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Deliberative Democracy and the  
Emerging Jury System in Japan: A  
Natural Combination or Two Ships  
Passing in the Night?

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# Deliberative Democracy and the Emerging Jury System in Japan: A Natural Combination or Two Ships Passing in the Night?

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*“I come from an environment where, if you see a snake, you kill it. At GM, if you see a snake, the first thing you do is go hire a consultant on snakes. Then you get a committee on snakes, and then you discuss it for a couple of years. The likely course of action is—nothing. You figure the snake hasn’t bitten anybody yet, so you just let him crawl around on the factory floor.” – H. Ross Perot<sup>1</sup>*

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<sup>1</sup> See DIANA C. MUTZ, HEARING THE OTHER SIDE: DELIBERATIVE VERSUS PARTICIPATORY DEMOCRACY, 103 (Cambridge University Press) (2006).

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## INTRODUCTION

In May, 2009 Japanese citizens, for the first time in over 60 years, will have right to help decide serious criminal cases by being a part of a petit quasi-jury, or Saiban-in Seido. This major reform will have many effects on Japan and Japanese government. One of its most interesting potential effects, however, will be to see, in light of deliberative democracy theory, what kind of effect, if any, will Japan's new criminal jury system have on Japan's democratic government? In Part II of this note I will define deliberative democracy and give a summary of relevant theoretical and empirical research. In Part III, I will discuss and assess the criticisms of deliberative democracy. In Part IV, I will assess how jury systems in general, and Japan's jury system in particular, interplay with deliberative democracy. Part V will be a brief conclusion.

First, however, in order to completely understand the reform, it is necessary to have at least a rudimentary understanding of Japan's entire system of government. Although the reform only deals with the judicial branch, all of its branches interact with each other, so a crude understanding of the whole system will be beneficial. Japan's government is a constitutional monarchy with a parliamentary government.<sup>2</sup> It consists of a legislative, executive, and judicial branch.<sup>3</sup> The legislative branch is called the Diet and consists of two democratically elected legislatures, the House of Representatives and the House of Councilors.<sup>4</sup> A majority of the members of the parliament must appoint the prime minister, who is the head of the executive

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<sup>2</sup> The Central Intelligence Agency World Factbook: Japan, <https://www.cia.gov/library/publications/the-world-factbook/geos/ja.html> (last visited Nov. 2, 2007).

<sup>3</sup> *Id.*

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

branch.<sup>5</sup> The prime minister has the power to appoint a cabinet.<sup>6</sup> The judicial branch includes a Supreme Court that is appointed by the cabinet with the approval of the Emperor.<sup>7</sup> There are several levels of inferior courts.<sup>8</sup>

## I

### WHAT IS DELIBERATIVE DEMOCRACY?

#### A. HISTORY

Democracy has always been linked with deliberation. In ancient Athens, political leaders thought that deliberation was an “indispensable preliminary to any wise action at all.”<sup>9</sup> In his classic treatise on politics, Aristotle wrote of the virtues of deliberation. He wrote, “Now any member of the assembly, taken separately, is certainly inferior to the wise man. But the state is made up of many individuals. And as a feast to which all the guests contribute is better than a banquet furnished by a single man, so a multitude is a better judge of many things than any individual.”<sup>10</sup> Over 2000 year after Aristotle, John Stuart Mill urged democratic governments to use large, random samples of citizens to deliberate about broad political issues.<sup>11</sup> In America, Thomas Jefferson wrote that the single greatest failure of the founding was not creating an

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<sup>5</sup> *Id.* Technically, the Emperor is the Head of the Japanese state, but he only has symbolic power. Thomas H. Reynolds & Arturo A. Flores, *The Foreign Law Guide, Japan*, <http://www.foreignlawguide.com/ip/> (last visited Nov. 2 2007).

<sup>6</sup> The Central Intelligence Agency World Fact book: Japan, <https://www.cia.gov/library/publications/the-world-factbook/geos/ja.html> (last visited Nov. 2, 2007).

<sup>7</sup> *Id.*

<sup>8</sup> Prime Minister of Japan and His Cabinet, Organizational Chart, [http://www.kantei.go.jp/foreign/constitution\\_and\\_government\\_of\\_japan/charts\\_e.html](http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/charts_e.html) (last visited Nov. 2 2007) (listing the lower courts: High Courts, District Courts, Family Courts, Summary Courts and Committees for the Inquest of Prosecution).

<sup>9</sup> Thucydides, *Peloponnesian War*, II. 40 S. Lattimore, trans. (Indianapolis: Hackett, 1998).

<sup>10</sup> Aristotle, *Politics*, Book III, B. Jowett, trans., <http://classics.mit.edu/Aristotle/politics.3.three.html>.

<sup>11</sup> JOHN STUART MILL, *Considerations on Representative Government*, in *ON LIBERTY AND OTHER ESSAYS*, 225 (John Gray ed., 1991) (1861).

institution that encouraged popular deliberative politics.<sup>12</sup> Jefferson's writings contain a variety of proposals for creating face-to-face deliberation.<sup>13</sup> However, Jefferson was ambassador to Paris at the time of the founding, so the other delegates did not heed his advice.<sup>14</sup>

Although certain writings of Aristotle, John Stuart Mill and Thomas Jefferson are precursors to modern deliberative democratic theory, they are also undemocratic. In Aristotle's ancient Athens, only free men could participate in the deliberations.<sup>15</sup> Furthermore, although Aristotle advocated deliberation by the "masses", he preferred deliberation by the aristocracy, where the debate would be more sophisticated.<sup>16</sup> Even John Stuart Mill thought that educated people should lead deliberation.<sup>17</sup> Lastly, the deliberation that Thomas Jefferson advocated would not have included slaves<sup>18</sup> or women.<sup>19</sup> Understanding the history of deliberative democracy is important because it is the old theories that serve as the building blocks that have created this well-developed modern theory

