Citizen Participation in Japanese Criminal Trials: Reimagining the Right to Trial by Jury in the United States

Jon P. McClanahan

Follow this and additional works at: http://scholarship.law.unc.edu/ncilj

Recommended Citation
Available at: http://scholarship.law.unc.edu/ncilj/vol37/iss3/3

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law and Commercial Regulation by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
Citizen Participation in Japanese Criminal Trials: Reimagining the Right to Trial by Jury in the United States

Cover Page Footnote
International Law; Commercial Law; Law

This article is available in North Carolina Journal of International Law and Commercial Regulation: http://scholarship.law.unc.edu/ncilj/vol37/iss3/3
Citizen Participation in Japanese Criminal Trials: 
Reimagining the Right to Trial by Jury in the United States

Jon P. McClanahan†

I. Introduction .................................................................................. 726
II. Right to Trial by Jury in Early America ........................................ 729
   A. The Significance of Juries in Colonial America............730
   B. The Founders’ Conception of the Right to Trial by Jury.............................................................................. 734
   C. Jury Trials at the Time of the Founding and Today......738
      1. Roles of Judge and Jury in Deciding Issues of Law ........................................................................ 738
      2. Division of Labor in Rendering Verdicts and Imposing Punishment .........................................741
      3. Defendant’s Right to Waive Trial by Jury.............743
III. Citizen Participation in the Japanese Criminal Justice System ..........746
    A. Previous Attempts at Trial by Jury in Japan ..........746
    B. Laying the Groundwork for Citizen Participation ......753
IV. Adoption and Implementation of the Saiban-in Seido ..........761
    A. Justice System Reform Council Deliberations and Recommendations............................................. 762
    B. Features of the Saiban-in Seido ..................................... 766
    C. Initial Impact of the Saiban-in Seido on the Japanese Judicial System ............................................. 770
V. Evaluating the Saiban-in Seido in Light of the Founders’ Conception of the Right to Trial by Jury ......774
  A. Citizen Participation in Deciding Issues of Law.........775
     1. Advantages ........................................................................ 775
     2. Drawbacks ...................................................................... 777
     3. Recommendations ........................................................... 779
  B. Mixed Court and Joint Decision-making as to Guilt and Punishment .................................................... 781

†Clinical Assistant Professor of Law, University of North Carolina School of Law; J.D., University of North Carolina School of Law. The author wishes to thank Ruth Sheehan and Dr. Seiko Okada for their individual research contributions as well as Leah Richardson for her assistance throughout the revision process.
I. Introduction

If the United States were to reform contemporary jury trials to match the Founders’ conception of the right to trial by jury, how might they look? In recent years, we have gained insight into how to answer that question from an unlikely source: Japan.

On August 3, 2009, millions of people across Japan tuned in to witness the first criminal trial brought under the new saiban-in seido ("quasi-jury system" or "lay judge system"). After the four-day murder trial, a panel of six citizen jurors and three professional judges rendered a guilty verdict and sentenced the defendant to fifteen years imprisonment. The citizens serving on

---


of participating in such a system and criticisms of the system by legal analysts).

4 See Japan Holds First Jury Trial Since World War II, MSNBC (Aug. 6, 2009, 3:35 PM), http://www.msnbc.msn.com/id/32318045/ns/world-news-asia-pacific/ ([Jurors] said it was difficult to decide on the sentence, but they praised the professional judges, prosecutors and defense for making their arguments easy to follow and avoiding the use of legal jargon.).

5 See generally infra Part III.B.

6 See AKHIL REED AMAR, THE BILL OF RIGHTS 83 (1998) (explaining that to “keep agents of the central government under control was to use the populist and local institution of the jury”).

7 See id. at 94 (explaining the ability of citizens to “participate in the application of national law through their service on juries”).


9 See AMAR, supra note 6, at 83-100 (describing the division of responsibility between judges and juries in relation to the Founders’ conception of the right to trial by jury).

10 See generally Takuya Katsuta, Japan’s Rejection of the American Criminal Jury, 58 AM. J. COMP. L. 497 (2010) (tracing the history of the adoption of the saiban-in seido and the pervasive influence, but rejection, of the modern American jury system).
to question witnesses or determine sentencing.11

This Article examines the introduction of citizen participation into the Japanese judicial system from a different perspective. Rather than focusing on the contemporary American jury system, this Article evaluates the Japanese reforms in light of the Founders' conception of the right to trial by jury. It is this conception of the right to trial by jury, rather than its modern formulation, that positively influenced the creation and adoption of the saiban-in seido. Moreover, American legal scholars and professionals should closely evaluate the reforms in Japan to determine how aspects of the new Japanese system might be introduced in the United States to more fully effectuate the Founders' conception of the right to trial by jury.

This Article proceeds in four parts. Part II of this Article describes the Founders' conception of the right to trial by jury. The conflict between the American colonies and England in the period leading up to the Revolution shaped the institution of trial by jury.12 This Part also identifies aspects of jury trials that were tied to the Founders' conception of this right and describes their evolution. Part III explores the circumstances in Japan that led to its push for judicial reform at the end of the twentieth century. While in some ways the environments in early America and late-twentieth century Japan are quite different, there are similarities in the functioning of their respective judicial systems and the relationship between their citizenry and the judiciary.13 Because

11 See Daniel Senger, The Japanese Quasi-Jury and the American Jury: A Comparative Assessment of Juror Questioning and Sentencing Procedures and Cultural Elements in Lay Judicial Participation, 2011 U. ILL. L. REV. 741, 771-72 (2011) (proposing additional research into the effectiveness of questioning and sentencing procedures); Douglas G. Levin, Saiban-in-seido: Lost in Translation? How the Source of Power Underlying Japan's Proposed Lay Assessor System May Determine Its Fate, 10 ASIAN-PAC. L. & POL’Y J. 199, 221-22 (2008-2009) (discussing effects of allowing jurors to question witnesses). This latter article acknowledges that the design of the saiban-in seido might “allow [] jurors to come closer to deciding legal issues as well as factual issues.” Levin, supra, at 222 (emphasis in original). Nevertheless, the article incorrectly conflates the historical right of the jury to decide issues of law with the modern-day doctrine of jury nullification. See id. at 223. Nor does the article suggest that the jury’s right to decide issues of law is an essential component of the right to trial by jury. See id. at 223-25.

12 See infra Part II.

13 See infra Part III.
of these similarities, the American Founders and Japanese reformers had a shared vision of the role that citizen participation should have in the administration of justice. Part IV describes the saiban-in seido and the process of its adoption. Even though those charged with reforming the Japanese judicial system looked closely at the contemporary American jury system, they did not recommend its adoption. Instead, Japan created a unique system that combines aspects of the European “mixed court” tribunals and the American jury system. Part V examines several components of the saiban-in seido in light of the Founders’ conception of the right to trial by jury, including citizen participation in determining issues of law, the method of joint decision-making in guilt and sentencing, and the defendant’s inability to waive trials subject to the saiban-in seido. Each of these components contains aspects that are more in line with the Founders’ conception of the right to trial by jury than our own contemporary system. This Part also explores how aspects of these components could be incorporated into the American jury system, and it provides recommendations for how these components could be refined to further reflect the Founders’ conception of the right to trial by jury.

II. Right to Trial by Jury in Early America

Arguably the right to trial by jury was the most prominent political, social, and cultural construct in America’s struggle for independence and development as a fledgling nation. It is no surprise that the right to trial by jury is featured in all of the country’s defining documents: the Declaration of Independence, the United States Constitution, and the Bill of Rights. A

---

14 See infra Part III.
15 See infra Part IV.
16 See infra Part IV.
17 See infra Part V.
18 The Declaration of Independence para. 20 (U.S. 1776) (including in the charges against King George III, “[D]epriving us in many cases, of the benefits of Trial by Jury”).
19 U.S. Const. art. III, § 2 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.”).
20 U.S. Const. amend. VI. The Fifth, Sixth, and Seventh Amendments to the
comprehensive treatment of the right to trial by jury at the time of the Founding is beyond the scope of this Article. Instead, this Part traces the historical significance of the right in colonial America, and in particular its function as a check on paternalistic and, at times, oppressive English rule. Next, this Part briefly describes the nature of the right as it existed at the time of the Founding, focusing on the purposes that trial by jury was meant to fulfill. Finally, this Part discusses how the right to trial by jury was implemented at the time of the Founding. Although there were considerable differences among state and federal courts, this Part identifies three general trends and compares them to modern practice.

A. The Significance of Juries in Colonial America

Initially, the right to trial by jury in colonial America was circumscribed by its use and function in England. Although jury trials primarily served an administrative function at the time of their adoption in eleventh century England, they occupied a more central role in societal governance by the seventeenth century when American colonial governments began to be established. Nevertheless, prior to the late seventeenth century, jury trials were still primarily conceived as a tool for local self-governance. At that time, several cases served to transform the conception of jury trials from an important tool for deciding private disputes into an essential check on the judiciary and other branches of government.

---

United States Constitution concern aspects of the right to trial by jury. This Article will focus on the Sixth Amendment, which states in relevant part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”


23 See Landsman, supra note 22, at 589.

24 See id.
The first of these landmark cases was *Bushell’s Case*, decided in 1670. The underlying trial giving rise to *Bushell’s Case* concerned William Penn and William Mead. The two men were arrested and prosecuted for congregating to discuss a religion other than that of the Church of England, which was prohibited by the Conventicles Act. When the jury twice refused to render a guilty verdict, the court responded:

[Y]ou shall not be dismissed till we have a verdict that the court will accept; and you shall be locked up, without meat, drink, fire, and tobacco. You shall not think thus to abuse the court; we will have a verdict, by the help of God, or you shall starve for it.

Despite this admonition, the jury returned a not-guilty verdict. The jurors were held in contempt, fined for their conduct, and those who refused to pay were imprisoned. Edward Bushell, one of the jurors who had been imprisoned, petitioned for a writ of habeas corpus. In granting the petition, Judge Vaughan ruled that no juror could be punished merely for rendering a verdict contrary to the opinion of the court. In reaching this conclusion, Vaughan noted that “the judge and jury might honestly differ in the result from the evidence, as well as two judges may, which often happens.”

*Bushell’s Case* had a profound influence on both English and colonial American juries. First, it curtailed judicial coercion over jury decision-making, which had theretofore been commonplace in

---

26 Green, supra note 25, at 202.
27 Id. at 202-03.
28 Penn and Mead’s Case, (1670) 6 How. State Tr. 951, 962-63.
30 See Green, supra note 25, at 231-32; see also Regnier, supra note 29, at 794.
32 See id.
33 Id.
England. Second, it solidly established the jury’s power to nullify unjust laws and arguably to decide issues of law. Third, the unique subject matter of the underlying dispute highlighted the jury’s power to decide issues of great significance to other branches of government and to operate as a check on government oppression.

On the heels of Bushell’s Case, English courts attempted to quell the jury’s power by narrowly framing the issues jurors would decide, particularly in seditious libel cases. In the Seven Bishops’ Case, a jury returned an acquittal in a seditious libel case brought against Anglican bishops who signed a letter in protest of James II’s Declaration of Indulgences being read in their churches. This case further solidified the jury’s independence from the judiciary and its role in “opposition to tyranny.”

Although the right to trial by jury began to transform in England at the end of the seventeenth century, the right took on an even more significant role in colonial America in the decades leading up to its independence from England. The prominence of the colonial jury was epitomized by the 1735 trial of John Peter Zenger, who was charged with seditious libel for publishing a newspaper that criticized the Crown-appointed governor of New

34 See Smith, supra note 21, at 408 (explaining that Bushell’s Case “cemented [the English jury’s] position as a guarantor of liberty in the face of state oppression”).

35 See Andrew J. Parmenter, Nullifying the Jury: “The Judicial Oligarchy” Declares War on Jury Nullification, 46 WASHBURN L.J. 379, 381-82 (2007) (noting the importance of Bushell’s Case in establishing jury nullification); see also Simon Stern, Note, Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After Bushell’s Case, 111 YALE L.J. 1815, 1815-16 (2002) (explaining how Bushell’s Case was later interpreted as supporting a jury’s right to decide issues of law).


37 Landsman, supra note 22, at 590.

38 The Trial of the Seven Bishops, (1688) 12 How. State Tr. 183.

39 See GREEN, supra note 25, at 320; see also Landsman, supra note 22, at 590-91.

40 GREEN, supra note 25, at 320-21 (discussing the importance of the Seven Bishops’ Case in establishing jury nullification in England).

41 See VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 32 (1986).
York. At the time of the trial, the law of seditious libel did not require that the publication be false; rather, the law required the jury to determine only whether the defendant made the publication. Andrew Hamilton, arguing on behalf of Zenger, admitted that his client published the material in question; however, he successfully convinced the court to allow jurors to render a general verdict. In his summation, Hamilton argued that the jury should acquit Zenger because the publication was not false, thus appealing to the jury’s sense of duty:

[Y]our upright conduct, this day, will not only entitle you to the love and esteem of your fellow citizens; but every man who prefers freedom to a life of slavery will bless and honor you as men who have baffled the attempt of tyranny; and by an impartial and uncorrupt verdict, have laid a noble foundation for securing to ourselves, our posterity, and our neighbors that to which nature and the laws of our country have given us a right,—the liberty—of both exposing and opposing arbitrary power... by speaking and writing truth.

The jury acquitted Zenger, and accounts of the trial were published and distributed throughout the colonies.

The Zenger trial thus ushered in a new era in which England struggled to retain control over increasingly hostile colonial juries. Parliament used methods of control such as having the sheriff select jurors who were biased in favor of the Crown and limiting a defendant’s ability to strike jurors on account of their political


46 JOHN GUINTHER, THE JURY IN AMERICA 30 (1988); see, e.g., Linder, supra note 42.
Massachusetts attempted to circumvent this practice by enacting the Massachusetts Jury Selection Law, which mandated that jury lists be compiled and vetted through town meetings. Parliament responded by cancelling the law, once again vesting sheriffs with plenary authority to select jurors.

Another method of control was limiting the power of colonial juries to hear particular types of cases. After Parliament enacted the Stamp Act of 1764, a statute that imposed a controversial tax on paper, the English government transferred prosecutions under the statute to the Admiralty courts, which did not allow jury trials. In 1774, Parliament went even further by enacting the Administration of Justice Act, which permitted English officials charged with crimes in the colonies to face trial in England. Colonists indicted for treason could also face trial in England instead of having the potential benefit of drawing a sympathetic colonial jury.

England’s attempts to reign in the jury’s power only exacerbated the mounting dissidence among the colonists and galvanized the struggle for political independence. Among the grievances listed in the Declaration of Independence were “depriving [the colonists] in many cases, of the benefits of Trial by Jury” and “transporting [colonists] beyond Seas to be tried for pretended offences.”

B. The Founders’ Conception of the Right to Trial by Jury

The implementation of the right to trial by jury has varied considerably in the United States throughout its history, which might lead one to wonder if there are any guiding principles to

---

47 HANS & VIDMAR, supra note 41, at 35.
48 Id.
49 Id. at 36.
50 GUINHER, supra note 46, at 30.
51 Id.
53 Id.
54 Id. at 395.
55 THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).
56 Id. para. 21.
determine whether a particular feature is “essential” to the right. Given that the U.S. Constitution recognized and firmly established the right to trial by jury at the time of the Founding, guiding principles may be gleaned from the Founders’ conception of the right—that is, from the roles that the Founders intended for the right to fulfill in the country’s democratic form of government.\textsuperscript{57} The Founders envisioned the jury as an institution that fulfilled three related roles: operating as a check against judicial and governmental overreaching, allowing for meaningful citizen participation in the democratic process, and acting as an essential figure in the administration of justice.\textsuperscript{58}

As discussed in the preceding section, the tensions between the colonists and the Crown were fueled in large part by the Crown’s use of the judicial system as a mechanism to establish its authority over the colonists. It is no wonder then that the Founders considered the jury to be the “bulwark against the unjust use of governmental power.”\textsuperscript{59} Although there was some debate between the Federalists and Anti-Federalists regarding the extent to which civil juries fulfilled this role, there was consensus that criminal juries were necessary for this purpose.\textsuperscript{60} In justifying the need for jury trials in criminal cases, Alexander Hamilton highlighted the dangers of “[a]rbitrary impeachments, arbitrary methods of prosecuting pretended offenses, [and] arbitrary punishments upon arbitrary convictions” that operated as “the great engines of judicial despotism.”\textsuperscript{61} The Anti-Federalists sought even greater protection for the right to trial by jury than the Federalists, arguing that protection of the right should extend to civil cases as well.\textsuperscript{62} According to Federal Farmer IV, jurors act as the “centinels and guardians” of free society.\textsuperscript{63} Thomas Jefferson echoed this

\begin{footnotesize}
\begin{enumerate}
\item See McClanahan, \textit{supra} note 8, at 795.
\item \textit{Id.} at 803.
\item Note, \textit{The Changing Role of the Jury in the Nineteenth Century}, 74 \textit{Yale L.J.} 170, 172 (1964) [hereinafter \textit{Jury's Changing Role}].
\item \textit{The Federalist} No. 83 (Alexander Hamilton).
\item \textit{Id.}.
\item \textit{Letters from the Federal Farmer to the Republican} IV (Oct. 12, 1778); see
\end{enumerate}
\end{footnotesize}
sentiment when he wrote: “I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.”

