

**Japan’s Secretive Death Penalty Policy:  
Contours, Origins, Justifications, and Meanings<sup>♦</sup>**

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I. ABSTRACT

The secrecy that surrounds capital punishment in Japan is taken to extremes not seen in other nations. This article describes the Japanese state’s policy of secrecy and explains how it developed in three historical stages: the “birth of secrecy” during the Meiji period (1867 – 1912); the creation and spread of “censored democracy” during the postwar Occupation (1945 – 1952); and the “acceleration of secrecy” during the decades that followed. The article then analyzes several justifications for secrecy that Japanese prosecutors provide. None seems cogent. The final section explores four

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<sup>♦</sup> The field research for this article was conducted in Japan from August 2003 to May 2004. In addition to the sources listed in the footnotes, the article relies on interviews conducted with Japanese criminal justice professionals and capital punishment informants, including 16 prosecutors, 21 defense attorneys, 5 judges, 12 professors, 10 journalists, 5 politicians, 3 police officers, 6 members of the clergy, and various students, citizens, and activists. Many of the interviewees were guaranteed anonymity. Death penalty research was also conducted in China (two weeks), Taiwan (one week), and South Korea (two weeks).

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meanings of the secrecy policy that relate to the sources of death penalty legitimacy, the salience of capital punishment, the nature of Japan's democracy, and the role and rule of law in Japanese society.

*[T]he purpose of secrecy is, above all, protection.*

Georg Simmel<sup>1</sup>

## II. "REIKO IN WONDERLAND"

On 19 September 2002, Reiko Oshima, a member of the progressive but unpopular Social Democratic Party and a Member of Parliament in Japan's Lower House, visited the warden of the Nagoya Detention Center and tape-recorded the following conversation.<sup>2</sup> It was the day after convicted murderer Yoshiteru Hamada had been executed in the same Nagoya facility, and the warden, Tsukasa Yoshida, was one of a handful of state officials who witnessed the hanging. By Ministry of Justice policy, no "private persons" were allowed to attend.

Oshima: What about Mr. Hamada?

Yoshida: Who's Mr. Hamada?

O: Yoshiteru Hamada, the man who was executed here yesterday.

Y: Who said he was executed here yesterday? I have no comment. Where did you hear that?

O: I have heard that members of his family came here, and it has been reported by the mass media, right?

Y: No comment.

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<sup>1</sup> THE SOCIOLOGY OF GEORG SIMMEL 345 (Kurt H. Wolff ed. & trans. 1950).

<sup>2</sup> SHIKEI HAISHI HENSHU IINKAI, SHIKEI HAISHI HOAN 266 (2003).

O: You mean you cannot say that it was Mr. Hamada?

Y: No comment.

O: Warden Yoshida, you are tight-lipped aren't you?

Y: I'm a corrections man, and I've lived my life as a prison official.

O: If you are saying that you did *not* execute Mr. Hamada, then why have you not protested against the newspaper articles that say he was hanged?

Y: I don't know where that came from, but since it has not been verified I have no comment. Now I have a question for you Ms. Oshima. Do you think all news reports are true? Is the news 100 percent accurate?

O: When did the death warrant from the Minister of Justice arrive?

Y: Like I said, no comment. As I keep telling you, if the premise is that there was an execution, I cannot answer your questions.

O: OK then, as a general matter, how many detention center officials participate in an execution?

Y: I don't have a hold on that information, and I don't feel the need to reply.

O: I also heard from a defense lawyer that there was an execution here yesterday.

Y: No comment.

O: Warden Yoshida, how many executions have you been involved in?

Y: No comment...

O: Warden, why don't you acknowledge yesterday's execution?

Y: On what basis are you speaking?

O: You know, yesterday even Minister of Justice [Mayumi] Moriyama responded [to my request for a meeting about Hamada's execution].

Y: Did she say that there was an execution in Nagoya? I heard that you met with the Minister...

O: Minister Moriyama admitted that she signed her second death warrant.

Y: I'm not in a position to speak on this subject...

O: Did you inform Mr. Hamada's family about yesterday's execution? What is the latest news?

Y: No comment...

O: Some people from the world outside cannot meet with inmates on death row because of orders issued by the prison. What do you have to say about this?

Y: My thinking is the same as Warden Kameoka [the previous Nagoya warden]. Meetings with outsiders are forbidden in order to promote the emotional stability of the inmates.

O: This spring I sent a letter [to another death row inmate in the Nagoya jail], but since I have not yet received a reply I don't know if it arrived. Did it reach him?

Y: I don't know. I have not looked into it.

O: Could you please look into it for me?

Y: No comment...

O: I heard from the lead attorney in Gifu prefecture that Mr. Hamada's family came to Nagoya [after the execution].

Y: I don't know.

O: You're trying to make me look like a fool, aren't you? The previous warden, Mr. Kameoka, spoke more straightforwardly about matters like this. I shouldn't make comparisons, but Warden Kameoka wore a grim expression after an execution. You're smiling.

Y: If you pressure me I'm going to get mad. What do you want? For me to look uptight?

O: This winter, will there be stoves to heat the cells in this detention center?

Y: This winter we will do the same as we always do [that is, no heating]...

O: OK, I am submitting this letter of protest to you.

Y: I cannot accept it.

O: Then I'll place it here on the table.

Y: I'm just going to put it through the shredder.

O: Are you saying it will become garbage?

Y: If you pressure me I'll get mad.

O: [Addresses the letter to Warden Yoshida.]

Y: I cannot accept it even if it is addressed to me.

O: [Continues to write...] I'll sign my name too.

Y: I cannot accept it.

O: You know, this is the first time I've met a warden in this

way. I'm not doing it because I'm a Member of Parliament, I'm doing it because I just happened to get this position and the responsibility that comes with it. On the Detention Center's front lines, nothing at all is said about executions. It seems like your plan is to concentrate all information about executions in the Ministry of Justice. In a democratic society, that's not right...

Y: I have no comment about executions.

O: Who told you that you cannot comment about executions?

Y: It's not a matter of who told me. It's because I'm working in the field [at a Detention Center].

O: This conversation is not going anywhere. I'm leaving. [Once again Oshima presents the letter of protest to Warden Yoshida.]

Y: I cannot accept it.

O: Why can't you accept a letter that is addressed to you?

Y: I'm bothered by the way you're treating me.

O: I'm going to place the letter here on the table and leave.

Y: I cannot accept it.

O: Well then, please write "unaccepted" on it.

Y: I don't want to write "unaccepted" on it.

O: [Stands up from her seat and begins to leave...]

Y: [Follows after Oshima and attempts to return the letter to her...]

O: If you touch me that'll be sexual harassment.

Y: What the...[Placing the letter on top of a cabinet in the

hallway...] I'm putting it here.

In February 2004, I interviewed Reiko Oshima for 8 hours in her Nagoya office. By this time she had lost her seat in Parliament but had not lost her passion about capital punishment:

It's like *Alice in Wonderland*, isn't it? Or perhaps we should call it "Reiko in Wonderland." A person has just been killed, journalists have already published the fact [in the previous evening's newspapers], and yet the executioner refuses to acknowledge the reality. Why? Because the state wants to discourage debate about the death penalty and because, frankly, many of the state officials who participate in executions don't like doing it. Still, Warden Yoshida's denials are strange, aren't they? His predecessor, Warden Kameoka, was more forthcoming, and do you know what happened to him? He was transferred from the Detention Center in Nagoya [Japan's fourth largest city] to [the Detention Center in the much smaller city of] Tokushima [on the island of Shikoku]. That's not a promotion. The Ministry of Justice [which is run by prosecutors who control such transfers] does not want prison officials to talk about the death penalty. Those who do get punished. In this sense, silence is professional common sense. Warden Yoshida was just a cog in the state's killing machine, and the Ministry of Justice is both the engine and the driver...Events that day were even stranger than the tape-recording suggests. In fact, while [my daughter] Moe [who, as Oshima's secretary, accompanied her to the Nagoya Detention Center] was taking notes during the conversation with Warden Yoshida, other prison officials were desperately peering over her shoulder trying to see what she was writing. It was so absurd I didn't know whether to laugh or cry.

Nine months before Warden Yoshida's "Who's Hamada?" response, Reiko Oshima did cry when she observed the corpse of another man (Toshihiko Hasegawa) who had been hanged in the same Nagoya gallows. The condemned's sister had permitted Oshima to

photograph her brother's dead body after the state transferred it to her. The photos (which Oshima showed me) reveal large bruises where the rope bit and a neck that was stretched to an unnatural length by the force of the drop and by the 30 minutes that Hasegawa dangled. On 3 April 2002, Oshima showed the photographs to Minister of Justice Mayumi Moriyama and to executive prosecutor Yuki Furuta during a meeting of the Diet's Judicial Affairs Committee. "This is the reality of hanging," Oshima declared as she displayed an image few Japanese had ever seen. "Capital punishment is unconstitutionally cruel." Oshima believes the Minister of Justice was "stunned" by what she saw. On videotape, the woman who had signed Hasegawa's death warrant can be seen staring in silence at the photo for several seconds before replying that she "already knew the death penalty is an extremely severe sanction" and that it therefore "must be administered as carefully as possible."<sup>3</sup> In an interview some time later, Furuta, who led the team of prosecutors that selected Hasegawa from a pool of more than 50 death row inmates whose convictions had been finalized by the Supreme Court, told me that Oshima's use of the photographs was "shameful." "It was an affront to the Minister and to me," Furuta fumed, "and it was an insult to the deceased. There is no reason for doing something like that."<sup>4</sup>

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<sup>3</sup> The Hasegawa case is also notable because Masaharu Harada, the brother of one of the victims, repeatedly urged the Minister of Justice not to authorize execution since he "needed to talk" with the condemned and since he believed that the repentant Hasegawa should continue atoning for his crimes. In the months leading up to the hanging, Harada appeared on several television shows to explain his views and to argue against execution. His face was hidden for fear of retaliation from death penalty supporters. Interview with Masaharu Harada, in Nagoya (2/8/04). Some commentators believe Japanese prosecutors are increasingly adopting a "victim-service" mentality of the kind that is common in the United States. Shinichi Ishizuka, *Shushinkei Donyu to Keibatsu Seisaku no Henyo*, GENDAI SHISO, Mar. 2004, at 170; FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 57 (2003). Although the trend seems to be in that direction, the Hasegawa case suggests there is reason to wonder about the sincerity of some "victim-service" claims. As Harada sees it, "The government cites bereaved families' sentiments as a basis for maintaining the death penalty, but it completely ignored my wish when it executed Mr. Hasegawa." Harada, *supra*.

<sup>4</sup> Other prosecutors were similarly critical of Oshima's decision to tape-record the conversation with the Nagoya Warden. One called it a "dirty tactic." Interviews, Tokyo (Feb.-Mar. 2004).



### A. SECRECY AND SILENCE

But Reiko Oshima does have her reasons, chief of which is the desire to expose the reality of capital punishment in a country where the state kills in secret.<sup>5</sup> Capital punishment in the United States has become increasingly hidden, privatized, and bureaucratized over the last 150 years<sup>6</sup>, but the secrecy and silence that shroud Japan's death penalty are taken to extremes not seen in other nations. Warden Yoshida's evasions are but one brick in a much larger wall of denial that surrounds the death penalty in Japan. This section summarizes sixteen more.

1. Inmates on Japan's death row are not notified of the date or time of execution until an hour or so before it occurs. Former prison officials suggest that some condemned are extracted from their cells on the ruse that they are "wanted in the office".<sup>7</sup> At most, the about-to-be-killed are given only enough time to clean their cells, write a final letter, and receive last rites. Death penalty supporters have called this sudden "your-time-has-come" policy a "surprise attack" (*damashi-uchi*). Whatever the nomenclature, what it means is that the condemned live for years not knowing if the present day will be their last. Sakae Menda, who was exonerated and released in 1983 after spending 34 years on death row, had this to say about Japan's prior notification policy: "Between 8:00 and 8:30 in the morning was the most critical time, because that was generally when prisoners were notified of their execution...You begin to feel the most terrible anxiety, because you don't know if they are going to stop in front of your cell. It is impossible to express how awful a feeling this was. I

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<sup>5</sup> Following Scheppele's seminal study, a "secret" is "a piece of information that is intentionally withheld by one or more social actor(s) from one or more other social actor(s)." KIM LANE SCHEPPELE, *LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW* 12 (3rd ed. 1988).

<sup>6</sup> See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* (2002); Annula Linders, *The Execution Spectacle and State Legitimacy: The Changing Nature of the American Execution Audience, 1833-1937*, 34 L & SOC. REV. 607 (2002).

<sup>7</sup> TOSHIO SAKAMOTO, *SHIKEI WA IKA NI SHIKKO SARERU KA* 69 (2003).

would have shivers down my spine. It was absolutely unbearable.”<sup>8</sup>

2. Relatives of the condemned are told of the execution after the fact and are given twenty-four hours to collect the body. Most cadavers go uncollected. Relatives of the victim are not told anything.

3. Defense lawyers receive no prior notification. If they want to postpone an appointment with the hangman, they must guess when to file extraordinary appeals.<sup>9</sup>

4. The Japanese public receives no advance notice of executions. This minimizes protest and limits debate.

5. In some cases, the execution team is not given prior notification, in large part out of fear that if they are told in advance they may not show up for work. When members of the team are given prior notice, they are told the day before, they are ordered not to tell anyone else about the assignment, and they are urged to “be grateful” for receiving such an “honorable assignment.” Executioners are not allowed to refuse the assignment.<sup>10</sup>

6. After the condemned has been killed, the state sends news agencies a notification by fax. A typical announcement reads as follows: “Today in Tokyo, two death row convicts were executed.” That is all. The names of the deceased are not revealed (though journalists may learn who they were through backstage conversations), and the fax may not even indicate who is making the announcement. Until 1999, the government did not make any post-execution announcements at all,<sup>11</sup> so journalists learned about hangings when attorneys or family members told them a client or loved one was gone. In some cases, death was discovered only after

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<sup>8</sup> Howard W. French, *Secrecy of Japan Executions Is Criticized As Unduly Cruel*, N.Y. TIMES, June 30, 2002.

<sup>9</sup> Author's interviews with defense lawyers, September 2003 and February 2004.

<sup>10</sup> SAKAMOTO, *supra* note 7, at 35.

<sup>11</sup> YUJI HARA, KOROSARERU TAME NI IKIRU TO IU KOTO: SHIMBUN KISHA TO SHIKI MONDAI 13 (1997).

mail addressed to the deceased was returned to the sender unopened.<sup>12</sup>

7. No “private persons” are allowed to attend hangings: No journalists, no relatives or friends of the victim, no family or friends of the condemned, no scholars, and no members of the general public. The only persons permitted to witness executions are a handful of state officials: a prosecutor, a prosecutor’s assistant, the warden of the jail where the gallows is located, and members of the execution team.<sup>13</sup>

8. A “spiritual advisor” can attend the hanging but (unlike the situation in the United States) condemned persons in Japan are not free to choose who it will be. Instead, advisors must be selected from a list of state-approved clergy, none of whom is openly abolitionist. Activity that the state deems “political” will result in removal from the list. Proscribed behavior includes actions that could cultivate “hope” in the condemned.<sup>14</sup>

9. Citizens and the media are not allowed to view the gallows even when it is not in use. In July 2003, nine persistent Members of Parliament did get a tour of the new Tokyo gallows (before it was ever used), but they were the first outsiders to see where the state kills in at least 30 years. With this as “precedent,” I asked Japan’s Prosecutor General if I could see it too. My request was refused (after six months of deliberation), ostensibly on the grounds that opening the gallows to me could create a precedent that would enable “undesirables” to see it as well.

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<sup>12</sup> Author’s interviews with abolitionists and defense lawyers, September 2003.

<sup>13</sup> “The Japanese image of horror, of dying poorly, is dying alone.” See Susan Orpett Long, *Becoming a Cucumber: Culture, Nature, and the Good Death in Japan and the United States*, 29 J. JAPANESE STUD. 66.

<sup>14</sup> Books like *Dead Man Walking* – a spiritual advisor’s description of how condemned men in Louisiana spent their final days on death row – could not be written in Japan. This may help explain why the book and its author, Sister Helen Prejean, are popular in Japan’s abolitionist circles. SISTER HELEN PREJEAN, *DEAD MAN WALKING. AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES* (1993).

10. Between imposition of a death sentence and physical execution, inmates on death row are socially extinguished through the state's severe restrictions on meetings and correspondence. If one is not a close relative or a defense lawyer, contact with the condemned is all but impossible, and even if one falls into one of the two permitted categories, strict limitations are placed on the frequency, duration, and content of contacts.<sup>15</sup> The state's stated reason for this policy is to promote "stable feelings" (*shinjo no antei*) in the inmates and thereby to help them "prepare for death," but one function of killing socially before killing physically is the facilitation of "smooth" executions in which demoralized inmates do not resist.

