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Saiban In Seido: Lost in Translation?

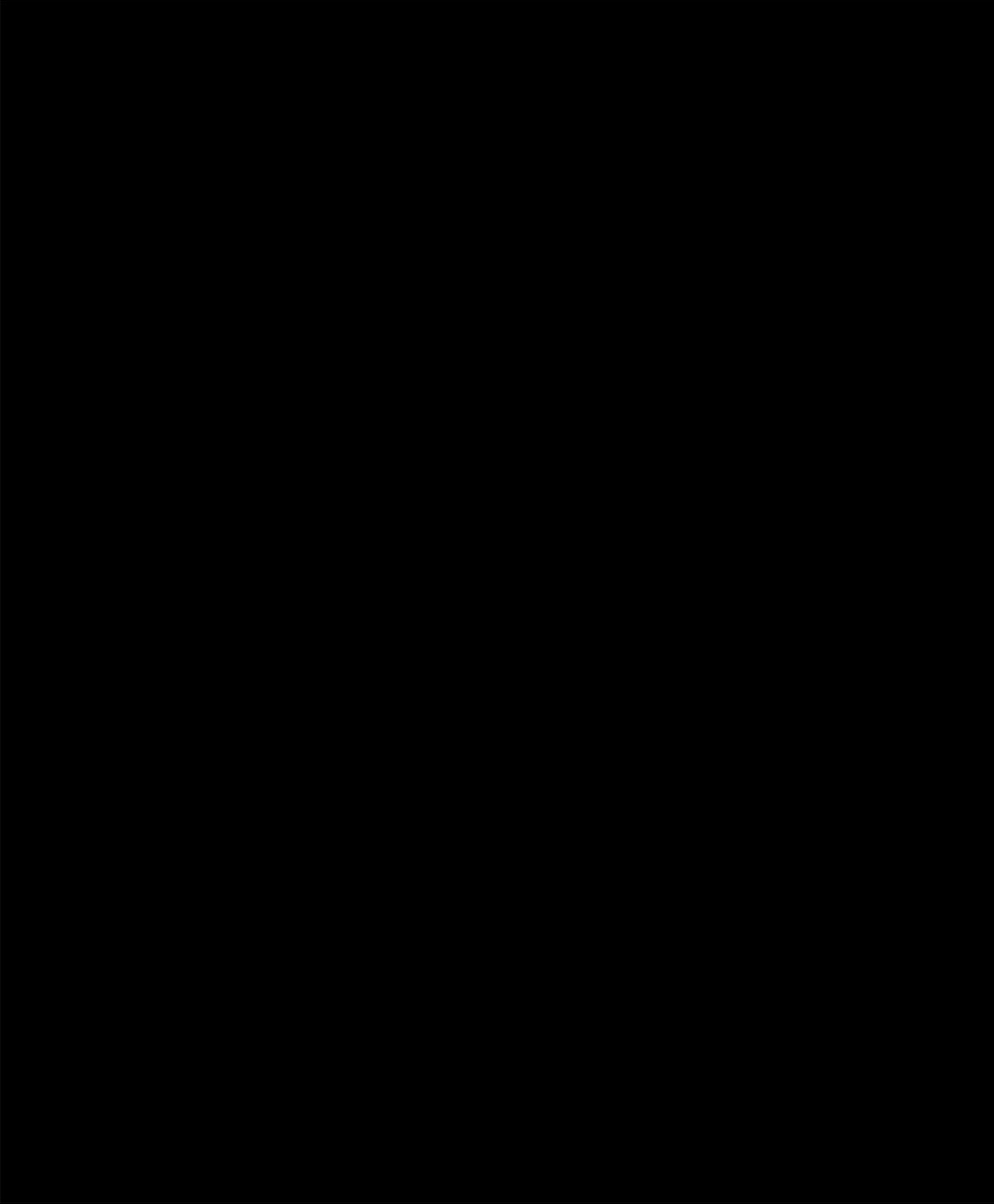
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Seiban-in-seido: Lost in Translation?

**How the source of power underlying Japan's proposed lay assessor system
may determine its fate.**

Douglas G. Levin

I. Introduction

A. Events leading to the introduction of a lay assessor system

Half a century after abolishing its jury system, the Japanese Diet enacted the Act Concerning Participation of Lay Assessors in Criminal Trials (“Lay Assessor Act”) on May 28, 2004.¹ Despite repeated attempts by scholars and groups to restore the jury system every few years since the end of World War II, legislators largely ignored these proposals until the “serendipity of events” that led to the development of the Judicial Reform Council in June 1999.² The Lay Assessor Act

¹ See Kent Anderson & Emma Saint, *Japan's Quasi-Jury (Saiban-In): An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials*, 6 ASIAN-PAC. L. & POL'Y J. 233 (2005) (providing an English translation of the “Lay Assessor Act”). Note that this article hereafter cites this English translation of the Lay Assessor Act rather than the Act itself. It is possible that some discrepancies exist because many Japanese words do not translate perfectly to English, as noted by the authors of the translation.

² Kent Anderson & Mark Nolan, *Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System from Domestic Historical and International Psychological Perspectives*, 38 VANDERBILT J. TRANSACTIONAL L. 935, 939 (2004).

(hereafter the “Act”), or “saiban-in-seido” in Japanese,³ establishes a mixed panel composed of professional judges and lay assessors that decides specific types of criminal cases. The Act will come into force before 2009⁴ and legislators will perform an “additional investigation” three years after the law comes into effect in order to assess the continued viability of the lay assessor system.⁵

B. Goals of this article

A number of periodicals and law review articles, most notably a journal article by Kent Anderson and Mark Nolan (hereafter “Anderson and Nolan”),⁶ examine the judicial efficiency of particular procedures set forth in the Act⁷ as well as the general concerns about encouraging lay participation in a culture that stereotypically avoids confrontation. While this article analyzes the procedures established by the Act and examines the importance of lay assessor assertiveness, this article seeks to look more broadly at the *source of power* underlying the lay assessor system. In doing so, this article proposes that the system’s likelihood of

³ *Id.* at 938.

⁴ Kent Anderson & Emma Saint, *supra* note 1, at 234.

⁵ *Id.* at 283.

⁶ Kent Anderson & Mark Nolan, *supra* note 2.

⁷ *See, e.g., id.* at 973 (“The pre-enactment *design* of the program...will make success or failure more likely.”) (emphasis added).

success depends on more than having the right proportion of lay assessors and judges or whatever cultural peculiarities may exist in the Japanese psyche; it also depends upon the source of power underlying the system.

Of the many goals sought by the drafters of the Act, they primarily desired to promote a more democratic society in Japan.⁸ Although the Act does not explicitly seek to emulate the success of the American jury system, the American jury system surely embodies those democratic ideals which the Japanese system hopes to promote. However, while the American right to a jury trial in criminal cases⁹ exists as a *right of the people*, the Japanese lay assessor system exists as a *legislative privilege* which the Diet can remove (as it did in 1943) as easily as it granted the privilege.

This distinction partly derives from the relative significance and permanence of the documents in which the two rights originate: the U.S. Constitution's Bill of Rights enshrines the American jury system¹⁰ whereas the Japanese Act exists in a legislative document. The Act's performance review provision (or sunset

⁸ *Id.* at 941.

⁹ Note that the American right to a jury trial in *civil* cases is outside the scope of this article because the Japanese Act is limited in scope to criminal cases.

¹⁰ U.S. CONST. ART. III, § 3 (“The trial of all Crimes, except in the Cases of Impeachment, shall be by Jury.”); *see also* U.S. CONST. AMEND. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...”). Note that those provisions of the Constitution regarding the right to trial by jury in *civil* cases are excluded because this article focuses on the right to trial by jury in criminal cases.

provision, depending on how one looks at it), requiring an “additional investigation” to assess the continued viability of the lay assessor system after three years, illustrates the contrasting durability of the two rights. Simply put, rights do not have sunset provisions.

Therefore, this article proposes that the Japanese Diet can benefit by understanding how the American jury system has effectively promoted democracy because the people establish its source of power. This article further proposes that if Japan truly seeks to promote a more democratic society, then it must consider fundamental changes in its criminal justice system because a “trial by jury can be healthy only as the summit of a system that itself is healthy.”¹¹ Additionally, this article explores (1) how Japan can learn from similarly structured European continental systems, (2) the ways in which the Japanese system actually promotes democracy better than the American system, and (3) additional issues arising from the reintroduction of a lay assessor system which Japan should consider in advance.

This article does *not* seek to propose the most efficient procedures for the new lay assessor system or that Japan simply copy the American system. Rather, this article examines how the American system promotes democracy by deriving

¹¹ WILLIAM L. DWYER, IN THE HANDS OF THE PEOPLE 180 (2002).

its power from the people (rather than the government), and offers this understanding to the Japanese system so that it may achieve its goal of promoting democracy and survive its three-year test period.

After briefly summarizing Japan's previous failures to promote lay participation in its judicial system, outlining fundamental provisions of the Act, and further examining Japan's goals in enacting a lay assessor system in Parts II and III of this article, Part IV contrasts the different sources of power underlying the American and Japanese jury systems. Part V analyzes those provisions of the Act which may undermine Japan's stated goal of promoting democracy and Part VI explores those provisions of the Act which promote democracy better than the American system. Part VII proposes that Japan must make fundamental changes to its criminal justice system for its lay assessor system to effectively promote democracy and Part VIII concludes with an opinion regarding the prospect of success for Japan's lay assessor system.

II. Japan's previous failed attempts to encourage lay participation in its judicial system

The reintroduction of a lay assessor system signifies Japan's commitment to overcome its many failed attempts to encourage lay participation in its judicial system. Almost every attempt at "Broad Lay Participation" (broad involvement of the general population in the judicial process)¹² and "Narrow Lay Participation" (narrow involvement of specific private individuals with special skills or qualifications)¹³ has failed.

Beginning with Japan's failures to promote "Broad Lay Participation," its previous experience with a jury system stands out as the obvious example. Between 1928 and 1943 the Jury Act in Japan provided a right to jury trial in a limited range of criminal cases, and in the first several years of that period defendants exercised their right to a jury trial fairly often.¹⁴ The Jury Act provided for a 12-person jury, utilized the majority voting requirement (not unanimity), and confined the jury to making factual determinations.¹⁵ Notably, although the court could not render a judgment contrary to the verdict, the jury's verdict did not bind

¹² Kent Anderson & Mark Nolan, *supra* note 2, at 962.

¹³ *Id.* at 966.

¹⁴ DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE* 42 (2002).

