

THE JAPANESE QUASI-JURY AND THE AMERICAN JURY:  
A COMPARATIVE ASSESSMENT OF JUROR QUESTIONING  
AND SENTENCING PROCEDURES AND CULTURAL  
ELEMENTS IN LAY JUDICIAL PARTICIPATION

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*This Note evaluates the effectiveness of juror questioning and sentencing in the context of Japan's recently instituted quasi-jury (saiban-in) system. The author begins by chronicling the Japanese and American experience with lay judicial participation and examining the procedural details of the saiban-in system. Lay judicial participation has received a mixed response in American jury research, but Japan's system appears to be accomplishing its goal of involving Japanese citizens in the criminal judicial process. The author attributes the system's preliminary success to Japan's use of juror questioning and sentencing. Drawing upon American research, the author suggests some modifications that could reduce the risks created by lay judicial participation and enhance the system's effectiveness. If Japan's jury structure continues to enjoy its current success, a comprehensive study of the saiban-in system may provide valuable lessons in how to improve the American jury experience by implementing effective jury questioning and sentencing procedures.*

I. INTRODUCTION

The tale of Japanese incorporation of Western ideas, political philosophies, and technologies has been told countless times.<sup>1</sup> Romanticized in such literature and film as *Shogun* and *The Last Samurai*, Japan has a history of adapting Western customs to its own set of political and social traditions.<sup>2</sup> Now, in the next chapter of this tradition of identifying

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1. For one such account, see KENNETH L. PORT & GERALD PAUL MCALINN, *COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN* 32–33 (2d ed. 2003).

2. See generally JAMES CLAVELL, *SHŌGUN* (1975) (telling the tale of a Western sea captain assisting a Japanese *daimyo* lord to start the *Tokugawa Shogunate*); *THE LAST SAMURAI* (Warner Bros.

and incorporating Western models of governance and law, Japan has begun another experiment with a Western judicial tradition: the jury system.<sup>3</sup> The Japanese quasi-jury, or *saiban-in*, system was adopted into law by the Japanese Diet in 2004<sup>4</sup> and began its first official trials in the summer of 2009.<sup>5</sup> The system involves lay jurors participating in joint deliberations with professional judges to determine the culpability and sentence of criminal defendants in severe criminal cases.<sup>6</sup>

Traditionally, the modern Japanese judiciary has been regarded by both the public and academia as being insulated from the public, elitist, and unfriendly to criminal defendants, who generally face a conviction rate upwards of ninety-nine percent due to intense prosecutorial proceedings and a high rate of pretrial confessions.<sup>7</sup> The Japanese government adopted a quasi-jury system largely in response to these concerns as part of the recommendations of the Justice System Reform Council (JSRC), which was established by the government in 1999 to research potential judicial reforms.<sup>8</sup>

The initial academic response, particularly from American legal scholars, has generally been quite skeptical of the effect that the new quasi-jury system will have on establishing a community influence in the judicial system and endowing the Japanese population with a sense of judicial appreciation and competence.<sup>9</sup> The fear is that the nature of joint deliberations, combined with the effects of Japanese culture's deference to authority and its legal system's broad prosecutorial powers, will cause lay jurors to have little chance to make meaningful decisions.<sup>10</sup> Further, deliberations will generally be reduced to following the decisions of the professional judges. Jurors will hence have neither the incentive nor the procedural ability to provide meaningful input.<sup>11</sup>

In focusing on these potential limitations of the jury system in implementing judicial reform, however, prior research has potentially overlooked, or at least not treated with the academic credence it deserves,

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Entertainment Inc. 2003) (telling the tale of a disillusioned American cavalry officer who assists in the incorporation of Western ideas in Japan during the Meiji era).

3. See Hiroko Tabuchi & Mark McDonald, *Once Again, Trial by Jury in Japan: First Panel Since War Sentences Murderer*, N.Y. TIMES, Aug. 7, 2009, at A4.

4. Saiban'in no sanku suru keiji saiban ni kansuru hōritsu [Act Concerning Participation of Lay Assessors in Criminal Trials], Law No. 63 of 2004 (Japan), translated in Kent Anderson & Emma Saint, *Japan's Quasi-Jury (Saiban-in) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials*, 6 ASIAN-PAC. L. & POL'Y J. 233, 233 (2005). The Diet is the Japanese National Legislature. See PORT & MCALINN, *supra* note 1, at 34.

5. See Tabuchi & McDonald, *supra* note 3.

6. See Kyodo News, *First Lay Judges Hand Killer 15-Year Term*, JAPAN TIMES ONLINE (Aug. 7, 2009), <http://search.japantimes.co.jp/cgi-bin/nn20090807a1.html>.

7. See Arne F. Soldwedel, *Testing Japan's Convictions: The Lay Judge System and the Rights of Criminal Defendants*, 41 VAND. J. TRANSNAT'L L. 1417, 1419–20 (2008).

8. See *id.* at 1420–21.

9. See, e.g., Robert M. Bloom, *Jury Trials in Japan*, 28 LOY. L.A. INT'L & COMP. L. REV. 35, 38 (2006).

10. See *id.* at 51–58.

11. See *id.*

two elements of the new Japanese system that represent a high potential for democratic lay participation: (1) the ability of *saiban-in* to participate in juror sentencing decisions and (2) the ability of *saiban-in* to directly question witnesses and criminal defendants as part of evidentiary proceedings.<sup>12</sup> A large body of American jury research is devoted to the ideas of juror questioning and sentencing,<sup>13</sup> and both concepts remain highly controversial in the United States.<sup>14</sup> Nevertheless, there is a common belief that, despite drawbacks associated with having laypeople question witnesses directly or determine sentencing, the practices have a high potential for increasing juror involvement and community voice in the judicial system.<sup>15</sup> In order to understand and improve the effectiveness of lay participation in the Japanese *saiban-in* system, an analysis of the American jury research regarding these particular procedural elements remains necessary. This Note seeks to introduce such procedural analysis, as well as addresses some of the cultural issues that inevitably underlie a comparative analysis of different jury systems.

Part II of this Note begins with a discussion of the history of the Japanese and American experience with lay judicial participation and describes the procedural details of the new *saiban-in* system in Japan. Part III starts by discussing the traditional arguments for and against the adoption of a mixed-panel system as opposed to a full jury system. It then utilizes both American and other international jury research to analyze two of the major procedural elements of the *saiban-in* system that drastically differ from the traditional American jury—joint deliberations with regard to both culpability and sentencing and the ability of jurors to ask questions to witnesses and defendants. This analysis also includes some initial observations of how these procedural elements are being utilized in Japan during the initial trials under the new mixed-panel system. Part III concludes with an explanation of how differences in experience and culture between Japanese and American society could affect the incorporation of effective lay participation in spite of procedural opportunities. Part IV offers a few recommendations as to how the *saiban-in* sentencing deliberations and questioning procedures may be modified to

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12. Act Concerning Participation of Lay Assessors in Criminal Trials, Law No. 63 of 2004, arts. 6, 56–59 (Japan), translated in Anderson & Saint, *supra* note 4, at 240, 267–68. Some scholars have noted the potential role that jury sentencing and juror questioning may play in the *saiban-in* system, and their observations deserve recognition. Such comments, however, have been relatively brief. See, e.g., Ingram Weber, *The New Japanese Jury System: Empowering the Public, Preserving Continental Justice*, 4 E. ASIA L. REV. 125, 165 (2009).

13. See, e.g., SEVENTH CIRCUIT BAR ASS'N, SEVENTH CIRCUIT AMERICAN JURY PROJECT: FINAL REPORT 15 (2008) (calling for allowing jurors to ask questions during trial as one part of a large body of jury reforms); Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885 (2004).

14. See generally Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, (2003) (arguing that there are compelling reasons to remove sentencing discretion from judges and to grant it to jurors); Nicole L. Mott, *The Current Debate on Juror Questions: "To Ask or Not to Ask, That Is the Question,"* 78 CHI.-KENT L. REV. 1099 (2003) (analyzing the advantages and disadvantages of allowing jurors to ask questions).

15. See sources cited *supra* note 13.

effectively enhance the quality of Japanese lay participation, and how culture should affect the further development of the *saiban-in* system. Further, Part IV suggests ways that American jury research could benefit from additional comprehensive comparative study of the Japanese system. Part V then offers a few concluding remarks. Ultimately, lay assessor participation in sentencing decisions and lay assessor questioning appear to be creating the capability for meaningful lay participation in the *saiban-in* system in Japan, irrespective of cultural differences; however, a few additional reforms and safeguards remain necessary to ensure that such participation continues to develop successfully in coming years.

## II. BACKGROUND: A BRIEF OVERVIEW OF JURIES AND QUASI-JURIES IN JAPAN, THE UNITED STATES, AND ABROAD

The evolution of jury systems in the United States and Japan has proceeded very differently, and a thoughtful comparison of the two systems requires understanding differences in the structure and history of Japan's quasi-jury system as compared to the American jury. This Part outlines the evolution of the quasi-jury system in Japan and describes its key procedural elements based on the Act Concerning Participation of Lay Assessors in Criminal Trials (Lay Assessor Act), which was adopted on May 28, 2004.<sup>16</sup> It then provides a brief overview of the history of the American jury system, highlighting the events that have embedded the institution as one of the foundational principles of the American political and judicial tradition.

### A. *The Japanese Judiciary and the Adoption of the Saiban-in System*

The Japanese legal system is primarily a civil-law system with origins dating back to the adoption of the Japanese Civil Code in 1898, which was based largely on the codes of the civil-law nations of continental Europe, particularly France and Germany.<sup>17</sup> After World War II and the establishment of the new modern Japanese Constitution during the American occupation, this civil-law model persisted into the modern era.<sup>18</sup> The separation of powers between the branches of government became more closely akin to the traditional American model, with courts gaining autonomy relative to the other branches of government, particularly the cabinet.<sup>19</sup>

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16. Law No. 63 of 2004 (Japan), *translated in* Anderson & Saint, *supra* note 4.

17. *See* PORT & MCALINN, *supra* note 1, at 32–33.

18. *See id.* at 34.

19. *See id.* at 34, 337. The extent of the autonomy of the Japanese judiciary is still a highly contested topic today. Professor Ramseyer offers a comprehensive study of the Japanese judicial system that describes how, although the Supreme Court retains a certain level of autonomy, the lower courts are heavily influenced by the partisan branches of government. J. Mark Ramseyer, *Predicting Court Outcomes Through Political Preferences: The Japanese Supreme Court and the Chaos of 1993*, 58 DUKE L.J. 1557, 1587 (2009). Still, the court system today is much more autonomous than it was be-

Japan first utilized a limited modern jury system for its criminal trials in 1923 with the passage of the Jury Act by the *Taisho*-period government, and the system became active in 1928 during the *Shōwa* era.<sup>20</sup> The jury system was actively promoted by the Ministry of Justice and Japan's local bar associations; however, it was ultimately abandoned in 1943.<sup>21</sup> Although jury trials did appear periodically in Japan after the repeal of the Jury Act in Okinawa during the American occupation,<sup>22</sup> juries remained absent from the Japanese judicial process until the reemergence of the jury system with the passage of the Lay Assessor Act in 2004.<sup>23</sup>

The movement toward a jury system in Japan came about primarily as a result of an increasing distrust of the judiciary among the Japanese public, who over the 1980s and 1990s had come to view judges as elitist and out of touch with community concerns and public morals.<sup>24</sup> Such distrust was especially due to the elite nature of judicial education in Japan, which involves immediate appointment to the bench following legal training at the Supreme Court's Legal Training and Research Institute and passing the highly exclusive Japanese bar.<sup>25</sup> Further, Japanese authorities hoped to increase public understanding of judicial processes and decrease dependency on state authority and other elites for management of the judicial system, allowing Japanese citizens to "develop public consciousness within themselves, and become more actively involved in public affairs."<sup>26</sup>

Although a limited movement in favor of the creation of the jury system existed in the 1980s and received some acknowledgement from the judiciary,<sup>27</sup> judicial reform started to accelerate when it became a part of the broader bureaucratic, administrative, and economic reforms that Japan began implementing after the collapse of the economy in the 1989 economic bubble.<sup>28</sup> In 1999 the Japanese Diet established the JSRC to create a series of recommendations regarding judicial reform in Japan.<sup>29</sup> The JSRC was composed of a broad cross-section of representatives

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fore World War II. See Perry R. Luney, Jr., *The Judiciary: Its Organization and Status in the Parliamentary System*, 53 L. & CONTEMP. PROBS. 135 (1990), reprinted in PORT & MCALINN, *supra* note 1, at 337, 337.

