME 2005], available at <http://hakusyo1.moj.go.jp/en/53/nfm/mokuji.html> (last visited May 10, 2009).

<sup>109</sup> See KENPŌ, art. 38.

<sup>110</sup> See Foote, *supra* note 105, at 434-35 (explaining that in 1952, the Supreme Court ruled that police did not need to mention a suspect's right to silence when providing an opportunity for the suspect to speak).

<sup>111</sup> See *Saito v. Japan* (The No Coerced Confession Case), 53 KEISHŪ 514 (Sup. Ct., Mar. 24, 1999).

mandatory.<sup>112</sup>

The Supreme Court further eroded Article 38 by upholding the legality of so-called “substitute prisons.”<sup>113</sup> The Japanese Code of Prisons, enacted in 1908, authorized police detention cells to be used as substitutes for prisons to relieve overcrowding.<sup>114</sup> Today, no prison shortage remains, but suspects are routinely held in police detention cells to provide investigators more opportunities to procure confessions.<sup>115</sup>

In addition to reflecting a greater trust in the propriety of investigating officials, the judiciary’s dilution of the privilege against self-incrimination signals the supreme importance of confessions in the Japanese justice system. Police and prosecutors strive to procure confessions and most of the time they are successful. Over 90% of suspects in Japan confess.<sup>116</sup> The primary role of confessions is evidentiary. Police and prosecutors elicit confessions, compare the suspect’s statements with the material evidence, pursue more evidence on the basis of those statements, and finally decide how to dispose of the case.

But confessions are also essential for achieving another goal: the rehabilitation of the offender. Japanese criminal justice garners much praise for its distinctive commitment to rehabilitation.<sup>117</sup> By invoking feelings of repentance and offering leniency in exchange for sincere expressions of remorse, justice officials attempt to correct certain

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<sup>112</sup> *See id.*

<sup>113</sup> *See Fujii v. Japan*, 18 KEISHŪ 127 (Sup. Ct., Apr. 9, 1964).

<sup>114</sup> SETSUO MIYAZAWA, *POLICING IN JAPAN: A STUDY ON MAKING CRIME* 9 (Frank G. Bennett, Jr. & John O. Haley trans., 1992).

<sup>115</sup> *See, e.g.*, JAPAN FEDERATION OF BAR ASSOCIATIONS, *JAPAN’S ‘SUBSTITUTE PRISON’ SHOCKS THE WORLD: DAIYO KANGOKU AND THE UN COMMITTEE AGAINST TORTURE’S RECOMMENDATIONS* 9 (2d. rev. ed. 2008), available at [http://www.nichibenren.or.jp/en/activities/statements/data/daiyo\\_kangoku.pdf](http://www.nichibenren.or.jp/en/activities/statements/data/daiyo_kangoku.pdf) (last visited May 10, 2009).

<sup>116</sup> Supreme Court of Japan, *Statistics on Criminal Cases in Japan*, tbl. 2, [http://www.courts.go.jp/english/proceedings/statistics\\_criminal\\_cases\\_index.html](http://www.courts.go.jp/english/proceedings/statistics_criminal_cases_index.html) (last visited May 10, 2009).

<sup>117</sup> *See generally* JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* (1989) 61-65 (using Japan to illustrate his argument that society will have lower crime rates by effectively communicating shame about crime and supporting reintegration); Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317 (1992) (explaining Japan’s model of rehabilitation and reintegration and assessing its successes and failures).

categories of offenders and reintegrate them back into society.<sup>118</sup> Supported by what have been deemed widely accepted inclinations to apology and forgiveness, this benevolent approach to criminal justice—summarized in the oft-cited Japanese proverb, “condemn the crime, not the criminal”—avoids, where possible, the stigma and social disruption of public trial and prison.<sup>119</sup> In order to determine whether an offender is correctable, however, prosecutors need to discover the motive for his offense and ensure the social environment he returns to will be conducive to rehabilitation. This requires the cooperation of the suspect. Despite the justice system’s continued reliance on confessions, over the last twenty-five years criminal suspects have gradually gained more protection. In response to concerns about forced confessions, the Supreme Public Prosecutor’s Office recently agreed to allow audio and video recording of some aspects of interrogations on a trial basis.<sup>120</sup> These recordings will be used for cases likely to be heard by the *saiban-in*.<sup>121</sup> In addition, new oversight committees will be placed in detention centers to guard against inmate maltreatment.<sup>122</sup>

As part of the current judicial reform movement, prosecutors must now disclose all the information they uncovered during their investigation if they plan to present it at trial, even if it was excluded from the official dossier.<sup>123</sup> This change was necessary for the *saiban-in* trials. In bench trials, hearings relied on written documents and were staggered over several months. Lay participation required short trial periods and live testimony. As a result, defense attorneys needed to be as thoroughly prepared on the first day of the trial as prosecutors. In addition to these new rights, during private interviews with the author,

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<sup>118</sup> Haley, *supra* note 32, at 133.

<sup>119</sup> See *id.* (positing that failure to obtain a confession is interpreted as the suspect being unrepentant or uncorrectable more often than as the prosecutor having made an error and the suspect being not guilty).

<sup>120</sup> See, e.g., Tōru Tsunetsugu & Yūsuke Yoshino, *Prosecution Yields to Pressure*, DAILY YOMIURI, May 11, 2006.

<sup>121</sup> See, e.g., *Certain Grillings Exempt: Prosecutors to Tape Interrogations*, JAPAN TIMES, May 10, 2006.

<sup>122</sup> Keiji shūyō shisetsu oyobi hishūyōsha nado no shogū ni kansuru hōritsu [Act on Penal Detention Facilities and Treatment of Inmates and Detainees], Act No. 50 of 2005, art. 7; See, e.g., Masami Itō, *Inmate Rights Bill Passed*, JAPAN TIMES, June 3, 2006.

<sup>123</sup> Keiji soshōhō to no ichibu wo kaisei suru hōritsu [Law to Amend the Criminal Procedure Code and Other Laws], Law No. 62 of 2004, art. 316, no. 14.

young Japanese defense lawyers exhibited a greater distrust of prosecutors than their older colleagues and a willingness to adopt more aggressive defense tactics if their clients request them.<sup>124</sup>

These reforms may portend an incipient adversarial ethos among the bar, but justice officials continue to subscribe to the inquisitorial idea that impartial legal professionals must excavate the truth. They further regard an American-style interpretation of constitutional protections, particularly the right against self-incrimination, as an intolerable obstacle to this duty. The same legislation that established oversight committees in detention centers maintained the use of substitute prisons, over the objections of opposition parties and human rights groups. By the same token, prosecutors continue to condemn aggressive defense tactics. In 1995, a group of private Japanese attorneys formed the Miranda Society, an association dedicated to securing the right against self-incrimination by advising accused clients to refuse interrogation without the presence of counsel and to otherwise remain uncooperative unless accompanied by a lawyer.<sup>125</sup> In response, some prosecutors have excoriated these activities and accused Miranda lawyers of forgetting their “professional obligation to preserve social justice.”<sup>126</sup>

In conclusion, the Japanese justice system operates according to Damaška’s model of the hierarchical ideal. High authority presents an exclusive interpretation of legal codes, determines which factors should be assigned probative weight in determinations of guilt, and lays out precisely how various actions by the defendant impact sentencing. Justice is defined as fidelity to these standards and so decision making is entrusted to legal professionals well versed in complex organizational conventions and subject to oversight and discipline by superiors.

Lay juries threaten this approach to justice. Ignorant of official standards and possibly unsympathetic to the goals they are designed to advance, lay persons are certain to bring a measure of unpredictability to the decision-making process and may inject into it irrationality, emotion, or bias. The hostility toward lay participation displayed by the Supreme

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<sup>124</sup> Interviews with defense lawyers, July, 2008.

<sup>125</sup> See Takashi Takano, *The Miranda Experience in Japan*, in *THE JAPANESE ADVERSARY SYSTEM IN CONTEXT: CONTROVERSIES AND COMPARISONS* 128, 130 (Malcolm M. Feeley & Setsuo Miyazawa eds., 2002).

<sup>126</sup> *Id.* at 133.



Court and, to a lesser extent, the Ministry of Justice during the jury debates reflects their commitment to the Continental vision of justice.

#### IV. JURY REFORM

##### A. *The Origins of the Jury Reform*

Criticism of the criminal justice system began to build in the 1970s and 1980s following a series of high-profile death-row acquittals in which innocent defendants endured decades-long imprisonment.<sup>127</sup> Judges came under fire for poor fact-finding and citizen groups calling for criminal juries started to emerge.<sup>128</sup> These citizen groups saw lay participation as a corrective to the limited life experience of judges and as a necessary safeguard for the defendant's rights.<sup>129</sup> In 1987, the Supreme Court acknowledged declining public trust in the judiciary by commissioning studies of foreign jury systems.<sup>130</sup> Encouraged by this decision, the Japan Federation of Bar Associations (JFBA) held national symposiums on juries in the early 1990s<sup>131</sup> and citizen groups recruited people each year to participate in mock trials.<sup>132</sup>

The origins of the *saiban-in*, however, cannot be directly traced to these civil activities. Instead, the *saiban-in* grew out of a government-driven reform movement aimed at strengthening the rule of law. After the burst of the financial bubble in 1989, the government embarked on a major renovation of the country's social, economic, and political arenas.