In addition to the conception of the jury as a protector of the people, the Founders envisioned the jury as an institution through which citizens could participate in government. The Founders believed that there were two primary benefits to allowing citizen participation through jury service. First, the jury was seen as an educational tool, teaching citizens about the government and their rights and responsibilities. Alexis de Tocqueville, a French citizen who traveled to America and studied the jury system, wrote the most well-known descriptions of this benefit. Tocqueville referred to the jury as “a gratuitous public school” that “invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society; and the part which they take in the Government.”

Second, the Founders conceived of the jury as one part of the judicial branch, a type of “lower judicial bench” in a bicameral judiciary. Viewed in this way, the judicial branch was similar in structure to the legislative branch, which has “an upper house of greater stability and experience and a lower house to represent popular sentiment more directly.” John Adams recognized this

also AMAR, supra note 6, at 84 (discussing the importance of the right to trial by jury to the Anti-Federalists).

64 3 THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 71 (H. A. Washington ed. 1854); see also Thomas J. Methvin, Alabama—The Arbitration State, 62 THE ALABAMA LAWYER 48, 49 (2001) (“In 1774, John Adams stated: ‘Representative government and trial by jury are the heart and lungs of liberty. Without them, we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds.’”).

65 AMAR, supra note 6, at 94-95.

66 Id. at 93.


68 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 337 (Henry Reeve trans., Schoken Books 1961) (1835); see AMAR, supra note 6, at 93.


70 AMAR, supra note 6, at 95.
similarity, writing that “the common people, should have as complete a control, as decisive a negative, in every judgment of a court of judicature” as they have in the legislature. Andrew Hamilton likewise adopted this view during the Zenger trial; in his summation to the jury, he described the disagreement between judges regarding the law of seditious libel and asserted that the jury had the power (and should be charged) to resolve the issue. These two benefits of jury service—the judiciary educating the citizenry and the citizens in turn affecting judicial decision-making—also demonstrate the symbiotic relationship that the Founders envisioned between judges and jurors, with each informing the other.

The right to trial by jury thus served to maintain the balance between the government and its citizens, making it central to the administration of justice. The importance of the right to trial by jury to the Founders is evidenced not only by its inclusion in the Constitution and the Bill of Rights, but also by the contentious exchanges between the Federalists and Anti-Federalists regarding the inclusion of the right in those governing documents. Much of the debate did not concern whether the right was significant enough to be included, but rather how it could be included given the lack of uniformity among the states in the way in which the

---

71 2 JOHN ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS 253 (1850). John Adams was one of the most vigorous proponents of the jury’s right to decide cases contrary to the court. See, e.g., id, at 254-55 (“[S]hould the melancholy case arise that the judges should give their opinions to the jury against one of these fundamental constitutional principles, is a juror obliged to give his verdict generally, according to this direction, or even to find the fact specially, and submit the law to the court? Every man, of any feeling or conscience, will answer, no. It is not only his right, but his duty, in that case, to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court.”).

72 See Linder, supra note 42.

73 McClanahan, supra note 8, at 808; see AMAR, supra note 6, at 96-97 (positing that the centrality of jury trials is evidenced by its inclusion in the Fifth, Sixth, and Seventh Amendments, as well as by the limitations on the judiciary that are found in the First, Fourth, and Eighth Amendments).

74 See, e.g., THE FEDERALIST NO. 83, supra note 60; LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN IV, supra note 63; see also Kenneth S. Klein, The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial, 53 OHIO ST. L.J. 1005, 1009 (1992) (noting that the Anti-Federalists threatened to block ratification of the Constitution because of its failure to include the right to trial by jury in civil cases).
right was implemented in civil cases. Nevertheless, Alexander Hamilton noted of the Federalists and Anti-Federalists: "[I]f they agree in nothing else, [they]concur at least in the value they set upon the trial by jury." The jury's impact also extended beyond the judicial branch, "for however great its influence may be upon the decisions of the courts, it is still greater on the destinies of society at large." Therefore, the jury was viewed as an institution having an immediate practical effect on the parties before it, as well as a more far-reaching effect on the judicial system and even the success of the nation as a democracy.

C. Jury Trials at the Time of the Founding and Today

Contrary to the Founders' conception of the right to trial by jury, which had many universally shared aspects, the implementation of the right varied among colonies and newly-created states. This Part discusses several features of jury trials at the time of the Founding and attempts to identify commonalities; these historical trends will then be compared to trends in the modern American jury system. The following features will be explored: (1) the roles of the judge and jury in deciding issues of law; (2) the division of labor between the judge and jury in rendering verdicts and imposing punishments; and (3) a defendant's right to waive trial by jury in criminal cases.

1. Roles of Judge and Jury in Deciding Issues of Law

Judges in colonial America typically exercised less control over trials than their contemporary counterparts, particularly as it pertained to resolving issues of law for the jury. In Rhode Island, for instance, judges assumed an administrative role, holding office "not for the purpose of deciding causes, for the jury decided all questions of law and fact; but merely to preserve order, and see that the parties had a fair chance with the jury."

75 Klein, supra note 74, at 1012-21.
76 THE FEDERALIST No. 83, supra note 60.
77 DE TOCQUEVILLE, DEMOCRACY IN AMERICA, supra note 68, at 282.
78 See Mark DeWolfe Howe, Juries as Judges of Criminal Law, 52 HARV. L. REV. 582, 590-91 (1939) (explaining that judges in colonial America were typically laymen).
79 Id. at 591; see also Amasa M. Eaton, The Development of the Judicial System in Rhode Island, 14 YALE L.J. 148, 153-54 (1905) (discussing the limited role of judges in colonial Rhode Island).
Moreover, judges in several colonies, including Rhode Island and Massachusetts, did not routinely give jury instructions.80 Although judges in Connecticut gave jury "instructions," these instructions were generally limited to identifying the issues to be decided by the jury.81

In colonial Massachusetts, judges assumed an advisory role in relation to juries' decisions on issues of law.82 Cases were tried before at least three judges, each of whom informed the jury of the judge's own interpretation of the law.83 Even if all judges agreed on a single interpretation, however, attorneys could still argue their own interpretation of the law to the jury.84 Thus, the jury could disregard the judges' interpretations of the law and apply its own interpretation—giving the jury the ultimate power over all issues of law or fact before it.85

The jury's role in determining issues of law continued throughout the transition from colony to fledgling nation.86 During the first seventy-five years of the nation's existence, at least nine states granted juries the right to decide issues of law through a constitutional or statutory provision, and the courts in another six states recognized the existence of the right.87 The Supreme Court of the United States itself recognized the jury's right to decide issues of law when sitting as a trial court in the 1791 decision of Georgia v. Brailsford.88 Chief Justice John Jay,

80 Smith, supra note 21, at 441-42.
81 Id. at 441.
83 Id.
84 Id.
85 See Landsman, supra note 22, at 592-93; see also NELSON, supra note 82, at 28-30 (discussing the nature of the law-finding power of colonial Massachusetts juries).
87 Alschuler & Deiss, supra note 86, at 910; see also Richard E. Myers, II, Requiring a Jury Vote of Censure to Convict, 88 N.C. L. REV. 137, 158-59 (2009) (stating that the "jury's right to decide questions of law in criminal cases was widely accepted around the country from the time of the passage of the Constitution until the middle of the 1800s").
88 Georgia v. Brailsford, 3 U.S. (3 Dall.) 1 (1794); see Jury's Changing Role, supra note 59, at 173-74 (discussing the significance of the Brailsford decision).
in his instructions to the jury, stated:

On this, and on every other occasion, however, we have no
doubt, you will pay that respect, which is due to the opinion of
the court: For, as on the one hand, it is presumed, that juries are
the best judges of fact; it is, on the other hand, presumable, that
the courts are the best judges of law. But still both objects are
lawfully, within your power of decision.\(^8\)

Although the jury's right to decide issues of law was firmly
established at the time of the Founding, the right began to erode in
the mid-nineteenth century.\(^9\) Even the Supreme Court reversed
course in Sparf v. United States,\(^9\) an 1895 decision. Justice
Harlan, in his majority opinion, espoused a circumscribed view of
the right, as well as the role of the jury more generally:

\[\text{It is the duty of juries in criminal cases to take the law from}
\text{the court and apply that law to the facts as they find them to be from}
\text{the evidence . . . . Under any other system, the courts, although}
\text{established in order to declare the law, would for every practical}
\text{purpose be eliminated from our system of government as}
\text{instrumentalities devised for the protection equally of society}
\text{and of individuals in their essential rights. When that occurs our}
\text{government will cease to be a government of laws, and become}
\text{a government of men.}^{92}\]

Sparf drew a sharp distinction between the judge as law-
decider and the jury as fact-finder, and those distinctions became
even more pronounced during the next century.\(^9\) Only the

\(^{89}\) Brailsford, 3 U.S. (3 Dall.) at 4.
\(^{90}\) McClanahan, supra note 8, at 819-24 (documenting the erosion of the right
during the mid- to late-nineteenth century); Alschuler & Deiss, supra note 86, at 909-11
(explaining the historical changes that indicated the right was diminishing).

\(^{91}\) 156 U.S. 51 (1895); see Myers, supra note 87, at 157-58 (explaining the
dramatic shift in the Supreme Court's understanding of the right to trial by jury from the
Brailsford decision to the Sparf decision).

\(^{92}\) Sparf, 156 U.S. at 102-03.

\(^{93}\) Smith, supra note 21, at 452-53. See generally Jeffrey Abramson, We, the
changes in jury functions following Sparf).
constitutions of three states still retain constitutional provisions that ostensibly grant jurors the right to decide issues of law. The courts in each of those states have interpreted the constitutional provisions to render the right meaningless.

2. Division of Labor in Rendering Verdicts and Imposing Punishment

Perhaps because of the historical context in which jury trials rose to prominence in colonial America, criminal juries uniformly have been given the authority to render general verdicts, with relatively little influence or interference from judges except by way of jury instructions. Furthermore, if a criminal jury returns an acquittal, it may not be invalidated by the judge or appealed by the prosecution.

Although considerably less is known about the colonial jury's role in determining sentencing, the colonial jury certainly had a greater role in the process than its modern counterpart. This sentencing role initially stemmed from the jury's right to decide issues of law and to render general verdicts. Unlike modern criminal codes, the criminal codes in the colonial and early American periods "made death the exclusive and mandatory sentence for... all persons convicted of any of a considerable number of crimes, typically including at a minimum, murder, treason, piracy, arson, rape, robbery, burglary, and sodomy." Jurors responded to the harshness of these provisions by refusing

---

94 Alschuler & Deiss, supra note 86, at 911. The three states retaining such provisions are Georgia, Indiana, and Maryland. Id.
95 Id.
97 Id.
98 See Smith, supra note 21, at 454 (explaining the differences between the role of a jury in colonial courts and modern courts).
99 See Chris Kemmitt, -Function Over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body, 40 U. Mich. J.L. Reform 93, 103 (2006) (arguing that the historical function of the jury was to provide guidance for sentencing).
to convict defendants, even when they had actually committed the conduct in question.\textsuperscript{101} States responded by limiting the types of capital offenses,\textsuperscript{102} dividing murder into degrees,\textsuperscript{103} and giving juries discretion in determining whether a convicted defendant should receive the death penalty.\textsuperscript{104} Thus, through its power to render general verdicts, the jury functioned as a type of sentencing body at the time of the Founding.\textsuperscript{105}

Upon entering the Union, most states expanded the jury's rudimentary sentencing power by including specific jury sentencing provisions in their original criminal codes.\textsuperscript{106} In the nineteenth century, approximately half of the states allocated to juries the responsibility of determining sentences in non-capital cases, and several other states allowed juries to recommend sentences in non-capital cases.\textsuperscript{107} Taken together, these statistics indicate that few states exclusively relied upon judges to determine sentences in non-capital cases.\textsuperscript{108}

Over the course of the twentieth century, nearly every state took away this responsibility from jurors and vested it in judges.\textsuperscript{109} Only five states (Arkansas,\textsuperscript{110} Missouri,\textsuperscript{111} Oklahoma,\textsuperscript{112} Texas,\textsuperscript{113} and Virginia\textsuperscript{114}) still allow juries to render binding sentences in

\footnotesize{\begin{itemize}
\item \textsuperscript{101} \textsc{Hugo Adam Bedau}, \textit{The Death Penalty in America} \textsuperscript{9-10} (3d ed. 1982).
\item \textsuperscript{102} \textit{Woodson}, 428 U.S. at 289.
\item \textsuperscript{103} Bedau, \textit{supra} note 101, at 10-11.
\item \textsuperscript{104} \textit{Id}.
\item \textsuperscript{105} See Kemmit, \textit{supra} note 99, at 102-11 (describing the jury's role as one of sentencing mitigation).
\item \textsuperscript{106} See Adriaan Lanni, \textit{Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?, 108 Yale L.J. 1775, 1791} (1999) (noting that there is a popular misconception that American judges have always had the sole authority to determine sentences in non-capital cases).
\item \textsuperscript{107} Morris B. Hoffman, \textit{The Case for Jury Sentencing}, 52 Duke L.J. \textsuperscript{951, 964} (2003).
\item \textsuperscript{108} \textit{Id}.
\item \textsuperscript{109} See Lanni, \textit{supra} note 106, at 1777 (noting the dramatic decrease in jury sentencing from the 1970s onward).
\item \textsuperscript{110} \textsc{Ark. Code Ann.} \textsection 5-4-103 (2011).
\item \textsuperscript{111} \textsc{Mo. Rev. Stat.} \textsection 557.036 (2011).
\item \textsuperscript{112} \textsc{Okla. Stat. tit. 22, §§ 926.1, 927.1} (2011).
\item \textsuperscript{113} \textsc{Tex. Code Crim. Proc. Ann. art. 37.07(2)(b)} (West 2011).
\item \textsuperscript{114} \textsc{Va. Code Ann.} \textsection 19.2-295 (2011).
\end{itemize}}
non-capital felony cases, and several of those states include further limitations on the jury’s right to determine sentences. For example, in Missouri, a defendant may request, before voir dire, that the judge determine the sentence if the defendant is convicted. In Kentucky, juries may make sentencing recommendations in non-capital felony cases, but their decisions are not binding upon judges. In the federal court system, all non-capital sentences are determined by judges.

3. Defendant’s Right to Waive Trial by Jury

During the eighteenth century, English courts did not give criminal defendants a meaningful option to waive jury trials. Prior to 1772, defendants who refused to consent to a jury trial were tortured until they changed their minds; afterwards, defendants who refused to consent to a jury trial were instead deemed to have pled guilty to the charges against them. Colonial practice was somewhat more varied, with at least some colonies permitting waivers of jury trials, but such waivers were

---

115 Hoffman, supra note 107, at 953 n.1.

116 See, e.g., ARK. CODE ANN. § 5-4-103(b) (2011) (providing that the court determines sentences where “(1) The defendant pleads guilty to an offense; (2) The defendant’s guilt is tried by the court; (3) The jury fails to agree on punishment; (4) The prosecution and the defense agree that the court may fix punishment; or (5) A jury sentence is found by the trial court or an appellate court to be in excess of the punishment authorized by law”).


