The somewhat less reluctant litigant: Japan's changing view toward civil litigation
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THE SOMEWHAT LESS RELUCTANT LITIGANT: JAPAN'S CHANGING VIEW TOWARDS CIVIL LITIGATION

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Ever since Professor Haley's insightful article *The Myth of the Reluctant Litigant*,[1] students of Japanese law have suggested various reasons for the marked difference in litigation rates between the United States and Japan.[2] Some maintain that the Japanese are reluctant litigants for cultural and social reasons,[3] while others contend that there are structural reasons that compel the Japanese to avoid litigation when possible.[4] Still others suggest that because the ultimate result of Japanese litigation is more predictable than in the United States, the Japanese are simply rational litigants, or non-litigants as the case may be.[5] Of course, these are not necessarily conflicting theories,[6] and it is this author's view that facts support, in some measure, each of these

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1. John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359 (1978).

2. The mere fact that the Japanese may be less litigious than Americans does not ipso facto mean that they are nonlitigious. As Haley has noted, "[a]lthough litigation rates in Japan are low compared with some industrial democracies, particularly the United States, they are higher than others, especially the Scandinavian states. More telling, civil dockets in Japan are generally more crowded than in Canada or the United States." John O. Haley, *Dispute Resolution in Japan: Lessons in Autonomy*, 17 CAN.-U.S. L.J. 443, 444 (1991).

3. *See* Richard B. Parker, *Law, Language, and the Individual in Japan and the United States*, 7 WIS. INT'L L.J. 179, 179-80 (1988) ("Ordinary Japanese citizens regard a resort to law to settle private disputes as a general disgrace to all concerned. The distaste of the Japanese for law has been widely noted. The most common explanation given for the phenomenon is that Western legal traditions conflict with the value Japanese place on mutual trust, personal interdependence, and group harmony."); THE JAPANESE LEGAL SYSTEM 306-07 (Hideo Tanaka ed., 1976).

4. *See, e.g.*, Nobutoshi Yamanouchi & Samuel J. Cohen, *Understanding the Incidence of Litigation in Japan: A Structural Analysis*, 24 INT'L LAW. 443 (1991); Harold See, *Dispute Resolution in Japan: A Survey*, 10 FLA. ST. U. L. REV. 339 (1982).

5. *See generally* Haley, *The Myth of the Reluctant Litigant*, *supra* note 1.

6. *See* J. Mark Ramseyer, *The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, 94 YALE L.J. 604, 609 (1985) ("Although this Article presents the two factors as separate and distinct, the nonlitigious ethos and the institutional

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views. Nonetheless, much has changed since the late 1970s, and the time is ripe to re-examine whether the modern Japanese are becoming less reluctant litigants.

I. VIEWING JAPANESE LITIGATION PATTERNS THROUGH THE IMPERFECT LENS OF U.S. SOCIETY

In order to consider whether the Japanese, or any other people, are composed of "reluctant" or "willing" litigants, one must first determine what the norm is from which degrees of reluctance or willingness should be measured. For the American writer the norm would appear to be that of his or her own society. But even for an American, is the United States the appropriate norm from which to view the behavior of people in other societies? There is anecdotal evidence (both inside and outside U.S. borders) questioning whether there is something "wrong" with American society that has made Americans overly litigious.[7] Whether Americans are overly litigious or not litigious enough, however, an analysis should be made to determine whether the United States is an appropriate model by which to measure the behavior of others. It is suggested that it is not and thus the typical discussion of Japanese reluctance to litigate may require reconsideration.[8]

In order to determine if a society is overly litigious, it is necessary to first explore the purpose of its litigation system. In the United States, the criminal justice litigation system is designed both to rehabilitate and punish those who are guilty of committing antisocial activities that

barriers to litigation are mutually reinforcing rather than mutually exclusive."); *see also* JOSEPH W. S. DAVIS, DISPUTE RESOLUTION IN JAPAN 121-49 (1996).

7. In 1998,

> the 50 states, the District of Columbia, and Puerto Rico reported over 91 million new cases filed in our nation's state courts in 1998—the largest amount since 1992 . . . . Nearly 15.5 million civil (non-domestic relations) cases were filed in State courts during 1998. Since 1984, limited and general jurisdiction cases have increased 38% and 29% respectively.

WANT'S FEDERAL-STATE COURT DIRECTORY 363 (2001) [hereinafter WANT'S 2001].

8. The year 2000 U.S. presidential election melodrama illustrates the expansive use of litigation and the role of the judicial branch in the United States. *See* Bush v. Gore, 121 S. Ct. 525 (2000); Bush v. Palm Beach County Canvassing Bd., 121 S. Ct. 471 (2000). What is of interest here is that not only the candidate but also partisans for each side used litigation to try to either get ballots counted or not counted—as would help their candidate.

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rise to a level that causes society to define the conduct as criminal.[9] For this reason, the United States has adopted mandatory sentencing for certain crimes, has enacted laws requiring certain convicted persons to serve their entire sentences without parole, and has even endorsed the ultimate penalty—capital punishment. To assure (to the extent possible) that only the guilty are punished for their antisocial conduct, the United States has adopted a series of procedural protections that make it more difficult for the prosecutor to convict those suspected of crime.[10] Moreover, to guarantee that the prosecutor does not seek shortcuts around these procedural protections, the United States has constitutionalized prophylactic devices such as the exclusionary rule,[11] and civil damage actions against public servants who cross the line when seeking a conviction.[12] To assure that the government cannot abuse the system to warehouse and punish those who disagree with the government, the United States has adopted a citizen-based determin-

9. Kelly v. Robinson, 479 U.S. 36, 53 (1986) (explaining that the purpose of the criminal justice system is rehabilitation and punishment not victim compensation). This is not the sole purpose that a criminal justice system can serve. In the United States it seems clear that another purpose is to protect the public by having those who commit crimes locked up and thus unable to commit additional crimes. *Cf.* Lopez v. Davis, 531 U.S. 230, 240 (2001) (affirming Bureau of Prison's exercise of discretion in not reducing sentences of those committing a drug crime and in possession of a firearm "in the interest of public safety"). Restoration of harmony may be a more compelling need in other societies. Moreover, other societies may emphasize repairing the damage caused by criminal activities. *See generally* JIM CONSEDINE, RESTORATIVE JUSTICE: HEALING THE EFFECTS OF CRIME (1995). For an interesting comparative law analysis of the purposes behind the U.S. and Japanese criminal justice systems, see David A. Suess, *Paternalism Versus Pugnacity: The Right to Counsel in Japan and the United States*, 72 IND. L.J. 291, 306-23 (1996).

10. *See, e.g.*, U.S. CONST. amends. IV-VI; Weeks v. United States, 232 U.S. 383, 391-92 (1914) ("The effect of the Fourth Amendment is to put the courts of the United States and Federal officials . . . under limitations and restraints . . . .").

11. Mapp v. Ohio, 367 U.S. 643 (1961) (applying the exclusionary rule asserted in *Weeks*, 232 U.S. 383, to state proceedings and overruling *Wolf v. Colorado*, 338 U.S. 25 (1949)). The Japanese Constitution also protects against unreasonable search and seizure, KENPE, art. 35, prohibits forced confessions, *id.* art. 35, 38, and grants a right to counsel, *id.* art. 37, para. 3. These rights are, however, interpreted differently in Japan. While Japan has an exclusionary rule, it is not as expansive as the U.S. rule and requires serious illegality to trigger exclusion. For a comparison of the U.S. and Japanese criminal justice systems, see Jean Choi DeSombre, *Comparing the Notions of the Japanese and U.S. Criminal Justice Systems: An Examination of Pretrial Rights of the Criminally Accused in Japan and the United States*, 14 UCLA PAC. BASIN L.J. 103 (1995); *see also* JOHN OWEN HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX 128-137 (1991).

12. *See* Civil Action for Deprivation of Rights, 42 U.S.C. § 1983 (2000); *see also* Howlett v. Rose, 496 U.S. 356 (1990); Malley v. Briggs, 475 U.S. 335 (1986); Haring v. Prosise, 462 U.S. 306 (1983); Harlow v. Fitzgerald, 457 U.S. 800 (1982); Monroe v. Pape, 365 U.S. 167 (1961).

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ing system to judge guilt or innocence—the jury.[13]

In the civil law arena, the United States has also adopted a system to carry out certain policy objectives. While perhaps less universally recognized by the populace than the policy objectives behind the criminal law system, the policy choices that the United States has made as a society have determined the character and substance of its civil procedure system. Thus, in the United States there are several functions that the civil litigation system is designed to further that other societies may decide should be handled differently. To the extent that a society determines to handle these matters differently, its civil trial system will reflect that difference and its litigation rates may differ. To then compare those litigation rates and determine that in one case litigants are reluctant while in another they are not is to view matters through a distorted lens. Indeed, when a society determines that it will change the purpose of at least part of its civil legal system we should expect to see (and in the case of Japan we can begin to see) a change in litigation norms and outcomes.[14] Thus, a change in purpose can affect cultural and societal norms defining litigation, the structural barriers to litigation, the remedies available and the anticipated amount of damages awarded from litigation. These societal changes require that the question of reluctance be viewed through a different lens.

A. *Law Enforcement*

One of the major differences between the American and Japanese view of the function of a legal system relates to the question of law enforcement. In Japan the government, especially the entrenched

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13. Williams v. Florida, 399 U.S. 78, 100 (1970) (explaining that the jury interposes the common sense judgment of a group of laymen between the government and those accused of crime).

14. Japanese rental housing is, as a general rule, much smaller than Western norms. This situation is blamed, in substantial part on the fact that "Japanese courts give every tenant the right to stay in a unit as long as he likes, provided only that he pay rent at a rate a court approves." J. MARK RAMSEYER & MINORU NAKAZATO, JAPANESE LAW: AN ECONOMIC APPROACH 39 (1999). Recently, Japan adopted new legislation designed to permit a landlord to force a tenant to leave a rental unit provided the original lease is for a fixed term of four years. The new law does not affect pre-existing leases. Nonetheless it should result in landlords being willing to construct and renovate to create larger apartments without fear that the new tenant can stay forever. *See* Tomoko Otake, *New Law Means Marching Orders for Bad Tenants,* JAPAN TIMES ONLINE (Oct. 12, 2000), *at* http://www.japantimes.co.jp (explaining that if such larger apartments are created and rented on four-year lease terms as contemplated by the new law and if tenants then refuse to leave as requested when the lease expires, one can anticipate that Japanese landlords will sue under the new law to evict tenants).

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bureaucracy, views itself as the appropriate enforcer of legal norms.[15] This view is reflected in various ways. First, legislation is typically drafted by the bureaucracy[16] in what Americans would view as hortatory terms. Such drafting excludes the possibility of creating a private right cause of action that can be enforced by a civil damage action.[17] Examples of such hortatory legislation abound. For example, Chapter 4 of the Administrative Procedure Law of July 1994 (APL), entitled "Administrative Guidance," provides:

> In rendering Administrative Guidance, persons imposing Administrative Guidance shall take care that their actions not exceed, in the slightest degree, the scope of the duties or designated functions of the Administrative Organ concerned and that the substance of the Administrative Guidance is, to the utmost degree, realized based solely upon the voluntary cooperation of the subject party.[18]

While stating a general rule of conduct for those giving Administrative Guidance, Chapter 4 contains no provision for judicial review of such guidance and contains no right given to the subject of the guidance. Thus, the section, while providing that administrative officials should not undertake certain actions, does not provide that the subject of such actions has a judicially enforceable right if the administrative official acts contrary to the law.[19] Moreover, to the extent that the APL may be

15. Hideo Tanaka & Akio Takeuchi, *The Role of Private Persons in the Enforcement of Law: A Comparative Study of Japanese and American Law*, 7 L. JAPAN 34, 36 (1974); *see also* FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 54-60 (1987).

16. In the United States, the Executive Branch cannot submit bills to Congress on its own, but must get a friendly Member of Congress to submit the bill on its behalf. Congressional Committees and individual representatives and senators have large staffs that write and edit proposed legislation. In comparison, in Japan most legislation is written by the Administrative Agencies or Cabinet Departments and submitted to the Diet by the ruling party. *See* Mamoru Seki, *The Drafting Process for Cabinet Bills*, 19 L. JAPAN 168, 171 (1986).

17. *See* Robert W. Dziuba, *The Impotent Sword of Japanese Justice: The Doctrine of* Shobunsei *as a Barrier to Administrative Litigation*, 18 CORNELL INT'L L.J. 37 (1985); Frank K. Upham, *The Legal Framework of Japan's Declining Industries Policy: the Problems of Transparency in Administrative Processes*, 27 HARV. INT'L L.J. 425, 428-30, 444-6 (1986).

