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I. INTRODUCTION

In the late 1980s, I hosted a group of Japanese lawyers and judges from the Osaka Bar Association Committee for Judicial System Reform,[1] a group interested in observing the jury system in the United States. I took them to the Massachusetts Superior Court[2] where they could observe jury trials. From the discussions I had with the visitors, it was clear that they were keenly interested in the concept of citizen participation in the legal process.

Japan's commitment to democracy has flourished for sixty years and is enshrined in the preamble of its post-World War II[3] Constitution: "Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people."[4] Despite this textual com-

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1. This group was headed by Professor Takashi Maruta of Kwansei Gakuin University School of Law.

2. The Trial Court of general jurisdiction in Massachusetts.

3. Promulgated on November 3, 1946 and went into effect on May 3, 1947. The constitutional monarchy with a sovereign emperor was superseded by a constitutional democracy in which sovereignty is entrusted in the people. There are three branches the legislative (Diet), executive (the cabinet and prime minister), and the Courts. The Diet chooses the prime minister who heads the cabinet. *See, e.g.*, Scott M. Lenhart, *Hammering Down Nails*, 29 GA. J. INT'L & COMP. L. 491, 493 (2001); Eric N. Weeks, *A Widow's Might:* Nakaya v. Japan *and Japan's Current State of Religious Freedom*, 1995 BYU L. REV. 691, 709 (1995) (discussing fact that Japanese Constitution was drafted by Americans).

4. NIHONKOKU KENP [KENP] [Constitution] pmbl. (Japan).

mitment, jury trials, a wonderful vehicle for citizen participation in governmental operation, have not existed in Japan since 1943.[5]

The French political philosopher, Alexis de Tocqueville, commented that the jury functions as "a political institution . . . one of the forms of the sovereignty of the people."[6] The framers of the United States Constitution envisioned jurors not only as a democratic check on the government's efficacy of the court system, but also as a way to ensure citizen participation in governmental activity.[7]

Inspired largely by the United States Constitution and the American experience with jury trials,[8] Japan has sought to introduce jury trials. The objectives of this reform are to ensure greater participation by average citizens within the Japanese judicial system and to establish a check on the power of the judiciary.[9] Japan's

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5. 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, 962 (2004).

6. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 2 (Knopf 1945) (1835).

7. Insight can be found in the language of *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968), which states, "The framers of the Constitution strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *See also* United States v. Booker, 125 S.Ct. 738 (2005) (reiterating the importance of a right to a jury trial for a convicted defendant). Arthur L. Burnett, Sr., *Jury Reform for the 21st Century: A Judge's Perspective*, 20 CRIM. JUST. 32 (2005). ("Jury service in our federal and state judicial systems is absolutely essential to ensure the proper functioning of our democracy, just as important as our voting for elected officials.")

8. It is interesting to note that the Japanese Constitution drafted during United States occupation has many of the same protections found in the United States Constitution, including the right to counsel, protection against unreasonable searches and seizures, a due process provision, and a double jeopardy clause. *See* RAMSEYER & NAKAZATO, JAPANESE LAW AN ECONOMIC APPROACH (UNIV. CHICAGO PRESS 1998) at 4-5. It should be pointed out that Japanese judges often cite American cases as persuasive authority. Christopher A. Ford, *Indigenization of Constitutionalism in Japanese Experience*, 28 CASE W. RES. J. INT'L L. 3, 41 (1996). Robert J. Grey, Jr., *Justice through Juries*, 91 A.B.A. J. 8 (Jan. 2005) ("There are more than 80,000 jury trials in this country every year with nearly a million Americans empanelled to serve. More than five times that number take time out of their busy schedules to show up to their local courthouse after receiving a summons. Besides voting, few activities in the life of the typical American offer this kind of active participation in our system of government.").

9. Anderson & Nolan, *supra* note 5, at 946.

desire to adopt jury trials is the latest in an international trend toward increasing the participation of citizens in the legal process, particularly in criminal trials.[10] Being a juror is envisioned as a way to involve average Japanese citizens in the operation of government, a sentiment reflected in the language of the Justice System Reform Council (JSRC):[11] "What commonly underlies these reforms is the will that each and every person will break out of the consciousness of being a governed object and will become a governing subject. . . ."[12] De Tocqueville captured the same intent when he commented on the American jury: "Juries invest each citizen with a sort of magisterial office; they make all . . . feel that they have duties toward society and that they take a share in its government."[13]

Following the recommendations of the JSRC, the Japanese Diet enacted legislation to create jury trials, and in May 2009 the Japanese will institute jury trials for serious crimes, such as those involving bodily injury.[14] The legislation creates a mixed-jury sys-

10. Stephen C. Thaman explained the recent trend towards increased citizen participation in this way: "Lay participation in the affairs of state is the foundation of a democratic society. Just as the participation of laypersons is unquestioned in the legislative and executive branches of government in a democratic society, in many countries it has played an important part in the administration of justice as well. In countries making the transition to democracy, legal reformers should therefore consider how lay participation could serve to achieve the universal goals of criminal procedure in a democratic society, that is, the ascertainment of the truth of the charge so as to ensure the conviction of the guilty and the exoneration of the innocent, the respect of the human dignity of the accused and the victim in the criminal trial, the protection of society, restorative justice, the resolution of conflict and rehabilitation and reintegration of offenders. In doing so, such countries should look to the experiences of other countries as well as to their own legal history and tradition in assessing the proper role for lay participation in the administration of criminal justice. Although the economic cost of introducing lay participation is a valid consideration, legislators should be careful to not use this factor as an excuse for postponing otherwise necessary and useful reforms." Stephen C. Thaman, *Symposium on Prosecuting Transnational Crimes: Cross-Cultural Insights for the Former Soviet Union*, 27 SYRACUSE J. INT'L L. & COM. 58, 59-60 (2000) (comments at a conference at the International Institute of Higher Studies in the Criminal Sciences, "Lay Participation in the Criminal Trial in the XXIst Century" at Siracusa, Italy, May 25-29, 1999).

11. *See* discussion *infra* section, History of Reform.

12. The 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, 127 [hereinafter JUSTICE SYSTEM].

13. DE TOCQUEVILLE, *supra* note 6, at 291.

14. The law was promulgated on May 28, 2004 upon its signing by the prime minister. Editorial, *Reinstating a Jury System*, JAPAN TIMES, May 29, 2004 (reporting details of the legislation). "On May 21, 2004, the Japanese Diet passed an act creating a lay assessor system. Passage was made possible following a compromise by the parties of the Coalition government on January 26, 2004. The new Komeito Party had advocated the lawyers' po-

tem where citizens and professional judges determine criminal responsibility and then the resulting sentence.[15] Specifically, six ordinary citizens (*saiban-in*) and three professional judges will constitute the jury.[16] Decisions are made by a majority of the group (five to four) provided that at least one citizen and one professional judge agree.[17] In cases where the defendant pleads guilty and both parties consent with court approval, a panel consisting of four citizens and one professional judge will determine the appropriate sentence.[18]

This article will point out that despite the JSRC's noble motives, a mixed-jury system in Japan will not result in greater participation by ordinary citizens in the Japanese legal system unless additional procedural safeguards are enacted. Part II highlights some of the differences between mixed juries and the American jury system and then compares the proposed Japanese mixed-jury system with European mixed-jury systems. Part III explains why the Japanese opted for a mixed-jury system by examining possible historical and political catalysts for the decision. Part IV explores the psychological theory surrounding collective judgment and how dominant individuals influence the group dynamic. Part V argues that Japanese cultural attitudes will impede the effectiveness of a mixed-jury system in Japan. Finally, Part VI proposes specific procedural devices to help ensure citizen participation, and accomplish the JSRC's stated objectives and hopefully overcome the obstacles inherent in the proposed Japanese mixed-jury system.

II. AN OVERVIEW OF MIXED-JURY SYSTEMS

The concept of juries of twelve and unanimous verdicts had

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sition of a large lay contingent of seven people with two professional judges, while the Liberal Democratic Party had pursued the bureaucracy's position of only four lay representatives and three judges. The compromise was built on a two-track approach that would allow for smaller mixed courts when the defendant challenges the allegations." Anderson & Nolan, *supra* note 5, at 992. As previously mentioned, jury trials have been dormant in Japan since 1943. Japan did enact a jury system law in 1923, which took effect in 1928. Lester W. Kiss, *Reviving the Criminal Jury in Japan*, 62 LAW & CONTEMP. PROBS., Spring 1999, at 261, 266. However, as Kiss notes, the jury system failed in 1943 because of the fascist political climate, procedural defects in the system giving ultimate authority to the judge, and finally the Japanese respect for authority which held judges in great reverence. *Id.* at 266-270.

15. Editorial, *Reinstating a Jury System*, JAPAN TIMES, May 29, 2004.

16. *Id.*

17. *Id.*

18. *Id.*

its roots in the Middle Ages.[19] Medieval juries were fact-finders in the true sense of the term, as they were selected based upon their familiarity with the parties and the facts of the dispute and were responsible for finding facts outside the realm of court proceedings.[20]

The right to a trial-by-jury existed in the American colonies and was incorporated into the Constitution.[21] Unlike the medieval juries, juries in the United States did not do independent fact finding but relied on what was presented in court. The jurors were chosen for their impartiality and told to rely on the presentation of facts as presented by the lawyers.[22] Most states required juries of twelve and unanimous verdicts for convictions.[23] In the 1970s, the United States Supreme Court loosened the requirement for unanimous verdicts and juries of twelve in criminal cases.[24] Through the participation of average citizens in the governmental process of dispute resolution, a jury was considered an important exercise of political power[25] and has long been regarded as a fundamental pillar of democracy.[26]

Mixed juries differ from juries in the United States in a number of ways. A mixed-jury system consists of professional judges ("judges") and ordinary citizens ("lay judges" or "lay jurors") who work together to determine culpability and sentencing.