119 FED. R. CRIM. P. 32. The jury has a limited role in sentencing in that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Apprendi v. United States, 530 U.S. 466, 466 (2000). A discussion of the impact of Apprendi is beyond the scope of this Article. For more information on this issue, see generally Erwin Chemerinsky, Making Sense of Apprendi and Its Progeny, 37 MCGEORGE L. REV. 531 (2006).


121 See Patton v. United States, 281 U.S. 276, 306 (1930) (using the fact that jury waivers were not “unknown” in the colonial period as evidence that jury trials could be waived by the defendant).
considered to be "isolated instances." Alexander Hamilton's Federalist No. 83 further supports the proposition that jury trials could not be waived by criminal defendants, in that it argues against extending such a mandate to all civil trials.

If anything, state courts were less apt than colonial courts to allow criminal defendants to waive jury trials. This practice continued through the Supreme Court's 1898 decision in Thompson v. Utah, in which it seemingly held that criminal defendants could not waive jury trials. According to the opinion, a criminal defendant could not "assent to be deprived of his liberty by a tribunal not authorized by law to determine his guilt." In reaching this conclusion, the Court noted that "[t]he public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law." In the following decade, two circuit courts likewise held that criminal defendants could not waive jury trials in federal trial courts.

Notwithstanding the decades of state and federal court procedure to the contrary, the Supreme Court reversed course in Patton v. United States, in which it held that jury trials may be

123 Singer, 380 U.S. at 26; see Appleman, supra note 120, at 441 (noting that bench trials were uncommon occurrences in early America).
124 The Federalist No. 83, supra note 60.
125 Such states included Arkansas, Maine, Michigan, Nebraska, Rhode Island, Vermont, Massachusetts, North Carolina, and Ohio. See Singer, 380 U.S. at 32 n.6 (compiling state court decisions in which defendants were prohibited from waiving jury trials).
126 170 U.S. 343 (1898).
128 Id.
129 Thompson, 170 U.S. at 354-55.
130 Low v. United States, 169 Fed. 86, 92 (6th Cir. 1909) ("Undoubtedly the accused has a right to waive everything which pertains to form and much which is of the structure of a trial. But he may not waive that which concerns both himself and the public, nor any matter which involves fundamentally the jurisdiction of the court."); Dickinson v. United States, 159 Fed. 801, 812 (1st Cir. 1908) ("[I]n accordance with the rules of the common law, some things may be waived, as, for example, the qualification of a particular juror or the right to a speedy trial, while it does not follow that, by analogy, a waiver may extend to any part of the provisions of article 3 of the original Constitution applicable hereto.").
131 281 U.S. 276 (1930).
waived by criminal defendants. In reaching this conclusion, the Court stated that trial by jury at the time of the Founding "uniformly was regarded as a valuable privilege bestowed upon the person accused of [a] crime for the purpose of safeguarding him against the oppressive power of the King and the arbitrary or partial judgment of the court." On the other hand, the Court found no evidence "that trial by jury was regarded as part of the structure of government." Later cases clarified that a defendant does not have an absolute right to waive a jury trial, and a waiver may be contingent upon prosecution consent or court approval. Nevertheless, nearly every jurisdiction currently allows criminal defendants to waive jury trials.

Examining these features of jury trials at the time of the Founding, a different picture of the jury begins to emerge. The jury was an active participant in the administration of justice, charged both with deciding issues of law and in imposing sentences. Through these roles, juries worked alongside judges; although both had their areas of expertise, juries could provide input in other areas as well. Furthermore, the "right" to trial by jury was not originally seen as one held within the discretion of the accused, but rather as an integral part of the judicial system, reflecting the role of citizens in that system.

132 Id. at 312-13; see also Amar, supra note 6, at 108 (describing the Supreme Court's reversal in Patton from its earlier precedent).
133 Id. 281 U.S. at 296-97.
134 Id. Akhil Amar strongly criticizes the Patton Court's characterization of the right to trial by jury as solely for the benefit of the accused and argues that the court misconstrued the language of Article III, Section 2 and the Sixth Amendment. See Amar, supra note 6, at 104-06; see also Jackie Gardina, Compromising Liberty: A Structural Critique of the Sentencing Guidelines, 38 U. Mich. J.L. Reform 345, 374-82 (2005) (criticizing the reasoning of the Patton Court).
135 See Singer v. United States, 380 U.S. 24, 27 (1965); see also Fed. R. Crim. P. 23(a) (providing such a restriction).
III. Citizen Participation in the Japanese Criminal Justice System

On May 21, 2004, the Japanese Diet enacted Saibin-in no Sanka Suru Keiji Saiban ni Kansuru Horitsu ("Saiban-in Act"),\(^{137}\) which created the saiban-in seido to decide particular categories of criminal cases. The Saiban-in Act was the result of five years of official debate and decades of informal exchanges between legal scholars and professionals about the role of citizen participation in the Japanese judicial system.\(^{138}\) This Part discusses Japan’s previous attempts at trial by jury and the circumstances of the late twentieth century that prompted judicial reform. This Part also examines the goals that Japanese reformists sought to achieve by reintroducing citizen participation in the judicial system and compares those goals to the Founders’ conception of the right to trial by jury.

A. Previous Attempts at Trial by Jury in Japan

The Japanese government attempted to introduce jury trials twice prior to the enactment of the Saiban-in Act.\(^{139}\) The first endeavor came in the 1870s during the Meiji Period, with the introduction of the sanza system.\(^{140}\) Unlike other jury systems, the

---


\(^{139}\) There was a third attempt at trial by jury in Japan, but it came about as a result of the Allied Occupation of mainland Japan and Okinawa following World War II. See Anna Dobrovolskaia, Japan’s Past Experiences With the Institution of Jury Service, 12 ASIAN-PAC. L. & POL’Y J. 1, 17-21 (2010) [hereinafter Dobrovolskaia, Japan’s Past Experiences].

\(^{140}\) Id. at 6-7 (citing TAKEKI OSATAKE, KEIJI BUNKA SHI TOSHITE NO NIHON BAISHIN
sanza system was a special jury created in response to a single high-profile incident, a dispute involving both the Counselor and Governor of the Kyoto Prefecture. The sanza panel was reprised two years later, following the assassination of the Counselor of State. Notably, the sanza rules were developed independently for each trial, and there were significant differences regarding the role of the jury in both trials. In the first trial, the sanza panel was empowered to determine the verdict only; in the second trial, the jurors were charged “not only with the task of determining whether the accused was guilty or not, but also with the responsibility of evaluating the quality of pre-trial investigations and even commenting on the appropriateness of the court’s actions.”

Because the sanza system was a special jury system, rather than a systematic attempt to introduce citizen participation into the judicial branch, it is difficult to ascertain the precise reasons why it was not used after 1875. However, two insights can be gleaned from Japan’s first experiment with jury trials. First, the Japanese government apparently recognized the value of citizen participation in cases in which the government could be perceived as having a strong bias towards one of the litigants. Second, although the role of the initial sanza panel was similar to its contemporary western counterparts in that it was limited to a fact-finding function, the second sanza panel was envisioned as a more central figure in the trial—going beyond the fact-finding function

---

141 Doe. at 6.
142 Id. at 7-8.
143 Id. at 8.
144 Dobrovolskaia, Japan’s Past Experiences, supra note 139, at 8.
145 Id.
146 In the years following the sanza trials, Emile Gustave Boissanade de Fontarabie, a French scholar involved with judicial reform in Japan, recommended that the country formally adopt a jury system. Although there was some support among Japanese legislators, it did not become part of the Meiji Constitution. MERYLL DEAN, JAPANESE LEGAL SYSTEM 96-99 (2d ed. 2002); see also Dobrovolskaia, Japan’s Past Experiences, supra note 139, at 9-11 (discussing Boissonade’s proposal).
typically associated with American juries by the late 1800s.  

Japan's next attempt at trial by jury came almost fifty years later, with the 1923 enactment of the *Baishin Ho* ("Jury Act"). Unlike the earlier special juries, the introduction of the "pre-war" jury system appears to be linked to the strong democratic movement in Japan at the time. Although there was little written prior to the enactment of the Jury Act about the driving forces behind the introduction of trial by jury, the purposes of the Act may be surmised from the *Baishin Tebiki* ("The Jury Guidebook"), which was published in 1931. The *Jury Guidebook* was one of several efforts geared towards educating the Japanese citizenry about the workings of jury trials and improving public reception of the pre-war jury system. The *Jury Guidebook* sets out the purpose of the Jury Act in the following manner:

> Until recently, the judiciary was the only branch of power that did not allow for public participation, and justice was carried about exclusively by professional judges. . . . More than forty years have passed since the promulgation of the Constitution, and the Japanese people have accumulated sufficient experiences and have been prepared for participating in the national administration. In addition, the realities of the world have become more complex, and allowing for public participation in certain trial proceedings is likely to result in an even higher level of trust in the judicial system on the part of ordinary citizens. It is also a good opportunity for people to develop their knowledge and understanding of law, which, in turn, should enable the operations of the court system to be carried out smoothly.

---

147 See supra Part II.C.1.

148 Baishin Ho [The Jury Act], Law No. 50 of 1923 (Japan); see DEAN, supra note 146, at 100 (describing the introduction of The Jury Act).

149 See Kiss, supra note 138, at 267-68 (noting how the political climate affected the Japanese jury system).


151 Id. at 240.

152 DAI NIPPON BAISHIN KYOKAI HENSHUBU [THE EDITORIAL DEPARTMENT OF THE
Even taking into account the nature of this document, it is clear that the Japanese government was hoping to achieve many of the same benefits as those espoused by the American Founders. Indeed, the pre-war jury system was modeled in large part after the Anglo-Saxon jury system, as Japanese prosecutors traveled to the United States and Europe to observe the workings of those jury systems. Not surprisingly, the pre-war jury system “was at first welcomed as the palladium of liberty.”

Although the pre-war jury system shared some similarities with the American jury system of the early twentieth century, including having the primary responsibility of fact-finder in criminal trials, the two systems differed in several respects. The pre-war jury was not permitted to render a general verdict, but rather had to answer specific questions posed by the trial judge regarding the facts comprising a crime. Furthermore, only a majority of the twelve jurors needed to agree on an answer to a fact-related question for the outcome to be binding on the

---

153 DEAN, supra note 146, at 100. There is some debate regarding whether the pre-war jury system was modeled primarily after the contemporary Anglo-Saxon jury system or the contemporary German jury system. Compare id., with A.C. Oppler, Legal Reform in Occupied Japan—A Participant Looks Back, reprinted in MERYLL DEAN, JAPANESE LEGAL SYSTEM: TEXT AND MATERIALS 144-45 (1997) ("A petty jury system, patterned... on the German model, existed in Japan from 1923-1943... Actually, the Japanese jury system was even a watered-down edition of the German."). Nevertheless, the greater weight of authority concludes that the Japanese jury system was modeled after the Anglo-Saxon system. E.g., Lempert, supra note 138, at 37.

154 Dobrovolskaia, The Jury System, supra note 150, at 253; see also Kiss, supra note 138, at 266 (noting that the Japanese examined the trial systems of the United States, England, France, and Germany).

155 DEAN, supra note 146, at 100.

156 See Levin, supra note 11, at 203.

The types of cases subject to jury trials were limited to particular categories of serious crimes, and jury service was limited to literate males who had attained thirty years of age and had satisfied residence and tax-paying requirements.

The most dramatic differences between the two systems, however, pertained to the effect of decisions made by the pre-war jury. In one respect, a decision of the pre-war jury as to the existence of a fact was conclusive; if the decision was accepted by the trial court, no *kosō* appeal (appeal on issues of fact) was permitted. Nevertheless, a court was not obligated to accept a decision by the pre-war jury; rather, "upon finding the jury's answer unwarranted," it could dismiss the jury and submit the case to another jury. Apparently there was no limit to the number of times a court could refuse to accept the decisions of jury panels.

Even though the Jury Act was enacted in 1923, the first jury trials did not commence until 1928. The initial response, as measured by the number of jury trials, was promising: 143 jury trials were held in 1929. The next year, the number of jury trials declined to sixty-six, and by 1942, that number plummeted to two. The Jury Act was suspended in 1943, and it was never

---

158 *Id.*

159 *See id.* In cases carrying possible sentences of death or life imprisonment, trial by jury would be granted unless waived by the defendant. *Id.* In cases in which the minimum sentence was at least one year imprisonment and the maximum sentence was in excess of three years, a defendant could petition to have his case tried by a jury. *Id.* Notably, several categories of crimes were expressly prohibited from being heard by juries, including: "crimes against a member of the Imperial Family, riot with the purpose of overthrowing the government, violation of the *Chian Iji Ho* ("Peace Preservation Act"), espionage, and violation of laws concerning the election of public officials." *Id.*


161 *DEAN,* supra note 146, at 100.


163 *See DEAN,* supra note 146, at 100.


166 *Id.*

167 Baishin Ho no Teishi Ni Kansuru Horitsu [An Act to Suspend the Jury Act], Law No. 88 of 1943 (Japan).
The demise of the pre-war jury system has been the subject of much scholarly discussion. A complete treatment of the possible contributing factors is beyond the scope of this Article, but several of the most prominent ones are identified and explored below.

First, the pre-war jury system was not structured to optimally achieve its foremost goal of increasing citizen participation in the democratic process. The Jury Act provided for jury trials only in a small number of serious criminal cases, thereby decreasing the opportunities for citizens to serve on juries. The qualifications for jury service—reminiscent of those in early America—further reduced the likelihood that citizens would be exposed to jury service. The publication of *The Jury Guidebook*, three years after the first jury trial, illustrates the limited awareness of the pre-war jury system at the time.

Second, the Japanese political and social climate shifted dramatically from the enactment of the Jury Act in 1923 until its suspension in 1943. Whereas the jury system was conceived during a time of political liberalism and democratization, that environment shifted in the 1930s to one of militarism and autocracy. Thus, even without the structural barriers to widespread citizen participation, it is arguable that the participants...
in the system, including the litigants, would be less apt to use such a democratic system.

Third, in instituting the pre-war jury system, the Japanese government focused primarily on creating an avenue for citizen participation—rather than on creating a system whereby the jury would function as a key figure in the administration of justice or operate as a check on governmental overreaching. The Ministry of Justice and local bar associations engaged in widespread promotional efforts in the five-year period between the enactment of the Jury Act and the first jury trial, trying to prepare Japanese citizens for the prospect of participation in the judicial branch. Nevertheless, the limited fact-finding role of pre-war juries and the non-binding nature of their decisions rendered their participation little more than a rubber stamp on the judiciary. Indeed, the court’s ability to disregard the decision of a jury panel or, alternatively, to accept the decision and thereby foreclose the defendant’s opportunity for a kosō appeal, is one of the most commonly cited reasons for the small percentage of cases tried under the pre-war jury system.

Not only was the jury’s role in criminal cases clearly subservient to that of the judge, but jury participation was also disallowed in the very types of cases in which arguably it would be most important. Among the types of cases that could not be

---

176 See Dobrovolskaia, The Jury System, supra note 150, at 233-37. An editorial published at the time of the enactment of the Jury Act stated that it “signaled the ‘fulfillment of the hopes of the people’ and that it represented ‘the most important reform in the history of [efforts aimed at] protecting human rights’ in Japan.” Id. at 235 (quoting Baishin Hoan No Tsuka O Shukusu [Celebrating the Passage of the Jury Act Bill] Horitsu Shinbun, Mar. 28, 1943, at 3).

177 DEAN, supra note 146, at 100; Urabe, supra note 157, at 486 (describing that defendants routinely waived jury trials because of the inability to appeal issues of fact, once accepted).