¹⁵ MERYLL DEAN, *JAPANESE LEGAL SYSTEM: TEXT AND MATERIALS* 113 (1997).

the court as it could repeatedly change the panel until it found one that would render the desired verdict.¹⁶ Although the Japanese first welcomed the Jury Act as the “palladium of liberty,” it ultimately failed.¹⁷ In 1929, the peak year for jury trials, 143 criminal defendants exercised their right to a trial by jury.¹⁸ However, the popularity of jury trials declined dramatically by 1942, with only two jury trials during that year, and the Japanese suspended the Jury Act the next year.¹⁹

Scholars offer many theories to explain the demise of the Jury Act. Some suggest that it failed because defendants who chose to be tried by jury gave up their right to appeal jury errors of fact, thereby foreclosing an opportunity to reverse convictions or reduce sentences.²⁰ Others suggest the system failed because “juries were merely impotent ornaments of democratic legitimacy because judges could reject their verdicts.”²¹ A more sociological explanation for the failure provides that the Japanese prefer hierarchy and therefore seek professional rather than peer decision-making, even fearing that juries would rule more severely

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ DAVID T. JOHNSON, *supra* note 13, at 42.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

than judges.²² Finally, in describing how the jury system failed due to disuse and increasing authoritarianism, Anderson and Nolan explain that juror eligibility requirements failed to broadly represent society, similar to the manner in which the United States initially restricted eligibility for jury service to property-owning white males.²³

Scholars cite the Prosecutorial Review Commission as the other example of Japan's failure to promote lay participation in its judicial system through a Broad Lay Participation Organ. Japanese law provides that, when a prosecutor decides not to indict a suspect in a case, the victim of the crime, or a suitable proxy, may demand a hearing to challenge the prosecutor's decision before a Prosecutorial Review Commission.²⁴ The Commission consists of eleven citizens who may issue prosecutors a non-binding recommendation to prosecute.²⁵ However, citizens are largely unaware of the system and rarely utilize it because the "prosecutor's

²² *Id.* Notably, the fear that juries would be more severe was misplaced. Between 1928 and 1943, "defendants were much more likely to be acquitted by juries than by judges." *Id.* at 221. In fact, "prosecutors favored suspending the Jury Act because juries reached so many unfavorable verdicts." *Id.* at 43.

²³ Kent Anderson & Mark Nolan, *supra* note 2, at 962-63.

²⁴ Mark West, *Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion*, 92 COLUM. L. REV. 684, 685 (1992).

²⁵ Kent Anderson & Mark Nolan, *supra* note 2, at 965.

refusal to act on the Commission’s recommendations has undermined any popular confidence or renewed commitment to the system.”²⁶

The Narrow Lay Participation Organs have also failed to promote lay participation in the judicial process because legal professionals have captured most of the places for private citizens.²⁷ Anderson and Nolan identify four Narrow Lay Participation Organs that have been “commandeered” by legal professionals: (1) Summary Court judges, (2) Supreme Court justices, (3) conciliators, and (4) arbitration.²⁸

In order to inject common experience into its lowest and highest courts, Japan does not require judges in the Summary Courts or the Supreme Court to have practiced law prior to serving as a judge.²⁹ In practice, however, Summary Court judges (with limited jurisdiction over relatively minor cases) often come straight from the legal world.³⁰ Similarly, despite the expectation that one-third of the Supreme Court bench would lack a legal background, lawyers have dominated

²⁶ Kent Anderson & Mark Nolan, *supra* note 2, at 966; Mark West, *supra* note 24, at 694.

²⁷ Kent Anderson & Mark Nolan, *supra* note 2, at 973.

²⁸ *See id.* at 966-73.

²⁹ *Id.* at 967.

³⁰ *Id.* (further explaining the jurisdiction of Summary Court judges).

the bench from its very inception.³¹ Additionally, whereas legislators intended for arbitrators and conciliators to infuse common experience into the dispute-resolution process and avoid the legalistic nature of formal proceedings, this goal has also failed as legal professionals have “commandeered the common person’s role.”³²

III. Japan’s proposed lay assessor system

A. Procedural summary

Under the Act, lay participants will be selected at random and sit for only one case.³³ The Act excludes certain categories of citizens from participating, most notably legal professionals and related legal personnel.³⁴ Those matters eligible for resolution by lay assessors consist of crimes where the maximum penalty is death or indefinite imprisonment with hard labor, and crimes where the victim dies due to an intentional criminal act.³⁵ The Act provides for a mixed panel composed of three professional judges and six lay assessors in serious contested cases and

³¹ *Id.* at 967-68.

³² *Id.* at 969-70 (detailing the objectives and jurisdiction of the conciliator function).

³³ Kent Anderson & Emma Saint, *supra* note 1, at 234.

³⁴ *Id.* at 245-246 (translating Art. 15(iv-xvi)).

³⁵ *Id.* at 233-234.

one judge and four lay assessors in lesser uncontested cases.³⁶ The panel will operate by a simple majority and require at least one judge and one lay assessor to consent to the conviction or sentence.³⁷ Although the Act requires jurors to attend the deliberations and express an opinion, and requires judges to provide sufficient opportunity for the lay assessors to voice their opinions, it remains unclear who will lead the discussion and voting process and how the processes will operate.³⁸

B. Goals sought by the lay assessor system

The Act primarily seeks to produce better justice and promote a more democratic society.³⁹ Notably, the various goals sought by the Act do not include the promotion of defendants' rights.⁴⁰ Regarding the first goal, the Japanese believe that the lay assessor system will produce better justice because the general public's diverse experiences and backgrounds best qualify them to understand a

³⁶ *Id.* at 233. Note that, because of its mixed composition (of professional judges with lay assessors), Japan's proposed lay assessor system is appropriately called a "mixed panel" or "lay assessor" system. However, this article may describe it as a "jury system" for the sake of semantic simplicity, even though it is not technically a "jury" because of its mixed composition.

³⁷ *Id.* at 234.

³⁸ *Id.* at 273 (translating Art. 66(2) and Art. 66(5)); Kent Anderson & Mark Nolan, *supra* note 2, at 950.

³⁹ *Id.* at 941. Note that a third category of "miscellaneous" objectives is beyond the scope of this article and will not be discussed.

⁴⁰ *Id.*

defendant's criminality and reach an appropriate response.⁴¹ Likewise, the Japanese believe that professional judges lack such decision-making abilities because they hold narrower life experiences, over-represent certain segments of society, and have an institutional bias in favor of the prosecution or the state.⁴² Therefore, the Japanese believe that laypeople will feel less constrained to make judicial decisions against the police and prosecutors because they lack the judges' elite background and pressure to assimilate and have no personal political stake in court proceedings.⁴³

The second stated goal, the promotion of a more democratic society, provides the subject of this article. Commenting on the need for a lay assessor system to temper the strength of Japan's exceptionally centralized government, the Judicial Reform Council insisted it was "incumbent" on modern Japanese society to break out of its "excessive dependency on the state..."⁴⁴ The Council's chairman, Professor Emeritus Koji Sato, similarly proclaimed that it was time to live as autonomous individuals, outgrow the way in which their society passively

⁴¹ *Id.* at 941-942.

⁴² *Id.* at 942.

⁴³ *Id.* at 943.

⁴⁴ *Id.*

depended on regulation from above, and rebuild Japan from a self-reliant base.⁴⁵

The Judicial Reform Council also hoped that the lay assessor system would promote democracy in a broader manner by serving as a political forum to publicize consent or dissent with the policies established by other political forums such as Parliament.⁴⁶

The Act establishes this overarching goal in Article 1 by stating that “this legislation seeks to contribute to the promotion of the public’s understanding of the judicial system and thereby raise their confidence in it.”⁴⁷ Additionally, the Supplementary Provisions twice describe the “people” as the “foundation” of the country’s judicial system, even asserting that the lay assessor system “will enable the people to adequately fulfil[1] their role as the foundation of the country’s judicial system *for the first time*.”⁴⁸ Finally, Article 3 of the Supplementary Provisions expresses “a belief in the indispensability of having citizens able to participate easily in trials as lay assessors.”⁴⁹

⁴⁵ *Id.* at 944.

⁴⁶ *Id.* at 943.

⁴⁷ Kent Anderson & Emma Saint, *supra* note 1, at 236 (translating Art. 1).

⁴⁸ *Id.* at 280 (translating Supp. Prov. Art. 2), 283 (translating Supp. Prov. Art. 8), and 280 (translating Supp. Prov. Art. 2) (emphasis added).

⁴⁹ *Id.* at 281 (translating Supp. Prov. Art. 3).

IV. Contrasting the sources of power underlying the Japanese and American jury systems

A. The Japanese lay assessor system: a privilege granted by the government

Japan designed its lay assessor system, with both professional judges and lay persons deciding matters together, based upon the continental European mixed panel system.⁵⁰ In explaining how the continental system relies on overwhelming central power, scholars note that professional judges, who are not former trial lawyers but civil servants trained for a lifetime career on the bench, control the proceedings (unlike an adversarial system dominated by lawyers).⁵¹ Furthermore, the continental system does not treat the process as a partisan conflict, but rather, as an official inquiry into the truth.⁵² Because a judge controls the continental system and its main goal is to discover the “truth,” some argue that the “separateness of the defendant and the government – the individual’s dignity and autonomy against the state – is not preserved as it is in American courts. [The

⁵⁰ *Id.* at 234.

⁵¹ WILLIAM L. DWYER, *supra* note 11, at 155.

⁵² *Id.*

American system's] staunch protection of individual rights is buttressed by [its] adversary system.”⁵³

Japan's decision to model its judicial system after the continental system rather than the adversarial system comes as no surprise given its history of defending centralized power. In describing how the Constitution of the Great Empire of Japan, promulgated by Emperor Meiji on February 11, 1889, establishes the government as the source of all power, Richard Mitchell explains that its “preamble rejects Western ideas about limitations on the government imposed by natural rights or social contracts. Although a number of articles in the constitution guarantee rights for the people, none are unconditional; all can be removed by government legislation.”⁵⁴ Mitchell further notes that “[m]ost people did not think about rights in terms of inalienable human rights bestowed by heaven; instead they viewed rights as a *gift* from the emperor enshrined in the Meiji Constitution.”⁵⁵

Others have similarly noted:

The Constitution of Japan provides no absolute guarantee in respect of civil rights and liberties; that is to say, it does not restrict the power of either the government or the Diet to make laws with regard to these *privileges*... It can do anything constitutionally to restrict the rights

⁵³ *Id.* at 157-158.

⁵⁴ RICHARD H. MITCHELL, *JUSTICE IN JAPAN* 10 (2002).