## B. MODERN DELIBERATIVE DEMOCRATIC THEORY

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<sup>12</sup> BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY*, 159 (Yale University Press) (2004) citing HANNAH ARENDT, *ON REVOLUTION*, 252–59 (1963).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?*, 8 (Princeton University Press) (2004)

<sup>16</sup> *See id.*

<sup>17</sup> *Id.* at 9 citing JOHN STUART MILL, *Considerations on Representative Government*, in *COLLECTED WRITINGS*, vol. XIX, ch. XV ed. J.M. Robson (Toronto: University of Toronto Press; London: Routledge & Keagan Paul, 1977)

<sup>18</sup> See PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 144–47 (2001) (stating that, as the chairman of the committee to revise the laws in Virginia, Thomas Jefferson prevented a measure that would have gradually emancipated the slaves in Virginia from reaching the floor). *A fortiori*, Jefferson did not want slaves included in political deliberation.

<sup>19</sup> See MARTIN GRUBERG, *WOMEN IN AMERICAN POLITICS*, 4 (1968) (quoting Thomas Jefferson, "[w]ere our state a pure democracy there would still be excluded from our deliberations . . . women, who, to prevent deprivation of morals and ambiguity of issues should not mix promiscuously in the gatherings of men"). *But see* HANNAH ARENDT, *ON REVOLUTION*, 119 (Viking Press) (1963) quoting John Adams describing public happiness, "[w]herever men, women, or children are to be found, whether they be old or young, rich or poor, high or low, wise or foolish, ignorant or learned, every individual is strongly actuated by a desire to be seen, heard, talked of, approved and respected by the people about him."

Deliberative democracy is a popular and frequently debated topic in modern political science scholarship.<sup>20</sup> Deliberative democracy is a political theory that emphasizes the need for public deliberation to justify laws and decisions.<sup>21</sup> Two noted deliberative democracy scholars, Amy Gutmann and Dennis Thompson, define deliberative democracy as “a form of government in which free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future.”<sup>22</sup>

Deliberative democracy differs from traditional democratic theories, such as aggregative democracy—which takes the preferences of citizens as a given and advocates resources accordingly<sup>23</sup>—in several important ways.<sup>24</sup> Deliberative democracy emphasizes the justification that citizens give for political preferences, instead of taking the preferences as a given.<sup>25</sup> The way in which each theory deals with rational disagreement, however, illustrates the biggest difference between the two theories.<sup>26</sup> Aggregative democracy deals with rational

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<sup>20</sup> See GUTMANN & THOMPSON, *WHY DELIBERATIVE DEMOCRACY?*; FRANK CUNNINGHAM, *THEORIES OF DEMOCRACY*, 163–83 (London and New York: Routledge) (2002); DAVID ESTLUND ED., *DEMOCRACY* (Oxford: Blackwell) (2002); JOHN DRYZEK, *DELIBERATIVE DEMOCRACY AND BEYOND* (Oxford: Oxford University Press) (2000); STEPHEN MACEDO ED., *DELIBERATIVE POLITICS* (Oxford: Oxford University Press) (1999); JOHN ELSTER, *DELIBERATIVE DEMOCRACY* (Cambridge: Cambridge University Press) (1998); JAMES BOHMAN AND WILLIAM REHG, EDs., *DELIBERATIVE DEMOCRACY* (Cambridge, Mass.: MIT Press) (1997).

<sup>21</sup> JOSHUA COHEN, “*Deliberation and Democratic Legitimacy*” in *THE GOOD POLITY* 15 (Alan Hamlin & Philip Pettit eds., 1989) (“By a deliberative democracy I shall mean, roughly, an association whose affairs are governed by the public deliberation of its members.”).

<sup>22</sup> GUTMANN & THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* 7.

<sup>23</sup> *Id.* (also noting that some aggregative theories would correct preferences based on misinformation).

<sup>24</sup> See *Id.* at 190, n.13 (explaining that, “for the purpose of contrasting deliberative democracy with other conceptions [of democracy], the distinction between deliberative and aggregative approaches is more relevant”).

<sup>25</sup> *Id.* at 13.

<sup>26</sup> *Id.* at 14 (“[b]ut that some disagreement is reasonable . . . When citizens disagree about such issues as the morality of abortion, capital punishment, starting a preventive war, or funding health care, deliberation does not produce agreement, and perhaps should not.”).

disagreement in one of two ways. First, it allows the citizens to vote on the topic and the majority triumphs.<sup>27</sup> Second, officials acknowledge the expressed preferences of the electorate and “put them through an analytic filter—such as cost-benefit analysis—which is intended to produce optimal outcomes.”<sup>28</sup> Deliberative democracy, however, encourages citizens to continue to engage in reasoned-discussion because reasoned-discussion is likely to produce respect for the merit of each other’s positions instead of simply viewing them as the result of impaired judgment or impure motive.<sup>29</sup>

### C. DELIBERATIVE DEMOCRACY AND THE “REAL WORLD”

While it is useful to develop the theory of deliberative democracy, it is also necessary to examine how the theory works in the “real world.” In order to illustrate deliberative democracy in action, it is helpful to show several high-profile non-researcher created examples of deliberative democracy. Examining deliberative polls, which are genuine exercises of deliberative democracy set up by researchers, will further illuminate the potential effects of deliberative democracy. Lastly, evaluating the existing empirical research on deliberative democracy will provide further insights to the theory.