18. Gyōseitetsutsukihō [Administrative Procedure Act], Law No. 88 of 1993, art. 32.

19. Administrative Guidance, which is not subject to judicial review, may have great impact on private parties. *See* Takehisa Nakagawa, *Admininistrative Informality in Japan: Governmental Activities Outside Statutory Authorization*, 52 ADMIN. L. REV. 175, 179 (2000) ("Neither internal agency standards nor administrative guidance have legal effects, but they usually exert practical influence on private entities."). While the guidance may not exceed the scope of the Administra-

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construed to contain a cause of action, such actions would be limited to the principles of the law that "are basically a restatement of judicial opinions regarding administrative guidance that appeared before the enactment of the APL."[20] Thus, the statutory enactment provides no new legally enforceable rights and contains no provisions for judicial review of administrative action in violation of the law.

Similarly the Equal Employment Opportunity Law of 1985 (EEOL) provides for equality of the sexes in five areas: (1) recruitment and hiring; (2) job assignments and promotion; (3) education and training; (4) employee benefits; and (5) retirement, mandatory retirement age and dismissal.[21] In the areas of recruitment, hiring, job assignments, and promotion, the law requires that employers "endeavor" to provide equality between women and men. The law was quite specific in not *requiring* such equality in these areas and creates no private right, let alone a right that could be enforced through judicial action.[22] In the remaining areas, the employer is prohibited from discriminating against women on the basis of sex. However, the law lacks any provisions that actually compel employers to comply. For example, there is no private right of action created that women could enforce through litigation. Japanese courts had, prior to passage of the EEOL, interpreted Japanese law to allow women a cause of action for discrimination in the areas of "equal pay for equal work" and mandatory retirement age. The EEOL did not take away these

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tive Organ concerned, this does not mean that there is a statutory grant of authority to the Agency giving the guidance to act in the case at issue. *Id.* at 186 ("[T]he request need *not* necessarily be part of a specific administrative program that an enabling statute (or an enabling local ordinance) has authorized an agency to implement.").

20. *Id.* at 187.

21. The EEOL was amended in 1997, effective April 1, 1999. The new law specifically prohibits discrimination against women in "recruitment, hiring, assignment and promotion." To secure compliance, the Ministry of Labor is given authority to publicize the fact that an employer has refused to follow the Ministry's "advice" to cease such discriminatory practices. Danjě Koyěkikaihě [Equal Employment Opportunity Law], Law No. 92 of 1997, arts. 5-6. In addition, mediation procedures have been improved. *See Developments in 1997*, 18 WASEDA BULL. COMP. L. 59-61 (1997).

22. Loraine Parkinson, Note, *Japan's Equal Employment Opportunity Law: An Alternative Approach to Social Change*, 89 COLUM. L. REV. 604, 607 (1989) ("The law does not provide for enforcement by means of a private action. Instead, its provisions are to be carried into effect primarily by three mechanisms: the voluntary resolution of employee complaints utilizing dispute resolution mechanisms established by the employer itself; assistance in the resolution of disputes to be given by the Directors of the Ministry of Labor (MOL) Offices of Women's and Young Workers' Affairs . . . when the two parties cannot reach a resolution; and mediation by an Equal Opportunity Mediation Commission . . . *if* both parties agree to the mediation.").

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causes of action but it did not add new causes of action for the discriminations that it purported to prohibit, let alone the discriminations that employers were to *endeavor* to abolish.[23] By failing to provide a private right of action to force compliance with the law, compliance decisions are left to the government or the bureaucracy.[24]

Even when Courts permit private litigation and create new causes of action in favor of private parties, the bureaucracy has shown a tendency to close off the litigation avenue in favor of government control over the process.[25] The "Big Four" pollution cases are a good example of the use of government power to assure that the government (i.e., the bureaucracy) retains control over social policy. The *Minamata* disease case, filed in 1967, was the first major pollution case in post-war Japan.[26] By 1969, three more pollution cases had been filed.[27] In these cases, Japanese courts liberalized the standard of proof for negligence in a pollution case and placed on the defendants a duty to use the best technology available without consideration of economic feasibility.[28] Not only were substantial damages (by Japanese standards) awarded to the plaintiffs, but the court also established a doctrine that required

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23. *See id.* at 628, 637-38 (explaining lack of private right in typically cultural terms with sections headed "The Large Toll Civil or Criminal Enforcement Suits Would Exact upon Their Beneficiaries," "The Need for a Consensus on the Desirability of Change," and "The Japanese Preference for Compromise and Negotiation").

24. *Id.* at 627 ("As may be seen from a study of the content of the EEOL, although it adopts several measures to encourage compliance and provides means for government intervention in the form of administrative guidance both to persuade employers to conform and to guide them to conformance, it establishes no measures to *compel* compliance on the part of recalcitrant employers.").

25. *See* DAVIS, *supra* note 6, at 127.

> It is the author's belief that the Japanese are basically anti-litigation as a result of a combination of these theories. "Sociological thinking", [sic] institutional barriers, and the ability to predict the outcome as well as "does it pay to litigate" are all considered when deciding whether to use the courts. The most significant factor is lack of access to the judicial system. The government, especially the bureaucrats, and the politicians to a lesser degree, do not want a third force, the Judiciary, interfering with their efforts to achieve what they think is right for the citizens of this country. While bureaucrats try to give the impression that litigation destroys the hierarchical structure of Japanese society, this attitude is only an attempt to hide their real motives.

Id.

26. *See* UPHAM, *supra* note 15, at 35.

27. *See id.*

28. *See id.* at 43-44.

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polluters to cease pollution when there existed doubt about the safety of their discharges.[29] As a consequence of the new standards of proof and the newly established rules concerning the responsibility of polluters, it became substantially easier for victims of pollution to file suit and recover considerable damages.

The Japanese government, however, saw the availability of a judicial remedy as a threat to its control over both pollution policy and its ability to set the pace at which such policy should be pursued. As a consequence, the government passed a number of measures that had the effect of creating an effective antipollution regime while at the same time moving pollution cases out of the judicial system and into a government administered complaint system where, if certain criteria are met, complainants are awarded substantial compensation.[30] Professor Upham in analyzing the government's steps to curtail the judicial remedies available to pollution victims noted:

> By the early 1980s, a decade after the height of the antipollution movement and the implementation of most of these measures, social peace had returned to Japanese society, at least in the environmental area. Environmental litigation had largely disappeared as a major political or legal factor in national policy, and the central government had recaptured the initiative in environmental planning.[31]

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29. *See id.* at 44 (stating that the compensation awards were "unprecedented").

30. Among the reforms enacted by the government was a requirement for environmental impact statements for certain projects. American law also requires such statements in many instances.

> [A]lthough Japanese and American impact assessments are similar in coverage and technique, they are radically different in legal effect. Both are conducted pursuant to elaborate guidelines and must satisfy certain criteria. But in the United States those guidelines and criteria are legally mandated by statute and enforceable in court; in Japan they are developed ministry by ministry in coordination with the Environment Agency and are of no legal force, at least in the sense of judicial review of an agency or a developer's compliance with them. In this sense they remain legally informal—legal non-events that do not increase the possibility of judicial intervention or ministerial loss of control.

UPHAM, *supra* note 15, at 60. A new Environmental Impact Assessment Law was enacted in 1997. While it unifies the procedure for assessments and permits greater public participation in the assessment process, the new law does not appear to grant a right to sue for non-compliance. *See Developments in 1997*, *supra* note 21, at 45-46.

31. *See* UPHAM, *supra* note 15, at 62.

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On the other hand, in the United States, certain types of law enforcement are not viewed as exclusively, or for that matter even as primarily, a government function. Rather, in the United States, the individual, acting as a kind of private attorney general, is given a role in law enforcement.[32] To carry out this enforcement policy, American legislation is worded, or many times construed, so as to contain a private right to sue to enforce the legislation.[33] The enforcement provisions of the Equal Employment Opportunity Act of 1974 are good examples of this phenomenon.[34] While the legislation creates an Administrative Agency, that agency has no cease-and-desist authority to prevent the individual from bringing suit, and the Justice Department is restricted to bringing major cases involving patterns and practice of discrimination.[35] The primary enforcement measure under the Act is private litigation, including class actions.[36] Similarly the Sherman Act contains criminal penalties for certain antitrust violations,[37] and both the Justice Department and the Federal Trade Commission are given authority to enforce various antitrust laws. Nonetheless, individual

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32. While criminal actions in the United States are brought by the State, most conduct that is criminal is also a civil tort. As such, the individual victim has a say in enforcement through the ability to bring a civil suit based on the same conduct that causes the State to use its criminal jurisdiction. Indeed, if the State is unsuccessful in prosecuting its case or refuses to prosecute, a private party may bring a civil action for damages. The O.J. Simpson case is an example of this private party law enforcement through the tort law. *See* Rufo v. Simpson, 103 Cal. Rptr. 2d 492 (Cal. Ct. App. 2001). In addition, if the government is successful in its prosecution, the injured party may bring a civil tort action and the criminal conviction could preclude a defendant from certain defenses under the concepts of res judicata and collateral estoppel. *See* Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568-69 (1951). As Professor Ramseyer notes, "Private litigation has long served a public purpose in the Anglo-American tradition . . . . Deterrence is thus a function not of criminal penalties alone, but rather of the sum of all public and private sanctions." Ramseyer, *supra* note 6, at 605.

33. In determining whether a statute creates a private cause of action, the crucial question is the intent of Congress. *See* Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 377-78 (1982). Congress' intent may be found from examining various factors such as "the legislative history and purposes of the statute, the identity of the class for whose particular benefit the statute was passed, the existence of express statutory remedies adequate to serve the legislative purpose, and the traditional role of the States in affording the relief claimed." Daily Income Fund Inc. v. Fox, 464 U.S. 523, 536 (1984). Once a private right of action is found to exist, the court presumes "the availability of all appropriate remedies unless Congress has expressly indicated otherwise." Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 66 (1992).

34. *See* 42 U.S.C. §§ 2000e-5 (1994).

35. *See* 42 U.S.C. §§ 2000e-6 (1994).

36. Class actions may be particularly appropriate to redress violations of civil rights. *Cf.* Manning v. Int'l Union, 466 F.2d 812, 813 (6th Cir. 1972), *cert. denied,* 410 U.S. 946 (1972).

37. *See* 15 U.S.C. § 1 (2000).

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citizens and companies are given a private cause of action when they suffer a direct financial antitrust injury.[38] To make it worthwhile for private citizens to enforce the antitrust laws, successful plaintiffs are given a bounty in the form of treble damages.[39]

Private enforcement is also a major tool of environmental law enforcement,[40] although the use of private citizen litigation to enforce environmental laws is not without criticism.[41] In the United States litigation is also used as a tool to supplement government enforcement of securities laws. Thus, class action derivative lawsuits have the salutary purpose of enforcing disclosure of information a company might otherwise wish to keep secret and can be used to enforce corporate democracy norms on Boards of Directors.[42]

The role of the individual in enforcing law is not just statutory. Traditional tort law in the United States provides for the concept of punitive damages. Punitives are designed to assure future compliance with the law by punishing defendants whose conduct has been particularly egregious.[43] In this sense, punitive damages do not compensate a particular plaintiff for the damages that she has suffered but rather

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38. *See* 15 U.S.C. § 15 (1994); *see generally* Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT'L L. 219, 222-226 (2001).

39. *See* U.S. v. Borden Co., 347 U.S. 514, 518 (1954) ("The private-injunction action, like the treble-damage action under § 4 of the Act, supplements government enforcement of the antitrust laws .... These private and public actions were designed to be cumulative, not mutually exclusive.").

40. *See* Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 340 (1990).

41. *See* Steven Lanza, *The Liberalization of Article III Standing: The Supreme Court's Ill-Considered Endorsement of Citizen Suits in* Friends of the Earth v. Laidlaw Environmental Services, Inc., 52 ADMIN. L. REV. 1447 (2000). *Compare* Robert F. Blomquist, *Rethinking the Citizen as Prosecutor Model of Environmental Enforcement under the Clean Water Act: Some Overlooked Problems of Outcome Independent Values*, 22 GA. L. REV. 337 (1988) (suggesting that Congress reign in citizen suits for penal monetary damages under the Clean Water Act), *with* David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd when Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1651-1655 (1995) (suggesting that citizen suits under the Clean Water Act have advanced compliance with the Act); *see also* Greve, *supra* note 40 (arguing that citizen suit provisions of environmental laws are a form of subsidy to environmental advocacy groups).

42. *See* Mark D. West, *Information, Institutions, and Extortion in Japan and the United States: Making Sense of Sokaiya Racketeers*, 93 NW. U. L. REV. 767, 783 (1999).

43. *See* Smith v Ingersoll-Rand Co., 214 F. 3d 1235 (10th Cir. 2000) (upholding a $17 million punitive award to a worker injured by a machine manufactured by the defendant); *cf.* BMW of N. America v. Gore, 517 U.S. 559 (1996) (holding that 500 to 1 ratio of punitive damages to compensatory damages was not reasonable).