20. Anna Dobrovolskaia, *The Jury System in Pre-War Japan: An Annotated Translation of "The Jury Guidebook"* (Baishin Tebiki), 9 ASIAN-PAC. L. & POL'Y J. 231, 233-34 (2008).

21. *Id.* Several reasons have been advanced as to why the jury system was ultimately abandoned, relating to both the structure of the Japanese judiciary and the surrounding social and political climate in Japan during the 1930s and 1940s. See *id.* at 237-38 n.27.

22. See *id.* at 232 n.4.

23. Law No. 63 of 2004 (Japan), translated in Anderson & Saint, *supra* note 4, at 233.

24. See Weber, *supra* note 12, at 151-52.

25. See *id.* at 139, 151-53.

26. *Id.* at 159 (quoting JUSTICE SYS. REFORM COUNCIL, RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL: FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY (2001), reprinted in 2001-2002 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 119, 211).

27. See *id.* at 149.

28. See *id.* at 149-50.

29. See *id.* at 150-51.

from the Japanese government, the Japanese bar, academia, and other political associations.<sup>30</sup>

The JSRC prepared a series of recommendations for Japanese judicial reform that included the establishment of a quasi-jury (*saiban-in*) system for a limited number of high-penalty criminal cases.<sup>31</sup> Prime Minister Junichiro Koizumi's cabinet adopted the JSRC's recommendations and established the Office for Promotion of Justice System Reform to implement them.<sup>32</sup> The final act leading to the creation of the *saiban-in* system was eventually passed by the Diet on May 28, 2004.<sup>33</sup> After five years of preparations, including use of a widespread campaign of educating and informing the public about the implications and responsibilities associated with *saiban-in* trials,<sup>34</sup> the first trial under the new system began on August 3, 2009.<sup>35</sup>

### B. *An Outline of the Lay Assessor Act and the Japanese Saiban-in System*

The quasi-jury system established by the Lay Assessor Act represents a compromise between those political elements advocating for greater layperson involvement in the Japanese judicial system and more conservative elements, particularly the Japanese Supreme Court, which adamantly opposed the creation of an American style jury system in Japan.<sup>36</sup> Judges and lay assessors deliberate together to make determinations of fact, apply laws and ordinances to fact in the determination of guilt or innocence, and finally make determinations of sentence if the defendant is found guilty.<sup>37</sup> Judges decide issues concerning the interpretation of laws and ordinances, court procedure, and any other decisions outside those powers explicitly given to the lay assessors.<sup>38</sup>

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30. See Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L.J. 315, 321 (2007).

31. JUSTICE SYS. REFORM COUNCIL, *supra* note 26, at 213–17.

32. See Kent Anderson & Mark Nolan, *Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (Saiban-in Seido) from Domestic Historical and International Psychological Perspectives*, 37 VAND. J. TRANSNAT'L L. 935, 939–40 (2004).

33. Act Concerning Participation of Lay Assessors in Criminal Trials, Law No. 63 of 2004 (Japan), *translated in* Anderson & Saint, *supra* note 4, at 233.

34. See Kent Anderson & Leah Ambler, *The Slow Birth of Japan's Quasi-Jury System (Saiban-in Seido): Interim Report on the Road to Commencement*, 21 J. JAPANESE L. 55, 71–76 (2006); Setsuko Kamiya, *Spreading the Word: Schools in Saibanin Front Line*, JAPAN TIMES ONLINE (Feb. 27, 2005), <http://search.japantimes.co.jp/cgi-bin/fl20050227x5.html>.

35. See Kyodo News, *supra* note 6.

36. See Anna Dobrovolskaia, *An All-Laymen Jury System Instead of the Lay Assessor (Saiban-in) System for Japan? Anglo-American-Style Jury Trials in Okinawa Under the U.S. Occupation*, 24 J. JAPANESE L. 57, 59 n.8 (2007). The composition of the Justice System Reform Council reflected multiple perspectives in the debate on the necessity of greater lay participation in the judiciary, including the government and the Japanese Federation of Bar Associations. See Fukurai, *supra* note 30, at 321.

37. Law No. 63 of 2004, art. 6, *translated in* Anderson & Saint, *supra* note 4, at 240–41.

38. *Id.* at 241.

The trial proceedings are governed by a presiding judge.<sup>39</sup> Although the rules of evidence are less specific and complex than those in the United States, the presiding judge has the power to limit the questions presented to witnesses, and he or she may limit the consideration of irrelevant or inappropriate statements made by witnesses in front of the *saiban-in* panel.<sup>40</sup> Opposing counsel may also object to the improper examination of any evidence.<sup>41</sup>

The joint deliberations between the judges and lay assessors require only a majority, rather than a unanimous, verdict.<sup>42</sup> The majority must generally include at least one professional judge unless a majority of the lay assessors determine a verdict of not guilty, in which case a professional judge's support is not required.<sup>43</sup> The information and opinions resulting from the deliberations, including any dissenting opinions, are held strictly confidential.<sup>44</sup> Lay assessors face potential fines up to ¥500,000, approximately \$5,000, for leaking their individual opinions or other information about a case.<sup>45</sup>

The number of judges and lay assessors varies based on the situation in the case. In cases where there are facts in dispute, the mixed panel consists of three professional judges, including a chief judge, and six lay assessors.<sup>46</sup> When there are no facts in dispute, however, such as a case in which the defendant has confessed to the crime charged and only issues of sentencing remain, the court may choose to use a smaller panel of one professional judge and four lay assessors.<sup>47</sup> Lay assessors are selected for a single trial from among the citizens with the right to vote for members of the Lower House (*shugin*) of the Diet.<sup>48</sup>

Currently, only a very limited number of offenses require, or are entitled to, trial before a mixed-panel court including *saiban-in* lay assessors.<sup>49</sup> Cases that require trial by a mixed panel involve crimes potentially punishable by death or indefinite imprisonment and crimes in which the victim has died due to an intentional criminal act.<sup>50</sup> This may include

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39. KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.] 2006, art. 294 (Japan).

40. *See id.* art. 295, para. 1.

41. *Id.* art. 309, para. 1.

42. Law No. 63 of 2004, art. 67, *translated in* Anderson & Saint, *supra* note 4, at 273.

43. *Id.* at 273 n.49.

44. *Id.* art. 70, at 274–75.

45. *Id.* art. 79, at 277. There are some indications that this confidentiality requirement might be interpreted very narrowly. For example, one lay assessor was able to express his satisfaction that a *saiban-in* decision was appealed at the post-trial press conference. *See Houka jikkei hanketsu de kouso, yokatta to 1 saiban-in* [Good that Arson Sentence Appealed, Says One Lay Assessor], YOMIURI SHIMBUN (Japan) (Feb. 4, 2010), <http://www.yomiuri.co.jp/feature/20081128-033595/news/20100204-OYT1T01234.htm>.

46. Law No. 63 of 2004, art. 2, paras. 1–2, *translated in* Anderson & Saint, *supra* note 4, at 236–37.

47. *Id.* para 3, at 237.

48. *Id.* art. 13, at 243.

49. *Id.* art. 2, at 236–37.

50. *Id.* The translation in this instance is misleading when compared to the actual law in Japanese. The translation could be interpreted to mean that crimes punishable by “hard” labor, and cases

a substantial number of cases, however, as 3089 cases could have potentially fallen under this category in 2003.<sup>51</sup>

The JSRC desired to ensure that the powers of the lay assessors allowed them to “participate autonomously and meaningfully in trial decisions while sharing responsibilities with judges,” and explained that the *saiban-in* “should possess appropriate authority including the authority to question witnesses” just as a professional judge is able to do under the Japanese civil-law system.<sup>52</sup> This recommendation of the JSRC was ultimately incorporated into the final Act adopted by the Diet.<sup>53</sup> Lay assessors are authorized to directly ask questions to witnesses, victims, and the defendant in court, and are allowed to attend the questioning of witnesses or other persons that takes place outside of court.<sup>54</sup>

Japan is not the first country to adopt a mixed-panel jury model for criminal cases, although the model outlined above deviates in significant ways from lay assessor systems adopted by other countries prior to Japan’s *saiban-in* system.<sup>55</sup> Continental European national criminal courts have utilized different forms of lay assessor systems.<sup>56</sup> The Italian Corte d’Assise uses a similar system of a limited number of mixed-panel trials for severe crimes such as those involving death, a prolonged sentence, or treason.<sup>57</sup> Unlike in Japan, in Italy mixed panels exist at both the trial and appellate levels.<sup>58</sup> In France, a mixed-jury system is utilized for offenses with a prison term exceeding ten years.<sup>59</sup> German courts use mixed juries of one judge and two lay jurors for misdemeanors and juries of two layperson and three professional judges for cases involving more serious offenses.<sup>60</sup> Mixed-panel systems are also utilized in many smaller nations in Europe, such as Poland and Croatia.<sup>61</sup>

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included in Courts Act article 26(2)(ii) not involving a deceased victim, could be subject to a *saiban-in* trial. This is not the case. Article 2(1)(i) is better expressed as, “[c]ases involving crimes punishable by death or imprisonment for an indefinite period or by imprisonment with labor.” Article 2(1)(ii) should read, “[c]ases involving crimes noted under Courts Act article 26(2)(ii) in which the victim has died due to an intentional criminal act.” Compare *id.*, with *Saiban’in no sanku suru keiji saiban ni kansuru horitsu* [Act Concerning Participation of Lay Assessors in Criminal Trials], Law No. 63 of 2004, art. 2 (Japan) (untranslated).

51. See Bloom, *supra* note 9, at 41 n.44.

52. JUSTICE SYS. REFORM COUNCIL, *supra* note 26, at 214. Judges typically ask questions directly to witnesses in civil-law systems, where the judge sees his role more as discovering the truth of the dispute rather than serving as a referee as in the common-law system. Peter G. Stein, *Roman Law, Common Law, and Civil Law*, 66 TUL. L. REV. 1591, 1598–99 (1992).

53. Law No. 63 of 2004, arts. 56–59, translated in Anderson & Saint, *supra* note 4, at 267–68.

54. *Id.*

55. See Bloom, *supra* note 9, at 42–46.

56. See *id.*

57. See *id.* at 42–43.

58. See *id.* at 42.

59. See *id.* at 43.

60. See *id.* at 44.

61. See Sanja Kutnjak Ivković, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, 40 CORNELL INT’L L.J. 429, 440–41 (2007). Actually, a very large number of nations, primarily located in Europe and Africa but also in Asia, utilize lay assessor systems. For a comprehensive listing of the countries that utilize lay assessor systems, see Stefan Voigt, *The (Eco-*

Further, judicial reform increasing lay participation is not unique to Japan, but rather appears to be a growing trend across East Asia.<sup>62</sup> In 2007, the South Korean National Assembly approved a reform bill for the adoption of a jury system for serious criminal cases.<sup>63</sup> Even countries with less-established political systems such as Thailand have begun to incorporate lay judges into judicial proceedings.<sup>64</sup> The success or failure of the *saiban-in* system in Japan could have broader implications for the rest of the region.

### C. *The American Jury*

The sudden controversial resurgence of laymen participation in the Japanese judiciary represents a stark contrast to the American experience. In contrast to the sudden resurgence of the jury trial in Japan as a mechanism of modern judicial reform, jury trials as a means of checking the power of the State elite and giving community voice to the judicial process were firmly established by the time of the founding of the United States.<sup>65</sup> This has affected the nature of American jury participation and its role in the national judiciary.<sup>66</sup>

The origins of the Anglo-American jury system have traditionally been traced to as early as the signing of the Magna Carta in Britain in 1215, based on the language that “[n]o freemen shall be taken or imprisoned . . . except by the lawful judgment of his peers or by the law of the land.”<sup>67</sup> This idea, however, has been discredited.<sup>68</sup> Although not necessarily formally incorporated into the Magna Carta, the British judiciary came to allow juries to play a substantial role in hearing the evidence and issuing verdicts in criminal trials by the fifteenth century.<sup>69</sup> A major turning point in the role of juries in realizing their potential to offset the power of the state and challenge views of the elite judiciary occurred in 1670 in *Bushell’s Case*.<sup>70</sup> This case established the principle of jury nullification when the court eliminated the action for writ of attainder, which al-

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*nomie*) *Effects of Lay Participation in Courts—A Cross-Country Analysis* 33–34 (CESifo Working Paper No. 2365, 2008), available at [http://www.cesifo.de/DocCIDL/cesifo1\\_wp2365.pdf](http://www.cesifo.de/DocCIDL/cesifo1_wp2365.pdf).