⁵⁵ *Id.* at 13 (emphasis added).

and liberties of the people, provided it first enacts a law to that effect.⁵⁶

Therefore, in the context of Japan's constitutional history and its continental design, the Act exists as more of a legislative gift or privilege than a permanent or constitutional right of the people. In fact, during the drafting of the Meiji Constitution, drafters objected to the initial phrase "Rights and Duties of Subjects" on the grounds that "subjects should have nothing but duties in connection with the emperor."⁵⁷ The drafters ultimately reached a compromise by changing "Rights and Duties of Subjects" to "Responsibility of Subjects."⁵⁸ Interestingly, in discussing the reasons why "talk of 'individual rights' in Japan may seem an abstraction, only the most nominal of guarantees," scholars cite Japan's prior abolition of its jury system at the very top of the list.⁵⁹

B. The American jury system: a constitutional right of the people

In stark contrast to the legislative source of power underlying the Japanese lay assessor system, the right to trial by jury originates in the Bill of Rights of the

⁵⁶ *Id.* at 14 (emphasis added).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ MELVIN M. BELLI & DANNY R. JONES, *BELLI LOOKS AT LIFE AND LAW IN JAPAN* 44 (1960). The lack of a writ of habeas corpus and protections against double jeopardy are also cited as examples of how the notion of individual rights in Japan "may seem an abstraction."

United States Constitution as a virtually impenetrable right of the people.⁶⁰ In fact, the Founders of the Constitution emphasized the jury function as a right of the people by listing it as one of few *explicit* reservations to the people (as the Constitution generally presumes that the people reserve any powers not specifically granted to the government).⁶¹ Sandra Day O'Connor describes the rarity of the Founders' unanimous agreement upon the importance of the right to trial by jury:

The Declaration of Independence listed deprivation of "The Benefits of Trial by Jury" as one of the intolerable outrages King George had committed against the colonists and, when it came time to draft the Constitution, the federalists and anti-federalists, who could agree on little, agreed on the importance of preserving trial by jury.⁶²

At the constitutional convention, Alexander Hamilton similarly noted:

The friends and adversaries of the plan of the convention, if they agree on nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.⁶³

Furthermore, the records of the constitutional convention reveal that the founders left the right to trial by jury "open and undefined from the difficulty in

⁶⁰ See *supra* note 10.

⁶¹ See ALEXANDER HAMILTON, JOHN JAY & JAMES MADISON, *THE FEDERALIST* 24 (Benjamin Fletcher Wright ed., MetroBooks 2002) (1961) (noting that it was unusual for the drafters to explicitly reserve any powers to the people when the right would implicitly belong to the people absent a grant of that power to the government).

⁶² Sandra Day O'Connor, *Juries: They May Be Broke, But We Can Fix Them*, 44 *FED. LAW.* 20, 22.

⁶³ ALEXANDER HAMILTON, JOHN JAY & JAMES MADISON, *supra* note 61, at 521-2.

attending to *so valuable a privilege* [sic].”⁶⁴ Interestingly, the proponents of the English jury did not originally intend to promote individual rights. Rather, the jury function *evolved* into a systematic check on government as a result of its early abuse by English judges.⁶⁵ In fact, some argue that the Founders drafted the U.S. Constitution “at the luckiest of times” because their “memories extended beyond the Revolutionary War and the grievances that had led to it,” inspiring them to write “a Constitution based on mistrust of concentrated power.”⁶⁶

During the course of the constitutional convention, James Wilson passionately advocated the vital function of the jury as a check on government. On October 6, 1787, Wilson explained that “the oppression of government is effectually barred, by declaring that in all criminal cases, the trial by jury shall be

⁶⁴ MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 150 (Yale University Press 1966) (1911) (emphasis added).

⁶⁵ See WILLIAM L. DWYER, *supra* note 11, at 157 (““In the late colonial era the king’s judges [in England], seen as arbitrary and oppressive, left an abiding fear of the bench and helped inspire our constitutional guarantees of trial by jury.”); *id.* at 43 (“The kings and lords who adopted the jury saw it as a way to keep order in a realm plagued by strife and lawlessness. They had not the slightest thought of expanding citizens’ rights; what mattered to them was simply that the jury system worked... But the jury, like many other children, soon surprised its parents. It became not just a tool of government but a welling up, a resistance, a brake on cruelty and excess, a force for reason and common sense and mercy. To play that role in full it had to win its own freedom- its right to decide cases without fear of reprisal by the king or the judge or the local lord.”); for a description of the abuses by English judges which inspired the change in the jury’s function, see *id.* at 50 (“Jurors were expected to reach a verdict that was not just honest but *true* – failing which they could be punished. If the judge or another personage disagreed with the outcome, a writ of attaint could issue. A new jury of twenty-four would be sworn to try the original jurors for perjury. If the second jury decided the first had reached a false verdict, then, as an observer wrote in 1470: “All of the first jury shall be committed to the King’s prison, their goods shall be confiscated, their possessions seized into the King’s hands, their habitations and houses shall be pulled down, their woodland shall be felled, their meadows shall be plowed up and they themselves forever thenceforward be esteemed in the eye of the law infamous...” Jurors were routinely denied food and water while they deliberated. If they were obdurate the judge might have them hauled through the town in open carts until they came to their senses.”).

⁶⁶ *Id.* at 105.

preserved.”⁶⁷ Later that year, on December 7, Wilson similarly reasoned that, with the constitutional right to trial by jury, “[w]henver the general government can be a party against a citizen, the trial is guarded and secured in the constitution itself, and therefore it is not in its power to oppress the citizen.”⁶⁸

The Founders intention for the right of a jury trial to serve as a check on government oppression has endured. The U.S. Supreme Court in *Burch v. Louisiana* noted that the “purpose of trial by jury... is to prevent government oppression by providing a safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.”⁶⁹ The *Burch* Court also explained that the jury function promotes democratic ideals because its “essential feature lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group’s determination of guilt or innocence.”⁷⁰

Sandra Day O’Connor has more recently observed that juries have succeeded in representing the people, even against the will of a hostile or corrupt

⁶⁷ MAX FARRAND, *supra* note 64, at 101.

⁶⁸ *Id.* at 163.

⁶⁹ 441 U.S. 130, 135 (1979).

⁷⁰ *Id.*

judge.⁷¹ In fact, the Supreme Court has noted that when judges disagree with verdicts, “it is usually because [they] are serving some of the very purposes for which they were created and for which they are now employed.”⁷² Contrary to isolated criticism of the jury function,⁷³ however, studies reveal overwhelming judicial approval of the work of juries.⁷⁴

V. The proposed Japanese lay assessor system employs procedures which may undermine its goal of promoting democracy

Japan should reconsider certain procedures in the Act which may undermine its stated goal of promoting democracy. This section explores some of these procedures, examining how the American system would treat them differently as a

⁷¹ See Sandra Day O’Connor, *supra* note 62, at 20 (“Juries usually do their job very well, and on occasion show extraordinary courage in the face of hostile or corrupt judges, delivering the verdict that justice demanded, even if it was not the verdict the judge wanted.”)

⁷² WILLIAM L. DWYER, *supra* note 11, at 134 (quoting from *Duncan v. Louisiana*, 391 U.S. 145, 157 (1968)).

⁷³ The success of the American jury system has not come without its criticism, especially in the civil context. In proposing the abolition of juries in civil cases, for example, Erin Griswold, Dean of the Harvard Law School, insisted that “the jury trial is at best the apotheosis of the amateur.” HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 5 (1966). A scathing (though highly poetic) article in the *American Bar Association Journal* in 1924 similarly criticized that “[t]oo long has the effete and sterile jury system been permitted to tug at the throat of the nation’s judiciary as it sinks under the smothering deluge of the obloquy of those it was designed to serve... Justice has fled to brutish beasts and men have lost their reason.” *Id.* Mark Twain has also voiced his opinion on the matter, writing that the “jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and perjury.” WILLIAM L. DWYER, *supra* note 11, at 131. Twain also complained that juries had become “the most ingenious and infallible agency for defeating justice that human wisdom could contrive.” Sandra Day O’Connor, *supra* note 62, at 20.

⁷⁴ WILLIAM L. DWYER, *supra* note 11, at 134 (“[Surveys of all state trial judges in Texas and all federal trial judges in the United States] showed that more than 90 percent believe that juries are conscientious, understand the legal issues, and reach just and fair verdicts.”).

result of its emphasis on *reserving rights* to the people rather than *granting privileges* to them.

A. Prosecutors may directly bypass the lay assessor system altogether

While a criminal defendant in the United States retains the right to decide whether to proceed by jury, the Japanese prosecutors determine whether lay assessors adjudicate a case by charging a crime within (or outside) the Act's definition of crimes adjudicated by lay assessors.⁷⁵ Even if the defendant admits guilt he or she has no right to waive a hearing by a lay assessor panel.⁷⁶ This delegation of power to the prosecutors seems contrary to one of the Act's primary goals of tempering the power and discretionary control of the prosecutor's office.⁷⁷

Notably, German prosecutors similarly control whether lay assessors participate by predicting a certain sentence (that would or would not warrant adjudication by lay assessors) in the event a conviction is returned.⁷⁸ However, in practice, there is no systematic circumvention of the lay assessor system in

⁷⁵ Kent Anderson & Mark Nolan, *supra* note 2, at 953.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Walter Perron, *Lay Participation in Germany*, 72 REV. INTERNATIONALE DE DROIT PENAL 181, 182-3 (2001).

Germany.⁷⁹ Nonetheless, because of its emphasis on a jury trial as a right of the defendant, the American system would never allow for the circumvention of the jury system in serious criminal cases by anyone other than the accused.

B. Prosecutors may indirectly circumvent the lay assessor system through a “koso appeal”

Even where prosecutors do not directly bypass the lay assessor system at the onset, they retain a second chance to indirectly bypass the system through a “koso appeal.” The koso appeal allows a prosecutor to appeal an acquittal based on an error in legal application *or fact-finding*.⁸⁰ In fact, prosecutors may appeal the sentence and the verdict twice: first to one of the eight High Courts, then to the Supreme Court if the lower court decision contradicts the Constitution or Supreme Court precedent.⁸¹

Because prosecutors carefully choose which cases to appeal, statistics show that they have historically enjoyed much greater success in their appeals than have defendants: between 1982 and 1991, prosecutors reversed an average of 75 percent

⁷⁹ *Id.* at 188.

⁸⁰ CURTIS J. MILHAUPT, J. MARK RAMSEYER, & MARK D. WEST, *THE JAPANESE LEGAL SYSTEM: CASES, CODES, AND COMMENTARY* 467 (Foundation Press 2006).