In a mixed-jury system, the judge provides learned guidance during jury deliberation,[27] a potentially beneficial structure given

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19. Apodaca v. Oregon, 406 U.S. 404, 407 (1972).

20. *See* Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 416 (1996).

21. *Id.* at 421-422.

22. Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. CHI. LEGAL F. 87, 92-93 (1990).

23. Apodaca v. Oregon, 406 U.S. at 408 n.3. Although in the 17th Century, the Carolinas, Connecticut, and Pennsylvania allowed for majority votes.

24. *Id.* at 406-413 (allowing for verdicts of 10-2); *See also* Williams v. Florida, 399 U.S. 78, 86 (1970) (allowing for a six person jury in criminal trials). *Apodaco* and *Williams* were both cases originating in the state court system. The Supreme Court was interpreting the Sixth Amendment to the U.S. Constitution which states, "In all criminal prosecutions the accused shall enjoy the right to speedy and public trials by an impartial jury. . . ." This amendment was made applicable to the states by the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145, 149 (1968). Federal Rule of Criminal Procedure 3(a) requires a unanimous verdict and Federal Rule of Criminal Procedure 23(b) requires a 12-person jury unless otherwise stipulated. A verdict from eleven jurors is acceptable provided there was a finding of just cause.

25. Apodaca v. Oregon, 406 U.S. at 410.

26. *Id.*

27. *See, e.g.*, Markus Dirk Dubber, *The German Jury and the Metaphysical Volk: From*

the common lack of comprehension by jurors of the judge's instructions on the law in the United States.[28] With this judicial guidance, rules of evidence, which are largely designed because of a distrust of the lay juror's ability to appropriately evaluate evidence, are no longer necessary.[29] Another positive aspect of a mixed-jury system is the more active role of jurors, who may have an opportunity to ask questions during the trial process.[30] Additionally, jurors in mixed-jury systems often serve for multiple years and hear numerous cases.[31] In this way, with a greater experiential base, they might be able to act with more confidence with a professional judge and thereby more readily express their opinions.[32] Unlike the United States, where unanimous verdicts are generally required for conviction of a crime, a majority vote usually determines culpability in a mixed-jury system.[33] In addition, because mixed juries decide issues of fact and law, they avoid the difficult dilemma facing juries in the United States who are forced to separate questions of law and fact.[34] Mixed juries also participate in the sentencing as well as the adjudication of a case.[35]

In the United States, the jury verdict is not subject to appeal by the State in criminal prosecution because of double jeopardy

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Romantic Idealism to Nazi Ideology, 43 AM. J. COMP. L. 227, 257 (1995); Thomas Weigend, *Sentencing in West Germany*, 42 MD. L. REV. 37, 62 (1983).

28. *See generally* Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 77-78 (1988) (finding levels of jury understanding of court instructions to be extremely low).

29. *See* RAMSEYER & NAKAZATO, *supra* note 8, at 145.

30. *See* Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 448-449 (1997). There is a movement in the United States for greater involvement of jurors. *See, e.g., The Past, Present, and Future of Trade Secrets Law in Tennessee: A Practitioner's Guide Following the Enactment of the Uniform Trade Secrets Act*, 32 U. MEM. L. REV. 1, 35 (reforms in Tennessee allowing for juror note-taking and questioning of witnesses); *see also* Nicole L. Mott, *The Jury in Practice: The Current Debate on Juror Questions: "To Ask or Not to Ask, That is the Question,"* 78 CHI.-KENT L. REV. 1099 (2003) (surveying the pluses and minuses of jury questioning). Jury questioning has been implemented in Arizona. *See, e.g.*, ARIZ. R. CIV. P. 39(b)(10); ARIZ. R. CRIM. P. 18.6(e); Michael Dann & George Logan, III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 281 (1996) (discussing the Arizona reforms); Larry Heuer & Steven Penrod, *Increasing Juror Participation in Trials Through Note Taking and Question Asking*, 79 JUDICATURE 256, 257-258 (1996) (discussing results of a study designed to observe effects of juror questioning).

31. *See* Smith, *supra* note 30, at 462.

32. *Id.*

33. *Id.*

34. The role of juries in the United States is to make factual determinations. NANCY S. MORDER, THE JURY PROCESS 7-8 (2005).

35. *See* Smith, *supra* note 30, at 469.

protection.[36] Appeals by the defendant are limited in most instances to law, with the findings of facts by the jury given great deference.[37] In most mixed-jury systems, however, there can be a *de novo* review of both law and fact.[38] Japanese appellate courts, for example, review law and fact, and the first appeal sometimes looks like a continuation of the original trial.[39]

While all mixed-jury systems have certain basic traits in common, the countries that utilize a mixed-jury system have taken widely varying approaches to jury size, voting requirements, whether and how appeals are handled, how jurors are selected, and what type of cases the jury can hear.

The legislation passed by the Japanese Diet lays out some of the procedural requirements of a mixed-jury system. In cases in which guilt is contested, the jury will be a panel of nine: six lay jurors and three judges.[40] In cases where there is an acknowledgment of guilt and consent by the parties, the panel shall consist of one judge and four lay jurors.[41] Jurors shall be those who are eligible to vote.[42] Convictions shall be by a majority vote provided that one lay juror and one professional judge agree.[43] The jurisdiction of the mixed-jury is restricted to those cases that are punishable by death, life imprisonment, or imprisonment for at least a year where the crime committed by an intentional act caused the death of a victim.[44] There is also a provision for an immediate appeal,[45] in which the court considers both the law and the facts of the jury trial.[46] Appeals can be taken by either the defense or prosecution.[47]

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36. The Fifth Amendment to the United States Constitution states, "[n]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

37. *See* Smith, *supra* note 30, at 551, 553.

38. *Id.* at 460.

39. *See* RAMSEYER & NAKAZATO, *supra* note 8, at 145.

40. Saiban'in no sanka suru keiji saiban ni kansuru h ritsu [Participation of Lay Assessors in Criminal Trials Law], Law No. 63 of 2004, art. 2(2) (Japan) [hereinafter Criminal Trials Law], *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, 237 (2005).

41. *Id.* art. 2(3).

42. *Id.* art. 13.

43. *Id.* art. 67.

44. *Id.* art. 2(1). In 2003 this amounted to a total of 3089 cases. Statistic from Saiban-in System, *available at* http://courtdomino2.courts.go.jp/saibanin.nsf/.

45. Criminal Trials Law art. 84.

46. Joseph J. Kodner, *Re-introducing Lay Participation To Japanese Criminal Cases: An Awkward Yet Necessary Step,* 2 WASH. U. GLOBAL STUD. L. REV. 231, 237 (2003).

47. *Id.*

While Japan's approach to mixed juries borrows heavily from similar systems in Europe, Japan's proposed mixed-jury system is unique. By briefly examining how mixed juries operate in Italy, Germany, Denmark, and France, one gets a better idea of how the Japanese system will differ from European mixed juries.

A. Italy

The Corte d'assise, Italy's version of the mixed jury, is composed of one professional judge who serves as "president of the court," one professional judge from the Tribunale (an all professional judge court), and six lay jurors.[48] To qualify for service as a lay juror one must possess Italian citizenship, exhibit good moral conduct, be between the ages of thirty and sixty-five, and have completed secondary school education.[49] The lay jurors preside over the trial with the professional judges and enjoy equal judicial authority.[50] The jurisdiction of the Corte d'assise is limited to cases involving serious crimes, such as those that result in death or are punishable by a prison sentence ranging from twenty-four years to life, and crimes against the state (treason).[51] A simple majority is required for deciding guilt or innocence and sentencing.[52] Tie votes are interpreted as an acquittal[53] and for purposes of sentencing in the absence of a simple majority, the most lenient punishment will prevail.[54] Appeals from the Corte d'assise in Italy are heard by the Corte d'assise d'appello, which is also made up of two professional judges and six lay jurors.[55] Because in Italy broad appellate rights are afforded both parties, the defendant or the prosecution can appeal issues of law and fact and either side may introduce new evidence to the appellate tribunal.[56] The Corte di cassazione is the highest of the appellate courts in Italy.[57] This court is responsible

48. Ottavio Campanella, *The Italian Legal Profession,* 19 J. LEGAL PROF. 59, 78 (1994).

49. Stephen P. Freccero, *An Introduction to The New Italian Criminal Procedure*, 21 AM. J. CRIM. L. 345, 351, n.25 (1994).

50. *Id.* at 351.

51. *Id.* at 352.

52. *Id.* at 371.

53. Campanella, *supra* note 48, at 78.

54. Freccero, *supra* note 49, at 371.

55. Campanella, *supra* note 48, at 78-79.

56. *See* William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1, 9 (1992).