11. Prosecutors in the Ministry of Justice select execution dates strategically, to minimize the possibility of *ex-post* protest and debate. Among other calculations, executions almost always occur when Parliament is in recess, usually on a Thursday or Friday (near the end of the "news week" and as people are becoming preoccupied with weekend activities). Execution dates are also selected to achieve "justification by association." In August 1997, for example, Norio

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<sup>15</sup> Conditions on death row are harsh, especially for the condemned who have had their sentences approved by an appellate court. In addition to being detained in almost total isolation, death row inmates are not permitted to stand up, lie down, or move without permission; they must sit and sleep in approved positions; they are not allowed to receive letters from anyone except family members; they are given five to ten minutes to eat each meal; they can exercise outside of their cells (by themselves) just two to three times per week for 30 minutes a session; they may not choose which newspaper to read; foreign books and all calendars are prohibited; their cells are constantly lit; and so on. KOICHI KIKUTA, SHIKEI: SONO KYOKO TO FUJORI 298-300 (1999). In 2006, the Japan Federation of Bar Associations released the results of a questionnaire administered to all of the persons on Japan's seven death rows. Fifty-eight out of 79 condemned inmates (*shikei kakuteisha*) responded. The results reinforce the impression that death row conditions are harsh. As the JFBA's report puts it, "The condemned are not allowed to participate in any group activities...and communication with the outside world is extremely limited." NIHON BENGOSHI RENGOKAI, ANKETO KAITO KEKKA HOKOKU 1, 5 (2006), at [http://www.nichibenren.or.jp/ja/committee/list/data/enquete\\_a.pdf](http://www.nichibenren.or.jp/ja/committee/list/data/enquete_a.pdf). Although conditions on American death rows are deeply "dehumanizing" too, conditions in Japan seem worse. See Robert Johnson, *Life Under Sentence of Death: Historical and Contemporary Perspectives*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 648 (James R. Acker et al. eds., 2nd ed. 2003); see also SEIJIRO YAMANO, SHIKEISHU NO INORI (1999).

Nagayama, an award-winning writer<sup>16</sup> and Japan's most well-known death-row inmate, was hanged shortly after a Kobe juvenile was arrested for murdering an elementary school boy and placing the victim's severed head on the school's front gate. The Kobe killer was 14 years old. Nagayama, who had lived for 29 years on death row, committed four homicides in 1968 when he was a 19-year-old minor. It appears that prosecutors chose him for execution at this time in order to mobilize support for legislation that would "get tougher" on juvenile offenders.<sup>17</sup> Following Nagayama's execution, The Juvenile Law was revised to make it easier to transfer minors to adult court.

12. The Ministry of Justice provides no explanation or justification for why it selects certain inmates for execution while permitting others to continue living. As of January 2006, 79 persons (including at least three women) had received "finalized" death sentences. By law, any of them could be chosen to die at any time, leading critics to contend that prosecutors are "playing god." Although length of time on death row is apparently one fact the Ministry considers when deciding who to hang next, the other factors remain unclear.

13. Ministers of Justice are appointed by the Prime Minister so as to minimize the possibility of public protest. By law, the Minister (a Cabinet member and almost always an elected politician) must sign a death warrant before an execution can occur (though in practice it is Ministry prosecutors who make the most important decisions about who goes next). In recent years, most Justice Ministers have had no local electoral district. They came instead from the ranks of representatives in the House of Councilors' national district and from "proportional representation" winners in the House of Representatives. It appears locally elected politicians are avoided in part to prevent a "problem" that was common before 1993: abolitionists demonstrating against the death penalty in the Minister's home district.<sup>18</sup>

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<sup>16</sup> NORIO NAGAYAMA, *MUCHI NO NAMIDA* (1990).

<sup>17</sup> MASAKO SATO, *GYAKUTAI SARETA KODOMOTACHI NO GYAKUSHU: OKASAN NO SEI DESU KA* 13-14 (2001).

<sup>18</sup> Yoshihiro Yasuda, *Kokka to Shikei: Oumu to Iu Tenkanten*, *GENDAI SHISO*, Mar. 2004, at 44, 44-55.

14. Members of Parliament who oppose capital punishment rarely tell their constituents. As of May 2003, 122 of the 762 Members of Parliament had joined the “Diet Members League for the Abolition of Capital Punishment” (a decline from the peak of nearly 200 some years earlier). Of these, “only two or three” tell voters their views on the death penalty; the rest fear being punished at the ballot box.<sup>19</sup>

15. Scholars and reporters are routinely denied access to death penalty documents – including trial records – that by law should be made public.<sup>20</sup> In Kitakyushu, for example, prosecutors refused a researcher’s request to read documents related to a case in which the defendant’s death sentence was finalized after he withdrew his right to appeal. Prosecutors claimed that providing the professor with copies of the documents would “hinder the administration of prosecution functions.”<sup>21</sup> Withholding records discourages research and reporting about capital punishment.

16. The Japanese state tries to insulate capital punishment from international scrutiny. All of the practices described above serve this end, as do the state’s unwillingness to cooperate with interested foreign visitors and its refusal to sign international treaties and protocols related to the death penalty.<sup>22</sup>

Although there are more bricks in Japan’s wall of silence,<sup>23</sup> the

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<sup>19</sup> Interviews with members of Parliament (Jan.- Feb. 2004); Yasuda, *supra* note 18, at 47.

<sup>20</sup> CODE OF CRIM. PROC., art. 53.

<sup>21</sup> Shinichi Ishizuka, *Shikei Kiroku no Etsuran to Shimin no Shiru Kenri*, in SHIKEI SONCHI TO HAISHI NO DEAI 183-193 (Shikei Haishi Henshu Iinkai ed., 1997).

<sup>22</sup> See SHIKEI HAISHI HENSHU IINKAI, SEKAI NO NAKA NO NIHON NO SHIKEI (2002).

<sup>23</sup> For example, capital defenders are often denied access to relevant case evidence, in part because their discovery rights are highly restricted, but also because “external checks on prosecutor power are almost non-existent.” Daniel H. Foote, *Nichibei Hikaku Keiji Shiho no Kogi o Furikaette*, 1148 JURISTO 165, 173 (1999). This leaves defense lawyers in the passive position of hoping that prosecutors will not withhold mitigating and exonerating evidence. Their hope is sometimes disappointed. The worst miscarriages in Japanese criminal justice occur when prosecutors withhold evidence from the defense. See CHALMERS JOHNSON,

foregoing summary does suggest its contours. The rest of this article proceeds from two premises: there is no government power greater than the power of life and death and no government intrusion more invasive than the death penalty, and there is no government power in greater need of public oversight. In Japan that oversight is missing. Moreover, if transparency and accountability are two hallmarks of a healthy democracy, then the secrecy that surrounds capital punishment seems decidedly undemocratic. Albert Camus believed that “Instead of saying that the death penalty is first of all necessary and then adding that it is better not to talk about it, it is essential to say what it really is and then say whether, being what it is, it is to be considered as necessary.”<sup>24</sup> State officials in Japan – and prosecutors in particular – practice a “better not to talk about it” strategy. The next section explores the historical origins of this policy, and the following two sections examine the justifications of secrecy that prosecutors provide and the meanings implied when the state kills in secret.

### III. ORIGINS

The secrecy and silence that characterize capital punishment in Japan developed unevenly over the last century and a half. This section identifies three historical moments of special significance: the “birth of secrecy” during the first 15 years of the Meiji era (1867 - 1912); the creation and spread of “censored democracy” during the American Occupation (1945 - 1952); and the acceleration of silence in the decades that followed.

#### A. MEIJI BIRTH

Capital punishment in Japan was not always surrounded by so much secrecy. Indeed, throughout most of Japanese history, death was the main criminal sanction and was administered openly. Until

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CONSPIRACY AT MATSUKAWA (1972); NOBUO KINOSHITA, SAIBANKAN NO HANZAI: “ENZAI” (2001); DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN (2002).

<sup>24</sup> ALBERT CAMUS, *Reflections on the Guillotine, in RESISTANCE, REBELLION, AND DEATH* 178 (1960).

the fourth century, when Chinese concepts of punishment began to influence Japan's legal system, law and morality were inseparable normative spheres, and perpetrators of many kinds were commonly executed in public.<sup>25</sup> The practice of capital punishment was interrupted when Japan became the world's first abolitionist nation in 810. For three-and-one-half centuries thereafter -- until 1156 -- the death penalty was defunct, a development that appears to have been rooted in two social facts: the peace that Japan enjoyed during the Heian era, and the flourishing of Buddhism which was introduced from China in 538.<sup>26</sup> Though the death penalty was never formally abolished during this period, death-eligible defendants were routinely exiled or given lesser punishments such as flogging, so Japan was "de facto" abolitionist.<sup>27</sup>

Executions resumed in 1156 following a violent rebellion known as the *Hogen-no-Ran*. During the next seven centuries of samurai rule — from the beginning of the Kamakura period in the twelfth century until the Tokugawa era ended in 1867 -- capital punishment again became the sanction of choice. Almost all crimes, from petty larceny to murder, were punishable by death, and execution methods ranged from boiling, burning, and crucifixion to several levels of beheading.<sup>28</sup> As in colonial America, capital punishment in pre-modern Japan was more than just one penal technique among many, it was the "base point" from which other punishments deviated. Japanese officials used a variety of practices to "intensify" the punishment and thereby create "degrees of death."<sup>29</sup> Executions again became highly public affairs, both in order to maximize deterrence and in order to demonstrate and celebrate the

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<sup>25</sup> KAORU MURANO, *NIHON NO SHIKEI* 40 (1992).

<sup>26</sup> Shigemitsu Dando, *Toward the Abolition of the Death Penalty*, 72 *IND. L.J.* 7, 7 (1996).

<sup>27</sup> PETRA SCHMIDT, *CAPITAL PUNISHMENT IN JAPAN* 11 (2002). There is, however, some evidence that Buddhist rulers in India may have abolished capital punishment before Japan did so in the Heian period. Moreover, some analysts suggest that in 724 AD, seventy years before the Heian era began, Japan's Emperor Shomu, a devout Buddhist, forbade the use of capital punishment. Damien P. Horigan, *Of Compassion and Capital Punishment: A Buddhist Perspective on the Death Penalty*, 41 *AM. J. OF JURIS.* 271, 283-285 (1996).

<sup>28</sup> See TAKEO ONO, *EDO NO KEIBATSU FUZOKUSHI* (1963).

<sup>29</sup> BANNER, *supra* note 6, at 53.



“sovereignty” of the ruling authorities.<sup>30</sup>

In 1600, when Englishmen sailed into Japan searching for gold and trade, the foreigners were alarmed and appalled by the corpses they encountered along the Tokaido road connecting Tokyo to Kyoto. They were the remains of crucified criminals. The diary of one English captain refers to bodies which after execution had been hewn “into pieces as small as a man’s hand” by the swords of passers-by.<sup>31</sup> By 1637, the shogun had expelled all foreigners from the country except for a small group of Dutchman confined to an island off the coast of Nagasaki. Over the next 230 years of Tokugawa history, countless Christians were publicly tortured and killed by agents of a government that feared their “destabilizing” influence. From 1614 to 1640, for example, at least five thousand Christians were publicly executed, many through methods such as *ana-tsurushi*, or “hanging upside-down in pits” that contained excreta and other filth.<sup>32</sup>

Executions declined in number during the 18<sup>th</sup> century, but since criminals could only be sentenced after a confession, coercion was institutionalized as a means of obtaining the requisite evidence<sup>33</sup> – much as had been done in medieval Europe.<sup>34</sup> While the public was informed of laws and orders, they were told little about punishments because of the Confucian belief that too much knowledge might encourage the calculators. Punishments were still administered in public, however, and this plus their elaborated cruelty “served the purpose of general prevention.”<sup>35</sup>

When the Tokugawa period ended in 1867 and Imperial rule was restored, Meiji reformers realized the need to modernize all

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<sup>30</sup> DANIEL BOTSMAN, PUNISHMENT AND POWER IN THE MAKING OF MODERN JAPAN 25 (2004).

<sup>31</sup> GILES MILTON, SAMURAI WILLIAM: THE ENGLISHMAN WHO OPENED JAPAN 180 (2003).

<sup>32</sup> William Johnston, *Translator’s Preface*, in SHUSAKU ENDO, SILENCE 8 (1966).

<sup>33</sup> SCHMIDT, *supra* note 27, at 18, *citing* BOTSMAN, *supra* note 30, at 35.

<sup>34</sup> John Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978).

<sup>35</sup> SCHMIDT, *supra* note 27, at 18.

aspects of Japanese society, including penal practices. Corporal punishments were eliminated, status-based distinctions were removed, mandatory death sentences were all but eradicated, barbarisms were banned, and hanging became the only way the state could administer death. By 1882, executions had to be carried out inside prison grounds, and prison guards and other state officials were the only persons permitted to be present. For the first time in Japanese history, the principle of secrecy had been laid down in law. In 1908, Japan enacted a Penal Code that is, for the most part, still in force today. Hanging remains the sole means of execution (Article 11), and the state's "officials only" attendance policy has not been altered. During the long Pacific War (1931 - 1945), capital punishment "flourished."<sup>36</sup> Murders declined (as they usually do when young males are sent abroad), so the number of executions remained relatively flat, but the number of capital offenses increased, and the wartime spirit of "giving all for the Emperor" muffled calls for abolition and reform that had been common in the preceding years.<sup>37</sup>

In comparative perspective, the transformation of capital punishment occurred much faster in Japan than it did in Western countries that experienced similar shifts from high to low usage, public to private executions, and "barbaric" to "civilized" methods of state-killing. A process that took a few years in Japan lasted centuries elsewhere.<sup>38</sup> Since the death penalty in some societies has deep cultural roots,<sup>39</sup> the concentrated nature of the Japanese changes might seem to create the possibility for reversion to public "spectacles of suffering" that had prevailed for centuries. That is not what happened. Rather, the Japanese state held fast to the Western standards it adopted and adapted, in large part because that is what it felt it needed to do in order to earn the recognition and respect of "the

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<sup>36</sup> *Id.* at 29

<sup>37</sup> Yasuda, *supra* note 18, at 45.

<sup>38</sup> See BANNER, *supra* note 6; RICHARD J. EVANS, RITUALS OF RETRIBUTION: CAPITAL PUNISHMENT IN GERMANY, 1600-1987 (1996); PIETER SPIERENBURG, THE SPECTACLE OF SUFFERING: EXECUTIONS AND THE EVOLUTION OF REPRESSION (1984); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1977).

<sup>39</sup> ZIMRING, *supra* note 3. *But see also* David Garland, *Capital Punishment and American Culture*, 7 PUNISHMENT & SOC. 347.

civilized world” that was then colonizing Asia.<sup>40</sup> Here as on many other occasions in its modern history, Japan was “invented” through its encounters with the West.<sup>41</sup>

#### B. THE OCCUPATION’S “CENSORED DEMOCRACY”

During the seven-year Occupation of Japan that followed its defeat in 1945, death sentences and executions spiked. This was not so much because of a punitive turn in criminal justice policy as it was the result of a steep increase in the number of homicides.<sup>42</sup> In the aftermath of “total war,” millions of males returned to Japan, and the “exhaustion and despair” that overwhelmed many people helped spread a variety of social problems, from alcoholism and drug addiction to corruption and crime of various kinds.

General Douglas MacArthur, the Supreme Commander for the Allied Powers (SCAP) who governed Japan for the first six years of this period, regarded his host country differently than did his Occupation counterparts in defeated Germany. For him and for the other American men who ruled, “demilitarizing and democratizing” a pagan, “Oriental” society was unequivocally “a Christian mission.”<sup>43</sup> MacArthur and many of the “old Japan hands” who had spent their professional lives studying the country belittled the capacity of ordinary Japanese to govern themselves. So did Yoshida Shigeru, Japan’s most powerful post-Occupation politician. When MacArthur left Japan for good in April 1951, at least 200,000 people lined the streets of Tokyo to bid him adieu, some with tears in their eyes. Upon his arrival in the United States, the General told a Senate committee that “measured by the standards of modern civilization, [the Japanese] would be like a boy of 12 compared with our [American] development of 45 years.”<sup>44</sup> Though this phrase struck many

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<sup>40</sup> See BOTSCHAN, *supra* note 30.

<sup>41</sup> See IAN BURUMA, *INVENTING JAPAN, 1853-1964* (2003).

<sup>42</sup> MANABU MIYAZAKI & AKIHIRO OTANI, *SATSUJINRITSU: NIHONJIN WA SATSUJIN GA DEKINAI! SEKAI SAITEI SATSUJINRITSU NO NAZO* 21 (2004).