⁸¹ DAVID T. JOHNSON, *supra* note 14, at 41.

of the cases they appealed to the High Courts while defendants succeeded in less than 17 percent of their appeals.⁸² By allowing “two bites at the factual cherry,” Anderson and Nolan explain that the koso appeal creates “the possibility of judges overruling lay assessors on arguably the latter’s area of expertise.”⁸³

The koso appeal would clearly run afoul of the American constitutional amendment forbidding double jeopardy.⁸⁴ Furthermore, the Founders of the Constitution hypothesized that, even if a factual appeal was allowed, a second jury should resolve the issue on appeal to preserve the right of the people to make factual determinations.⁸⁵ Germany has employed this rationale, allowing prosecutors to appeal acquittals on factual grounds, but requiring that factual appeals result in a new public trial before a mixed panel.⁸⁶ Therefore, by lacking any lay participation on appeal, the Japanese system allows for the indirect circumvention of lay participation in its judicial system. This loophole surely

⁸² *Id.* at 41-42.

⁸³ Kent Anderson & Mark Nolan, *supra* note 2, at 957.

⁸⁴ See U.S. CONST. AMEND. V (“...nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb...”). Notably, the Constitution explicitly addresses the right of the jury to make factual determinations in the civil context; see also U.S. CONST. AMEND. VII (“In suits at common law...no fact tried by jury, shall be otherwise re-examined in any Court of the United States...”).

⁸⁵ See ALEXANDER HAMILTON, JOHN JAY & JAMES MADISON, *supra* note 61, at 512 (“If, therefore, the reexamination of a fact once determined by a jury, should in any case be admitted under the proposed Constitution, it may in any case be admitted under the proposed Constitution, it may be so regulated as to be done by a second jury, either by remanding the cause to the court below for a second trial of the fact, or by directing an issue immediately out of the Supreme Court.”).

⁸⁶ Walter Perron, *supra* note 78, at 182, 187.

undermines Japan's goal of enabling the people to adequately fulfill their role as the foundation of the country's judicial system.⁸⁷

C. The Act's lacks of a unanimity requirement allows dissenters to be ignored

The Act requires a simple majority with the consent of at least one judge and one lay person to sustain a conviction or sentence.⁸⁸ While the European continental systems, which the Japanese used as a model, similarly allow non-unanimous verdicts, many European systems nevertheless exhibit a stronger preference for unanimity than the Japanese system. The English system, for example, provides that unanimous verdicts are preferred, but 10-2 verdicts may stand as long as the judge believes the jury has deliberated for a reasonable time.⁸⁹

Although the U.S. Supreme Court has held that the Constitution does not *require* unanimity in most state criminal proceedings, it has consistently defended the fundamental importance of unanimity, suggesting that unanimity falls just short

⁸⁷ See Kent Anderson & Emma Saint, *supra* note 1, at 280 (translating Supp. Prov. Art. 2).

⁸⁸ *Id.* at 234.

⁸⁹ Sandra Day O'Connor, *supra* note 62, at 25; JEFFREY ABRAMSON, WE, THE JURY 180 (1994).

of a constitutional requirement.⁹⁰ Moreover, legislation often requires unanimity where the Constitution does not: the Federal Rules of Criminal Procedure, for example, require unanimity in the United States District Courts.⁹¹

In both *Johnson v. Louisiana* and *Apodaca v. Oregon* the Supreme Court held that a jury split by a 10-2 or 9-3 margin in noncapital cases would not violate the Constitution.⁹² Interestingly, the *Apodaca* Court noted that an initial draft of the Sixth Amendment required unanimity.⁹³ In determining the relevance of the exclusion of the unanimity requirement, the Court considered that “[o]ne possible inference is that Congress eliminated references to unanimity and to other ‘accustomed requisites’ of the jury because those requisites were thought already to be *implicit* in the very concept of the jury.”⁹⁴ However, rejecting the “inference”

⁹⁰ Although the lack of a constitutional unanimity requirement reveals that states may reduce certain democratic aspects of jury trials, any such reduction is likely to be tested by thorough resistance and litigation. Furthermore, the *gradual reduction* of isolated democratic features of a jury trial in the American system is a far cry from the *full-scale repeal* permitted under the Act’s three-year performance review provision.

⁹¹ FED.R.CRIM.P. 31(a) (“The verdict must be unanimous...”).

⁹² JEFFREY ABRAMSON, *supra* note 89, at 180; *Johnson v. Louisiana*, 406 U.S. 356 (1972) (“The provisions of Louisiana law requiring less-than-unanimous jury verdicts in criminal cases do not violate the Due Process Clause for failure to satisfy the reasonable-doubt standard.”); *Apodaca v. Oregon*, 406 U.S. 404 (1972). Unsurprisingly, Louisiana and Oregon (the two states involved in the litigation) are currently the only states that authorize non-unanimous verdicts for felony criminal trials. Sandra Day O’Connor, *supra* note 62, at 25.

⁹³ *Apodaca*, 406 U.S. at 409 (“The most salient fact in the scanty history of the Sixth Amendment...as it was introduced by James Madison in the House of Representatives...provided for trial ‘by an impartial jury of freeholders of the vicinage, with the *requisite of unanimity* for conviction...’”) (emphasis added).

⁹⁴ *Id.* at 409-10 (emphasis added); see also JEFFREY ABRAMSON, *supra* note 89, at 179 (“Incidental references to the ‘*obvious*’ requirement that criminal jury verdicts be unanimous date to the late 1800s. As the Court noted in 1898, ‘The Wise men who framed the Constitution of the United States and the people who approved of it were of [the] opinion that life and liberty, when involved in criminal prosecutions, would not be adequately secured except through the unanimous verdict of twelve jurors.’”) (emphasis added).

that unanimity was constitutionally required, the Court reasoned in *Johnson* and *Apodaca*:

Unanimity was not essential to justice because its demise would lessen neither the reliability of verdicts, still proven beyond a reasonable doubt to the overwhelming majority of the jurors, nor the representativeness of jury verdicts, because deliberation supposedly would go on as before between majority and minority points of view.⁹⁵

Dissenting from the *Johnson* decision, Justice Stewart explained:

The requirement that the verdict of the jury be unanimous, surely as important as these other constitutional requisites, preserves the jury's function in linking law with contemporary society... It provides the simple and effective method endorsed by centuries of experience and history to combat the injuries to the fair administration of justice that can be inflicted by community passion and prejudice.⁹⁶

The Supreme Court in *Burch v. Louisiana* subsequently held that the Constitution requires unanimity when a court employs a six-person jury (the fewest jurors permitted by the Constitution).⁹⁷ Therefore, the *Burch* decision certainly cautions against non-unanimity for the proposed Japanese system comprised of three professional judges and six lay assessors for serious cases.

⁹⁵ JEFFREY ABRAMSON, *supra* note 93, at 179.

⁹⁶ *Johnson*, 406 U.S. at 399.

⁹⁷ 441 U.S. 130, 139 (1979) (“[W]e think that when a State has reduced the size of its juries to the minimum number of its juries to the minimum number of jurors permitted by the Constitution, the additional authorization of nonunanimous verdicts by such juries sufficiently threatens the constitutional principles that led to the establishment of the size threshold that any countervailing interest of the State should yield.”).

Many studies have documented the problematic nature of non-unanimous verdicts. Most important is the reality that, absent a unanimity requirement, “deliberation between majority and minority factions becomes weak and watery once the majority has enough votes for a verdict.”⁹⁸ In particular, studies reveal that juries lacking a unanimity requirement (1) spend less time deliberating, (2) feel less confident in their conclusions, and (3) are more combative, leaving holdouts feeling ignored by the majority.⁹⁹ Any of these negative side-effects of non-unanimity would certainly undermine Japan’s stated goal of promoting democracy by encouraging lay participation in the legal process.

The unanimity requirement derives its value from Aristotle’s model of “collective wisdom,” by which each juror considers the case from opposing perspectives in search of the “conscience of community.”¹⁰⁰ Because the unanimity requirement fosters a “disposition to harmonize” among jurors, political leader John Calhoun feared that if a verdict were based “on a bare majority, [then] jury trial, instead of being one of the greatest improvements in the judicial department of the government, would be one of the greatest evils.”¹⁰¹

⁹⁸ JEFFREY ABRAMSON, *supra* note 89, at 199.

⁹⁹ *Id.* at 200.

¹⁰⁰ JEFFREY ABRAMSON, *supra* note 89, at 183.

¹⁰¹ *Id.* at 184.

The cost of the unanimity requirement appears in the form of a hung jury. Although the hung jury “marks a failure of the system, since it necessarily brings a declaration of mistrial in its wake,” it also provides “a valued assurance of integrity, since it can serve to protect the dissent of a minority.”¹⁰² Consequently, scholars argue in favor of preserving the unanimity requirement because the “cost of the unanimity rule is small, and its value in causing jurors to listen carefully to one another, and occasionally in avoiding an unjust conviction is great.”¹⁰³ In analyzing the Act’s majority requirement, Anderson and Nolan note that, because the majority can effectively ignore the dissenters’ views, the majority requirement may reinforce status-based and expertise-based group differences inherent in mixed courts and lead to negative perceptions of the process.¹⁰⁴ Such resentment would certainly undermine the Act’s goal of encouraging democratic participation in the Japanese judicial system.

¹⁰² HARRY KALVEN, JR. & HANS ZEISEL, *supra* note 73, at 453; *see also Huffman v. United States*, 297 F.2d 754, 759 (5th Cir. 1962) (“[A] mistrial from a hung jury is a safeguard to liberty. In many areas it is the sole means by which one or a few may stand out against an overwhelming contemporary public sentiment. Nothing should interfere with its exercise.”) (Brown, R., concurring as to one appellant and dissenting as to another).

¹⁰³ WILLIAM L. DWYER, *supra* note 11, at 193.

¹⁰⁴ Kent Anderson & Mark Nolan, *supra* note 2, at 980.

D. The interaction of professional judges with lay assessors may undermine participation by the lay assessors

Despite the Act's attempts to protect the participation of lay assessors from the strong influence of their professional counterparts,¹⁰⁵ “the current set-up – with judges leading a discussion voted on by a majority of members – seems ripe for abuse.”¹⁰⁶ Most important, the proposed system does not explain whether the panel will deliberate communally (or whether lay assessors and professional judges will deliberate in separate groups) and, if so, who will lead the deliberations and voting.¹⁰⁷ These procedural issues remain crucial to those who question the Japanese lay participants' ability to play an active role in deliberation.¹⁰⁸ In fact, Anderson and Nolan suggest that the Act requires lay assessors to voice an opinion at deliberations in order to address the fear of passivity by lay assessors, but conclude that the requirement lacks muscle due to the difficulty of enforcing it.¹⁰⁹

¹⁰⁵ See Kent Anderson & Emma Saint, *supra* note 1 at 241 (translating Art. 8 (“Lay assessors will carry out their authority independently”)); *id.* at 273 (translating Art. 66, cl. 2 (“The lay assessors shall attend the deliberations... and express an opinion”)); *id.* (translating Art. 66, cl. 5 (“...the chief judge shall...provid[e] sufficient opportunity for the lay assessors to voice their opinions”)).