57. Campanella, *supra* note 48, at 79.

for reconciling questions of law and is not concerned with questions of fact.[58] Each section of the Corte di cassazione is comprised of five professional judges.[59]

B. France

The Cour d'assises, the only court in the French criminal system that uses a mixed jury, has jurisdiction over serious crimes, which are those punishable by a prison term in excess of ten years.[60] The jury is made up of three professional judges and nine lay jurors.[61] An eight-to-four majority is required for all decisions regarding culpability or punishment unfavorable to the defendant.[62] Jurors must possess French citizenship with full privileges, be between the ages of twenty-three and sixty-one, and be able to read and write.[63] Due to the perceived influence of the local government, lay jurors cannot be civil servants, government ministers, parliamentarians, police or military officials.[64]

In France, "jurors are selected at random from the electoral role."[65] Potential jurors are screened by a joint committee, from which a final selection list is drawn up.[66] Thirty days before the Cour d'assises first sits, a panel of thirty-five jurors is selected, from which nine are selected for any particular case by the presiding judge in open court.[67] No appeal, except one concerning issues of law, is possible from the Cour d'assises.[68] This is likely because the defendant had been afforded a jury of his peers, and all decisions of the Cour d'assise are automatically reviewed by a subdivision of the appellate court.[69] Issues of law may be appealed to the Supreme Court of Appeal (Cour de Cassation).[70] The appellate jurisdiction of this court is limited to: (i) a decision by an irregularly

58. *Id.*
59. *Id.*
60. Renée Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour d'Assises*, 2001 U. ILL. L. REV., 791, 800 (2001); Edward A. Tomlinson, *Non-Adversarial Justice: The French Experience*, 42 MD. L. REV. 131, 142-43 (1983).
61. Lerner, *supra* note 60, at 800; Tomlinson, *supra* note 60, at 143.
62. COMPARATIVE CRIMINAL PROCEDURE 74 (John Hatchard et al. eds., 1996).
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 53, 74.
68. *Id.* at 54.
69. *Id.*
70. *Id.* at 55.

constituted tribunal, (ii) jurisdiction questions, (iii) decision in breach of procedural requirements, (iv) a decision not supported by written grounds, and (v) a decision not supported by law.[71]

C. Germany

The German system has three trial or first instance courts, two of which have mixed-jury systems.[72] The local courts, which have jurisdiction over misdemeanors punishable by up to three years in prison, have mixed juries comprised of one professional judge and two lay jurors.[73] The district courts, which have jurisdiction over serious misdemeanors, capital offenses, and crimes punishable by over three years in prison, have mixed juries comprised of three professional judges and two lay jurors.[74] The supreme courts, which consist of five professional judges, have sole jurisdiction over crimes against the State, including murder, and have no lay jurors.[75]

For the mixed juries in both the local court and the district court, a two-thirds majority is required for any decision of guilt, innocence or punishment.[76] The appellate system in Germany is slightly more complicated than its continental counterparts. If one of the two parties is not satisfied with the judgment, it has two remedies: appeal or revision.[77] An appeal made against a decision of the local court may address issues of fact and law.[78] Such an appeal proceeds as a new trial, with the appellate court re-hearing the evidence.[79] This appeal is discretionary, however, and the appellate court can deny it if it believes the decision of the trial court was correct.[80] The district court presides over these "re-trial" appeals,[81] and such appeals are not allowed against decisions of the supreme court or of the district court, when it serves as a court of

71. *Id.* at 55-56.

72. *Id.* at 102-103 (discussing the jurisdiction and composition of German mixed juries).

73. *Id.*

74. *Id.*

75. *Id.* Note that the supreme court of each state is different from the federal Supreme Court, which is the highest court in Germany. *Id.* at 102.

76. *Id.* at 130.

77. *Id.* at 132.

78. *Id.* This is distinct from its American counterpart, which only allows for appeals on issues of law.

79. *Id.* at 133. These re-trials are subject to similar procedural rules.

80. *Id.* This extends to appeals on matters of fact and matters of law.

81. *Id.* at 102-103. This appellate version of the district court is composed of three professional judges and two lay judges and acts as a retrial.

first instance.[82]

Unlike the appeal procedure, the revision procedure considers only matters of law and seeks to provide legal consistency throughout the German Republic.[83] All first instance decisions are subject to appeal by revision[84] and are presided over by the supreme courts and the federal Supreme Court.[85] Appeals by revision do not reconsider facts and will only occur where the original judgment was procedurally incorrect or not supported by substantive law.[86] In this sense, the appeal by revision process is very similar to the appeals process in the United States. The German system acts to ensure legal consistency throughout the country by subjecting these decisions to revision by the highest courts in Germany.

D. Denmark

For courts with jurisdiction over serious crimes, Denmark's jury system is closest to the United States system, with twelve lay jurors determining guilt.[87] The mixed-jury aspect of the system kicks in for purposes of sentencing.[88] Denmark adopted its mixed-jury system in 1937 as a means of expanding public participation in criminal trials.[89] Lay jurors are used only in cases where the defendant pleads "not guilty."[90] Where the potential punishment is more than four years, involves a political crime, or involves a question concerning the defendant's placement in an institution, juries of twelve lay jurors determine guilt.[91] Only economic crimes are excluded from the jurisdiction of jury trials, as they are thought to be too complicated.[92] A two-thirds vote of eight to four is required for conviction.[93] After reaching a guilty verdict, the jury then deliberates with three professional judges to determine sentencing.[94] Each

82. This is likely because of the large size of the presiding bench. *Id.*

83. *Id.* at 133.

84. *See id.*

85. *Id.* These are two wholly professional entities.

86. *Id.*

87. Stanley Anderson, *Lay Judges and Jurors in Denmark*, 38 AM. J. COMP. L. 839, 839 (1990).

88. *Id.*

89. *Id.* at 840.

90. Eva Smith, *The Danish Jury and Mixed Court System*, 2001-2002 ST. LOUIS-WARSAW TRANSATLANTIC L. J. 29, 31 (2003).

91. *Id.*

92. *Id.*

93. *Id.* at 34.

94. *See* Anderson, *supra* note 87, at 844.

of the professional judges has four votes equaling the votes of the twelve jurors.[95] In the event of a tie, the defendant receives the lesser penalty.[96] Appeals in these cases are handled by the Supreme Court, which can alter the length of the penalty, decide whether the High Court made errors of law, or determine whether there were procedural errors.[97] The Court does not review the jury's decision of guilt.[98]

The Municipal Court initially hears criminal charges that might result in more than a fine or less than four years of prison.[99] In such cases, the mixed jury consists of two lay jurors and one professional judge who determine guilt and sentencing.[100] Any question, including guilt, can be appealed.[101] The High Court handles the appeal, with a mixed jury consisting of three lay jurors and three professional judges.[102] While typically a case can only be appealed once, in very special circumstances the decision of the mixed jury on the High Court can be appealed to the Supreme Court.[103]

III. HISTORY OF REFORM IN JAPAN

Academics have highlighted several reasons for Japan's renewed interest in jury trials. In his article *Reviving the Criminal Jury in Japan*, Lester W. Kiss discusses several of these factors, including the aura of cynicism that surrounds the judiciary.[104] In their article, Kent Anderson and Mark Nolan point out that in addition to the desire to deliver better justice and better democracy, some Japanese view a lay assessor system as necessary to ensure international competitiveness in the 21st century as a well as a means of making trials shorter and more efficient.[105]

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95. *Id.*

96. *Id.*

97. *See* Smith, *supra* note 90, at 38.

98. *Id.*

99. *See* Anderson, *supra* note 87, at 848.

100. Smith, *supra* note 90, at 37.

101. *Id.* at 39.

102. *Id.*

103. *Id.* If the case is determined to present a problem of principle or special circumstance, it may be appealed to the Supreme Court. Permission for this must be granted by a board consisting of three judges, a lawyer and a professor from one of the universities. Smith, *supra* note 90, at 39.

104. Kiss, *supra* note 14, at 264-265 (observing that controversial judge-made verdicts have led to criticism of Japan's judge-based system).

105. *See* Anderson & Nolan, *supra* note 5, at 944-944. *See also infra* note 156 and ac-

One reason for the current reforms was a series of highly controversial criminal cases in the 1980s. Between 1983 and 1989, there were four controversial death penalty cases involving overturned confessions. The four wrongfully convicted defendants in these cases spent a combined 130 years in prison before ultimately being released.[106] The publicity associated with these cases reflected especially adversely on the judiciary. Specifically, the cases highlighted that the Japanese criminal justice system had a 99.9% conviction rate, with judges almost always supporting the prosecution.[107] In 1987, as a result of the judiciary's role in these four wrongful convictions and mounting domestic pressure for reform, Chief Justice Koichi Yaguchi of the Japanese Supreme Court initiated a study examining the feasibility of the jury system in Japan.[108]

Other reasons for the current reforms involve the selection and assignment of judges. Judges in Japan are chosen from a competitive exam after college graduation.[109] The low passage rate on this exam suggests that judges represent a highly intelligent, well-educated part of society.[110] They seem to be an elitist, homogenous

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companying text.

106. Daniel H. Foote, *From Japan's Death Row to Freedom*, PAC. RIM L. & POL'Y J. Winter 1992, at 11, 13 (documenting cases).

107. Yumi Wijers-Hasegawa, *Jury System Needs to be Made Accessible for Citizens*, THE JAPAN TIMES, August 5, 2003 (explaining the high conviction rate might be that prosecution only brings airtight cases). *See* DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN 215-218 (2002) (finding this prosecutorial practice as well) [hereinafter THE JAPANESE WAY OF JUSTICE]. Judge Sonobe (*see supra* note 1) also concurs in this assessment. *See also* RAMSEYER & NAKAZATO, *supra* note 8, at 178-182 (showing a 99.9% conviction rate in 1994 and 99.7% of murder cases compared to U.S. federal courts 85.1% in 1995 and 83.3% of murder). Ramseyer suggests that because of the shortage of prosecutors, the government brings only very strong cases. He states, "[o]f the 919,000 people arrested for criminal code crimes in 1995. . .prosecutors brought charges against only 161,000 (17.5%). Even of the 1822 people arrested for murder, they tried only 781 (42.9%)." *Id.* at 182 (citing HOMUSHO, HANZAI HAKUSHO [WHITE PAPER ON CRIME] 122 (Tokyo: Okura sho 1996)). *See also* J. Mark Ramseyer & Eric Rasmusen, *Why is the Japanese Conviction Rate So High*, 30 J. LEGAL STUD. 53 (2001); *See also* Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (noting, "[f]ear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.").

108. Foote, *supra* note 106, at 83-84.

109. One becomes a judge after taking the National Legal Examination (Shiho Shikh) then followed by one year and six months of apprentice training. *See* Kiss, *supra* note 14, at 265 n.45.