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<sup>127</sup> See Daniel H. Foote, *From Japan's Death Row to Freedom*, 1 PAC. RIM. L. & POL'Y J. 11 (1992) (discussing four cases in which innocent individuals were sentenced to death based on faulty findings of fact).

<sup>128</sup> See Baishin saiban wo kangaeru kai Homepage, <http://www.baishin.com> (last visited May 10, 2009) (examining various options for incorporating lay participation into the criminal justice system); Baishin seido wo fukkatsu suru kai Homepage, <http://www.baishin.sakura.ne.jp> (last visited May 10, 2009) (advocating a full jury system). See also Anna Dobrovolskaia, *An All-Laymen Jury System Instead of the Lay Assessor (Saiban-in) System for Japan? Anglo-American-Style Jury Trials in Okinawa Under the U.S. Occupation*, 12 J. JAPAN. L. 57, 63-64 (2007) (providing an overview of Japanese organizations that promote all-layperson juries).

<sup>129</sup> Baishin wo kangaeru kai Homepage, *Naze baishin saiban ka [Why Jury Trials?]*, <http://www.baishin.com/01kiso/index.htm> (last visited May 10, 2009).

<sup>130</sup> See Maruta, *supra* note 3, at 220.

<sup>131</sup> See *id.* (explaining how the JFBA considered reintroduction of jury trials in detail during the 13th and 14th Judicial Symposiums in 1990 and 1992, respectively).

<sup>132</sup> See Dobrovolskaia, *supra* note 118, at 63.

Japan's much hailed system of administrative guidance, in which highly trained bureaucrats used an array of extra-legal carrots and sticks to persuade regulated parties to adopt administrative goals, was blamed for the economic crisis.<sup>133</sup> The Administrative Procedure Act<sup>134</sup> and new laws involving freedom of information<sup>135</sup> increased the transparency of bureaucratic decisions and made it easier for plaintiffs to challenge government decisions. Reforms to the electoral system in 1994 expanded judicial supervision of elections.<sup>136</sup> Corporate reforms helped protect shareholder rights.<sup>137</sup> A small claims procedure was introduced and judges were empowered to order businesses to disclose documents.<sup>138</sup> In 1998, the Civil Procedure Code was amended to speed up trials and make litigation more attractive.<sup>139</sup>

Underlying all these changes was an expanded role for the judiciary in managing disputes. Thus the final "linchpin" of the country's reformist drive became judicial reform and in 1999 the government began soliciting opinions on what it should include.<sup>140</sup> Recognizing the first major opening for judicial reform in over fifty years, groups ranging from political parties and business associations to legal organizations and domestic think tanks quickly submitted their proposals.<sup>141</sup> As the draft of

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<sup>133</sup> Daniel H. Foote, *Introduction and Overview*, in *LAW IN JAPAN: A TURNING POINT*, at xxix (Daniel H. Foote ed., 2007).

<sup>134</sup> Gyōsei tetsuzuki hō [Administrative Procedure Act], Law No. 88 of 1993.

<sup>135</sup> See, e.g., Gyōsei kikan no hoyu suru jyōhō no kōkai ni kan suru hōritsu [Law Concerning Access to Information Held by Administrative Organs], Law No. 42 of 1999.

<sup>136</sup> See Steven R. Reed, *Evaluating Political Reform in Japan: A Midterm Report*, 3 *JAPANESE J. POL. SCI.* 243, 246 (2002) (explaining *renza-sei*, or the court's ability to invalidate election results if "a relative, campaign manager, or 'political secretary' is found guilty of violating electoral laws").

<sup>137</sup> See, e.g., Mark D. West, *Why Shareholders Sue: The Evidence from Japan*, 30 *J. LEGAL STUD.* 351, 355-56 (2001) (discussing how a reduction in litigation fees in 1993 removed the "biggest roadblock to shareholder litigation").

<sup>138</sup> Shōzo Ōta, *Reform of Civil Procedure in Japan*, 49 *AM. J. COMP. L.* 561, 570 (2001) (noting exemptions to compelled discovery for trade secrets and privacy concerns).

<sup>139</sup> *Id.* at 564-65.

<sup>140</sup> Foote, *supra* note 133, at xx-xxii, xxxii.

<sup>141</sup> See, e.g., Setsuo Miyazawa, *The Politics of Judicial Reform: The Rule of Law at Last?*, 2 *ASIAN-PAC. L. & POL'Y J.* 89, 106 (2001) (discussing how the LDP, business groups led by *Keidanren*, and even the JFBA became involved in the politics of judicial reform).

the law establishing a reform council moved through the Diet, the mandate of the proposed council underwent continuous revision.

The story of the *saiban-in* begins with the mandate for the JSRC. Article 2 required the council to “clarify the role of the Japanese judiciary in the 21st century, investigate how to make it easier for the public to use, examine a system of popular participation in the judiciary, strengthen the three branches of the legal profession and determine how they should perform, and explore other policies regarding reform to the justice system, including its foundation and operation.”<sup>142</sup>

The ambiguity of the mandate—not to mention the breadth of topics it covered—handed enormous discretion to the thirteen members of the council. These members included representatives of the three branches of the legal profession (the bar, the judiciary, and the procuracy), law professors, representatives of business and labor, a civic organization, and an author.<sup>143</sup>

The members of the JSRC were charged with drafting recommendations for improving the justice system. All agreed that criminal trials took too long to resolve and that proceedings were inaccessible to the public.<sup>144</sup> In particular, the court’s reliance on dossiers was said to inhibit public understanding. Lay participation would necessitate shorter trials and replace the dossier-based trial procedure with live testimony and oral arguments, thereby opening up the workings of the trial to the eyes of the public.<sup>145</sup> A consensus quickly arose to introduce some sort of jury system and to restrict its domain, at least initially, to criminal trials.

### B. *Rationales for Lay Participation*

The primary argument for lay participation advanced in the JSRC centered on a perceived disparity between the concerns of the judiciary and those of the public. Critics alleged that justice officials were excessively insulated from the public and made decisions that lacked

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<sup>142</sup> Shihō seido kaikaku shingikai secchihō [Law Establishing the Justice System Reform Council], Law No. 68 of 1999, art. 2.

<sup>143</sup> Foote, *supra* note 133, at xxi.

<sup>144</sup> See generally JSRC Meeting Minutes, *supra* note 37.

<sup>145</sup> Foote, *supra* note 133, at xxxiii.

common sense.<sup>146</sup> As a result, public trust in the judiciary had declined. The notion that professional judges are out of touch with common social ideas and public morals is familiar to students of juries in Western countries, but the point has particular salience in Japan. The backgrounds and experiences of Japanese judges are strikingly homogenous.<sup>147</sup> Many hail from the same elite high schools and universities.<sup>148</sup> Upon graduation, they study a uniform curriculum at the same legal training institute and spend most of their careers serving as judges.<sup>149</sup> Long working hours afford them little time to socialize outside their field.<sup>150</sup> A judicial rotation system which sends judges to different regions of the country every three years further divorces them from the communities in which they work.<sup>151</sup>

JSRC members agreed that this distance from the public diminished the quality of the justice system, but differed on how it impacted public trust and why lay participation would improve the judiciary. Broadly defined, two groups emerged. One group, which included all members of the JSRC except those from the Court and Ministry of Justice, believed that this insulation had generated a host of defects that in turn undermined the legitimacy of the courts. For purposes of clarity I call members of this group “reformers.” Citing the high approval rate for warrant requests, Tsuyoshi Takagi derided judges as mere “palanquin bearers” for investigators.<sup>152</sup> In trial proceedings, he claimed that judges displayed no human warmth toward victims and rendered decisions at odds with public sentiment.<sup>153</sup> Legal professionals monopolized the legal system as a whole, charged Kōichiro Fujikura, and gave no role to the public in realizing the law.<sup>154</sup> As a result, the public did not understand

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<sup>146</sup> *Id.* at xxxiv.

<sup>147</sup> Anderson & Nolan, *supra* note 6, at 942.

<sup>148</sup> *Id.*

<sup>149</sup> Haley *supra* note 18, at 102-03.

<sup>150</sup> Anderson & Nolan, *supra* note 6, at 942.

<sup>151</sup> *Id.*

<sup>152</sup> Tsuyoshi Takagi, Kokumin no shihō sankā ni tsuite [Regarding Citizen Participation in Law], JSRC 31st Meeting Minutes add. 2 (Sept. 18, 2000), available at <http://www.kantei.go.jp/jp/sihouseido/dai31/31betten2.html> (last visited May 10, 2009).