178 See, e.g., Urabe, supra note 157, at 485-91 (collecting the views of Japanese legal scholars on the demise of the pre-war jury system; many of the scholars cited the non-binding nature of jury decisions and/or the lack of kosō appeal); Kiss, supra note 138, at 268.

179 See Urabe, supra note 157, at 486 (“Professor Fumio Aoyagi . . . offers the following opinion [regarding the demise of the jury system]: The Jury Act . . . provided that no crime of political nature was to be tried by jury.”); see also Kiss, supra note 138, at 270 (postulating that the contemporaneous rise of fascism and lack of jury-trial availability for individuals charged with political crimes was a factor in the failure of the Japanese jury system).
tried by a jury were "crimes against a member of the Imperial Family, riot with the purpose of overthrowing the government, violation of the Chian Iji Hō ("Peace Preservation Act"), espionage, and violation of laws concerning the election of public officials." 180 Ironically, these same types of cases—high-profile cases involving the government—precipitated Japan’s first attempts at trial by jury during the Meiji period.181 Thus, although there was discussion that the jury system would "contribute to the impartiality of justice," 182 that goal was not borne out in the jury system actually introduced and, over the course of fifteen years, disregarded.

B. Laying the Groundwork for Citizen Participation

Because the pre-war jury system was suspended in connection with World War II, many thought that jury trials would be expeditiously revived at its conclusion.183 That was not the case.184 In the meantime, Japanese judges had acquired a reputation as "honest, esteemed, politically independent, and professionally competent."185 Beginning in the early 1980s, however, criticism of

180 Urabe, supra note 157, at 484; accord Dobrovolskaia, Japan’s Past Experiences, supra note 139, at 13-14.

181 See Dobrovolskaia, Japan’s Past Experiences, supra note 139, at 6-9.

182 Id. at 12 (referencing a 1910 proposal passed by the House of Representatives supporting the introduction of a jury system in Japan). Unsurprisingly, The Jury Guidebook does not focus on the impropriety or perceived impropriety of the judiciary as a reason for instituting a jury system in Japan. The Jury Guidebook, supra note 152, at 249 ("The reasons behind the introduction of jury trials in [Japan] are fundamentally different from those that triggered the implementation of the system in other countries. In Japan, the citizens did not demand that this system be introduced and did not suffer from the trial system that preceded it. The scrupulous fairness of Japanese courts was unrivaled in the word and was exceptional in that it was trusted by the citizens unreservedly. The reasons for introducing the jury system lie in the essence of the constitutional state.").

183 See Dimitri Vanoverbeke, The Taisho Jury System: A Didactic Experience, 43 SOC. SCI. JAPAN 23, 26 (Sept. 2010) (discussing the didactic effects of the pre-war jury system).

184 See id. ("[O]nly in the 1990s, in the wake of larger judicial reforms, did the policy proposals on lay participation in the criminal justice system catch fire.").

Within six years, four death row inmates were retried and acquitted of their offenses. The exonerated inmates had spent a combined total of over 130 years in prison on account of their convictions. Moreover, the cases were remarkably similar; in each, the suspect had confessed to the murder only after a lengthy—and at times severe—interrogation. Although the suspects withdrew their confessions, they were convicted in trials that were dominated by the prosecution. These cases turned the public’s attention squarely towards mechanisms designed to restrict the power of prosecutors and ensure the propriety of all government actors in the criminal justice system.

Around the same time that the first of the wrongful convictions came to light, the *Baishin Saiban o Kangaeru Kai*, ("Research Group on Jury Trial" or "RGJT") was established as the first grassroots organization committed to the reintroduction of jury trials in Japan. Several RGJT members had been involved in the celebrated wrongful conviction cases. The organization held
public forums throughout the country to “talk about the importance of civic participation in legal institutions” and “assess positive effects of creating civic oversight of the judiciary and prosecutions.”194 Among the individuals associated with the group was the former Chief Justice of the Japanese Supreme Court, Koichi Yaguchi;195 he later initiated a government study in 1989 regarding the introduction of a citizen jury system in Japan, and “sent Japanese jurists” to the United States and several European countries to observe the workings of the systems.196 The Japanese Federation of Bar Associations (“JFBA”) likewise began advocating for the introduction of citizen participation in criminal trials to act as a check on the judicial system.197

While the high-profile nature of the four wrongful convictions galvanized the calls for reform,198 the efforts were also fueled by the increasingly negative perception of the judiciary as a whole. In part, the negative perception of the judiciary flows from the structure of the system. In order to become a judge, candidates must pass a rigorous examination after college graduation and engage in two years of training.199 They then become “career” judges, being stationed for two- or three-year assignments around the country.200 The assignments are made by the Secretariat of the Japanese Supreme Court.201 This fact, together with the relative


198 Other legal scandals in the 1990s contributed to the deterioration in the public perception of lawyers and judges. See Kodner, *supra* note 160, at 238 & n.57 (providing several examples of lawyer and judicial impropriety that were covered in Japanese newspapers). See also id. at 233 (quoting a Feb. 14, 2001 editorial in the Mainchi Daily entitled *Judicial Corruption* describing one such incident: “The rule of law here is threatened by a major scandal. No matter how low standards and morals were to fall, we had always believed that we could continue to place our trust in prosecutors and judges. But officers of the court have betrayed this trust by attempting to cover up the investigation of one of their own.”).


201 Id.; see also Weber, *supra* note 192, at 140 (describing the Supreme Court’s appointment power in detail).
youth of judges at the time of their initial appointments, has led many to claim that Japanese judges are out of touch with society and pressured to reach outcomes that are favorable to the government that bestowed their positions upon them.\(^2\) Annual conviction rates in the late 1980s exceeded 99.8\%, providing further support for this claim.\(^3\)

In 1989, as RGJT and other public and private entities began to gain traction with their calls for citizen participation in the judicial system, Japan suffered an economic collapse.\(^4\) The collapse had profound effects: first, it triggered massive government deregulation; and second, it prompted reforms to increase the country’s competitiveness in the global economy.\(^5\) These reforms were far reaching and included changing the corporate governance system, improving the educational system, and increasing government transparency.\(^6\) The judicial system likewise came under scrutiny at this time because of its inefficiency and lack of transparency.\(^7\) The Liberal Democratic Party, with input from several organizations, published reports in 1997 and 1998 advocating sweeping reforms of the legal profession and judiciary, including an examination of citizen participation in legal matters.\(^8\)

\(^{202}\) See, e.g., Bloom, supra note 186, at 48-49; Weber, supra note 192, at 141 ("[T]he Japanese judiciary provides career judges with little incentive, let alone opportunity, to act on individual initiative and remains a conformist institution tightly regulated by the General Secretariat."); see also Nuno Garoupa & Tom Ginsburg, Judicial Audiences and Reputation: Perspective from Comparative Law, 47 COLUM. J. TRANSNAT’L L. 451, 486-87 (2009) (presenting arguments on both sides of the issue of whether the Japanese judiciary is truly independent).

\(^{203}\) Bloom, supra note 186, at 47; see also Foote, supra note 138, at 83 ("After reaching a low of 0.10% in 1988, the acquittal rate nearly doubled in 1989 (albeit to a still miniscule 0.19%).").


\(^{205}\) See Wilson, The Dawn of Criminal Jury Trials in Japan, supra note 185, at 841-42; see also Weber, supra note 192, at 149-150.

\(^{206}\) See Wilson, The Dawn of Criminal Jury Trials in Japan, supra note 185, at 841-42; see also Mark Levin & Virginia Tice, Japan’s New Citizen Judges: How Secrecy Imperils Judicial Reform, 60 ASIA-PAC. J. 91 (May 9, 2009).

\(^{207}\) See Wilson, The Dawn of Criminal Jury Trials in Japan, supra note 185, at 843; Landsman & Zhang, supra note 169, at 186-87.

\(^{208}\) See Fukurai, People’s Panels vs. Imperial Hegemony, supra note 190, at 106-07.
On July 9, 1999, Prime Minister Keizo Obuchi established the Shiho Seido Kaikaku Shingikai ("Justice System Reform Council" or "JSRC"). According to the legislation that created the JSRC ("JSRC Act"), its task was to "consider fundamental measures necessary for judicial reform and judicial infrastructure management by defining the role of the Japanese administration of justice in the 21st century." To that end, "[t]he agenda of the [JSRC] may include the realization of a more accessible and user-friendly judicial system, public participation in the judicial system, redefinition of the legal profession and enforcement of its function." The JSRC was composed of thirteen members representing a variety of professions and callings, including three attorneys, two law school professors, three university administrators, two businesspersons, a popular author, and the president of the Japan Housewives Association.

Five months after the JSRC was established, it published "The Points at Issue in the Judicial Reform." This document describes the reasons behind and goals for judicial reform, as conceived by the group charged with providing recommendations for reforming the judicial system. In laying out the goals for judicial reform, the JSRC stressed the importance of citizen participation to the health and prosperity of the country:

209 Shiho Seido Kaikaku Shingikai Secchiho [Law Concerning Establishment of Justice System Reform Council], Law No. 68 of 1999 (Japan) [hereinafter JSRC Act]; see also Matthew J. Wilson, Failed Attempt to Undermine the Third Wave: Attorney Fee Shifting Movement in Japan, 19 EMORY INT'L L. REV. 1457, 1459-61 (2005) [hereinafter Wilson, Failed Attempt to Undermine the Third Wave] (discussing the creation of the JSRC and its reform efforts).

210 JSRC Act, art. 2; see also JUDICIAL REFORM COUNCIL, THE POINTS AT ISSUE IN THE JUDICIAL REFORM I.1 (Dec. 21, 1999) [hereinafter POINTS AT ISSUE], available at http://www.kantei.go.jp/foreign/judiciary/0620reform.html (explaining reasons for the creation of the JSRC).

211 POINTS AT ISSUE, supra note 210, at I.1 (quoting JSRC Act, art. 2).

212 See Fukurai, People's Panels vs. Imperial Hegemony, supra note 190, at 321 (discussing the composition of the JSRC). The JSRC Act also indicated that "efforts shall be made so that the actual condition of the judicial system is fully grasped and that the voice of people of every class in Japan shall be fully reflected." POINTS AT ISSUE, supra note 210, at I.1 (quoting JSRC Act, para. 2, Supplementary Resolution of the Judiciary Committee of the House of Representatives).

213 POINTS AT ISSUE, supra note 210.

214 See id.
Faced with a sense of crisis, plans of economic structure reform such as political reform, administrative reform, promotion and deregulation have been made and are being implemented in order to recover creativity and vitality in this country. These reforms hold in common the recognition that the basis required to sustain the development of this nation in the 21st century is that every person shall grow out of the sense of being a governed object and shall participate in making a free and fair society in mutual cooperation as an autonomous governing subject with social responsibility in hand. This judicial reform is one last pivot to achieve such [a] goal.\footnote{Id. at II.2.}

Nevertheless, the need for judicial reform was not linked solely to participation in the democratic process. Among the goals for judicial reform was to “exclude the remaining practices of arbitrary decision making and restrictions.”\footnote{Id. at II.1.} Indeed, the document acknowledged that a common complaint of the current system was its “fail[ure] to exercise the check-function against [the] administration.”\footnote{Id. at III.1.} The JSRC envisioned the judicial system as “play[ing] a crucial role” in “keeping a watch of activities of the political sector... in order to avoid unfair infringement of the people’s fundamental human rights.”\footnote{POI NT S AT ISSUE, supra note 210, at II.2.} While the JSRC emphasized the importance of citizen participation in the judicial system, initially it did not take a position about the precise form such participation should take, noting that it would debate “the propriety of introduction of jury trials/lay-judge system which are adopted in Europe and the United States of America, by paying attention to their historical/cultural backgrounds and institutional/practical conditions.”\footnote{Id. at III.2(4).}

Although the circumstances in colonial America differed in many respects from those in late twentieth-century Japan, several parallels can be drawn between the two as it relates to the push for citizen participation in the judicial system. First, there were
famous trials—Zenger in America, the wrongful conviction cases in Japan—in which the authority of the judiciary was publicly questioned, causing citizens to closely scrutinize the respective systems.\textsuperscript{220} Second, judges were perceived as being out of touch with the citizenry and unduly influenced by other forces within the government.\textsuperscript{221} Third, the push for judicial reform initially stemmed from private action rather than being derived from the government.\textsuperscript{222} Finally, judicial reform was part of a democratic transformation that was taking place on a much larger scale.\textsuperscript{223} These similarities likewise shaped each country’s conception of the roles that juries or other citizen participation systems should have in their society.

By the same token, the circumstances in Japan differed in significant ways from the other periods in which the country had experimented with trial by jury, and these differences help to explain why the earlier systems were not sustainable.\textsuperscript{224} Although the sanza system was used in two high-profile cases to ensure that the government did not unduly influence the verdicts, the sanza system was used in two high-profile cases to ensure that the government did not unduly influence the verdicts.

\textsuperscript{220} See Fukurai, People’s Panels vs. Imperial Hegemony, supra note 190, at 319 (discussing four controversial death penalty cases in Japan in which the convicted individuals were later exonerated); see also Nelson, supra note 44, at 1018-20 (examining the background and implications of the not-guilty verdict in the Zenger case).

\textsuperscript{221} See, e.g., Landsman \& Zhang, supra note 169, at 180 (noting that judicial reform is being “driven by concerns about public disenchantment with an elite judicial corps viewed as out of touch with ordinary life”); Fukurai, People’s Panels vs. Imperial Hegemony, supra note 190, at 105 (“[B]oth prosecutors and judges remain as an exclusive class of elite bureaucrats within the Japanese government.”); Bloom, supra note 186, at 47-48 (noting that Japanese judges “seem to be an elitist, homogeneous group with limited life experience”).

\textsuperscript{222} See, e.g., Landsman \& Zhang, supra note 169, at 186 (implying that criticism of the press and politicians led to adoption of judicial reform measures); see also Kodner, supra note 160, at 233 (noting that “[t]he Reform Council’s radical departure from the status quo was motivated, in part, by the perceived deterioration of public support for the Japanese legal system”).

\textsuperscript{223} See, e.g., Bloom, supra note 186, at 49 (stating that “the major reason for the introduction of juries seems to be the idea of greater citizen participation in the running of the government”); see also Wilson, The Dawn of Criminal Jury Trials in Japan, supra note 185, at 41-42 (observing that what began as governmental response to an economic slowdown in the 1980s “evolved into wholesale reevaluation of Japan’s political and economic structure”).

\textsuperscript{224} See Sato Iwao, Emergence of Citizen Participation in Trials in Japan: Background and Issues, 43 SOC. SCI. JAPAN 3, 5 (Sept. 2010).
system was not created to promote democratic principles.\textsuperscript{225} Thus, there was no impetus to allow for broad citizen participation or to use the jury system to educate citizens about the judicial or political systems. Conversely, the pre-war jury system was a politician-led initiative with the sole purpose of promoting democracy.\textsuperscript{226} In fact, \textit{The Jury Guidebook} states that “[t]he scrupulous fairness of the Japanese courts . . . was exceptional in that it was trusted by the citizens unreservedly.”\textsuperscript{227} Given this sentiment, it is no surprise that the pre-war jury system was not structured to provide an effective check on the government or to give jurors meaningful participation in the judicial system.