There have been many “real-world” examples of deliberative democracy. For example, in 1995, shortly after the O.J. Simpson verdict, Los Angeles city official organized “Days of Dialogue” to allow people within the city to discuss race relations.<sup>30</sup> Additionally, in the early

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<sup>27</sup> *Id.* (“The electoral process is modeled on the analogy of the market . . . Whatever debate takes place in the campaign serves a function more like that of advertising (informing the voters about the comparative advantages of the candidates) than like that of argument (seeking to change minds by giving reasons.”).

<sup>28</sup> *Id.* at 14–15.

<sup>29</sup> *Id.* at 20.

<sup>30</sup> U.S. Senator Bill Bradley, *Foreword* to MATT LEIGHNINGER, *THE NEXT FORM OF DEMOCRACY: HOW EXPERT RULE IS GIVING WAY TO SHARED GOVERNANCE . . . AND WHY POLITICS WILL NEVER BE THE SAME*, xiii (Vanderbilt University Press) (2006) (“I was invited to sit in on a session at a drug rehabilitation center, where a member of the Nation of Islam served as an evenhanded facilitator . . . . I believe these discussion may have helped avert a wave of violence like the one that accompanied the 1992 Rodney King verdicts.”)

1990s, the city of Eugene, Oregon faced a budget crisis.<sup>31</sup> In order to engage the citizenry in the crisis, the city council mailed a work sheet (that listed possible revenue and expenses and allowed each taxpayer to create a balanced budget) to everyone in the city and a mail-in questionnaire to a representative sample of voters.<sup>32</sup> The city council used the work sheet as part of a number of three-hour community workshops, where small groups discussed possible budgets.<sup>33</sup> At each workshop, participants met in groups of 7–9 people, who were facilitated by a trained volunteer and a city staff person with knowledge of the city budget.<sup>34</sup> After the public deliberation, the city council of Eugene enacted a budget that included the citizen’s insights and suggestions.<sup>35</sup>

Although not completely organic, Deliberative Polls are an excellent demonstration of deliberative democracy at work. Researchers created Deliberative Polls because they wanted a systematic way to analyze the effects of exchanges between citizens. A Deliberative Poll is “a survey of a random sample of citizens before and after the group has had a chance to deliberate seriously on an issue.”<sup>36</sup> First, the researchers select a representative sample of citizens and ask them questions about a particular topic.<sup>37</sup> Then, the respondents of the survey are invited to a central location for a weekend to engage in discussion on that issue.<sup>38</sup>

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<sup>31</sup> MATT LEIGHNINGER, *THE NEXT FORM OF DEMOCRACY: HOW EXPERT RULE IS GIVING WAY TO SHARED GOVERNANCE . . . AND WHY POLITICS WILL NEVER BE THE SAME*, 198 (“In 1991, city finances were complicated by rising health and pension costs, a weak economy, and state ballot measures that capped local property taxes.”)

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 199.

<sup>34</sup> *Id.* (noting that although the city had never had more than a couple hundred citizens attend a public meeting, 682 people attended the budget work shops.)

<sup>35</sup> *Id.* (“The final budget included six efficiency measures, twenty user-fee increases, twenty-five service reductions, three transfers of service costs to non-general funds, and three service expansions.”).

<sup>36</sup> BRUCE ACKERMAN AND JAMES S. FISHKIN, *DELIBERATION DAY*, 4 (Yale University Press) (2004).

<sup>37</sup> *Id.* (“This initial survey is the standard sort conducted by social scientists doing public opinion research.”).

<sup>38</sup> *Id.*; “A small honorarium and travel expenses are paid to recruit a representative sample.” *Id.*

Researchers give participants briefing material for background on the topic.<sup>39</sup> When the participants arrive, researchers assign them to small groups with trained moderators.<sup>40</sup> The groups not only discuss the issue, but also identify key questions for further discussion.<sup>41</sup> Next, the groups bring the questions to panels of competing experts in a large, plenary session.<sup>42</sup> The participants alternate between small groups and plenary sessions throughout the weekend.<sup>43</sup> At the end of the weekend, the participants take the same survey they took when the researchers first contacted them.<sup>44</sup> Typically, there are dramatic changes between the first and second surveys.<sup>45</sup> Professor Fishkin writes, “[w]hen ordinary people have the chance seriously to consider competing sides of an issue, they take the opportunity to become far more informed. Their considered judgments demonstrate higher levels of knowledge and greater consistency with their basic values ad assumptions.”<sup>46</sup>

So far, there have been about twenty Deliberative Polls in a variety of different countries<sup>47</sup> and on a variety of different topics.<sup>48</sup> Deliberative Polls usually deal with a controversial and relevant issue in the local or national community.<sup>49</sup> For example, one

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<sup>39</sup> *Id.* (“These materials are typically supervised for balance and accuracy by an advisory board of relevant experts and stakeholders.”).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

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

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

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 44. (Fishkin has conducted Deliberative Polls in the United States, Britain, Australia and Bulgaria.)

<sup>48</sup> *See infra* note 48.