<sup>153</sup> *Id.*

<sup>154</sup> Kōichiro Fujikura, Hō no jitsugen ni okeru shijin no yakuwari [The Role of Private Citizens in the Realization of the Law], JSRC 43d Meeting Minutes add. 1 (Jan.

what the courts were for.<sup>155</sup> Kōzō Fujita, a former High Court judge turned attorney, indicted the philosophical foundation of the judiciary and argued that it should be based on the principle of popular sovereignty.<sup>156</sup> How exactly judicial thinking differed from the public's was never specified. Nevertheless, bridging the gap between lay and professional thinking, however that gap was imagined, became the chief argument for lay participation. Though critics were split on whether lay persons should supplement or replace professional judges—in other words, whether to introduce mixed or all-lay juries—all agreed that reducing the influence of judges would improve the quality of criminal justice.

The Supreme Court and the Ministry of Justice acknowledged that bridging the gap between lay and professional opinions would improve the justice system, but adamantly maintained that judges should remain the primary adjudicators. In defending the judiciary, the Supreme Court articulated a vision of the justice system that resemble Damaška's hierarchical ideal.<sup>157</sup> According to this view, Japan's unitary system is marked by consistency and homogeneity, which have in turn provided fair and predictable decisions. The aim of the judiciary, the Court argued, was to discover the truth and clarify the result to the public.<sup>158</sup>

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9, 2001), available at <http://www.kantei.go.jp/jp/sihouseido/dai43/43betten1.html> (last visited May 10, 2009).

<sup>155</sup> *Id.*

<sup>156</sup> JSRC 12th Meeting Minutes (Feb. 8, 2000), available at <http://www.kantei.go.jp/jp/sihouseido/dai12/12gaiyou.html> (last visited May 10, 2009).

<sup>157</sup> The Ministry of Justice and members of the ruling Liberal Democratic Party (LDP) endorsed the Court's opinion. See Ministry of Justice, *Shihō seido no genjō to kaikaku no kadai* [The Current State of the Legal System and Issues for Reform], JSRC 8th Meeting add. (Dec. 8, 1999), available at <http://www.kantei.go.jp/jp/sihouseido/dai8append/append1.html> (last visited May 10, 2009) (contending that the Ministry must preserve the basic structure and characteristics of Japanese justice, including the judicial obligation to discover the truth); LDP JUDICIAL SYSTEM INVESTIGATION COUNCIL, CERTAIN STEP TOWARD A 21ST CENTURY JUDICIARY: AIMING FOR A JUDICIARY TRUSTED BY THE PEOPLE AND THE WORLD (May 18, 2000), cited in Noboru Yanase, *Saiban-in hō no rippō katei (I)* [The Legislative History of the Saiban-in Law, pt. I], 8 SHINSHŪ DAIGAKU HŌGAKU RONSHŪ 99, 116 (2007) (reflecting the LDP's fear that a full jury system would lead to unstable decisions and a lack of uniformity).

<sup>158</sup> Sup. Ct., *Kokumin no shihō sankā ni kansuru saibanshō no iken* [Opinion of the Judiciary on Citizen Participation in the Legal System], JSRC 30th Meeting add. (Sept.

Japanese criminal justice may operate under a party-led process modeled on the American adversarial system, but the demands of discovering truth were so high that judges must play the role of guardian in supplementing the deficiencies of the parties' activities.<sup>159</sup> Apart from problems with trial length and transparency, the Court contended, no one could dispute that the judiciary delivered quality justice.<sup>160</sup>

The Court agreed with critics that the most important challenge facing the judiciary was winning the trust of the public. This had become more difficult, the Court contended, not because of any defect in the judiciary, as its critics argued, but because, as living patterns changed, the values of the public had diversified.<sup>161</sup> While this argument, as presented to the JSRC, was never explained in detail, it seems the court believed that social forces had transformed a once homogenous Japanese society into one of diverse values and perspectives. The only way for judicial decisions to accord with this new diversity of opinions was to provide a representative sample of lay citizens a hand in deliberations. Judicial decisions could then become more firmly grounded in common sense, and secure the public's trust.<sup>162</sup> Again, the Supreme Court did not specify in which areas judicial perspectives diverged from those of the public. Nor did it explain how what they perceived as a decline in public trust had affected the judiciary's operation. The Ministry of Justice left these same questions unanswered when its representatives offered an identical diagnosis of the justice system.<sup>163</sup> In the Conclusion, I speculate on the areas in which the opinions of the public and the judiciary diverge, and why justice officials were concerned about the difference.

For the Supreme Court, the goal of justice system reform was to strengthen the legitimacy of the judiciary by injecting lay opinions into

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12, 2000), available at <http://www.kantei.go.jp/jp/sihouseido/dai30/30bessi5.html> (last visited May 10, 2009).

<sup>159</sup> Sup. Ct., *21 Seiki no shihō seido wo kangaeru: shihō seido kaikaku ni kan suru saibansho no kihontekina kangaekata* [Thinking About the Judicial System for the 21st Century: A Basic Conception of the Courts with Respect to Judicial Reform] (Dec. 8, 1999), available at [http://www.courts.go.jp/about/kaikaku/sihou\\_21.html](http://www.courts.go.jp/about/kaikaku/sihou_21.html) (last visited May 10, 2009).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> Ministry of Justice, *supra* note 157.

deliberations while at the same time maintaining a system of justice in which the discovery of the truth is entrusted to professional judges. Achieving this balance required certain limits on the role for lay participants. Unsurprisingly, the Supreme Court opposed an all-lay jury system. An American-style jury system would retreat from the truth discovering function of the courts, it claimed, because no reasons would be attached to jury decisions and outside observers could not guarantee the probity of the deliberations. Without a written record, determining how jurors reconciled two pieces of contradictory evidence would be impossible.<sup>164</sup> In an apparent rebuke to Fujita's claim that juries should be based on popular sovereignty, the Court claimed that under such a system the jury's recognition of facts would become the "voice of the emperor" and appeals would not be permitted.<sup>165</sup> Seeking to reconcile lay participation with what was perceived as the duty of professionals to ascertain the truth, the Court proposed a jury system in which lay persons could participate in proceedings and express their opinion but were denied any voting power in decisions. This proved unacceptable to the majority of the council and the Court quickly shifted its support to a mixed jury system to stave off any further erosion of judicial influence.

### C. *The Function of the Saiban-in*

The rationale for juries settled on by the council laid the groundwork for a jury system that accommodated the core arguments of both sides. For reformers, this was injecting a measure of common sense and public values into court decisions by giving lay persons a determining power over fact-finding and sentencing. For justice officials, this amounted to preserving a role for professional judges in decision-making and, critically, providing a justification for them to educate lay jurors in the conventions of the judiciary and its notions of justice. The council achieved this by emphasizing cooperation and exchange of knowledge. The final report of the JSRC states:

The significance of the involvement of *saiban-in* is that, while judges and *saiban-in* share responsibilities, the judges who are legal specialists and the *saiban-in* who are laypersons will share their respective

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<sup>164</sup> Sup. Ct., *supra* note 159.

<sup>165</sup> *Id.*

knowledge and experience through mutual communication and reflect the results thereof in their judgments. This significance applies not only to fact finding and decisions on guilt, but in the same way to decisions on sentencing, as to which the public takes a strong interest.<sup>166</sup>

Details from the JSRC meetings clarify this. The purpose of a jury system, posited Kōichiro Fujikura, is to facilitate communication between the public and legal professionals, each of whom fulfills fixed roles.<sup>167</sup> Lay judges are valued for their fresh perspective and knowledge of common social ideas.<sup>168</sup> For example, lay persons and professionals will look at a nervous witness and likely evaluate that behavior very differently.<sup>169</sup> Lay participation will lead to more robust deliberation, which in turn will yield a better quality of justice.<sup>170</sup> Because their participation ensures that the decisions of the court meet public expectations and trust, lay persons must play a substantive role in decisions.<sup>171</sup> The legal profession is obligated to behave toward the lay judges as legal specialists.<sup>172</sup> Their role is to help the public understand the law by explaining their decision-making process.<sup>173</sup> The goal is to create a system that can be appropriately called a people's court that also reflects the consciousness of the legal professionals.<sup>174</sup>

By casting judges in the role of legal educators for the public, the JSRC report provided an opening for the Court to maintain what it believed were the essential features of the justice system. This opening was seized in 2005 when researchers at the Supreme Court began work on drafting the details of the jury system. Article 2 of the Supplementary Provisions of the Lay Assessor Act empowered the Supreme Court to articulate the details of the *saiban-in* system's operation by clarifying such things as the duties of lay assessors in deliberations and the

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<sup>166</sup> JSRC RECOMMENDATIONS, *supra* note 2, at ch. IV, pt. 1-1(1)a.

<sup>167</sup> Fujikura, *supra* note 154.

<sup>168</sup> *Id.*

<sup>169</sup> JSRC 31st Meeting Minutes (Sept. 18, 2000), *available at* <http://www.kantei.go.jp/jp/sihouseido/dai31/31gaiyou.html> (last visited May 10, 2009).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> Fujikura, *supra* note 154.