Nevertheless, there is one striking difference between the circumstances leading to judicial reform in the two countries: whereas the Japanese government eventually itself pushed for increased citizen participation in the judiciary, citizen participation in colonial courts was viewed as a type of popular rebellion against the English government.\textsuperscript{228} Some scholars have cited the differences between the sources of power underlying the two systems—government legislation in the case of Japan, the Founding documents in the case of the United States—in claiming that the \textit{saiban-in seido} would, ultimately, not fully promote democracy in Japan.\textsuperscript{229} However, such an argument is wrongly premised on the idea that the Japanese government historically sought to preserve the centralization of power, and thus its judicial reforms would be similarly tailored in this instance.\textsuperscript{230} While that

\begin{footnotesize}
\begin{enumerate}
\item See Dobrovolskaia, \textit{Japan's Past Experiences}, supra note 139, at 6-9 (describing the introduction and limited use of the \textit{sanza} system).
\item See Dobrovolskaia, \textit{The Jury System}, supra note 150, at 242 (noting that the advocates for the pre-war jury system were “associated with the democratization movement, which aimed to establish a court system that would serve the interests of the people”).
\item Id. at 248.
\item See Levin, supra note 11, at 207-11 (contrasting the origins of the jury trial in Japan and America).
\item See, e.g., id. at 211 (observing that aspects of the \textit{Saiban-in Act} “may undermine its stated goal of promoting democracy”).
\item See \textit{id.} at 207. Levin correctly notes that the Meiji Constitution was created under the premise that the government was the ultimate source of power. \textit{id.} at 207-08. \textit{The Jury Guidebook} reflects a similar attitude during the time of the pre-war jury system. Dobrovolskaia, \textit{The Jury System}, supra note 150, at 249 (“The Japanese Empire is graciously ruled by the line of Emperors unbroken for ages eternal, and the supreme
\end{enumerate}
\end{footnotesize}
might have been true with both of the previous experiments with trial by jury, such was not the case in the events leading up to the enactment of the JSRC Act. In the 1990s, Japan found itself in a dire economic situation in which it believed that the only way it would be able to sustain itself—much less compete globally—was through massive decentralization of power. Furthermore, it saw judicial system reform, including increased citizen participation, as vital to achieving this goal. Thus, even though the Japanese government did promote judicial reform, it did so for the purpose of decentralizing the government.

IV. Adoption and Implementation of the Saiban-in Seido

Given the similarities in the circumstances leading to judicial reform in early America and late twentieth-century Japan, as well as the common goals sought in increasing citizen participation in the judiciary, one might expect that Japan would have adopted a jury system similar to that of the United States. Although the JSRC Act did not suggest that the American system would eventually be adopted, nearly all of the discussions leading up to its passage focused on the implications of adopting that type of system. This Part describes the JSRC deliberations that led to its recommendation of the saiban-in seido, a system which differs from both the American jury system and the mixed-court tribunals that are prevalent throughout Europe. This Part also discusses the workings of the Saiban-in Act in greater detail and assesses its initial impact on the judicial system and the Japanese people.

power in the Empire lies with the Emperor alone, which is something that does not require any additional explanation.”). However, such an attitude is notably absent from the discussions regarding judicial reform in the late twentieth century.


232 See POINTS AT ISSUE, supra note 210, at III.2(4) (“It is also anticipated that independence and participation of residents in local affairs shall further increase its importance following decentralization of power. In such conditions where involvement of the people as the sovereign is going to expand in many ways, we must also study the ideal way of participation of the people in the judicial field as the sovereign.”).

233 See Katsuta, supra note 10, at 506-11 (discussing the study of the American jury system in Japan beginning in the 1980s).
A. Justice System Reform Council Deliberations and Recommendations

Between July 27, 1999 and June 12, 2001, the JSRC held sixty-three meetings, at least six of which concerned citizen participation. In addition, JSRC members traveled to the United States, Germany, France, and England in April and May 2000 to meet with lawyers and judges in order to gain a better understanding of the judicial systems in those countries. Takuya Katsuta, a Japanese scholar who has extensively studied the American jury system and its influence on Japan, noted that although the members conducted these trips and presented their findings to the JSRC, the American jury system was the only one discussed in any detail during JSRC meetings. Thus, this section focuses on the reasons for the JSRC's rejection of the American jury system, rather than its reasons for not adopting the jury systems of other countries.

Because the JSRC meetings included testimony from legal professionals and academics with varying views on the role of citizen participation in the administration of justice, it is difficult to determine which criticisms of the American jury system actually resonated with the council members. Nonetheless, the criticisms can be grouped into two general categories. The first category concerned the functioning of the contemporary American jury. Many of these criticisms came from members of the Japanese Supreme Court who suggested that American juries returned a high number of erroneous verdicts and, even more

---

234 Id. at 513. The JSRC deliberations were made available online to the public. Meeting minutes, meeting summaries, and meetings handouts may be accessed at http://www.kantei.go.jp/jp/sihouseido/.

235 See Katsuta, supra note 10, at 522.


237 See Katsuta, supra note 10, at 522-23. JSRC members submitted reports of their impressions during the 19th meeting. See JSRC, 19th Meeting Minutes (May 16, 2000), http://www.kantei.go.jp/jp/sihouseido/dai19/19gijiroku.html.

238 See Katsuta, supra note 10, at 519-20.
troublingly, returned erroneous guilty verdicts against innocent accuseds.239 These types of criticisms likely struck a chord with the JSRC members, as one of the traditional principles of the Japanese judicial system is a commitment to accuracy and uniformity.240 Moreover, media coverage of American criminal trials, such as the O.J. Simpson trial, have become widespread throughout Japan, which could have affected the council members’ perceptions about the effectiveness of American juries in reaching just results.241

Whereas the first category of criticisms related to the effectiveness of American juries, the second category concerned the adoption of any type of all-citizen jury system in Japan. These criticisms focused on the historical and cultural differences between Japan and the countries with an all-citizen jury system such as the United States,242 alleging that these differences resulted in American citizens being “more conscious of public interests” than Japanese citizens.243 Consequently, American citizens theoretically would be better equipped to serve on an all-citizen jury than would Japanese citizens, who would need more guidance regarding their role in the administration of justice.244 In fact, the

---

239 JSRC, 30th Meeting Minutes (Sept. 12, 2000), http://www.kantei.go.jp/jp/sihouseido/dai30/30gijiroku.html [hereinafter 30th Meeting]; Katsuta, supra note 10, at 514-15. For more information, see also “The Opinion of the Supreme Court on Lay Participation,” a document presented during the 30th meeting, which is available at http://www.kantei.go.jp/jp/sihouseido/dai30/30bessi5.html.

240 See Weber, supra note 192, at 153-55 (noting that the Supreme Court advocated for maintaining a strongly hierarchical system in the judiciary because “Japan’s unitary system . . . provided fair and predictable decisions”); see also Senger, supra note 11, at 753 (discussing concerns raised by the Japanese Supreme Court regarding unpredictability in the English and American jury systems).

241 See Katsuta, supra note 10, at 499-500 (discussing the influence of American media outlets on the Japanese view of the American judicial system). In fact, the O.J. Simpson trial was explicitly referenced at the 30th Meeting. See 30th Meeting, supra note 239.

242 See 30th Meeting, supra note 239; see also Katsuta, supra note 10, at 514-15 (summarizing viewpoints of two contributors).

243 Katsuta, supra note 10, at 521.

244 See 30th Meeting, supra note 239. In fact, at least one legal expert suggested during the 30th meeting that a mixed court tribunal would better serve Japan’s interest. See id. This view has been termed by one scholar as “The Enduring Myth of the Immature Japanese Public,” which is the idea that “the average Japanese citizen lacks the political maturity to participate in governance.” Weber, supra note 192, at 157-60.
Japanese Supreme Court at one time recommended that citizens should be able to participate and give their opinions in proceedings, but that they should not have any decision-making authority.\textsuperscript{245}

It was not until the JSRC’s 51st meeting on March 13, 2001 that Professor Masahito Inouye, a JSRC member, first presented materials regarding the \textit{saiban-in seido} as an alternative to both the American jury system and the traditional mixed-court tribunals of Europe.\textsuperscript{246} Although there had been some discussion of a “lay judge system” in a prior meeting,\textsuperscript{247} the precise structure and function of the \textit{saiban-in seido} appears to have been both introduced to, and deliberated on by, the JSRC at this single meeting.\textsuperscript{248} Many aspects of the \textit{saiban-in seido} remain the same since its unveiling at the 51st meeting, and any differences relate to aspects of the system in which Professor Inouye had not provided definitive suggestions.\textsuperscript{249}

The JSRC issued its final recommendations for judicial reform on June 21, 2001 (“JSRC Report”).\textsuperscript{250} As in the “Points at Issue in the Judicial Reform” nearly two years earlier, the JSRC Report reiterated the need for Japanese citizens “to break out of the excessive dependency on the state, . . . develop public consciousness within themselves, and become more actively involved in public affairs.”\textsuperscript{251} Simultaneously, the judicial branch was charged with “meeting the demand for accountability to the

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{245}] Weber, \textit{supra} note 192, at 155.
\item[\textsuperscript{246}] JSRC, 51st Meeting Minutes (Mar. 13, 2001) [hereinafter 51st Meeting], http://www.kantei.go.jp/jp/sihouseido/dai51/51gijiroku.html; see also Fukurai, \textit{People’s Panels vs. Imperial Hegemony}, supra note 192, at 321-22 (discussing Professor Inouye’s contribution to the creation of the \textit{saiban-in seido}).
\item[\textsuperscript{247}] See JSRC, 45th Meeting Minutes (Jan. 30, 2001), http://www.kantei.go.jp/jp/sihouseido/dai45/45gijiroku.html (including a general discussion of lay judges).
\item[\textsuperscript{248}] See id.; see also Fukurai, \textit{Japan’s Quasi-Jury and Grand Jury Systems}, \textit{supra} note 1, at 804-05.
\item[\textsuperscript{249}] See Fukurai, \textit{People’s Panels vs. Imperial Hegemony}, \textit{supra} note 192, at 321-22.
\item[\textsuperscript{250}] \textit{Id.} at 322; see also JUSTICE SYSTEM REFORM COUNCIL, RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL: FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY (June 12, 2001) [hereinafter JSRC REPORT], available at http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html.
\item[\textsuperscript{251}] JSRC REPORT, \textit{supra} note 250, ch. IV.
\end{itemize}
\end{footnotesize}
people, while paying heed to judicial independence.\textsuperscript{[252]} In explaining the purpose behind recommending the saiban-in seido in particular, the JSRC noted that the system must “enabl[e] the broad general public to cooperate with judges by sharing responsibilities, and to participate autonomously and meaningfully in deciding trials.”\textsuperscript{[253]} There, the citizen jurors “should possess generally equivalent authority to that of judges” in deliberations.\textsuperscript{[254]}

Although the JSRC Report included general descriptions about the roles and divisions of responsibility between the professional judges and citizen jurors, it left several issues unaddressed. Three issues are of importance to this Article. First, the JSRC Report did not specify the number of professional judges and citizen jurors that would serve together on a panel or how the panel would reach a verdict; it stated that those decisions should be made by:

\begin{quote}
\textit{[G]iving consideration to the need to ensure the autonomous and meaningful participation of the saiban-in and the need to ensure the effectiveness of the deliberations, taking into account the seriousness of the cases to which this system will apply and the significance and potential burden of the system on the general public.}\textsuperscript{[255]}
\end{quote}

Second, the JSRC Report did not address the number or composition of votes that would be required to render a verdict or impose punishment, but it did state that a guilty verdict could not be rendered “on the basis of a majority of either the judges or the saiban-in alone.”\textsuperscript{[256]} Third, although the JSRC Report stated that citizen jurors and professional judges should make joint decisions on guilt and punishment, the question of “whether saiban-in should be involved in highly specialized or technical matters such as questions of law or questions of procedure” was not

\begin{footnotes}
\item[252] \textit{Id}. ch. I.
\item[253] \textit{Id}. ch. IV.
\item[254] \textit{Id}.
\item[255] \textit{Id.; see also Anderson & Nolan, supra note 168, at 947-48 (describing several proposals that had been considered regarding the composition of the saiban-in panels).}
\item[256] JSRC \textit{REPORT}, supra note 250, ch. IV; \textit{see also Anderson & Nolan, supra note 168, at 949-50 (discussing options regarding voting rules).}
\end{footnotes}
addressed. The Report nevertheless stressed that “while judges and saiban-in share responsibilities, the judges who are legal specialists and the saiban-in who are laypersons will share their respective knowledge and experience through mutual communication and reflect the results thereof in their judgments.”

Following the issuance of the JSRC Report, the Japanese Cabinet established the Office for the Promotion of Justice System Reform, which created an investigation committee to determine how to implement the saiban-in seido. Those efforts culminated in the Diet’s enactment of the Saiban-in Act.

B. Features of the Saiban-in Seido

The saiban-in seido is a system of joint judicial decision-making that is unlike any other in the world. The purpose of the saiban-in seido, as indicated by the Saiban-in Act, is to “contribute to the promotion of the public’s understanding of the judicial system and thereby raise their confidence in it.”

The saiban-in seido is applicable to two categories of criminal cases: crimes punishable by death or life imprisonment and crimes punishable by at least one year in prison, where the victim died as a result of an intentional criminal act. Subject to limited exceptions, the accused has no right to forego the saiban-in seido and have the case heard by a panel of professional judges.

---

257 JSRC REPORT, supra note 250, ch. IV.
258 Id.
259 Fukurai, Japan’s Quasi-Jury and Grand Jury Systems, supra note 1, at 804-05.
260 Saiban-in Act, supra note 137; see also Fukurai, Japan’s Quasi-Jury and Grand Jury Systems, supra note 1, at 804-05 (describing the process in which the Saiban-in Act came to fruition).
261 Legal experts have referred to the saiban-in seido as “a new species” that is “as isolated as the Galapagos.” Editorial, Three Professional Judges in Black Robes Have Traditionally Presided Over Proceedings at the Tokyo District Court[.] On Monday, They Were Joined by Six Private Citizens in Ordinary Attire to Help Pass Judgment in a Murder Trial, ASAHI SHIMBUN/INTERNATIONAL HERALD TRIBUNE (HERALD ASAHI), Aug. 5, 2009.
262 Saiban-in Act, supra note 137, art. I.
263 Id. art. 2; see also Court Act, Act No. 59 of 1947, art. 26(2)(ii) (specifying crimes falling under this provision).
264 See Saiban-in Act, supra note 137, art. 3; see also Soldwedel, supra note 204, at 1424-25 (noting that although defendants may not choose to waive trial by saiban-in
Japanese citizens are eligible to serve as jurors if they are at least twenty years of age, have completed compulsory education (equivalent to a ninth-grade education), have not spent time in prison, and are not prevented from serving due to physical or mental infirmities. Most individuals connected with the legal profession, the court system, or prominent political offices are ineligible for service.

Typically, saiban-in panels are composed of nine participants: six citizen jurors and three professional judges. If there is "no dispute concerning the facts" and issues during the pre-trial procedure, and if the court determines that it is appropriate, the panel may be composed of five participants: four citizen jurors and one professional judge.

At trial, the citizen jurors have essentially the same rights and responsibilities as the professional judges; consistent with the Code of Criminal Procedure, jurors are permitted to ask questions to witnesses, victims, and even defendants. Nevertheless, the Saiban-in Act instructs "[j]udges, prosecutors, and defense counsel . . . to make trials quick and easy to understand so that lay [jurors] are able to perform sufficiently their duties without their responsibility becoming onerous." This provision reiterates a desire that was expressed by the JSRC to limit the burdens of the citizen participants in the saiban-in seido.

---

265 See Saiban-in Act, supra note 137, arts. 13-14. Although the qualification requirements are less stringent than under the pre-war jury system, there is some concern that the requirements still exclude too many citizens from participating in the saiban-in seido. See Levin, supra note 11, at 220-21. But see Weber, supra note 192, at 166 (contending that qualification requirements will promote citizen participation).

266 Saiban-in Act, supra note 137, art. 15; see also Levin, supra note 11, at 221 (discussing the exclusion of legal professionals).