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provide a bounty to plaintiffs whose actions enforce the law. In contrast, Japanese law contains no provision for punitive damages and contains no treble damage remedies.[44]

In the United States, not only are citizens viewed as a means of enforcing laws that enact public policy into substantive law, but citizens are also given a role in enforcing remedies that the federal government itself may have against third parties. Thus, U.S. law recognizes the qui tam lawsuit wherein the citizen sues on behalf of the United States. While the government may take over such a suit on its own behalf, the initiating citizen is entitled to a percentage of the ultimate recovery. If the government refuses to take over the case, the individual may nonetheless proceed with the litigation.[45]

B. *Avoidance of "Political" Fallout*

Rarely do Americans think of the litigation system as a means of avoiding tough political issues that ideally should be decided by the legislature, that cannot garner the necessary votes because of either popular opposition or special interest lobbying—depending on your point of view. Yet, it seems clear that on many occasions Congress, rather than directly facing an issue, "punts." Sometimes Congress kicks the ball directly to the Chief Executive himself, as it tried to do in the "Line Item Veto" case,[46] but more frequently it "delegates" authority to make difficult political decisions to an administrative agency.[47] In either event, in the United States, the matter is likely to wind up in litigation under which federal judges with life tenure are asked either to make or at least put a seal of approval on the difficult choices made by administrators.

For example, legislation such as the Occupational Safety and

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44. The Supreme Court of Japan has held that punitive damages are against the public order and for this reason refused to give comity to a judgment for punitive damages entered by a California court. *See* Takeshi Kojima, *Japanese Civil Procedure in Comparative Law Perspective*, 46 KAN. L. REV. 687, 724 n.217 (1998).

45. The U.S. Supreme Court has recently placed its seal of approval on qui tam litigation by holding that an individual plaintiff in such case has the requisite standing to sue although it would appear that such a citizen does not have the individualized interest which would typically be considered necessary for Article III standing. *See* Vermont Agency v. United States *ex rel.* Stevens, 120 S.Ct. 1858, 1861-5 (2000).

46. Clinton v. City of New York, 524 U.S. 417 (1998) (holding the line item veto law unconstitutional).

47. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW, 131-33 (1980).

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Health Act (OSHA) must assure "to the extent feasible . . . that no employee will suffer material impairment [in the workplace]."[48] Both feasibility and materiality are subject to administrative/judicial interpretation. Thus, once the agency is given authority, the legislature can stand back and let either the agency or the courts take the political heat for filling in the details. Once the agency acts, the issue will likely wind up in court through litigation challenging the agency's determination, which seeks to modify the chosen policy through a court ruling. This use of both the judiciary and executive agencies to avoid difficult choices has led some judges to try to reign in the power of agencies by hinting that such broadly worded standards may not pass constitutional muster and by threatening to resurrect *Schechter Poultry*.[49]

Similarly, civil litigation is used when policy makers cannot or will not act to deal with issues of concern to the public. The Supreme Court's groundbreaking decision in *Brown v. Board of Education*[50] resulted from a failure of political leaders to deal with the cancer of segregation in United States society. Recently, several cities and housing authorities brought suit against the makers of firearms to recover damages because the manufacturers' weapons had been used to commit crimes.[51] These crimes, in turn, caused expense to the cities involved because the cities were required to expend money on police and health services. This use of the federal court system is reflective of the fact that in the United States, one function of litigation is to protect politicians who could not summon up the courage, will, or ability to make the hard policy choices concerning firearms, but instead defer to the life-tenured federal

48. 29 U.S.C. § 655(b)(5) (1994).

49. A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935). The "delegation doctrine" has been used to uphold delegations to agencies when Congress has provided a "standard" to guide agency action and to restrain agency discretion. *See also* Yakus v. United States, 321 U.S. 414 (1944); J.W. Hampton & Co. v. United States, 276 U.S. 409 (1928). Raising concerns that the doctrine has allowed Congress too great an ability to avoid tough political issues, it has been suggested that some delegations may not be upheld. *See, e.g.*, Indus. Union Dep't. v. Am. Petroleum Inst., 448 U.S. 607, 686 (1980) (Rehnquist, C.J., concurring) (stating that legislation fails because neither the provisions at issue nor their legislative history "provide the Secretary with any guidance that might lead him to his somewhat tentative conclusion that he must eliminate exposure to benzene as far as technologically and economically possible").

50. 347 U.S. 483 (1954).

51. *See* David E. Rosenbaum, *Echoes of Tobacco Battle in Gun Suits*, N.Y. TIMES, Mar. 21, 1999, at A32; Fox Butterfield, *California Cities to Sue Gun Makers Over Sales Methods*, N.Y. TIMES, May 25, 1999, at A20; David Stout & Richard Pérez-Peña, *Housing Agencies to Sue Gun Makers*, N.Y. TIMES, Dec. 8, 1999, at A1.

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judiciary to make these choices.[52]

The recent tobacco litigation is an example of how both the administrative process and private lawsuits are used to get the judiciary to do the uncomfortable work of policy makers.Cigarettes are a lawful product in the United States and may be sold to adults throughout the country. Indeed, states derive substantial revenue from the sale of tobacco products. Notwithstanding, concern over the adverse health effects of tobacco products has become a major political issue pitting the tobacco companies, a powerful political lobby that makes substantial campaign contributions, against public health advocates. The federal government, unable to find the needed votes to pass legislation that gives the FDA authority to regulate tobacco products, turned to the "un-elected bureaucracy" and the courts for relief. First, the FDA adopted a new interpretation of the Food and Drug Act so to treat cigarettes as a means of delivering a drug. This placed cigarettes within the scope of the FDA's authority to regulate.[53] The FDA then sought a judicial ruling that its new interpretation of the Act was proper after a group of tobacco interests filed suit against the FDA.[54] Unelected regulators thus had the burden of finding a way to regulate tobacco products and the courts were then required either to affirm or reject this interpretation, in essence absorbing the political heat.

Along with this regulatory/judicial approach of the federal government, private parties have sued the tobacco companies hoping to obtain such substantial damage awards that they would effectively put the industry out of business or cause the tobacco companies to increase prices and thus drive down demand.[55] At the same time, state governments, which derive substantial revenues from the sale of tobacco products, sued the tobacco companies to recover the health costs to these governments related to the sale and use of tobacco products. This litigation by state attorneys general resulted in a huge financial settlement and agreements regarding the marketing practices of tobacco companies.[56] The financial terms gained in the suits could have been

52. In the gun control area this use of the judicial process has had mixed results. *See* Fox Butterfield, *Gun Maker's Accord on Curbs brings Pressure from Industry*, N.Y. TIMES, Mar. 30, 2000, at A1.

53. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 120 (2000)

54. *See id.*

55. *See, e.g.*, Howard A. Engle v. R.J. Reynolds Tobacco Co., No. 94-08273 CA 22, (Fla. Cir. Ct. 2001).

56. *See* Richard Pérez-Peña, *State Efforts to Cut Smoking Leave New York Far Behind*, N.Y. TIMES, May 30, 1999, at A1 (explaining how under the tobacco settlements forty six states as well as the

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obtained through the imposition of higher taxes on these products; however, this was not politically palatable because consumers might object to such increased taxes. Having this tax hidden as a cost increase to pay off the settlement award resulted in blame resting on the tobacco companies, not the politicians. Like the financial terms of the settlement, the regulatory practices could have been obtained via legislation as well. The judicial route made it appear that all the government officials were doing was upholding the already existing law, and settlement may have given the politicians the result they sought without the political baggage.

However, in Japan, the litigation system has traditionally not been viewed as serving this, essentially undemocratic role.[57] Instead, legislation is drawn up over an extended number of years through a consensus-making process that has the effect of taking account of all sides of an issue.[58] Just as in the United States, politicians in Japan may "duck" the difficult issues. But rather than have the courts be an active player in filling in the blanks left in legislation, the Japanese model gives this authority to the bureaucracy—without substantive judicial review.[59] The bureaucracy in turn is not entirely free to act as it wants. Rather, the Japanese courts have developed doctrines that "enshrine bargaining and negotiation as the primary focus of judicial inquiry to evaluate

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District of Columbia are to receive $206 billion over a 25-year period); *Struggle Over Tobacco Spoils*, N.Y. TIMES, May 15, 1999, at A16; Alan L. Calnan, *Distributive and Corrective Justice Issues in Contemporary Tobacco Litigation*, 27 SW. U. L. REV. 577 (1998).

57. *See* Phil Rothenberg, Note, *Japan's New Product Liability Law: Achieving Modest Success*, 31 LAW & POL'Y INT'L BUS. 453, 488 (2000) ("This kind of lawsuit [against tobacco companies] would have been unthinkable a decade ago. This is a good example of changing attitudes.") (citation omitted).

58. *See* Seki, *supra* note 16, at 176.

59. *See* Michael K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923, 960 (1984).

> Having recognized a right to challenge administrative guidance, Japanese courts had to develop doctrine that would assure plaintiffs relief while affording administrators adequate flexibility. In resolving this dilemma, Japanese courts did not turn to the traditional civil law techniques of judicial review of administrative action, which ask whether the administrator conformed his acts to the legislative mandate and to constitutional imperatives. Such sweeping review would eliminate a great deal of Japanese administrative flexibility, which commentators agree is essential to accomplish the difficult and complex tasks assigned the bureaucracy.

Id.

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the propriety of administrative action."[60]

Nor is private litigation in Japan generally viewed as a means of making policy in Japan. Direct action, demonstration, or civil disobedience is more likely to be used to affect policy than is litigation. Although some parties have used litigation to publicize an issue and bring it to public attention, private litigation has not been used in Japan to drive an industry out of business.[61]

C. *Avoidance of Policy Determinations That Could Adversely Affect Elected Representatives*

American use of the judiciary to resolve an essentially political issue is perhaps best observed in the context of "one person-one vote." Both the United States and Japan have constitutions drafted by "Americans" that give voice to the American notion of democracy. That notion is reflected in the view that each person is entitled to the same vote as each other person.[62] The Japanese Constitution specifically provides that "all of the people are equal under the law. . . ."[63] and "the people have the inalienable right to choose their public officials and to dismiss them. . . ."[64]

In an earlier day, failure of American elected officials to redistrict so as to give city residents the same voting parity with rural residents would have been viewed as a political question and a non-justiciable issue. But beginning with *Baker v. Carr*,[65] the Supreme Court (perhaps in response to the failure of legislatures to deal with the issue) began to

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60. *Id.* at 965.

> First, the courts employ traditional and occasionally nontraditional judicial techniques to place limits on the agencies' power to force the regulated parties to reach an agreement. Second, the courts rearticulate the agency's regulatory mandate so as to focus on the voluntary nature of compliance. Finally, the courts refuse to determine the priority of competing claims of right.

Id.

61. For a general discussion of the use of litigation for reasons other than money damages or to drive a company out of business, see UPHAM, *supra* note 15, at 38-42, 156.

62. The U.S. Constitution has several exceptions to this democratic ideal. The most notable current exceptions are the provisions allowing each state to have two senators regardless of the population of the state and the provisions governing the electoral college system for electing a president.

63. KENPŌ, art. 14.

64. *Id.* art. 15.

65. 369 U.S. 186 (1962).

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assert jurisdiction over such cases. In *Reynolds v. Sims*,[66] the Supreme Court announced the "one person-one vote" rule, as it affected state legislative bodies.[67] To carry out its one person-one vote mandate, the judicial branch of the United States government has many tools available. The most powerful tool is the court's equity power to issue a mandatory injunction. State officials are punished for contempt if they fail to comply with the court's order that they write an acceptable redistricting proposal. Moreover, the judiciary may itself write a redistricting plan and place such a plan into effect. Indeed in *Sims*, the Court upheld the power of the lower court to order an election held under a provisional plan it had written.

Japan's Supreme Court has also been faced with constitutional challenges to the apportionment of seats in its national legislature, the Diet. Like the United States, Japan has a bicameral legislature although Japan is a unitary country and thus has no "federalism" concerns.[68] In addition to providing for equality of the citizens, the Japanese Constitution provides that "Electoral districts . . . shall be fixed by law."[69] In accordance with this provision, the Diet has passed legislation fixing the various electoral districts.

However, as Japan has become an industrial power, more and more of its citizens have moved from farm areas to city areas. This people drain from rural districts to urban districts has resulted in a great disparity in the value of a city resident's vote vis-à-vis a rural vote. The LDP, the ruling party of Japan for many years,[70] has its power base in rural Japan and refused to reapportion in such a way as to lessen the voting power of the farm constituency. This intransigence has led to several cases challenging Japan's electoral system. Although the Japanese Supreme Court has adopted a rule similar to the United States

66. 377 U.S. 533 (1964).