<sup>43</sup> JOHN W. DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* 23 (1999).

<sup>44</sup> *Id.* at 549.

Japanese like a slap in the face, the truth is that they, too, routinely spoke of themselves as “MacArthur’s children.”<sup>45</sup> Indeed, the entire Occupation was premised on Japan’s acquiescence to America’s overwhelming authority. That authority forged many enduring features of Japan’s postwar polity, three of which are especially relevant here: the decision to retain the death penalty; the capital punishment precedents of the Tokyo War Crimes Trial; and the legacies of the “censored democracy” that prevailed during the Occupation period.

First, Occupation authorities could have abolished the death penalty in Japan, and their decision not to was neither natural nor inevitable. Indeed, the Occupation’s “democratizing” agenda was highly ambitious: land redistribution, equality of the sexes, the downsizing of the emperor from “god” to a mere “symbol of the State and of the unity of the people,” the establishment of the Diet as the highest organ of state power, the power of judicial review, the renunciation of war, the creation of due process rights, and so on. But the abolition of capital punishment was nowhere on the agenda. This not only distinguishes the Occupation of Japan from the parallel Occupation of Germany,<sup>46</sup> it also helps explain why Japan today is one of only two developed democracies that still practice capital punishment.

Second, abolition never occurred in large part because American officials were determined to put “war criminals” to death in the Tokyo War Crimes Trial. The “main trial” was actually one of many. Altogether, some 5700 Japanese were tried on “war crimes” charges, of whom 920 were executed.<sup>47</sup> In the main tribunal initiated by SCAP in Tokyo, 28 defendants were tried and 25 convicted (of the remaining three, two died during trial and one was deemed psychologically unfit to be adjudicated). No one was acquitted. (In Nuremburg, three of the 22 defendants were found not guilty). Seven of the 25 convicts were executed on 23 December 1948, just seven

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<sup>45</sup> *Id.* at 551.

<sup>46</sup> EVANS, *supra* note 38, at 741.

<sup>47</sup> By country, the number of war-crime death sentences was as follows: Dutch 236, British 223, Australian 153, Chinese 149, American 140, French 26, and Filipino 17. In addition, “the Soviets may have executed as many as three thousand Japanese as war criminals, following summary proceedings.” DOWER, *supra* note 43, at 447, 449.

weeks after the Tokyo court's 11-judge bench had sentenced them to death and just three days after the U.S. Supreme Court rejected the defendants' appeal on the grounds that it had no jurisdiction in the case. Before he was hanged, Hideki Tojo, who was both Prime Minister and War Minister at the time of Pearl Harbor, said that "this trial was a political trial. It was only victors' justice."<sup>48</sup> Much subsequent scholarship argues that this is an accurate assessment.<sup>49</sup>

The Tokyo Trial was flawed in numerous ways. None of the judges was from a neutral nation, and only one came from a country (India) that had not suffered directly and severely from Japanese acts in the war. At least five judges had prior involvement in the issues to come before the tribunal, including an American judge who was an Army Major General and a Filipino justice who had survived the Bataan Death March. Notably, no Koreans or Japanese served as judge or prosecutor, and the death sentence votes in all of the capital cases were either 6 to 5 or 7 to 4 (four defendants escaped death by a single vote). At Nuremburg, by contrast, verdicts and sentences required the approval of three of the four sitting justices. Had the voting rule been similar in Tokyo, there would have been no capital convictions. A 6-5 vote also determined the method of death, which was hanging. Richard Minear, who has written the classic account of the trial, believes the other option under consideration (firing squad) may have been deemed "too dignified" for Japanese defendants.<sup>50</sup>

All of the defendants at the Tokyo Trial were Japanese. Considering the fire bombings of Tokyo and the atomic bombs at Hiroshima and Nagasaki, there is room to wonder whether war crimes in the Pacific were the exclusive preserve of America's enemy. The

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<sup>48</sup> Tojo was the only defendant to implicate the Emperor, which he did by testifying that "it was inconceivable for him or any subject to have taken action contrary to the emperor's wishes." In response to this defense, Prosecutor Keenan and Occupation officials pressured other Japanese defendants to urge Tojo to rectify his reply. One week later he retracted the statement. *Id.* at 468.

<sup>49</sup> See RICHARD H. MINEAR, *VICTOR'S JUSTICE: THE TOKYO WAR CRIMES TRIAL* (1971); ARNOLD BRACKMAN, *THE OTHER NUREMBURG: THE UNTOLD STORY OF THE TOKYO WAR CRIME TRIALS* (1988); DOWER, *supra* note 43; HERBERT P. BIX, *HIROHITO AND THE MAKING OF MODERN JAPAN* (2000); TIMOTHY P. MAGA, *JUDGMENT AT TOKYO: THE JAPANESE WAR CRIMES TRIALS* (2001); Kentaro Awaya, *The Tokyo Tribunal, War Responsibility and the Japanese People*, JAPAN FOCUS (Timothy Amos tr.), JapanFocus.org (February 6, 2006).

<sup>50</sup> MINEAR, *Id.* at 91.

selection of Japanese to put on trial was arbitrary in the extreme. Most conspicuously, Emperor Hirohito was nowhere to be found in the indictments – and not because he lacked culpability. History shows that Hirohito was hardly the reluctant, passive, wartime monarch that SCAP, Japan, and the emperor himself presented for public consumption. He was, rather, “a man of strong will and real authority”<sup>51</sup> who “bore enormous responsibility for the consequences of his actions in each of his many roles. Yet, he never assumed responsibility for what happened to the Japanese and Asian peoples whose lives were destroyed or harmed by his rule.”<sup>52</sup> If anyone deserved to be on trial on Tokyo, this was the man.<sup>53</sup> SCAP, however, made a calculated decision to preserve the person and institution of the emperor in the belief that their continuation would facilitate governing Japan and out of fear that trying and executing Hirohito could create lasting resentment among the Japanese. MacArthur’s chief of psychological warfare operations even suggested that trying the emperor would be “blasphemous.” In some respects, the Occupation decision to separate Hirohito and the military leadership proved remarkably effective. Postwar Japan is much richer, freer, and more egalitarian than imperial Japan ever was. On the other hand, since the emperor’s role in the war was never seriously investigated, justice was rendered so arbitrary that the Tokyo Trial has been called “an exercise in revenge,” “the worst hypocrisy in recorded history,” and “a white man’s tribunal.”<sup>54</sup>

As for the legal process itself, Chief Prosecutor Joseph Keenan predicted on the eve of the trial that “in this very courtroom will be made manifest to the Japanese people themselves the elements of a fair trial which, we dare say, perhaps they may not have enjoyed in the fullness – in all of their past history.”<sup>55</sup> What ensued was anything but. For one thing, the tribunal was not bound by “technical rules of evidence,” and this proved to be a gateway through which much unfairness entered the proceedings. Among other problems,

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<sup>51</sup> BIX, *supra* note 49, inside cover.

<sup>52</sup> *The Emperor, Modern Japan and the U.S.-Japan Relationship: an Interview with Herbert Bix*, at <http://japanfocus.org/article.asp?id=376>.

<sup>53</sup> DOWER, *supra* note 43, at 277.

<sup>54</sup> *Id.* at 469.

<sup>55</sup> MINEAR, *supra* note 49, at 74.

press releases from the prosecution were accepted as evidence, and there was even “a conversation with a person since deceased” that the court took into account.<sup>56</sup> Conversely, reams of relevant evidence was excluded, including materials describing the conditions in China prior to the time Japanese forces invaded, evidence about America’s A-Bomb decisions, and other information the defense wanted the court to consider. American control of prosecution policy also bordered on the absolute, with the main aim of insulating the emperor from accountability.<sup>57</sup> Judges were frequently absent from trial (one missed 22 consecutive days), and the whole panel of judges never even met together to discuss their final judgment.<sup>58</sup> In the context of criminal justice, “truth” has been defined as “accurate accounts by competent people of what they genuinely believe they recall from sensory experience” and the “honest production of papers and objects relevant to legal controversies.”<sup>59</sup> By this definition, the Tokyo Trial produced little truth.

In the end, MacArthur could have commuted any or all of the convictions. He chose not to. After a cursory review of the tribunal’s proceedings, he directed an American general to “execute the sentences as pronounced,” and he went on to implore “Divine Providence” to “use this tragic expiation as a symbol to summon all persons of good will to the realization of the utter futility of war.”<sup>60</sup> When the seven condemned men were hanged two days before Christmas in 1948, they were required to wear United States army salvage work clothing rather than their old uniforms or civilian clothes of their own choosing.<sup>61</sup> Of the eighteen defendants sentenced to prison, six died there; the rest were paroled or released after their sentences were reduced (the last in 1958). Many of them were “woefully wronged” by a “highly defective” trial.<sup>62</sup> Since they were

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<sup>56</sup> *Id.* at 120.

<sup>57</sup> DOWER, *supra* note 43, at 458.

<sup>58</sup> *Id.* at 465.

<sup>59</sup> MARVIN E. FRANKEL, *PARTISAN JUSTICE: TOO MUCH FIGHT? TOO LITTLE TRUTH? EQUAL JUSTICE?* 73 (1978).

<sup>60</sup> MINEAR, *supra* note 49, at 167.

<sup>61</sup> *Id.* at 172.

<sup>62</sup> *Id.* at 177.

the leaders of Japan and indicted as its representatives, the nation, too, was dishonored.

Although much has been written about the Tokyo Trials, the tomes do not answer many basic questions. How were established principles of law reversed after Japan surrendered? On what basis were the 28 unlucky defendants selected from a vastly larger pool of possibilities? Why was the emperor invisible throughout the legal proceedings? Why was the tribunal's voting rule tilted in favor of conviction? Why were the normal rules of evidence undermined and ignored? Why were the opinions of dissenting judges buried in huge files? Why did the Occupation authorities block publication of Indian Justice Radhabinod Pal's stinging dissent? And most importantly, why has the record of the Tokyo War Crimes Trial never been published *in toto*?<sup>63</sup> While the Nuremburg proceedings have been made available in a 42-volume set, no official publication ever emerged from Tokyo. As John Dower's magnificent study of the Occupation concludes, "for all practical purposes, the record of the [Tokyo] proceedings was buried."<sup>64</sup> Not even the majority judgment has been made readily accessible.<sup>65</sup>

Third and finally, though the secrecy that shrouds the Tokyo Trial has an obvious affinity with the secrecy that surrounds capital punishment in contemporary Japan, the legacies of the Occupation's policy of "censored democracy" are broader than that. Much that lies at the heart of contemporary Japan "derives from the complexity of the interplay between the victors and the vanquished" during the Occupation.<sup>66</sup> For this study of the death penalty, the most salient feature of that interplay was a censorship bureaucracy, 6000 persons strong, that extended into most aspects of public expression. Censorship applied to all forms of media, from newspapers, magazines, and books to radio, film, and theatre, and the policy itself was often opaque because the lines between permissible and

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<sup>63</sup> *Id.* at 33.

<sup>64</sup> DOWER, *supra* note 43, at 454.

<sup>65</sup> Two English-language sources for the Tokyo Trial are JOHN R. PRITCHARD, *THE TOKYO MAJOR WAR CRIMES TRIAL: THE RECORDS OF THE INTERNATIONAL MILITARY TRIBUNAL OF THE FAR EAST, WITH AN AUTHORITATIVE COMMENTARY AND COMPREHENSIVE GUIDE* (1998) and JEANIE M. WELCH, *THE TOKYO TRIAL: A BIBLIOGRAPHIC GUIDE TO ENGLISH-LANGUAGE SOURCES* (2001).

<sup>66</sup> DOWER, *supra* note 43, at 28.



impermissible discourse were never made public. The secrecy of the standards fostered a “pathology of self-censorship,” a problem that persists in Japan to this day.<sup>67</sup> At one point during the Occupation, more than 60 topics were considered taboo, including criticism of SCAP or of any of its policies, mention of SCAP’s role in writing the new Constitution, and public justification or defense of any of the defendants in the Tokyo War Crimes Trial. Since the taboos included public acknowledgement of the existence of censorship, SCAP remained “beyond accountability” for the duration of the Occupation.<sup>68</sup> Only after the American authorities left in 1952 did it become possible to discuss forbidden subjects (such as abolition of capital punishment) and the Occupation more generally.<sup>69</sup> By then, seven years of censored democracy had helped forge a postwar political consciousness that to this day remains inclined to “acquiesce to overweening power,” “conform to a dictated consensus,” and accept authority “fatalistically.”<sup>70</sup> Though these habits of the heart

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<sup>67</sup> See LAURIE A. FREEMAN, *CLOSING THE SHOP: INFORMATION CARTELS AND JAPAN’S MASS MEDIA* (2000).

<sup>68</sup> DOWER, *supra* note 43, at 412. In Okinawa, censorship lasted until 1955. While the United States built this prefecture into a major Cold War military base, no news reports or commentaries were published in the Japanese press. *Id.* at 434.

<sup>69</sup> In 1956 there were two days of discussion in the Diet about a bill to abolish capital punishment, but it died in the next Diet session. SHIKEI HAISHI HENSHU INKAI, *supra* note 2, at 1. No subsequent Parliament seriously considered abolition until progressives tried to introduce a “life-without-parole and moratorium” bill in 2003. It failed in the face of conservative opposition led by prosecutor-turned-Parliamentarian Tomoko Sasaki. Interviews with members of Parliament, *supra* note 19.

<sup>70</sup> DOWER, *supra* note 43, at 439. Tomoko Matsushima, who interviewed homeless people in the USA and Japan, notes that the homeless in Manhattan frequently channel their anger into “criticism of the policies of city authorities, the economic situation and other targets” such as the mayor or the market. Tomoko Matsushima, *Society Should Be Kinder to the Homeless*, ASAHI SHIMBUN, August 20, 2004. In contrast, “not one homeless person [in Tokyo] ever complained to [her] about politics, the recession, society or other contemporary issues.” Matsushima says she cannot explain the silence of her Tokyo informants, but research suggests it may be one piece of a larger pattern of passive political consciousness. DOWER, *supra* note 43; see also ATSUO ITO, SEIJI NO SUJI (2005); SHELDON GARON, *MOLDING JAPANESE MINDS: THE STATE IN EVERYDAY LIFE* (1997); DAIKICHI IROKAWA, *THE AGE OF HIROHITO: IN SEARCH OF MODERN JAPAN* (Mikiso Hane & John K. Urda trans., 1995). In recent years, signs of a more

have come to be considered “peculiarly Japanese,” they are in large part legacies of the American Occupation.<sup>71</sup> What SCAP bequeathed – retention of capital punishment, the Tokyo Trial precedents, and a political consciousness that seems uncommonly comfortable with the silences dictated by “censored democracy” – helps explain why Japan’s subsequent death penalty policy encountered little resistance.<sup>72</sup>

### C. POSTWAR ACCELERATION

For more than a decade after the Occupation ended in 1952, death row inmates in Japan were notified a day or two in advance of their execution date and given the opportunity to arrange final meetings with family and friends, to worship in a group with other inmates, to receive spiritual counseling, to request last meals, and to otherwise put their final affairs in order.<sup>73</sup> Until 1975, the condemned were allowed to play softball together and to talk with inmates in adjacent cells.<sup>74</sup> These freedoms no longer exist. Viewings of the gallows have also been banned and visits to death row curtailed. Hideo Itazu, a prison guard in Nagoya from 1948 to 1963, says that when he was a prison official, the Ministry of Justice held debates about capital punishment and published abolitionist articles in its own

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vigorous “civil society” can be seen in some segments of Japanese society. *THE STATE OF CIVIL SOCIETY IN JAPAN* (Frank J. Schwartz & Susan J. Pharr eds., 2003).

<sup>71</sup> DOWER, *supra* note 43, at 440.

<sup>72</sup> Many Japanese journalists also illustrate these tendencies toward fatalism and acquiescence to power. I interviewed ten reporters, all of whom covered criminal justice. Few expressed interest in attending executions or in expanding the circle of persons who can attend, and most knew little about the state’s secrecy policy. Though there are institutional and structural causes of these dispositions (such as “press clubs” that discourage competition and encourage reliance on official sources of information), elite Japanese journalists also possess different sensibilities about their “proper role” compared with journalists in other rich democracies. See FREEMAN, *supra* note 67; HARA, *supra* note 11; MARK D. WEST, *SCANDAL NATIONS: JAPAN AND AMERICA* (forthcoming).

<sup>73</sup> MURANO, *supra* note 25, at 15.