267 See Saiban-in Act, supra note 137, art. 2(2).

268 Id. art. 2(3).

269 Id. arts. 56-57.

270 Id. art. 58.

271 Id. art. 59.

272 Saiban-in Act, supra note 137, art. 51.

273 See JSRC REPORT, supra note 250, ch. IV (noting that final decisions regarding the implementation of the system must "take[e] into account the seriousness of the cases to which the system will apply and the significance and potential burden of the system..."
One difference between the powers of citizen jurors and professional judges is that the decision-making authority of citizen jurors is limited. 274 Whereas the entire panel has the authority to determine the existence of facts and the application of laws and regulations to the facts, 275 only the professional judges may make decisions regarding court procedure and the interpretation of laws and regulations. 276 During full panel deliberations, one of the professional judges (designated the “presiding judge”) is to instruct jurors regarding these latter issues, and jurors are required to make determinations in accordance with these instructions. 277 The presiding judge must also ensure that the “deliberations are easily understandable for the lay [jurors], providing sufficient opportunity for the lay [jurors] to voice their opinions . . . so that lay [jurors] are sufficiently able to execute their duties.” 278 Additionally, in rendering decisions, citizen jurors and professional judges “are both entrusted to decide freely based on the strength of the evidence.” 279

In contrast to the rules regarding deliberations on decisions to be made by the entire panel, only the professional judges are generally permitted to attend the deliberations on the decisions entrusted to them alone. 280 The professional judges, at their discretion, may jointly agree to allow citizen jurors to attend these deliberations and express opinions on the matters. 281

Regardless of whether the panel for a particular trial consists of nine members or five members, all decisions as to guilt or punishment must be supported by a majority of panel members. 282 Furthermore, no decision will be binding unless it is supported by

---

274 See Saiban-in Act, supra note 137, art. 6(1)-(2).
275 See id. art. 6(1).
276 See id. art. 6(2).
277 Id. art. 66.
278 Id. art. 66(5).
279 Saiban-in Act, supra note 137, art. 62. Notably, the title for Article 62 may be translated as the “Principle of Free Conviction.” Anderson & Saint, supra note 137, at 268.
280 Saiban-in Act, supra note 137, art. 68(1).
281 Id. art. 68(3).
282 Id. art. 67.
at least one citizen juror and one professional judge. It is important to note that, because of the citizen-juror to judge ratio in panel compositions, this extra requirement is only an issue when a decision is supported by five or six citizen jurors on a nine-member panel (or alternatively three or four citizen jurors on a five-member panel) but not supported by any judge.

When there is no consensus on the sentence to be imposed:

[T]he number of opinions for the option most unfavorable to the defendant will be added to the number of opinions for the next favorable option, until a majority opinion of the members of the judicial panel which includes both a [professional] judge and a [citizen juror] holding that opinion is achieved.

In effect, this rule dictates that the votes for the most punitive punishment are added to the votes of progressively more lenient punishments until there is a majority “vote” that includes at least one professional judge and one citizen juror. At the conclusion of a case, all decisions concerning guilt or punishment, whether they involve errors of law or fact, are subject to immediate appeal.

Citizen jurors are expected to perform their duties with “honesty and fairness,” and they must not “commit acts that may injure the public’s trust in the fairness of the trial” or the “dignity of the trial.” The greatest responsibility placed on citizen jurors is to not divulge “secrets” learned in the course of deliberations or in carrying out their duties. Unlike the other responsibilities of

---

283 Id.; see also Anderson & Saint, supra note 137, at 273 n.49 (explaining an exception to this general rule that requires acquittal when five or six lay jurors vote for acquittal even without the consenting vote of any judge).
284 See Saiban-in Act, supra note 137, art. 67.
285 Id. art. 67(2).
286 See id.
287 See id. art. 84; see also Soldwedel, supra note 204, at 1445-46 (indicating the retention of the koso appeal on all issues of law and fact and arguing that it is not protective enough of defendant’s rights).
288 Saiban-in Act, supra note 137, art. 9.
citizen jurors, the divulging of secrets is criminalized under the *Saiban-in Act*, carrying a potential term of imprisonment of six months or a fine of 500,000 yen ($6,500).290

**C. Initial Impact of the Saiban-in Seido on the Japanese Judicial System**

Although the adoption of the *saiban-in seido* was intended to promote broad citizen participation and instill confidence in the judicial system, Japanese citizens were initially unreceptive to the idea of serving as citizen jurors.291 A February 2005 poll conducted by the Cabinet Office found that 70% of respondents did not want to participate in the *saiban-in seido*.292 In another poll, respondents cited the following reasons for not wanting to serve: "'the responsibility to decide another's fate is too great' (75%); 'lay people cannot try a case without legal knowledge' (64%); and 'lay people cannot deliberate as equals with experienced and professional judges' (55%)."293

In the five-year gap between the passage of the *Saiban-in Act* and its implementation, the Supreme Court, the Ministry of Justice, and the JFBA launched a comprehensive public relations campaign geared toward educating citizens about their new role in the judicial system.294 In the first three years following the enactment of the *Saiban-in Act*, the Supreme Court spent 3.6 billion yen ($47 million) on advertising, and the Ministry of Justice spent 970 million yen ($12.6 million) on advertising.295 While these initiatives in one sense were intended to promote the

---

290 *Saiban-in Act*, supra note 137, art. 79.

291 See, e.g., 70% of Survey Respondents Do Not Want to Become "Citizen Judge," KYODO NEWS, Apr. 16, 2005 (reporting survey results).


293 Shinomiya Satoru, *Defying Experts' Predictions, Identifying Themselves as Sovereign: Citizens' Responses to Their Service as Lay Judges in Japan*, 43 SOC. SCI. JAPAN 8, 9 (Sept. 2010) (quoting a May 2008 survey conducted by the Supreme Court).


295 See Wilson, *Japan's New Criminal Jury Trial System*, supra note 289, at 493-94 (chronicling the advertising and promotion efforts).
saiban-in seido, many materials used had a strong educational component; the materials explained to the Japanese public the role of citizen jurors in relation to other components of the judicial system.\textsuperscript{296}

Despite efforts to enhance the public's perception of the saiban-in seido, as well as significant expenditures toward remodeling the courts for the introduction of citizen jurors,\textsuperscript{297} Japanese citizens remained resistant to saiban-in service.\textsuperscript{298} In a Cabinet Office poll conducted around the time saiban-in trials were scheduled to begin, 71.5\% of respondents indicated they were “willing” to participate as citizen jurors.\textsuperscript{299} Although this result was more favorable than in previous polls, only 13.6\% of respondents indicated they would take part “regardless of [their] legal obligation” to do so; 57.9\% of respondents said they felt legally obligated to serve.\textsuperscript{300} This negativity led several scholars to speculate that the saiban-in seido would follow a similar trajectory as the pre-war jury system—“an expensive experiment in futility.”\textsuperscript{301}

Although it is too soon to tell whether the saiban-in seido will be a long-term success in Japan, the initially negative perception of the system seems to have lessened among the Japanese public, especially among those who have participated as citizen jurors.\textsuperscript{302}

\textsuperscript{296} See Wilson, The Dawn of Criminal Jury Trials in Japan, supra note 185 and accompanying text.

\textsuperscript{297} See Wilson, Japan’s New Criminal Jury Trial System, supra note 289, at 494 (noting that by the end of 2008, facility remodeling costs and other preparatory expenditures exceeded 28.6 billion yen ($350 million)).


\textsuperscript{299} GOVERNMENT INFORMATION OFFICE, MINISTER’S SECRETARIAT, CABINET OFFICE, PUBLIC OPINION SURVEY ON JURY SYSTEM (June 2009), available at http://www8.cao.go.jp/survey/h21/h21-saiban/index.html; see also Over 70\% Willing to Take Part in Lay Judge Trials: Survey, KYODO NEWS, July 25, 2009 (reporting survey results).

\textsuperscript{300} Over 70\% Willing to Take Part in Lay Judge Trials: Survey, supra note 299.

\textsuperscript{301} Wilson, Japan’s New Criminal Jury Trial System, supra note 289, at 496-99.

Of qualified candidates who were summoned to the courthouse to serve as citizen jurors from May 21, 2009 to May 31, 2010, 82.6% appeared for duty, a number which dwarfs the 45% attendance rate for prospective jurors in the United States. The Japanese Supreme Court Office has conducted several surveys on jurors' feelings about serving on saiban-in panels; although a majority of jurors were initially reluctant to serve, over 96% of jurors felt satisfied after their saiban-in seido experiences. While most jurors (77.6%) have been satisfied with their level of involvement in the proceedings and deliberations, only a few jurors (7.7%) felt that they could not fully discuss matters before the court.

There are also indications that the public perception of the saiban-in seido has increased due to the public's exposure to the system in action. Ever since August 3, 2009, saiban-in trials have been a staple in Japanese newspapers, with coverage including both trivial and non-trivial cases. Citizens who have witnessed the system firsthand remark that although they initially had “great interest and anxiety,” they found that “watching the

303 See id.; see also Fukurai, Japan's Quasi-Jury and Grand Jury Systems, supra note 1, at 815-16 (summarizing results).

304 Lewis, supra note 2 (noting that the 95% turnout rate in Tokyo in the first few months after the introduction of the saiban-in seido was “more than double the national turnout rate of 45 percent for American jury trials”).


306 See Satoru, supra note 293, at 9; Fukurai, Japan’s Quasi-Jury and Grand Jury Systems, supra note 1, at 817-18 (describing the results of two surveys conducted by the Supreme Court Office); see also Makoto Ibusuki, “Quo Vadis?: First Year Inspection to Japanese Mixed Jury Trial, 12 ASIAN-PAC. L. & POL’Y J. (SPECIAL ISSUE) 24, 44-46 (2010) (discussing the positive experiences of citizen jurors during the first year of the saiban-in seido).

307 SUPREME COURT OFFICE, supra note 305, at 7; see Satoru, supra note 293, at 10 (summarizing results).

308 Setsuko Kamiya, Citizens Find Their Place on the Bench: Lay Judge Duties Weigh on Candidates, JAPAN TIMES (Sept. 3, 2009), http://www.japantimes.co.jp/ (search “Citizens Find Their Place on Bench;” select first search result).

309 Ibusuki, supra note 306, at 25-26 (providing first-hand impressions of media coverage in Japan).
new system in action helped alleviate some of their concerns.\textsuperscript{310} Makoto Ibusuki, a law professor at Seijo University in Tokyo, has noted from his observations of Japanese courtrooms that the \textit{saiban-in seido} "now presents itself as an integral part of the Japanese justice system."\textsuperscript{311}

With regard to the trial proceedings, there is anecdotal evidence that citizen jurors have taken an active role in directly questioning witnesses and defendants, and juror questions have been included in newspaper coverage of \textit{saiban-in} trials.\textsuperscript{312} Although most juror questions have not contained questionable content, there have been a few notable reported instances in which jurors have asked inappropriate questions or made inappropriate statements.\textsuperscript{313} In one rape trial, after receiving no response from a defendant regarding whether he felt remorse for his actions, one juror exclaimed, "You piss me off."\textsuperscript{314}

The initial impact of the introduction of the \textit{saiban-in seido} appears to be a positive one, at least as it pertains to increasing citizens' understanding of the judicial system and augmenting participation in the democratic process.\textsuperscript{315} It is still unclear, however, how much of a practical impact citizen jurors have in reaching verdicts,\textsuperscript{316} and the anti-disclosure provisions of the

\textsuperscript{310} Kamiya, supra note 308.

\textsuperscript{311} Ibusuki, supra note 306, at 25.

\textsuperscript{312} See Senger, supra note 11, at 761-62 (discussing the attention given to juror questions in early trials under the \textit{saiban-in seido}); Kamiya, supra note 308 (noting that all participants in the first trial asked questions); Setsuko Kamiya, Historic First: Lay Judge Quizzes Witness, \textit{JAPAN TIMES} (Aug. 5, 2009), http://www.japantimes.co.jp/text/nn20090805a3.html.


\textsuperscript{314} Id.; see also Heavy Sentence in Aomori Case ‘Reflects’ Public Sentiment Against Leniency, \textit{DAILY YOMURI}, Sept. 12, 2009, at 4 (questioning the role of citizen jurors in sexually-related crimes).

\textsuperscript{315} See supra notes 294-95 and accompanying text.

\textsuperscript{316} See Ibusuki, supra note 306, at 40-44 (discussing the initial impact of the \textit{saiban-in seido} on guilt and sentencing). It appears that the impact of the \textit{saiban-in seido} is greater with regard to sentencing than as to guilt. See \textit{id}. To date, there have been a total of eight acquittals rendered by \textit{saiban-in} panels. See Data Base of Wrongful Arrests, Convictions, and the Death Penalty, \textit{JAPAN RES. AND DEATH PENALTY CTR.}, http://www.jiadep.org/Data_Bases.html (last visited Jan. 22, 2012) (providing
Saiban-in Act make it nearly impossible to study the nature of the interaction between citizen jurors and professional judges. Yet the “success” of any particular jury system should not be linked to a particular conviction rate or punishment level; rather, a system’s success should be measured by how effectively it comports with its purposes. It is this larger question of purpose to which this Article next turns.

V. Evaluating the Saiban-in Seido in Light of the Founders’ Conception of the Right to Trial by Jury

As explained in Part III, the circumstances in Japan in the late twentieth century were analogous to those in America at the time of the Founding, particularly in regards to the perception of the criminal justice system and the need for citizen participation in the administration of justice. Furthermore, most of the initial discussions about the reintroduction of citizen participation in Japan focused on the introduction of an American-inspired jury system. Yet, as described in Part IV, the saiban-in seido differs in fundamental ways from the modern American jury system. Such differences should give pause to academic and legal professionals who have interest in reforming criminal jury trials in the United States. This Part aims to address whether there are aspects of the saiban-in seido which better effectuate, or could better effectuate, the Founders’ conception of the right to trial by jury. This Part also offers suggestions for modifications of the saiban-in seido to ensure that it meets its own stated purposes.

Although the saiban-in seido shares some characteristics with other international lay assessor systems, its combination of components—and, in particular, its implementation of these components—makes it unique. This Part focuses on three components of the saiban-in seido: (1) citizen participation in deciding issues of law; (2) the mixed court and the method of joint decision-making on issues of guilt and sentencing; and (3) the inability of criminal defendants to waive trial by the saiban-in panel and opt for trial by professional judges. While there are aspects of the saiban-in seido that make it impractical to adopt in its entirety in the United States, there are also aspects of the

---

317 For example, Japanese reforms did not take into account the rights of defendants,
saiban-in seido that are arguably more in line with the Founders' conception of the right to trial by jury than the modern American jury system.

A. Citizen Participation in Deciding Issues of Law

1. Advantages

At the time of the Founding, it was taken for granted that American juries had the authority to decide both issues of law and issues of fact. Although some scholars have suggested that the authority to decide issues of law at the time of the Founding was due to the lack of a professional judiciary, a closer look at the historical context and writings of the Founders indicates that the authority to decide issues of law fits within the Founders' conception of the right to trial by jury.

As demonstrated by the Zenger trial, the law-finding function of the jury was used by the Founders as a tool for resisting governmental oppression. In Notes on the State of Virginia, Thomas Jefferson wrote that it was "usual" for jurors to decide issues of fact and defer to judges on issues of law; nevertheless, he explained, "if [a] question relate[ed] to any point of public liberty, or if it [was] one in which the judges [could have] be[en] suspected of bias, the jury [would] undertake to decide both law and fact."

which are central to constitutional criminal procedure in the United States. See Anderson & Nolan, supra note 168, at 941 (noting that the JSRC reforms were not meant to address the rights of criminal defendants). See generally Soldwedel, supra note 204 (describing the ways in which the Japanese judicial system does not protect the rights of criminal defendants).

See supra notes 78-89 and accompanying text.

See, e.g., Alschuler & Deiss, supra note 86, at 903-06 (suggesting that the jury's role in deciding issues of law could be traced to the lack of a professional judiciary); see also Harrington, supra note 52, at 378-79 (suggesting that judges' lack of formal training allowed juries to play a significant role in deciding issues of law).

McClanahan, supra note 8, at 810-13.

See supra note 42 and accompanying text; see also Abramson, supra note 93, at 73-75 (discussing the role of the Zenger trial in combating governmental oppression).

THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (1781-1782), reprinted in WRITINGS, supra note 64, at 256. See also 3 Johns. Cas. 337, 362 (N.Y. 1804) (expressing the sentiment of Alexander Hamilton that "it is not only the province of the jury, in all criminal cases, to judge of the intent with which the act was done, as being parcel of the fact; they are also authorized to judge of the law as connected with the fact.)
In addition to the expectation that jurors would use their law-deciding power to act as a check against judicial overreaching, the Founders envisioned that the jury’s right to decide issues of law would be similar to the role of the lower house in the "bicameral judiciary." In explaining the role of the judge and jury in deciding issues of law, James Wilson, a contributor to the Constitution, wrote: "Suppose that... a difference of sentiment takes place between the judges and the jury with regard to a point of law[;]... what must the jury do? The jury must do their duty and their whole duty. They must decide the law as well as the fact." Wilson further explained the types of resources that should be relied upon by jurors in making such decisions, including "precedents, and customs, and authorities, and maxims." Fairly read, Wilson envisioned the jury as a bona fide actor in the judicial system, deciding issues of law alongside judges.