110. Kiss, *supra* note 14, at 266. Pass rate was 2.75% in 2001. *Id.* at 265 n.45. Exam taking is a very important part of Japanese society. Japanese describe their society as *gaku-*

group with limited life experience.[111] Given their youth at the commencement of their judgeship, they tend to be more impressionable and are therefore subject to greater influence by some of the veteran actors in the system.[112]

Indeed, the success of a judge's career in Japan seems linked to his or her readiness to defer to the ruling party and thus find in favor of the prosecution.[113] This deferral by judges has to do with the institutional structure that controls the transfer of judges. Assignments to higher level courts and specific geographical locations are controlled by the Supreme Court through the Supreme Court Secretariat.[114] Judges are assigned to the Secretariat by the Supreme Court.[115] The Supreme Court presumably independently administers the entire judicial system, but the ruling Cabinet appoints individual Justices.[116] Even though there is no direct influence of politics, the control of transfer by the Supreme Court, a politically appointed body, might have some subliminal influence on judges' decisions.[117] Judges therefore have an incentive to find

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reki shakai, one which an individual's future is determined by their academic record. There are *juku* (exam cramming schools) because passing examinations is so important. Twelve years of pre-college education culminates into two examinations. One is taken by all Japanese high school seniors on the same day and the other is for specific university admission. *See* RAMSEYER & NAKAZATO, *supra* note 8, at 6-9, 16-17.

111. Richard Lempert, *Jury for Japan?* 40 AM. J. COMP. L. 37, 48 (1992); *See also* John O. Haley, *Judicial Independence in Japan Revisited,* 25 LAW IN JAPAN 1, 15-16 (1995) (showing that most of Japan's judges completed the same law and undergraduate programs as one another and with members of the economic and political elite).

112. Judges in the United States are chosen or elected usually after an extensive legal career. Therefore, they have greater life experience. *See* Anderson & Nolan, *supra* note 5, at 942. ("[U]pon entry into the profession Japanese judges are better educated, come from richer families, and are likely to have had more limited life experience than their non-lawyer peers.")

113. *See, e.g.*, Hiro Iwamura, *Memoir of International Trade Law: Issues of Translating WTO Safeguard Provisions into Japanese,* 5 ASIAN-PAC. L. & POL'Y J. 188, 210 (2004) (continuity of ruling party causes judiciary to make decisions in accord with ruling party); M. Christina Luera, *No More Waiting for Revolution: Japan Should Take Positive Action to Implement the Convention on the Elimination of All Forms of Discrimination Against Women*, 13 PAC. L.J. 611, 619 n.56 (2004) (noting that Japanese judiciary defer to LDP politicians on sensitive issues because those who do enjoy better careers); David T. Johnson, *American Law in Japanese Perspective,* 28 LAW & SOC. INQUIRY 771, 781 (2003). In a conversation with a Japanese judge, she indicated that the assumption that judges defer to the wishes of politicians and government officials is largely a myth, and she hopes that by exposing the system to citizens, this myth will be debunked.

114. RAMSEYER & NAKAZATO, *supra* note 8, at 17-18.

115. *Id.*

116. *Id.*

117. *Id. See also* J. Mark Ramseyer & Eric B. Rasmusen, *Judicial Independence in a Civil Law Regime: The Evidence from Japan*, 13 J.L. ECON & ORG. 259 (1997) (studies supporting the proposition that Japanese judges face politically biased incentives).

guilt in order to avoid an appeal by a prosecutor.[118]

In addition, judges are often isolated from ordinary people because of their societal status.[119] The jury will expose the judge to ordinary citizens who bring their own life experiences to their work as jurors.[120] The hope is that the introduction of lay jurors into the decision-making process will make judges more accessible to the public they serve. The American jury was similarly intended to keep "class instincts of the judge in check."[121]

While the wrongful conviction cases and the high rate of convictions might have contributed to the exploration of juries in Japan, the major reason for the introduction of juries seems to be the idea of greater citizen participation in the running of the government.[122] Indeed, as Richard Lempert notes, "[t]he fact that jurors do bring non-legal values and understanding to their deliberations is regarded by many as a virtue of the jury system and a way of introducing an important democratic voice into the least democratic of the three bricks of the modern liberal state government." [123]

In July 1999, the Japanese Cabinet formed the Justice System Reform Council (JSRC), a working group of thirteen prominent lawyers, academics and business executives, and asked them to design a Japanese judicial system for the 21st century.[124] One of the project's major objectives was to enhance the legitimacy of the judiciary.

> This Council sincerely hopes that these Recommendations provide the opportunity for a new start for the Japanese justice system, that the reforms proposed herein will steadily be put into effect, and that the justice system at the earliest possible time becomes one that is easy to use and meets the expectation and

118. Japan's conviction rate hovers above 99%. THE JAPANESE WAY OF JUSTICE, *supra* note 107, at 41-42.

119. *See* Anderson & Nolan, *supra* note 5, at 942.

120. "Through the participation of the general public in criminal court trials, the trials will reflect the general feelings and opinions of those who are not legal experts. As a result, this is expected to increase the understanding and trust of the general public toward the justice system." SUPREME COURT OF JAPAN, MINISTRY OF JUSTICE & JAPAN FEDERATION OF BAR ASSOCIATIONS, START OF THE SAIBAN-IN SYSTEM 2005 [hereinafter START OF THE SAIBAN-IN SYSTEM].

121. Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 696 (1973).

122. JUSTICE SYSTEM, *supra* note 12, at 127.

123. Lempert, *supra* note 111, at 58.

124. The Council was chaired by Koji Sato, Professor of Law, Kyoto University. *See* Setsuo Miyazawa, *The Politics of Judicial Reform in Japan: The Rule of Law at Last?* ASIAN-PAC. L. & POL'Y J., Spring 2001, at 89, 107 (2001) (discussing the make-up of the Council).

trust of the people.[125]

More citizen exposure to the courts is one way to achieve this objective.[126] Throughout its report, the JSRC uses language that clearly indicates that Japan's objective in establishing a jury system is to empower the citizenry.[127] In language reminiscent of de Tocqueville, the report states:

> What commonly underlies these reforms is the will that each and every person will break out of the consciousness of being a governed object and will become a governing subject, with autonomy and bearing social responsibility, and that the people will participate in building a free and fair society in mutual cooperation and will work to restore rich creativity and vitality to this country.[128]

With that objective in mind, the JSRC sought to create a mixed-jury (*saiban-in*) system. The reformers suggested a mixed-jury system in which judges and citizens deliberate together:

> In order to establish a stronger popular base for the justice system, measures shall be taken to expand participation of the people in the justice system. As a new system for popular participation in litigation proceedings which constitute the core of the justice system, a new system shall be introduced for a portion of criminal cases. Under this new system, the general public can work in cooperation with judges, sharing responsibility for and becoming involved in deciding the cases autonomously and meaningfully.[129]

The hope is that citizen participation will result in greater acceptance of the justice system and that having citizens work with judges will grant the judiciary wider public legitimacy.[130] If lay jurors participate as equals, the results of trials (over ninety-six percent of which currently end in conviction) could become more balanced.[131] Greater citizen participation will bring increased legitimacy and respect to the judiciary by creating the perception

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125. JUSTICE SYSTEM, *supra* note 12, at 224. This article focuses on the introduction of a jury system but it should be pointed out that the Council also suggests other mechanisms for public participation, including the selection of judges. *See id.* at 207.

126. *Id.* at 135.

127. *Id.* at 126-136.

128. *Id.* at 127.

129. *Id.* at 135.

130. Anderson & Nolan, *supra* note 5, at 943.

131. *See id.* at 942 (suggesting this potential benefit).

that disputes are resolved openly and fairly.[132] It should be noted that de Tocqueville regarded jury duty as a great educational opportunity, "a free school" to learn about democracy and the court system in particular.[133]

The JSRC's language regarding the objectives of jury trials and citizen participation is wonderfully inspirational. However, by adopting a mixed-jury system, the JSRC has greatly limited its ability to achieve these objectives. Inherent in the choice of a mixed-jury system is distrust in the average Japanese citizen's ability to effectively decide legal issues. While Japan wants to make its judicial system more understandable to its citizens, it is not prepared to entrust decisions solely to them, an approach seemingly inconsistent with the democratic ideals that prompted the call for reform in the first place. As the later section on Japanese culture will demonstrate, the actual participation of citizens in this type of mixed system will be minimal as opposed to mixed.

IV. How Collective Judgments Occur

Juries are group decision-makers, so not surprisingly the process by which they deliberate is similar to other group decision processes.[134] A concept that pervades the scholarship on group decision-making is that of the "opinion leader."[135] The opinion leader exists in the jury as the "dominant juror."[136] The dominant juror often has a considerable effect on the deliberation process.[137] This

132. In Russia, for example, the conviction rate for all types of trials is 99%. In jury trials, however, the conviction rate decreases to 85%. Fred Weir, *A gift to Russian defendants: juries; Acquittal rate has doubled to 0.08%, but reform aims for more*, CHICAGO SUN-TIMES, March 9, 2003, 2003 WLNR 6790749. By way of comparison, the United States conviction rate in jury trials is approximately 17%. Fred Weir, *A gift to Russian defendants: juries; Acquittal rate has doubled to 0.08%, but reform aims for more*, CHICAGO SUN-TIMES, March 9, 2003, 2003 WLNR 6790749. *See also* Inga Markovits, *Exporting Law Reform – But Will it Travel?* 37 CORNELL INT'L L.J. 95, 107 (noting acquittal trends in Russian jury trials); Hon. John C. Coughenour, *Reflections on Russia's Revival of Trial by Jury*, 26 SEATTLE UNIV. L. R. 399, 409-410 (2003).

133. DE TOCQUEVILLE, *supra* note 6, at 275.

134. *See* Adam M. Chud & Michael L. Berman, *Six-Member Juries: Does Size Really Matter?* 67 TENN. L. REV. 743, 755 (2000) (citing Kathleen M. Propp & Gary L. Kreps, *A Rose by Any Other name: The Vitality of Group Communication in Research*, 45 COMM. STUDS. 7, 8 (1994)).