62. See Valerie P. Hans, *Introduction: Citizens as Legal Decision Makers: An International Perspective*, 40 CORNELL INT’L L.J. 303, 303–04 (2007) (describing the implementation of a jury system in South Korea).

63. See *id.* at 303.

64. See *id.* at 311.

65. See *Duncan v. Louisiana*, 391 U.S. 145, 151–53 (1968) (giving a broad overview of the history of American juries in upholding defendant’s right to a trial by jury).

66. See *id.* at 153–56.

67. AM. BAR ASS’N DIV. FOR PUB. EDU., *DIALOGUE ON THE AMERICAN JURY: WE THE PEOPLE IN ACTION* 3 (2005) (quoting the Magna Carta); see also *Duncan*, 391 U.S. at 151; 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*349.

68. See AM. BAR ASS’N DIV. FOR PUB. EDU., *supra* note 67; James B. Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 249, 265–66 (1892).

69. AM. BAR ASS’N DIV. FOR PUB. EDU., *supra* note 67.

70. (1670) 124 Eng. Rep. 1006 (C.P.).

lowed for the imprisonment of jurors for improperly finding a verdict of not guilty.<sup>71</sup>

By Sir William Blackstone's time, the jury was well established as an institution for protecting the liberty of the people from oppression by the king, and Blackstone referred to the jury as one part of a "two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown."<sup>72</sup> The Founding Fathers jealously guarded the right to trial by jury both before and after the revolution.<sup>73</sup> The First Continental Congress strongly objected to the colonial adoption of bench trials, and the Founders insisted on adding protections to the trial by jury in both Article III, Section 2 of the Constitution and the Bill of Rights' Sixth Amendment.<sup>74</sup>

The recognition of the jury as an embodiment of American democracy and political values is manifest in the works of commentators such as Alexis de Tocqueville, who recognized the unique significance of the jury in the American political tradition.<sup>75</sup> In *Democracy in America*, Tocqueville highlighted the use of the jury as not only a judicial but a political institution, emphasizing the role of the jury in "invest[ing] the people . . . with the direction of society."<sup>76</sup> Trial by jury, especially in the United States, was "as direct and as extreme a consequence of the sovereignty of the people as universal suffrage."<sup>77</sup> Various reiterations of statements such as these and the strong constitutional basis for jury trials existing since the nation's founding have created a general understanding that the jury embodies one of the essential elements of American democratic governance.<sup>78</sup>

#### D. Modern Jury Research and Calls for Reform

Although the jury itself occupies an almost unassailable position as one of the hallmarks of American democracy, calls for jury reform to change specific aspects of jury procedure in the United States have re-emerged, particularly in the last decade as jury research has again come to the forefront of scholarly research.<sup>79</sup> Movements to change the structure and procedural functions of the jury have taken various forms, but the two most relevant for purposes of this Note are modern movements ana-

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71. *Id.* at 1012.

72. *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*349).

73. *See id.* at 152–53.

74. *See id.*

75. AM. BAR ASS'N DIV. FOR PUB. EDU., *supra* note 67, at 2–3.

76. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 361 (Francis Bowen ed., Henry Reeve trans., Cambridge: Sever and Francis 1862).

77. *Id.* at 362.

78. *See* AM. BAR ASS'N DIV. FOR PUB. EDU., *supra* note 67, at 2.

79. *See generally* Gregory E. Mize & Christopher J. Connelly, *Jury Trial Innovations: Charting a Rising Tide*, CT. REV., Spring 2004, at 4 (documenting the sudden wave of jury reform and innovation efforts across the country and some of the major calls for reform).

lyzing, advocating, or condemning the idea of juror sentencing decisions<sup>80</sup> and recent advocacy for the expanded implementation of juror questioning at trial, which has taken the form of a series of reports and experimental projects throughout the last two decades.<sup>81</sup> These two elements, though controversial in American jury procedure, are fundamental characteristics of the emergent Japanese *saiban-in* system. Analyzing these particular elements of the *saiban-in* system in the context of this emergent body of jury research, while keeping in mind the significant historical and cultural differences that can affect the results of utilizing these procedural elements, will be the task of the remainder of this Note.

### III. ANALYSIS

This analysis of the *saiban-in* system consists of four parts. Section A presents the traditional discussion of the pros and cons of utilizing a joint deliberation scheme as opposed to the traditional American-style jury. Section B discusses lay participation in sentencing decisions in particular, analyzes American jury research, and also offers a few observations on the effects of lay participation in sentencing in Japan and other mixed-panel systems. Section C presents the major American research regarding juror questions during trial and then discusses the initial effects of lay assessor questioning on the Japanese trial process. Finally, Section D discusses the cultural arguments for the feasibility of lay judicial participation in Japan and makes observations as to the initial popular response to the new system's implementation.

#### A. *The Virtues and Vices of Joint Deliberation Schemes*

Much skepticism exists regarding the effectiveness of using a mixed-panel system in Japan, and the arguments against such a system are well-founded in American and other international jury research. Professor Robert Bloom describes the powerful effects that dominant-juror mentalities have on juror decision making.<sup>82</sup> He notes that the participation by professional judges in deliberations under the Japanese *saiban-in* system has a high potential to cause dominant-juror problems and constrain meaningful lay participation.<sup>83</sup> Because the professional judges have a readily apparent position of education and status in the collective-judgment group, they have a high probability of becoming the dominant jurors and playing the leading role in jury decisions, creating a quasi-jury panel that essentially follows the advice of the professional judges.<sup>84</sup> Professor Bloom further notes the problems emanating from the effect of

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80. *E.g.*, Hoffman, *supra* note 14; King & Noble, *supra* note 13.

81. *E.g.*, MARY DODGE, SHOULD JURORS ASK QUESTIONS IN CRIMINAL CASES? (2002); SEVENTH CIRCUIT BAR ASS'N, *supra* note 13.

82. Bloom, *supra* note 9, at 51–55.

83. *Id.*

84. *Id.* at 52.

the “spiral of silence,” a term coined by Elisabeth Noelle-Neumann in a study of German opinions before elections, when a dominant voice in group deliberations has the potential to propose an initial opinion, and this opinion would come to dominate the potential discourse and eliminate the voice of any dissenters even when such dissenters are actually in the majority.<sup>85</sup> The fear is that in a quasi-jury system, a professional judge’s opinion will always have this “spiral of silence” effect on the lay assessors, and that essentially the lay assessors will adopt whatever opinion the professional judges hold with only minor variation.<sup>86</sup>

Professor Sanja Ivkovic provides a similar explanation of this phenomenon based on the status characteristics theory.<sup>87</sup> This theory indicates that higher-status individuals, such as professional judges, are naturally allocated more floor time in deliberations, and in addition, these individuals’ contributions are viewed more positively and accorded higher importance by the group.<sup>88</sup>

Studies of lay assessor systems in Europe tend to support such worries about judicial domination over lay assessor deliberations.<sup>89</sup> In a study of the frequency of dissent between professional judges and lay assessors in the German system in which professional judges were asked if they noted any conflicting views between professional and lay judges with regard to guilt or innocence, meaningful dissent from the opinion of the professional judge was recognized in only six percent of the 341 cases studied where guilt was not admitted before trial.<sup>90</sup>

In the Soviet Union, the jury system was replaced by a lay assessor system when the Bolsheviks took power in 1917.<sup>91</sup> The system involved so little power for the lay assessors relative to the professional judge that the lay assessors came to be referred to as “noddors” for nodding along with the professional judge.<sup>92</sup>

The Japanese judiciary appears to have been quite conscious of the potential for judicial domination and has taken steps to try to minimize its effects.<sup>93</sup> Japanese judicial rules prohibit the professional judges from stating their opinions in deliberations until the lay assessors have stated theirs and postpone aggressive advocacy among the jurors until the late stages of the deliberations to ensure active participation by the lay asses-

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85. *Id.* at 53 (citing ELISABETH NOELLE-NEUMANN, *THE SPIRAL OF SILENCE* 3–5 (2d ed. 1993)).

86. *Id.* at 53–54.

87. Ivković, *supra* note 61, at 436–40.

88. *Id.* at 439–40. The only exception is “when a leader explicitly puts low status members in a leadership position.” *Id.* at 440.

89. See Christoph Rennig, *Influence of Lay Assessors and Giving Reasons for the Judgment in German Mixed Courts*, 72 *INT’L REV. PENAL L.* 481, 482 (2001).

90. *Id.*

91. See Stephen C. Thaman, *The Good, the Bad, or the Indifferent: 12 Angry Men in Russia*, 82 *CHI.-KENT L. REV.* 791, 794 (2007).

92. *Id.*

93. See Weber, *supra* note 12, at 163.

sors.<sup>94</sup> As the deliberations in the actual *saiban-in* trials are subject to strict standards of confidentiality, however, verification of whether judges are actually complying with these standards is highly limited.<sup>95</sup>

In light of this risk of judicial domination, it may be difficult to determine why the JSRC would adopt a mixed-panel rather than a full jury system. Generally, however, the decision in large part seems to stem from distrust of a full jury system by the Japanese judiciary,<sup>96</sup> which has the authority to create judicial rules and maintains a great influence over determining judicial procedure.<sup>97</sup>

The judiciary discussed its concerns about a full jury system in a statement issued in 2000 by the Japanese Supreme Court.<sup>98</sup> The Supreme Court cites to jury studies in both England and the United States, stating that a jury system often leads to unpredictable opinions with no record of the basis on which the jury made a decision, has a high rate of error and potential for bias, and tends to favor criminal defendants.<sup>99</sup> The Supreme Court also highlights the fact that trials may involve complex fact scenarios that jurors can have difficulty understanding, referring to problems in Anglo-American antitrust law and securities litigation.<sup>100</sup> Further, the Supreme Court highlights the high costs and long duration of jury trials in the United States and fears the potential cost and time burdens on the Japanese population in implementing a full jury system.<sup>101</sup> These recognized disadvantages of jury systems probably played a major role in the JSRC's decision to ultimately adopt a mixed-panel rather than a full jury system,<sup>102</sup> as professional judge participation could help to ensure rational consideration of the most relevant facts during juror deliberations and ensure that the jury's reasoning is premised in the law rather than the jurors' whims.<sup>103</sup>

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94. See *id.* Weber also notes how a judge was criticized for excessively persuading a lay assessor during a Japanese mock trial in preparation for the system's implementation. *Id.* at 163–64.

95. Act Concerning Participation of Lay Assessors in Criminal Trials, Law No. 63 of 2004, art. 70 (Japan), translated in Anderson & Saint, *supra* note 4, at 274–75.

96. SUPREME COURT OF JAPAN, KOKUMIN NO SHIHOU SANKA NI KANSURU SAIBANSHO NO IKEN [AN OPINION REGARDING CITIZEN JUDICIAL PARTICIPATION] (Sept. 12, 2000), [www.saibanin.courts.go.jp/shiryō/pdf/24.pdf](http://www.saibanin.courts.go.jp/shiryō/pdf/24.pdf) [hereinafter OPINION REGARDING CITIZEN PARTICIPATION].

97. See Takaaki Hattori, *The Role of the Supreme Court of Japan in the Field of Judicial Administration*, 60 WASH. L. REV. 69, 83 (1984).