¹⁰⁶ Kent Anderson & Mark Nolan, *supra* note 2, at 974.

¹⁰⁷ *Id.* at 950 (suggesting that it is “implicit that deliberations will be done communally rather than as separate deliberations by subgroups of judges and lay assessors as some have advocated.”)

¹⁰⁸ *Id.*; see also *id.* at 987-88 (“Japanese citizens [contrasted with Western citizens] are said to be collectivist and psychologically dependent on authority.”)

¹⁰⁹ *Id.* at 954.

Studies also suggest that merely increasing the number of lay assessors relative to professional judges will not reduce undesirable levels of judicial dominance.¹¹⁰

The experiences of European mixed panel systems substantiate these concerns. Judge William Dwyer argued that, in the European system, “the professional judges dominate; these mixed panels are not juries.”¹¹¹ Judge Dwyer then explained:

[A] system that relies so heavily on judges invites not just sloth and incompetence but corruption... Judge-ruled court systems can fall prey to bribery or tyranny; strong, deeply rooted roles for citizens and lawyers in the trial courts are safeguards against judicial decay... [H]owever skilled and conscientious European judges may be, they are government employees...¹¹²

In Germany, Walter Perron similarly concludes that “[l]ay participation generally does not have a vital impact on the criminal process for the professional judges dominate the trials.”¹¹³ Despite the seeming importance of the lay participants because the professional judges need their votes to establish a majority, Perron explains that “[a]s a matter of fact their actual influence is far weaker, since no decision is made without a preceding discussion with their

¹¹⁰ *Id.* at 978.

¹¹¹ WILLIAM L. DWYER, *supra* note 11, at 158.

¹¹² *Id.*

¹¹³ Walter Perron, *supra* note 78, at 189.

professional counterparts.”¹¹⁴ Perron also explains that when a rare disagreement does occur, the professional judges generally assert themselves against their lay colleagues.¹¹⁵ In fact, Perron describes a process by which the professional judges negotiate a settlement without the lay assessors present and then simply persuade the lay participants to agree to the settlement, thereby avoiding their participation in the case altogether.¹¹⁶ Nevertheless, Anderson and Nolan note that the German system provides better protection against abuse by professional judges than the proposed Japanese system because German lay assessors receive appointments for a number of years during which they accumulate enough legal sophistication to achieve the self-confidence necessary to disagree with a professional judge.¹¹⁷ Therefore, the Japanese one-time appointment system makes it particularly susceptible to lay assessor’s deference, not because of age or social status, but because of legal knowledge and experience.¹¹⁸

English judges also exert tremendous influence over the jury. Just before handing the case over to the jury, English judges often offer their opinion as to the

¹¹⁴ *Id.* at 184.

¹¹⁵ *Id.* at 193.

¹¹⁶ *Id.* at 190.

¹¹⁷ Kent Anderson & Mark Nolan, *supra* note 2, at 974.

¹¹⁸ *Id.* at 974-75.

credibility of the evidence presented.¹¹⁹ Of course, the Act allows for an even greater degree of judicial influence, permitting the professional judge to go beyond merely offering an opinion to actually arguing his or her opinion against the lay assessors.

The American system not only delineates the exclusive authority of a jury to determine facts, but it also restricts the extent to which a judge may interfere with that function. Specifically, the “dynamite charge” in *Allen v. United States*,¹²⁰ whereby the judge encourages a deadlocked jury to reconsider the opposing position, represents the outer boundary of permissible interaction with the jury’s fact-finding function. The risk of the dynamite charge is that the jury may perceive the judge as agreeing with the majority and, contrary to any warning,¹²¹ suggesting that the minority simply succumb to the will of the majority.¹²² Once again, the Act permits a professional judge to go far beyond the dynamite charge, which encourages *any* verdict, to actually persuading the jurors to adopt the verdict which the judge prefers. This undeniable influence surely exceeds the role prescribed by

¹¹⁹ HARRY KALVEN, JR. & HANS ZEISEL, *supra* note 73, at 417-18.

¹²⁰ 164 U.S. 492 (1896).

¹²¹ Despite the judge’s attempt to motivate further deliberations, the dynamite charge typically entails a cautionary reminder that “the verdict must be the verdict of each juror, and not a mere acquiescence in the conclusion of his fellows...” *Id.* at 501.

¹²² HARRY KALVEN, JR. & HANS ZEISEL, *supra* note 73, at 454.

the American system, especially considering the U.S. Supreme Court has explained that “the purpose of trial by jury is to prevent oppression by the Government by providing a safeguard against... the compliant, biased, or eccentric judge.”¹²³ Therefore, since that the purpose of trial by jury is to subject law to a democratic interpretation, the ability of a professional judge to influence the lay assessors may undermine the Act’s goal of promoting democracy.¹²⁴

E. The lack of lay participation once the panel reaches a verdict undermines the transparency and credibility of the proposed system

The Act provides that the professional judge will draft the opinion in all circumstances.¹²⁵ Furthermore, despite the Act’s prescription that “[l]ay assessors shall appear on the day of the trial when the court hands down its decision of a sentence...,” it also provides that “a lay assessor’s failure to appear will not invalidate the relevant judgment or the pronouncement of the verdict.”¹²⁶

Therefore, Anderson and Nolan argue that, because of the (1) majority voting rules, (2) exclusive power of professional judges to draft opinions, (3) prohibition

¹²³ *Apodaca*, 406 U.S. at 410.

¹²⁴ See JEFFREY ABRAMSON, *supra* note 89, at 6.

¹²⁵ See Kent Anderson & Mark Nolan, *supra* note 2, at 956.

¹²⁶ See Kent Anderson & Emma Saint, *supra* note 1, at 269 (translating Art. 63).

against lay assessors divulging any information regarding the deliberations (including the size of a majority that rendered a decision), and (4) lack of confirmation power by lay assessors (who may be discharged without signing the judgment), “nothing ensures the accuracy and transparency of the proceeding’s record, which is of course where its precedential value lies.”¹²⁷

The German system also grants exclusive authority to write judicial opinions to professional judges, even when the lay judges constitute the majority.¹²⁸ Scholars have criticized this policy for two reasons. First, it generally diminishes lay influence on the criminal trial.¹²⁹ Second, it enables the professional judges to undermine a majority of lay assessors by framing the opinion in such a manner that an appellate court must reverse the judgment and order a new trial.¹³⁰

The American system avoids many of these transparency and accuracy problems because the jury alone reaches a decision at the trial level and delivers the opinion in open court, even allowing the judge to “poll” the jury to ensure the

¹²⁷ See Kent Anderson & Mark Nolan, *supra* note 2, at 956-58.

¹²⁸ Walter Perron, *supra* note 78, at 187.

¹²⁹ *Id.* at 194.

¹³⁰ *Id.*

requisite consensus has been met.¹³¹ The American system also facilitates transparency by informing attorneys of questions solicited from the jury room and even permitting the occasional tell-all books written by jurors after highly publicized trials.¹³²

F. The Act risks excluding too many classes of people from lay participation to truly promote democracy

In order to ensure that the legal profession does not capture the proposed lay assessor system, the Act carefully excludes all quasi-lawyers from eligibility.¹³³ Furthermore, the Act effectively excludes persons under the age of 20 by requiring the selection of lay assessors from among those with suffrage rights (which impose a twenty-year age requirement).¹³⁴ Germany's system also excludes legal professionals and imposes a twenty-five-year age requirement notwithstanding its prescription that the candidates should reflect all sections of the population.¹³⁵

¹³¹ See, e.g., FED.R.CRIM.P. 31(a) (“The jury must return its verdict to a judge in open court.”); see also U.S. CONST. amend VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and *public* trial”) (emphasis added).

¹³² Kent Anderson & Mark Nolan, *supra* note 2, at 958.

¹³³ *Id.* at 973.

¹³⁴ Kent Anderson & Emma Saint, *supra* note 1 at 243 (translating Art. 13).

¹³⁵ Walter Perron, *supra* note 78, at 191.

Although Anderson and Nolan acknowledge that the de facto age requirement may satisfy the Judicial Reform Council’s desire for the lay assessor system to reflect “sound social commonsense,” they nevertheless note that the limitation likely “compromise[s] the democratic objective sought by the overall lay assessor plan.”¹³⁶ The Act also excludes persons who do not have a junior high school education (nine years of education) and those who have been imprisoned or are imprisoned or indicted.¹³⁷

While the American system surely excludes certain classes of citizens from serving as jurors, it represents a stronger *presumption of eligibility*,¹³⁸ undoubtedly the result of America’s hard-fought battle to overcome its jury’s discriminatory origins.¹³⁹ Beginning with a presumption of eligibility, the American system then carves out narrow exceptions, most notably the eighteen-year age requirement.

The Act, by contrast, lacks any presumption of eligibility and instead creates the

¹³⁶ Kent Anderson & Mark Nolan, *supra* note 2, at 954.

¹³⁷ *Id.* at 954.

¹³⁸ *See, e.g.*, 28 U.S.C. § 1862 (beginning with the general rule that “*No citizen shall be excluded...*”) (emphasis added).

¹³⁹ For a broad overview of the litigation and statutory history regarding discrimination and the right to serve on a jury, see *Virginia v. Rives*, 100 U.S. 313 (1879) (holding that jurors could not be excluded on racial grounds but that the mere absence of blacks from a jury would not establish an intent to discriminate); *Smith v. Texas*, 311 U.S. 128 (1940) (going beyond *Rives* to hold that a nondiscriminatory statute could nonetheless violate Equal Protection if its *application* was discriminatory, referring to the need to make the jury a “body truly representative of the community”); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (holding that “[t]he States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are *representative of the community*.”) (emphasis added); the Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-67 (imposing the affirmative obligation to include members of cognizable groups in proportion to their percentage of the voting population or population registered to vote).

exceptions in the same legislation that establishes the privilege to begin with. This difference does not exist because of diverging legislative preferences or arbitrary semantic decisions. Rather, it exists because the American system embodies the protection of rights that already belong to the people whereas the Japanese system reflects a grant of privilege in the first instance.

Although the Japanese system hardly harnesses malicious motivations behind its broad exclusion of legal professionals from service, the American system would not tolerate such an expansive exemption to the constitutional right to serve on a jury. Additionally, Japan should beware of the virtues it sacrifices in the pursuit of protecting its jury system from legal dominance: “An ideal of jury impartiality that can be practiced only by disqualifying the most well-informed members of the community does not inspire confidence in the accuracy of jury verdicts. It naively defines an impartial mind as an empty mind.”¹⁴⁰

Some would argue that the Act should not seek to exclude any juror with bias or impartiality. Rather, they would propose that the Act seek to “achieve the ‘overall’ or ‘diffused’ impartiality that comes from balancing the biases of its members against each other.”¹⁴¹ While some argue that distance puts justice in

¹⁴⁰ JEFFREY ABRAMSON, *supra* note 89, at 37; *see also id.* at 21 (“A remarkable level of inattention and apathy become the necessary conditions for impartiality as a juror.”)