<sup>74</sup> Ryan Connell, *Life on Death Row Hangs by a Thread*, MAINICHI DAILY NEWS, Dec. 28, 2002.

house journal.<sup>75</sup> Forty years after Itazu retired, prosecutors acknowledge that such practices are today “utterly unimaginable.”<sup>76</sup> More generally, Japan’s government, and prosecutors in particular, have become increasingly unwilling to describe, explain, justify, or discuss a wide range of death penalty policies and practices. At one level, this postwar acceleration of secrecy is a puzzle because it contradicts a trend towards more openness and accountability in some other spheres of Japanese governance.<sup>77</sup> At a deeper level, however, insulating a practice with secrecy and silence is a common reaction to threat. As the sociologist Georg Simmel put it, “The flight into secrecy is a ready device for social endeavors and forces that are about to be replaced by new ones.”<sup>78</sup> Japan’s postwar acceleration of secrecy reflects the kind of anxiety Simmel had in mind, and this section summarizes some of the forces that have quickened the Justice Ministry’s “flight.”

In the first place, the death penalty in Japan is used much more sparingly than it used to be, with executions falling from an average of 800 per year during the first five years of the Meiji era (1868 - 1872) to an average of 18 per year during the first five years of the Showa period (1926 - 1930) – a 98 percent drop in just 58 years. As explained earlier, executions remained flat during the Pacific War (1931 - 1945) and Occupation (1945 - 1952), but they declined thereafter, from an annual average of 24.6 in the 1950s, to 13.2 in the 1960s, 9.4 in the 1970s, and just 1.5 in the 1980s. Death sentences fell as well, from an annual average of 24.2 in the 1950s, to 15.1 in the 1960s, 5.0 in the 1970s, and 4.1 in the 1980s.<sup>79</sup> Then, for the 40 months from November 1989 to March 1993, the Japanese state executed no one because four successive Ministers of Justice refused to sign (or had no opportunity to sign) the requisite death warrants.<sup>80</sup>

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<sup>75</sup> Hideo Itazu, *Jo ga Utsutte ne, Honto ni Tsurai Desu yo*, 14 FORUM 90 1-2, June 1991.

<sup>76</sup> Interviews with prosecutors in Japan (Mar. 2004).

<sup>77</sup> Jonathan Marshall, *Here Comes the Judge: Freedom of Information and Litigating for Governmental Accountability*, 23 SOC. SCI. JAPAN 8, Apr. 2002.

<sup>78</sup> THE SOCIOLOGY OF GEORG SIMMEL, *supra* note 1, at 347.

<sup>79</sup> MURANO, *supra* note 25, at 53.

<sup>80</sup> HARA, *supra* note 11.

The third of those Ministers, Megumu Sato, was a Buddhist priest who believed that the death penalty violates the sanctity of life. Despite no significant opposition to this moratorium, it ended when a new Minister of Justice, Masaharu Gotoda, signed warrants authorizing the hanging of three condemned men – two in Osaka, one is Sendai, and all on the same March morning. In his memoirs, Gotoda calls capital punishment an “insoluble problem” and offers three reasons for authorizing the executions: his obligation as Minister of Justice to “protect law and order,” the thorough process of case “review and consultation” (*kessai*) that officials in the Ministry engage in before selecting persons to execute, and “public support” for the death penalty.<sup>81</sup> Whatever his reasons,<sup>82</sup> the resurrection of capital punishment surprised many, including abolitionists who believed the moratorium was the prelude to inevitable abolition.<sup>83</sup> After executions resumed in 1993, capital punishment became a more salient issue than it has been ever since, but the surge in controversy did not slow the Ministry down.<sup>84</sup> Eight months later, on 26 November 1993, four more men were executed. This time, their warrants were signed by a Minister (and former professor of law at Tokyo University) who was unelected and therefore could not be easily pressured by protesters before the execution fact.<sup>85</sup>

In the subsequent decade, three high-profile cases have reinforced support for the death penalty and diluted concerns about the way in which it is administered. All involved multiple murders and unrepentant defendants. The most important case broke in 1995 when the sarin gas attacks in the Tokyo subway led to the arrest of

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<sup>81</sup> MASA HARU GOTODA, JO TO RI: GOTODA MASA HARU NO KAIKOROKU 268-270 (1998).

<sup>82</sup> In 2003, Gotoda was sued by abolitionist activists for misrepresenting public opinion figures in his memoirs. The next year he told abolitionists that during the case review (*kessai*) with prosecutors that preceded his signing of death warrants in March 1993, he never was told about the mental illness of a man whose execution he ordered. Interviews with lawyers in Tokyo who talked to Gotoda (May 2004).

<sup>83</sup> Yasuda, *supra* note 18.

<sup>84</sup> Kaho Shimizu, *Diet group against death penalty to make its move*, JAPAN TIMES, Oct. 4, 2002; Dana Domikova-Hashimoto, *Japan and Capital Punishment*, 6 HUMAN AFFAIRS 77 (1996).

<sup>85</sup> Yasuda, *supra* note 18, at 46.

dozens of members of the AUM Shinrikyo religious group. Prosecutors regard that incident as “the most atrocious crime” in Japanese history, and have sought the death penalty for 13 defendants, including guru Shoko Asahara, who was convicted of masterminding crimes that killed dozens. As of 27 February 2004, courts had imposed death sentences on 12 (the last trial was still in progress). AUM’s effects on Japanese society are difficult to exaggerate. Indeed, by making the public more insecure and criminal justice policy more punitive, the AUM attacks have been called “Japan’s 9-11.”<sup>86</sup>

In 1998, the retentionist mood was further reinforced when four people died in Wakayama prefecture after eating curry that had been prepared for a neighborhood festival. A local housewife, Masumi Hayashi, was arrested and convicted of poisoning the curry, and in December 2002 she was sentenced to death. Hayashi denies any involvement in the case, and throughout the course of her original trial she remained silent -- an unusual strategy in a country where the usual posture for a criminal defendant is like “a carp on the cutting board.”<sup>87</sup> It is an attitude many Japanese condemn.

While the Hayashi and Asahara trials were ongoing, Mamoru Takuma stormed an Osaka elementary school with two kitchen knives. It was recess, and by the time Takuma had slashed his way through four classrooms, eight children were dead and 15 people were injured. Takuma told the Osaka District Court that he hoped to be executed for his crimes, and prosecutors were happy to help him fulfill that wish. He was sentenced to death in August 2003. When his lawyers appealed, Takuma asked them to drop it so that his death sentence could be finalized. Throughout his trial, Takuma offended victims and their bereaved families by failing to show remorse and by extreme displays of defiance. Prosecutors and judges therefore agreed that capital punishment is “the only fitting penalty for him.” In Takuma’s last court hearing, the parents of the eight murdered children released a statement saying “We do not believe the death penalty is enough for this man.” The same day Takuma appeared in the dock wearing a shirt embroidered with the English words “White Devil.” At sentencing three months later, he was removed from the courtroom for insulting victims’ family members. After asking that

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<sup>86</sup> *Id.* at 47.

<sup>87</sup> DAVID H. BAYLEY, *FORCES OF ORDER: POLICING MODERN JAPAN* 136 (1991).

his appeal be dropped, Takuma sent a letter to his lead attorney stating that he “should have used gasoline” during the attack because more people would have died. The condemned said he was “disappointed” that he had not caused more destruction, and he instructed his attorney to publicize his perverse lamentation.<sup>88</sup> On 14 September 2004, Takuma was hanged, less than one year after his death sentence had been finalized. Most condemned inmates “spend years on death row, and in recent years the shortest time spent waiting for execution was four years.”<sup>89</sup>

Big crimes can have big effects. In the United States, high-profile homicides have powerfully shaped death penalty opinion for centuries,<sup>90</sup> and in post-moratorium Japan the heinous crimes and defiant attitudes of Takuma, Hayashi, and Asahara have strengthened the view among many Japanese that death is sometimes deserved. At the same time, the long-term decline of the death penalty and the rise of the abolition movement have prompted the Japanese state to pursue a postwar policy of thoroughgoing concealment. On the one hand, prosecutors felt the “threat” of abolition during the 1989-93 moratorium years, and for thirty years before that some worried that capital punishment was in serious decline.<sup>91</sup> During those decades, many of the bricks in Japan's wall of silence were put into place. On the other hand, high-profile cases during the last ten years – the AUM attacks especially – have provided prosecutors with the context and cover they need to continue pursuing a policy of secrecy despite increased pressures for openness and accountability in other areas of Japanese governance.<sup>92</sup>

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<sup>88</sup> TATSUKI SAKU, SHINSO 77 (2002).

<sup>89</sup> *Takuma Hangs for Massacre of Eight Kids at Osaka School*, JAPAN TIMES, September 15, 2004; Eric Talmadge, *Secrecy Shrouds Japan Executions*, Honolulu Advertiser, December 19, 2004.

<sup>90</sup> See ROBERT M. BOHM, DEATHQUEST II: AN INTRODUCTION TO THE THEORY AND PRACTICE OF CAPITAL PUNISHMENT IN THE UNITED STATES (2003); BANNER, *supra* note 6.

<sup>91</sup> Interviews with prosecutors (Mar., May 2004).

<sup>92</sup> Lawrence Repeta & David M. Schultz, *Japanese Government Information: New Rules for Access: The 2001 Information Disclosure Law, and a Comparison with the U.S. FOI*, at <http://www.freedominfo.org/analysis/japan/index.htm> (posted July 5, 2002); Marshall, *supra* note 77.

Now for the details. By most accounts, secrecy began to accelerate in 1963 when the Corrections Bureau of the Ministry of Justice issued a “circular” (*tsutatsu*) declaring its authority to tighten restrictions on meetings and correspondence with death row inmates in order to promote their “emotional stability.” The strengthened controls appear to have been a response to Japan’s nascent abolition movement.<sup>93</sup> Public interest in capital punishment had risen as a result of the exposure of a number of dubious convictions and political prosecutions. At the same time, state officials discovered that the emergence of “support groups” for the condemned made administering death more difficult than it had been theretofore. Some executions were even permanently postponed because of “problems” posed by such groups.<sup>94</sup> During the rest of the turbulent 1960s, as protests multiplied and jail populations bulged, the Japanese state continued to strengthen controls on access to the condemned and to “left-leaning” inmates of various kinds.<sup>95</sup> Simultaneously, prosecutors in the Ministry of Justice took away discretion that had been delegated to wardens in order to concentrate control over capital punishment in their own hands<sup>96</sup> and in order to reduce the number of “leaks” from corrections officials.<sup>97</sup>

In the 1970s, the Ministry of Justice further fortified controls when a death row inmate committed suicide the day after being notified that he would be hanged later in the week. The jail officials deemed responsible for this suicide were reprimanded and their once promising careers veered markedly off course.<sup>98</sup> The ensuing

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<sup>93</sup> MURANO, *supra* note 25, at 75.

<sup>94</sup> Interviews with prosecutors (Oct. 2003, Mar. 2004).

<sup>95</sup> Patricia G. Steinhoff, *Doing the Defendant’s Laundry: Support Groups as Social Movement Organizations in Contemporary Japan*, in JAPANSTUDIEN: JAHRBUCH DES DEUTSCHEN INSTITUTS FÜR JAPANSTUDIEN 55 (Vol 11 1999); Patricia G. Steinhoff, *Political Offenders in the Japanese Criminal Justice System*, presented at the annual meeting of the American Society of Criminology, Nov. 23, 1991 (unpublished manuscript).

<sup>96</sup> SAKAMOTO, *supra* note 7, at 62-66.

<sup>97</sup> Sayako Kikuchi, *Himitsushugi o Tsuranuku Homusho no ‘Shikeiron’*, in SHIKAI NO GENZAI (special issue of HOGAKU SEMINA). December 1990, at 114, 115.

<sup>98</sup> Toshio Sakamoto, a former corrections official in the Ministry of Justice, says there are four rules that jail personnel must never forget: “Don’t let

Ministry investigation led to abolition of the prior notification policy and to its replacement with the “surprise attack” system of announcements that still operates today.<sup>99</sup> Some of the wardens and guards who conducted executions in the more open era came to know the condemned as people and, like some of their American counterparts,<sup>100</sup> expressed ambivalence and regret over the roles they played in killing for the state.<sup>101</sup> One man who worked as a prison guard in Nagoya before the 1963 circular was issued says that death row assignments were especially difficult because interacting with the condemned awakened in him uncomfortable “human feelings.”<sup>102</sup> Most jail officials who help hang the condemned regard the assignment as the most difficult and distasteful duty they perform. Since it is not easy to kill, even with the law’s imprimatur, one of the “threats” that motivated the Ministry’s flight into secrecy was the realization that at the vital moment on the front lines, some executioners prefer to become conscientious objectors.<sup>103</sup> One senior prosecutor told me that the distaste for killing for the state may be especially acute in a postwar Japan that has “renounce[d] war as a sovereign right of the nation and the threat or use of force as a means

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them escape! Don’t let them commit suicide! Don’t let them destroy evidence!” and “Don’t let them go crazy!” SAKAMOTO, *supra* note 7, at 82, 261.

<sup>99</sup> *Id.* at 63. In American prisons as well, security lapses have led to reactionary reforms in death penalty policy and practice. In 1998, for example, five inmates escaped from a Texas death row work program, prompting a roll-back of reforms that gave 40 percent of the “work capable” condemned more freedom than their counterparts in “death row segregation.” Robert Johnson, *supra* note 15, at 658. Similarly, the escape of three inmates from New York’s Sing Sing prison led to the forced retirement of anti-death penalty warden Lewis E. Lawes. RALPH BLUMENTHAL, *MIRACLE AT SING SING: HOW ONE MAN TRANSFORMED THE LIVES OF AMERICA’S MOST DANGEROUS PRISONERS* (2004).

<sup>100</sup> See DONALD A. CABANA, *DEATH AT MIDNIGHT: CONFESSIONS OF AN EXECUTIONER* (1996); ROBERT JOHNSON, *DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS* (1998); IVAN SOLOTAROFF, *THE LAST FACE YOU’LL EVER SEE: THE CULTURE OF DEATH ROW* (2001).

<sup>101</sup> See KAORU MURANO, *SENGO SHIKEISHU RETSUDEN* (2002); MURANO, *supra* note 25; KIMIKO OTSUKA, *SHIKAI SHIKKONIN NO KUNO* (1988).

<sup>102</sup> Itazu, *supra* note 75, at 1.

<sup>103</sup> SAKAMOTO, *supra* note 7; Dan Baum, *The Price of Valor*, *THE NEW YORKER*, July 12 & 19, 2004, at 44.



of settling international disputes.”<sup>104</sup> The connection to Constitutional pacifism also helps explain why a larger proportion of the death penalty literature in Japan concerns the executioners’ plight than does the parallel literature in the United States. In fact, an American professor at a university in Osaka says that when he assigns his students the task of deciding whether the death penalty should be included in their “ideal” criminal justice system, a stark contrast consistently emerges: None of the foreign students consider its effects on the executioners while all of the Japanese students do.<sup>105</sup>

In the 1980s, when four death row inmates were exonerated and released, the state’s drive towards secrecy continued to accelerate, apparently in an effort to insulate the death penalty from criticisms of the kind that these acquittals stimulated. People on both sides of Japan’s death penalty divide believe it is no accident that the 40-month moratorium began after these miscarriages were exposed,<sup>106</sup> and yet the official response to the revelation that the system makes mistakes was to make it more difficult for outsiders to know how and why capital sentences are imposed and administered. The death-row exonerations engendered “much soul-searching” among Japanese criminal justice officials and led to “numerous proposals for reform” – none of which was enacted.<sup>107</sup> As of 1993, the best study of these cases concluded that at least with respect to collateral review, “there seems little doubt an innocent individual would prefer Japan’s retrial

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<sup>104</sup> Constitution (1946), art. 9.

<sup>105</sup> Interview with Professor Mark Tracy, in Osaka (Feb. 12, 2004). In 1974, a bill to reform capital punishment was never introduced in the Diet because liberal critics considered other parts of the bill too punitive. More specifically, three death penalty reforms were proposed by members of a law reform committee who wanted total abolition but believed it was too early to achieve it. First, in order to impose a sentence of death the three-judge panels that hear capital cases would need to agree unanimously (at present unanimity is not required). Second, in order to assess offenders’ potential for rehabilitation, judges would be given the option of suspending the execution of death sentences for two years (as is commonly done in China). Third, in order to minimize the likelihood of injustice, application of the death penalty would have to be done as “cautiously” as possible. Interview with legal advisor to the Ministry of Justice (March 2004).

<sup>106</sup> Interviews with abolitionists, prosecutors, defense lawyers, and judges (Aug. 2003-May 2004).