<sup>174</sup> JSRC 31st Meeting Minutes (Sept. 18, 2000), *available at* <http://www.kantei.go.jp/jp/sihouseido/dai31/31gaiyou.html> (last visited May 10, 2009).



significance of their participation.<sup>175</sup> Throughout their meetings, researchers consistently and unanimously affirmed that the introduction of lay persons should not require any departure from what it expressed in the JSRC as the core features of the judiciary. All researchers agreed, for example, that professional judges still retained the duty to determine the truth and ensure consistency in decision-making.<sup>176</sup> For this reason, judges would provide lay assessors with a detailed sentencing history in similar cases. Without this guidance, researchers unanimously reasoned, prosecutors could too easily lure jurors into adopting the sentences that they thought appropriate.<sup>177</sup>

#### V. THE ENDURING MYTH OF THE IMMATURE JAPANESE PUBLIC

The notion that judges should serve as educators for lay judges was supported by the long-standing belief among Japanese elites that the average Japanese citizen lacks the political maturity to participate in governance. It was this notion that was used to torpedo previous attempts to introduce lay participation in criminal justice. In the 1870s, Gustave Boissonade, the French jurist and legal advisor to the Meiji oligarchs, repeatedly tried to establish a Western-style jury system, first in early drafts of the criminal code, and then in a preliminary version of the Constitution.<sup>178</sup> Boissonade argued that juries would convince Western powers that Japanese justice was modern and impartial.<sup>179</sup> In both attempts, he was frustrated by officials who argued that the public was not ready for such responsibility.<sup>180</sup>

This meme reemerged in the immediate post-war period when SCAP officials recommended juries as part of their wide-ranging reform of Japanese justice.<sup>181</sup> The Ministry of Justice resisted, citing the failure of

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<sup>175</sup> Anderson & Saint, *supra* note 1, at 236-38.

<sup>176</sup> Yukihiro Imasaki, *Saiban-in seido dōnyū to keiji saiban no gaiyō* [Outline on the Introduction of the Lay Assessor System and Criminal Trials], HANREI TIMES, Nov. 15, 2005, at 5.

<sup>177</sup> *Id.* at 7.

<sup>178</sup> See Schmidt, *supra* note 10, at 689.

<sup>179</sup> *Id.* at 689 n.78.

<sup>180</sup> *Id.*

<sup>181</sup> See OPPLER, *supra* note 23, at 146.

the pre-war juries and locating the cause in the public's immaturity.<sup>182</sup> American reformers, eventually endorsing this view, did not press the point.<sup>183</sup>

The image of the lay Japanese as immature took on a slightly different guise and gained a new measure of respectability in the 1960s with the publication of Takeyoshi Kawashima's book, "The Legal Consciousness of the Japanese."<sup>184</sup> Kawashima, regarded as the founder of sociology of law in Japan, presented a picture of the Japanese as excessively deferential and inclined to compromise over confrontation. Asking why, in comparison to the West, the Japanese eschewed litigation, he argued that the Japanese possess a weak legal consciousness and have a cultural preference for harmony.<sup>185</sup> Subsequent scholarship has undermined this view and highlighted structural features of the justice system that discourage litigation.<sup>186</sup> Nevertheless, Kawashima's image of the Japanese persists among Japanese elites and informs some Western observers who question whether the Japanese possess the cultural inclination to argue that juries require.<sup>187</sup>

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 147.

<sup>184</sup> TAKEYOSHI KAWASHIMA, *NIHONJIN NO HŌISHIKI* [THE LEGAL CONSCIOUSNESS OF THE JAPANESE] (1967).

<sup>185</sup> *See id.* at 137-43.

<sup>186</sup> *See, e.g.*, John Owen Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359, 389-90 (1978) (concluding that institutional factors, such as the failure of Japan to provide more lawyers and judges, explain the country's low litigation rates); J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263, 289-90 (1989) (theorizing that the predictability and inefficiency of the Japanese justice system lead many to settle disputes out of court); Takao Tanase, *The Management of Disputes: Automobile Accident Compensation in Japan*, 24 LAW & SOC'Y REV. 651, 679 (1990) (arguing that most disputes in Japan are solved between the parties and without lawyers and citing the non-court resolution of automobile accidents as support).

<sup>187</sup> *See, e.g.*, Lester W. Kiss, *Reviving the Criminal Jury in Japan*, 62 LAW & CONTEMP. PROBS. 261, 273-81 (1999) (concluding that the Japanese desire to maintain harmony might make argument difficult, but that the homogeneity of society, education level of citizens, and general agreement with the laws work in favor of a jury system); Robert Bloom, *Jury Trials in Japan*, 23-27 (Boston College Law Sch. Legal Studies Research Paper Series, Research Paper No. 66, 2005), available at <http://ssrn.com/abstract=688185> (last visited May 10, 2009) (arguing that Japanese

This image of the immature lay Japanese reemerged throughout the JSRC discussions. In the 31st meeting, doubts arose as to whether the democratic consciousness of the Japanese, which had been cultivated in a mere fifty years of democratic government, was mature enough to support a full jury system.<sup>188</sup> In an addendum to that meeting, Hiroji Ishii noted that even if the public accepted the burden of a jury system, some method must be found for cultivating the public's moral sense beginning in childhood. Otherwise, lay jurors would be easily swayed by emotion and misunderstand their role.<sup>189</sup>

In the 32nd meeting, one member compared the lay Japanese unfavorably with their Western counterparts. While in the West a public consciousness had developed over centuries, the Japanese had been dependent on a governing authority. They thus had no training in expressing their opinion. As one member put it, “[t]hey cannot even scold their own children.”<sup>190</sup> An early draft on the lay assessor bill obligating the lay persons to voice an opinion during deliberations reflected the fear that lay assessors would be too passive to properly undertake their roles.<sup>191</sup>

The JSRC's final report revives the belief that average Japanese are not yet sufficiently independent in mind to participate unaided in public affairs. “[I]t is incumbent on the people to break out of the excessive dependency on the state that accompanies the traditional consciousness of being governed objects, develop public consciousness within themselves, and become more actively involved in public affairs.”<sup>192</sup>

This assumption of political immaturity provided judges with a convenient opportunity to fulfill their roles as legal educators. During the Supreme Court's meetings on the *saiban-in*, researchers justified a larger role for judges by reference to relieving the burden on the public

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“[h]ierarchy, harmony, and group identity” will stifle jury deliberation unless safeguards are put in place).

<sup>188</sup> Hiroji Ishii, *Kokumin no shihō sankā (yōshi)* [Citizen Participation in the Judicial System (Key Concepts)], JSRC 31st Meeting add. (Sept. 18, 2000), available at <http://www.kantei.go.jp/jp/sihouseido/dai31/31betten1.html> (last visited May 10, 2009).

<sup>189</sup> *Id.*

<sup>190</sup> JSRC 32d Meeting Minutes (Sept. 26, 2000), available at <http://www.kantei.go.jp/jp/sihouseido/dai32/32gaiyou.html> (last visited May 10, 2009).

<sup>191</sup> Anderson & Nolan, *supra* note 6, at 954.

<sup>192</sup> JSRC RECOMMENDATIONS, *supra* note 2, at ch. IV. See also *id.*, ch. I, pt. 2–3.

and filling holes in their knowledge.<sup>193</sup> Through their role as educators, judges could ensure standards they had spent years mastering.

## VI. THE STRUCTURE OF THE JURY SYSTEM

In this section, I review the operation of the system and then explain how it combines the benefits of lay participation without abandoning a commitment to uniform standards for fact-finding and decision making.

### A. *The Lay Assessor Act*

The law establishing and governing jury trials is the Lay Assessor Act. Enacted by the Diet on May 28, 2004, the law calls for mixed panels of professional judges and lay jurors to determine the guilt and sentences of persons charged with serious crimes.<sup>194</sup> The details of the jury system have yet to be confirmed by the Supreme Court,<sup>195</sup> and modifications will likely occur after its scheduled evaluation in 2012.<sup>196</sup> Nevertheless, a broad outline of the jury system is visible.

Three judges and six lay assessors will hear contested cases; one judge and four lay assessors, uncontested ones.<sup>197</sup> Judges and jurors are responsible for finding facts, applying laws, and determining sentences.<sup>198</sup> Judges retain the exclusive privilege to interpret law and determine procedure.<sup>199</sup> Decisions are reached through a majority vote and require that at least one judge and one lay juror assent.<sup>200</sup> In the event this requirement cannot be met in sentencing decisions, the number

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<sup>193</sup> See Yukihiro Imasaki, *Saiban-in seido ni okeru shinri oyobi seido un'eijyō no kadai* [Adjudication and Administrative Issues in the Lay-Assessor System], HANREI TIMES, Feb. 1, 2008 (discussing the necessary level of explanation to be provided by judges on the particular elements of criminal law and procedure).

<sup>194</sup> Anderson & Saint, *supra* note 1, at 233.

<sup>195</sup> See Lay Assessor Act *supp. prov.*, art. 2(1) (calling for the government and Supreme Court to elaborate on “lay assessors’ duties in deliberations and the hearing of cases, the procedure for selecting lay assessors, and the significance of citizen participation as lay assessors in trials”).