98. OPINION REGARDING CITIZEN PARTICIPATION, *supra* note 96, at 11.

99. *Id.* at 3–6. Among other works, the Supreme Court cites to a portion of Kalven and Zeisel's classic *The American Jury*, stating that juries disagreed with judges thirty percent of the time and tended to favor defendants when they disagreed. HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* 55–65 (1966). It also refers to works referencing controversial events such as the trial and execution of Sacco and Vanzetti, in which the jurors were thought to be heavily influenced by anti-Italian and anti-socialist sentiments. OPINION REGARDING CITIZEN PARTICIPATION, *supra* note 96; see also G. LOUIS JOUGHIN & EDMUND M. MORGAN, *THE LEGACY OF SACCO AND VANZETTI* 201–20 (1948). Though, interestingly, the judge in that case may have been equally prejudiced.

100. OPINION REGARDING CITIZEN PARTICIPATION, *supra* note 96, at 3–6.

101. *Id.* at 8–9.

102. See JUSTICE SYS. REFORM COUNCIL, *supra* note 26, at 213–14.

103. See Weber, *supra* note 12, at 168–69 (describing how judges can provide detailed explanations of the law during deliberations to ensure a legal basis behind a lay juror's factual evaluation).

B. *The Effects of Lay Participation in Sentencing—and Will There Be Any Under the Saiban-in System?*

Whereas joint deliberations with regard to determining culpability have the recognized drawbacks and advantages explained previously as compared to an American-style jury, when the mixed-panel system is compared to the traditional American judicially determined sentencing structure, a different calculus emerges. The Japanese mixed-panel system involves *greater* lay participation in sentencing than the traditional American model. An overview of American jury research and some observations of the Japanese and other lay assessor systems highlights the potential advantages, and disadvantages, of allowing lay participation in sentencing.

1. *American Jury Research Regarding the Effects of Jury Sentencing*

Within the past decade there has been a reemergence of American scholarship discussing juror sentencing.<sup>104</sup> Although, historically, juror sentencing existed in a majority of states well into the nineteenth century,<sup>105</sup> the practice has been retained in only six states, predominantly in the South—Arkansas, Missouri, Oklahoma, Texas, Virginia, and Kentucky—and has been eliminated from the federal court systems for non-capital cases.<sup>106</sup> Oddly, though scholars and popular media retain an almost unshakable confidence in the ability of jurors to determine matters of guilt or innocence, Americans' confidence in juries' abilities wavers when it comes to making sentencing decisions.<sup>107</sup> Criticisms of juror sentencing determinations vary greatly but tend to focus on how jury sentencing gives excessive powers to laypersons who lack the technical expertise and full factual understanding of a judge.<sup>108</sup>

Criticisms of juror sentencing escalated around the 1960s, at the height of the movement for greater rehabilitative punishments and amidst the dismissal of traditional notions of retributivism.<sup>109</sup> Advocates of judicial sentencing argue that the judge has information on which to base a sentence that is inappropriate for a jury, such as the defendant's personal background and criminal history.<sup>110</sup> Also, judges' backgrounds

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104. See *supra* note 80 and accompanying text; see also Nancy J. King & Rosevelt L. Noble, *Jury Sentencing in Noncapital Cases: Comparing Severity and Variance with Judicial Sentences in Two States*, 2 J. EMPIRICAL LEGAL STUD. 331 (2005); Adriaan Lanni, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775 (1999).

105. See Hoffman, *supra* note 14, at 964–65.

106. *Id.* at 953 n.1. Kentucky courts have interpreted the sentencing statuses as permitting only nonbinding recommendations by juries. *Id.*

107. See *id.* at 953.

108. See H.M. LaFont, *Assessment of Punishment—A Judge or Jury Function?*, 38 TEX. L. REV. 835, 837–39 (1960).

109. See, e.g., *id.* The traditional justifications for criminal punishment generally include rehabilitation, retribution, education, restraint, and general and specific deterrence. WAYNE R. LAFAVE, CRIMINAL LAW 25–31. (4th ed. 2003).

110. See LaFont, *supra* note 108, at 837–38.

in law and criminology allow them to create more effective sentences for defendants, including the possibility of probation or suspended sentence when they so deem appropriate.<sup>111</sup>

Another common criticism of juror sentencing, especially when the sentencing process is not separated in bifurcated proceedings of guilt and sentencing determinations, is that jurors will often produce “compromise verdicts” where a guilty verdict is awarded in exchange for a light sentence over which the jury has discretion in determining.<sup>112</sup> Such “compromise verdicts” have the potential to undermine standards of reasonable doubt and result in a higher number of guilty verdicts than under judicial sentencing schemes.<sup>113</sup>

Some also worry that jurors are influenced by emotion and prejudices far more than a judge, and that these prejudices and other irrelevant considerations can weigh too heavily in juror sentencing determinations.<sup>114</sup> Although racial or societal prejudices might not seem as problematic in facially-homogenous Japan, Japan has a significant minority population, particularly recent immigrants and other foreigners, that has been the target of substantial discrimination in the past.<sup>115</sup>

A final consideration against juror sentencing, supported by recent quantitative research in the field and interviews with practicing prosecutors and defense attorneys, is that juror sentencing tends to result in more varied and harsher sentences for defendants than judicial sentencing, calling into question the effectiveness of the practice in defending defendants’ rights.<sup>116</sup> A quantitative study and regression analysis of sentencing decisions after bench and jury trials in Arkansas and Virginia found that juries tend to issue more unpredictable and severe sentences than judges, particularly for crimes involving property (burglary) and drug offenses.<sup>117</sup> Interviews with prosecutors in Arkansas, Kentucky, and Virginia reveal that prosecutors heavily favor the jury sentencing systems in those states.<sup>118</sup> Whereas some favor the system because it gives a “barometer” of community opinions and values regarding particular crimes, far more favor the practice because the randomness and severity of juror sentences encourage plea bargaining and deter jury trials.<sup>119</sup>

In response to these traditional criticisms of juror-sentencing schemes, recent support of juror sentencing in noncapital cases has emerged within the last decade.<sup>120</sup> In the last several decades, retributive

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111. *See id.* at 837–41, 844.

112. Hoffman, *supra* note 14, at 989–90.

113. *See* Lanni, *supra* note 104, at 1797.

114. *See* LaFont, *supra* note 108, at 842–43.

115. *See* Kenneth L. Port, *The Japanese International Law “Revolution”: International Human Rights Law and Its Impact in Japan*, 28 STAN. J. INT’L L. 139, 155–60 (1991).

116. *See* King & Noble, *supra* note 104, at 331–32.

117. *Id.* at 344–57.

118. King & Noble, *supra* note 13, at 895.

119. *Id.* at 895–96.

120. *See, e.g.,* Hoffman, *supra* note 14; Lanni, *supra* note 104.

doctrines have reemerged in state sentencing schemes, particularly in the form of legislation establishing mandatory sentencing guidelines.<sup>121</sup> Perhaps the strongest argument in favor of increased juror participation in sentencing decisions is that juror participation almost indisputably better reflects the conscience of the community regarding the appropriate punishment for a particular offense than a judicially determined sentence.<sup>122</sup> Especially in light of the wane of the rehabilitative punishment model, which at least theoretically required the additional professional expertise of a judge to determine the appropriate rehabilitative path, juror sentencing arguably offers the most direct way of determining what the community views as “just deserts” for a particular offense.<sup>123</sup>

Advocates of jury sentencing have pointed out that even if jurors are more prejudiced than judges, which is debatable, such criticism could equally apply to jury determinations of guilt and innocence.<sup>124</sup> Plus, increased diversity among those determining a sentence potentially better reflects the differences in opinion among various population subgroups as to appropriate sentence length.<sup>125</sup> Removal of sentencing decisions from the sole discretion of the judiciary is recognized as also ensuring judicial restraint and serving as a check against an excessively powerful judicial branch.<sup>126</sup>

## 2. *Evidence of Effects in Japan and Other Mixed-Panel Systems*

Research of other mixed-panel systems, and some initial observations regarding the initial lay assessor trials in Japan, demonstrates the potential effects of lay participation in sentencing. Evidence from the German mixed-panel jury system suggests that lay assessors are much more adept at displaying dissent from the opinions of professional judges during the sentencing phase as opposed to the guilt-or-innocence phase.<sup>127</sup> In the same study of dissent in German mixed courts referenced above, disagreement between lay and professional judges regarding sentencing occurred in twenty-one percent of cases in which there was no full confession, as opposed to six percent disagreement in the determination of guilt.<sup>128</sup> Of these sentencing decisions, the study found that the lay assessors’ opinion “prevailed” twenty-four percent of the

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121. See Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 34–35 (2003); Hoffman, *supra* note 14, at 998.

122. See Lanni, *supra* note 104, at 1775.

123. See Hoffman, *supra* note 14, at 997–98.

124. See *id.* at 990. Actually, the Japanese Supreme Court made a similar argument in its criticisms of a full jury system as noted above. See *supra* note 99 and accompanying text.

125. See Lanni, *supra* note 104, at 1798.

126. See Hoffman, *supra* note 14, at 999.

127. Rennig, *supra* note 89, at 482.

128. *Id.*

time, and another eleven percent of the time the professional and lay judges negotiated a compromise sentence.<sup>129</sup>

Early evidence based on news reports regarding the initial jury trials in Japan indicates that, at least as far as Japanese media is concerned, as much or more attention is being paid to the sentence imposed by lay jurors as compared to the result of the trial regarding the defendant's guilt or innocence.<sup>130</sup> News reports about *saiban-in* trials tend to make careful mention about what sentence was imposed by the lay assessor system.<sup>131</sup> The sentencing influence of the *saiban-in* is particularly significant because of Japan's high conviction rate and the high influence of prosecutors on the judicial process.<sup>132</sup> Such attention to the sentencing phase of the trial in the popular press, though natural given the relative infrequency of not-guilty pleas in Japan,<sup>133</sup> indicates how the true ability of Japanese lay assessors to reflect the conscience of the community and embody the spirit of popular influence over the judiciary will potentially emerge through their role in sentencing determinations rather than in their more limited role in determining guilt or innocence.

Of course, early cases have demonstrated some of the risks associated with juror sentencing systems as well. Multiple appeals to the high courts have already been made, arguing that the sentence imposed by a *saiban-in* panel was excessively severe, particularly in cases involving stimulant drug smuggling.<sup>134</sup> It remains unclear, however, whether such appeals simply reflect defense attorneys attempting to take advantage of a new sentencing system, or are a genuine indication of a tendency of lay jurors to impose harsher penalties than judges for drug and other serious

129. *Id.* at 487.

130. Newspaper reports have tended to emphasize the sentence imposed on the defendant in both the headlines and text of the article in reporting on the major early trials under the *saiban-in* system. Possibly the most notable of the reports demonstrating this trend are those highlighting some of the "famous firsts" in sentencing under the *saiban-in* system. See, e.g., Kyodo News, *supra* note 6; *Saiban-in saiban hatsu no mukikakutei, Wakayama no goutou satsujin* [Lay Assessor System's First Indefinite Sentence, a Robbery Murderer of Wakayama], YOMIURI SHIMBUN (Japan) (Oct. 1, 2009), <http://www.yomiuri.co.jp/national/news/20091001-OYT1T00378.htm>.

131. See *supra* note 130 and accompanying text.

132. See Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CALIF. L. REV. 317, 318-19 (1992). Japan's criminal conviction rate stood at 99.8% in 1989, and the accusation has been made that "prosecutors and not the courts conducted the real trials of Japanese criminal defendants." *Id.*

133. The severity of the Japanese prosecutorial system makes not-guilty pleas relatively infrequent in the Japanese criminal system. J. Mark Ramseyer & Eric B. Rasmusen, *Why Is the Japanese Conviction Rate So High?*, 30 J. LEGAL STUD. 53, 56-57 (2001). The first lay assessor trial to face a not-guilty plea did not occur until November 2009, a full three months after the first trial under the *saiban-in* system. See *Saiban-in saiban de hatsu no muzai shuchou . . . kakuseizai mitsuyu* [The First Not-Guilty Plea in a Lay Assessor Trial . . . Stimulant Smuggling], YOMIURI SHIMBUN (Japan) (Nov. 10, 2009), <http://www.yomiuri.co.jp/feature/20081128-033595/news/20091110-OYT1T01021.htm>.