<sup>49</sup> ACKERMAN & FISHKIN, DELIBERATION DAY 44. (The more national topics for Deliberative Polls the United States have included the economy, America’s role in the world, and the current state of the American Family. In Great Britain the topics included crime, Britain’s future in Europe, reform of the monarchy, the economic issues in the 1997 British general election, and the future of the National Health Service. In Denmark, the Deliberative Poll focused on the euro. The poll took place immediately before the national referendum on adopting the euro as its currency. In Australia, there were two Deliberative Polls. One topic was whether or not

Deliberative Poll, held in Texas, considered how regulated electric utilities were going to plan for future energy use.<sup>50</sup> The options included using fossil fuels such as coal and gas, building renewable energy facilities, or encouraging conservation to lessen the need for new power.<sup>51</sup> Participants also discussed whether to subsidize the energy needs of poor customers.<sup>52</sup>

The results—as measured by the surveys filled out participants before and after deliberation—of the Texas Deliberative Poll were somewhat surprising. In all of the eight separate Deliberative Polls, there was an increase in the number of participants who claimed they would be willing to pay a higher electric bill to subsidize the poor.<sup>53</sup> Additionally, the percentage of participants who were willing to pay more money for renewable energy also increased.<sup>54</sup>

Despite the evident success of Deliberative Polls as accurate measurements of the effects of interactions between citizens, other academics have severely criticized them. In her book *Hearing the Other Side: Deliberative versus Participatory Democracy*,<sup>55</sup> Diana C. Mutz writes, “what is especially troubling . . . is that they are often lacking both in the strength of causal inferences that may be drawn from them (i.e., internal validity) *and* in the extent to which they

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Australia should be a republic, which took place immediately before the referendum on whether Australia should become a republic and the other involved reconciliation with the Aboriginals).

<sup>50</sup> *Id.* at 45.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 55.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* (“Averaged over all eight DPs [Deliberative Polls], the percentage of participants who were willing to pay more each month for renewable energy rose from 52 to 84 percent at the end of the poll.”).

<sup>55</sup> (Cambridge University Press) (2006). The book won the 2007 Goldsmith Book Prize, from the Joan Schorenstein Center on the Press, Politics & Public Policy at the John F. Kennedy School of Government, Harvard University, which “is awarded to the trade and academic book published in the last year that best fulfills the objective of improving government through an examination of the intersection between press, politics, and public policy.” The Joan Shorenstein Center on the Press, Politics & Public Policy at the John F. Kennedy School of Government at Harvard University [http://www.ksg.harvard.edu/presspol/goldsmith\\_awards/book\\_prize.htm](http://www.ksg.harvard.edu/presspol/goldsmith_awards/book_prize.htm). (last visited Nov. 7 2007).

can be generalized to deliberation as it occurs naturally (i.e., external validity).”<sup>56</sup> In order to prove her first criticism, Professor Mutz points out that researchers send briefing materials to the people who participate in the weekends and experts and politicians teach the participants additional, new information throughout the weekend.<sup>57</sup> Therefore, it is impossible to know whether the benefits that accrue in participants are caused by the new information the participants learned from the materials the researchers gave them, the information they learned from the experts or politicians during the weekend, the deliberation that occurred during the weekend, or some combination of the three factors.<sup>58</sup>

Professor Mutz supports her second criticism<sup>59</sup> of Deliberative Polls by showing that Americans generally do not interact in a way that resembles the type of interaction that occurs during a Deliberative Poll.<sup>60</sup> She writes that, “the presence of briefing materials, expert panels, group moderators, and the like, ‘make the formal on-site deliberations very different from naturally occurring discussion in the real world.’”<sup>61</sup> Therefore, the only way for Deliberative Polls to be useful is if they were adopted on a large scale, which would be “an undertaking... well beyond the real of the practical.”<sup>62</sup>

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<sup>56</sup> HEARING THE OTHER SIDE: DELIBERATIVE VERSUS PARTICIPATORY DEMOCRACY, DIANA C. MUTZ, 58. (Although Professor Mutz notes that, “[t]o be fair, many of these problems are not unique to studies of deliberative events. The well-worn axiom that all research designs are flawed in some respects is valid here as in any other area”).

<sup>57</sup> *Id.* at 59.

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

<sup>59</sup> *Id.* (which is that Deliberative Polls create situations which do not occur naturally and therefore have limited applicability to the real world).

<sup>60</sup> *Id.* at 60 citing P.J. Conover & D.D. Searing, *Political Discussion and the Politics of Identity* (1998, April) Paper presented at the annual meeting of the Midwest Political Science Association, Chicago.

<sup>61</sup> HEARING THE OTHER SIDE: DELIBERATIVE VERSUS PARTICIPATORY DEMOCRACY, DIANA C. MUTZ, 60 citing C. Farrar et. al. *Experimenting with Deliberative Democracy: Effects on Policy Preferences and Social Choice*. The Center for Deliberative Democracy, Stanford University, (2003) available at <http://cdd.stanford.edu/research/papers/2003/experimenting.pdf>.

<sup>62</sup> HEARING THE OTHER SIDE: DELIBERATIVE VERSUS PARTICIPATORY DEMOCRACY, DIANA C. MUTZ, 61. *But See* ACKERMAN & FISHKIN, DELIBERATION DAY 120–146, 221–227 (arguing for and showing the cost of large-scale Deliberative Polling).

Professor Mutz has also conducted a study that shows some benefits of deliberation.<sup>63</sup> Her study examined the relationship between exposure to opposing political viewpoints and political tolerance and the ability to give valid<sup>64</sup> rationales both for the respondent's positions and for the views held by people with opposing political views.<sup>65</sup> Professor Mutz predicted that exposure to different political view points would lead to greater awareness of rationales for one's own viewpoints, greater awareness of rationales for oppositional viewpoints and greater tolerance.<sup>66</sup> Exposure to opposing political views did not lead to respondents offering more valid rationales for their own positions.<sup>67</sup> Respondents who were exposed to opposing political views, however, offered significantly more rationales for opposing political views.<sup>68</sup> Lastly, political tolerance<sup>69</sup> increased the more the respondent was exposed to other people with opposing political views.<sup>70</sup> This occurred because "close ties with those who hold differing political views increase tolerance."<sup>71</sup> Additionally, political tolerance was also higher when the respondent could offer more valid rationales for opposing political viewpoints.<sup>72</sup> This is logical because [i]f one generally perceives those opposed to one's own views to have some legitimate, if not

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<sup>63</sup> *Id.* at 62 ("I commissioned an original national survey to include indicators of people's exposure to politically like-minded and differently minded people, *and* the kinds of beneficial outcomes this contact is assumed to engender - an awareness of oppositional perspectives, a deeper understanding of reasons behind one's own views, and support for the civil liberties of groups whose politics one dislikes.").