135. GABRIEL WEIMANN, THE INFLUENTIALS: PEOPLE WHO INFLUENCE PEOPLE (1994).

136. *See, e.g.*, Arthur Austin, *The Jury System at Risk from Complexity, the New Media, and Deviancy*, 73 DENV. U. L. REV. 51, 55-56 (1995).

137. *See, e.g.*, Emma Cano, *Speaking Out: Is Texas Inhibiting the Search for Truth by Prohibiting Juror Questioning of Witnesses in Criminal Cases?* 32 TEX. TECH L. REV.

person often takes the lead and dictates the agenda by which the decision is made. This person, the so-called opinion leader,[138] has certain characteristics, such as perceived competence and specific expertise. A judge undoubtedly embodies these qualities in a manner that would allow him or her to emerge as the dominant juror during a trial. Certainly, judges have more experience and familiarity with legal proceedings and are thus likely to persuade and lead decisions by a jury.[139] Indeed, one study applying the opinion leader analysis to the jury found that an individual juror's perceived persuasiveness was inextricably linked to the juror's level of education (and associated indicia such as income, social status, and occupation).[140]

The impact that the "opinion leader" has over decision-making is extensive.[141] To illustrate, a study conducted by Solomon Asch asked a group of seven to nine individuals to observe a line that was drawn on a white card.[142] They were then asked to select one card from three, which they thought best represented the line drawn on the original card.[143] The participants were asked to make twelve selections.[144] In the first two selections all the participants chose correctly.[145] In the proceeding rounds, all participants but one were told to select incorrectly in order to observe the impact this would have on the unknowing participant (the "subject").[146] Of the thirty-one subjects studied, the study found that the subjects followed the incorrect majority thirty-three percent of the time, compared to seven percent in the control group.[147] This effect was

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1013, 1036 (2001) (citing Ellyn C. Acker, *Standardized Procedures for Juror Interrogation of Witnesses*, 1990 U. CHI. LEGAL F. 557, 562 (1990), which concluded that dominant jurors may easily persuade uninformed jurors).

138. WEIMANN, *supra* note 135, at 74.

139. *See* Anderson & Nolan, *supra* note 5, at 981 n.225 (deference is afforded judges in a mixed jury setting.); *See also* R. Arce et al., *Empirical Assessment of the Escabinado Jury System*, 2 PSYCHOL., CRIME & L. 175, 179, 181 (1996) (showing post-deliberation verdict change toward the judge's verdict by lay assessors observed in mock trial deliberations with one professional judge and five lay assessors).

140. REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, INSIDE THE JURY 145 (1983). The study was primarily conducted through post-trial juror questionnaire.

141. *See* Chud & Berman, *supra* note 134, at 757 (equating group decision making with jury decision making).

142. SOLOMON E. ASCH, SOCIAL PSYCHOLOGY 451 (1987).

143. *Id.* at 451-452.

144. *Id.* at 455.

145. *Id.* at 453.

146. *Id.* at 454.

147. *Id.* at 457. The control group consisted of twenty-five unknowing participants who reported their judgments privately in writing. *Id.*

enhanced if the subject perceived himself to be a member of the group, something that a juror likely would feel about his relationship with his peer jurors.[148] Asch concluded, "[t]hat we have found the tendency to conformity in our society so strong that reasonably intelligent and well-meaning young people are willing to call white, black, this is a matter of concern."[149] The results of this study become even more disturbing when considering the importance of group identity in Japanese culture. It is interesting to note that in a Japanese study that measured the effect of different ratios of citizens to judges (2 judges to 9 to 11 citizens or 3 judges to 6 citizens), increasing or decreasing the ratio of judges did not necessarily avoid the judicial dominance.[150]

Another concept in group-decision making is the "spiral of silence," which was identified by Elisabeth Noelle-Neumann in her study about group minority opinions.[151] In her attempt to rationalize a sudden shift in German voting behavior days before an election, Noelle-Neumann observed that the position with the most vocal support appeared stronger than it really was and other positions appeared weaker.[152] Once a position dominated the discourse, proponents of the other positions were drowned out.[153] She called this process a "spiral of silence."[154] According to the "spiral of silence" theory, a viewpoint that receives more vocal support can dominate and eventually extinguish competing opinions.[155] Applying the "spiral of silence" to jury deliberations, the dominant juror is likely to be the most vocal or at least the most influential participant in the deliberations and may therefore actually silence other jurors.[156]

In 1970, the Supreme Court of the United States approved the constitutionality of a six-person criminal jury,[157] and later ap-

148. Dominic Abrams, *Knowing What to Think by Knowing Who You Are: Self-Categorization and the Nature of Norm Formation, Conformity and Group Polarization*, 29 BRIT. J. SOC. PSYCHOL. 97, 109 (1990).

149. Solomon E. Asch, *Opinions and Social Pressure*, SCIENTIFIC AMERICAN, Nov. 1955, at 31, 34 (discussing the same study).

150. *See* Anderson & Nolan, *supra* note 5, at 976-77.

151. *See* ELISABETH NOELLE-NEUMANN, THE SPIRAL OF SILENCE (1993).

152. *See id.* at 3.

153. *Id.* at 5.

154. *Id.*

155. *See id.*

156. Fred L. Strodtbeck & Richard D. Mann, *Sex Role Differentiation in Jury Deliberations*, 19 SOCIOMETRY 3 (1956).

157. Williams v. Florida, 399 U.S. 78, 86 (1970).

proved the constitutionality of a six-person civil jury.[158] Prior to these decisions a twelve-person jury was constitutionally required.[159] Immediately following the Court's rulings, scholars began to study the effect that jury size has on the dominance of a single juror. Research suggests that because people's timidity and insecurity are greater in larger numbers thus rendering them less likely to speak,[160] a larger jury enhances the likelihood of domination by an individual juror.

A second area of research is the extent to which jurors are allowed to participate in the court proceedings. In an effort to enhance the understanding of jurors, especially in light of complex litigation, some courts have allowed witness-questioning by jurors.[161] In *DeBenedetto*,[162] the Fourth Circuit allowed juror-questioning in extreme circumstances yet warned of the power this gives to the dominant juror: " . . .one or two jurors often will be stronger than the other jurors, and will dominate the jury inquiries."[163] The court feared that the dominant juror who audibly relayed his or her question would be able to influence fellow jurors and thus persuade and impose premature deliberation.[164] The court's fears were realized in *DeBenedetto*, when the dominant foreperson asked over half of the ninety-five questions asked during trial.[165]

One way to allay such fears of juror dominance associated with audible witness questioning is to permit only written questions, reviewed and asked by the judge. The Third Circuit Court of Appeals endorsed such an approach in 1999.[166]

A third area of focus that researchers have looked at is juror note-taking. Some fear that note-taking skills correlate to an individual's level of education, thus creating a further opportunity for juror dominance.[167] However, a recent study showed that jurors

158. Colgrove v. Battin, 413 U.S. 149, 164 (1973).

159. *See, e.g.*, Thompson v. Utah, 170 U.S. 343, 355 (1898).

160. *See, e.g.*, Franklin J. Boster, *An Information Processing Model of Jury Decision Making*, 18 COMM. RES. 524, 542 n.108 (1991).

161. *See, e.g.*, Heuer & Penrod, *supra* note 30, at 257-58.

162. DeBenedetto v. Goodyear Tire & Rubber Co., 754 F.2d 512 (4th Cir. 1985).

163. *Id.* at 516.

164. *Id.* at 516-17.

165. *Id.* at 517.

166. *See* United States v. Hernandez, 176 F.3d 719, 722-723 (3rd Cir. 1999).

167. Prentice H. Marshall, *A View From the Bench: Practical Perspectives on Juries*, 1990 U. CHI. LEGAL F. 147, 153 (1990).

who take notes do not always dominate deliberations.[168]

Despite the seemingly unavoidable reality of the existence of the dominant juror, accurate decisions are still likely to be reached. One study showed that regardless of the make-up of the jury, a twelve-person panel was able to reach the correct decision eighty-three percent of the time, compared to a sixty-nine percent accuracy for six-person panels.[169] A survey of studies on small-group decision-making showed that groups, regardless of their make-up, were more accurate decision makers than individuals, at least concerning complex matters.[170] Moreover, studies overwhelmingly show that larger groups are more likely to render accurate decisions.[171]

V. JAPANESE CULTURE

The importance of social status within Japanese culture was driven home for me during a six-week teaching experience in Japan.[172] The janitor of my office building would greet me each day with a low bow. One day, as a symbol of my respect for him, I tried to bow lower than him during our morning encounter. I saw that this made the janitor rather uncomfortable (which certainly was not my objective!). I observed similar examples of this consciousness of social status during dinners following my talks before various Japanese bar associations when I, as the honored guest, was seated next to the person of highest status.[173]

Japan's unique cultural attributes present a significant challenge to establishing meaningful citizen participation in the Japanese judicial system. Even in its report, the JSRC recognizes inherent impediments in Japanese society that inhibit meaningful citizen participation. The people are accustomed to being gov-

168. Smith, *supra* note 30, at 574-75 (finding that note-takers did not dominate proceedings).

169. MICHAEL J. SAKS, JURY VERDICTS: THE ROLE OF GROUP SIZE AND SOCIAL DECISION RULE 86-87 (1977).

170. *See* MICHAEL J. SAKS, SMALL-GROUP DECISION MAKING AND COMPLEX INFORMATION TASKS 2 (Federal Judicial Center, 1981). *See infra* note 181.

171. *See* Cheryl D. Block, *Truth and Probability-Ironies in the Evolution of Social Choice Theory*, 76 WASH. U. L.Q. 975, 977 n.3, 1033 (1998).