<sup>196</sup> *Id.* *supp. prov.*, art. 8.

<sup>197</sup> *Id.* art. 2(2).

<sup>198</sup> *Id.* art. 6(1).

<sup>199</sup> *Id.* art. 6(2).

<sup>200</sup> *Id.* art. 67(1).

of opinions for the harshest sentence will be added to the number of opinions for the next harshest sentence until a majority is reached that includes both a judge and juror.<sup>201</sup> Who decides which sentence is harshest and how the votes are counted is yet to be determined. Unlike the German mixed jury system, jurors sit for only one case.<sup>202</sup> Both judges and lay jurors can question witnesses, the defendant, and the victim.<sup>203</sup>

Jurors will be drawn randomly from the electoral roles within municipal jurisdictions.<sup>204</sup> This fixes the minimum age for jury service at twenty years old.<sup>205</sup> Those who have failed to complete compulsory education (up to junior high school) cannot serve.<sup>206</sup> Politicians and members of the legal profession are also excluded.<sup>207</sup> Lay juror candidates will be screened on the basis of information they provide on a questionnaire and in a selection proceeding,<sup>208</sup> and will be subject to limited *voir dire* vetting by the prosecution and defense.<sup>209</sup>

Juries will hear only a fraction of the criminal cases processed in Japan. In 2004, public prosecutors disposed of 2,183,811 cases.<sup>210</sup> 34.5% were sent to summary courts, where punishment is limited to minor fines and short-term imprisonment.<sup>211</sup> 10.9% were referred to family courts.<sup>212</sup> 44.7% received suspensions of prosecutions and 2.9% were not prosecuted for a variety of reasons.<sup>213</sup> In only 6.8% of cases were suspects (148,939) indicted.<sup>214</sup> Of those indicted, only 2.2%, or 3,308 cases, would have received jury trials.<sup>215</sup> The bulk of criminal cases will remain the exclusive province of legal professionals. This is similar to

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<sup>201</sup> *Id.* art. 67(2).

<sup>202</sup> Anderson & Saint, *supra* note 1, at 234.

<sup>203</sup> Lay Assessor Act arts. 56-59.

<sup>204</sup> *Id.* art. 21.

<sup>205</sup> Anderson & Nolan, *supra* note 6, at 992.

<sup>206</sup> Lay Assessor Act art. 14.

<sup>207</sup> *Id.* art. 15.

<sup>208</sup> *Id.* arts. 30-34.

<sup>209</sup> *Id.* art. 36.

<sup>210</sup> WHITE PAPER ON CRIME 2005, *supra* note 108, at pt. 2, ch. 2, sec. 4.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> WHITE PAPER ON CRIME 2005, *supra* note 97, at pt. 1, ch. 1, sec. 4.

the U.S., where juries hear only about 2% of felony dispositions.<sup>216</sup>

The introduction of lay participants demands faster trials and more accessible court proceedings, and officials have responded with changes to the pre-trial and trial procedures. Previously, trials for serious crimes extended over many months. In 2005, trial courts averaged 2.4 hearings over a 2.8 month period when defendants confessed.<sup>217</sup> In contested cases, 7.3 hearings on average were held over a 9.5 month period.<sup>218</sup> To speed up proceedings and accommodate lay jurors, a new pre-trial was introduced in 2005.<sup>219</sup> The prosecution and defense now consult with the presiding judge before the trial to identify the disputed points for the jury to decide. The focus of trials will also shift from written material to oral argument and live testimony. Currently, prosecutors collect evidence, interview witnesses, procure confessions, note evidence of offender remorse (if any) and compile their findings in a massive dossier that forms the basis for a judge's verdict and sentencing.<sup>220</sup> To ensure that proceedings are accessible to lay jurors, *saiban-in* trials will differ in several respects. In place of dossiers, the prosecution and defense will present their evidence orally. Witnesses and the accused will be cross-examined in public. Prosecutors and defense lawyers have begun honing their public speaking skills and courtrooms have been outfitted with screens and other devices to make the presentation of evidence more accessible to the lay judges.<sup>221</sup> Still, prosecutors will create a dossier (for

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<sup>216</sup> See G. Thomas Munsterman & Shauna Strickland, *Jury News*, 19 CT. MANAGER 50, 51 (2004) (noting that by 2002, the trial rate for felonies had fallen to 22 trials for every 1,000 dispositions).

<sup>217</sup> See Wilson, *supra* note 6, at 845 (citing SUP. CT., SAIBAN-IN SEIDO NO TAISHŌ TO NARU JIKEN NO JINNINSUU, GENZAI NO HEIKIN KANRI KIKAN OYOBI HEIKIN KAITEI KAISUU-HEISEI 17NEN [NUMBER OF NECESSARY LAY JUDGES, AVERAGE NUMBER OF INVESTIGATIONS, AND AVERAGE NUMBER OF TRIALS IN 2005]).

<sup>218</sup> *Id.*

<sup>219</sup> Keiji soshōhō to no ichibu wo kaisei suru hōritsu [Law to Amend the Criminal Procedure Code and Other Laws], Law No. 62 of 2004.

<sup>220</sup> See JOHNSON, *supra* note 85, at 36, 52.

<sup>221</sup> See, e.g., Posting of Robert E. Precht to Foley Square: Thoughts on Legal Reform in China and Japan, Article on Trial Techniques for Japanese Lawyers, [http://www.foleysquare.com/my\\_weblog/2008/03/article-on-tria.html](http://www.foleysquare.com/my_weblog/2008/03/article-on-tria.html) (Mar. 11, 2008) (last visited May 10, 2009); Posting of Robert E. Precht to Foley Square: Thoughts on Legal Reform in China and Japan, Bengoshi Create Opening Statements, [http://www.foleysquare.com/my\\_weblog/2007/12/bengoshi-work-o.html](http://www.foleysquare.com/my_weblog/2007/12/bengoshi-work-o.html) (Dec. 24, 2007) (last visited May 10, 2009) (depicting lawyers working on opening statements).

determining the indictment) and some have discussed providing jurors with shortened versions of it.<sup>222</sup>

At the close of the trial, the panel of judges and lay jurors will retire to deliberate. The Lay Assessor Act provides little guidance for how deliberation should proceed. This question was left to researchers at the Supreme Court. Though every detail is not finalized, summaries of their meetings indicate that some important decisions have already been made.<sup>223</sup> Researchers determined that jury deliberations should open with undirected, free conversation about the trial and evidence, after which judges can clarify disputed points, review the evidence, and explain the law.<sup>224</sup> Great emphasis was placed on guarding against the possibility of judges leading lay jurors to the judges' interpretation of events.<sup>225</sup> For example, judges will be asked to state their opinion only after the lay jurors have stated theirs.<sup>226</sup> In the case of a disagreement between a judge and the lay jurors, if the judge can recognize the lay interpretation as valid, she should defer to the jurors.<sup>227</sup> Judges should state only their opinion and avoid actively persuading jurors, especially at the beginning stages of the deliberation.<sup>228</sup> However, if a judge cannot compromise on a disputed point, she is permitted to vigorously argue her view.<sup>229</sup> Judges have begun practicing in mock trials,<sup>230</sup> though it remains to be seen how they will behave in real trials. There is some indication that the Court is extremely sensitive to the perception of judicial domination. During an interview with the author, one Kansai judge recalled being scolded by his superiors for attempting to persuade

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<sup>222</sup> Interview with Kansai judge, July, 2008.

<sup>223</sup> For a detailed account of these meetings, see Imasaki, *supra* note 193; Yukihiro Imasaki, *Saiban-in saiban ni okeru fukuzatsu konnan jiken no shinri* [*The Adjudication of Complex Issues in Lay-Assessor Trials*], HANREI TIMES, Dec. 1, 2006 [hereinafter Imasaki, *Adjudication of Complex Issues*]; Imasaki, *supra* note 176.

<sup>224</sup> Imasaki, *supra* note 176, at 6-7.

<sup>225</sup> See generally *id.*; Imasaki, *Adjudication of Complex Issues*, *supra* note 223, at 13.

<sup>226</sup> Imasaki, *supra* note 176, at 6.

<sup>227</sup> Imasaki, *Adjudication of Complex Issues*, *supra* note 223, at 13.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> See, e.g., Norimitsu Onishi, *Japan Learns the Dreaded Task of Jury Duty*, N.Y. TIMES (July 16, 2007) (discussing the overall experience of mock trials in Japan).

a lay juror.<sup>231</sup>

When a defendant was found guilty, researchers at the Supreme Court were unanimous in deciding to present jurors with a list of sentences given to defendants in similar cases in the past.<sup>232</sup> The author was able to obtain a sample of this document used in a mock trial on the condition that it not be published.<sup>233</sup>

The top of the sample features a summary of the facts of the crime. In this case, it was a street robbery resulting in injury, committed by a single assailant without a weapon. Past offenses and the victim's recovery time are also included. Following this is a range of past sentences given to eleven similar offenses, displayed as a chart and graph. A brief description of each case is provided, along with information on the defendant's criminal record, whether compensation or an apology was offered to the victim, and the victim's attitude toward the defendant. Jurors are not required to conform their decisions to past standards, however, and may decide any sentence within the law. At the close of the deliberations, one of the presiding judges will compose a detailed document listing which facts were found to be true, how the law was applied, and what factors led to the sentence.<sup>234</sup> In line with common practice in civil law countries, both acquittals and convictions can be appealed.