<sup>64</sup> *Id.* at 70 ("Volunteered rationales for own and opposing views were not evaluated by an external standards of sophistication. But coders did eliminate from the counts of the rationales that served to *delegitimize* the other view point.").

<sup>65</sup> *Id.* at 62.

<sup>66</sup> *Id.* at 63.

<sup>67</sup> *Id.* at 72-73 ("[t]here is no compelling evidence that exposure to non-like-minded views had an impact on awareness of rationales for people's *own* political perspectives.").

<sup>68</sup> *Id.* at 74 ("[a]ll else being equal, exposure to oppositional viewpoints significantly increases awareness of legitimate rationales for opposing views.").

<sup>69</sup> Political tolerance includes, "extend[ing] the rights of speech, assembly, and so forth to disliked groups." *Id.* at 77.

<sup>70</sup> *Id.* at 77

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

compelling reasons for being so, then one will be more likely to extend the rights of speech, assembly, and so forth to the disliked groups.”<sup>73</sup>

## II

### IS A DELIBERATIVE DEMOCRACY DESIRABLE?

Thus far, this paper has been assuming that deliberative democracy is a desirable goal. Since there are both benefits to certain types of deliberation,<sup>74</sup> and there are potentially some negative effects of deliberation that premise needs to be questioned. In order to determine if a deliberative democracy is desirable, it is necessary to examine some of the criticisms that critics have leveled against it. First, Professor Charles Blattberg has leveled several theoretical criticisms against deliberative democratic theory. Next, Professor Mutz has used empirical research to show that an increase in political deliberation may lead to a decrease in political activity. Furthermore, Professor Mutz and Professor Cass Sunstein show that an increase in deliberation as it occurs naturally in certain circumstances may lead to increased polarization of opinion in the group.

In his paper, *Patriotic, Not Deliberative, Democracy*, Professor Charles Blattberg levels several criticisms at deliberative democracy.<sup>75</sup> First, he claims that deliberative democrats create a “too-strong division between just and rational deliberation or conversation on the one hand and self-interested and coercive bargaining or negotiation on the other.”<sup>76</sup> Second, he argues that

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<sup>73</sup> *Id.*

<sup>74</sup> *See supra* notes 46, 81–83.

<sup>75</sup> *See* Charles Blattberg, *Patriotic, Not Deliberative, Democracy*, available at [http://www.mapageweb.umontreal.ca/blattbec/pdf/essays/3\\_Patriotic\\_Not\\_Deliberative.pdf](http://www.mapageweb.umontreal.ca/blattbec/pdf/essays/3_Patriotic_Not_Deliberative.pdf) (last visited Nov. 11, 2007), an earlier version of the paper was published in *CRITICAL REVIEW OF INTERNATIONAL SOCIAL AND POLITICAL PHILOSOPHY* 6, no. 1, 115–74 (Spring 2003). The other two criticisms he offers, which are not discussed in this paper, are that deliberative democracy is biased towards liberalism and biased towards republics and against parliamentary systems of government and that the rules that most deliberative democrats propose are not conducive towards meaningful deliberation. *Id.* at 2–10.

<sup>76</sup> *Id.* at 10.

deliberative democracy theorists create an unnecessary and harmful division between the state and the rest of society.<sup>77</sup>

In order to validate his first criticism, Professor Blattberg notes that deliberative democracy theorists frequently require that support for arguments be “reciprocal,”<sup>78</sup> which means that people must be able to understand the support even if they do not share the party’s world-view.<sup>79</sup> The type of detachment that this form of argumentation entails is an impediment in reaching the common good because “common goods are things that are shared by particular communities in particular historical contexts.”<sup>80</sup> Therefore, in order to reach the conception of the common good, there needs to be a “conception of conversation in which interlocutors remain intimately connected to the goods that constitute their identities”<sup>81</sup> which deliberative democracy does not provide.

In order to validate his second criticism of deliberative democracy theory, Professor Blattberg notes that in deliberative democracy theory, there is an inherent division between the state and the rest of society because the state cannot always deliberate before it must make decisions.<sup>82</sup> The division between the state and the rest of society means that “there is no place for a conception of the common good that is larger than that shared by the *demos*.”<sup>83</sup> In other words, since the state tries to enact<sup>84</sup> the decisions<sup>85</sup> that the rest of society reaches through

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<sup>77</sup> *Id.* at 13.

<sup>78</sup> See Gutmann & Thompson, *supra* note 22 (requiring deliberative democracy to use justifications that are “generally accessible”).

<sup>79</sup> *Id.* at 10.

<sup>80</sup> *Id.* at 11.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* (“[u]nlike the people in the public sphere, state agents must meet certain imperatives if they are to secure the state’s longevity and stability . . . there are times when politicians must simply come to a decision and this means that they haven’t the luxury to deliberate in a genuinely open-ended way.”).

<sup>83</sup> *Id.* at 14.