172. I taught Principles of American Law at Kwansei Gakuin University School of Law in Nishinomiya.

173. *See generally* ROBERT C. CHRISTOPHER, THE JAPANESE MIND 146-150 (1983) (discussing the Japanese's public displays of deference to persons considered to be of high social status).

erned, and view the "government as the ruler (the authority)."[174] The Council's recommendations seek to transform the people from passive to active participants in the operation of the government.[175]

Japanese culture puts a high value on group relationships. The slang expression "going along to get along" is particularly applicable to Japanese culture. A distinction exists in Japanese society between what one says (*tatemae*) and what one really thinks (*honne*). Not expressing oneself honestly has a great deal to do with fitting into the group. The emphasis on fitting-in is highlighted in elementary school text books in Japan that state that good relationships with others are valued more than asserting one's own ideas.[176] The concept of harmony is a cornerstone of Japanese culture, a concept found in the first clause of an early Japanese constitution dating back to 697 A.D: "Harmony is to be valued, and an avoidance of wanton opposition to be honored."[177] A Japanese proverb captures the importance of harmony: "The nail that sticks up gets pounded down."[178]

What flows from this desire to get along is a great emphasis on group identification. Much of a Japanese individual's self-esteem comes with his or her group identification. Thus, group disapproval can be devastating. Some even suggest that group disapproval provides a powerful deterrent for crime in Japan.[179]

In addition to fitting in, Japanese culture accords great respect and deference to others based on their social status, which includes considerations of wealth, profession, and position.[180] The Japanese have a high level of respect for authority figures, a definite legacy of the Confucianism influence. There are three rela-

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174. JUSTICE SYSTEM, *supra* note 12, at 127.

175. A further indication of citizen passivity can be found in a statement by JSRC chairman Professor Emeritus Kofi Sato: "I think we have reached the situation where we have to re-think how human beings should live, that is as 'autonomous individuals'. I feel that the time has come to outgrow this society which passively depends on regulation from above, and to rebuild and form a self-reliant base. The departure point is self-reliance based on the autonomous individual, so we have to prepare a social structure that facilitates this." Anderson & Nolan, *supra* note 5, at 944.

176. *Japanese Studies on Attitudes Towards Person with Mental Retardation*, 40 MENTAL RETARDATION 245-251 (June 2002).

177. *See* 2 NIHONGI: CHRONICLES OF JAPAN FROM THE EARLIEST TIMES TO A.D. 697, 128 (W.G. Aston trans., Charles E. Tuttle Co. 1972) (1896).

178. CHRISTOPHER, *supra* note 173, at 53.

179. *Id.* at 164.

180. NORIKO KAMACHI, CULTURE AND CUSTOMS OF JAPAN 163-164 (Hanchao Lu ed., Greenwood Press 1999).

tionships prominent in Confucian ethic – father-son, ruler-subjects, and husband-wife.[181] Each of these relationships emphasizes deference to the superior figure.[182] In a family, usually the opinion of the household head is the rule. Any dissenting opinions are regarded as disloyal.[183]

> Similar status issues also appear in the language. In English, the word "you" is used to describe anyone regardless of status. In Japanese, age, gender, and status affect the form of address. Given the emphasis that in effective group decision-making, everyone must be of equal status, it is somewhat problematic when the language itself calls attention to various status concerns.[184]

Many scholars are convinced that as a result of the hierarchy in Japanese society, the Japanese people prefer trial by "those above the people" rather than by "their fellows," and that this caused the Japanese to distrust juries from the very beginning.

> People trust judges because they have a special sense of responsibility when adjudicating cases and try to keep their moral standards high in order to ensure impartial trials. Therefore, citizen participation in the judicial process is ultimately not suitable for the Japanese people because citizens would simply prefer to have a judge decide their case rather than their fellow citizens. Scholars disagree on exactly how much weight should be given to the cultural aspect of the failure of the earlier jury system in Japan, but most agree culture played some part.[185]

It should be pointed out that Anderson and Nolan would question the assumption that Japanese citizens would automatically defer to the judge's opinion. They point out that the JSRC, aware of this cultural perception, thought that with the appropriate leadership and education this cultural deference would change over time.[186]

Hierarchy, harmony, and group identity are three powerful reasons why a mixed-jury system will tend to stifle free and open jury deliberation and lead to several questions. First, will the superior figure of the judge become the dominant juror and have an

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181. *Id.* at 27.

182. *See id.*; *See also* Kiss, *supra* note 14, at 273.

183. *See* Chia Nakone, *Japanese Society* (1950), *reprinted in* JAPANESE CULTURE AND BEHAVIOR: SELECTED READINGS 155 (Takia Sigyang Lebra & William P. Lebra eds., 1978). Lempert, *supra* note 111, at 40.

184. *See* Nakone, *supra* note 183, at 155; Lempert, *supra* note 111, at 40.

185. Kiss, *supra* note 14, at 269-270.

186. Anderson & Nolan, *supra* note 5, at 987.

undue influence on the jury panel? In any society, judges are respected and have a great deal of influence. In the United States, "jurors typically begin their jury experience by viewing the judge with great deference. Jurors are laypersons, and look up to the judge, who is an authority figure, robed in black, seated on high with gavel in hand; clearly the judge is experienced and in control of the proceedings."[187] When we couple this with the hierarchal nature of Japanese culture, we are presented with a difficult problem especially when we consider the group-decision making data. Secondly, with the ideal of harmony ingrained in the Japanese psyche, will dissenting opinion be voiced or even allowed by the group? Finally, given the emphasis placed on group approval, how many jurors will take a position and risk the wrath of the group?[188]

As previously mentioned, a majority vote is all that the legislation required for conviction.[189] Although some studies have indicated that a majority vote and a unanimous verdict can be similar,[190] the concern of the dominance of judges within the deliberation process might be alleviated if a unanimous vote were instituted. At a minimum, it would improve the perception of meaningful citizen deliberation. At a maximum, it might enhance the quality of argument during the deliberation process, as one holdout would have to be convinced to change positions.[191] Certainly a unanimous vote or a minimum two-thirds vote would foster greater deliberation because it would be necessary to convince jurors not agreeing with the majority position.

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187. MORDER, *supra* note 34, at 118. *See also* Peter David Blanck et al., *The Appearance of Justice: Judges' Verbal and Non-Verbal Behavior in Criminal Jury Trials,* 38 STAN. L. REV. 89 (1985) (discussing the how non-verbal behavior of judges has an influence on jurors).

188. An article in the *Boston Globe* recalled the experience of one Linda Cox as a juror. She maintained her position despite pressure of the group: "But for nine hours over two days, during an unusually hot July two years ago, Cox was told, and sometimes shouted at, by her fellow jurors that she was wrong." Doris Sue Wong, *A Lone Juror Holds Out, Aids Quest for Freedom,* BOSTON GLOBE, April 1, 1990.

189. Criminal Trials Law art. 67.

190. *See* Anderson & Nolan, *supra* note 5, at 980 n.221 (citing Ana M. Martin et al., *Discussion, Content and Perception of Deliberation in Western European vs. American Juries*, 9(3) PSYCHOL. CRIME & LAW 247, 249 (2003)).

191. *See id.* at 981 n.223 (citing C.J. NEMETH, DISSENT, DIVERSITY AND JURIES IN SOCIAL INFLUENCE IN SOCIAL REALITY: PROMOTING INDIVIDUAL AND SOCIAL CHANGE 23 (F. Butera & G. Mugny eds., 2001)); *See generally* C.J. Nemeth et al., *Devil's Advocate versus Authentic Dissent: Stimulating Quantity and Quality*, 31(6) EUR. J. SOC. PSYCHOL. 707, 707-720 (2001)).

VI. SPECIFIC RECOMMENDATIONS

Notwithstanding the basic structure of the mixed-jury system, there are a number of procedural measures that can contribute to "meaningful and autonomous participation." Although as previously expressed, there are some cultural and systemic problems with mixed juries, the following recommendations are made in light of the confines of the system adopted by the Japanese Diet.

A. Principal of Orality

The term orality refers to evidence presented to the fact-finder through the testimony of live witnesses.[192] Under Japan's current hearsay rule, written records of statements made outside the trial instead of testimony at the trial are not admissible.[193] Even with a guilty plea, consent is required for the introduction of written statements.[194] Orality during contested trials should go a long way to putting the prosecution and defense on equal footing so that prosecutors will be unable to rely on written documents, and thus, will need to produce live witness testimony in order to prove their cases.

Orality will also impact the use of confessions. One of the reasons for Japan's high conviction rate is due to confessions. Confessions are allowed in a vast majority of cases and often form the basis for the conviction.[195] Since suspects may be detained for up to twenty-three days before charging, it is not surprising that confessions are obtained.[196] Because of their importance in the system, there is a great deal of pressure on prosecutors to secure confessions. This pressure, coupled with the 23-day detention, could lead to abusive tactics in obtaining confessions.[197] Greater orality in the

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192. *See* JUSTICE SYSTEM, *supra* note 12, at 163.

193. *Id.* at 162-163.

194. KEIJI SOSH H [KEISOH] [CODE OF CRIMINAL PROCEDURE] art. 320 (Japan), *translated in* MINISTRY OF JUSTICE JAPAN, JAPAN STUDIES: STUDIES IN JAPANESE LAW AND GOVERNMENT (Univ. Publ'n of Am. 1979).

195. RAMSEYER & NAKAZATO, *supra* note 8, at 169. "In 1992 they had confessions in 91.8% of all trials." *Id.* (citing ATSUSHI FUKUI, KEIJI SOSHO HO (CRIMINAL PROCEDURE) 258 (2nd ed., Tokyo, Yuhikaku 1994)).

196. KEIJI SOSH H [KEISOH] [CODE OF CRIMINAL PROCEDURE] art. 203, 205, 208 (Japan), *translated in* MINISTRY OF JUSTICE JAPAN, JAPAN STUDIES: STUDIES IN JAPANESE LAW AND GOVERNMENT 134-136 (Univ. Publ'n of Am. 1979).