In some ways, the saiban-in seido creates the opportunity for citizen participants to have even more direct input in the interpretation of laws and regulations than American jurors presently have. Unlike the American concept of jury nullification, in which the jury’s law-finding function is ascertained through its rendering of a general verdict, the Saiban-in Act affords citizen participants, under certain circumstances, the opportunity to state their opinions on the interpretation of laws and regulations. When such exchanges occur, the citizen participants can be seen as a lower house in a "bicameral judiciary." The citizens' opinions are not binding on judges, but judges are able to consider the opinions in the context of rendering a specific decision on an

... In England, trial by jury has always been cherished, as the great security of the subject against the oppression of government; but it never could have been a solid refuge and security, unless the jury had the right to judge of the intent and the law.

323 McClanahan, supra note 8, at 826.
325 Id. at 542.
326 McClanahan, supra note 8, at 812.
327 See infra note 355 and accompanying text.
328 See supra notes 274-81 and accompanying text; see also Levin, supra note 11, at 222-23 (discussing citizen jurors’ input into deciding issues of law).
329 McClanahan, supra note 8, at 826.
interpretation of a law or regulation. In contrast, a general verdict at best gives a blunt, post-hoc signal to the judiciary that "either... the law itself is oppressive or... its application against a particular defendant would be oppressive." Consequently, citizen participation in the Japanese system could occupy a more central role in the administration of justice than its American counterpart—affecting not only the lives of individual defendants but also the interpretation of the laws and regulations themselves.

2. Drawbacks

In theory, the saiban-in seido allows more direct citizen input into the interpretation of laws and regulations than does the American jury system. Nonetheless, the Saiban-in Act contains two sets of provisions that greatly limit the likelihood that jurors will actually influence the law-deciding function of the court.

While it is true that citizen jurors may have the opportunity to attend the deliberations in which professional judges discuss the interpretation of laws and regulations, the attendance of citizen jurors at these deliberations is not required or even presumptively permitted. Instead, citizen jurors may only attend and give their opinions if the professional judges jointly agree to their attendance. The Saiban-in Act does not provide a methodology for determining when citizen jurors should be included in these deliberations, nor does it discuss if or how citizen jurors may request to take part in the deliberations.

Notably, the JSRC Report specifically left open the question of whether citizen jurors would determine the interpretation of laws

330 Levin, supra note 11, at 222 ("Although the act provides that the professional judges will make the final decision regarding legal issues, it nevertheless suggests that the chairing judge may allow the lay assessors to participate in the decisions." (citing Anderson & Nolan, supra note 168, at 948)).

331 Levin, supra note 11, at 223 (comparing the saiban-in seido to the American jury system).

332 See Saiban-in Act, supra note 137, arts. 66 and 68(3); see also infra notes 334-43 and accompanying text.

333 See Saiban-in Act, supra note 137, art. 68(3).

334 Id.

335 See id. (explaining that the professional judges "may allow [jurors] to hear the deliberations [of the judges] and they may ask [jurors'] opinions," but not describing any additional details of the process).
and regulations. The provisions that were ultimately adopted seem to reflect two concerns expressed by those opposed to the introduction of citizen participation in the judicial system. First, the Saiban-in Act was designed to minimize the burden of participating on a saiban-in panel. This concern for citizens is expressed throughout the Act, including in a command to those connected with the judicial system "to make trials quick and easy to understand so that lay [jurors] are able to perform sufficiently their duties without their responsibility becoming onerous." The desire to reduce the burden on citizens explains, at least in part, why jurors are not expected to attend deliberations involving the interpretation of laws and regulations.

Second, many experts, including some members of the JSRC, were worried that the introduction of citizen participation would decrease uniformity in decision-making, particularly given the Japanese citizens' lack of understanding of their legal rights. This latter concern may explain why citizen jurors have been given no authority to determine issues of law, even in tandem with professional judges.

The citizen jurors' lack of participation in law-related deliberations is compounded by the fact that the Saiban-in Act specifically requires jurors to make determinations in accordance with the presiding judge's instructions on the interpretation of laws and regulations. Although the propriety of jury nullification is intensely debated among legal scholars, there is

336 See supra note 257 and accompanying text.
337 See Saiban-in Act, supra note 137, art. 51.
338 Id.
339 See supra notes 239-41 and accompanying text.
340 See supra notes 239-45 and accompanying text.
341 See Saiban-in Act, supra note 137, art. 66; see also Levin, supra note 11, at 22-23 (explaining the procedure by which judges and citizen jurors make decisions).
342 See, e.g., Andrew D. Leipold, Rethinking Jury Nullification, 82 VA. L. REV. 253, 312-22 (1996) (proposing alternatives to jury nullification); Parmenter, supra note 35, at 402-27 (advocating for the retention of jury nullification); Richard St. John, Note, License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking, 106 YALE L.J. 2563, 2565 (1997) (arguing that juries should not have the power to nullify). Included in discussions of jury nullification is the extent to which it permits jurors to consider other characteristics of the defendant, such as race. See, e.g., Paul Butler, Black Power in the Criminal Justice System, 105 YALE L.J. 677 (1995) (advocating in favor of race-based jury nullification); see also Andrew Leipold, The
no doubt that jury nullification gives American jurors the power, albeit indirectly, to decide issues of law through the rendering of a general verdict.\textsuperscript{343} The \textit{Saiban-in Act}'s mandate that jurors make determinations in accordance with the presiding judge’s instructions, in combination with its mandate that all decisions be supported by at least one professional judge,\textsuperscript{344} accords citizen jurors no opportunity to collectively affect a decision if they believe that the presiding judge’s instructions on the law are incorrect. The \textit{Saiban-in Act} thus provides a limited opportunity for citizen jurors to listen to and participate in deliberations on issues of law. The role of the citizen juror in the Japanese system is somewhat analogous to the role of judges in colonial Massachusetts; they may share their understanding with the ultimate decision makers, but they have no authority in the decision-making process.\textsuperscript{345} In fact, citizen jurors in Japan have even less input than did judges in colonial Massachusetts, for citizen jurors cannot even share their opinions unless the judges agree to allow them to participate in their deliberations.\textsuperscript{346}

3. Recommendations

Given the importance the Founders placed on allocating to jurors the authority to decide issues of law, the American judicial system should consider incorporating citizen input into the interpretation of laws that come before the court. Such citizen input would promote the Founders’ conception of the jury,\textsuperscript{347} in that it would put citizen jurors in a position to meaningfully participate in the democratic process and learn more about the law as they deliberate with judges.

On the other hand, if a system similar to the \textit{saiban-in seido


\textsuperscript{343} See infra note 355 and accompanying text.

\textsuperscript{344} See \textit{Saiban-in Act}, supra note 137, art. 67.

\textsuperscript{345} See \textsc{Nelson}, supra note 82, at 3 (explaining the decision-making powers of juries in colonial Massachusetts).

\textsuperscript{346} See \textit{Saiban-in Act}, supra note 137, art. 68(3).

\textsuperscript{347} See supra notes 321-24 and accompanying text.
were to be adopted in the United States, several modifications would be necessary to ensure that the system would better effectuate the Founders' conception of the right to trial by jury.

The deliberation provisions of the *Saiban-in Act* would need to be revised so that citizen jurors have the option to attend deliberations and share their opinions, irrespective of whether professional judges wish them to attend. As it stands, citizen participation is at the will of professional judges,\(^348\) which lessens the likelihood that citizens will broadly participate in deciding issues of law. Furthermore, it is problematic to allow professional judges to be the "gatekeepers" of citizen participation, since one of the purposes behind allowing citizen participation is so that citizens may operate as a check on governmental and judicial overreaching.\(^349\) If citizens are not permitted to attend deliberations, their exclusion limits the transparency of the system and increases the chances that such overreaching will continue.

In addition to giving jurors an invitation to attend and participate in deliberations, the *saiban-in seido* voting rules would need to be modified to allow jurors to vote on the interpretation of at least some laws and regulations. There are various ways that this could be accomplished. For instance, citizen jurors could be obligated to attend and vote on issues of law in instances where there is no consensus among the professional judges. Alternatively, such procedures could be triggered whenever one of the parties puts an issue of law squarely before the panel. No matter how such a procedure is implemented, it is important—both to the role of the citizen juror as a meaningful participant in the democratic process, and to the importance of the jury in the administration of justice—that jurors have not only an opportunity to share their viewpoints, but also a meaningful opportunity to have their viewpoints shape the decision-making of the court.

\(^348\) See, e.g., *Saiban-in Act*, supra note 137, art. 68(3) (exemplifying a provision of the *Saiban-in Act* in which the professional judges determine whether or not citizen jurors will participate in deliberations).

\(^349\) See *supra* notes 216-18 and accompanying text.
B. The Mixed Court and Joint Decision-making as to Guilt and Punishment

1. Advantages

Since the saiban-in seido consists of citizen jurors and professional judges sitting together on the same panel, it shares many similarities with other “mixed court” tribunals. Several scholars in the 1980s and 1990s, including most notably John H. Langbein, lauded the virtues of mixed court tribunals, and in particular the German system. Much of the positive response to mixed court tribunals was related to their efficiency and greater accuracy in fact finding; there was only limited discussion about whether mixed court tribunals advanced the Founders’ conception of the right to trial by jury. At most, the scholarship posited that mixed court tribunals did not contravene the Sixth Amendment right to trial by jury.

In fact, one can argue that mixed court tribunals further the Founders’ conception of the right to trial by jury, and in particular its role of increasing citizen participation in the democratic process. Unlike all-citizen jury systems such as those in the United States, in a mixed court tribunal citizen jurors and professional judges deliberate together on the merits of cases. During these deliberations, citizens should have an opportunity to learn more about the law and the workings of the judicial system directly from professional judges, fulfilling the educational role of jury service. Just as important, however, is the potential for

---


351 See, e.g., Langbein, supra note 350, at 201-02.

352 See, e.g., Alschuler, supra note 350, at 936-37.

353 Bloom, supra note 186, at 39-40 (describing the method of joint deliberation and decision-making in mixed court tribunals).

354 See id.
professional judges to interact with, and learn from, citizen jurors. This feedback is missing from American jury trials in criminal cases, except perhaps indirectly through the rendering of general verdicts.\textsuperscript{355}

Mixed court tribunals provide for joint decision-making not only in rendering verdicts, but also in determining sentencing.\textsuperscript{356} With few exceptions, there is no opportunity for jurors in the modern American system to participate in the determination of sentencing.\textsuperscript{357} This lack of participation is in contrast to the jury system at the time of the Founding, when jurors were generally afforded more participation in sentencing.\textsuperscript{358} Opportunities for citizen participation enabled jurors to mitigate sentences when they felt that the law was too harsh, either as applied to the defendant or in relation to all defendants.\textsuperscript{359} Citizen participation on mixed court tribunals could theoretically serve the same purpose, with the additional advantage of providing a forum for citizen jurors and professional judges to jointly discuss and decide the appropriate sentence for a particular defendant.

In addition to the benefits that stem from mixed court tribunals, the \textit{saiban-in seido} has other aspects that further promote the Founders' conception of the right to trial by jury. First, the composition of the tribunals and method of rendering decisions are unique; as discussed in Part IV, a panel generally consists of six citizen jurors and three professional judges.\textsuperscript{360} While the composition of mixed court tribunals varies around the world, in Japan, the two to one ratio and large number of jurors on each panel serve to increase the amount of citizen participation on

\textsuperscript{355} Andrew D. Leipold, \textit{The Problem of the Innocent, Acquitted Defendant}, 94 Nw. U. L. REV. 1297, 1301-02 (2000) (explaining that a general verdict provides very limited information, if any, on the reasons for a jury’s decision).


\textsuperscript{357} See \textit{supra} notes 110-20 and accompanying text.

\textsuperscript{358} See \textit{supra} notes 99-109 and accompanying text.

\textsuperscript{359} See \textit{supra} notes 100-06 and accompanying text.

\textsuperscript{360} See \textit{Saiban-in Act}, \textit{supra} note 137, art. 2(2). The potential numerical composition of a tribunal is discussed more extensively in \textit{supra} notes 267-68 and accompanying text.
each case and in the judicial system as a whole.\textsuperscript{361} All decisions must be supported by a majority of panel members, including at least one citizen juror and one professional judge.\textsuperscript{362} It follows that citizen jurors and professional judges each have the collective power to veto a decision by the other group. Such veto power is consistent with the concept of the “bicameral judiciary,” since at least one member from each group is needed to concur in a decision.

Second, citizen jurors in Japan serve only on one case, which increases the breadth of citizen participation in the judicial system.\textsuperscript{363} In the German system, by contrast, citizens are selected for four-year terms; such lengthy terms arguably “professionalize” the jury and decrease the breadth of citizen participation.\textsuperscript{364}

2. Drawbacks

When Japan announced its intention to adopt a mixed court tribunal instead of an all-citizen jury system, several scholars criticized the decision.\textsuperscript{365} Much of this criticism was due to the German system, which has been the most studied of the mixed court tribunals.\textsuperscript{366} The German system has been characterized as one of “[j]udicial dominance,”\textsuperscript{367} in which “jurors are likely to

\textsuperscript{361} See Weber, supra note 192, at 165 (noting that the Japanese system promotes more citizen participation than other mixed court tribunals such as the German system due to the number of citizen jurors and the ratio between the citizen jurors and professional judges).

\textsuperscript{362} See Saiban-in Act, supra note 137, art. 67. This unique feature of the Act is discussed more extensively in supra notes 282-86 and accompanying text.

\textsuperscript{363} Indeed, the JSRC recognized this benefit in issuing its recommendations for reform. See JSRC REPORT, supra note 250 (“To provide the opportunity to as many people as possible and to avoid excessive burden on those selected, new saiban-in should be selected for each specific case and should be released when they have served for the entire case up through the judgment on it.”).

\textsuperscript{364} Kiss, supra note 138, at 271-72. Kiss argues that the professionalism of the German jury “may diminish the effectiveness of” the system. Id.

\textsuperscript{365} See, e.g., Katsuta, supra note 10; Kodner, supra note 160, at 245-54; Landsman & Zhang, supra note 169, at 194-97; Levin, supra note 11, at 216-19.

\textsuperscript{366} See generally Landsman & Zhang, supra note 169, at 194 (discussing the German system).

defer to the judge too often and too quickly.\footnote{368} Empirical studies substantiate these observations, as citizen participation has been shown to affect the determination of guilt in only 1.4\% of cases.\footnote{369} Furthermore, citizen participants in the German system have taken a passive role during trial; although they are technically permitted to ask questions, they rarely do so.\footnote{370} Therefore, the role of citizen participants in the German system is seen as symbolic rather than as meaningful.\footnote{371}

Initially, at least, it appears that the Japanese system is faring better than the German system at encouraging citizen jurors to actively participate during trial.\footnote{372} The reasons for this difference may be attributable to how the saiban-in seido was conceived and implemented. The JSRC Report and Saiban-in Act both provided that citizen jurors were to be accorded the same authority as professional judges to participate during trial and in deliberations, “entrust[ing] [them] to decide freely based on the strength of the evidence.”\footnote{373} During the interim period between the enactment of the Saiban-in Act and the first trial under the system, judges participated in a series of mock trials to ensure that they would not

\begin{footnotes}
\footnote{368} Jenia Iontcheva, \textit{Jury Sentencing as Democratic Practice}, 89 \textit{VA. L. REV.} 311, 375 (2003); \textit{see also} Landsman & Zhang, \textit{supra} note 169, at 194-95 (criticizing the German system).

\footnote{369} Langbein, \textit{supra} note 350, at 204 (summarizing the results of an empirical study conducted by Casper and Zeisel).