<sup>84</sup> It is not clear how the deliberating public should transmit the results of its deliberation to the state so the state can enact the policy. *Id.* at 17 (“This one has to do with how they believe the

deliberation,<sup>86</sup> the government can never really make a decision that carries the full weight of deliberative validity.<sup>87</sup> Therefore, citizens “cannot aim for the realization of the civic, political community as a whole.”<sup>88</sup>

Professor Mutz suggests that as a person engages in more deliberation, the amount of political activity she engages in may decrease.<sup>89</sup> Professor Mutz has conducted empirical research on the likelihood and effects of natural deliberation between people who have similar and different political beliefs.<sup>90</sup> The results of her empirical research make her arrive at the thesis of her book, which is that “theories of participatory democracy are in important ways inconsistent with theories of deliberative democracy.”<sup>91</sup> Other researchers have reached similar conclusions.<sup>92</sup> The idea of how interacting with people who have differing beliefs (or cross pressure), however, dramatically decreased in popularity because of an “accumulation of

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public sphere and the state ought to relate: the former, it is said should ‘transmit’ its deliberations to the latter. Whatever this means, exactly . . .”).

<sup>85</sup> It is also not clear in deliberative democracies when a decision has been reached. *Id.* at 17 (“For the debate often carries on after the decision is taken, with those on the losing end vowing to continue the struggle.”).

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

<sup>87</sup> *Id.* at 13–14 (“This is why the deliberative democrat’s state cannot be said to express, even occasionally, an ‘ethical community’ . . . Now this, I would claim, is a serious failing.”).

<sup>88</sup> *Id.* at 18

<sup>89</sup> See HEARING THE OTHER SIDE: DELIBERATIVE VERSUS PARTICIPATORY DEMOCRACY, DIANA C. MUTZ, 91 (“[p]otential drawbacks of cross-cutting exposure for one democratic outcome in particular - political participation.”).

<sup>90</sup> HEARING THE OTHER SIDE: DELIBERATIVE VERSUS PARTICIPATORY DEMOCRACY, DIANA C. MUTZ, ix (Although her originally topic of “evaluating the extent to which empirical evidence substantiates the claims of deliberative democratic theory” would have been better for the purposes of this paper).

<sup>91</sup> *Id.* at 16.

<sup>92</sup> See e.g., ANGUS CAMPBELL ET. AL., THE AMERICAN VOTER, 83 (University of Chicago Press, 1960) (“The person who experiences some degree of conflict tends to cast his vote for President with substantially less enthusiasm . . . and he is somewhat less likely to vote at all than is the person whose partisan feelings are entirely consistent.”); CARL HOVLAND ET. AL., COMMUNICATION AND PERSUASION: PSYCHOLOGICAL STUDIES OF OPINION CHANGE, 283 (Yale University Press 1953) (“vacillation, apathy, and loss of interest in conflict-laden issues.”)

negative evidence.”<sup>93</sup> Professor Mutz writes, however, that the theory did not die, but has been “reincarnated under a variety of different labels.”<sup>94</sup> Furthermore, the methodology of the studies that allegedly discredited the idea were not sound. Old studies simply identified *potential* conflicts in a persons’ life and then determined if political activity decreased.<sup>95</sup> What studies should do, and what modern studies do is identify actual exposure to cross-pressure.<sup>96</sup>

In order to test the resurrected theory, Professor Mutz analyzed data from representative national surveys that collected data regarding respondents’ political conversations and their political participation.<sup>97</sup> Professor Mutz concludes that, “[h]aving friends and associates of opposing political views makes it less likely that a person will vote.”<sup>98</sup> Additionally, if a person has a diverse network of people with whom they speak about politics with, they are more likely to decide whom to vote for later in the political season and thus are less likely to participate in political activities.<sup>99</sup> Furthermore, exposure to different political views makes it less likely that people will even have the intention to vote.<sup>100</sup> Finally, Professor Mutz concludes, “Drawing on

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<sup>93</sup> See HEARING THE OTHER SIDE: DELIBERATIVE VERSUS PARTICIPATORY DEMOCRACY, DIANA C. MUTZ, 94 citing DAVID KNOKE, POLITICAL NETWORKS: THE STRUCTURALIST PERSPECTIVE, (Cambridge University Press, 1990) for a summary of the negative evidence.

<sup>94</sup> See HEARING THE OTHER SIDE: DELIBERATIVE VERSUS PARTICIPATORY DEMOCRACY, DIANA C. MUTZ, 91–101.

<sup>95</sup> *Id.* at 101 (“Conflicts were defined purely at the level of social categories deemed *potentially* conflictual by the researchers. Actual interactions that might exert pressure on people were not documented, even though interaction was generally the micro level process assumed to be responsible for producing cross-pressures.”).

<sup>96</sup> *Id.* (“Today several surveys that include batteries of items on individuals’ political networks make it possible to test this hypothesis in a matter that allows measurements of actual (as opposed to inferred) exposure to cross-pressure.”).

<sup>97</sup> *Id.* at 109. (“These [the national surveys] include the Spencer survey and the American component of the Cross-National Election Project.”).

<sup>98</sup> *Id.* at 112. (adding “This relationship is particularly pronounced for nonvoting in congressional elections, although it also applies to nonvoting in the presidential context”).

<sup>99</sup> *Id.* at 113.

<sup>100</sup> *Id.* at 114.

every available indicator of political participation across these two surveys, my findings are extremely consistent: cross-cutting exposure discourages political participation.”<sup>101</sup>

Another criticism that is frequently leveled against deliberative democracy is that deliberation that occurs naturally is likely to lead to people becoming more extreme in their positions. Professor Mutz has used previously collected data to examine this point. In order to examine the results of her research, first it is necessary to briefly examine the procedure of her studies, and then it is necessary to more closely examine the results of the study.