<sup>107</sup> Daniel H. Foote, *From Japan’s Death Row to Freedom*, 1 PAC. RIM L. & POL’Y. J. 11.

system over federal habeas corpus in the United States.”<sup>108</sup> A decade later there are doubts in abundance. Between 1993 and 2005, dozens of death row inmates were exonerated and released from American death rows. In Japan, by contrast, the analogous number is 0, in part because there probably are fewer “actually innocent” persons on Japanese death rows than on American ones,<sup>109</sup> but also because Japanese prosecutors have tightened their control over the evidence needed by the defense to challenge convictions, and because Japanese courts have grown increasingly reluctant to open the door to retrial.<sup>110</sup>

These events – the 1960s circular, the 1970s suicide, the 1980s death row exonerations – help explain the acceleration of secrecy, but the most fundamental force motivating the state’s flight into secrecy is the development of Japan’s abolition movement.<sup>111</sup> Groups opposed to capital punishment have been formed in several regions of the country to educate people about the death penalty and to protest against it. Support groups for convicted and condemned inmates have multiplied. Amnesty International Japan was established in 1970.<sup>112</sup> Connections have been forged with foreign abolitionists in Asia, America, and Europe,<sup>113</sup> and the allies include members of the Council of Europe who have threatened to remove Japan’s “observer” status in their Parliamentary Assembly if it does not make significant

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<sup>108</sup> Daniel H. Foote, *The Door That Never Opens: Capital Punishment and Post-Conviction Review of Death Sentences in the United States and Japan*, 19 BROOK. J. INT’L L. 367, at 520 n.657.

<sup>109</sup> See DAVID T. JOHNSON, *supra* note 23.

<sup>110</sup> See KENZO AKIYAMA, SAIBANKAN WA NAZE AYAMARU NO KA (2002); AKIRA KITANI, KEIJI SAIBAN NO KOKORO: JIJITSU NINTEI TEKISEIKA NO HOSAKU (2004). To Americans who have seen 175 convicted felons released from prison (many from death row) on the basis of DNA evidence, it is notable that DNA analysis has never been used in Japan to obtain a post-conviction exoneration. DNA is frequently used to convict. See [www.innocenceproject.org](http://www.innocenceproject.org).

<sup>111</sup> This paragraph relies on an unpublished lecture by Sayoko Kikuchi, one of Japan’s most experienced abolition activists. Sayoko Kikuchi, *Shikei Haishi o Kangaeru*, presented at Amnesty International-Japan in Tokyo, October 10, 2003.

<sup>112</sup> See Amnesty International-Japan’s website at <http://www.amnesty.or.jp/>.

<sup>113</sup> SHIZUKA KAMEI, SHIKEI HAISHIRON 32 (2002).

“progress” toward abolition.<sup>114</sup> Most importantly, a coalition of anti-death-penalty groups coalesced in 1990 to form Forum 90, Japan’s largest and most active abolition organization. With a membership of around 5000 and a core of about 50, Forum 90 holds an annual congress on capital punishment, publishes a regular newsletter, and sponsors a variety of meetings, lectures, and seminars. The group’s leader, a lawyer named Yoshihiro Yasuda, says he founded Forum 90 out of frustration that many capital defenders lack zeal for their cases and for the cause of abolition, and out of anger over the wrongful conviction of a man he once defended in a capital case.<sup>115</sup> Forum 90’s original aim, Yasuda reports, was to expose the fact that there are people in Japan who oppose the death penalty (about 16 percent of the adult population at the time the organization was founded). Previously, opponents of capital punishment “were all but invisible.” Thereafter, Forum 90 intended to work towards abolition in three stages: first by establishing a moratorium on executions, then by getting judges to stop imposing death sentences, and finally by passing a law to abolish altogether. During the 40-month moratorium from 1989 to 1993, Yasuda believed abolition was not only “inevitable” it was “not far off.”<sup>116</sup> In November 2003, ten years after executions had resumed, I heard him make the closing remarks at Japan’s annual abolitionist congress. Attendance was disappointing, and Yasuda was much gloomier than he had been a decade earlier:

This was a severe year for abolition. The bill to stop executions and create a life-without-parole alternative to death could not even get introduced in the Diet. Three of the key abolitionist Members of Parliament were defeated in the last election. After 36 years on death row, Tsuneki Tomiyama died [of kidney failure] at age 86. Shinji Mukai was executed in Osaka. Masaharu Harada [the brother of a murder victim and a critic of capital punishment] gave two talks in Takamatsu. On each occasion there were seats for 30 people yet only three persons attended. And today, Shizuka Kamei [a faction chief in the conservative

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<sup>114</sup> *Id.* at appendix 11.

<sup>115</sup> Yasuda, *supra* note 18.

<sup>116</sup> Interview with Yoshihiro Yasuda (Sept. 2003).

ruling party and the chairman of the Diet Members League for the Abolition of Capital Punishment] did not attend our gathering. He said he would come. I don't know what happened....<sup>117</sup>

Whatever happened to Kamei, what happened to Yasuda seems clear: Events have taken a toll on his optimism.<sup>118</sup> Behind his lamentation is the perception, widely shared by abolitionists, that "the average Japanese knows nothing about capital punishment and is not really interested in the subject."<sup>119</sup> Considering developments in the postwar period, the Japanese state seems to like it this way.

#### IV. JUSTIFICATIONS

Three months after Yasuda spoke so glumly at the capital punishment congress, I met his friend and fellow-capital-defender Takeyoshi Nakamichi. If Yasuda is the most prominent death penalty defense attorney in Tokyo, Nakamichi is his Osaka counterpart. At

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<sup>117</sup> Yoshihiro Yasuda, address before Japan's abolitionist congress (Nov. 2003).

<sup>118</sup> Getting wrongly arrested and indicted did not add to Yasuda's abolitionist cheer. This is what happened to him while he was the lead defense lawyer for AUM guru Shoko Asahara in Japan's "trial of the century." Following Yasuda's arrest, more than 1200 lawyers signed a petition for his release. Many believe that prosecutors were politically motivated, and Yasuda himself feels "certain" that his arrest was calculated to undermine Asahara's defense. Interview with Yoshihiro Yasuda (Feb. 2004). There is reason to wonder. Before the arrest, prosecutors complained that Yasuda was trying to slow down the trial by meticulously cross-examining witnesses. On Christmas Eve 2003, Yasuda was acquitted (of helping a corporate client hide assets from creditors in a civil case). The courtroom, which was packed with Yasuda's supporters, including many abolitionist activists, erupted in cheers when the verdict was read. In the opinion that followed, the Tokyo District Court harshly rebuked prosecutors for hiding evidence that pointed to Yasuda's innocence. By then, however, the defendant had spent 10 months in jail and five years on trial and had been forced to stop defending Asahara, a result that prosecutors may have sought and certainly welcomed. Interviews with prosecutors (Feb.-Mar. 2004). See YOSHIHIRO YASUDA, IKIRU TO IJU KENRI 336 (2005). Prosecutors have appealed the acquittal. *Prosecutors Appeal Not Guilty Decision for AUM Founder's Lawyer*, JAPAN ECONOMIC NEWSWIRE, Dec. 26, 2003.

<sup>119</sup> SCHMIDT, *supra* note 27, at 194.

the time we spoke in February 2004, he was representing eleven persons on death row in addition to doing a wide variety of other legal work.<sup>120</sup> Eager to hear what most concerned Nakamichi about capital punishment in his country, I asked him what death penalty question he would most like to ask Japan's top prosecutor if he ever got the chance. "Why do you hide it?" Nakamichi replied. "I'd like to know why he and other elite prosecutors try so hard to conceal capital punishment."

State officials seldom explain or justify Japan's secrecy policy. That, after all, would be inconsistent with the policy. On occasion, however, they do engage Nakamichi's question. I spent twelve hours interviewing one retired and three current prosecutors about this and other death penalty issues.<sup>121</sup> All of them were or recently had been executives in the procuracy, and one was the current prosecutor general (the top prosecutor post). This section summarizes and scrutinizes what they said (and what other prosecutors have said) about how death is administered in Japan. Social researchers have found that what is "rational" depends on context and that the most important context of rationality is power. This section illustrates a corollary truth: that power is inclined to "blur the dividing line between rationality and rationalization."<sup>122</sup>

*1. Secrecy is in the offender's interest.* This is what officials often offer foreign members of the media who discover that the

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<sup>120</sup> There are at least three reasons why Nakamichi and a few other ardent attorneys defend so many capital cases. First, capital work is unattractive to many lawyers because it pays poorly. "Somebody has to do it." Interview with defense lawyers (Oct. 2003-Feb. 2004). Second, capital defenders are sometimes scorned by the public and the media for defending "evil people." Shigeki Todani, who defended Mamoru Takuma in the case described earlier, was harshly criticized for having the temerity to represent a man who had killed eight children because he wanted to commit suicide by capital punishment. Interview with Shigeki Todani (Dec. 2004). Third, doing capital cases is a point of professional pride among a small group of progressive attorneys. Interviews with defense lawyers (Oct. 2003-Feb. 2004). Notwithstanding these reasons, some Japanese lawyers believe 11 capital cases are too many for one person to handle.

<sup>121</sup> If secrecy and silence are such strong norms, the reader may wonder why these prosecutors agreed to talk with me. The main reason is that we knew each other from previous encounters in Japan. See Johnson, *supra* note 23.

<sup>122</sup> BENT FLYBJERG, *RATIONALITY & POWER: DEMOCRACY IN PRACTICE 2* (Steven Sampson ed. 1998).

Japanese state kills in secret. In 2001, for example, a Japanese prosecutor told a Washington Post reporter that “We have to consider the feelings of the criminal who gets the death penalty. It’s such a disgrace against his honor. I don’t think he surrenders his honor or his privacy just because he surrenders his life.”<sup>123</sup> A year later, a journalist for the New York Times was told that “it would be more cruel if we notified the inmates of their execution beforehand because it would inflict a major pain on them. They would lose themselves to despair. They might even try to commit suicide or escape.”<sup>124</sup>

One way to test these claims is to ask the people whose fates are ostensibly at issue. This has been done (by defense lawyers and other visitors to death row) and the pattern is clear.<sup>125</sup> While some condemned inmates are unsure if they want to be told the time of their demise,<sup>126</sup> they are a minority.<sup>127</sup> For the majority, knowing in advance is better because it enables them to prepare for death and because it eliminates the “Is today the day?” anxiety they wake up with every morning. Japanese criminal justice is “benevolent” in

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<sup>123</sup> Doug Struck, *On Japan’s Death Row, Uncertainty By Design*, WASH. POST, May 3, 2001.

<sup>124</sup> French, *supra* note 8. See also Bruce Wallace, “Awaiting Death’s Footsteps,” L.A. TIMES, Mar. 2, 2006.

<sup>125</sup> Interviews with defense lawyers and abolitionists (Oct. 2003-May 2004).

<sup>126</sup> In Japan, medical professionals and relatives sometimes withhold “bad news” from the ill, at least partly out of concern that it may be more than they can bear. The practice, however, is declining. See SUSAN ORPETT LONG, *FINAL DAYS: JAPANESE CULTURE AND CHOICE AT THE END OF LIFE* (2005). Some writers in Western literature also suggest that knowing the day of one’s death can be agonizing. In *The Idiot*, for example, Fyodor Dostoevsky (1868) said that “the chief and worst pain” is in knowing for certain when one will “cease to be a man.” Similarly, in *Life of Pi*, the Canadian writer Yann Martel has the protagonist say that, “Oncoming death is terrible enough, but worse still is oncoming death with time to spare.” YANN MARTEL, *LIFE OF PI* 147 (2001). See also David T. Johnson, *The Death Penalty in Japan: Secrecy, Silence, and Salience*, in *THE CULTURAL LIVES OF CAPITAL PUNISHMENT: COMPARATIVE PERSPECTIVES* 251 (Austin Sarat & Christian Boulanger eds. 2005).

<sup>127</sup> See OTSUKA, *supra* note 101; TOMOYUKI SATO, *SHIKEISHU NO ICHINICHI* (1992); SHIKI NO BUNKA O TOINAOSU (Katatsumuri no Kai ed. 1994).

some respects.<sup>128</sup> In this instance, however, benevolent regard for the welfare of the condemned is not the animating impulse. As one prosecutor told me (and others acknowledged), “It isn’t about what’s good for the inmate, it’s about what’s convenient for us.”

If prosecutor *mea culpas* and the preferences of the condemned are not enough, consider three other problems in the state’s assertion that it is acting in the offender’s interest. First, it is striking how inarticulate such claims are. Beyond a few key words – privacy, dignity, honor, reputation – there is little normative logic linking such values to specific secrecy practices.<sup>129</sup> Second, the privacy and dignity defense can only be used to cement a few of the bricks in Japan’s wall of secrecy (particularly those pertaining to the moment of execution). It does not apply to the restrictions on meetings with death row inmates, the limits on correspondence and spiritual advisors, the off-hours inaccessibility of the gallows, and so on. It is, in short, a very partial defense. Third, Japanese officials show little regard for the privacy and dignity of suspects and offenders who are incarcerated *off* death row.<sup>130</sup> Joji Abe, who has written several books about life behind bars in a variety of countries, argues that Japanese prisons are especially deficient in this respect. “In Japan,” he says, “prison guards don’t regard inmates as human. They treat them like bugs.”<sup>131</sup> Hence, in order to believe that secrecy is in the condemned’s interest, one must be persuaded that the Japanese state cares most about the welfare of those offenders it wants to punish most severely. The implication is implausible.

2. *Secrecy is in the executioner’s interest.* It is, or at least it is for some people who are compelled to join execution teams.<sup>132</sup> Many

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<sup>128</sup> Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317.

<sup>129</sup> Interviews with prosecutors (Feb. 2004).

<sup>130</sup> See TOMOYUKI SATO, NIPPON KANGOKU JIJO: HEI NO MUKO NO TOJIRARETA SEKAI (2002); KOICHI KIKUTA, NIHON NO KEIMUSHO (2002); Kazuo Honda, *Moto Jukeisha ga Akasu Hei no naka Kyogaku Gyakutai no Nakami*, SHUKAN ASAHI, Nov. 29, 2002, at 166-167.

<sup>131</sup> Hiroshi Hasegawa, *Ryogaku Keimusho ni Zenkindaisei*, AERA, May 26, 2003, at 26.

<sup>132</sup> Interviews with prosecutors, *supra* note 127. See also Wallace, *supra* note 124.

Japanese prison guards have a strong distaste for performing executions.<sup>133</sup> Indeed, the previous section showed that one reason for the postwar descent into secrecy was the desire to insulate correctional officials from the “uncomfortable human feelings” that killing provokes. Hence, even if this justification is true it is not compelling. What it amounts to is an admission that the state policy of secrecy serves the state’s interest in seeing that executions are done as impersonally, bureaucratically, and uncontroversially as possible. One could (I suppose) construct an argument asserting that this interest *should* be served, but Japanese prosecutors do not even try. Furthermore, if executioners were told about hangings in advance, some would stay away on execution day.<sup>134</sup> They, presumably, would prefer prior notice.

3. *Secrecy is the East Asian way.* This justification has a certain plausibility, for moral truths vary from culture to culture,<sup>135</sup> and East Asian countries do strike a different balance between openness and order than Western democracies do.<sup>136</sup> On the one hand, China, Taiwan, and South Korea do not tell the condemned the time of execution until shortly before the event (the notification policies in Taiwan and South Korea appear to be vestiges of Japan’s colonial rule). On the other hand, none of Japan’s closest cultural kin has a secrecy policy as comprehensive as the one found in Japan. The differences are striking. In China, where at least 80 percent of the world’s executions occur, death row inmates are not kept in solitary confinement; they are permitted to meet with family and friends on death row (and some are allowed to take commemorative photos);

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<sup>133</sup> In order to diffuse and confuse responsibility for executions, three corrections officials simultaneously push buttons, only one of which opens the trap door of the gallows. SAKAMOTO, *supra* note 7, at 76. In the state of Utah, where execution by firing squad is still legal, five marksmen shoot rifles at the condemned from a distance of 23 feet, but only four of the shooters have live bullets. L. KAY GILLESPIE, *INSIDE THE DEATH CHAMBER: EXPLORING EXECUTIONS* 59 (2003). In other American states, responsibility for executions is masked in similar ways. See SOLOTAROFF, *supra* note 100.

<sup>134</sup> SAKAMOTO, *supra* note 7, at 263.

<sup>135</sup> See KISHORE MAHBUBANI, *CAN ASIANS THINK? UNDERSTANDING THE DIVIDE BETWEEN EAST AND WEST* (2002).