134. "Choueki 8 nen wa omosugiru" *saiban-in saiban no kousoshin* ["8 Year Sentence is Too Severe" Lay Assessor Trial Appeal], YOMIURI SHIMBUN (Japan) (Jan. 18, 2010), <http://www.yomiuri.co.jp/feature/20081128-033595/news/20100118-OYT1T01002.htm>; *Kakuseizai mitsuyu "hanrei yori omoku" to choueki 11 nen* [11 Year Sentence for Stimulant Smuggling "More Severe than Precedent"], YOMIURI SHIMBUN (Japan) (Dec. 17, 2009), <http://www.yomiuri.co.jp/national/news/20091217-OYT1T01149.htm>.

offenses.<sup>135</sup> A study by the Japanese national newspaper *Yomiuri Shimbun* suggests that lay assessors have not tended to impose excessive punishments when victims or victims' families testified in court.<sup>136</sup> Rather, the sentences in such cases have been very consistently close to eighty percent of the sentence sought by prosecutors.<sup>137</sup> Such a consistent sentencing scheme for violent crimes could be an indication of the manner of compromise amongst the lay and professional judges in determining sentence, but it does not seem to indicate that the lay assessors have succumbed to emotional prejudices or pushed for unduly variable or harsh sentences.

Perhaps more important than determining what the early effects of lay participation in sentencing in Japan actually are is the promising sign that early evidence indicates that the *saiban-in* system seems to already be having *some* effect.<sup>138</sup> The major risk of the mixed-panel system has always been that the lay assessors would have no effect, but would simply follow the decisions of the professional judges.<sup>139</sup> American arguments both for and against juror participation in sentencing, and evidence from the German lay assessor system and early Japanese *saiban-in* trials, indicate that lay participation *will* have substantive effects on sentencing.<sup>140</sup> If this is true, then the system has begun to accomplish its goal of allowing for lay influence and the conscience of the community to take a greater role in the Japanese justice system.

### C. *Lay Assessor Witness Questioning: Effective Participation or Judicial Russian Roulette?*

The other element of the Japanese *saiban-in* system that has the potential to allow for more effective lay participation than might otherwise be possible under a mixed-panel system is the lay assessors' ability to directly submit questions to the parties and witnesses in court.<sup>141</sup> Jury questioning has generally maintained a controversial status in American courtrooms over the last several decades,<sup>142</sup> however, there have been recent calls for increased use of juror questioning of witnesses as a part of major jury reform movements in multiple jurisdictions within the last

135. The fifteen-year sentence imposed by the first *saiban-in* trial involving a roadside killer was appealed, with little success. See "Saiban-in saiban no ryoukei seitou" *kousoshin demo choueki 15 nen* ["Lay Assessor Trial Sentence Justifiable" 15 Years Despite Appeal], YOMIURI SHIMBUN (Japan) (Dec. 17, 2009), <http://www.yomiuri.co.jp/feature/20081128-033595/news/20091217-OYT1T01180.htm>.

136. *Higaisha sanko seido no saiban-in saiban, genbatsuka mirarezu* [Lay Assessor Trials with Victim Participation, Severe Punishment Not Seen], YOMIURI SHIMBUN (Japan) (Jan. 5, 2010), <http://www.yomiuri.co.jp/feature/20081128-033595/news/20100105-OYT1T00008.htm>.

137. *Id.*

138. See *supra* notes 130–37 and accompanying text.

139. See Ivković, *supra* note 61, at 440–41 (noting the limited effect of lay judges in mixed panels in Croatia and Poland).

140. See *supra* Part III.B.2.

141. Act Concerning Participation of Lay Assessors in Criminal Trials, Law No. 63 of 2004, arts. 56, 58, 59 (Japan), translated in Anderson & Saint, *supra* note 4, at 267–68.

142. See, e.g., Mott, *supra* note 14, at 1099.

several years.<sup>143</sup> Overall, an analysis of such recent American research, as well as recent accounts of the substantial role that lay assessor questioning has played in Japanese courtrooms thus far, indicates that the current Japanese system's use of *direct* questioning is controversial from the American perspective<sup>144</sup> and has resulted in some procedural problems. The use of lay assessor questioning when used effectively, however, has allowed and will continue to allow the lay assessors to maintain an influential presence in the courtroom, even in light of the use of a mixed-panel system.

1. *American Research on the Effectiveness of Juror Questions During Trials*

Even as recently as the late 1980s and 1990s, judges have viewed the allowance of juror questions at trial with great suspicion.<sup>145</sup> Although allowing jurors to submit questions to witnesses has not been forbidden by any court of appeals,<sup>146</sup> courts have only recently started to recognize the practice as favorable rather than simply narrowly tolerable.<sup>147</sup> In *United States v. Johnson*, Chief Judge Lay of the Eighth Circuit expressed concerns about juror questions that potentially violate the rules of evidence, noting that such questions potentially lead to improper juror considerations and biases even if the question is thrown out by the judge for impropriety and that jurors taking on the role of advocates distorts the adversarial process.<sup>148</sup> Government counsel in the case described juror questioning as not favoring either party, but ultimately being “like playing Russian roulette—you never know what will happen.”<sup>149</sup> In *United States v. Sutton*, the First Circuit, even while recognizing many of the potential benefits of juror questioning during trial, declared that “in most situations, the risks inherent in the practice will outweigh its utility” and that “juror participation in the examination of witnesses should be the long-odds exception, not the rule.”<sup>150</sup>

Other judges have expressed concern that, in addition to jurors prematurely becoming partial and argumentative, juror questions could potentially assist prosecutors in overcoming the reasonable doubt burden of proof in criminal trials and thereby undermine basic due process

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143. See, e.g., DODGE, *supra* note 81, at 57–59 (discussing a study conducted on behalf of the Colorado Supreme Court with generally positive assessment of jury questioning); SEVENTH CIRCUIT BAR ASS'N, *supra* note 13, at 24.

144. See, e.g., *United States v. Johnson*, 892 F.2d 707, 711–12 (8th Cir. 1989) (Lay, C.J., concurring).

145. See *United States v. Sutton*, 970 F.2d 1001, 1005 (1st Cir. 1992); *Johnson*, 892 F.2d at 711–14.

146. *SEC v. Koenig*, 557 F.3d 736, 742 (7th Cir. 2009).

147. Compare *Koenig*, 557 F.3d at 742 (citing approval for the practice of juror questions), with *Johnson*, 892 F.2d at 711–14 (condemning the practice but refusing to overturn the final judgment).

148. *Johnson*, 892 F.2d at 712–13.

149. *Id.* at 713.

150. *Sutton*, 970 F.2d at 1005.

rights.<sup>151</sup> Also, critics of juror questioning simply dislike how juror questions add additional time and complications to the trial process.<sup>152</sup>

In the face of such skepticism, however, a growing body of empirical research has demonstrated the practical utility of allowing jurors to submit questions to parties and witnesses, and that many of the primary concerns associated with juror questioning are less problematic than previously anticipated.<sup>153</sup> The Seventh Circuit American Jury Project, a comprehensive empirical study of trial procedures, recently produced a comprehensive empirical study of thirty-eight trials employing jury questioning to test the American Bar Association's recent endorsement of the practice.<sup>154</sup> The study found that participants in the trials, whether judges, attorneys, or jurors, overwhelmingly perceived the addition of juror questions to enhance juror understanding.<sup>155</sup> Most participants, but particularly jurors (eighty-one percent), expressed increased satisfaction with the trial process as a whole with the addition of juror questions.<sup>156</sup> Additionally, the vast majority of judges (seventy-four percent) and jurors (sixty-seven percent) viewed juror questions as increasing trial fairness.<sup>157</sup>

In another study of juror questions during trial, conducted through the video observation of fifty Arizona State civil cases, researchers assessed the content of juror questions and the effects that such questions had on the juror deliberations.<sup>158</sup> The study found that juror questioning does not take an argumentative form to the degree previously predicted and is generally used to cross-check conflicting factual testimony or the underlying basis for witness evaluations, clarify factual background, or evaluate a witness or party's motivations and character.<sup>159</sup> Further, the study indicated that jurors do not demonstrate an excessive preoccupation with their own questions over other evidence during jury-room deliberations.<sup>160</sup> The study generally favors jury questioning, and it recommends that counsel should simply view such questions like questions from judges: as an opportunity to learn the thoughts of the decision-making body before they have reached an ultimate decision.<sup>161</sup>

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151. See N. Randy Smith, *Why I Do Not Let Jurors Ask Questions in Trials*, 40 IDAHO L. REV. 553, 561, 563-64 (2004).

152. See Shari Seidman Diamond et al., *Juror Questions During Trial: A Window into Juror Thinking*, 59 VAND. L. REV. 1927, 1932-33 (2006).

153. See sources cited *supra* note 81.

154. SEVENTH CIRCUIT BAR ASS'N, *supra* note 13, at 15, 19.

155. *Id.* at 22-23.

156. *Id.* at 23 & tbl.3d.

157. *Id.* at 22-23.

158. Diamond et al., *supra* note 152, at 1930-31.

159. See *id.* at 1949. The study found that of 829 questions submitted during the study, only 69 could be classified as argumentative, in that the answer was "predictable" or assumed to be impossible to answer effectively. Eight of these were submitted by a single juror. *Id.* at 1964-65.

160. *Id.* at 1943.

161. See *id.* at 1972.

The Dodge Report, a report prepared for the Colorado Supreme Court's Jury System Committee based on the study of 239 district and county court criminal court trials, also ultimately recommended the use of juror questioning of witnesses during trials.<sup>162</sup> The study found that, given the opportunity, jurors *did* tend to submit a significant amount of improper questions;<sup>163</sup> however, because these written questions were reviewed by the judges before being submitted to witnesses, judges were fairly effective at screening against improper questions such that the questions did not have an unfavorable impact on the trial proceedings.<sup>164</sup> Further, the survey found that juror questions do not create prejudice to either party and allow jurors "to be more engaged, attentive, and empowered."<sup>165</sup>

Such empirical research has led to the increasing endorsement of juror questioning by American judges. In *SEC v. Koenig*, Judge Frank Easterbrook provided a ringing endorsement of juror questions during trial, declaring the trial court's management of the questioning process and the allowance of juror questions during trial "well considered and sensible."<sup>166</sup> Unsympathetic to the argument that some of the questions potentially showed lack of impartiality, Judge Easterbrook equated juror questions with those of judges, commenting that "[j]ust as questions from the bench can supply insight that helps lawyers make a stronger case, so questions from jurors can help lawyers tailor their presentations."<sup>167</sup> Overall, modern American research has begun to embrace the idea that juror questioning allows jurors to become empowered and more actively involved.<sup>168</sup>

## 2. *Initial Observations of the Effects of Witness Questions in Japan*

In studies of other mixed-panel systems, the low frequency of lay judge questions has been criticized as demonstrating the relative ineffectiveness of lay judges to participate effectively in the decision-making process.<sup>169</sup> One article criticizes how only one-third of lay judges in Poland asked questions during trials.<sup>170</sup> Perhaps it is in light of such concerns that articles regarding the early *saiban-in* trials in Japan emphasized the relative frequency that lay assessors have asked questions to

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162. DODGE, *supra* note 81, at i, ii.

163. *Id.* at 22. Twenty-four percent of the 1068 written questions submitted by jurors over the course of the study were declined by the judges. *Id.*

164. *Id.* at 22–23.

165. *Id.* at ii.

166. *SEC v. Koenig*, 557 F.3d 736, 742 (7th Cir. 2009) (dismissing arguments against juror questioning as "occasional judicial skepticism").

167. *Id.* at 743.

168. See Valerie P. Hans, *Empowering the Active Jury: A Genuine Tort Reform*, 13 ROGER WILLIAMS U. L. REV. 39, 70 (2008).