¹⁴¹ *See* WILLIAM L. DWYER, *supra* note 11, at 101.

perspective, distance also reduces confidence in the competence of juries.¹⁴²

Furthermore, it seems ironic for the Act to exclude legal professionals from serving as lay assessors in order to protect the system from legal dominance considering the lay assessors will serve alongside tremendously influential professional judges.

VI. The Act promotes democracy to a greater extent than most systems

Although many of the Act's procedures jeopardize its goal of promoting democracy, the Act actually promotes democracy to a greater extent than the American and most other systems (for better or worse) in two important ways.

First, the Act grants lay assessors an active role during trial, authorized to directly question witnesses, victims, and defendants at trial and outside of the courtroom.¹⁴³

Many American scholars criticize the passive role of the American juror and argue in favor of encouraging the sort of active participation which the Act provides.¹⁴⁴

¹⁴² JEFFREY ABRAMSON, *supra* note 89, at 21.

¹⁴³ See Kent Anderson & Emma Saint, *supra* note 1, at 267-68 (translating Art. 56 ("In the event the court questions a witness or other person, a lay assessor may, upon informing the chief judge, question that person concerning those matters that are required to be decided with the lay assessor's participation."), Art. 57, (titled "Witness Questioning Outside the Court"), Art. 58 (titled "Questioning of Victims"), and Art. 59, (titled "Questioning of the Defendant)).

¹⁴⁴ See Sandra Day O'Connor, *supra* note 62, at 22 ("Too often, jurors are allowed to do nothing but listen passively to the testimony, without any idea what the legal issues are in the case, without permission to take notes or participate in a way, finally to be read a virtually incomprehensible set of instructions and sent into the jury room to reach a verdict in a case they may not understand much better than they did before the trial began."); WILLIAM L. DWYER, *supra* note 11, at 175, 177 ("[W]e have been in the era of the passive juror. Judges, fearing that some untoward word might slip out or some irrelevancy be uttered – fearing also, and more profoundly, chaos in the courtroom (order shattered, people shouting, the gavel banging in vain) – have required jurors to sit silently and listen. A juror seeking to ask a question is told, ordinarily, to subside; anything that matters will be brought out by

Active participation in the proposed Japanese system will increase the lay assessors' confidence in its verdict by allowing the jury access to the information it wants and ensuring that it received helpful answers to questions. Moreover, such participation will promote the democratic ideal of placing the ultimate power over the trial in the hands of the people.¹⁴⁵ However, it will also present the many policy concerns that inspired the American system's restriction of evidence from the jury: most notably the fears of undue prejudice, reliability, and improper police procedure.

Second, the proposed Japanese system promotes democracy to a greater extent than the American and most other systems by allowing jurors to come closer to deciding *legal* issues as well as factual issues. Although the Act provides that the professional judges will make the final decision regarding legal issues, it nevertheless suggests that the chairing judge may allow the lay assessors to participate in the decisions.¹⁴⁶ The German system similarly allows the entire

the lawyers. Once active participants, the jurors have been turned into receptacles.... In a bench trial, we don't expect the judge to be content with a brush-off when she questions counsel during final arguments; jurors' questions should be treated with similar respect."). Note that certain American jurisdictions allow for a limited degree of active participation at trial, ranging from note-taking to drafting questions for witnesses.

¹⁴⁵ Of course, the benefit of the jury's control of the trial is limited because of the ability of professionals to undermine the trial altogether through (1) a "koso appeal" (discussed *infra* at Part 2, Section B) and (2) the professional judge's exclusive ability to draft the opinion in such a manner as to facilitate a reversal (discussed *infra* at Part 2, Section E).

¹⁴⁶ Kent Anderson & Mark Nolan, *supra* note 2, at 948.

mixed panel to settle important procedural issues raised at trial.¹⁴⁷ Despite the apparent influence of German lay participants over its judicial system, however, the persuasive power of their professional counterparts often undermines this influence.¹⁴⁸ Furthermore, as previously discussed, if the lay assessors insist upon a legal judgment contrary to the law, the professional judges will clearly illuminate the error in the written opinion so the prosecutor, defense counsel or secondary accuser can successfully overturn the judgment.¹⁴⁹

Although granting lay assessors influence over legal decisions undoubtedly invites tremendous democratic participation in the judicial system, a brief examination of the American experience with jury nullification provides significant insight as to the risks and advantages of allowing lay assessors to decide legal issues. In essence, jury nullification allows a jury to acquit a defendant (who concededly violated a law) either because it finds that the law itself is oppressive or that its application against a particular defendant would be oppressive.¹⁵⁰ The nullification concept extends back to America's early beginnings. In a diary entry from 1771, John Adams argued that a juror should disregard a judge's statement of

¹⁴⁷ Walter Perron, *supra* note 78, at 184.

¹⁴⁸ *Id.* (“[Despite the apparent influence of German lay assessors over legal decisions,] [a]s a matter of fact their influence is far weaker, since no decision is made without a preceding discussion with their professional counterparts.”)

¹⁴⁹ *Id.* at 186.

¹⁵⁰ JEFFREY ABRAMSON, *supra* note 89, at 59.

the law if the juror believed that the instruction ran counter to fundamental principles of the British Constitution.¹⁵¹ In fact, subsequent state constitutions, including the Georgia Constitution of 1777 and the Pennsylvania Constitution of 1790, specifically provided that “the jury shall be the judges of law, as well as fact.”¹⁵²

The notion of jury nullification implicates important democratic principles as the “fight over the jury’s right to decide questions of law was another front in the battle over the geography of democracy in America.”¹⁵³ Some felt that juries needed nullification to shield liberty against tyranny by bringing the enforcement of the law into harmony with local values and sentiments.¹⁵⁴ At first, the fact that different communities might interpret national laws differently was well-received as “the welcome result of decentralizing power over the law down to the local level and into the hands of citizens.”¹⁵⁵ However, the United States systematically prohibited nullification, most notably by the Supreme Court in *Sparf v. United States*.¹⁵⁶ *Sparf* restricted juries to deciding factual issues, primarily reasoning that

¹⁵¹ *Id.* at 30.

¹⁵² *Id.* at 76.

¹⁵³ *Id.* at 90.

¹⁵⁴ *Id.* at 87.

¹⁵⁵ *Id.* at 89.

¹⁵⁶ 156 U.S. 51 (1895).

such a limitation best protects “the stability of public justice as well as the security of private and personal rights.”¹⁵⁷ Uncontrolled by any settled, fixed legal principles, the Court feared that nullification would reduce a “government of laws” to a mere “government of men – twelve unelected, unaccountable men at that.”¹⁵⁸ The Court also reasoned that nullification would undermine the appellate process (as the jury, upon remand, could simply disregard the appellate court’s answer to the legal issue)¹⁵⁹ and that judges were better equipped to enforce unpopular laws.¹⁶⁰

Most important, jury nullification is “in virtual eclipse today” primarily because of its “service to racism.”¹⁶¹ The “vicious side to jury nullification” appeared most readily in the South, where all-white juries refused to convict whites charged with murdering blacks or civil rights workers of any race.¹⁶² As one author explains, “[t]o get the jury that resists the tyranny of the state, we must risk

¹⁵⁷ *Id.* at 106.

¹⁵⁸ JEFFREY ABRAMSON, *supra* note 89, at 87.

¹⁵⁹ *Id.*

¹⁶⁰ *Sparf*, 156 U.S. at 107 (“[W]hen an unpopular cause is a just cause; when a law, unpopular in some locality, is to be enforced, -there then comes the strain upon the administration of justice; and few unprejudiced men would hesitate as to where that strain would be most firmly borne.”)

¹⁶¹ JEFFREY ABRAMSON, *supra* note 89, at 62.

¹⁶² *Id.* at 61.

our freedom on the jury that practice its own petty tyranny.”¹⁶³ In some sense, however, some sort of nullification will exist as long as juries do because “[h]istory teaches us that jurors escape all kinds of legal straightjackets designed to restrain conscientious acquittals in criminal trials.”¹⁶⁴ The prohibition against double jeopardy also facilitates a sort of nullification by protecting a jury’s verdict, regardless of its reasons for reaching that verdict.

Some scholars compare the passive role of the American juror to that of a computer responsible for accepting the law from the judge (as the major premise) and merely filling in the facts (as the minor premise) in order to produce a logical conclusion.¹⁶⁵ Others argue that, by requiring the jury to apply the law in every case regardless of how unjust the results seem to them, the American system “opens the chasm between law and popular beliefs that the jury system exists to prevent.”¹⁶⁶ Consequently, Judge William Dwyer proposes a form of quasi-nullification for the American system in which the judge would simply “say nothing” about the jury’s right to nullify a verdict based on conscience; thereby

¹⁶³ *Id.* at 5.

¹⁶⁴ *Id.* at 92.

¹⁶⁵ WILLIAM L. DWYER, *supra* note 11, at 61.

¹⁶⁶ JEFFREY ABRAMSON, *supra* note 89, at 92.

allowing for nullification if it should happen to occur.¹⁶⁷ Such quasi-nullification would avoid the feared chaos of an explicit nullification instruction while keeping the law legitimately attuned to community values.¹⁶⁸ Like the quasi-nullification theory, the Act (allowing lay assessors to at least voice their opinions regarding legal decisions) reaches a position somewhere between granting jurors *carte blanche* to override the law and excluding them from legal decisions altogether. Wherever the Act falls along this spectrum, it certainly allows for greater democratic influence over the judicial system than the computer-like passivity of the American jury.

VII. The Act will not effectively promote democracy unless Japan makes fundamental changes to its legal system

A criminal justice system exists like a pyramid. The source of power underlying the entire system establishes the foundation, influencing each of the layers above. Above any legislation, common law, or evidentiary rules, the right to trial by jury sits atop the pyramid, overlooking the layers below. In this position, trial by jury “can be healthy only as the summit of a system that itself is

¹⁶⁷ WILLIAM L. DWYER, *supra* note 11, at 81.

¹⁶⁸ *Id.*

healthy.”¹⁶⁹ One author describes the importance of looking beyond the summit of the system to the layers below:

In the church, a black-robed figure presides and everyone is on good behavior, saying good morning, kneeling at the right times, singing the hymns together. But most of the time the congregants are out of sight, and when they are in the streets they go at each other with tire irons and baseball bats. Judges need to walk into those streets...¹⁷⁰

Therefore, Japan should begin any judicial reform in the “streets” because the “real substance of criminal procedure in Japan and the truly distinctive character of Japanese criminal procedure lie not in the trial but in the investigative process and the police and prosecutors who dominate it.”¹⁷¹ Japan stands apart from other democracies such as Holland, Germany, France, and the United States “in the precision of its justice, in its reliance on confessions, and in the intensity and insularity of its processes for obtaining admissions of guilt.”¹⁷² Because the Japanese criminal justice system, like those of the European systems it was modeled after, derives from a dimmer view than the American system of constitutional rights,¹⁷³ Anderson and Nolan argue that the proposed lay assessor

¹⁶⁹ *Id.* at 180.