For her data, Professor Mutz used “several representative national surveys that included information on Americans’ networks of political discussion.”<sup>102</sup> The three studies were very similar and had only a few, minor differences.<sup>103</sup> Although Mutz does not examine true deliberation, the surveys deal with “on one necessary, though not sufficient, condition in almost all definitions of deliberation: that is, that people be exposed to oppositional political perspectives through political talk.”<sup>104</sup>

Initially, Mutz makes two inter-related points. First, people talk about politics more frequently with people in closer relationships.<sup>105</sup> Therefore, a person is more likely to talk about politics with a person who is a close friend instead of just a friend or an acquaintance. Also, a person is much more likely to be better friends with someone who has similar political beliefs.<sup>106</sup>

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<sup>101</sup> *Id.* Professor Mutz also notes that the lack of political participation is caused by a combination of ambivalence—not being able to decide between competing ideas—and by social concerns—not wanting to offend people with different political views. *Id.* at 119–124.

<sup>102</sup> *Id.* at 21 (each survey was a random sample of Americans). The three studies the Professor Mutz relies on are the 1992 American component of the Cross National Election Project (CNEP) survey, the 2000 American National Election Study (NES), and a 1996 survey funded by the Spencer Foundation and gather by the University of Wisconsin-Madison Survey Research Center. *Id.* at 22.

<sup>103</sup> *See Id.* at 22–25 for the minor differences between the three studies.

<sup>104</sup> *Id.* at 6.

<sup>105</sup> *Id.* at 26 (“Not surprisingly, political discussion becomes more frequent as relationships become more intimate.”).

<sup>106</sup> *Id.* at 25–27 (“Previous research on social and political networks has repeatedly documented the tendency toward homophily, that is, for likes to talk to likes.”).

Therefore, most people have frequent political discussions with close friends or family, who have similar beliefs as they do.<sup>107</sup> Also, most people tend to have infrequent political discussions with friends or acquaintances who do not share similar political views.<sup>108</sup> Therefore, most people do not frequently discuss politics with people who have different views than they do.

Professor Mutz proceeds to empirically show two additional, but inter-related points. First, as people become more knowledgeable about politics, the amount of political dialogue with people who have different views decreases.<sup>109</sup> Second, people who are more extreme—strong democrat or strong republican—tend to discuss politics with more homogenous groups than do moderates.<sup>110</sup> Strong republicans, however, have more homogenous groups than strong democrats.<sup>111</sup> The fact that moderates have more political discussions with people who have different views than they do is not because they are apolitical. The data did not change when Professor Mutz “differentiated those without party or ideology from those who called themselves true centrists.”<sup>112</sup>

Professor Mutz’s research combined with the research of Professor Cass Sunstein show that deliberation that occurs naturally is likely to lead the deliberators to form more extreme positions.<sup>113</sup> Professor Sunstein examines a phenomenon called “group polarization,” which

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<sup>107</sup> *Id.* at 26 (“Closer relationships may breed more frequent political conversations, but in that case they will, in all likelihood, be among those who agree.”)

<sup>108</sup> *Id.* (“Casual acquaintances, on the other hand, are likely places for political disagreement, but these conversations are unlikely to occur on a frequent basis.”).

<sup>109</sup> *Id.* at 32 (“The dominance of like-minded over oppositional voices increases as political knowledge increases. Likewise, as self-reported levels of political interest increase, the extent of exposure to disagreement also declines.”)

<sup>110</sup> *Id.* at 33 (“Those who consider themselves liberals or conservatives and those who self-identify as partisans on either end of the spectrum are less likely to be exposed to cross-cutting political communication.”)

<sup>111</sup> *Id.* (“In addition, there is significant asymmetry to the patterns . . . such that being a strong republican or a conservative corresponds to a lower level of cross-cutting exposure than being a strong Democrat or a liberal.”)

<sup>112</sup> *Id.* at 34.

<sup>113</sup> Professor Mutz shows that people talk about politics with people that have similar political views. *See supra* note 105. Also, she shows that this is particularly true for people with more

means “members of a deliberating group predictably move toward a more extreme point in the direction indicated by the members’ predeliberation tendencies.”<sup>114</sup> Group polarization is caused by two main factors. First, it is caused by people’s desire to maintain their reputation and their self-conception.<sup>115</sup> Second, it is caused by “limited argument pools”, which occur when people are not deliberating with people that have different viewpoints.<sup>116</sup>

Group polarization has several intuitive characteristics. If a group has a more extreme initial position, the polarization that occurs tends to be more extreme.<sup>117</sup> Furthermore, when group members feel a sense of solidarity toward each other, the polarization that occurs in the group will likely be more extreme.<sup>118</sup> Also, the group’s shift will be greater if the member of the group advocating for the position is perceived as friendly.<sup>119</sup> Furthermore, the more confident members of the group are about their extreme position, the more likely the position is to be adopted.<sup>120</sup> This information, combined with Professor Mutz’s conclusion that people talk about

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extreme political views. *See Supra* notes 106–08. Professor Sunstein will show that when people talk about topics with people who share similar views, especially more extreme people, the group’s view becomes more extreme.

<sup>114</sup> Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 74.

<sup>115</sup> *Id.* at 75

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 88 citing (“Thus the direction of the shift seemed to turn on the location of the original disposition, and the size of the shift depended on the extremeness of that original disposition.”).