169. See Ivković, *supra* note 61, at 440–42.

170. *Id.* at 440–41.

witnesses.<sup>171</sup> Such reports often set out the lay assessors' questions in remarkable detail, relying on such indicators to demonstrate the effectiveness of the laymen's role in the trial process.<sup>172</sup> Though not comprehensive empirical research, such reports indicate that lay assessor questioning is quickly becoming one of the most important aspects of the lay assessor's role in criminal proceedings.<sup>173</sup> In one case even the defendant, who was sentenced to fourteen years in prison for murder, felt the desire to express his gratitude to the lay assessors for asking him questions reflecting the views of regular people.<sup>174</sup>

The direct-questioning system implemented by the *saiban-in* system has had some problems with inappropriate questions and comments from lay assessors, even in its initial trials.<sup>175</sup> The ability of lay assessors to directly question witnesses, particularly the defendant, can lead to argumentative questioning and, in some circumstances, even loss of temper.<sup>176</sup> In one well-publicized trial, a particularly vocal lay assessor made an inappropriate expletive outburst after continually receiving evasive answers from the defendant.<sup>177</sup> Such problems, though rare, reflect some of the concerns related to direct juror questioning voiced by advocates and critics of juror questioning alike.<sup>178</sup> Still, such early attention given to lay assessor questioning by the Japanese press and public,<sup>179</sup> as well as the substantial body of American jury research in support of juror questioning as a means of juror empowerment,<sup>180</sup> indicate that questions by lay assessors could quickly become one of the cornerstones of the lay assessors' role under the *saiban-in* system.

171. See, e.g., *Saiban-in hatsu no seihanzai shinri, 5 nin ga hikokunin shitsumon* [First Lay Assessor Sex-crime Trial, Five Question Defendant], YOMIURI SHIMBUN (Japan) (Sept. 2, 2009), <http://www.yomiuri.co.jp/national/news/20090902-OYT1T01274.htm>.

172. See *id.* This article highlights in particular two of the questions asked by the *saiban-in*. The first asked why the defendant in a burglary/sexual assault chose not to use a knife, and another asked why the burglar did not flee immediately upon hearing the victim come home. *Id.*

173. See *id.*

174. *Choueki 14 nen hanketsu ukefukuekichu hikoku "saiban-in ni kansha"* [Defendant Serving Fourteen Year Sentence "Thankful to Lay Assessors"], YOMIURI SHIMBUN (Japan) (Nov. 5, 2009), <http://kyushu.yomiuri.co.jp/news-spe/20080605-2766128/news/20091105-OYS1T00742.htm>.

175. See *Goukan chishou hikoku ni saiban-in "mukatsukun desu yo ne"* [Lay Assessor to Rape Defendant: "You Make Me Sick"], YOMIURI SHIMBUN (Japan) (Nov. 19, 2009), <http://www.yomiuri.co.jp/feature/20081128-033595/news/20091119-OYT1T00619.htm>.

176. *Id.*

177. *Id.* The lay assessor asked a series of fairly argumentative questions to the defendant. Finally, after receiving no response to a question about whether the defendant felt any regret for what he did, the lay assessor exclaimed, "You make me sick, listening to this since yesterday . . ." *Id.*; see also *Jury Member Loses Cool in Miyagi High School Girl Rape Case*, JAPAN TODAY (Nov. 20, 2009), <http://www.japantoday.com/category/crime/view/jury-member-loses-cool-in-miyagi-high-school-girl-rape-case>.

178. See *United States v. Johnson*, 892 F.2d 707, 711–15 (8th Cir. 1989) (Lay, C.J., concurring) (criticizing the trial court's allowance of jurors' direct questions to the defendant as part of criticism of juror questioning in general). Even advocates for juror questions during trial such as the Seventh Circuit Bar Association do not recommend direct juror questioning, advising that "jurors should, ordinarily, be permitted to submit *written* questions for witnesses." SEVENTH CIRCUIT BAR ASS'N, *supra* note 13, at 15 (emphasis added).

179. See *supra* notes 171–75 and accompanying text.

180. See *supra* notes 153–68 and accompanying text.

D. *The Cultural Challenge—Is Japanese Society Capable of Effective Lay Judicial Participation?*

One of the potential dangers of relying on American jury research to examine the possibilities of procedural elements of the *saiban-in* system is that Japanese are not Americans. Particularly when utilizing a mixed-panel system, Japanese citizens may react differently than Americans when given the opportunity to perform judicial functions during trial.<sup>181</sup> The general concern is that even if the *saiban-in* system allows lay assessors the opportunity to make a meaningful contribution to the judicial process, Japanese cultural tendencies, as well as Japan's relative inexperience with lay judicial participation, will serve to undermine any procedural innovations and render the *saiban-in* system a failed experiment.<sup>182</sup>

1. *The Traditional Debate: Will Culture Undermine Lay Participation?*

Americans have in many ways been raised to be jurors. The long history of integration of the jury system into the American political and civil consciousness outlined above has served to create a sense of civic consciousness and confidence in lay decision making.<sup>183</sup> In a study by Professor of Sociology Hiroshi Fukurai comparing Japanese and American thoughts on civic participation, American respondents showed overwhelmingly high willingness to serve on juries and confidence that as jurors they "could make a fair and just judgment."<sup>184</sup> Americans' confidence in lay participation in the judiciary and juror decisions is fairly unique in the international community, amongst both Western and Eastern nations alike, and few nations have shared America's eagerness to support the continued use of a jury system.<sup>185</sup>

In contrast, Japanese experience with Westernized legal institutions in general, particularly those involving significant participation from average citizens, remains somewhat limited and novel.<sup>186</sup> Japanese scholar Yosiyuki Noda describes a traditional Japanese view of the legal system and law—one that does not bode well for the success of a lay assessor system:

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181. See Lester W. Kiss, *Reviving the Criminal Jury in Japan*, 62 LAW & CONTEMP. PROBS. 261, 283 (1999). Worries about unique aspects of Japanese culture that would undermine lay jurors' role in the courtroom have been prevalent since jury reform was first considered in Japan. See *id.*

182. See Fukurai, *supra* note 30, at 331.

183. See *id.* at 337–39 (demonstrating through empirical analysis Americans' high willingness to serve on juries and confidence in their reasoning abilities).

184. *Id.* Over ninety-two percent of American respondents with jury experience and eighty-two percent of those without expressed their willingness to serve. Even higher percentages (94.5% and 88% respectively) reported that they were confident they could make a fair judgment. *Id.* at 338.

185. See Richard O. Lempert, *The Internationalization of Lay Legal Decision-Making: Jury Resurgence and Jury Research*, 40 CORNELL INT'L L.J. 477, 478–79 (2007) (explaining the traditional "American exceptionalism in the use of the jury").

186. See YOSIYUKI NODA, INTRODUCTION TO JAPANESE LAW 159–60 (Anthony H. Angelo trans., 1976).

With the exception of lawyers and persons with some knowledge of law, Japanese generally conceive of law as an instrument of constraint that the state uses when it wishes to impose its will. . . . Japanese do not like law. There is no wish at all to be involved with justice in the European sense of the word.<sup>187</sup>

Japanese are often said to have an “aversion to the formal mechanisms of judicial adjudication,” which is demonstrated by the lack of civil litigation in Japan.<sup>188</sup>

In addition to the literature noting the weakness of legal experience and legal consciousness in Japan is the idea that Japanese culture does not lend itself well to lay decision making, particularly in the context of a mixed-panel system.<sup>189</sup> Japanese jurisprudence has traditionally emphasized the role of law in instilling loyalty to the various levels of a feudal hierarchy, in accordance with principles of traditional Confucianism.<sup>190</sup> Even today, many consider Japanese people to have a unique sense of deference to authority figures and people of higher social position, much greater than that of their Western counterparts in America and Europe.<sup>191</sup> Also, Japanese potentially put a uniquely heavy emphasis on conformity and consensus and rely heavily on their superiors in maintaining this social harmony.<sup>192</sup> These concepts are somewhat reflected in the Japanese language itself.<sup>193</sup> Japanese uses a series of humble (*kenjōgo*) and honorific (*keigo*) forms that are spoken according to the status of the parties in conversation.<sup>194</sup> Such cultural principles arguably do not lend themselves well to the implementation of a mixed-panel jury system attempting to voice the conscience of the community against the weight of professional judges.<sup>195</sup>

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187. *Id.*

188. John Owen Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359 (1978), reprinted in PORT & MCALINN, *supra* note 1, at 385, 385.

189. See Bloom, *supra* note 9, at 56–58.

190. See David A. Funk, *Traditional Japanese Jurisprudence: Justifying Loyalty and Law*, 17 S.U. L. REV. 171, 174–75 (1990).

191. See, e.g., Bloom, *supra* note 9, at 56–57; Kiss, *supra* note 181, at 275 (recommending the adoption of a full jury system rather than a mixed-panel system to prevent excessive deference to professional judges).

192. See NODA, *supra* note 186, at 174–79 (describing the Japanese social order as being based on *giri*, a system of nonlegal social principles emphasizing cooperative relationships). This concept is popularly embodied in the now famous (or infamous) phrase describing Japanese society: “The nail that sticks up gets pounded down.” Bloom, *supra* note 9, at 56.

193. See Bloom, *supra* note 9, at 57.

194. Wikipedia offers a great explanation of basic honorifics in Japanese for those unfamiliar with the language. *Honorific Speech in Japanese*, WIKIPEDIA: THE FREE ENCYCLOPEDIA, [http://en.wikipedia.org/wiki/Honorific\\_speech\\_in\\_Japanese#](http://en.wikipedia.org/wiki/Honorific_speech_in_Japanese#) (last visited Dec. 31, 2010).

195. See Bloom, *supra* note 9, at 57–58; Kiss, *supra* note 181, at 275. Indeed, a hypothetical scenario where lay assessors address the judge using *keigo* and refer to themselves using *kenjōgo* is the linguistic embodiment of some of the worst fears associated with a mixed-panel system: “May I (humbly) request that the judge (honorably) consider deviating from the sentencing guidelines in this case due to the defendant’s good demeanor?” Judge Yoshioka assures that although formal Japanese is used during deliberations, honorifics are not used in this unequal manner between lay assessors and professional judges. E-mail from Toru Yoshioka, Judge, to Daniel Senger, author (Feb. 17, 2010, 23:45 CST) (on file with author).

Professor Fukurai's survey of Japanese and American legal consciousness and confidence in laypersons' judicial decision-making abilities does demonstrate substantial deviation between Japanese and Americans.<sup>196</sup> Japanese expressed significantly less willingness to serve on juries, as well as significantly less confidence in their abilities to make a fair and just judgment.<sup>197</sup> Only when jury duty was described as a duty imposed by the government did Japanese respondents' willingness to serve come to closely match that of Americans.<sup>198</sup>

Other scholars readily dismiss these cultural arguments against the feasibility of implementing a mixed-panel jury system in Japan.<sup>199</sup> Kent Anderson and Mark Nolan offer a scathing critique of the traditional culture-based criticisms of Japanese attempts at implementing a quasi-juror system, calling the criticisms of the mixed-panel system "gross stereotypes about Japanese psychology."<sup>200</sup> They point to modern studies of Japanese collectivism and social behavior, which reconsider the accepted standards of Japanese homogeneity and deference to authority in terms of individual perceptions and differences within social groups.<sup>201</sup> Further, they note that the Judicial Reform Council's objective in implementing the *saiban-in* system has been to redefine Japanese people's legal consciousness and that the traditional Japanese legal psyche could easily change with institutional reform.<sup>202</sup> Premature conclusions about the cultural inadequacies of Japanese society in implementing lay judicial participation, they warn, "could stymie useful reform by allowing relevant research [regarding the mixed-court system] to be regrettably ignored."<sup>203</sup>

Ingram Weber describes the lack of Japanese legal consciousness and political maturity as an "enduring myth" that was initially used to allow judges to take a more active role in educating the public during preparations for implementing the *saiban-in* system.<sup>204</sup> He concludes that the lay judges will play a very active role in the new system, particularly in light of their numerical superiority and the deference that the professional judges show them during deliberations.<sup>205</sup>

## 2. *Initial Japanese Response to the System—Better than Expected?*

Prior to the implementation of the *saiban-in* system, significant doubts existed as to whether the Japanese public would embrace the new

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196. Fukurai, *supra* note 30, at 333–41.

197. *Id.* at 337–39.

198. *Id.* at 338–39.

199. See Anderson & Nolan, *supra* note 32, at 987–89; Weber, *supra* note 12, at 158–60.

200. Anderson & Nolan, *supra* note 32, at 987.

201. See *id.* at 988–89.

202. *Id.* at 988.

203. *Id.* at 990.