<sup>136</sup> See JAMES FALLOWS, *LOOKING AT THE SUN: THE RISE OF THE NEW EAST ASIAN ECONOMIC AND POLITICAL SYSTEM* (1994).



they sometimes are presented at public rallies or paraded along public streets prior to execution (some wearing a death placard that bears the name of the criminal and the crime); they are given a “last meal”; their images appear on television and in magazines; their family members may be present at the execution site; some executions can be seen by members of the public; and so on.<sup>137</sup> In Taiwan, I attended an abolitionist conference that was well-attended by members of the Ministry of Justice who spoke openly about the steps they are taking towards abolition – a form of fraternization (and a message) impossible to imagine in contemporary Japan.<sup>138</sup> In South Korea, no one has been executed since December 1997, and in February 2006 the Ministry of Justice announced that it would like to end capital punishment and that it is considering replacing the ultimate penalty with life without parole.<sup>139</sup> More generally, state officials in South Korea are forthcoming about a variety of death penalty issues. The first Ministry of Justice official I interviewed in Seoul said that “as a Christian” he is opposed to capital punishment “for religious reasons,” and other Korean informants were (on the whole) more open than their Japanese counterparts.<sup>140</sup>

Analytically, the logic of this justification – “They do it too” and “We are different than you” therefore “Our way is OK” – hardly constitutes a compelling normative argument. A Japanese Minister of Justice once acknowledged to members of Parliament that “our country’s administration of the death penalty is a secret system,” which “has a number of features that are difficult for ordinary people to understand.”<sup>141</sup> It is notable that many “ordinary people” in China, Taiwan, and South Korea also find features of Japan’s secret system “difficult to understand.”<sup>142</sup>

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<sup>137</sup> In China, however, the government does not publish death penalty statistics, and some capital trials and appeals are closed to the public. Interviews with Chinese scholars and legal professionals, April 2004 and April 2006. See also SANG YE, CHINA CANDID: THE PEOPLE ON THE PEOPLE’S REPUBLIC 298-316 (2006).

<sup>138</sup> Interviews in Taipei, May 2004.

<sup>139</sup> *Editorial: Death Penalty Abolition Is Desirable, But Don’t Hurry*, KOREA TIMES, Feb. 23, 2006.

<sup>140</sup> Interviews, Mar. 2004.

<sup>141</sup> Kikuchi, *supra* note 97, at 117.

<sup>142</sup> Author’s interviews.

4. *Secrecy is a Japanese tradition.* This resembles the third justification in that both invoke an empirical norm in order to defend a contemporary practice. They also share the same problem: one cannot get to an ought from an is. Still, since many social practices outlive their original justifications, an “inertia” explanation could be instructive if the facts were on its side. They are not. Japanese officials have consciously and strategically expanded the reach of secrecy in the postwar period. As has often been the case in Japanese history, this “tradition” turns out to be a recent invention.<sup>143</sup>

5. *America is worse.* This justification is one species of the rhetorical maneuver my mother calls “changing the subject,” and my first reaction to it resembled the one she frequently has (“let’s stick to the subject”). But since *non-sequiturs* can be interesting even though off-point, let us examine this one. Most notably, this justification illustrates the importance of the American example to Japan. If the United States abolished capital punishment, Japan might be compelled to follow. This, at least, is the view of many Japanese abolitionists who believe the American case gives state officials “a shield” with which to deflect international pressure.<sup>144</sup> That pressure is growing.<sup>145</sup>

Japanese prosecutors offer two versions of the “America is worse” defense, neither of which explicitly engages the propriety of their own secrecy policy. In its first form the defense asserts that troubling features of the American landscape – the “constant controversies” over innocence, the last-minute appeals that routinely seem “disingenuous,” the “Forgive!” and “Fry ‘em!” demonstrations outside prison walls, the media’s “morbid fascination” with acts of violence committed by criminals and by the state, the frustrations that the condemned “did not suffer enough,” the salience of state-killing in American politics, and so on *ad nauseum* – are unseemly and unattractive.<sup>146</sup> It is hard to disagree.<sup>147</sup> However, saying “America

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<sup>143</sup> Frank Upham, *Weak Legal Consciousness as Invented Tradition*, in *MIRROR OF MODERNITY: INVENTED TRADITIONS OF MODERN JAPAN* (Stephen Vlastos ed. 1998).

<sup>144</sup> Interviews with abolitionists (Aug. 2003-May 2004).

<sup>145</sup> WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* (3rd ed. 2002); ZIMRING, *supra* note 3, at 17.

<sup>146</sup> Interviews with prosecutors, *supra* note 127.

is worse” does not lead to the conclusion that the Japanese way is OK, for one can imagine “cultures of capital punishment” that differ from both the American and the Japanese systems.<sup>148</sup>

It is also possible to imagine a death penalty that is rarely and carefully imposed. Some Japanese prosecutors believe their country comes closer to this point than the USA because they seek (and Japanese courts impose) death sentences less frequently than their American counterparts do. This belief is not only a point of pride among Japanese prosecutors, it is one of the few areas of agreement they have with abolitionists.<sup>149</sup>

But the belief that Japan is a low-rate user of capital punishment is not well grounded. To be sure, its “rate of execution” (an average of four hangings per year for the last decade)<sup>150</sup> is about 7 times lower than the United States and 34 to 38 times lower than high-rate American states such as Texas, Oklahoma, and Virginia.<sup>151</sup> From 1977 to July 2004, Harris County (Houston), Texas had more executions (73) than did all of Japan (66) during the same period of time.<sup>152</sup> In this respect, while the Japanese government remains

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<sup>147</sup> In 2002, the Illinois Governor’s Commission on Capital Punishment made no fewer than 85 recommended reforms in order to assure fair and impartial administration of that state’s death penalty. SCOTT TUROW, *ULTIMATE PUNISHMENT: A LAWYER’S REFLECTIONS ON DEALING WITH THE DEATH PENALTY* 119 (2003). Though the Illinois legislature has ignored many of the most important recommendations, the quality of capital justice in some other American states is even worse. See Thomas P. Sullivan, *DEATH PENALTY: For capital punishment, more reforms necessary*, CHI. TRIB., Jan. 4, 2004; Alan Berlow, *The Wrong Man*, ATLANTIC MONTHLY, Nov. 1999.

<sup>148</sup> See *THE CULTURAL LIVES OF CAPITAL PUNISHMENT: COMPARATIVE PERSPECTIVES*, *supra* note 126; Sullivan, *supra* note 147.

<sup>149</sup> Interviews with prosecutors, *supra* note 127, and abolitionists (Apr.-May 2004).

<sup>150</sup> See *The Death Penalty in Japan: Secrecy, Silence, and Salience*, in *THE CULTURAL LIVES OF CAPITAL PUNISHMENT: COMPARATIVE PERSPECTIVES*, *supra* note 126, 252.

<sup>151</sup> ROGER HOOD, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 92 (2002). Execution rates are expressed as the total number of executions per year per million population. For the five years from 1996 through 2000, Japan’s rate was 0.04, while the rates for the United States and Virginia (the highest rate American state) were, respectively, 0.27 and 1.51. *Id.*

<sup>152</sup> Adam Liptak & Ralph Blumenthal, *New Doubt Cast on Crime Testing in Houston Cases*, N.Y. TIMES, Aug. 5, 2004.

“firmly committed” to the death penalty,<sup>153</sup> the scale of executions seems to resemble capital punishment practice in low-use democracies such as South Korea and India more than it does the United States.<sup>154</sup>

But there is another way to assess how often Japan uses capital punishment, and by this measure it looks more like the United States than previous analysts have recognized. Stalinist nightmares aside, persons are not selected randomly for death; they are, for the most part, condemned and executed from a larger pool of potentially capital cases. In democracies such as the United States and Japan, this pool consists entirely of homicide crimes. In order to answer questions of “scale,” therefore, one must consider the size of the capital-crime pool.

In the United States from 1977 through 1999, about 2.2 percent of all known murder offenders were sentenced to death.<sup>155</sup> By state, the range ran from a low of 0.4 percent in Colorado to a high of 6.0 percent in Nevada (so murderers in Nevada were 15 times more likely to receive a death sentence than their counterparts in Colorado). Of the 31 states in this study, the median was Texas, where 2.0 percent of known murderers were sentenced to death. What distinguishes Texas from other American states is not the propensity for sentencing murderers to death but rather the probability of executing death sentences that have been imposed. Of the first 5700 death sentences handed down nationwide since 1972, only 313 (5.5 percent) had been executed as of 1995.<sup>156</sup> In states such as Illinois the percentage was even lower;<sup>157</sup> in Texas it was higher.<sup>158</sup>

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<sup>153</sup> HOOD, *supra* note 151, at 49.

<sup>154</sup> Japan's commitment to capital punishment seems to be strengthening. Despite a homicide rate that remains low and stable, Japanese courts sentenced more than twice as many people to death in the most recent five years (N = 149 for 2000-2004) as they did in the preceding five (N = 70 for 1995-1999). See SHIKAI HAISHI HENSHU IINKAI, OUMU JIKEN 10nen (2005), at 141.

<sup>155</sup> John Blume et al., *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165 (2004), at 171.

<sup>156</sup> JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995* (2000).

<sup>157</sup> TUROW, *supra* note 147, at 51.

<sup>158</sup> Blume, *supra* note 155, at 172 tbl. 1.

The probability of a known murderer being sentenced to death is not much different in Japan, largely because it has the one of the lowest homicide rates in the world.<sup>159</sup> During the ten years from 1994 through 2003, 93 persons were sentenced to death in Japan. Each year during that period the pool of known murderers was about 700, so the chance of being sentenced to death was 1.33 percent (about the same as in California and Virginia). For the period 2000 to 2003 – an interval during which the number of death sentences in Japan increased while the pool of known murderers stayed constant – the percentage is 1.96, or about the same as Texas. Thus, when it comes to the probability of imposing a death sentence, Japan looks a lot like an ordinary American state. Since 12 American states have abolished capital punishment, and since (unlike the United States)<sup>160</sup> virtually everyone who has a death sentence upheld by Japan’s Supreme Court eventually gets executed, the state that kills in secret can also be considered a vigorous killing state.

In sum, five justifications have been given for the secrecy and silence with which the Japanese state kills. None is convincing.<sup>161</sup> If death row isolation helps some among the condemned to “accept the

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<sup>159</sup> MIYAZAKI & OTANI, *supra* note 42, at 13; Mariko Hasegawa, *Nihon no Wakamono wa Naze Sekai de Mottomo Hito o Korosanakunatta no ka*, JIMON KORYU, October, 2003, at 12-13.

<sup>160</sup> In the state of Illinois, “less than half of one percent” of condemned prisoners had been executed at the time Governor George Ryan called a moratorium in January 2000. This percentage “is consistent with national averages.” TUROW, *supra* note 147, at 51; James S. Liebman et al., *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It* (2002), at <http://www2.law.columbia.edu/brokensystem2/report.pdf>.

<sup>161</sup> Japanese officials sometimes say that the death penalty is an effective deterrent. KIKUTA, *supra* note 15, at 15; Kikuchi, *supra* note 97, at 118. I know of no good study of this issue, but the claim is implausible because Japan’s death penalty lacks at least three of the requirements (certainty, celerity, and publicity) that an effective deterrent should have. Japanese officials do not argue that death penalty secrecy serves the end of deterrence – a claim that would be difficult to defend. As Albert Camus said, if society “really believed what it says [about deterrence], it would exhibit the heads.” CAMUS, *supra* note 24, at 180. In the United States, where heads are not exhibited and deterrence studies are legion, the evidence shows that capital punishment is not an effective deterrent for murder. Ruth D. Peterson & William C. Bailey, *Is Capital Punishment an Effective Deterrent for Murder? An Examination of Social Science Research*, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION, *supra* note 15, at 277.

inevitable” and “prepare for death,” it does so by killing them twice, first socially and then physically. If secrecy is designed to protect the “privacy and dignity” of offenders and their families, it does so by sacrificing democratic values – transparency, accountability, and deliberation – at precisely those times when they ought to be most operative. And if silence helps maintain “stability” on death row, it does so through a mechanism of terror that profoundly destabilizes the psyches of the condemned.<sup>162</sup> “Am I next?” and “Is today the day?” are questions that naturally preoccupy the people on Japan’s death row. The uncertainty which surrounds them makes them easier to govern, for the condemned know know that misbehavior may hasten their appointment with the hangman.<sup>163</sup>

Finally, it is difficult to discern how sincerely prosecutors believe the justifications they offer. While some seem convinced that killing secretly is “the best we can do at present,”<sup>164</sup> others are more ambivalent (two executive prosecutors told me they would prefer not to have capital punishment at all). Still others believe that as long as it is legal, capital punishment should be administered with more “confidence and openness.” As one former executive sees it, “Our criminal justice system is the best in the world. Since the death penalty is a legitimate part of that system, there is no need to be embarrassed about using it.”<sup>165</sup> On the whole, however, state officials in Japan display considerable “guilt and uneasiness” (*ushirometai*) about capital punishment. This is not only apparent in their policies of secrecy and silence, it also is evident in the linguistic formula – “it cannot be helped” (*yamu o enai*) – that they use when condemning offenders to death.<sup>166</sup> The expression is ubiquitous in Japan’s death

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<sup>162</sup> OTOHIKO KAGA, *SHIKEISHU NO KIROKU* (1980); YAMANO, *supra* note 15.

<sup>163</sup> Takeko Mukai, with Masako Sato, *Shikei de Itta Musuko Shinji to tomo ni Ikita 17nen*, CHUO KORON, Mar. 2004, 222-232; Jonathan Watts, *Japan in Dock for Inhuman Treatment on Death Row*, GUARDIAN, Feb. 26, 2001.

<sup>164</sup> Kaho Shimizu, *Even the victimized are divided on death penalty*, JAPAN TIMES, Oct. 3, 2002.

<sup>165</sup> Some senior prosecutors seem sure that secrecy is a longstanding Japanese tradition. I was surprised to learn how little they know about “postwar acceleration.” Interviews with prosecutors (Feb.-May 2004).

<sup>166</sup> The dictionary gives many definitions of *yamu o enai*. The first five in my lexicon are “unavoidable,” “inevitable,” “beyond one’s control,” “necessary,”

penalty discourse.<sup>167</sup> Prosecutors use it to explain their charge decisions, to justify their demands for death sentences, and to persuade Ministers of Justice to sign death warrants. Victims use it to lobby for death. Reporters and editors use it to predict verdicts in capital trials and to interpret death sentences that have been imposed. And judges use it – routinely – to explain and justify state-killing.<sup>168</sup> The “it cannot be helped” phrase not only expresses “inevitability,” it also reveals the speaker’s subjective sense that she is impotent to act differently and that, in many cases at least, she is ambivalent about the outcome her behavior will help produce.<sup>169</sup> The reservations wrapped in this expression suggest that the death penalty operates most efficiently when the state enables its agents to present themselves, to themselves and others, as cogs in a machine over

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and “compulsory.” Used in its adverb form, as *yamu o ezu*, the expression means “against one’s will,” “reluctantly,” and “under compulsion.” What all of these meanings have in common is the denial of choice, for a behavior that is *yamu o enai* — whether a prosecutor’s indictment or a judge’s sentence — is not freely elected, it is dictated by circumstances and therefore “cannot be helped.” Some uses of *yamu o enai* seem to display “bad faith” of the kind lamented by Jean-Paul Sartre: “pretending something is necessary that in fact is voluntary.” PETER BERGER, *INVITATION TO SOCIOLOGY: A HUMANISTIC PERSPECTIVE*, 143 (1963).

<sup>167</sup> KOICHI KIKUTA, IMA, NAZE SHIKEI HAISHI KA 88 (1994).

<sup>168</sup> KAORU INOUE, *SHIKEI NO RIYU* (2003).

<sup>169</sup> It is interesting to compare the attitudes of leading death penalty “dissenters” on the Supreme Courts of the United States and Japan. In America, Justices William Brennan and Thurgood Marshall frequently voted to stay executions and overturn death sentences, and their critiques of capital punishment were savage. Marshall “opposed all executions,” even of notorious killers such as Ted Bundy. DAVID VON DREHLE, *AMONG THE LOWEST OF THE DEAD: THE CULTURE OF DEATH* ROW 376 (1995). In Japan, by contrast, the most prominent “dissenter” in the post-war period, Justice Masao Ono, expressed reservations about capital punishment in opinions in which he voted with the majority to *uphold* sentences of death. Ono’s most famous death penalty opinion is regarded by some Japanese abolitionists as a powerful critique of capital punishment. *State v. Hasegawa* (Sup. Ct. , Sept. 10, 1993). To my American sensibilities, it is a mild and ambivalent form of resistance (Ono even uses the “it cannot be helped” formula). Dissent is critical to a successful judiciary. See CASS SUNSTEIN, *WHY SOCIETIES NEED DISSENT* (2003). In Japan’s judiciary, death sentence dissents are rare, perhaps because the conservative politicians who have ruled postwar Japan exclude abolitionist judges from the highest benches. See J. MARK RAMSEYER & ERIC B. RASMUSEN, *MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN* (2003).

which they have little control.<sup>170</sup> For judges and prosecutors alike, achieving this imperative is difficult. Some engage in intense emotional labor in order to subdue their feelings of resistance to state-killing.<sup>171</sup> As one Japanese judge said, “there is nothing more unpleasant than imposing a sentence of death.”<sup>172</sup> Others seem to agree.<sup>173</sup> Whatever their levels of sincerity and however their explanations are received, some of the officials who defend the secrecy policy do seem to experience serious dissonance in their own heads and hearts. Secrecy and silence may also be devices for reducing and managing those tensions.