### B. *Empowering Lay Persons, Maintaining Professional Standards*

How does the *saiban-in* system balance the power of elite and lay participants? Looking over the Lay Assessor Act and the details elaborated by the Supreme Court, the *saiban-in* system affords lay judges substantial discretion to find facts, form and articulate their assessment of the evidence, and determine the final outcome of a case. This power is supported formally by the equality of lay and professional jurors stated

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<sup>231</sup> Interview with Kansai Judge, July, 2008.

<sup>232</sup> Imasaki, *supra* note 176, at 7.

<sup>233</sup> Presumably, judges fear criminals will exploit their knowledge of the details of the court's punishment standards. This perhaps may partly explain the regulation barring lay judges from publicly discussing their jury experience even after the trial ends. Lay Assessor Act, arts. 9(2), 70, 79.

<sup>234</sup> Imasaki, *supra* note 176, at 12–13.



in the Lay Assessor Act,<sup>235</sup> and substantively in the structure of the *saiban-in* and the guidelines on judicial behavior.<sup>236</sup>

Compared to their counterparts in the United States and United Kingdom, Japanese lay assessors have much more authority to uncover facts that they believe are relevant to decision-making through their right to question witnesses, the defendant, and the victim. Furthermore, unlike jurors in the American system, they possess a measure of direct control over sentencing.

The composition of the *saiban-in* and rules on decision-making also afford Japanese lay judges more influence than their equivalents in the German mixed jury system, upon which the *saiban-in* was partly based. In Germany, mixed panels hearing serious crimes are composed of two lay judges and two to three professionals.<sup>237</sup> Decisions that disadvantage the accused require a two-thirds majority vote.<sup>238</sup> In Japan, lay assessors outnumber judges by at least two to one in both types of panels and require the consent of only one judge in order to reach a decision.<sup>239</sup> Guidelines on deliberation also give more power to lay judges than their counterparts in Germany. While the Japanese Supreme Court has emphasized cooperation and equality between judges and lay jurors,<sup>240</sup> the German Code of Criminal Procedure empowers judges to lead debate by putting questions to jurors.<sup>241</sup> Furthermore, unlike lay participants in *saiban-in* trials, German lay jurors may not view the dossier that forms

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<sup>235</sup> Lay Assessor Act art. 62.

<sup>236</sup> References to “guidelines on judicial behavior” indicate decisions on *saiban-in* procedures that came out of Supreme Court discussions. See, e.g., Imasaki, *supra* notes 176, 193; Imasaki, *Adjudication of Complex Issues*, *supra* note 223 (summarizing the Supreme Court meetings).

<sup>237</sup> Gerichtsverfassungsgesetz [GVG] [Court Organizational Statute] May 9, 1975, Bundesgesetzblatt, Teil I [BGBI. I] 1077, as amended, § 74, ¶ 1, § 76 ¶ 2, sentence 2 (F.R.G.). See also Thomas Weigend, *Germany*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 243, 263 n.118 (Craig M. Bradley ed., 2d ed., 2007) (noting that if the victim of a serious crime survives the attack, the court can sit with two instead of three professional judges).

<sup>238</sup> *Id.* at 263-64.

<sup>239</sup> Lay Assessor Act art. 2.

<sup>240</sup> Imasaki, *supra* note 176.

<sup>241</sup> See John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 6 AM. B. FOUND. RES. J. 195, 200 (1981) (indicating that the presiding judge leads the “*in camera*” proceedings and “puts the questions and takes the votes” pursuant to the statute).

the basis of the judges' interrogation and thus they rarely pose questions at trial.<sup>242</sup> The Japanese may have a reputation for passivity, but it was the meekness of the German lay juror that was criticized in the JSRC deliberations.<sup>243</sup>

Lay participation is further enhanced by the presence of rules that appear to implicitly acknowledge the flaws that undermined the efficacy of the country's first jury system. When cases are eligible for *saiban-in* trials, juries are mandatory. Defendants cannot opt for all-judge panels as they could in the past. The requirement that all decisions win the consent of at least one judge and one juror means that judges cannot disregard the opinions of lay assessors, a common practice under the first system. The composition of *saiban-in* juries will also be more representative than those in imperial Japan. Previously, juries were composed entirely of men over thirty.<sup>244</sup> Today, candidates will be drawn from the electoral roles, giving women and the young opportunities to serve. This will, however, exclude large numbers of ethnic Koreans and Chinese who reside in Japan as permanent residents, but are denied suffrage rights.<sup>245</sup> An extensive blacklist of types of persons ineligible to become lay assessors—including legal professionals and government officials—will also prevent the sort of elite capture that has occurred in the German system and in Japan's selection of summary court judges.<sup>246</sup>

Skeptics might counter that despite these rules, other provisions provide backdoor means for judicial domination. For example, the Lay Assessor Act imposes on lay judges, but not professionals, a lifetime prohibition against disclosing the content of jury deliberations or any secrets revealed during the trial, at penalty of a fine or short-term

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<sup>242</sup> See Markus Dirk Dubber, *The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology*, 43 AM. J. COMP. L. 227, 240 (1995) (noting that reducing the number of lay participants in German jury trials would have little effect since they pose few questions and therefore do not affect trial length).

<sup>243</sup> JSRC 32d Meeting Minutes (Sept. 26, 2000), available at <http://www.kantei.go.jp/jp/sihouseido/dai32/32gaiyou.html> (last visited May 10, 2009).

<sup>244</sup> Maruta, *supra* note 3, at 216.

<sup>245</sup> Masami Itō, *Lay Judgement in Practice: Workings of a Watershed*, JAPAN TIMES, Feb. 27, 2005 (noting that under the law Japanese nationals of Korean origin will be excluded from serving).

<sup>246</sup> Lay Assessor Act arts. 14-15.

imprisonment.<sup>247</sup> The ostensible purpose is to protect the privacy of jurors and trial participants. Some speculate that this provision might also serve to discourage lay assessors from identifying judges who pressure them into adopting the “correct” view.<sup>248</sup>

The justice system’s reliance on confessions may open another door to excessive judicial influence. As mentioned before, most Japanese defendants confess. In 2007, 91.2% of defendants in district courts confessed.<sup>249</sup> This means that the vast majority of *saiban-in* trials will be uncontested cases, decided by four lay assessors and one judge. The stipulation that all decisions require the consent of at least one judge and one lay juror means that in uncontested trials the sole professional judge can effectively veto any decision on her own.

Given the woeful history of lay participation in Japan, any possibility of elite domination cannot be dismissed out of hand. However, unlike previous attempts at democratization, the judiciary has expressed its support, albeit belatedly, for the *saiban-in*, and guidelines on judicial behavior confirm their commitment to ensuring lay judges have a substantive impact on important decisions. Individuals in the Ministry of Justice, Supreme Court, and JFBA claim that in serious cases where the defendant confesses, the courts will exercise discretion to channel the case to the larger panel in order to realize the democratic ideals of the system.<sup>250</sup>

Researchers in the Supreme Court were highly sensitive to both the appearance and reality of judicial domination, and sought to devise rules for deliberation that would strengthen the impact of lay participation. Recall, for example, that judges are largely silenced at the beginning of deliberations to allow lay jurors the opportunity to form and articulate their opinions. In the case of two equally valid interpretations of the

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<sup>247</sup> *Id.* arts. 9(2), 79 (stipulating that lay assessors convicted of disclosing secrets could be fined up to ¥500,000 and/or imprisoned for up to six months).

<sup>248</sup> See Jones, *supra* note 6, at 370 (“While the confidentiality provisions may reflect a desire to protect the rights of other lay judges, they also seem designed to prevent the system from generating additional criticism of judiciary.”).

<sup>249</sup> Sup. Ct., Statistics on Criminal Cases in Japan, *supra* note 116.

<sup>250</sup> See Kent Anderson & Leah Ambler, *The Slow Birth of Japan’s Quasi-Jury System (Saiban-in Seido): Interim Report on the Road to Commencement*, 11 J. JAPAN L. 55, 67 (2006) (citing conversations with individuals who believe that even if parties agree to a smaller panel, courts will exercise discretion by referring serious matters to full panels instead of an abbreviated procedure).

facts, judges are asked to defer to the lay version. Moreover, in mock trials, officials in the judiciary have criticized judges deemed excessively disputatious.<sup>251</sup>

In short, professional judges have neither the formal power nor, at the moment at least, the inclination to direct jurors to particular conclusions. When it comes to finding facts and determining verdicts and sentences, lay assessors share the burden with judges as, at a minimum, co-equals. Considering their numerical superiority in *saiban-in* panels and the deference judges are obliged to show them during deliberation, one might say that in this capacity lay judges occupy a senior position relative to judges.