204. Weber, *supra* note 12, at 157–60.

205. *Id.* at 168.

system.<sup>206</sup> Early public opinion surveys taken while promoting the new system found that seventy percent of Japanese citizens did not want to serve on a lay assessor panel.<sup>207</sup> In addition, the public present at town meetings promoting the new system expressed various concerns with the feasibility of the new system and its appropriateness to Japanese society.<sup>208</sup> Although the Japanese government has taken various measures since the passage of the Lay Assessor Act to increase public awareness and confidence in the *saiban-in* system, some believe that these efforts have been insufficient and ineffective.<sup>209</sup>

Surprisingly, however, many reports regarding the early *saiban-in* trials reflect that Japanese confidence in the new quasi-jury system may be catching hold more quickly than previously anticipated.<sup>210</sup> One survey reports that after the initial fourteen *saiban-in* trials, over ninety-seven percent of lay assessors described their experience as jurors as a “good experience.”<sup>211</sup> Another study recorded that, contrary to expectations that a significant percentage of people would not show up to jury duty even when summoned, over ninety percent of the 549 persons called for duty in the initial fourteen trials were present.<sup>212</sup> A survey by the Japanese Supreme Court revealed an eighty-five percent attendance rate among the 3471 unexcused individuals summoned for *saiban-in* duty from May until the end of November.<sup>213</sup>

In addition, the vast majority of *saiban-in* participants reported that the trials were easy to understand (72.2%) and that they were able to easily and effectively participate in deliberations (75.6%).<sup>214</sup> Such initial data from the first *saiban-in* trials presents a picture that the *saiban-in* system is off to a good start despite initial public hesitation.

#### IV. RECOMMENDATION

Analysis of American and international jury research and observations from the early *saiban-in* trials reveal that lay assessor participation in sentencing and lay assessor questioning will be two of the most significant avenues for popular participation in the Japanese judicial system.<sup>215</sup>

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206. See Anderson & Ambler, *supra* note 34, at 69.

207. *Id.*

208. *Id.* at 69–70.

209. See, e.g., Fukurai, *supra* note 30, at 342.

210. See *infra* notes 211–13 and accompanying text.

211. *Saiban-in 97% “yoi keiken”* [Lay Assessors 97% “Good Experience”], YOMIURI SHIMBUN (Japan) (Nov. 18, 2009), [http://job.yomiuri.co.jp/news/ne\\_09111804.htm](http://job.yomiuri.co.jp/news/ne_09111804.htm).

212. *Yosougai ni takai shussekiritsu . . . saiban-in kouhousha yobidashi* [Unexpectedly High Attendance Rate . . . Lay Assessor Candidate Summons], YOMIURI SHIMBUN (Japan) (Sept. 28, 2009), <http://www.yomiuri.co.jp/feature/20081128-033595/news/20090928-OYT1T00568.htm>.

213. See SUPREME COURT OF JAPAN, SAIBAN-IN SAIBAN NO JISSHI JYOUKYOU NO GAIYOU [AN OUTLINE OF THE CURRENT STATE OF IMPLEMENTATION OF THE SAIBAN-IN SYSTEM] 1–2 (2009), <http://www.moj.jp/content/000036266.pdf>.

214. *Id.* at 3–4.

215. See *supra* Parts III.B–C.

This next Part offers a few recommendations for *saiban-in* trials to allow lay assessor questioning and sentencing procedures to manifest their greatest potential for effective lay judicial influence. Also, it highlights how the recent adoption of the *saiban-in* system in Japan offers exciting opportunities in the area of comparative jury research.

A. *Effectively Managing Saiban-in Deliberations to Create Fair and Effective Sentencing Schemes*

American jury research reveals that sentencing decisions by laypersons rather than professional judges offer several advantages, yet are fraught with several risks stemming from the lay jurors' lack of expertise.<sup>216</sup> Specifically, laypersons perform very well in voicing community standards of appropriate punishment for offenses and determining the retributive "just deserts" for a criminal defendant.<sup>217</sup> But laypersons tend to lack an understanding of, or sympathy for, ideas of rehabilitative treatment or other goals such as deterrence, which judges' backgrounds in law and other fields provide.<sup>218</sup> This pattern offers insight into when a mixed-panel professional judge should perhaps give more deference to the opinions of lay assessors, and when the judge should provide additional guidance and leadership in the deliberative determinations. Professional judges could still withhold their specific opinions regarding sentence until the lay assessors have voiced their initial thoughts<sup>219</sup> and yet offer the lay assessors the opportunity to hear the professional judges' explanations of other considerations in determining sentence outside of direct moral desert. Such a procedure would preserve lay juror empowerment and their utility in setting community standards of retributive punishment,<sup>220</sup> while protecting against the tendency for lay juror sentencing to impose unduly harsh or varied sentences.<sup>221</sup>

As other scholars such as Anderson and Nolan have noted previously, in order for the sentencing deliberations to be as comprehensive and sophisticated as possible, the current majority requirement for *saiban-in* decisions should be strongly reconsidered in favor of a unanimity or super-majority requirement.<sup>222</sup> Such procedures would further increase the confidence of both the lay assessors themselves, and the public generally, in the fairness of the deliberations and the effectiveness of the lay assessors' participation in the deliberations process.<sup>223</sup> Especially for

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216. See *supra* Part III.B.1.

217. Lanni, *supra* note 104, at 1778–79.

218. See LAFAVE, *supra* note 109; LaFont, *supra* note 108, at 837–39 (describing how the judge's background and additional information allows him or her to provide for a more "enlightened" sentence).

219. See Weber, *supra* note 12, at 163.

220. See Lanni, *supra* note 104, at 1779.

221. See King & Noble, *supra* note 104, at 332–38.

222. Anderson & Nolan, *supra* note 32, at 980–81.

223. *Id.* at 980.

sentencing determinations, a sentence can only represent the conscience of the community if it is representative of the consensus of *all* the lay and professional judges.<sup>224</sup>

Currently, the Japanese high courts have refused to acknowledge any appeals of *saiban-in* judgments.<sup>225</sup> The high courts have generally applied a standard of high deference. In one appeal dismissal, the Tokyo High Court simply held that the *saiban-in* trial judgment was “rational” and dismissed the appeal.<sup>226</sup> Such broad deference to lay assessor judgments needs to continue in the Japanese judicial system if the *saiban-in* system is to gain credibility with the public and instill public confidence in their ability to impact the judicial system as the JSRC originally intended.<sup>227</sup>

### B. Potential Reforms in Lay Assessor Questioning Procedures

Lay assessor questioning has proven to be a valuable tool in empowering the lay assessors in Japan.<sup>228</sup> Further, American jury research confirms that lay juror questioning has the potential to increase perceptions of trial fairness and allow citizen participants to feel greater confidence and empowerment during the trial process.<sup>229</sup> The major problem with juror questioning, identified through both observations of early *saiban-in* trials and criticisms of juror questions in American jury research, is the potential for jurors to become overly hostile and argumentative during the questioning procedures.<sup>230</sup> A few modifications to the questioning process can maintain the active juror empowerment that questioning of witnesses allows while maintaining trial order and fairness and juror impartiality.

The fairly obvious, and yet highly effective, solution to the problem of lay assessors submitting inappropriate or argumentative questions is

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224. The first death sentence imposed by a *saiban-in* panel on November 16, 2010, offers further strong evidence of the need for a unanimity requirement. After sentencing the defendant to death, one lay assessor declared at the post trial press conference that it was “hard to say” that deliberations had been sufficient. Further, the presiding judge, in apparent accordance with the wishes of the panel, urged the defendant to appeal the decision. One juror was weeping as the sentence was handed down. Eiji Kaji, *Lay Judges Wept Over Sentence*, DAILY YOMIURI ONLINE (Nov. 17, 2010), <http://www.yomiuri.co.jp/dy/national/T101116005495.htm>; Fumio Tanaka & Eiji Kaji, *Lay Judge Duty Takes a Heavy Toll*, DAILY YOMIURI ONLINE (Nov. 18, 2010), <http://www.yomiuri.co.jp/dy/national/T101117005655.htm>. Such ambiguity and discontent accompanying the critical decision of sentencing a person to death is unacceptable, and almost certainly results at least in part from the lack of a unanimity requirement.

225. *Kakusezai mitsuyu de jikkei, hikokugawa kouso kikyaku* [Stimulant Smuggling Sentence, Defendant’s Appeal Dismissed], YOMIURI SHIMBUN (Japan) (Feb. 15, 2010), <http://www.yomiuri.co.jp/feature/20081128-033595/news/20100215-OYT1T01486.htm> (recounting how all three appeals of *saiban-in* trials to date have been dismissed).

226. *Id.*

227. JUSTICE SYS. REFORM COUNCIL, *supra* note 26, at 214–15.

228. *See supra* Part III.C.2.

229. *See supra* Part III.C.1.

230. *See supra* note 175–77 and accompanying text; *see also* United States v. Johnson, 892 F.2d 707, 712–13 (8th Cir. 1989) (Lay, C.J., concurring).

for the professional judges to provide an appropriate instruction as to what types of questions are appropriate. In the *Seventh Circuit American Jury Project: Final Report*, the second round of juror questioning studies (dubbed Phase Two) utilized a juror instruction that included instructions reminding jurors of their neutral fact-finding role and explaining the appropriate types of questions:

[A]s jurors you should remain neutral and open throughout the trial. As a result, you should always phrase any questions in a neutral way that does not express an opinion about the case or a witness. Remember that at the end of the trial, you will be deciding the case. For that reason, you must keep an open mind until you have heard all of the evidence and the closing arguments of counsel, and I have given you final instructions on the law.<sup>231</sup>

The results of adding this reminder to the jury instructions were overwhelmingly positive.<sup>232</sup> A comparison of the Phase Two instruction with the original Phase One instruction lacking this reminder caused both judges and attorneys to feel better about the quality of juror questioning.<sup>233</sup> The use of a similar instruction in Japanese courtrooms to prepare *saiban-in* for their essential role in questioning witnesses would likely be highly effective in increasing the quality of questioning by lay assessors.

Scholars of American jury research remain highly skeptical of the direct questioning practice utilized by the Japanese lay assessor system.<sup>234</sup> Unlike in American trials where the judge has the potential to filter out inappropriate questions submitted to him in writing,<sup>235</sup> direct questioning creates the possibility of unfair or argumentative questions being addressed to witnesses.<sup>236</sup> Still, because allowing direct questions potentially offers a visual representation of lay assessor empowerment and parity with the professional judges, this practice is useful in implementing the *saiban-in* system. The mixed-panel nature of the Japanese system makes evidentiary violations less dangerous to the overall trial process.<sup>237</sup> Also, as Judge Easterbrook reminds us, a couple of argumentative questions is not necessarily an indication of a hopelessly biased jury: "It is dangerous to draw such inferences [about jurors preemptively taking an adversarial position] from questions; judges often ask pointed questions of both sides, and it would be a mistake to infer from these questions that the judge was leaning against *both* litigants."<sup>238</sup> If direct questioning becomes impracticable in the future, the submission of written questions to the professional judges offers a viable, effective alternative; however, the

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231. SEVENTH CIRCUIT BAR ASS'N, *supra* note 13, at 19.

232. *See id.* at 20–21.

233. *See id.*

234. *See supra* note 178.

235. *See* SEVENTH CIRCUIT BAR ASS'N, *supra* note 13, at 18.

236. *See supra* note 178.

237. Because the judges will be discussing the case with the lay assessors during deliberations, the judges can theoretically prevent the lay assessors from considering improper evidence.

238. *SEC v. Koenig*, 557 F.3d 736, 743 (7th Cir. 2009).

continued use of direct questioning with cautionary jury instructions appears to be the best avenue for effective lay participation at this time.