## V. MEANINGS

The justifications of secrecy are not difficult to debunk. This final section suggests four meanings of Japan's death penalty policy that may not be so readily recognized. They concern the connections between secrecy and (1) the contrasting sources of death penalty legitimacy in the United States and Japan, (2) the low salience of capital punishment in Japan, (3) the nature of Japan's democracy, and (4) the role and rule of law in Japanese society.

### A. SECRECY AND LEGITIMACY

States that practice capital punishment have a legitimacy problem: They need to distinguish how state killing differs from the criminal killing they aim to condemn. In the United States, one major

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<sup>170</sup> See CRAIG HANEY, *DEATH BY DESIGN: CAPITAL PUNISHMENT AS A PSYCHOLOGICAL SYSTEM* (2005).

<sup>171</sup> One senior prosecutor who feels “no subjective resistance” to the death penalty said that during pre-charge consultations (*kessai*) he tries to persuade his subordinates to stop using the *yamu o enai* circumlocution in favor of more “direct” and “positive” expressions such as “the death penalty is deserved in this case.” His efforts often fail because prosecutors “do not want to appear eager” to seek death. I asked the same man if he had ever witnessed an execution. “No, no, no,” he grimaced before explaining that so few prosecutors want to attend that “the youngest and most inexperienced” (in the High Prosecutors Offices) are usually obliged to go.

<sup>172</sup> MURANO, *supra* note 25, at 67.

<sup>173</sup> Interviews with Japanese judges (Nov. 2003, Jan. 2004).



legitimation strategy has been the effort to kill more “softly” and “humanely.”<sup>174</sup> This strategy – to give the condemned a “kindler and gentler” death – helps explain the changes in execution method that America has experienced over the last century or so – from hanging to electrocution to the gas chamber to lethal injection.<sup>175</sup> The American quest to kill without imposing more pain than “necessary” is not so much about sparing the condemned from suffering as it is about convincing the administrators and spectators of death that capital punishment is “civilized.”

The Japanese state faces a similar legitimacy challenge but answers the call quite differently. Japan has experienced no significant changes in execution method since 1873 when a new kind of gallows was introduced after an old-fashioned hanging was botched.<sup>176</sup> Hanging remains the only method in each of Japan’s seven execution centers, and there has been almost no discussion of alternative methods such as lethal injection.<sup>177</sup> The lack of debate is not because the Japanese way of hanging is humane. There as elsewhere, the point of a hanging is to cut or crush the spinal cord by tearing it from the brain stem. If the initial shock of the drop is not fatal, death is completed by strangulation. Hangings are botched in Japan as they are everywhere else.<sup>178</sup> When mistakes have occurred,

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<sup>174</sup> AUSTIN SARAT, *WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION* 60 (2001).

<sup>175</sup> BANNER, *supra* note 6; MARK ESSIG, *EDISON & THE ELECTRIC CHAIR* (2003).

<sup>176</sup> MURANO, *supra* note 25, at 44.

<sup>177</sup> In response to foreign and domestic criticism, China adopted (in 1997) a lethal injection alternative to death-by-bullet-in-the-back-of-the-head. Interviews with Chinese scholars (Apr. 2004).

<sup>178</sup> In American history, more people (at least 70 percent of the total) have been executed by hanging than by any other method, but only three states (Delaware, New Hampshire, and Washington) still permit execution in this way, and all of them also authorize lethal injection. Between 1622 and 2002, at least 170 legal hangings were “botched” in the United States, and since executions resumed in 1977, approximately one out of every twenty-two involved a “major blunder” that made death lingering, painful, or both. Japan’s policy of secrecy makes it impossible to make comparative “blunder” estimates. BOHM, *supra* note 90, at 87; Marcus Borg & Michael L. Radelet, *On Botched Executions*, in *CAPITAL PUNISHMENT: STRATEGIES FOR ABOLITION* 158 (Peter Hodgkinson & William Schabas eds. 2004).

some executioners apparently used *judo* strangleholds to “finish the job.”

The secrecy that surrounds capital punishment in Japan helps explain the absence of controversy about execution methods. In effect, “killing secretly” instead of “killing softly” is the state’s main legitimation strategy. In the United States, lethal injection is now the sole or principal method of execution in all but one death penalty jurisdiction (Nebraska, where only electrocution is authorized), and in the 1990s more than 80 percent of all American executions were conducted in this “medicalized” way.<sup>179</sup> If one meaning of lethal injection is that state killing is different than murder because it is done humanely, the message conveyed in Japan is that “state killing is state business.” A corollary truth is that capital punishment in Japan has not been “degovernmentalized” or “symbolically transformed” into a “victim-service program” as thoroughly as it has in the United States.<sup>180</sup> The effort to “degovernmentalize” the American death penalty – to present capital punishment as a means of obtaining “closure” for victims – has been called a “signal that many citizens feel uncomfortable watching governments kill to achieve solely governmental purposes.”<sup>181</sup> In Japan, by contrast, the state keeps citizens “comfortable” not so much by satisfying victims as by keeping them (and everyone else) in the dark.

## B. SECRECY AND SALIENCE

Japan and the USA are the only two rich democracies that still use the death penalty. What distinguishes them is not so much scale of usage as method of administration. Another significant difference concerns the salience of state-killing: Whereas capital punishment in America is a highly contentious topic,<sup>182</sup> in Japan it is, as former Minister of Justice Hideo Usui once noted, simply “not a social

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<sup>179</sup> ZIMRING, *supra* note 3, at 51; Yasuda, *supra* note 18, at 95.

<sup>180</sup> ZIMRING, *supra* note 3, at 62.

<sup>181</sup> *Id.* at 63.

<sup>182</sup> BOHM, *supra* note 90.

issue.”<sup>183</sup> One key question is whether the high levels of secrecy contribute to low levels of salience. Most abolitionists think they do,<sup>184</sup> as do some prosecutors,<sup>185</sup> but the dismal quality of research on the subject makes it difficult to know for sure.

On the surface, public support for capital punishment is even broader in Japan than it is in the United States. In a recent opinion poll, 81 percent of Japanese respondents said they favor retaining the death penalty.<sup>186</sup> Since the Occupation ended in 1952, there have been at least 36 surveys on the subject, and in almost every instance a large majority expressed support for the death penalty.<sup>187</sup> The exceptions involved unrepresentative samples and advocacy polls by abolitionists (though of course government survey questions are not worded “neutrally” either).<sup>188</sup> During the postwar period there have

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<sup>183</sup> Struck, *supra* note 123; Yasuda, *supra* note 18; SCHMIDT, *supra* note 27.

<sup>184</sup> Ishizuka, *supra* note 21; YOSHIO TSUJIMOTO, SHIKEIRON 162 (1994).

<sup>185</sup> Interviews with prosecutors *supra* note 116.

<sup>186</sup> 2005 Cabinet Office Poll. *Support for Death Penalty Passes 80% for First Time*, JAPAN TIMES, Feb. 20, 2005. An October 2005 Gallup poll in found that 64% of Americans supported capital punishment, the lowest level in 27 years. *Summary of Recent Poll Findings* at the Death Penalty Information Center website at <http://www.deathpenaltyinfo.org/article.php?scid=23&did=210>.

<sup>187</sup> SCHMIDT, *supra* note 27, at 165. Though the data are thin, there appear to be at least two Japanese groups – politicians and lawyers – in which support for capital punishment is weaker than in the public at large. At the national level, 122 members of parliament have joined a Diet group to abolish the death penalty, and its leaders predict (too optimistically, I believe) that the number will “soon total 200.” Shimizu, *supra* note 84. At the local level as well, several city councils (including those in Kiyose, Takatsuki, Sennan, and Niiza) have submitted petitions to the Japanese Government appealing for a moratorium or abolition. Domikova-Hashimoto, *supra* note 84, at 87. As for lawyers, a 1991 survey (N = 2745) found the legal profession almost evenly divided: 47.6 percent wanted to retain the death penalty, while 45.8 percent favored abolition. KIKUTA, *supra* note 15, at 43. A more recent survey conducted in 1994 by the Tokyo Bar Association found that 32 percent of respondents (N = 1329 attorneys) wanted to retain capital punishment, while 61 percent wanted to abolish. Among female respondents, 81 percent wanted to abolish. See Toyko Bengoshikai Jinken Hogo Iinkai – Keiho ‘Kaisei’ Mondai Taisaku Tokubetsu Iinkai, *Shikei Sompai Mondai ni kan suru Tokyo Bengoshikai Kaiin Anketo Chosa Hokokusho* (1994), at 10.

<sup>188</sup> See KIKUTA, *supra* note 15.

been smaller fluctuations in support for capital punishment in Japan than in the United States, where pro-death-penalty sentiment fell as low as 42 percent in 1966. In some American jurisdictions, support for capital punishment seems to account for its continued use “more than any other factor,”<sup>189</sup> and “public opinion” is “frequently cited as a major [causal] factor” in a wide variety of other retentionist countries as well.<sup>190</sup> In Japan, too, one of the main foundations for retentionist thinking “is the assertion that the majority of citizens want to preserve the death penalty.”<sup>191</sup>

Nonetheless, the depth of citizens' desire for the death penalty seems shallower in Japan than in countries such as the USA<sup>192</sup> and China.<sup>193</sup> One indicator of this difference is the fact that there were no significant protests by pro-death-penalty forces during Japan's 40-month moratorium – a sharp contrast to the widespread backlash which followed the American Supreme Court's *Furman* decision that capital punishment was unconstitutionally “cruel and unusual” because the state statutes in question failed to give jurors adequate guidance. As for Japanese prosecutors, none sounds anything like the Missouri death penalty zealot who boasts that “God has only given me one talent, and that is the ability to talk twelve people into killing someone.”<sup>194</sup> The literature on American prosecutors suggests there are many more like him.<sup>195</sup> In the Japanese academy as well, capital

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<sup>189</sup> BOHM, *supra* note 90, at 27; ZIMRING, *supra* note 3, at 119.

<sup>190</sup> HOOD, *supra* note 151, at 233.

<sup>191</sup> KIKUTA, *supra* note 15, at 42.

<sup>192</sup> ZIMRING, *supra* note 3.

<sup>193</sup> Marina Svensson, *State Coercion, Deterrence, and the Death Penalty in the PRC*, Paper presented to the Annual Meeting of the Association for Asian Studies. Chicago, Illinois (Mar. 22-25, 2001).

<sup>194</sup> Interview with Mark Tracy, *supra* note 104.

<sup>195</sup> See Tina Rosenberg, *The Deadliest D.A.*, N.Y. TIMES, July 16, 1995; EDWARD HUMES, *MEAN JUSTICE: A TOWN'S TERROR, A PROSECUTOR'S POWER, A BETRAYAL OF INNOCENCE* (1996); ROBERT J. LIFTON & GREG MITCHELL, *WHO OWNS DEATH? CAPITAL PUNISHMENT, THE AMERICAN CONSCIENCE, AND THE END OF EXECUTIONS* (2000). Among other reasons for this difference, Japanese prosecutors have fewer incentives to act “tough” on crime. DAVID T. JOHNSON, *supra* note 23, at 30.

punishment is not at all salient. Informants in Forum 90 believe that only two Japanese scholars “seriously study the subject.”<sup>196</sup> One, former Supreme Court Justice Shigemitsu Dando, took up the subject long after he retired from Tokyo University. He is now in his 90s. The second scholar (Meiji University Law Professor Koichi Kikuta) retired in 2005. Even if the true number of experts is triple this count, the scholarly attention directed at capital punishment in Japan is far less than in the United States. More fundamentally, there is little public clamor for capital punishment in Japan, either as a matter of general policy or as a sanction in specific cases.<sup>197</sup> Though a few offenders (Asahara, Hayashi, Takuma) do provoke outrage, on the whole homicide cases in Japan are less influenced by the fear, fury, and wishful thinking that have driven American criminal justice policy in increasingly harsh directions.<sup>198</sup> At root, the continued use of capital punishment in Japan seems more a matter of government policy than the consequence of a deep cultural commitment such as can be seen in the southern United States.<sup>199</sup> The most important role of the Japanese public may not be as activator or motivator of death sentences and executions but as “passive assentor” to policies pursued by authorities for their own reasons. In this respect, too, the legacy of the Occupation persists.<sup>200</sup>

Abolitionists in Japan believe more citizens would resist the death penalty if they knew more about it. They may be right. U.S. Supreme Court Justice Thurgood Marshall implied as much when he said that support for the death penalty is a function of lack of knowledge about it and is responsive to efforts at reasoned

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<sup>196</sup> Interviews (April 2004).

<sup>197</sup> HARA, *supra* note 11.

<sup>198</sup> MICHAEL H. TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE (2004). Though the gap between Japan and America remains large, Japanese criminal justice has shown some signs of convergence towards the retributive “culture of control” that is seen in the UK and USA. DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001); David T. Johnson, *Criminal Justice in Japan*, in LAW IN JAPAN: A TURNING POINT (Daniel H. Foote ed., forthcoming).

<sup>199</sup> ZIMRING, *supra* note 3, at 136; KIKUTA, *supra* note 15, at 57; KOICHI KIKUTA, SHIKI TO YORON (1993).

<sup>200</sup> DOWER, *supra* note 43, at 439.

persuasion.<sup>201</sup> The American evidence on “the Marshall hypothesis” is complicated and conflicted;<sup>202</sup> Japanese evidence does not exist.<sup>203</sup> Unfortunately, I did not have the resources to administer surveys to collect systematic evidence of the kind that would speak to the Japanese question.<sup>204</sup> I did, however, have the opportunity to expose some Japanese citizens to more of the “presently available information” (as Justice Marshall put it) about how capital punishment is administered. On 27 February 2004, for example, I interviewed 30 of the people who had gathered outside the Tokyo District Court where AUM guru Asahara Shoko was about to be sentenced to death. Everyone received the same question: “If Mr. Asahara is convicted, what sentence do you think is appropriate?” The ensuing conversations lasted six hours, and all but one respondent believed death was deserved. The exception was a young office lady who said she preferred a sentence of life without parole (an option Japan does not have) because “death would be too easy” for this mass murderer. Although one might suppose that people who came to court that day possessed above-average interest in capital punishment, many of the respondents revealed remarkable ignorance about the subject. Several did not know that death is delivered by hanging in Japan (a misunderstanding I encountered in numerous other conversations),<sup>205</sup> and most knew nothing about the social isolation

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<sup>201</sup> See *Furman v. Georgia*, 408 U.S. 238 (1972). The Marshall hypothesis predates Marshall. In 1957, 15 years before Marshall’s *Furman* opinion, Albert Camus said that “if people are shown the [guillotine] machine, made to touch the wood and steel and to hear the sound of a head falling, then public imagination, suddenly awakened, will repudiate both the vocabulary and the penalty.” CAMUS, *supra* note 24, at 177. What Camus believed about the guillotine is what some Japanese abolitionists believe about the gallows. Interviews (Aug. 2003-May 2004).

<sup>202</sup> See BOHM, *supra* note 90, at 258-267.

<sup>203</sup> KIKUTA, *supra* note 15.

<sup>204</sup> For a description of what such studies require, see BOHM, *supra* note 90.

<sup>205</sup> The most common misperception is that Japan uses the electric chair, a belief that probably reflects the influence of American films. Few Japanese films take up the subject of capital punishment. The most recent exception is “*13 Kaidan*” (released in 2003), in which a prison official (not a defense lawyer) tries to prove a death row inmate has been wrongly condemned. The “cultural conservatism” of American death penalty films has been criticized for “legitimizing

that surrounds inmates on Japan's death row. The most well-informed persons were two college students, both age 21, who held hands while agreeing that Asahara should be executed because of "all the harm he caused" (he was convicted of killing 28 persons) and because of "the victims' feelings." The male student was studying law at a university where one of Japan's leading criminologists teaches and had even taken the professor's course. Nonetheless, he and his girlfriend were so "troubled" to hear about the conditions on death row and the secrecy that surrounds executions that they quickly generated critiques of their own ("that's inhumane and unnecessary"). After I asked whether they would like to witness Asahara's hanging (both said no), the woman began to cry. "I have never even tried to imagine that scene," she stammered through her tears. "It must be horrifying."