67. *Id.* at 568 (holding that "the seats of both houses of a bicameral state legislature must be apportioned on a population basis"); *Id.* at 579 (stating that "the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State").

68. The Japanese Constitution, as drafted by the American Occupation Authorities, provided for a one House legislative body. The change to bicameralism was suggested by the Imperial Diet and was not opposed by the Americans, although the Americans could see no reason for bicameralism in a unitary state. The Japanese appear to have supported bicameralism out of fear that leftists could control a one-house legislature. *See* HIROYUKI HATA & GO NAKAGAWA, CONSTITUTIONAL LAW OF JAPAN 55-56 (1997).

69. KENPŌ, art. 47.

70. The LDP's grip on power was loosened in the early 1990s when for a short time it was out of power. Today the LDP is the major party in the coalition government ruling Japan.

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one person-one vote rule, the results of the Japanese litigation have been quite dissimilar to the results of U.S. litigation.

In *Koshiyama v. Tokyo Metropolitan Election Commission,*[71] the Court held that the voter disparity of 1 to 4.09 between two districts in the election for the Upper House did not violate the Constitution. The Court, while rejecting the petition, held that it had jurisdiction over the controversy and rejected arguments that the case presented a political question that was not justiciable. This opened the door for the Court's decision in *Kurokawa v. Chiba Election Commission*[72] where the Court found that the 1972 election for the Lower House unconstitutional because of a 1 to 4.99 disparity in the value of votes between two districts. Such a large disparity was found to exceed the discretion of the Diet in determining the size of electoral districts. However, although the election was held to be unconstitutional, the Court, acting under the Administrative Case Litigation Act,[73] refused to overturn the election results.[74]

In 1980 a new election was held. This time the disparity in vote was reduced to 1 to 3.94 as a consequence of a reapportionment plan adopted by the LDP controlled Diet while the *Kurokawa* case was pending. A challenge to this election was turned back with a Supreme Court decision that found the disparity to be unconstitutional but refused to overturn the election because the Diet had not been given enough time from the Court's 1976 decision to change the voting procedures.[75] In 1983, a new election was held, and by now the disparity had risen to 1 to 4.40.[76] Once again the Court found the

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71. 18 MINSHŪ 270 (Sup. Ct., Feb. 5, 1964).

72. 30 MINSHŪ 223 (Sup. Ct., Apr. 14, 1976).

73. Gyōsei Jiken Soshō Hō [Administrative Case Litigation Law] Law No. 139 of 1962, art. 31. This law allows a court to uphold administrative action found to be violative of law or the constitution if overturning the action would cause great harm to the public interest.

74. A decision that finds administrative action to be unlawful but nonetheless, for reasons of the public interest, refuses to overturn such action is known as a "circumstance decision." The finding of illegality is not completely without significance in a circumstance decision because: a) a litigant can later sue for monetary damages based on the illegal administrative act, and b) the decision applies pressure on the political branch of government to change the illegal rule. *See* HATA & NAKAGAWA, *supra* note 68, at 167

75. *See* Kanao v. Hiroshima Prefecture Election Commission, 39 MINSHŪ 1100, (Sup. Ct., July 17, 1985). The new electoral districts had been based on the 1970 national census and based on that census the disparity was 1 to 2.92. A majority of Justices seemed to find such a disparity constitutional. *See* Hiroyuki Hata, *Malapportionment of Representation in the National Diet*, 53 L. & CONTEMP. PROBS. 157, 164 (1990).

76. The movement of rural residents to city areas where factory jobs were available accounts for the increasing disparity in the value of a vote.

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disparity unconstitutional and found the election held under this districting plan violative of the Constitution. Nonetheless, the Court once again entered a circumstance decision and refused to overturn the election. Nor did the Court write its own election districting plan or demand that the Diet write such a plan prior to the next election.[77] As Professor Hata notes, the result has been that while the Diet has written other redistricting plans, "in light of the still rapid changing social conditions in Japan, it is only a matter of time before further serious inequality arises in the value of a vote between districts."[78]

Whether we prefer the U.S. approach to redistricting or the Japanese approach, the differing approaches say much for the role of litigation in the two societies. In the United States, legislative leaders can leave the decision to the local district court judge to undertake the difficult job of redistricting without paying a political price for making what may be an unpopular decision. In Japan, on the other hand, the political parties are directly accountable for their actions or inactions in the redistricting field. While in the short run this may mean unconstitutional elections and arrogance by a ruling party in power for almost all of Japan's post-war period, such arrogance may eventually result in election defeat.[79] In any event, it is clear that in the United States the difficult and politically sensitive question of how to reapportion can be "punted" by political leaders to the courts while the same cannot be done in Japan.[80]

D. *Litigation as a Forum for Negotiation*

Most United States litigation never goes to trial, and a large percentage of cases that do go to trial are settled before a jury returns a verdict. Accordingly, it would appear that litigation in the United States is a method whereby the parties, usually through supposedly less emotional representatives (the lawyers) can negotiate their differences and come to an agreement. American discovery procedures are supposed to serve the function of leveling the playing field between the parties by providing each side with all the information required to make an informed decision. After sufficient information is gathered, the parties

77. *See Kanao*, 39 MINSHŪ 1100.

78. *See* Hata, *supra* note 75, at 166.

79. The Administrative Case Litigation Law has aroused some passion in Japan, and it remains to be seen whether there will be a political backlash.

80. Unlike Japanese judges, U.S. judges have tools such as amicus curie briefs and special masters to assist in this reapportionment process.

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should be able to reasonably assess their respective positions and come to a rational settlement. Indeed, the fear of discovery of some significant or adverse fact that could become public once produced might lead to a decision to settle rather than continue litigation.[81] In any event, every litigation lawyer knows that during the discovery phase of a case there will be time to negotiate and there will in fact be negotiations. Usually these negotiations are successful, and the case is resolved prior to trial.[82]

In Japan, most disagreements are also settled, but a much higher percentage of cases are settled before any litigation is started. One reason for this difference may be that there are alternatives to litigation that enable the parties to settle without the need for litigation as a forum for settlement negotiations.[83] Another reason may be that Japan's more restrictive discovery rules have made litigation less predictable as a means of leveling the playing field prior to serious negotiation than its U.S. counterpart.[84] In any event, while litigation is seen as a useful forum in which to initiate settlement negotiations in the United States, it does not appear to serve a similar purpose in Japan.

E. *Redistribution of Wealth*

Much of the U.S. government machinery has been used in recent years to accomplish a redistribution of wealth in society. To recognize this phenomenon is not to challenge or criticize it. On this political, sociological, and ethical question reasonable minds may differ. The point is simply that much of government machinery today exists to

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81. This is not to imply that such settlements are always in the interests of justice. Indeed, fear of abusive discovery can form the basis of a rational decision to settle a case in which there is a meritorious defense.

82. *See* WANT'S, FEDERAL-STATE COURT DIRECTORY 223 (1999-2000) ("More than 90% of all cases are, in fact, settled before trial.").

83. When litigation is utilized in Japan, it often serves as a forum for conciliation and mediation with the judge acting as the mediator and conciliator. Formal conciliation inside litigation is common in Japanese judicial procedures. *See* Tamoyuki Ohta & Tadao Hozumi, *Compromise in the Course of Litigation*, 6 L. JAPAN 97, 99 (1973). In fact, the 1998 amendments to the Code of Civil Procedure give Japanese judges additional tools to attempt to arrive at a settlement. *See* Yasuhei Taniguchi, *The 1996 Code of Civil Procedure of Japan—A Procedure for the Coming Century?*, 45 AM. J. COMP. L. 767, 785 (1997). Unlike Japanese judges, U.S. judges may view their role as one of assisting parties to privately settle their dispute, but U.S. judges generally do not directly participate in settlement discussions for fear it could taint the trial that may be required if settlement is not achieved.

84. For a discussion of how Japan's new Code of Civil Procedure may affect discovery in the future, see *infra* Part III.

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transfer wealth from those who have it to the less privileged in our society. Various mechanisms are utilized to carry out this egalitarian goal. Among these mechanisms are means-testing for programs that at one time were thought of as programs available to the general public regardless of means.[85] Entitlement programs are the most easily recognizable sources of wealth redistribution although the Internal Revenue Code is a close second. Aside from programs such as national defense that benefit all equally, most federal programs today are, in fact, a means for redistributing wealth—perhaps a necessity for a wealthy society that has many members in need.

Accordingly, it should come as no surprise that the American litigation system is also viewed by many as a means of redistributing wealth. The products liability system in particular can be seen as a vast "insurance system" that requires the general public (or at least that part of the public that consumes the product involved) to pay a slightly higher price in order to compensate those in need who suffered in some manner that could be tied to the product.[86] Rather than enact legislation that taxes the public and then uses such funds to compensate victims, our tort system requires manufacturers and distributors of products to compensate victims for injuries caused by factors unknown and even unknowable to the manufacturer. Of course, it is not the manufacturer who pays but rather the consuming public that has to pay a slightly higher price for the product on the market. Punitive damages in particular serve as a means for redistributing wealth from a wealthy (and presumably bad acting) defendant to a poorer plaintiff who gets a windfall for being the first to bring the action.

In Japan, punitive damages are not allowed.[87] Moreover, the Japanese litigation system is not seen as a general insurance system for the

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85. Social Security is one of these programs. Originally designed as a program to provide a basic pension to all workers regardless of their need or lack of need for such a pension the program has been "loaded" up with means testing mechanisms that result in a transfer of wealth from those who supposedly have no need to those who are in need. Thus a Social Security recipient who has income in excess of a government determined amount must pay income tax on the recipient's social security benefit—not withstanding that the contributions to Social Security were already taxed when earned.

86. *See generally* Richard Epstein, *Products Liability as an Insurance Market*, 14 J. LEGAL STUD. 645 (1985); Richard C. Ausness, *An Insurance Based Compensation System for Product Related Injuries*, 58 U. PITT. L. REV. 669 (1997). *But see* Leslie Bender, *Tort Law's Role as a Tool for Social Justice Struggle*, 37 WASHBURN L.J. 249, 258 (1997).

87. Yamanouchi & Cohen, *supra* note 4, at 451 ("The United States' use of punitive damage awards to punish intentional, outrageous, and in some cases reckless conduct does not exist in Japan.").

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public. Rather private mechanisms implicating no-fault concepts and more realistic damages are used to compensate injured parties when the manufacturer knew or should have known of the defect in its product.[88]

II. AMERICAN "INDUCEMENTS" VERSUS JAPANESE HISTORIC "BARRIERS" TO LITIGATION[89]

Whether one believes in the cultural/social theory or the structural theory, the fact remains that, when compared to the United States, there are serious barriers to meaningful litigation in Japan. The U.S. legal system is designed to carry out the various functions that the political branches have assigned to it. Thus, as already noted, the U.S. system has broad discovery rules that give plaintiffs the opportunity to discover facts that generally are only known to or hidden in the files of the defendant. A plaintiff in a U.S. district court need not have evidence to establish that the defendant is liable for the conduct of which the plaintiff complains. Indeed, it is not only appropriate but also typical to make allegations in a U.S. complaint on the basis of "information and belief." All that Federal Rule of Civil Procedure 11 requires is that the attorney signing the complaint for the plaintiff certify that "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the claims . . . are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."[90] As to the factual allegations in the complaint, all counsel need certify is that counsel reasonably believes that the allegations are "likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."[91]

Japanese procedures, on the other hand, do not permit wide discovery. Thus, a Japanese plaintiff must have knowledge of facts and witnesses to support his or her case before filing a complaint. Even

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88. *See generally* J. Mark Ramseyer, *Products Liability Through Private Ordering: Notes on a Japanese Experiment*, 144 U. PA. L. REV. 1823 (1996) (describing the Japanese products liability system).

89. As used herein "inducements" and "barriers" are neither positive nor negative terms but are simply designed to identify structural differences that affect the willingness of parties to undertake litigation. As noted above, the fact that the United States adopts structures favoring litigation does not imply that all countries should adopt the same structures or that such structures are "better" or "worse" than structures adopted by other systems.

90. FED. R. CIV. P. 11(b).

91. *Id.* American discovery procedures are broader than discovery permitted in European civil and common law countries.