What part then do judges play? Judges appear to have two responsibilities under the *saiban-in*. As mentioned above, judges have the duty to find facts and determine verdicts and sentences. In this role, they are equal or subordinate to their lay partners. Where judges possess far more influence is in their role as legal advisers. Judges have exclusive power to determine the applicable law and procedure.<sup>252</sup> Given the public's unfamiliarity with legal terms and ideas, judges are also expected to clearly explain the law to lay jurors so they can participate in decision-making. This is particularly important because Japanese legal doctrines are extremely complicated. For example, Japanese law contains over ten different variations on the concept of "self-defense," each with a different implication for sentencing.<sup>253</sup> Professional judges will explain these definitions along with the precise meaning of terms like "*satsui*" (murderous intent) and "*sekinin nōryoku*" (criminal culpability).<sup>254</sup> Introducing these legal terms is a crucial step in teaching laypersons how to evaluate cases according to court-determined standards. Merely knowing these definitions invariably influences the evidence on which one focuses. Consider the term "reckless driving." An official definition might turn on a certain number of kilometers above the speed limit, and a professional judge schooled in that definition will immediately look for evidence of that driving speed. But someone

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<sup>251</sup> Interview with Kansai judge, July, 2008.

<sup>252</sup> Lay Assessor Act art. 6(2).

<sup>253</sup> My gratitude to Professor Kanako Takayama, Kyoto University Faculty of Law, for pointing this out.

<sup>254</sup> Imasaki, *supra* note 193, at 15-16.

unfamiliar with that definition could impute any number of meanings to the term. A speed excessive to one person may be normal to another. What is reckless on one road may be safe on another. The experience of the driver, the weather and amount of daylight, the number of cars on the road, and myriad other factors all could reasonably be considered in any definition of “reckless.” How one defines it will determine what facts one looks for. Thus, some lay jurors may look for the time of day and others the conditions of the road. Language shapes how we see the world. By teaching official legal terms to lay jurors, judges present the judiciary’s vision of justice.

A similar situation occurs in sentencing. Lay assessors are free to argue for any sentence within the law. However, judges shape the way lay jurors consider desert and punishment by providing them with a list of sentences given to defendants in the past. This feature of the *saiban-in* merits consideration because public criticism of judges has focused on what is perceived to be their excessive leniency.<sup>255</sup>

### C. *Implications of the Saiban-in for Reintegrative Justice*

Japanese criminal justice has garnered much praise for its commitment to rehabilitating offenders.<sup>256</sup> By invoking feelings of repentance in offenders and offering leniency in exchange for sincere expressions of remorse, justice officials attempt to correct offenders and reintegrate them back into society.<sup>257</sup> While incarceration rates in the United States began to skyrocket in the mid-1970s,<sup>258</sup> rates in Japan have remained relatively low. Today, for every person Japan imprisons, America incarcerates twenty-five.<sup>259</sup> This is despite the fact that one study shows that Japanese citizens are no less likely than Americans to

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<sup>255</sup> JOHNSON, *supra* note 85, at 66–72. See generally Setsuo Miyazawa, *The Politics of Increasing Punitiveness and the Rising Populism in Japanese Criminal Justice Policy*, 10 PUNISHMENT & SOC’Y 47 (2008) (examining recent newspaper articles to argue that discussions regarding criminal justice policy have been focusing on increasing punitiveness).

<sup>256</sup> See generally BRAITHWAITE, *supra* note 117; Foote, *supra* note 117.

<sup>257</sup> See Haley, *supra* note 32, at 133.

<sup>258</sup> RICK RUDDELL, *AMERICA BEHIND BARS: TRENDS IN IMPRISONMENT, 1950-2000*, at 1-2 (2004).

<sup>259</sup> David T. Johnson, *Criminal Justice in Japan*, in *LAW IN JAPAN: A TURNING POINT* 343, 343 (Daniel H. Foote ed., 2007).

use retributive rationales for punishing serious crimes.<sup>260</sup> A prosperous economy, the wide perception and reality of public safety, and the insulation of prosecutors, judges, and criminal policy-makers from public pressure allowed Japanese officials to ignore this punitive sentiment and pursue correction. Recently, those conditions have begun to erode.<sup>261</sup> From 1998 to 2005, the percentage of Japanese who believed that violent crime was increasing more than doubled.<sup>262</sup> Although victimization rates for violent crime actually fell, changes to crime reporting created the appearance of a dramatic rise, which undermined confidence in public safety.<sup>263</sup> Sensationalist media coverage of brutal crimes combined with the rise of a powerful victim's rights movement inflamed public anxiety<sup>264</sup> and the Diet responded by increasing penalties and creating new categories of offenses.<sup>265</sup>

Though this new punitivism is visible in both written law and judicial decisions, career judges and the public diverge greatly in their attitudes toward mitigating and aggravating factors. In 2006, the Supreme Court's Research Institute published a study comparing lay and judicial sentencing opinions for a broad range of variables, including the profile of the offender, type and method of crime, and the response of the aggrieved party.<sup>266</sup> As a brief example of the reported disparity, 90.7% of judges believed that offenders under twenty should be afforded some

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<sup>260</sup> See generally V. LEE HAMILTON & JOSEPH SANDERS, *EVERYDAY JUSTICE: RESPONSIBILITY AND THE INDIVIDUAL IN JAPAN AND THE UNITED STATES* 169–70 (1994) (comparing responses from residents of Detroit and Yokohama to the question as to whether anything “should be done to the driver” in an auto accident, and concluding that the response of “payment of medical expenses” from Detroit residents could be considered “restitutive”).

<sup>261</sup> Johnson, *supra* note 259, at 358–59.

<sup>262</sup> Koichi Hamai & Thomas Ellis, *Japanese Criminal Justice: Was Reintegrative Shaming a Chimera?*, 10 *PUNISHMENT & SOC'Y* 25, 25 (2008).

<sup>263</sup> See generally Koichi Hamai & Thomas Ellis, *Crime and Criminal Justice in Modern Japan: From Re-Integrative Shaming to Popular Punitivism*, 34 *INT'L J. SOC. L.* 157 (2006) (arguing that changes in crime reporting brought on by reactionary policy-makers have created the illusion of an increase in crime).

<sup>264</sup> *Id.* at 162, 171.

<sup>265</sup> See Miyazawa, *supra* note 255, 63–69 (tracking political pressure on Diet members by victims' rights groups).

<sup>266</sup> SUPREME COURT OF JAPAN, LEGAL RESEARCH AND TRAINING INSTITUTE, RYŌKEI NI KAN SURU KOKUMIN TO SAIBANKAN NO ISHIKI NI TSUITE NO KENKYŪ [RESEARCH ON CITIZEN AND JUDGE AWARENESS OF SENTENCING] 6-8 (2006).

leniency, while none believed they deserved harsher punishment.<sup>267</sup> Only 24.7% of lay respondents favored leniency, while 25.4% sought more severity.<sup>268</sup> In the case of a victim's family forgiving an offender, 94.6% of judges supported leniency, while only 41.6% of lay respondents would do the same.<sup>269</sup>

The author's interviews with judges indicated a desire on the part of the career judiciary to curb public punitiveness. In response to an open question on why public trust in the judiciary had declined, the most common response was sentencing. "The media focuses on sensationalist crimes and consistently paints a negative picture of the accused. When we hand down sentences that account for the totality of evidence, including mitigating factors, the public becomes outraged because they haven't seen the evidence that we have seen."<sup>270</sup>

In the same way that professional judges guarantee that lay jurors approach fact-finding in what the judiciary perceives is a rational, rigorous, and balanced manner, past sentencing decisions serve to inculcate jurors in the professional judiciary's understanding of desert and fairness. If this proves persuasive to laypersons, the *saiban-in* might become the countervailing force to popular punitiveness, which will allow Japanese justice officials to continue to promote policies emphasizing rehabilitation and reintegration.

## VII. CONCLUSION

Recall that the Supreme Court sought to accomplish three goals in the jury reform: increase public trust in the judiciary, inject judicial decisions with the considerations of the public, and ensure consistency, predictability, and what judges perceived as fairness in decisions by evaluating cases according to the conventions of the court. The inclusion and empowerment of professional judges in the mixed juries was not designed to replace lay thinking with institutional thinking. Rather, judges serve to bolster public trust in the judiciary by explaining to lay jurors their logic and methodology and guarantee that, at a minimum,

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<sup>267</sup> *Id.* at 15.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 36.