197. It should be pointed out that there are provisions for protecting the suspect from being compelled to incriminate himself. NIHONKOKU KENP [KENP] [Constitution] art. 38 (Japan). Additionally, Article 198(2) of the Japanese Code of Criminal Procedure states, "In the case of questioning... the suspect shall, in advance, be notified that he is

system will help expose the possible abuses in obtaining confessions.

Orality also allows the system to take advantage of the collective wisdom and common sense of the jury; the jury must evaluate live witnesses to assess their verbal and non-verbal attributes. "To ensure that *saibin-in*, who are laypersons, can sufficiently form decisions by examining the evidence presented at trial, it is necessary to materialize the principles of orality and directness."[198] Another concern for jury comprehension is that trials are often interrupted and continued for various periods (weekly or a month).[199] To maximize the benefits of orality and ensure that jurors' memories remain intact, once a trial begins it should be completed without interruption.

The only exception to the principle of orality should occur when the witness is unavailable (out of the jurisdiction or ill) and there exists some indicia of truthfulness of the out-of-court statement (akin to the rules of hearsay developed in American jurisprudence). A deposition with all parties represented might provide sufficient indicia of truthfulness to allow for such an exception. A section of the legislation seems to minimize the importance of orality as it allows for examinations of witnesses outside of the courthouse.[200] It does allow, however, for the presence of jurors who may then participate in the examination.[201] This provision is limited to witnesses who, because of health, age, occupation or other limitations, cannot testify in court.[202]

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not required to make a statement against his will." KEIJI SOSH H [KEISOH] [CODE OF CRIMINAL PROCEDURE] art. 198(2) (Japan), *translated in* MINISTRY OF JUSTICE JAPAN, JAPAN STUDIES: STUDIES IN JAPANESE LAW AND GOVERNMENT 132 (Univ. Publ'n of Am. 1979).

198. JUSTICE SYSTEM, *supra* note 12, at 217.

199. *See* RAMSEYER & NAKAZATO, *supra* note 8, at 139-140.

200. KEIJI SOSH H [KEISOH] [CODE OF CRIMINAL PROCEDURE] art. 158 (Japan), *translated in* MINISTRY OF JUSTICE JAPAN, JAPAN STUDIES: STUDIES IN JAPANESE LAW AND GOVERNMENT 123 (Univ. Publ'n of Am. 1979).

201. *Id.*

202. Japanese Code of Criminal Procedure stipulates that a court may examine a witness out of the courthouse when it (a) counsels a public prosecutor and a defendant or his/her attorney, (b) considers the importance of the witness, his/her age, occupation, health condition, other matters and the gravity of a case, and (c) deems such a examination is necessary KEIJI SOSH H [KEISOH] [CODE OF CRIMINAL PROCEDURE] art. 158 (Japan), *translated in* MINISTRY OF JUSTICE JAPAN, JAPAN STUDIES: STUDIES IN JAPANESE LAW AND GOVERNMENT 123 (Univ. Publ'n of Am. 1979).

B. Active Role for Jurors

A movement has begun in the United States to reform the jury system so as to allow jurors to take a more active role during the trial.[203] The assumption that jurors who passively sit throughout a trial will retain and understand the evidence is hardly consistent with educational pedagogy. It is thought that greater juror comprehension will occur if steps are taken to involve jurors before the judge's instructions at the end of the trial, so methods have been developed to involve jurors more in the trial process.[204]

This greater involvement of jurors will likely result in a more knowledgeable jury. More knowledge in a mixed system is crucial to leveling the playing field between the judges and jurors. To this end, the Japanese legislation allows for jurors to participate in the questioning of all the witnesses including the defendant.[205] There are no provisions for note-taking in the legislation, but it is hoped that it is allowable.

The legislation also does not indicate when deliberation is to occur[206] but one can assume that it will occur at the end of trial. One suggestion is to allow jurors to also discuss the case before deliberation begins. Most jurisdictions in the United States frown on pre-deliberation discussions, as they are concerned that jurors will make up their minds before they have heard all the evidence. With a judge present, however, pre-deliberation discussions could avoid such a pre-determination, as the judge will carefully monitor the discussions. These preliminary discussions help jurors retain and process the pieces of information they are hearing and would be especially useful during a long trial.

Additionally, jurors should receive pre-trial instructions on

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203. These methods include: pre-deliberation discussions, instructions at the beginning of trial in addition to the instructions at the conclusion of a trial, and questions by jurors during the proceedings. Robert G. Boatright, *The 21st Century: Reflections from the Cantigny Conference*, 83 JUDICATURE 288, 294 (2000).

204. Boatright, *supra* note 203, at 294; Edward L. Barrett, Jr., *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV 1169, 1178-1194 (1995) (suggesting ten ways to reform the American jury); *See also Jurors: The Power of 12*, THE ARIZONA SUPREME COURT COMMITTEE ON THE MORE EFFECTIVE USE OF JURIES, 1994, *available at* http://www.supreme.state.az.us/jury/execsumm.htm [hereinafter *Jurors: The Power of 12*] (making several recommendations on how to improve jury procedures and increase the role of jury during trial). A study done by the American Judicature Society in 1998 indicated that thirty-nine percent of the American courts allowed for either note-taking, pre-deliberation discussion of the case by jurors, or questioning by jurors during the proceedings. Boatright, *supra* note 203, at 294.

205. Criminal Trials Law arts. 56-59.

206. *See* Criminal Trials Law art. 66.

relevant law as well as explanations on trial rulings. Such instructions would describe the elements of the crime charged and the procedural rules followed by the trial court. This approach would address the power imbalance between professional judges and jurors, would increase juror understanding of relevant evidence during trial, and would help jurors remember evidence during final deliberations.[207]

C. Deliberations

Since jury deliberations in the United States are conducted in great secrecy, little is known about how jurors actually deliberate. Each jury is free to structure the deliberations as it sees fit with the only general requirement being the selection of a foreperson. Jurors in the United States report that they would often go into deliberations without being given guidance as to how to deliberate.[208] Because of previously expressed concerns about the Japanese mixed-jury system, this article suggests a carefully structured deliberation process.[209]

1. Foreperson

The conduct of the judge(s) on the mixed jury during the deliberation is crucial. To start, judges must be committed to sharing their previously exclusive power to adjudicate with lay jurors. Judges should be trained to allow meaningful and autonomous participation of lay jurors. Although the legislation does not reflect these safeguards, there is at least recognition of concerns centering on the active participation of lay jurors during the deliberation process. One requirement notes that jurors must be given an opportunity to state their opinion and that the judges are required to see that the opportunity arises.[210] To this end, a layperson should

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207. COUNCIL FOR COURT EXCELLENCE, JURIES FOR THE YEAR 2000 AND BEYOND: PROPOSALS TO IMPROVE THE JURY SYSTEM IN WASHINGTON D.C. 61 (1998), *available at* http://www.courtexcellence.org/juryreform/juries2000_final_report.pdf; *See also Jurors: The Power of 12*, *supra* note 204, *available at* http://www.supreme.state.az.us/jury/execsumm.htm.

208. COUNCIL FOR COURT EXCELLENCE, *supra* note 207, at 65, *available at* http://www.courtexcellence.org/juryreform/juries2000_final_report.pdf.

209. Although a majority verdict is all that is required, the following statement in START OF THE SAIBAN-IN SYSTEM indicates that the deliberation process will be thorough: "When a unanimous verdict cannot be reached after repeated deliberations, a verdict shall be decided by majority vote. Such a majority requires the approval of at least one saiban-in and one professional judge." START OF THE SAIBAN-IN SYSTEM, *supra* note 120.

210. Criminal Trials Law art. 66.

be chosen as a foreperson (leader of the jury). The presiding judge should select this person based upon the judge's assessment of the person's leadership and character. This foreperson should be given a simple instruction manual and/or video outlining his or her responsibilities. Presumably, with the layperson as chair of jury deliberation, the role of judge would diminish. An additional safeguard would require the foreperson to meet with each juror privately and solicit her position. In this way, each juror would be forced to express herself and not be influenced by the conformity principles found in the society. Judges should also withhold their opinions until each juror has expressed an opinion. It is worthy to note that many Japanese judges, sitting in panels of three, are accustomed to having the younger judges express their opinion first so as to eliminate the hesitation that less experienced judges may have in expressing their opinion.

Before expressing their opinion, judges should act more as evidentiary advisors to the lay jurors. During deliberation, judges should help ensure that the evidence is given its appropriate weight. For example, if evidence is highly prejudicial because of its emotional appeal, the judge should suggest that it not be given undue weight. Because evidentiary rules can be complex and difficult for lay persons to understand, an advantage that a mixed-jury system has is that the elaborate evidence rules found in the United States are not necessary. The evidentiary rules exist largely because of an inherent distrust that the jurors will misuse information.[211]

To ensure meaningful citizen participation and to guard against the judge's control of the deliberation, the jury decision should include a detailed record of the process. All of the jurors should sign this record or any judgment rendered so that control does not rest exclusively with the presiding judge. The JSRC recognized the need to have a transcript of jury deliberation to ensure the trust of the public and the litigants, and to retain a record in case of appeal.[212] Stephen C. Thaman recommends the French system in which the presiding judge summarizes the argument of the defense and prosecution and then has a series of questions regarding the facts.[213] The jury's response to these questions will then be

211. *See supra* note 24 and accompanying text.

212. JUSTICE SYSTEM, *supra* note 12, at 217.

213. Stephen C. Thaman, *Japan's New System of Mixed Courts: Some Suggestions Regarding Their Future Form and Procedures,* 2001-2002 ST. LOUIS-WARSAW TRANSNAT'L L.J. 89, 108-109 (2001).

utilized in applying the law, and the answer will also be included in the record.[214] This approach is similar to the special-verdict approach utilized in the United States, in which jurors decide fact issues on a case-by-case basis without considering issues of law.[215] Their responses to these questions are recorded and the trial proceeds under the aegis of their answer. Moreover, as Professor Mark Brodin points out, the special verdict is an adequate procedural remedy to the problem of jurors' confusion with legal concepts inherent when they are called upon to determine mixed law and fact questions.[216] In addition, a jury instruction explicitly stating that the jurors are indeed independent and are free to disagree with the judge is imperative.