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when the court calls for the production of a document there are no effective means to compel such production.[92] Unlike in the United States, a litigant's information and belief will not suffice to open the floodgates of discovery, either documentary or testimonial. Because in many cases the defendant is the party most likely to have evidence of its own wrongdoing, this inability to get discovery has limited the number of cases brought.[93]

Further, the United States has numerous courts at numerous governmental levels to handle litigation. Most litigation in the United States is brought in state court. These courts are typically organized with a general jurisdiction trial court having offices in various parts of the state to make it easy for litigants to reach the courthouse. Moreover, states typically have small claims courts with jurisdiction over minor civil matters[94] that have streamlined procedures designed to enable litigants to represent themselves without the need for counsel. There are over 28,000 state court trial judges and quasi-judicial officials in the United States.[95] Added to this number are the ninety-four federal district courts in the United States with over 650 active district court

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92. *See* Doug Struck, *Tokyo Police Refuse Order to Release Mori File*, WASH. POST, Sept. 14, 2000, at A27. (reporting that in litigation initiated by Prime Minister Mori against a magazine to clear his reputation of charges alleged to be libelous, the court ordered the Tokyo police to produce records as to whether the Prime Minister had been arrested in a raid on a brothel when he was a college student). The Tokyo police refused the Tokyo District Court's request for the police report, asserting that "criminal records are collected and preserved for criminal investigations, therefore we cannot meet the request." *Id.* (internal quotations omitted). This nonsequitur appears sufficient to prevent discovery. The Post further reported that the magazine acknowledged "the court's request for the police document apparently cannot be enforced under Japanese court procedure . . . ." *Id.* This acknowledgment, which is consistent with the majority view concerning the inability of Japanese courts to enforce their orders may be at odds with Ramseyer's and Nakazato's view that "Japanese judges do have the power they need to make the discovery process work." *See* RAMSEYER & NAKAZATO, *supra* note 14, at 142. Moreover, if evidence in the possession of a third party (not a party to the action) is involved, the Court may not have sufficient power to compel discovery as its only remedy would appear to be a fine of ¥200,000 (approximately $2,000). HIROSHI ODA, JAPANESE LAW 409 (2d ed. 1999).

93. Ramseyer, *supra* note 6, at 631-32 ("Japanese discovery provisions represent a further barrier to litigation, for Japanese civil procedure provides few means of effective discovery either before or during trial. . . . This absence of any significant discovery creates enormous advantages, of course, for defendants who control access to information, especially in complex economic cases like antitrust damage actions."). The 1998 amendments to the Civil Procedure Code, by allowing additional discovery in some cases, may serve to bring about a "lowering" of this barrier. *See* Kojima, *supra* note 44, at 688; *see also* Taniguchi, *supra* note 83.

94. What is considered minor will vary from state to state but in some cases small claims jurisdiction may reach as high as a few thousand dollars.

95. DIRECTORY OF STATE COURT CLERKS & COUNTY COURTHOUSES (2001).

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judges who handle both civil and criminal cases.[96]

Japan, being a unitary state, has only one court system. That system is divided into districts. In 1997, it was estimated that there were a total of 2,899 judges in all of Japan, or 2.3 Judges for each 100,000 people.[97] By comparison, the number of judges per 100,000 people was 11.6 in the United States, 6.07 in the United Kingdom, 25.6 in Germany, and 8.4 in France.[98] While efforts have been made to create a small claims jurisdiction in Japan, these efforts have not been effective in making the courts easily accessible to small claims plaintiffs.[99] Moreover, the number of judges in Japan has not risen to take account of the need for additional judges. This has resulted in huge court backlogs and a litigation system wherein cases may take years to try.[100]

Filing fees for complaints in American courts vary depending on the state where a case is filed. But, wherever the case is brought, the filing fee will be minimal. In the federal district courts, for example, it costs only $150 to file a complaint and commence a civil action and a plaintiff who cannot afford to pay such a fee may file in forma pauperis.[101] In the State of New York the filing fee is only $175. In the most populous state, California, the filing fee is only $194. In fact, in some states, litigation may be started without the payment of any filing fee. In these "hip pocket" jurisdictions the action is begun with the service of a summons and complaint, not with the filing of such documents. Indeed, discovery and other pre-trial procedures may be pursued without any court filing. Only when a party seeks the assistance of the court on a matter, such as a motion to compel a party to comply with a discovery request, must papers be filed with the court. In Japan,

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96. WANT'S 2001, *supra* note 7, at 21.

97. *See* JUDICIAL REFORM COUNCIL, VISIONS ON THE JUDICIAL SYSTEM TOWARD THE 21ST CENTURY: BASIC ATTITUDES OF THE COURTS TOWARD REFORMS OF JUDICIAL SYSTEM Exhibit 16 (on file with author) [hereinafter JUDICIAL REFORM COUNCIL, VISIONS ON THE JUDICIAL SYSTEM].

98. *Id.*

99. The 1983 Amendments to the Civil Procedure Code expanded small claims jurisdiction (Summary Court jurisdiction) in Japan to cases up to ¥900,000 (approximately $9,000). In the more recent amendments, a more simplified procedure for handling cases of less than ¥300,000 was introduced. *See* ODA, *supra* note 92, at 72-73. This may also serve to reduce what has in the past been perceived as a barrier to small claims litigation. *See* Kojima, *supra* note 44, at 713-14; Taniguchi, *supra* note 83, at 781-82.

100. The actual time for a typical case in Japan from filing of suit to lower court decision may not be any longer (and in some situations may be shorter) than the time consumed by pre-trial and trial procedures in the United States. Nonetheless, Japanese judges have huge caseloads compared to American judges and some cases in Japan can linger for many years.

101. *See* 28 U.S.C. § 1915 (1994).

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on the other hand, filing fees are typically based on the amount at issue in a case and can be quite high.[102]

The United States has adopted a system of contingent fees for counsel in many different types of civil cases. Although such a system may raise questions about the objectivity of the lawyer, and could lead to situations where the financial interests of the lawyer and client are in conflict, the system does provide plaintiffs with relatively inexpensive means of getting professional assistance. By providing that the client only pays a lawyer's fee if the client is successful and by further providing that the fee will represent percentages of the actual monetary damages recovered, plaintiffs are provided with a very cost effective method of retaining counsel. In addition, in the United States there are a variety of "fee shifting" statutes under which successful plaintiffs may have their legal fees paid by unsuccessful defendants. Many of these statutes involve litigation where the government is the defendant and thus support the role of litigation as a device to monitor the activities of the government and assure that the government agencies follow the "rule of law."

When the "American Rule" under which the losing plaintiff does not, as a general rule, have to pay the legal fees of the winning defendant,[103] is factored into the equation, it is readily apparent that plaintiffs in the United States have a relatively risk free opportunity to litigate. Such a system is consistent with a litigation system that is designed to carry out the various objectives noted earlier.[104]

In Japan, contingent fees, while not illegal, are not widely employed. Japanese lawyers do get a success fee in litigation, but this fee is in addition to the normal fee for handling the case. The normal fee is paid "up front" at the start of the litigation and not spaced out over the course of the trial.[105] Accordingly, a Japanese plaintiff has the burden

102. *See* Yamanouchi & Cohen, *supra* note 4, at 453. As of 1991, "[t]o file a complaint in the amount of one billion yen (about $7,700,000) the filing fee in Japan would be 5,007,600 yen (about $38,520). As with the case of retainers for attorneys' fees, filing fees that progressively increase as the amounts alleged in the complaint increase discourage large damage claims and litigation in general in Japan." *Id.* In 1996, it was estimated that the filing fee for a products liability action seeking ¥100 million in damages ($1 million using a 1 to 100 exchange rate) would be ¥417,600 ($4,176 at the same exchange rate). *See* Rothenberg, *supra* note 57, at 510.

103. *See* Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240, 241 (1975).

104. Those objectives are as follows: (1) law enforcement through private litigation; (2) avoidance of political fallout; (3) "punting" policy choices that could adversely affect elected representatives; (4) assisting negotiation; and (5) redistributing wealth.

105. The Japan Federation of Bar Associations has regulations that set out a retainer and success fee schedule and call for the payment of the initial retainer fee when the attorney accepts a

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of paying fees out of pocket and at the start of the litigation. This not only provides a risk factor (if you lose, the fee is gone and you not only lose the case but the fee paid to counsel as well), but even a successful plaintiff will be out of pocket for the counsel fee during the trial. This in turn implicates a loss of use of money factor in litigation decisions.

Of course, a contingent fee system is only useful to plaintiffs if lawyers will accept the risk inherent in such a system. The U.S. litigation system takes this factor into account by providing a steady stream of new litigators to the litigating bar. By providing society with an excess of lawyers, the system makes contingent fees not only acceptable but desirable in many cases.

Japan, on the other hand, closely limits the number of licensed lawyers who are permitted to handle litigation. Not long ago a mere 500 new *hoso* (legal professionals) were licensed each year.[106] Reacting to pressure first from the United States and later from Japanese industry, Japan now admits some 1,000 new *hoso* each year.[107] In 1997, it was estimated that there were 16,398 licensed lawyers in private practice in all of Japan compared to 906,611 lawyers in the United States.[108] But with a population half the size of the United States and with *bengoshi* having substantial work from non-contingent, paying clients, this is hardly a large enough number to create a demand for contingent fee cases.

The U.S. system further encourages litigation by permitting a single plaintiff to pool numerous claims in the form of a class action.[109] By joining the class action mechanism with the contingent fee arrangement, actions for substantial damages may be brought even though a

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case and the success fee when the matter is concluded. *See* Yamanouchi & Cohen, *supra* note 4, at 448; *see also*, Rothenberg, *supra* note 57, at 510 (the retainer fee for a $1 million product liability case estimated at $30,000).

106. *Hoso* is usually translated to mean "legal professionals." In Japan the "legal profession" consists of *bengoshi* (licensed lawyers usually in private practice), public prosecutors and judges. While all must pass the same "bar examination" and undertake the same training, unlike the United States there is not great movement between the different groups. Thus prosecutors tend to remain in the career prosecutor service until they retire (although two public prosecutors presently serve on the Supreme Court) and judges also are a career service. The Judicial Secretariat does, however, assign judges to work in government departments including both the Ministry of Justice and the public prosecutors office. In these positions, these judges sometimes represent the government in administrative and governmental torts litigation before the courts. This "blurs" the distinction between the Executive and Judicial Branches and would be contrary to U.S. notions of separation of powers.

107. ODA, *supra* note 92, at 101.

108. JUDICIAL REFORM COUNCIL, VISIONS ON THE JUDICIAL SYSTEM, Exhibit 1, *supra* note 97.

109. FED. R. CIV. P. 23.

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single plaintiff, or even several plaintiffs, might not have a sufficient economic interest to justify a single suit. While the resolution of such a case might provide a small (if any) monetary recovery to the class action representative plaintiff and the members of the class, such suit is worthwhile from the point of view of counsel because the total recovery may be sufficient to justify a significant contingent fee.[110] Japan has no class action mechanism.[111] Although Japan has loosened the rules applicable to "representative actions," parties wishing to join such an action after it has been started are required to affirmatively take steps to have themselves added, which severely limits the scope of the amendment.[112]

Even after a Japanese plaintiff has committed to litigation, paid filing fees, and succeeded in winning a judgment after a trial, the Japanese judicial system may not provide the plaintiff with relief an American litigant would consider satisfactory. First, monetary awards traditionally have been low compared to awards in the United States.[113] Second, Japanese courts do not award punitive damages and rarely award

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110. When the possibility of recovering punitive damages is added to the mix, the American system is seen to provide substantial incentives to sue. Furthermore, the class action may also serve the law enforcement purposes mentioned above and can provide prophylactic relief from future questionable conduct.

111. *See* Koji Shindo, *Settlement of Disputes Over Security Transactions*, 14 HASTINGS INT'L & COMP. L. REV. 399 (1991) ("In Japan, there are no special classes of litigation like American class action suits. . . . it is difficult to protect the interests of a large number of plaintiffs as with class actions. In this respect, the Japanese system may be insufficient in providing redress to victims. In particular, parties seeking small amounts may simply give up any opportunity of receiving compensation.").

112. In a representative action all parties plaintiff must be listed although one plaintiff can represent them all. The judgment against the defendant will run to the benefit of all parties represented but not others similarly situated who are not listed. Recent amendments to the Civil Procedure Code rejected the adoption of U.S. type class actions and even rejected the German system under which consumer organizations may sue representing all consumers in certain types of actions. Instead, the representative action rules were modified to permit an individual who had not been named in the original action to be named as represented by the representative plaintiff after the action had started. *See* ODA, *supra* note 92, at 397-98. Moreover, there is no requirement for an "official notice" of the existence of a representative action. Thus, for the public at large to be notified of such an action so that joinder can be requested places a financial burden on the existing plaintiffs. "Placing the burden on the plaintiffs to provide such notice would seem to undercut the potential effectiveness of this device." Kojima, *supra* note 44, at 719 n.208; *see also* Taniguchi, *supra* note 83, at 782-83.