<sup>270</sup> Interview with Kansai judge, July, 2008.

jurors consider the factors believed by the court to be important for making just decisions. Unlike in bench trials, the standards of the court are presented as merely one method of decision-making, not the only one. They are open to contest and modification by lay jurors who, at the beginning of deliberation, form their own evaluation of the evidence and can freely persuade others of that evaluation's superiority. The requirement that judges must persuade at least two laypersons ensures that the Court's approach to fact-finding and sentencing receives public scrutiny and affirmation in every case and that when Court standards would result in decisions that deviate from public notions of justice, lay jurors possess the leverage to modify them. By the same token, documentation of *saiban-in* reasoning, superior review, and the requirement that at least one professional judge assent to decisions functions to exclude irrational or sloppy thinking and preserve a measure of uniformity and predictability in decisions. In this way, the *saiban-in* system seeks to glean some of the benefits of lay participation—strengthened public trust in the judiciary, a decision-making process more attuned to the complexities of life—without resigning the justice system to the presumed inconsistency or bias of lay opinion or abandoning notions of desert and punishment valued by an educated elite. This is the purpose of the *saiban-in*.

Recognizing that the *saiban-in* is simultaneously an advance for democracy and an affirmation of the country's civil law origins is crucial for those hoping to further expand the role of laypersons in the justice system. Future proposals for expanded lay participation that do not permit justice officials to ensure that the decision-making process complies, at a minimal level, with the Supreme Court's notion of fairness will be met with vigorous opposition from the judiciary and procuracy and will likely fail.

The *saiban-in* attempts an ambitious balance between the benefits of lay and elite influence on judicial decisions. There are at least two potential developments which could disturb this balance. The first is the judicial domination that worries so many today. Judges may be willing to defer to their lay colleagues in mock trials, but it remains to be seen how they will behave when a decision will determine a defendant's life. Alternatively, the mixed jury system will fail if the public is unwilling to participate. A government survey shows that over 70% of Japanese do



not want to serve.<sup>271</sup> Judges may read this apathy as tacit trust in the propriety of legal professionals and gradually come to dominate discussions in the mixed juries if lay jurors display little interest in contributing.

On the other hand, the intended balance could be upset from the other side. If support for the Continental tradition diminishes, an American-style all-lay jury could replace the mixed jury system. One can already speculate how such erosion might occur. *Saiban-in* trials will center on live testimony and cross-examination. In this respect, the JSRC has realized a core dimension of the adversarial system that Occupation reformers unsuccessfully labored to introduce. These adversarial trials could replace the dossier-driven proceedings that are still used for the vast majority of criminal cases. As mentioned previously, some Japanese defense attorneys have begun discouraging their clients from cooperating with investigators, and in the process irritating prosecutors, who continue to see the discovery of the truth as among their primary duties. If prosecutors cannot perform this function, they may begin to construe their role more along the lines of an adversarial system.

The new professional law schools might also frustrate efforts by the judiciary and procuracy to discipline new members to conform to institutional conventions. Until recently, there was no academic legal education specifically designed for the training of future lawyers.<sup>272</sup> Most students who study law at the undergraduate level do not seek to become lawyers<sup>273</sup> and the Supreme Court's LTRI offers only practical legal training. Filling this gap are over sixty new law schools, which began operation in 2004.<sup>274</sup> After completing their undergraduate education, aspiring lawyers will attend these schools for two to three

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<sup>271</sup> Saiban-in seido ni kan suru yoron chōsa [Public Opinion Poll Regarding the Lay Assessor System], Dep't of the Minister for the Cabinet Office, pt. 2, ques. 5, Feb. 2005, available at <http://www8.cao.go.jp/survey/h16/h16-saiban/2-5.html> (last visited May 10, 2009).

<sup>272</sup> See Miyazawa, *supra* note 141, at 111.

<sup>273</sup> See Daniel H. Foote, *Forces Driving and Shaping Legal Training Reform in Japan*, 7 AUSTL. J. ASIAN L. 215, 216 (2005) (suggesting that the difficulty of the bar exam explains why most students who study law enter companies on graduation instead of entering the legal profession).

<sup>274</sup> *Id.*

years before entering the LTRI.<sup>275</sup> Unlike the LTRI, which gives students a uniform education, each of these law schools will offer their own gloss on legal curriculum.<sup>276</sup> When graduates reach the LTRI, they will possess an understanding of the justice system and the role of legal professionals that might differ considerably from the one favored by the Supreme Court. Additionally, their knowledge of the law will broaden beyond the narrow confines of the LTRI exam to include a more reflective and critical approach to their profession.<sup>277</sup> As a result, young judges may be less willing to follow the precedents and interpretations of their superiors.

This is more likely now that decisions on judicial appointments, reappointments, and promotions are reviewed by legal professionals outside the judiciary. In 2003, the Supreme Court responded to charges that their personnel decisions were opaque by creating the Lower Court Judge Designation Consultation Commission.<sup>278</sup> The Commission is composed of eleven members, five from the legal profession and six “persons of learning and experience” from outside the profession.<sup>279</sup> Together they review candidates for lower-court judgeships and report their results to the Supreme Court.<sup>280</sup> The Commission was designed to increase the transparency of the judiciary and allow the views of the public to be reflected in personnel decisions.<sup>281</sup> Previously, these decisions were a complete black box.<sup>282</sup> The Commission now sheds only a sliver of light inside<sup>283</sup> and for the time being cannot prevent the Supreme Court from using its personnel office to encourage career judges to conform to institutional norms. The Commission cannot evaluate whether the Court improperly excluded potential candidates

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<sup>275</sup> See *id.* at 224 (noting that students who studied law at the undergraduate level can graduate in two years).

<sup>276</sup> Many have expressed concern, however, that some law schools, generally associated with less prestigious universities, will gear their curriculum to the LTRI exam to achieve high passages rates. *Id.* at 235.

<sup>277</sup> See Miyazawa, *supra* note 141, at 112.

<sup>278</sup> Daniel H. Foote, *Recent Reforms to the Japanese Judiciary*, 66 HOUSHAKAIGAKU 128, 143 (2007).

<sup>279</sup> *Id.* at 143.

<sup>280</sup> *Id.* at 144.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 150-51.

from lists of potential appointees<sup>284</sup> and members of the body are chosen by the Supreme Court.<sup>285</sup> Nevertheless, the Commission might one day evolve into an institution that disrupts the ability of the Court to enforce uniformity in the judiciary.

Finally, new efforts to diversify the judiciary could obstruct the inquisitorial activities of prosecutors. The Japanese bar has long advocated appointing practicing lawyers to the judiciary (*housou ichigen*). Until the 1980s, these appointments were rare despite Article 42 of the Courts Act, which permitted them.<sup>286</sup> The JSRC intended to promote the practice.<sup>287</sup> Before the JSRC issued its final recommendation, the Supreme Court entered into an agreement with the JFBA to cooperate in promoting the appointment of lawyers.<sup>288</sup> The Court also instituted a part-time judge system in which attorneys could serve as judges for one day per week.<sup>289</sup>

The consequences of these changes for the justice system are unclear. On the one hand, lawyers-turned-judges might challenge the Supreme Court's narrow interpretation of the Constitution's procedural protections, inhibiting inquisitorial pursuits of the truth and encouraging a more "American" reading of suspects' rights. On the other hand, as judges, prosecutors, and defense attorneys become accustomed to living in each other's shoes, they might develop a consensus on the nature of the Japanese criminal justice, and that consensus may very well develop around a Continental understanding. For the moment, this speculation is academic. Few practicing attorneys have chosen to serve as judges.<sup>290</sup>

No doubt many who fear judicial domination in the mixed juries would welcome a turn to adversarial justice and an all-lay criminal jury. Yet the post-war successes of the Japanese criminal justice system are considerable enough to render any enthusiasm about such a

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<sup>284</sup> *Id.* at 148.

<sup>285</sup> *Id.* at 143.

<sup>286</sup> *Id.* at 134-35.

<sup>287</sup> *See id.* (emphasizing that JSRC support was to reinvent an existing system instead of creating a new one).

<sup>288</sup> *See id.* at 135 (noting that the JFBA had long-supported the appointment of practicing attorneys as judges).

<sup>289</sup> *See id.* (describing that part-time judges would handle conciliatory matters at district, summary, and family courts).

<sup>290</sup> *Id.* at 135-36.

transformation premature. Japanese officials preside over a system that manages to deliver justice that is simultaneously individualized and consistent (like cases are treated alike).<sup>291</sup> The country's crime rates are reliably among the lowest in the industrialized world, while its prisons hold comparatively few offenders.

These successes have not come without cost. Investigations are invasive. In their pursuit of the truth, police and prosecutors frequently encroach upon the privacy and autonomy of suspects. Lengthy detentions undermine the voluntariness of confessions and zealous interrogations can too easily turn coercive. Decision-making, particularly by the procuracy, is opaque. Finally, justice officials can be unresponsive to the demands and shifting values of the public they are supposed to represent.

The *saiban-in* is an innovative experiment to readjust and improve this calculus, accommodating the diverse perspectives of the public while maintaining consistent decisions and elite notions of justice. If it succeeds, the *saiban-in* will become a valuable model for countries seeking to temper the inequality, punitiveness, and cynicism so often generated by democratized justice without extinguishing what, in the Anglo-American tradition, is often regarded as the "lamp that shows that freedom lives."<sup>292</sup>

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<sup>291</sup> JOHNSON, *supra* note 85, at 28.

<sup>292</sup> PATRICK DEVLIN, TRIAL BY JURY 164 (1966).