¹⁷⁰ *Id.*

¹⁷¹ DAVID T. JOHNSON, *supra* note 14, at 40.

¹⁷² *Id.* at 268.

¹⁷³ See WILLIAM L. DWYER, *supra* note 11, at 157.

system may occur too late in the criminal justice process to make a meaningful contribution:

Nothing suggests that the pre-trial practices of police and prosecutors, which results in the overwhelming number of defendants confessing to their crimes, will change. Thus, for all but a few showcase trials, the lay participants' primary role will not be impersonating Henry Fonda and deciding the defendant's guilt or innocence, but rather it will be assisting with finding an appropriate punishment.¹⁷⁴

However, rather than constituting significant reform in and of itself, the Act may *lead to* fundamental changes in Japan's criminal justice system if lay assessors react more than judges, prosecutors, and police to "perennial procedural problems" such as illegal arrest, coerced confessions, and discovery violations.¹⁷⁵ In its current state, though, the nation's astounding conviction rate¹⁷⁶ suggests the Japanese criminal trial proves little more than a foregone conclusion.¹⁷⁷ Scholars offer several reasons to explain Japan's remarkably high conviction rates: (1)

¹⁷⁴ Kent Anderson & Mark Nolan, *supra* note 2, at 948.

¹⁷⁵ LAWRENCE W. BEER & HIROSHI ITOH, *THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990* 27 (1996).

¹⁷⁶ See DAVID T. JOHNSON, *supra* note 14, at 215 ("Japan's high conviction rates are heralded by journalists, scholars, and prosecutors and by Japanese and foreigners alike. The country is said to have the 'world's highest conviction rate,' 'an astonishing conviction rate,' 'a 'dazzling' conviction rate, 'an extremely high conviction rate,' a conviction rate 'well over 99%,' 'an incredibly high conviction rate' of 99.8%, 'an almost 100% conviction rate,' and 'a conviction rate of close to 100%.' Just as frequently the point is put in the converse: Japan has 'low acquittal rates,' a 'very low acquittal rate,' 'very few acquittals,' and an acquittal rate 'approaching absolute zero.'").

¹⁷⁷ See RICHARD H. MITCHELL, *supra* note 54, at 199 ("Unlike the situation in many European nations and the United States, [Japanese] courtrooms are merely places where procuratorial investigations are authenticated."); DAVID T. JOHNSON, *supra* note 14, at 47 ("[T]he vast majority of Japan's criminal trials do not resemble fights, battles, or sporting events, as the adversarial logic of its laws seems to prescribe, but rather ceremonies or empty shells, devoid of even minor disagreements.").

defendants do not contest guilt in the vast majority of cases,¹⁷⁸ (2) prosecutors are inappropriately obsessed with maintaining high conviction rates and therefore drop all cases with even a remote risk of ending in acquittal,¹⁷⁹ and (3) even when a trial does occur, prosecutors have already practically secured a conviction with a confession because of the vast procedural advantages afforded to it.

A. Japan's need to discover the truth undermines the Act's ability to promote democracy

Japan's criminal justice system primarily seeks to ascertain the truth. Like those European continental systems which the Japanese system was modeled after (including the German system), "the process is seen not as a partisan conflict but as an official inquiry into the truth..."¹⁸⁰ By contrast, the American system, seeking to defend individual rights, places a greater premium on the process by which truth is discovered, often sacrificing truth to preserve the process. While Americans enjoy the "quixotic democratic luxury"¹⁸¹ of the exclusion of improperly obtained

¹⁷⁸ CURTIS J. MILHAUPT, J. MARK RAMSEYER, & MARK D. WEST, *supra* note 80, at 445.

¹⁷⁹ DAVID T. JOHNSON, *supra* note 14, at 215, 219.

¹⁸⁰ WILLIAM L. DWYER, *supra* note 11, at 155; *see also* Walter Perron, *supra* note 78, at 183 ("[In the German system,] [t]he taking of evidence is of an inquisitorial nature, i.e. the court is obliged to ascertain the *truth*...") (emphasis added).

¹⁸¹ HARRY KALVEN, JR. & HANS ZEISEL, *supra* note 73, at 318.

evidence, Japanese courts rarely exclude evidence unless the procedure was “gravely illegal.”¹⁸² Notably, the Japanese Supreme Court has reasoned that it would be “unreasonable to exclude all illegally obtained evidence since doing so would jeopardize the search for the truth.”¹⁸³

In a survey comparing the priorities of American and Japanese prosecutors, Japanese prosecutors expressed the greatest interest (in descending order) in (1) discovering the truth, (2) proper charge decisions, (3) invoking remorse in offenders, (4) rehabilitating and reintegrating offenders, (5) protecting the public, (6) treating like cases alike, and (7) respecting the rights of suspects.¹⁸⁴ The American prosecutors, on the other hand, prioritized (1) protecting the public, (2) respecting the rights of suspects and discovering the truth (a two-way tie), (4) proper charge decisions, (5) giving offenders the punishment they deserve, (6) treating like cases alike, and (7) having the public understand that the office responds properly to crime.¹⁸⁵ Interestingly, although the Japanese prosecutors expressed slightly more interest in discovering the truth, the American prosecutors placed significantly greater importance upon protecting the rights of suspects.

¹⁸² CURTIS J. MILHAUPT, J. MARK RAMSEYER, & MARK D. WEST, *supra* note 80, at 474.

¹⁸³ *Id.* at 475.

¹⁸⁴ DAVID T. JOHNSON, *supra* note 14, at 98.

¹⁸⁵ *Id.*

Japanese judges often care more about the sincerity, truthfulness, and demonstrated remorse of a confession than the process by which it was obtained.¹⁸⁶ Moreover, Japanese prosecutors resist expanding discovery rules for defendants (which would allow greater access to potentially exculpatory evidence) for fear that defendants might overemphasize the discovery to distort the “actual truth.”¹⁸⁷ Such a determination to discover the truth, despite the process by which it is acquired, may undermine Japan’s goal of promoting democracy by overlooking the fundamental democratic principle of defending individual rights.

B. Japan’s “enabling legal environment” undermines the Act’s ability to promote democracy

Japan’s criminal justice system operates as a well-oiled machine designed to enable a conviction. Many pro-police and pro-prosecution features contribute to this “enabling legal environment,” including favorable rules regarding the admissibility of evidence, expansive powers to arrest and detain, and rules regarding “voluntary investigation” (allowing police and prosecutors to process

¹⁸⁶ CURTIS J. MILHAUPT, J. MARK RAMSEYER, & MARK D. WEST, *supra* note 80, at 447.

¹⁸⁷ See Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317, 383 (1992).

over four-fifths of all suspects on an “at-home” basis and thereby avoid judicial scrutiny of their behavior).¹⁸⁸

1. Interrogation and confession

The broad grant of power to detain and interrogate suspects in order to produce a confession provides the most significant feature of Japan’s enabling legal environment. One author noted:

Japanese criminal justice relies so heavily on confessions that in some circumstances prosecutors use blatantly illegal tactics, like plea-bargaining, essay writing, and the third degree, in order to obtain them... Ironically, the enabling law that makes misconduct unnecessary in the vast majority of cases also makes it possible for investigators to abuse that law... Insulation from public and political scrutiny renders prosecutor misconduct difficult to detect, if not downright invisible.¹⁸⁹

Police and prosecutors feel tremendous pressure to obtain a confession because the confession marks the discovery of the truth and the crux of Japan’s “precise justice.”¹⁹⁰ The prosecutor reasons: no confession, no truth, no consistency, no

¹⁸⁸ DAVID T. JOHNSON, *supra* note 14, at 36.

¹⁸⁹ *Id.* at 264.

¹⁹⁰ *Id.* at 268.

correction, no conviction, no justice.¹⁹¹ Prosecutors feel disgraced if an indictment does not produce a conviction and judges expect a detailed confession.¹⁹²

Many judges regard the admission of guilt as an essential part of the psychological catharsis needed to put the defendant on the road to rehabilitation.¹⁹³ Moreover, law enforcement authorities not only expect a suspect to confess, but they also expect suspects to “behave with remorseful submission.”¹⁹⁴ By contrast, Western societies have not similarly prioritized the repentance of defendants. One author suggests that the Japanese seek repentance and rehabilitation of defendants because their system works; Americans, on the other hand, seek punishment because theirs does not.¹⁹⁵

The unavailability of any claim to release during periods of arrest or custody before the institution of a criminal prosecution facilitates effective interrogation for Japanese prosecutors.¹⁹⁶ After arrest, the judge decides where police will hold the suspect, and the prosecutor usually asks the judge to detain the suspect at a “substitute prison” (a detention cell at the police station) so that detectives may

¹⁹¹ *Id.*

¹⁹² RICHARD H. MITCHELL, *supra* note 54, at 197.

¹⁹³ *Id.*

¹⁹⁴ CURTIS J. MILHAUPT, J. MARK RAMSEYER, & MARK D. WEST, *supra* note 80, at 448.

¹⁹⁵ *Id.*

¹⁹⁶ LAWRENCE W. BEER & HIROSHI ITOH, *supra* note 175, at 27.

interrogate him at their convenience.¹⁹⁷ One author describes the enabling environment of a “substitute prison:”

The police can have unrestricted power to interrogate a suspect detained in a “substitute prison” for many hours. Many cases of torture have been reported... The police can easily restrict and control the communication between the detainee and those in the outside world, including counsel. Unlike in the United States where Miranda rules prevail, in Japan the presence of an attorney is not required at the police interrogation of the suspect. Even free access between the attorney and the accused client can be controlled by the police in terms of designation of time and place of interview in the interests of police investigation.¹⁹⁸

Furthermore, law enforcement often escalate the negative conditions for suspects that deny the charged facts or refuse to confess, occasionally resulting in false confessions simply to escape the harsh surroundings.¹⁹⁹ Consequently, one author concluded that “the substitute prison is the largest hotbed of false charges and convictions in Japan.”²⁰⁰

Defense counsel not only lack the right to attend interrogations,²⁰¹ but law enforcement typically preclude a defendant from meeting with counsel until after the suspect has confessed, making confession a “prerequisite to the exercise of his

¹⁹⁷ CURTIS J. MILHAUPT, J. MARK RAMSEYER, & MARK D. WEST, *supra* note 80, at 474.