113. *See* DAVIS, *supra* note 6, at 283 ("In this book, it will be emphasized several times that monetary awards in Japan are quite low when compared to the United States."); Doug Struck, *After Fatal Errors, Japan Examines Health Care in Harsher Light*, WASH. POST, Dec. 17, 2000, at A36 ("[V]ictories even in egregious cases win only modest compensation: The standard award for a death caused by malpractice is about $260,000, plus lost income for a breadwinner . . . ."). The

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damages for future conduct unless the damages were foreseeable, which is difficult to prove.[114] Third, a judgment at the trial court level is merely provisional in the sense that it may be appealed, and in the Japanese system new evidence, and in essence a new trial, may be had on the appeal.[115] Finally, even after a judgment is entered a successful plaintiff historically had to initiate a separate action to recover on the judgment[116] and could not simply proceed to levy on goods or real estate.[117]

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article, while highlighting discovery problems, nonetheless discloses that malpractice litigation is on the rise in Japan. *See id.* (noting in headline that "Malpractice Cases Surge in Japan").

114. *See* DAVIS, *supra* note 6, at 287; RAMSEYER & NAKAZATO, *supra* note 14, at 58 (noting that plaintiffs can demand damages arising from special circumstances if those circumstances were foreseeable to the parties).

115. *See* THE JAPANESE LEGAL SYSTEM, *supra* note 3, at 465 ("To express it straightforwardly, what is characteristic of the Japanese lawyers' view on the appellate system is the almost blind adherence to the scheme of three levels of adjudication with one chance for trial de novo at the second level . . . ."); Ramseyer, *supra* note 6, at 634 ("Compounding the delay, Japanese civil procedure entitles litigants to a trial *de novo* on appeal, complete with new evidence, and a full review of the legal issues at the Supreme Court."). The first level appeal is technically not a trial de novo but rather is considered as a continuation of the trial. The 1998 Civil Procedure Law did not make any substantial change in the intermediate appeal. The 1998 Civil Procedure Law limits the right to a second appeal by adopting a form of certiorari review and/or certification of appeal by the intermediate appellate court for most appeals to the Supreme Court. Kojima, *supra* note 44, at 715-17; *see also* Taniguchi, *supra* note 83, at 779-80. In any event, by allowing new evidence to be presented at the intermediate appeal stage, the Japanese system is not as accommodating to litigation as is a system that restricts appeal to the record made at the trial court.

116. In commenting on the advantages of compromise rather than a judgment in litigation, Judge Muto has noted:

> Litigants come to the court requesting a resolution of the dispute, and one that is a final resolution, not a tentative one. A trial court decision is only a tentative resolution, and furthermore considerable time is required until there is a decision of the highest court; the defeated party is dissatisfied and successful execution of the judgment is doubtful. In contrast to this, compromise requires only a few concessions, obtains a final resolution, no antagonism (between the parties) remains and execution is prompt and certain so that is the best way.

Shunkō Muto, *Concerning Trial Leadership in Civil Litigation: Focusing on the Judge's Inquiry and Compromise*, 12 L. JAPAN 23, 24 (1979).

117. The Code of Civil Execution was amended in 1996 and again in 1998 to facilitate execution of judgments. While the system seems rather straightforward, although time consuming, the Judicial Reform Council's Report on Points at Issue in Judicial Reform notes that one issue to be considered is the "Civil Execution System." The Report essentially acknowledges problems with the execution of judgments. *See* JUDICIAL REFORM COUNCIL, THE POINTS AT ISSUE IN THE JUDICIAL REFORM 10-11 (1999), *available at* http://www.kantei.go.jp/foreign/judiciary/0620reform.html [hereinafter JUDICIAL REFORM COUNCIL, POINTS AT ISSUE]; *see also* West, *supra* note

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The U.S. legal system is an amalgam of pre-revolution equity[118] and common law. Equity, with its authority over the person of the defendant and its ability to punish a party for contempt of court, is a strong inducement for compliance with court orders. Nothing focuses the mind of a litigant or its counsel like the prospect of having to spend some time in jail for failure to obey the court. Similarly, U.S. law allows the successful plaintiff in a monetary damages action to take steps to attempt to locate the assets of the losing party. These "supplementary proceedings" have as their goal the uncovering of assets so that judgment won in court may have a real economic advantage. All of the discovery tools available in litigation are available to the successful party in supplementary proceedings. Thus, depositions of the losing party and third persons are available to discover whether assets have been secreted and, if so, where. Similarly, depositions of third persons and document discovery are available to try to locate assets. Refusal to comply with discovery is punishable as a contempt of court. While such remedies do not guarantee that a monetary judgment or equity orders will be enforced, they give plaintiffs a reasonable expectation that winning the litigation will provide an adequate remedy.

In Japan, however, supplementary proceedings are not available. Moreover, because there has never been an equity jurisdiction there is no ability of a court to punish, through imprisonment, parties or others for a contempt of court. Accordingly, it is more difficult for a successful plaintiff to locate the assets of the defendant and more difficult to compel a defendant to obey a court order. Lacking a strong remedy, even a determined plaintiff may flinch before committing time and money to litigation.[119]

Finally, in the United States there is active participation in judicial proceedings by the public at large. This participation tends to support the underprivileged or weak in a contest with the powerful. This participation finds its most common outlet in the use of jury trials. While reasonable minds may differ as to whether jury trials in civil cases are a net positive to society, there can be no doubt that the jury system supports additional litigation by making the chance of recovery and the

42, at 787 ("[C]ompanies can hire yakusa to enforce judgments, a skill at which gangs appear to be more adept than the legal system.").

118. *See, e.g.*, Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999).

119. *See* HALEY, *supra* note 11. It remains to be seen what effect the 1996 and 1998 amendments to the Code of Civil Execution will have in making execution easier and more successful and thus in "lowering" a barrier to litigation.

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chance of a big recovery more likely than in a trial before a judge without a jury.

Although in Japan litigation historically has not been viewed as a desired method of proceeding because of issues such as cost, the lack of expansive discovery, lack of a collateral source rule,[120] and inefficient remedies, injured parties in Japan are not without a forum for their complaints. Numerous mechanisms for mediation and conciliation may be available that are not available in the United States.[121] These alternative dispute resolution (ADR) mechanisms[122] are a reflection of historic tools used during pre-*Meiji* times.[123] It may well be that the "myth of the reluctant litigant" has institutional support so that these historic tools are viewed favorably and are utilized. Whatever the reason, ADR is more readily available and more frequently used in Japan than in the United States.

III. A LESS RELUCTANT LITIGANT?

There are signs that a "less reluctant litigant" may be emerging in Japan. These signs can be found in recent changes in the Civil Procedure Code permitting additional discovery in some instances, making damages easier to prove,[124] and simplifying small claims procedures

120. Under the collateral source rule in effect in the United States a successful plaintiff may recover, in most instances, the full amount of her injury notwithstanding that she may have been made fully or partially whole by collection from a collateral source such as insurance or use of the allegedly defective product, etc. *See, e.g.*, Halek v. United States, 178 F.3d 481 (7th Cir. 1999); Indus. Chem. & Fiberglass v. N. River Ins., 908 F.2d 825, 832-33 (11th Cir. 1990); Whatley v. Skaggs Companies, Inc., 707 F.2d 1129, 1138 (10th Cir. 1983). Such a rule may "induce" litigation when there may, in fact, be no economic injury to the plaintiff and lack of such a rule may be a "barrier" to litigation since many potential plaintiffs will have no economic damages when they have recovered their loss from a collateral source.

121. *See* Joel Rosch, *Institutionalizing Mediation: The Evolution of the Civil Liberties Bureau in Japan*, 21 LAW & SOC'Y REV. 243 (1987); Parkinson, *supra* note 22, at 653 ("One of the most interesting features of the EEOL is that even though it may not have granted to women any additional legally enforceable rights, it has for the first time given women a place to take their grievances. . . . The Prefectural Offices of Women's and Young Workers' Affairs probably lack any of the tools of force to back up their efforts, but the psychological effect of having a government office negotiating with one's company to bring it into compliance with a law mandating equal treatment for women in the workplace is tremendous.").

122. In the United States, arbitration is considered a major alternative dispute resolution mechanism. In Japan, arbitration between Japanese entities is hardly ever used. There are Japanese arbitration associations but their fees are high and arbitration is viewed as simply another forum for litigation. *See* ODA, *supra* note 92, at 80.

123. *See* HALEY, *supra* note 11.

124. *See* Kojima, *supra* note 44, at 709; *see also* Taniguchi, *supra* note 83, at 785.

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and in changes in the Code of Civil Execution. Other recent changes in the law that have made litigation more available include decisions granting damages in amounts considered very unusual for Japan and a proposal to loosen the established Bar's grip on the number of lawyers permitted to practice in Japan. Although not likely to immediately open the floodgates of litigation in Japan, these signs signal a changing attitude in government circles toward the "rule of law" and the role of litigation in enforcing that "rule of law."[125]

In 1993, the Japanese Commercial Code underwent a major revision. In addition to giving shareholders greater access to corporate records,[126] the Code set ¥8,200 (at an exchange rate of $1 = ¥100, this translates into a mere $82) as the filing fee for a derivative action. This fee is fixed and does not increase as the amount of damages sought in such an action increases.[127] This reduction in fee is undoubtedly at least partially responsible for the increase in derivative litigation over the past few years.[128] As late as 1993, the year of the amendment to the Commercial Code, writers noted that there were several disincentives to bringing such suits. Chief among them were the high filing fees and the high cost of attorneys' fees.[129] Moreover, the number of derivative

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125. Professor Oda comments on the "emergence of new 'contemporary types of litigation' " in recent years. Among the types of cases he refers to are "cases on medical malpractice, product liability, environmental protection, and pollution. These cases . . . are a response to new phenomena which the legislature did not anticipate. There are few precedents and the courts are expected to create law or influence policy-makers by their judgments." ODA, *supra* note 92, at 393; *see also*, Tatsuo Uemura, *Legal Aspects of the Financial Big Bang in Japan*, 1 WASEDA PROC. COMP. L. 56 (1999) (arguing that for financial reform in Japan to be successful, Japan must strengthen its legal system).

126. SHŌHŌ [Commercial Code], arts. 263-6.

127. *See id.* art. 267.

128. *See* Curtis J. Milhaupt, *A Relational Theory of Japanese Corporate Governance: Contract, Culture and the Rule of Law*, 37 HARV. INT'L L.J. 3, 57 (1996) (suggesting that in addition to the reduction in filing fees the increase in derivative litigation may be based on "a need to adapt governance mechanisms to changing environments"). While such a theory may conform to the hypothesis that there may be "a link between corporate governance and economic efficiency," the real basis for the increase in both litigation and the size of damage awards sought may be the lowering of the barrier to gain access to the courts. *See Daiwa execs ordered to repay $775 million*, Japan Times Online (Sept. 21, 2000), *available at* http://www.japantimes.co.jp. ("The number of lawsuits that have been filed by shareholders against individual executives over company mismanagement has been rising since 1993, when a revision of the Commercial Code reduced the fee required for filing such suits to a uniform 8,200 yen, regardless of amount of damages sought. Before the revision, plaintiffs had to pay a fee that was based on the amount of compensation they were seeking.").

129. *See* Christopher Lee Heftel, Survey, *Corporate Governance in Japan: The Position of Shareholders in Publicly Held Corporations*, 5 U. HAW. L. REV. 135, 183 (1983).

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cases increased dramatically since the adoption of the lowered filing fee, but the size of damage awards sought has increased dramatically as well.[130] Finally, in 2000, the judiciary, reacting to a suit made possible by the amendment to the Commercial Code, brought forth a huge—whether by Japanese or American standards—$775 million derivative damage award in the Daiwa Bank scandal.[131] In light of this award, it is reported that the LDP has suggested that legislation is needed to limit the damages that can be recovered in such cases.[132] Such a limitation on recovery would most likely be another attempt by the bureaucracy to limit the role of the judiciary in setting policy. Such a limit on supervision by the judiciary may seem to bureaucrats to be especially appropriate in the Daiwa award, but would stifle future suits by sharply limiting the potential damages recoverable, thus changing the economic incentives for suit and erecting roadblocks to future litigation. Whatever the ultimate outcome of the case, the Daiwa award reflects the fact that recent changes in procedural law reducing barriers to litigation can make plaintiffs less reluctant litigants. Of course, if the judgment is affirmed on appeal (even if only a part of the damage award is affirmed) and if there is no legislation limiting recovery, then one can expect more litigation to follow the pattern of the Daiwa case.

Only a month before the Daiwa decision, the district court in Osaka rendered a $107,000 judgment in favor of a 21-year-old female university student who had sued the Governor of Osaka for sexual harassment during the Governor's reelection campaign. The complaint originally sought $117,000 and was raised to $146,000 after the Governor denied the allegations. The Governor refused to appear in court, although he persisted in his denial of the allegations. The court, finding the allegations supported, rendered its judgment—the largest awarded in a sexual harassment case in Japan. In commenting on the decision, the Washington Post noted that the ruling was "described by legal experts as revolutionary and one that is likely to lead to more such court cases."[133] In fact, the Governor's case followed an $87,000 judgment

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130. *See* Milhaupt, *supra* note 128, at 55-56.