### C. *The Culture Debate*

Since the proposed adoption of judicial reforms in Japan under the JSRC, the debate around the capabilities of Japanese culture to participate effectively in the judicial process has dogged discussions of potential reform.<sup>239</sup> Not only this, Ingram Weber recounts how the “meme” of a lack of legal consciousness in Japan has served to prevent lay participation in the judiciary several times since the Meiji era in the late nineteenth century.<sup>240</sup> Although cultural issues will always play a role in institutional reform, particularly with regard to informing and educating the public, such issues must not be allowed to forestall reform or presuppose institutional ineffectiveness.<sup>241</sup>

Differences in legal consciousness do indeed exist between Americans and Japanese.<sup>242</sup> This Note, as well as other scholarship,<sup>243</sup> demonstrates how America has a much longer history of lay civic participation than Japan, which largely explains this discrepancy in legal consciousness.<sup>244</sup> But to argue that reforms aimed at encouraging greater lay participation in government will inevitably falter because the Japanese historically lack legal consciousness or the capacity for individualized decision making is circular and fatalistic. It has the potential to stifle judicial reforms, particularly those aimed at procedurally enhancing the effectiveness of lay assessors’ participation during deliberations.<sup>245</sup>

Fukurai’s data offer the optimistic confirmation that anyone, whether Japanese or American, feels more confident in jurors’ judicial decision-making role after participating in a jury.<sup>246</sup> Further, some of his data indicate that the differences in confidence in lay decision making are largely a result of experience and institutional tradition rather than any deeper cultural issues.<sup>247</sup> Although Americans are much more confident about jurors’ abilities in determining verdict, they are approximately equal to Japanese in their confidence in determining sentence.<sup>248</sup>

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239. See Weber, *supra* note 12, at 157–60.

240. *Id.*

241. See Anderson & Nolan, *supra* note 32, at 988–89.

242. See Fukurai, *supra* note 30, at 337–40.

243. See, e.g., Douglas G. Levin, Saiban-in Seido: *Lost in Translation? How the Source of Power Underlying Japan’s Proposed Lay Assessor System May Determine Its Fate*, 10 *ASIAN-PAC. L. & POL’Y J.* 199, 207–11 (2008).

244. See *supra* Part II.C.

245. See Anderson & Nolan, *supra* note 32, at 989–90.

246. Fukurai, *supra* note 30, at 339.

247. See *id.* at 338–39.

248. *Id.* Whereas only about twenty-six percent of Americans with no jury experience said that it is extremely difficult for ordinary people to determine a criminal verdict, forty percent said it was difficult to determine sentence. Among Japanese with no jury experience, fifty-one percent said it was difficult to determine verdict, but only forty-one percent said it was difficult to determine sentence. *Id.*

Culture can be considered in the Japanese government's efforts to effectively publicize the new *saiban-in* system and encourage public confidence.<sup>249</sup> The promotional efforts by the Ministry of Justice, Supreme Court, and Japanese Federation of Bar Associations have utilized and accounted for various elements of modern Japanese culture in attempting to increase public legal consciousness in preparation for the new system.<sup>250</sup> Culture should be considered during these efforts only for encouraging popular publicity, however, and should not factor into the procedural improvement of the *saiban-in* system, which will benefit much more from culture-neutral institutional research and reform.

#### *D. Implications for American Jury Research*

The advent of the *saiban-in* system in Japan has implications for those on the other side of the Pacific as well. As this Note has demonstrated, a great amount of American jury research has sought to determine laypersons' effects on sentencing, as well as the effects of juror questions on trial procedure.<sup>251</sup> The recent adoption of a new lay participation system in which such questioning and sentencing procedures are primary vehicles of juror involvement allows for potentially invaluable research into the effects of such procedures.

With regard to sentencing, jury research into the effects of lay participation in sentencing has remained confounded by two major factors: (1) juror sentencing only occurs in six predominantly Southern states, and (2) plea bargaining procedures often produce a confounding variable in empirical studies comparing judicial and juror sentencing.<sup>252</sup> The Japanese adoption of the *saiban-in* system gives American researchers the opportunity to compare the sentences for similar offenses before and after the implementation of lay participation, all within a new population set and without the potentially complicating effects of plea bargaining or choice between bench and jury trial.<sup>253</sup>

Further, mixed-panel sentencing could actually be a feasible alternative to either the pure-jury or pure-judicial sentencing measures employed in the United States. Mixed-panel sentencing in the United States would allow the retention of judicial expertise in the sentencing process while providing restraint against excessive judicial rehabilitivism by allowing for lay jurors' retributive influence.<sup>254</sup> Such a system could

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249. See Anderson & Ambler, *supra* note 34, at 68–76.

250. *Id.*

251. See *supra* Part III.B.1, C.1.

252. See King & Noble, *supra* note 13, at 886–89, 895–97 (discussing how juror sentencing encourages plea bargains). If juror sentencing causes pleas, empirically comparing judicial and juror sentencing severity is difficult.

253. Plea bargaining is not allowed in Japan. Dirk Olin, *Plea Bargain*, N.Y. TIMES MAGAZINE, Sept. 29, 2002, at 29, available at <http://www.nytimes.com/2002/09/29/magazine/the-way-we-live-now-9-29-02-crash-course-plea-bargain.html>.

254. See LAFAYE, *supra* note 109, at 29–30; Hoffman, *supra* note 14, at 998–99.

provide an alternative check on judicial sentencing schemes to often-criticized legislative sentencing guidelines.<sup>255</sup> Additional jury research into the effectiveness of mixed-panel sentencing systems such as the *saiban-in* system would help to at least spark debate on the possibility of implementing such a system for the sentencing phase in American courtrooms.

With juror questions, although American research has very recently begun to embrace the idea of juror questioning in trials, much skepticism still remains.<sup>256</sup> The Japanese press has already done an impressive job documenting the numbers and types of questions submitted by *saiban-in* panels.<sup>257</sup> Further study of the number, types, and quality of *saiban-in* questions could have broad implications for the gradual implementation of juror questioning procedures in U.S. jurisdictions. After all, if juror questioning can work effectively in a new quasi-juror system amongst a culture with less experience in judicial participation, then why not here? The primacy of juror questioning and juror sentencing in the Japanese *saiban-in* system offers exciting potential for comparative jury scholarship, particularly in the United States where such practices remain limited and controversial.

## V. CONCLUSION

The Japanese *saiban-in* system is off to a good start. The fears of excessive judicial domination, so prevalent prior to the adoption of the system,<sup>258</sup> have tended not to manifest themselves as much as previously anticipated, and the lay assessors have expressed confidence and satisfaction with the new system.<sup>259</sup> The effectiveness of lay participation in the *saiban-in* system thus far can largely be attributed to the lay assessors' unique influence in determining sentence and questioning witnesses under the new system.<sup>260</sup> These two elements, more than any other procedural mechanisms under the new system, have allowed early Japanese lay assessors to realize at least some of their potential for becoming active lay participants in the Japanese judiciary.<sup>261</sup> The system appears to

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255. See Hoffman, *supra* note 14, at 1000–01.

256. See *supra* Part III.C.1.

257. See *supra* notes 171–74 and accompanying text.

258. See Bloom, *supra* note 9, at 51–52; Weber, *supra* note 12, at 167 (“Given the woeful history of lay participation in Japan, any possibility of elite domination cannot be dismissed out of hand.”).

259. Although a lack of judicial domination is difficult to prove directly at this early stage, the great amount of lay assessor satisfaction with the new system and lay assessor ability to speak during deliberations can serve as a good proxy for demonstrating that the professional judges' influence is not too excessive. See SUPREME COURT OF JAPAN, *supra* note 213, at 2–4. True evidence of a lack of judicial domination can be found through either a comparison of sentences for similar offenses before and after the implementation of the *saiban-in* system, to see if *saiban-in* have caused any significant deviations, or through interviewing lay and/or professional judges to determine whether any significant dissent occurred during deliberations in a manner similar to the study by Casper and Zeisel in the German lay assessor system. See Rennig, *supra* note 89. There is a need for such research.

260. See *supra* Part III.B.2, C.2.

261. See *supra* Part III.B.2, C.2.

be accomplishing the initial goals set out by the JSRC of enhancing lay understanding of the criminal justice system and allowing “the sound social common sense of the public [to be] reflected more directly in trial decisions.”<sup>262</sup>

The *saiban-in* system thus far has had little effect on the influence of the prosecutorial system on the judicial process and Japan’s high conviction rate, a fact which some might find disappointing given the jury’s traditional role.<sup>263</sup> As the Japanese judiciary expands the use of the *saiban-in* system into more cases where the culpability of the defendant is seriously disputed, some changes in Japan’s notoriously dominant prosecutorial system and high conviction rate may emerge.<sup>264</sup> Given Japan’s high conviction rate in the past, however, such a result seems relatively implausible in the near future.<sup>265</sup> Nevertheless, the fact that the *saiban-in* system may not lead to broader prosecutorial reform does not mean that the system will not result in effective lay participation. The system has already allowed Japanese citizens to take an active role in the criminal judicial process through witness questioning and determination of sentence, and this role is likely to expand and become more effective as Japanese citizens become further acquainted with the *saiban-in* system and lay judicial participation.<sup>266</sup>

American studies of juror questioning and juror sentencing reveal some of the risks associated with the use of these procedures. In particular, the reality that lay citizen retributivism might lead to harsher sentences than judicial sentencing is somewhat alarming given Japan’s high conviction rate and strong prosecutorial system.<sup>267</sup> Further, the possibility that direct juror questions could lead to argumentative questions from jurors that potentially undermine defendants’ rights remains a great risk of using witness questioning procedures in the *saiban-in* system.<sup>268</sup> Although these concerns exist, proper judicial management through effective cautionary instructions to *saiban-in*<sup>269</sup> and careful management of sentencing deliberation procedures should minimize these risks and still allow for effective lay participation.

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262. JUSTICE SYS. REFORM COUNCIL, *supra* note 26, at 213.

263. See Soldwedel, *supra* note 7, at 1422–23.

264. The Japanese judiciary plans on having more controversial *saiban-in* trials in the near future, including those where the culpability of the defendant is in serious dispute and death-penalty cases. *Shikei kyuukei, musai shuchou jiken shinri e . . . saiban-in 2 nenme* [Toward Death Penalty Prosecution, Not-guilty Plea Case Trials . . . the Lay Assessor System’s Second Year] YOMIURI SHIMBUN (Japan) (Jan. 2, 2010), <http://www.yomiuri.co.jp/feature/20081128-033595/news/20100101-OYT1T00583.htm>. A *saiban-in* panel handed down its first death sentence on November 16, 2010. *Lay Judges Hand Down Death Penalty for 1st Time*, DAILY YOMIURI ONLINE (Nov. 17, 2010), <http://www.yomiuri.co.jp/dy/national/T101116004817.htm>.

265. See Foote, *supra* note 132, at 318.

266. See *supra* Part III.B–C.

267. See King & Noble, *supra* note 13, at 895–96.

268. See Smith, *supra* note 151.

269. SEVENTH CIRCUIT BAR ASS’N, *supra* note 13, at 17–19.

Cultural concerns have remained prevalent throughout the implementation of the *saiban-in* system,<sup>270</sup> and indeed, when compared to their Western counterparts in America and elsewhere, Japanese citizens in general have a less experienced and developed tradition of lay legal consciousness.<sup>271</sup> Nevertheless, the early positive experience of Japanese lay assessors indicates that the *saiban-in* system is not doomed to fail simply because Japan's citizens lack prior experience participating in the judicial process.<sup>272</sup> Americans' comfort with the jury system has resulted from centuries of political and social tradition advocating lay participation in the judicial system as a check on governmental and elite authority.<sup>273</sup> Such a civic tradition, though not currently prevalent in Japanese culture, could easily develop with time.

As other scholars have noted, the adoption of jury and quasi-jury systems around the world have created exciting opportunities for the internationalization of jury research.<sup>274</sup> The recommendations above outline some of the ways such internationalized jury study of the *saiban-in* system could benefit further improvement and development of the American jury.<sup>275</sup> Comprehensive study of the *saiban-in* system could lead to further understanding on how to effectively implement lay influence in sentencing and juror questioning procedures into the American jury system.<sup>276</sup>

At this early stage, the *saiban-in* system appears to have been preliminarily successful in integrating a form of Western jury system into the Japanese judiciary. The Japanese tradition of borrowing institutions from the West may have worked yet again, and this time it may also provide the opportunity for the West to borrow back.

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270. Weber, *supra* note 12, at 157–60.

271. See Fukurai, *supra* note 30, at 338–39.

272. See *supra* Part III.D.2.

273. AM. BAR ASS'N DIV. FOR PUB. EDUC., *supra* note 67, at 2.

274. Lempert, *supra* note 185, at 482–83.

275. See *supra* Part IV.D.

276. See *supra* Part IV.D.