Nobody knows how representative this couple is, and nobody knows how long their critique of secrecy will endure. Japanese research on these subjects is still in its infancy,<sup>206</sup> while the best American evidence suggests that death penalty opinions often "rebound[ ] to near their initial pretest positions" after exposure to new information.<sup>207</sup> Still, if there is any country where the Marshall hypothesis accurately describes the shallow roots of pro-death-penalty opinion – and if there is any place where exposure to more of the "presently available information" could undermine support for capital punishment – it may well be Japan, for nowhere else does the state

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state killing." SARAT, *supra* note 174, at 245. The charge applies to Japanese films too.

<sup>206</sup> Public opinion data about the death penalty in Japan are very low quality. The main problem is that the questions asked are misleadingly simple. KIKUTA, *supra* note 15, at 44. There have been no studies that attempt to discern whether *giving respondents information* about the death penalty alters their opinion about it; there have been no questions that provide "harsh and meaningful" *answer alternatives* to death; and there have been few surveys that ask about the appropriate punishment for *different types of murder*. *But see also*, Takako Tanase, *Nihonjin no Kenrikan-Keibatsu Ishiki to Jiyushugi teki Ho Chitsujo*, 157 HOGAKU RONSO, No.4, at 1, No.5, at 1. The advent of these kinds of studies in the USA improved and complicated scholars' understanding of death-penalty opinion. *See* BOHM, *supra* note 90, at 253-272.

<sup>207</sup> Robert M. Bohm, *American Death Penalty Opinion: Past, Present, and Future*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION, *supra* note 15, at 43.

kill so secretly. But again, one cannot be sure. Marshall himself believed that where retribution is the basis of support for capital punishment, as may be the case in Japan,<sup>208</sup> additional knowledge may have little effect on opinions. There is some American evidence to support this view.<sup>209</sup> In any event, I urge Japan's own scholars and reporters to start conducting studies of a kind that could clarify the connections between secrecy and salience. If that reality is knowable but unknown, one fact does seem sure: the Japanese government will not conduct such studies because the information uncovered might stimulate discourse that threatens its prerogatives.<sup>210</sup>

### C. SECRECY AND DEMOCRACY

Assessing the relationship between secrecy and democracy depends less on empirical evidence than on principled arguments about what democracy requires. This much is clear: the secrecy that shrouds capital punishment in Japan is inconsistent with principles of democracy such as transparency, accountability, and public reasoning. And ironically, while death penalty secrecy has accelerated, these democratic values have become increasingly important in Japanese society.

Some scholars contend that America retains capital punishment and Europe does not because "America is more democratic."<sup>211</sup> On this view, most people support capital punishment

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<sup>208</sup> SHIGEMITSU DANDO, SHIKEI HISHIRON 487 (6th ed. 2000).

<sup>209</sup> BOHM, *supra* note 90, at 43.

<sup>210</sup> Japan is a "fact-rich, data-poor" place to do research, for two main reasons. First, government ministries rarely fund meaningful data-gathering studies. Second, even when they do, they seldom make the raw data available to researchers. Harvard sociologist Mary Brinton says that these problems have "had a strikingly negative impact on the volume of research and knowledge" in the fields of sociology, political science, and economics, and she believes that useful data are more abundant in the USA, Australia, New Zealand, Israel, South Africa, Taiwan, South Korea, and the countries of the European Union. Mary Brinton, *Fact-Rich, Data-Poor: Japan as Sociologists' Heaven and Hell*, in *DOING FIELD WORK IN JAPAN 195-210* (Theodore C. Bestor et al. eds., 2003).

<sup>211</sup> Richard Posner, *Capital Crimes*, THE NEW REPUBLIC, Apr. 1, 2002, reviewing BANNER, *supra* note 6.



in both the USA and Europe,<sup>212</sup> yet only in America are majority preferences allowed to prevail. Abolition in Europe has never been the result of popular demand; politicians had to ignore public opinion and “lead from the front” in order for it to occur.<sup>213</sup>

In Japan, state officials offer two “arguments from democracy” in order to explain and justify the continued use of capital punishment. Neither engages the question of secrecy. The first claim is that abolishing the death penalty despite public support would undermine confidence in law and perhaps even lead to an increase in private acts of vengeance. As one prosecutor told me, “If we stopped using capital punishment, people’s respect for law would decline. You may not notice it for one year or 10 years or even 50 years, but eventually it will happen.” The second assertion is more fundamental. Since the state should express “the will of the people,” it is “anti-democratic” to stop capital punishment when most Japanese support it. Some officials believe this ought to end the discussion. As another prosecutor put it, “Nothing more needs to be said.” On this vision of democracy, majorities should rule, and if most people want the death penalty then the state should use it.

But the view that capital punishment in Japan reflects “democracy-at-work” rests on a stunted conception of democracy. Democracy takes many forms, but all of them have demands that transcend the ballot box and public opinion polls.<sup>214</sup> Japanese citizens are badly informed about capital punishment. When the state kills in secret it suppresses knowledge that they should have.<sup>215</sup> When the state kills in secret it ignores the importance of “public reasoning” and “deliberative interactions” that are the hallmarks of a healthy democracy.<sup>216</sup> When the state kills in secret, government by

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<sup>212</sup> HOOD, *supra* note 151, at 23-26, 62-70.

<sup>213</sup> See FRANKLIN E. ZIMRING AND GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA (1986).

<sup>214</sup> *Public Records Are Lifeblood of Democracy*, DAILY YOMIURI, July 20 2004.

<sup>215</sup> See Amartya Sen, *Democracy and Its Global Roots: Why Democratization Is Not the Same as Westernization*, THE NEW REPUBLIC, October 6, 2003.

<sup>216</sup> See JOHN RAWLS, A THEORY OF JUSTICE (1999); RONALD DWORKIN, LAW EMPIRE (1988).

discussion becomes government by decree.<sup>217</sup> When the state kills in secret it is hard to hold it accountable.<sup>218</sup> And when the state kills in secret, the value of transparency is absent without leave.<sup>219</sup>

Some readers may suppose that I am trying to impose “Western values” on Japan. I am not. Democracy as “government by discussion” is not a Western invention; it has parents from numerous countries and cultures, including Japan. When Buddhist Prince Shotoku wrote Japan’s first constitution in 604 C.E. he said that “decisions on important matters should not be made by one person alone. They should be discussed with many.”<sup>220</sup> Fourteen centuries later, when Japanese prosecutors select a person for execution, the case is “discussed with many” other prosecutors. In fact, to disperse responsibility for their decision, up to 30 prosecutors sign off on a case before it is presented to the Minister of Justice for the signature that authorizes execution.<sup>221</sup> This is neither what the Prince had in mind nor is it what is aspired to by Japan’s information disclosure movement.<sup>222</sup> Good government is linked to public reasoning, and public reasoning implies the encouragement of public discussion. When the Japanese state kills in secret, these connections are cut.

#### D. SECRECY AND LAW

Legal secrets are common. They do, however, require justification, of which two main schools exist. Efficiency theory argues that a secret is sound if it helps maximize the general welfare,<sup>223</sup> while contractarian theory says legal secrets are legitimate if they are the result of “rational argument generated in an effort to

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<sup>217</sup> See ROBERT A. DAHL, *ON DEMOCRACY* (1998).

<sup>218</sup> See KIKUTA, *supra* note 15.

<sup>219</sup> Yasuda, *supra* note 18.

<sup>220</sup> Sen, *supra* note 215, at 33.

<sup>221</sup> Interviews with prosecutors, *supra* note 129; SAKAMOTO, *supra* note 7, at 12.

<sup>222</sup> Marshall, *supra* note 77; Repeta & Schultz, *supra* note 92.

<sup>223</sup> SCHEPPLE, *supra* note 6, at 31-31, 36-42, and 84.

attract consent.”<sup>224</sup> It is hard to see how the secrecy that characterizes capital punishment in Japan contributes to efficiency. If anything, since secrecy undermines deterrence, Japan’s version of capital punishment appears to be highly inefficient. Moreover, Japan’s secrecy policy is not the result of rational arguments intended to “attract consent.” It is the product of a historical imperative (the Meiji need to appear “civilized” to Western powers) multiplied by the self-interested actions of powerful persons in the Occupation and the Ministry of Justice. Japanese law has failed to mount a plausible case for consent to its policy of secrecy. It is, therefore, “open to criticism for failing to justify its own rules.”<sup>225</sup>

As for the rules themselves, what is striking is how many of them are informal and extralegal. “The government’s reluctance to disclose execution information...has no legal grounds,” says Koichi Kikuta,<sup>226</sup> and most of the rest of the bricks used to build Japan’s wall of silence were themselves constructed bureaucratically and informally by prosecutors in the Ministry of Justice, not legally or explicitly by legislatures and courts. In this respect, the case of capital punishment illustrates the Japanese penchant for what Frank Upham calls “bureaucratic informalism.”<sup>227</sup> Central to this model of law is “the elite’s attempt to retain some measure of control over the processes of social conflict and change.”<sup>228</sup> Without a formal and open policymaking process, Japan’s death penalty policies “appear as the inevitable and natural results of custom and consensus rather than as the conscious political choices” that they actually are.<sup>229</sup> In the main, the purpose of prosecutors’ “political choices” is their own protection against criticism and against pressures to reduce the control they currently possess over death penalty cases.<sup>230</sup>

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<sup>224</sup> *Id.* at 4.

<sup>225</sup> *Id.*

<sup>226</sup> *Diet Members Tour Execution Chamber*, JAPAN TIMES, July 24, 2003.

<sup>227</sup> FRANK UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* 17 (1987).

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 208.

Japan's "justice system reform movement" (*shiho kaikaku undo*) – the most important attempt at legal reform since the Occupation – claims to have a different purpose: "the expansion of the rule of law in Japanese society."<sup>231</sup> Though this is a laudable objective,<sup>232</sup> large obstacles to that end have not received the reform attention they deserve. One obstacle is the police, who are largely "above the law";<sup>233</sup> another is prosecutors. These two groups have kept issues of their own power, performance, and accountability outside the realm of public discussion. Their "success" at agenda-setting is society's failure, a contradiction which illustrates the truth that power has the capacity to define "reality" (what needs to be reformed in Japanese law) by producing knowledge that supports the reality it wants and by suppressing knowledge for which it has no use.<sup>234</sup> Since at least the time of Occupation, police and prosecutors have consistently produced rationalizations that serve their own interests and suppressed rationality that would challenge their position of primacy in Japanese criminal justice. Looking ahead, the effect of the "justice system reform" movement on capital punishment in Japan may not be to subject it to "the rule of law" but rather to legitimate the current system of bureaucratic informalism.<sup>235</sup>

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<sup>230</sup> More generally, "those who can successfully keep secrets achieve increased autonomy with respect to those attempting to control them." SCHEPPLE, *supra* note 6, at 307.

<sup>231</sup> Iwao Sato, *Judicial Reform in Japan in the 1990s: Increase of the Legal Profession, Reinforcement of Judicial Functions and Expansion of the Rule of Law*, 5 SOCIAL SCIENCE JAPAN JOURNAL 71, 81 (2002).

<sup>232</sup> Georg Simmel argued that secret societies become more open as they emphasize universal rules and values. THE SOCIOLOGY OF GEORG SIMMEL, *supra* note 1. If this is true, and if Japan's justice system reform movement subjects criminal justice to more "rule of law" values, then we may see declines in death penalty secrecy.

<sup>233</sup> David T. Johnson, *Nihon ni okeru Shiho Seido Kaikaku: Keisatsu no Shozai to Sono Juyosei*, 76 HORITSU JIHO 8 (2004).

<sup>234</sup> FLYVBJERG, *supra* note 121, at 36.

<sup>235</sup> Japan's justice system reforms include a new "lay assessor system" (*saiban-in seido*) under which 6 citizens will sit on a mixed court with 3 professional judges in order to decide guilt and sentence in capital and other serious cases. This system, to be implemented by 2009, injects much needed lay participation and oversight into the trial stage but does little to address the secrecy

A competing theory of what “law in Japan” is like contends that “no characteristic of Japanese political life seems more remarkable or intrinsic than the separation of authority from power.”<sup>236</sup> This disconnect is deemed especially significant in Japanese law. In the area of criminal law, Japan is said to be so “extraordinarily lenient” that it has “in effect abandoned the most coercive of all legitimate instruments of state control.”<sup>237</sup> Although the case of capital punishment suggests that such assertions should be softened, the same account provides sound methodological counsel when it notes that “[p]rosecutorial discretion, broadly defined to include control over all forms of law enforcement...should become the central focus of any inquiry as to the role of law in society.”<sup>238</sup> This article has followed that advice. Prosecutors’ control over charge decisions and over the selection of persons to be executed means that they largely determine the “inputs” and the “outputs” of Japan’s capital punishment system. They are, therefore, the main agents of state-killing in Japan, and hence deserve to be the primary focus of analysis.

Since law can be a useful “window to Japan,”<sup>239</sup> let us take a concluding look through the porthole defined by Japan’s freedom of information laws. If (as Ralph Nader avers) information is the currency of democracy, then the Japanese public lacks the key to the treasury.<sup>240</sup> Indeed, citizens in Japan lack legal leverage to acquire

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and accountability problems described in this article. In Japanese history, most previous attempts to give lay people responsibility for criminal justice decision-making have been “marginalized” by non-use and “captured” by legal professionals. Kent Anderson & Mark Nolan, *Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (saiban-in seido) from Domestic, Historical, and International Psychological Perspectives*, 37 VAND. J. TRANSNAT’L L. 935 (2004).

<sup>236</sup> JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* 13 (1991).

<sup>237</sup> *Id.* at 129, 138.

<sup>238</sup> *Id.* at 10.

<sup>239</sup> *Id.* at 4.

<sup>240</sup> David Boling, *Access to Government-Held Information in Japan: Citizens’ “Right to Know” Bows to the Bureaucracy*, 34 STAN. J. INT’L L. 1 (1998), at 2.

meaningful information from and about many of the institutions that govern them. In numerous areas of Japanese life – banking, political finance, the imperial household, police behavior, affirmative action, administrative guidance, capital punishment, and so on – crucial facts “are hidden so well that the truth is nearly impossible to know,”<sup>241</sup> and law does little to help those who would expose hidden truths.<sup>242</sup> Some observers hope that Japan's new Information Disclosure Law (which took effect in 2001) will empower citizens by providing them with increased access to the knowledge they need.<sup>243</sup> Though the law is a step forward, its scope is narrow and much crucial information remains outside its purview.<sup>244</sup> As for criminal justice more specifically, prosecutors recently received a legislative gift that contradicts the spirit of the movement towards more information openness. The new law, which took effect in 2004, makes it a crime for defendants, defense lawyers, and other persons to use “records of criminal cases” (*keiji jiken no kiroku*) for any purpose except the criminal trial. Prosecutors say the law is needed to protect the “privacy” of victims and others, but another effect will be to restrict the flow of information to the public and thereby to curtail knowledge and criticism of the system's deficiencies. Prosecutors wrote the law themselves and lobbied for it extensively.<sup>245</sup>

## VI. CONCLUSION

The most fundamental problem in Japanese criminal justice is that “the system is so hostile to outside scrutiny it remains impossible

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<sup>241</sup> ALEX KERR, *DOGS AND DEMONS: TALES FROM THE DARK SIDE OF JAPAN* 104 (2001).

<sup>242</sup> Howard W. French, *Tired of News That Rocks the Boat? Visit Japan*, N.Y. TIMES, Feb. 6, 2000.

<sup>243</sup> Patricia Maclachlan, *The Struggle for an Independent Consumer Society: Consumer Activism and the State's Response in Postwar Japan*, in *THE STATE OF CIVIL SOCIETY IN JAPAN*, *supra* note 70, at 230-231.

<sup>244</sup> Marshall, *supra* note 77. Akihiro Ishihara and Kenji Yoshimura, *Info Disclosure Law Has Achieved Little*, DAILY YOMIURI, April 3, 2006.

<sup>245</sup> Takashi Takano, *Jiken Kiroku: Shinri Igai no Katsuyo mo Mitomeyo*, ASAHI SHIMBUN, May 18, 2004, at 40.

to see or say what many of the problems are.”<sup>246</sup> The new criminal records law seems likely to aggravate that affliction; “postwar acceleration” may continue. On the other hand, two senior prosecutors did tell me that there are discussions in the Ministry of Justice about the possibility of allowing one “private person” to attend each execution. Having just defended the state’s secrecy policy, they could not explain why this reform was being considered, and they emphasized that an “opening” of the gallows could only happen on two conditions: the private witness would need to be chosen by the Ministry, and the person so designated would not be permitted to tell anyone what was seen and heard at the hanging. I asked how this reform would promote accountability and transparency. The question was met with silence.

James Madison once said that “A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both.” Reiko Oshima would agree.

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<sup>246</sup> DAVID T. JOHNSON, *supra* note 23, at 279.