131. For a discussion of the Daiwa Bank scandal, *see* Mitsuru Misawa, *Daiwa Bank Scandal in New York: Its Causes, Significance, and Lessons in International Society*, 29 VAND. J. TRANSNAT'L L. 1023 (1996); Akiko Kashiwagi, *Daiwa Officials Fined Millions: Japanese Executives Held Accountable in Landmark Case*, WASH. POST, Sept. 21, 2000, at E2; *Daiwa Execs Ordered to Repay $775 Million*, JAPAN TIMES, Sept. 21, 2000, at 1.

132. *See* Kiroku Hanai, *Executives Must Obey the Law*, Japan Times Online (Oct. 24, 2000), *available at* http://www.japantimes.co.jp.

133. Kathryn Tolbert, *Japan Official Is Cited for Harassment*, WASH. POST, Dec. 14, 1999, at A31.

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issued in July by another district court.[134] It is believed that this decision was influenced by the court proceedings in the United States brought against Mitsubishi Motor Manufacturing of America, a subsidiary of a Japanese auto manufacturer.[135]

After the court entered its judgment in the *Osaka* case, the public prosecutor initiated an investigation to see if the criminal laws had been violated. The Governor resigned to defend his name. Although there were reports that the district court decision would be appealed, in fact no appeal was filed. The news reports of the student's comments after the verdict was rendered disclose that cultural values and the desire for apology still play a role in decision making when litigation is involved:[136] "My aim was not to win the suit. The wrongdoer in a sexual harassment case should always apologize for his actions. If [Yokoyama] is unwilling to do so, he should resign."[137]

Both the sexual harassment and derivative cases referred to above were based on recent substantive and procedural law changes. Other recent changes may increase the likelihood for litigation. For example, the Products Liability Law enacted in 1995[138] imposes "liability on others for product-related harms without regard to fault."[139] It remains to be seen whether the various barriers to litigation described earlier will frustrate efforts to obtain judicial relief under the law.[140]

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134. *See id.*

135. *See id.* at A33.

136. Apology in Eastern cultures plays a more significant role than in the United States. *See* Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 Law & Soc'y Rev. 464 (1986); Keith Bradsher & Matthew L. Wald, *More Indications Hazards of Tires Were Long Known*, N.Y. Times, Sept. 7, 2000, at A1 (explaining how amidst the Firestone Tire recall, Masatoshi Oni, the chairman and chief executive of Bridgestone/Firestone, issued an apology for the tire problems); Matthew L. Wald, *Rancor Grows Between Ford and Firestone*, N.Y. Times, Sept. 13, 2000, at C1. This is, most likely, a reflection of cultural underpinnings overriding legal considerations.

137. Tolbert, *supra* note 133, at A33.

138. Seizōbuppinsekininhō [Products Liability Law], Law No. 85 of 1994.

139. Mark A. Behrens & Daniel H. Raddock, *Japan's New Products Liability Law: The Citadel of Strict Liability Falls, But Access to Recovery is Limited by Formidable Barriers*, 16 U. Pa. J. Int'l Econ. L. 669, 689 (1995). Some scholars believe the change may be more apparent than real. *See* Ramseyer & Nakazato, *supra* note 14, at 102 (noting that the "change may have been less significant than the hullabaloo would suggest").

140. *See* Behrens & Raddock, *supra* note 139, at 689. In adopting the new Products Liability Law in 1995, the Japanese government considered and rejected a treble damages remedy. *See* Oda, *supra* note 92, at 215; *see also*, Rothenberg, *supra* note 57, at 508 (arguing that while the new law has achieved some success in changing manufacturers' behavior and providing some consumers with a judicial remedy "structural barriers prevent the New PL Law from being more effective").

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The 1996 wholesale re-writing of the Code of Civil Procedure also supports an increase in litigation. Among the new Code provisions are changes in the discovery rules that, if broadly interpreted, should lead to greater discovery of documents in the hands of opposing parties. Under the new Code, an "inter-party inquiry procedure"[141] is permitted under which parties may ask each other to clarify matters at issue. Inquiries are not permitted that ask for opinion or are used to harass, or whose response may involve unreasonable cost or time. A party may refuse to respond concerning any matter about which that the party could refuse to testify. While it is hoped that such a procedure results in responses that advance the clarification of issues and leads to easier access to documents,[142] the failure of such procedure to provide any sanction for refusal to respond raises questions as to its utility.[143]

In addition, the new Code contains changes to the rules concerning document production by an adverse party. Japan's new Civil Procedure Law allows the judge to order a party to produce documents not made exclusively for the use of the party in possession ("self-use documents") unless production would violate limited privileges or would expose trade secrets.[144] This changes the presumption from one of non-production to one of production.[145] Moreover, courts have been given the authority to enforce such an order against a party by accepting as fact allegations of the opposing party as to the contents of documents withheld after an order to produce.[146] How broadly the courts interpret the exception from production of "self-use documents" may determine how much document discovery will be expanded under the

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Moreover, the availability of non-judicial remedies for defective products limits the need for judicial relief. *See generally* Ramseyer, *supra* note 88 (describing remedies for injuries though the Products Safety Council).

141. *See* Taniguchi, *supra* note 83, at 779.

142. *See id.* at 779 ("[I]t is hoped that the bar will cultivate a mutual feeling of collegial obligation to cooperate, in accordance with the professional duty to clients, when one receives a request from another member of the profession."). Of course, a "professional duty to clients" would seem to counsel against voluntarily providing responses that could adversely affect a client's litigation position.

143. *See* ODA, *supra* note 92, at 401 (even though the opposing party is supposed to respond "there is no sanction against non-compliance"); *see also* Taniguchi, *supra* note 83.

144. *See* Kojima, *supra* note 44, at 702.

145. *See* Toshiro M. Mochizuki, *Baby Steps or Giant Leap? Parties' Expanded Access to Documentary Evidence Under the New Japanese Code of Civil Procedure*, 40 HARV. INT'L L.J. 285, 286-7 (1999) ("The New Code's provisions reverse the presumption regarding the scope of discovery: generally speaking, the New Code makes all documents possessed by private persons presumptively discoverable.").

146. *See id.* at 296-7.

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new Code. For example, under the old Code, "internal" documents of a company did not have to be produced because such documents were neither produced for the benefit of the opposing party nor were they made in connection with a legal relationship between the parties.[147] Although the language of the old cases would seem to make such internal documents exempt from production under the language of the new Code, the rationale for the new Code is different from that of the old Code. The new Code adopts a more accommodating approach to discovery. Thus, such internal documents should be "discoverable" under the new Code.[148] Moreover, the new Code permits "in camera" review of such documents by the court before determining whether to order production.[149] This is particularly significant as the court that makes the in camera review is also the trier of fact because there is no jury. Accordingly, if the objective is to get the evidence in front of the trier of fact, the in camera review will achieve that objective.

To obtain discovery of a document, a party needs to know such important details as the date of the document, its author and recipient, and even what the substance of the document says. Document discovery cannot, as a general matter, be used to discover facts of which the party seeking discovery is ignorant.[150] The new Code liberalizes the rules under which a court may compel the production of documents so that if the title and contents of a document "are extremely difficult to specify, it is sufficient for the applicant to present facts which enable the possessor to identify the document."[151]

Perhaps of more significance are the changes being considered to

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147. *See* Taniguchi, *supra* note 83, at 775-76; Mochizuki, *supra* note 145, at 293.

148. *See* Taniguchi, *supra* note 83, at 776-78. However, there exists strong reason to believe that such internal documents will, as a general rule, remain undiscoverable under the doctrines developed under the old Code. *See* Mochizuki, *supra* note 145, at 302-03 (discussing the compromise which led to the New Code's language regarding document discovery generally and noting that some members of both the Executive and Judicial Branches in Japan have commented that the New Code compromise does not change the non-discovery rule of the Old Code as applied to self-use documents). Mochizuki further notes that commentators do not believe that the New Code will greatly expand the discoverability of self-use documents. *Id.* at 307; *see* Fuji Bank v. Maeda, 53 MINSHŪ 1787 (Sup. Ct., Nov. 12, 1999) (holding internal bank documents used for the approval of a loan were documents solely for the use of the possessor and hence not subject to discovery).

149. *See* Taniguchi, *supra* note 83, at 778.

150. *See* DAVIS, *supra* note 6, at 219-23; *see also*, Yamanouchi & Cohen, *supra* note 4, at 447 ("Japanese CCP article 313 requires that requests for production be made by a motion that identifies the document, summarizes its contents, identifies the holder of the document, specifies the fact to be proved . . . .").

151. ODA, *supra* note 92, at 408.

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Japan's judicial and lawyer system. In July 1999, the Japanese Cabinet established the Judicial Reform Council.[152] The Council's function is to "consider fundamental measures necessary for judicial reform and judicial infrastructure arrangements by defining the role of judicature in Japan in the 21st century."[153] In creating the Council, the Judiciary Committee of the Diet noted that among the issues the Council should consider are the method of appointment of judges, the size of the legal profession, and public participation in the judicial system.[154] In its initial report, the Council identified "a drastic expansion/reinforcement of institutional and human bases for the administration of justice responding to the expectation of the people based on the concept of the rule of law" as a "key" to judicial reform.[155] Such expansion is required because of "a shortage of lawyer population, uneven regional distribution of lawyers, difficult to estimate legal fees, undeveloped working conditions of lawyers and their expertise, and lack of information due to the regulation on their advertisement."[156] The Council recognized a significant expansion of the legal profession as a requirement of judicial reform.[157]

The Council identified education and training as a part of the

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152. *See* JUDICIAL REFORM COUNCIL, POINTS AT ISSUE, *supra* note 117, at 1.

153. *Id.*

154. *See id.*

> In Paragraph 4 of the Supplementary Resolution of the Judiciary Committee of the House of Representatives, it is stipulated that "the JRC shall thoroughly deliberate on important issues regarding the judicial system under debate such as introduction of judicial appointment system under which most judges are appointed from those with legal practice experiences as lawyers . . . and reinforcement of the quality and quantity of the legal profession, public participation in the judicial system and the relationship of human rights and criminal justice."

Id.

155. *Id.* at 5.

156. JUDICIAL REFORM COUNCIL, POINTS AT ISSUE, *supra* note 117 at 6.

157. *See id.* at 8.

> We need a large stock of human resources (legal professionals) equipped with both quality and quantity to entrust management of the institution . . . . Since 1991, the number [of lawyers admitted to the bar] was gradually increased and finally reached one thousand this year. However, legal demands are anticipated to further diversify and become more complicated so that we must study measures to realize the proper increase of the population of legal professionals in order to cope with it.

Id.

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problem of increasing the number of legal professionals. The Legal Training Institute is having difficulty as it is adjusting to the increase in its student body from 500 to 1,000.[158] In part to cope with its larger workload, the Institute program has been reduced to eighteen months from two years and will be further reduced to one year.[159] An increase in students will place additional stress eventually on the Institute. In addition, current Japanese practice is to treat law school as an undergraduate faculty. Most law students, knowing the difficulty in achieving success on the *bengoshi* exam, have no intention of ever becoming or attempting to become *bengoshi.*[160] Thus, the curriculum is more directed toward educating students to become business executives with knowledge of the law.[161] To improve the quality of legal education, institutions and curriculums directed toward practicing lawyers and judges must be created. Accordingly, the Council concluded, "we must conduct a drastic study of the ideal way of legal education including establishment of professional law schools."[162]

Similarly, the Council's report focuses attention on the need for more lawyers[163] and for greater and better training of new law-

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158. The Institute, which is run by the Judicial System, used to have a two-year course for those who passed the bar examination after which the student took a further exam which virtually all students passed. *See generally* Gino Dal Pont, *The Social Status of the Legal Professions in Japan and the United States: A Structural and Cultural Analysis*, 72 U. DET. MERCY L. REV. 291 (1995); *see also*, Yukio Yanagida, *A New Paradigm for Japanese Legal Training and Education—In Light of the Legal Education at Harvard Law School*, 1 ASIAN-PAC. L. & POL'Y J. 1 (2000) *available at* http://www.hawaii.edu/aplpj (recommending a new program for Japanese legal education at the Graduate Law School level using American type, Socratic method, education styles).

159. *See* ODA, *supra* note 92, at 101.

160. There are from 30,000-40,000 graduates of law faculties each year and "only 32 out of 97 university law departments had more than one successful candidate in the exam." Kojima, *supra* note 44, at 723.

161. JUDICIAL REFORM COUNCIL, VISIONS ON THE JUDICIAL SYSTEM, *supra* note 97, at 27 ("The reality is that legal education at universities is seriously lacking in fundamental education for legal profession because education at faculties of law in our country emphasizes developing the education of generalists for public offices and corporations."); *see also* ODA, *supra* note 92, at 110 ("Japanese law faculties are not necessarily designed to educate and train professional lawyers. Rather, their primary purpose is to produce people with a sound legal mind, but not necessarily lawyers. Law faculties may be better characterized as institutions which offer advanced social science education in the form of legal studies.").