¹⁹⁸ Toyoji Saito, “Substitute Prison:” *A Hotbed of False Criminal Charges in Japan*, 18 N. Kent. 399, 411 (1990).

¹⁹⁹ *Id.* at 412.

²⁰⁰ *Id.*

²⁰¹ CURTIS J. MILHAUPT, J. MARK RAMSEYER, & MARK D. WEST, *supra* note 84, at 474.

constitutional right.”²⁰² Despite warnings to suspects of their right to remain silent, no time limit is placed on the interrogation and investigators have ample time to wear down suspects and obtain confessions.²⁰³ During interrogations, the suspect’s statements are not recorded, but rather, detectives compose coherent stories while listening to the statements and simply ask the suspect to sign them.²⁰⁴ Some criticize this practice because the interrogator’s dossiers really constitute his interpretation of the suspect’s statement, his arrangement of the material, and his choice of words.²⁰⁵ Critics further contend that prosecutors add and omit words to the dossiers in order to strengthen the case against the suspect,²⁰⁶ or worse, concoct motives to fit the confessions.²⁰⁷

Once a confession is uttered, it is practically set in stone and the suspect’s fate is sealed. First, an exception to the hearsay rule renders the confession easily admissible.²⁰⁸ Second, suspects rarely disavow confessions and lawyers and

²⁰² *Id.*

²⁰³ RICHARD H. MITCHELL, *supra* note 54, at 197.

²⁰⁴ CURTIS J. MILHAUPT, J. MARK RAMSEYER, & MARK D. WEST, *supra* note 80, at 474.

²⁰⁵ DAVID T. JOHNSON, *supra* note 14, at 39.

²⁰⁶ *Id.*

²⁰⁷ RICHARD H. MITCHELL, *supra* note 54, at 198.

²⁰⁸ Toyoji Saito, *supra* note 198, at 412.

judges lack the motivation to question the confession's authenticity.²⁰⁹ Third, even when the accused denies the charge against him and challenges the veracity of the confession, judges prefer to accept the prior confession.²¹⁰ Critics contend that courts appear well aware of the interrogation tactics and tacitly condone the psychological pressure,²¹¹ relaxing the evidentiary rules by finding illegalities insufficiently grave to exclude the evidence thereby obtained.²¹²

In sum, interrogation conditions in Japan “suggest that an overborne will is more than merely an occasional problem,”²¹³ and, “given the overwhelming power of the examining police official... anyone can be made to confess.”²¹⁴ Consequently, United Nations committees on human rights have repeatedly rebuked Japan for violating interrogation protocol, excessive reliance on confessions, and inadequate disclosure of evidence to the defense.²¹⁵ One former

²⁰⁹ RICHARD H. MITCHELL, *supra* note 54, at 198.

²¹⁰ Toyoji Saito, *supra* note 198, at 412.

²¹¹ See RICHARD H. MITCHELL, *supra* note 54, at 197.

²¹² DAVID T. JOHNSON, *supra* note 14, at 218.

²¹³ *Id.* at 265.

²¹⁴ RICHARD H. MITCHELL, *supra* note 54, at 200.

²¹⁵ DAVID T. JOHNSON, *supra* note 14, at 266.

Japanese judge even conceded that the interrogation conditions for suspects held in substitute prisons “tends to lead to egregious trampling of human rights.”²¹⁶

2. Evidentiary protections

Japan’s criminal justice system lacks a number of evidentiary protections typically employed to preserve individual rights. As a result, for Japan to effectively promote democracy it should initiate reform closer to the base of the pyramid by implementing evidentiary protections intended to defend individual rights.

Japan’s most notable evidentiary deficiency is its “discovery law— or rather the lack of it...”²¹⁷ The minimal discovery laws require that prosecutors disclose only those statements that they introduce into evidence at trial. Therefore, prosecutors need not worry about multiple contradictory statements from the same source or that undisclosed statements might reveal weaknesses in the state’s case.²¹⁸ Ultimately, judges never see inconsistent or contradictory evidence, but

²¹⁶ See RICHARD H. MITCHELL, *supra* note 54, at 199.

²¹⁷ DAVID T. JOHNSON, *supra* note 14, at 40.

²¹⁸ *Id.* at 40-41.

rather, see only that material which proves the investigators' case.²¹⁹ Scholars propose that negative attitudes toward defense counsel generally explain the absence of thorough discovery rules in Japan.²²⁰ Additionally, as previously discussed, prosecutors strenuously resist expanded discovery rules for fear that defense counsel would overemphasize such discovery, thereby hindering the search for the truth.²²¹

By contrast, the American system's prioritization of an individual's right to a fair trial (even at the expense of the government's interest in discovering the truth) mandates that "suppression by the prosecution of evidence favorable to an accused" violates the constitutional rights of the accused.²²² Even German defendants within a European "inquisitorial" system enjoy access to the complete record, enabling them to "check, challenge, and change prosecutors' truth claims in ways Japanese defendants cannot."²²³

Japan also lacks a system of evidentiary rules intended to protect lay assessors from highly prejudicial material, surely the result of Japan's extensive

²¹⁹ RICHARD H. MITCHELL, *supra* note 54, at 198.

²²⁰ Daniel H. Foote, *supra* note 187, at 382.

²²¹ *See id.* at 383.

²²² *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

²²³ DAVID T. JOHNSON, *supra* note 14, at 267.

history with bench trials.²²⁴ Japanese judges tend to admit most evidence (even some improperly obtained evidence) in the name of discovering truth, similar to the European “inquisitorial” style in which:

There are no rules that keep out some kinds of evidence while allowing other kinds. Hearsay, for example, can be received if the judge thinks it should be. Witnesses are encouraged to talk in their own words rather than being tightly hemmed in by questions; a witness telling what he or she saw may go on for half an hour or more without interruption. Spontaneity may allow a prejudicial remark to slip out now and then, but is considered worth the risk.²²⁵

For better or worse, the Japanese trial enjoys freedom from most of the American Fifth and Seventh Amendment constraints; in Japan, prosecutors *may* use a defendant’s invocation of silence against him and defendants may not oppose hearsay statements from a declarant unavailable for cross-examination.²²⁶

Therefore, Japan should consider making changes closer to the bottom of the pyramid such as implementing evidentiary protections designed to preserve individual rights. This way, the proposed lay assessor system could effectively promote democracy as the summit of a system which also promotes democracy.

²²⁴ Kent Anderson & Mark Nolan, *supra* note 2, at 956.

²²⁵ WILLIAM L. DWYER, *supra* note 11, at 156.

²²⁶ *See Crawford v. Washington*, 541 U.S. 36, 53-54 (2004) ([T]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”).

VIII. Conclusion

With the reintroduction of a lay assessor system, Japan must anticipate more than the issue of where to seat the lay assessors in the courtroom; it must prepare for the systematic consequences of such a transformation. First, the lay assessor system will reintroduce a degree of uncertainty previously avoided because “[s]imply put, no jury means more certainty.”²²⁷ Japan’s astounding conviction rate will likely reflect this uncertainty as Japan’s previous experience with a jury system revealed that defendants were acquitted more often by juries than judges.²²⁸

Japan should also expect a significant change in the role of lawyers inside and outside of the courtroom. The reintroduction of a lay assessor system in Japan should instigate a shift of power to trial lawyers similar to the shift which occurred following the introduction of the American jury system.²²⁹ This is because lay assessors, more so than the judge, tend to “try the lawyers” as they are thought to be more “susceptible to the skill and rhetoric of trial counsel.”²³⁰

Finally, with the reintroduction of a lay assessor system, Japan should prepare to deal with the realities of jury selection. The Act allows prosecutors,

²²⁷ DAVID T. JOHNSON, *supra* note 14, at 45.

²²⁸ *Id.* at 221.

²²⁹ *See* WILLIAM L. DWYER, *supra* note 11, at 157.

²³⁰ HARRY KALVEN, JR. & HANS ZEISEL, *supra* note 73, at 351.

defendants, and defense counsel to object to any prospective juror on the ground that the candidate would act unfairly at trial and even allows for peremptory challenges.²³¹ Many scholars describe how American jury selection has developed into a game in which lawyers collaborate with consultants to “stack the jury” and win the case before it begins.²³² Therefore, Japan should prepare to referee this game before it begins to prevent it from undermining the noble intentions of its lay assessor system.

A. The prospect of success for Japan’s proposed lay assessor system

As described throughout this article, the source of power underlying a judicial system greatly influences the entire system. The American system, inspired by distrust for government, undoubtedly strikes the balance between individual liberty and government power much closer to individual liberty than the Japanese system, which invests a great deal of trust in its government. This is not

²³¹ Kent Anderson & Emma Saint, *supra* note 1, at 257 (translating Art. 34(4)), 258 (translating Art. 36 (titled “Requests for Non-Appointment that Do Not Indicate the Reasons”)).

²³² See Sandra Day O’Connor, *supra* note 62, at 22 (“[T]he availability of peremptory challenges has given rise to ‘scientific’ jury selection, which has led some to believe that a skilled jury consultant can virtually guarantee a verdict by stacking the jury with people who fit the ideal ‘demographic profile.’”); WILLIAM L. DWYER, *supra* note 11, at 164 (“The theoretical purpose of voir dire is to ferret out bias or prejudice and thus ensure a fair jury. But other purposes have crept in: to stack the jury with partisans, to implant a favorable picture in the jurors’ minds, to “win the case” before the evidence begins. The questions on voir dire often become intrusive, repetitious, even insulting.”).

to say that the Japanese would prefer the American system, as the Japanese truly enjoy the efficiency of their system; the streets are relatively safe and the guilty do not escape through “legal technicalities” as often as they have in the American system. In fact, many Americans would probably prefer the Japanese system. However, Japan should reconsider its willingness to accept the consequences of a more democratic system: in particular, its willingness to sacrifice the truth to defend individual rights.

The Japanese lay assessor system can very likely achieve the same success and public support as the similarly situated German mixed panel system has enjoyed.²³³ With professional judges serving as a check on the lay assessors (and vice versa), the Act may indeed strike the ideal balance by allowing the government to retain significant control over the trial while promoting democracy to a greater extent than it would without the lay assessor system.

To *promote* democracy, however, is not to *achieve* democracy. While Japan’s lay assessor system signifies a start in the right direction toward promoting greater democracy, Japan should consider those fundamental changes which will enable it to go all the way. Otherwise, the lay assessor system will exist as an anomaly, operating as an isolated body which promotes democracy within a

²³³ The Germans seem content with the balance of power struck between lay assessors and professional judges in their system; the lay assessors are neither too weak nor too strong. Walter Perron, *supra* note 78, at 195.

system that otherwise undermines that goal. Therefore, to effectively promote democracy Japan should fix the streets outside the courtroom before adding seats inside.