\footnote{370} Dubber, \textit{supra} note 367, at 582; Kodner, \textit{supra} note 160, at 249.

\footnote{371} Dubber, \textit{supra} note 367, at 582; \textit{see also} Levin, \textit{supra} note 169, at 217 (explaining that judges often negotiate settlements to avoid any citizen participation in cases). In addition to concerns about the functioning of the German system, some scholars warned that a mixed court tribunal would be especially prone to judicial dominance in Japan. \textit{See, e.g.}, Kiss, \textit{supra} note 138, at 275. According to this theory, the hierarchal nature of Japanese society would cause citizen jurors to defer to the decision-making of professional judges on the panel, because the judges would be considered a higher authority. \textit{Id.} Anderson and Nolan have rejected this claim, calling it a “rather simplistic cross-cultural assumption of automatic difference.” Anderson & Nolan, \textit{supra} note 168, at 988. They note that the judicial system reforms were aimed at increasing the autonomy of Japanese citizens, and thus the reforms may themselves have the effect of reducing deference to authority. \textit{See id.}

\footnote{372} \textit{See} Ibusuki, \textit{supra} note 306, at 44-46 (discussing positive impact of saiban-in seido); Senger, \textit{supra} note 11, at 761-62, 765-66 (noting that the Japanese response to the system may be “[b]etter than expected”).

\footnote{373} Saiban-in Act, \textit{supra} note 137, art. 62.
\end{footnotes}
unduly influence citizen jurors. Although the *Saiban-in Act* did not contain specific guidance on how deliberations should be conducted, the Japanese Supreme Court has implemented rules to further encourage citizen participation in deliberations. For instance, professional judges are instructed “to state their opinion [on an issue] only after [citizen] jurors have stated theirs.” In addition, judges are to try to refrain from “actively persuading jurors” at the beginning of deliberations in order to allow for a free and open conversation about the evidence. The comprehensive public relations campaign launched by the Japanese Supreme Court and Ministry of Justice further served to educate the Japanese public about the *saiban-in seido* and the rights and duties of citizens who participate in *saiban-in* trials.

Notwithstanding the perceived differences between the Japanese and German systems, there are some aspects of the structure of the *saiban-in seido* and its method of decision-making that limit its ability to fully promote the Founders’ conception of the right to trial by jury.

First, little is known—or lawfully can be known—about the actual deliberations between the citizen jurors and professional judges. That is because the *Saiban-in Act* has imposed strict confidentiality provisions, violations of which may result in fines or imprisonment. These confidentiality provisions thwart the optimal functioning of the jury system because it is unknown whether the “judicial dominance” that is characteristic of the German system is actually occurring in Japan behind closed doors. Nor are there any exceptions to the confidentiality provisions in cases of citizen juror or professional judge misconduct. More fundamentally, the confidentiality provisions

---

375 Id.
376 Id.
377 Id.
378 See *supra* notes 294-96 and accompanying text.
379 See *Saiban-in Act, supra* note 137, art. 79.
380 See Levin & Tice, *supra* note 206 (noting that the secrecy provisions “may chill or bar reports of irregular or illegal procedures”); Wilson, *Japan’s New Criminal Jury Trial System, supra* note 289, at 539-41 (explaining how misconduct or judicial domination could go unchecked under the current system).
restrict the ability of citizen jurors to meaningfully discuss the substance of their experiences with others in the community. If the saiban-in seido is meant to be used as a tool to teach citizens about their role in the democratic process, as the Founders would have intended, the provisions unnecessarily restrict the reach of that tool to those persons who happen to be selected for jury service. Such a limited reach is also contradictory to the stated purpose of the Saiban-in Act, which is to “promot[e]... the public’s understanding of the judicial system and thereby raise their confidence in it.”

Second, the procedure for determining sentencing does not promote meaningful citizen participation or deliberation. Unlike the rules for rendering verdicts, which require a majority of panel members to concur to render a binding decision, there is no requirement that a majority of panel members reach the same sentence. Instead, the Saiban-in Act lays out a rule in which the five (or, in the case of an uncontested trial, three) most punitive punishments are grouped together, and the least punitive option among them becomes the sentence. In effect, this rule of convenience eliminates the need for panel members to jointly deliberate on sentences, as a consensus need not be reached in order to render a binding decision. Instead, a sentence merely reflects the median sentence of panel members.

Third, the requirement that sentencing decisions include at least one professional judge limits the authority of citizen jurors to determine sentences free of judicial control, particularly in non-contested cases, where there is only one judge on the panel. There is also evidence that judges provide jurors information relating to the typical sentences of similarly situated defendants at

382 Id. at 534-37.
383 See Levin & Tice, supra note 206 (“Thus we find it profoundly ironic that the [Saiban-in Act], which clearly states its purpose is to promote citizen understanding, employs a harsh secrecy regime that operates in opposition to the law’s intended purpose.”).
384 See Saiban-in Act, supra note 137, art. 1.
385 See id. art. 67.
386 See id.
387 See id.
388 See id.
389 See Saiban-in Act, supra note 137, art. 67.
the outset of sentencing deliberations, contrary to their obligation to refrain from unduly influencing deliberations.

3. Recommendations

Given the history of the all-citizen jury system in the United States, it is difficult to imagine a complete transformation to a mixed court tribunal similar to that in Japan. Indeed, there are some scholars who suggest that such a system would in fact contravene the Sixth Amendment right to trial by jury, as interpreted in Duncan v. Louisiana. On the other hand, it is more likely that joint decision-making would be possible in connection with sentencing, since the determination of sentences has been shared between judges and juries in some states at earlier times in American history.

If a mixed court panel similar to that in Japan were to be adopted in the United States for purposes of determining sentencing, several modifications to the system would need to be made. The confidentiality provisions, while promoting free exchange of ideas during deliberations, ultimately do not ensure adequate citizen participation and understanding of the judicial system. At the very least, exceptions to the confidentiality provisions should be made for allegations of misconduct. Optimally, all post-trial confidentiality restrictions would be eliminated so that jurors could freely discuss their experiences with other citizens. Informal discussions extend the educational benefits of jury service beyond those who directly participate in the system.

---


392 See supra notes 99-109 and accompanying text.

393 See Levin & Tice, supra note 206.

394 Id.

395 See Wilson, Japan’s New Criminal Jury Trial System, supra note 289, at 526-37 (advocating for relaxation in confidentiality rules, in part, to increase the educational
In addition to relaxing or eliminating the confidentiality provisions of the Saiban-in Act, measures would need to be included to ensure that citizen participants and members of the judiciary have the opportunity to jointly deliberate and decide on an appropriate sentence. Although a rule of convenience such as that in the Saiban-in Act is understandable, given the desire to minimize the burden on citizen participants, such a rule should not automatically take effect after the first vote. Instead, such a rule should take effect only in an instance in which there have been substantial deliberations and there is a deadlock on the appropriate sentence to impose. Furthermore, there should be no requirement that a professional judge be included in the majority. To the extent that there is concern that citizen jurors might impose a sentence that is too harsh, such a concern is addressed by allowing a defendant to appeal the sentence, subject to a deferential standard such as the abuse of discretion standard currently used in federal courts.

C. Defendant’s Inability to Waive Trial by Saiban-in Panel

1. Advantages

At the time of the Founding, the right to trial by jury was not conceived of as solely an individual right, to be exercised at the option of the accused. To the contrary, Article III of the Constitution dictates that “the trial of all Crimes . . . shall be by jury,” which indicates that the right was intended to be an integral part of the structure of government. Indeed, the Founders’ conception of the right to trial by jury, including its function as a check on the judiciary and other branches of government, would be diminished if defendants were permitted to waive jury trials and have their cases heard by judges. Furthermore, if a substantial portion of defendants opted to waive jury trials, the number of waivers would likewise decrease citizen participation in the judicial system, and, ultimately, the role that the jury plays in the administration of justice.

aspects of jury reform); see also Levin & Tice, supra note 206 (criticizing the confidentiality and secrecy rules in the Saiban-in Act).

396 AMAR, supra note 6, at 104; see also Gardina, supra note 134, at 374-77.

397 U.S. CONST. art. III, § 2; see also Gardina, supra note 134, at 377-78.

398 Gardina, supra note 134, at 377-78.
The pre-war jury system in Japan provides an apt example of the potential detrimental impact of giving defendants an option to waive trial by jury. Despite its relatively high acquittal rate and initially positive response, defendants increasingly opted to waive jury trials—so much so that there were only two jury trials in the final year of the pre-war jury system.\textsuperscript{399} Given the lack of citizen participation in the pre-war jury system, it is not surprising that the \textit{Saiban-in Act} does not allow defendants to waive jury trials.\textsuperscript{400}

Nevertheless, this view of the Founders' conception of the right to trial by jury is in direct contrast to that espoused in \textit{Patton v. United States},\textsuperscript{401} in which the Supreme Court held that defendants may be given the option to waive trial by jury.\textsuperscript{402} The \textit{Patton} Court's characterization of the right to trial by jury as a right of the accused has been strongly criticized by scholars, including Akhil Amar.\textsuperscript{403} Amar has taken issue with the \textit{Patton} Court's description of the historical right to trial by jury and its blanket statement that "[t]he record of English and colonial jurisprudence antedating the Constitution will be searched in vain for evidence that trial by jury in criminal cases was regarded as a part of the structure of government."\textsuperscript{404} As discussed in Part II.B, the right to trial by jury was in fact conceived primarily as a part of the structure of government. To that end, a defendant should not have the option to exclude the "lower bench" from participating in the administration of justice.\textsuperscript{405}

\section*{2. Drawbacks}

Assuming that a criminal defendant's inability to waive trial by \textit{saiban-in} panel is consistent with the Founders' conception of the right to trial by jury, the only outstanding concern is whether the proper cases are tried by the \textit{saiban-in seido}. Unlike the pre-

\begin{itemize}
  \item[\textsuperscript{399}] Vanoverbeke, \textit{supra} note 183, at 25.
  \item[\textsuperscript{400}] See \textit{supra} note 264 and accompanying text.
  \item[\textsuperscript{401}] 281 U.S. 276 (1930).
  \item[\textsuperscript{402}] \textit{Id}. at 308.
  \item[\textsuperscript{403}] \textit{Amar, supra} note 6, at 104-05.
  \item[\textsuperscript{404}] \textit{Patton}, 281 U.S. at 296.
  \item[\textsuperscript{405}] See \textit{Amar, supra} note 6, at 104 (noting that the "bicameral analogy is historically apt" when considering a jury's role and whether defendants should have the right to waive jury trials).
\end{itemize}
war jury system, which excluded several categories of cases involving the government,\(^4\) the *saiban-in seido* applies to all cases punishable by death or life imprisonment and crimes punishable by at least one year in prison in which the victim died as a result of an intentional criminal act.\(^5\) Examining the process by which Japanese reformers considered which categories of cases should be subject to the Act, it appears that the decision was based solely on the ideal number of cases that could be heard by the system.\(^6\) The basis of such a decision should not be the ideal caseload, but rather the types of cases in which citizen participation would be most beneficial.\(^7\) For instance, it is unclear why the system generally excludes crimes punishable by one-year imprisonment, except for cases in which the victim dies as a result of an intentional act.\(^8\)

Even more troubling than the arbitrary nature of the crimes subject to the system is the authority of the prosecutor’s office to charge a crime in such a way that it falls inside or outside the *Saiban-in Act*.\(^9\) There is evidence that prosecutors’ offices have been exercising this authority since the introduction of the *saiban-in seido*; for instance, a prosecutor dropped a charge of “rape resulting in bodily injury” and instead indicted the defendant on a charge of “rape,” which falls outside the *Saiban-in Act*.\(^10\) This exercise of prosecutorial discretion likely explains why the number of *saiban-in* trials in the first year was approximately forty percent lower than the number had been expected at the time of the introduction of the *saiban-in seido*.\(^11\) Given that one of the driving forces behind judicial reform was the perception that prosecutors were unduly influencing criminal trials, this type of discretionary charging authority is problematic.\(^12\)

\(^{406}\) See supra notes 179-81 and accompanying text.

\(^{407}\) *Saiban-in Act*, supra note 137, art. 2; see also *Court Act*, supra note 263 (specifying crimes falling under this provision).

\(^{408}\) Anderson & Nolan, supra note 168, at 950-52.

\(^{409}\) See id.

\(^{410}\) *Saiban-in Act*, supra note 137, art. 2.

\(^{411}\) Anderson & Nolan, supra note 168, at 953; Ibusuki, supra note 306, at 50-51; Levin, supra note 11, at 211-12.

\(^{412}\) Ibusuki, supra note 306, at 50-51.

\(^{413}\) See id. at 39, 51.

\(^{414}\) See Levin, supra note 11, at 211-12.
3. Recommendations

Because the right to trial by jury concerns the relationship between the citizen participants and other parts of government, rather than solely the relationship between the accused and the judicial system, criminal defendants charged with serious offenses should not have the option of waiving trials. Although the Saiban-in Act ostensibly ensures that saiban-in panels hear serious crimes, careful consideration was not given to the types of cases that should be heard by the system. Furthermore, the Saiban-in Act does not address the loophole that allows prosecutors' offices to exercise their charging discretion to effectively remove cases from the saiban-in seido. This loophole is exacerbated by the arbitrary distinctions between the types of crimes that are subject and not subject to the Act. If the saiban-in seido were to be adopted in the United States, these types of loopholes would need to be eliminated so that the proper cases would be heard by jurors.

VI. Conclusion

The Saiban-in Act is scheduled for review and possible modification in May 2012, three years after the introduction of the saiban-in seido. At that time, there will undoubtedly be much discussion about whether the saiban-in seido has met its stated goals and how the system can be refined to increase its success. While the saiban-in seido was ostensibly adopted for the purpose of providing meaningful citizen participation in the judicial system, there are aspects of the system that limit its effectiveness as a democratic tool. Moreover, it appears that other practical concerns—including the desire for uniformity in decision-making and the desire to limit the burden on citizen participants—have resulted in compromises that give too much authority to

---

415 See Saiban-in Act, supra note 137, art. 2 (listing the crimes covered by the Act).
416 See supra notes 411-14 and accompanying text.
417 See supra notes 411-14 and accompanying text.
418 See Saiban-in Act, supra note 137, supp. art. 8; see also Press Release, Japan Fed'n of Bar Ass’n, Bill on Lay Judge Sys. and Crim. Pro. Reform Clears Lower House (Apr. 23, 2004), available at http://www.nichibenren.or.jp/en (select “News Release;” select “2004;” select “2004/04/23, Bills on Lay Judge System”) (“The Government will review the . . . saiban-in system after 3 years of its enforcement and, if necessary, take appropriate measures to ensure that this new criminal trial system is functioning effectively as a foundation of the judicial system in Japan.”).
professional judges.

Despite its limitations, the *saiban-in seido* is a new category of citizen participation system. On the one hand, it was designed as a broad citizen participation system similar to that of the United States. On the other hand, its makers eschewed an all-citizen jury system in favor of a mixed court tribunal, but its composition and voting rules are distinct from other mixed court tribunals. The *saiban-in seido* was designed to promote joint deliberations between citizen jurors and professional judges, albeit behind closed doors and subject to strict confidentiality restrictions. The *Saiban-in Act* even provides an opportunity for citizen jurors to express their views on issues of law, although this opportunity is limited to instances in which professional judges agree to allow citizen participation. Defendants do not have the right to waive trials that are subject to the system, but there are no assurances that the proper cases will be heard by *saiban-in* panels.

Given the similarities between the Founders’ conception of the right to trial by jury and the goals for judicial reform in Japan, those interested in jury reform should consider the *saiban-in seido* as an alternative model to that of the United States. While the system’s approach to deciding issues of law and method of joint decision-making in sentencing show promise, perhaps those reviewing the *Saiban-in Act* in 2012 will continue refining the system so that it better promotes its stated goals—as well as our own.

---

419 See Levin, supra note 11, at 205-06.
420 See id. at 207-11.
421 See id. at 206 (discussing the goals of the *saiban-in seido*).
422 See Saiban-in Act, supra note 137, supp. art. 68(3).
423 See supra notes 406-16 and accompanying text.