162. JUDICIAL REFORM COUNCIL, POINTS AT ISSUE, *supra* note 117, at 8.

163. *See* JUDICIAL REFORM COUNCIL, VISIONS ON THE JUDICIAL SYSTEM, *supra* note 97, at 23-24.

> The number of legal professionals in our country seems smaller than in other advanced countries . . . . On the other hand, in our country there are professions of judicial scriveners, administrative scriveners, patent agents and licensed tax accountants carry-

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yers.[164] The Council's report rejects the notion that the number of lawyers should be increased as much as possible, leaving the issue of quality to be decided by competition and "natural selection." Rather, regulation and control of numbers of new lawyers in the name of "quality" control is advocated.[165]

In its November 20, 2000 interim report, the Council confirmed its view and recommended a nationwide system of graduate level law schools to educate aspiring lawyers and to be used in conjunction with a new *bengoshi* exam to determine who is qualified to practice law.[166] What has not been decided is how many of these schools will be created and how many students will be permitted to attend these schools. While an agreement has been worked out between the government and the Association of Bar Associations to increase the number of newly admitted *hoso* to 3,000 per year, no agreement has been reached as to how many of these will be allocated to additional judicial positions and how many to the private bar. However, the interim report does recognize the need to increase the number of judges and expand the judicial system.[167] It apparently has not been decided how the government/ education system will control the number of law students and through this control the number of *bengoshi*.[168]

> ing out certain legal practices, which are covered by lawyers in the U.S.A. . . . . Nevertheless, it is a fact that the number of the legal profession in our country is small, and as pointed out by members of the Council it is necessary to increase the number of the legal profession in order to enhance their function.

Id.

164. *See* JUDICIAL REFORM COUNCIL, VISIONS ON THE JUDICIAL SYSTEM, *supra* note 97, at 27 ("As part of the review of such gap between academic education and training of legal profession, it is pointed out recently that it is necessary to establish law schools to implement legal training systematically.").

165. *Id.* at 28. The issue of quality control is a significant issue. In the United States, as a method of supporting litigation the system allows for a wide range of law schools (with differing minimum standards for the student body) and a relatively easy Bar Examination thus assuring an influx of huge numbers of lawyers every year. The idea appears to be that the market will ultimately weed out those who are not qualified or are not highly qualified. Today's system for licensing in Japan assures that only the most highly qualified are licensed as *bengoshi* or judges or prosecutors. While opening the ranks of the legal profession to new and more entrants, Japan is wise to find a system that balances the need for additional talent with the need to maintain the high standards of quality that presently exist.

166. *Judicial Reform Must Be Achieved*, DAILY YOMIURI, Nov. 20, 2000, *available at* http://www.yomiuri.co.jp/newse/1121ed13.htm.

167. *See Panel Releases Judicial Reform Report*, JAPAN TIMES, Nov. 21, 2000, at 2.

168. While the government can, through licensing, control the number of law schools, the control over how many students each school can admit becomes more problematic, especially

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The "Basic Attitude of the Courts" and "Points at Issue" reports also address the issue of inadequate judges in Japan. These reports recommend "the increase in judges and court staff in number who can cope with the expedition and specialization of litigation. What are [sic] especially required is an increase in the number of judges and court clerks at courts in busy urban areas and a reinforcement of judicial research officials. . . ."[169] Not only the number of judges, but the experience and manner of selecting judges is recognized as a matter needing reform. Today, most judges in Japan are selected in a civil service system wherein a career as judge is chosen at the Legal Training Institute.[170] After appointment, the first five years of a judge's tenure[171] are considered as a training period wherein the judge sits as part of three judge panels and learns the judge's craft. Under such a system, most judges are relatively insulated from commercial, professional, and even governmental functions, although efforts are made to increase the judge's experience through training programs, assignments to corporations and government agencies, and work experience in a *bengoshi* office as part of the Legal Training Institute.

In the United States, on the other hand, most judges (at least in the federal system) have had distinguished public or private careers. Thus they have been exposed to the kinds of problems likely to end up in court and have had the experience of representing clients with such problems. This provides judges with a greater practical experience than Japanese judges. The "Basic Attitude of the Courts" report notes that "the Court has adopted the policy to promote recruitment of

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because some of the schools will be private institutions. It is unlikely that such schools as Waseda, Chu-o, and Keio University can be excluded from the law school program. Further, after a first wave of schools there will undoubtedly be demand for a second and third wave of graduate law school faculties. If too many students are admitted and too few are permitted to pass the bar exam (to keep within the 3,000 limit) it is possible that the program will not succeed in getting better qualified students to attend law faculties. If the chance of success is small, why compete for *bengoshi* status when the top students can get government or corporate jobs without graduate school education?

169. JUDICIAL REFORM COUNCIL, VISIONS ON THE JUDICIAL SYSTEM, *supra* note 97, at 18.

170. *See* ODA, *supra* note 92, at 110.

171. Unlike U.S. federal judges who have life tenure, Japanese judges (below the level of Supreme Court Judge) are appointed for ten terms after which reappointment is required. A Judiciary controlled bureaucracy handles appointment and reappointment. For an interesting analysis of this system see, J. Mark Ramseyer, *The Puzzling [In]Dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUDIES 721, 723-29 (1999). The first ten years of a judge's tenure are considered a training period. However, because of a shortage of judges some new judges are permitted to handle cases on their own after five years.

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judges from lawyers."[172] The November 20, 2000, interim report calls for adoption of a system wherein more judges are selected from the ranks of practicing lawyers and prosecutors.[173] The fact remains that few judges come from the ranks of practicing lawyers. The reasons are many, but the question of judicial salaries versus the earnings of lawyers in private practice must be considered—as must the policy of the Japanese judiciary to transfer judges to different parts of the country every two or three years—thus putting a strain on family and personal relationships.

The interim report not only recommends more and better trained lawyers but also recommends changes in lawyer practice rules that would enable lawyers to better perform their functions. Thus, it is suggested that the system be opened to permit closer working relations between Japanese lawyers and foreign lawyers licensed to give advice on foreign law in Japan, as well as other professionals.[174]

The recommendations are not all supportive of changes that might lead to a greater role for litigation in Japanese society. For example, the "Basic Attitudes" report rejects the jury system because the system does not reflect a desire to search for truth, among other reasons.[175] The November 20, 2000 interim report postpones any decision on the jury system,[176] although it acknowledges a dispute between judges and the

172. JUDICIAL REFORM COUNCIL, VISIONS ON THE JUDICIAL SYSTEM, *supra* note 97, at 30.

173. *See Panel Releases Judicial Reform Report*, *supra* note 167.

174. *See Panel Releases Judicial Reform Report*, *supra* note 167.

> To boost the quality of services offered, the council suggested that a system be created under which lawyers and law firms may undertake broader activities. It also said quality could be enhanced if lawyers could work in cooperation with colleagues qualified to handle legal affairs in foreign countries as well as professionals engaged in technical legal matters, such as patent attorneys.

Id.

175. One issue still being debated in Japan is how to provide for greater use of individuals in judicial proceedings. Among the subjects being discussed are the introduction of a type of jury system—more likely in criminal cases than in civil cases in the author's opinion —or a variation of the European system which makes use of public participation along with the judge. In the Judicial Reform Council's report, the jury system is roundly criticized, whereas a variation of the European system is considered "worthy of consideration for introduction into the existing judicial system." JUDICIAL REFORM COUNCIL, VISIONS ON THE JUDICIAL SYSTEM, *supra* note 97, at 22.

176. Japan adopted a modified jury system in 1923, but the law was suspended during the war in 1943. Under this system, jurors reached a decision by majority vote (to avoid hung juries) and if the court was dissatisfied with the jury verdict it could order as many new trials as were required

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practicing bar on the issue.[177] While dispute exists as to the form of public participation in the judicial system,[178] the important point is that there is general agreement between the court system (the government) and the private bar that there should be more public participation in the judicial system.[179]

Furthermore, consideration is being given to a system where attorneys' fees are imposed on the losing party.[180] Obviously, such a system would inhibit litigation because of the potential costs that a plaintiff might be saddled with if the plaintiff's case were ultimately found insufficient. In addition, the judges and the interim report support expansion of Japan's already broad ADR mechanisms to relieve litigation burdens.[181] No specific recommendations are made for further loosening the discovery system to permit greater discovery, especially including discovery against third parties and discovery of documents produced for use of the party in possession (although the Judicial

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until it received the verdict it wanted. *See* ODA, *supra* note 92, at 110 ("[T]he verdict of the jury was not binding on the court and the judge was able to remand the case for retrial as many times as he wished, until the verdict conformed to his opinion."). As a result, it is not unexpected that jury trial was not common.

177. The *Daily Yomiuri* reports:

> However, as for the form that public participation should take, the Japan Federation of Bar Associations has insisted on the introduction of a jury system like the ones in the United States and Britain, which are independent of Judges, while the Supreme Court has supported another version of the jury system in which judges and lay jurors jointly participate in court procedures. The court favors a jury system in which jurors have no say in the verdict. Since the federation and the court failed to reach a consensus, the council postponed making a decision on the issue.

Judicial Reform Must Be Achieved, supra note 166.

178. Trial by jury does not necessarily reflect a "search for truth." Jurors being laypersons cannot be assumed to have the training and experience of professional judges in evaluating the credibility of witnesses. Furthermore, in today's high-tech world more litigation will involve technical issues outside the competence of lay jurors. Moreover, juries are less likely to be consistent in the monetary amounts awarded for similar cases than are professional judges who communicate with each other. It is suggested that this consistency is one reason why Japan can adopt extra-judicial forums to resolve some cases and one reason why it may be easier in Japan than in the United States to negotiate a settlement prior to litigation.

179. The *Daily Yomiuri* also appears to support the participation of the public in judicial affairs indicating public approval of the idea. *See Judicial Reform Must Be Achieved, supra* note 166 ("It is an epochal move for the council to propose promoting the participation of lay people to open the judicial system to the public and reflect the common sense of society in court rulings.").

180. *See* JUDICIAL REFORM COUNCIL, VISIONS ON THE JUDICIAL SYSTEM, *supra* note 97, at 13.

181. *See id.* at 14.

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Reform Council will be further discussing the question of whether and how to further liberalize discovery). Furthermore, no changes to the first level appeal system have been offered to prevent the introduction of evidence at the appeal stage. Nonetheless, on balance, both the Council and the "Basic Attitude of the Courts" reports favor a loosening of barriers to litigation, while specifically rejecting the "sociological/cultural model" for justifying barriers to litigation.[182] More significantly, the present restructuring effort, which is the first attempt at judicial reform in thirty-five years, follows quickly after the 1998 changes to the Civil Procedure Code and is based on the belief that the judicial system in Japan needs an overhaul to permit it to handle disputes fairly and expeditiously.

Finally, it must be recalled that it is the courts that will eventually decide how barriers to litigation should be interpreted and whether those barriers should be considered too high or low.[183] In this regard, the following statement in the "Basic Attitude of the Courts" report may be more important for the future than any of the specific proposals being considered or recommended by the Council:

> In the future, we need to establish a rule that disputes should be settled in accordance with laws, and try to spread the rule to every walk of life in society. For that purpose, the judicial system should become easy to be used and familiar for the people, and making an effort for reforms and improvements should be continued for long ahead with patience while deepening the efforts of the judicial system in the daily operation.[184]

IV. CONCLUSION

The civil litigation systems in Japan and the United States are designed to carry out differing social objectives. The systems have different historic roots and each is a reflection of the society it serves. As a consequence, it should come as no surprise that the structures of the systems differ in their "accommodation," "inducement," or "barrier" to litigation. Neither system has an absolute right or wrong answer to the proper role of litigation in society—in part because each society

182. *See id.* at 16.

183. *See* JOHN O. HALEY, THE SPIRIT OF JAPANESE LAW 108 (1998) ("In the end the judiciary itself, not the political branches of the Japanese government, determines the parameters of responsible judicial behavior.").

184. JUDICIAL REFORM COUNCIL, VISIONS ON THE JUDICIAL SYSTEM, *supra* note 97, at 16.

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creates its own role for litigation. It appears that in Japan, however, the role of litigation and the function litigation is to serve is undergoing a change. In the past several years Japan has taken major steps toward liberalizing access to the courts, access to evidence to be used in the courts, and the ability to recover substantial damages for certain types of wrongs, while at the same time preserving the alternative dispute resolution mechanisms that have served the Japanese public well for so many years. These steps, which are continuing through the work of the Judicial Reform Council, have the potential to increase the use of the litigation process in Japan and are likely to make the Japanese less reluctant litigants.

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