2. Educate the Public

Since service by the initial group of jurors will be a totally new experience, it is important that the notice to jurors empathetically considers and addresses many of the jurors' concerns. Brochures or videos should be sent describing the importance of this civic service as well as how it will operate. Careful marketing should be employed so as to alleviate anxiety as well as provide positive encouragement and incentive to participate. Mundane issues such as how to get to the court, the time of lunch break, and the appropriate dress should all be addressed.[217]

To ensure that citizens become more aware of their role as jurors, a massive public education program should be initiated. This program should include a broad assortment of approaches including: tours of the courthouse, educational television about the role of the jurors presented by judges and attorneys, an introductory video or lecture by the judge to jurors on their day of service, and publication of easy to read pamphlets and other reading material. In addition, the idea of jury service should be introduced to schoolchildren at an early age. To this end, teachers should be trained and the curriculum adjusted. Hopefully, such a successful program will help to alleviate the cultural concerns mentioned earlier.[218]

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214. *See id.* (thoughtfully presenting how best to ensure actual lay participation).

215. Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process–The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15, 22 (1990).

216. *Id.* at 21.

217. COUNCIL FOR COURT EXCELLENCE, *supra* note 207, at 5-7, *available at* http://www.courtexcellence.org/juryreform/juries2000_final_report.pdf.

218. The state of Arizona has done a great deal of thinking about effective ways to use

D. Selection Process

1. Jury Pool

People who are eligible to vote and have completed nine years of compulsory education or can demonstrate equivalent learning are eligible for jury service.[219] Similar to the American trend of one trial or one day, the legislation allows a juror to refuse service if they have previously served within five years.[220] There are numerous exemptions, including government officials and anyone associated with the court, and a catch-all discretionary exemption applying to individuals who " . . .fear that considerable damage will arise to an enterprise if the individual cannot personally undertake important work in which the business is engaged."[221]

This catch-all exemption raises some concern. Specifically, the catch-all exemption might result in more juries composed of jurors with lesser social status participating equally with the judges. The system adopted by the Diet has a provision for peremptory challenges to jurors.[222] In light of the prosecutor's considerable success in the high rate of conviction, a prosecutor might be inclined to exercise peremptory challenges on jurors who are well educated and would therefore most likely belong to a higher social status; these jurors are more likely to express themselves in the deliberation.[223] With the highly educated jurors out of the way, the result would be mixed juries composed of jurors less likely to express themselves and professional judges who can more easily control the deliberations.

With regard to the selection process of jurors, Japan should not make the same mistake historically made in the United States of readily granting many exemptions to prospective jurors. Often people with higher-ranking societal positions ask for, and receive, exemptions from jury service. A movement to eliminate exemp-

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juries. *See* Official State Website, http://www.supreme.state.az.us/jury/Jury/jury.htm. One pamphlet, START OF THE SAIBIN-IN SYSTEM, which is an example of an excellent education program, shows that the Japanese are already thinking about this issue. START OF THE SAIBAN-IN SYSTEM, *supra* note 120.

219. *See* Criminal Trials Law arts. 13, 14.

220. *Id.* art. 16(iv).

221. *Id.* art. 16(vii)(c).

222. *See id.* art. 36. Up to four peremptory challenges are allocated each to the public prosecutor and the defense attorney. *Id.*

223. *See* Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 5 NW. U. L. REV. 190, 194 (1990); *See also* Bateson v. Kentucky, 476 U.S. 79, 92 (1986); Georgia v. McCollum, 505 U.S. 42 (1992); JEB v. Alabama, 511 U.S. 127 (1994).

tions took place in the early 1980's as jury service became less burdensome. Each juror was guaranteed that service would be limited to one day or, if chosen, to one trial. The one-day/one-trial system is becoming increasingly prevalent throughout the United States.[224] Upon fulfilling the required term of service, most jurisdictions exempt jurors from further service for at least two years.[225] Jurors in mixed juries, on the other hand, serve for a period of several years.[226] Although this prolonged service aims to promote a more confident and forceful juror, the extent of the commitment might eliminate certain well-educated members of the Japanese society with important positions (e.g. doctors, teachers). A jury composed of less-experienced, more-intelligent jurors ensures greater parity with judges during deliberation than a jury composed of more-experienced, less-intelligent jurors.

When exemptions are utilized, it is not uncommon to have a jury panel made up of elderly or unemployed people. The reduction and elimination of exemptions will result in a more meaningful cross-section of jurors.[227] In this way, more people with responsible, societal positions will be part of the jury. From the data on collective decision-making previously discussed, it appears that better-educated individuals would have more confidence to express their position in deliberation with a judge, who is perceived as an individual with an elevated societal status.

2. Impartiality

The goal of any jury system is to have impartial jurors. But what is meant by "impartial" is a crucial consideration. Mark Twain, the American author, commented in 1871 as follows: "a noted desperado [criminal] killed Mr. B, a good citizen, in the most wanton and cold-blooded way . . . the papers were full of it,

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224. Joanna Sobol, *Hardship Excuses and Occupational Exemptions: The Impairment of the Fair Cross-Section of the Community*, 69 S. CAL. REV. 155, 219-220 (1995-1996). In February 2005, the American Bar Association House of Delegates adopted Principle 10(c)(1), which would eliminate exemptions and automatic excuses for jury service. *See* A.B.A., PRINCIPLES FOR JURIES AND JURY TRIALS 51 (2005), http://www.abanet.org/juryprojectstandards/principles.pdf.

225. Sobol, *supra* note 224, at 172.

226. In Germany, for example, jurors in mixed juries are selected to serve four-year terms. John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative fill the American Need?* 1981 AM. B. FOUND. RES. J. 195, 206 (1981).

227. *See* A.B.A., *supra* note 224, at 58, http://www.abanet.org/juryprojectstandards/principles.pdf.

and all men capable of reading read about it."[228] The odd lot of "fools and rascals," who neither read nor talked about the case, was sworn in as the jury. Twain commented, "The system rigidly excludes honest men and men of brains."[229]

When a case is highly publicized, jury selection works to lower the educational level of jurors. For example, people who read a daily newspaper or watch or listen to the news will be eliminated because they follow the events too closely. In order to ensure that a jury is composed of informed citizens, the impartial standard should be defined more flexibly. As opposed to focusing on knowledge about a particular case, the focus should instead be on juror open-mindedness and willingness to consider only the evidence presented at the trial. In this way, the jury will not exclude "men of brains." Impartiality is mentioned in the legislation, but it remains to be seen how it will be interpreted.[230]

VII. CONCLUSION

Despite the substantial concerns regarding the configuration of the juries in Japan, there is no doubt that group solutions are usually better than individual solutions and larger group solutions are ordinarily better than smaller group solutions.[231] Groups will tend to remember more than an individual, and individual prejudice can be neutralized in a group setting. The Supreme Court of the United States considered the issue of a five-person jury in *Ballew v Georgia*.[232] After reviewing the research data[233] the court concluded that larger groups ensured more effective group deliberation.[234] Another study found the greater the size of the jury, the more likely it would be accurate.[235] Although these studies do not

228. MARK TWAIN, ROUGHING IT 256 (Signet Classic, New American Library, 1872).

229. *Id.*

230. *See* Criminal Trials Law arts. 18, 34.

231. Lempert, *supra* note 111, at 50 (*cited in* HASTIE, PENROD & PENNINGTON, *supra* note 140).

232. Ballew v. Georgia, 435 U.S. 223 (1979).

233. *See id.*, at 232 n.10.

234. Two researchers summarized the findings of thirty-one studies in which the size of groups from two to twenty members was an important variable. They concluded that there were no conditions under which smaller groups were superior in the quality of group performance and group productivity. Edwin J. Thomas & Clinton F. Fink, *Effects of Group Size*, 60 PSYCH. BULL. 371, 373 (1963) (*cited in* Richard Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 643, 685 (1975)); *See also* SAKS, *supra* note 169, at 107.

235. Another doubt about smaller juries arises from the increasing inconsistency that

reflect the status differences among the jurors as would exist in the mixed-jury system in Japan, their conclusions on group behavior are nevertheless generally applicable to Japanese groups.

The Japanese commitment to introducing a mixed-jury system is an important first step to increasing citizen participation in the judicial process. Hopefully, as juries become more inculcated into Japanese society, there will be an expansion of jury decision-making. Over time the Japanese jury might even progress from the mixed-jury system currently espoused by the JSRC to the American model of exclusively citizen juries. The JSRC has indicated great flexibility in introducing its new jury system, and has indicated a willingness to constantly monitor and modify it to ensure that it is promoting a "popular base."[236] Without incorporating the measures recommended in this article however, Japan's mixed-jury system will face serious difficulties in achieving its goals.

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results as the size decreases. According to Michael J. Saks, "[t]he more a jury type fosters consistency, the greater will be the proportion of juries which select the correct (i.e., the same) verdict and the fewer 'errors' will be made." From his mock trials held before undergraduates and former jurors, he computed the percentage of "correct" decisions rendered by 12-person and 6-person panels. In the student experiment, 12-person groups reached correct verdicts 83% of the time; 6-person panels reached correct verdicts 69% of the time. The results for the former-juror study were 71% for the 12-person groups and 57% for the 6-person groups. SAKS, *supra* note 169, at 86-87 (working with statistics described in Harry Kalven & Hans Zeisel, THE AMERICAN JURY 460 (Univ. of Chicago Press, 1966)).

236. JUSTICE SYSTEM, *supra* note 12, at 213; *See also* Thaman, *supra* note 10, at 5 (pointing out that in Germany for less serious crimes there is a mixed panel of one judge and two citizens).