<sup>118</sup> *Id.* at 92 citing PATRICIA WALLACE, *THE PSYCHOLOGY OF THE INTERNET*, 73–76 (Cambridge University Press, 1999), Dominic Abrams et al., *Knowing What To Think by Knowing Who You Are*, 29 BRIT. J. SOC. PSYCHOL. 97, 113–16 (1990), Russell Spears et al., *De-Individuation and Group Polarization in Computer-Mediated Communication*, 29 BRIT. J. SOC. PSYCHOL. 121, 130–31. (“If people think of themselves as part of a group having a degree of solidarity, group polarization is all the more likely, and it is likely to be more extreme.”) Considerable evidence suggests that when politics, geography, race or sex united a group, polarization is heightened. *Id.* citing JOHN C. TURNER ET AL., *REDISCOVERING THE SOCIAL GROUP*, 159–62, (1987) Abrams et al., *Knowing What To Think by Knowing Who You Are*, BRIT. J. SOC. PSYCHOL. at 98–99, Spears et al., *De-Individuation and Group Polarization in Computer-Mediated Communication*, BRIT. J. SOC. PSYCHOL. 121, 130–31.

<sup>119</sup> Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, YALE L.J. 71, 91. citing HERMANN BRANDSTATTER *Social Emotions* in DYNAMICS OF GROUP DECISIONS 93, 93–97, 106–08.

<sup>120</sup> *Id.* citing MARYLA ZALESKA, *The Stability of Extreme and Moderate Responses in Different Situations*, in *Group Decision Making* GROUP DECISION MAKING 163, 164 (1982).

politics with people that have similar views,<sup>121</sup> which is particularly true for people that hold extreme political views<sup>122</sup> shows that the deliberation that occurs naturally will likely lead to extreme polarization.

The various pressures of interacting in a group, group polarization or conformity, can lead to absurd results. For example, in a classic study, Solomon Asch drew a line on a card and drew three lines, one longer, one equal to, and one shorter than the line on the first card on a separate card.<sup>123</sup> He then asked the participants to determine which line was the same length as the line of the first card.<sup>124</sup> The subject of the experiment was one of eight people answering the same questions.<sup>125</sup> The other seven people in the group were part of the experiment—also known as confederates.<sup>126</sup>

When the other seven people in the group gave the correct answer, the subject's error rate was less than 1%.<sup>127</sup> When the rest of the group, however, gave a clearly erroneous answer, the subject gave an incorrect answer—to match the group's incorrect answer— 36.8% of the time.<sup>128</sup> Over a series of 12 questions, 70% of subjects gave a clearly incorrect answer at least once.<sup>129</sup> If one confederate, however, gave the correct answer, the subject's error rate was reduced by 75%.<sup>130</sup> The “errors” of the subject can be attributed to both informational and reputational concerns.

Other, more recent studies, however, show that the subject's “errors” are more likely to be from reputational, than informational concerns. For example, one study suggests that when

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<sup>121</sup> See *supra* note 105.

<sup>122</sup> See *supra* note 106–08.

<sup>123</sup> *Id.* at 79 citing SOLOMON E. ASCH, “Opinions and Social Pressure” in READINGS ABOUT THE SOCIAL ANIMAL 13 (Elliot Aronson ed., 1995).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

subjects give their answers in private, their “errors” are dramatically reduced.<sup>131</sup> A separate study showed that people are more likely to publicly make erroneous statements when they perceive themselves as part of a discrete group that includes the experimenter’s confederates.<sup>132</sup> The desire to conform is dramatically reduced when the subjects perceive themselves to be in a different group than the experimenter’s confederates.<sup>133</sup> When subjects perceived themselves to be in the same group as the experimenter’s confederates and answered in private, however, their answers were much more accurate—and therefore less conforming—than when they answered in front of the group.<sup>134</sup> Again, this suggests that the reason for the subject’s “error” had to do with reputational concerns, more than informational concerns. The people who attributed their “error” to the informational factors may have done so to “avoid the dissonance that would come from confessing that the statement was false but made only for reputational reasons.”<sup>135</sup>

The participants in the above studies *did not* engage in any deliberation in reaching their conclusions.<sup>136</sup> It is possible that that deliberation would have lowered the amount of “errors” that subjects committed.<sup>137</sup> Particularly, it would have reduced the number of “informational” errors. It seems less likely, however, that deliberation would have a significant effect on the “errors” that occurred because of reputational pressure. This is especially true because in “real world” situations people will presumably not maintain a position that is demonstrably false. In other words, people who take the position for reputational pressure, will be able to rationalize it with the—at the very least, weak—arguments that will be advanced by the equivalent of the

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<sup>131</sup> Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. at 80 citing ELLIOT ARONSON, *THE SOCIAL ANIMAL* (7th ed. 1995).

<sup>132</sup> Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. at 80 citing Dominic Abrams et al., *Knowing What To Think by Knowing Who You Are*, 29 BRIT. J. SOC. PSYCHOL. 97, 112 (1990).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. at 80.

<sup>136</sup> *See Id.*

<sup>137</sup> *See Id.* (“[i]ndeed, one might expect that reason-giving on the part of Asch’s confederates would have lessened the amount of conformity and error.”)

experimenter's confederates. Therefore, since most of the polarization results from reputational factors, rather than informational factors, deliberation will probably not substantially alleviate the errors that occur.

Using the above information about group polarization, Professor Sunstein concludes that deliberation is not necessarily bad or good for a democracy. His thesis is that deliberation in which group polarization occurs is “simultaneously a potential danger to social stability, a source of social fragmentation, and a safeguard against social injustices and unreasonableness.”<sup>138</sup> A group that is extreme, deliberates, and becomes more extreme can become a danger to social stability and a source of social fragmentation (e.g. cults or militias). The reason why those groups can be “a safeguard against social injustices and unreasonableness” is because heterogeneous groups tend to give little weight to the views of low-status members of the group.<sup>139</sup> Therefore, the only way that low-status members of a group can be heard is if they deliberate in a group by themselves.<sup>140</sup>

### III

#### JAPAN'S EMERGING PETIT QUASI-JURY SYSTEM

Now that I have laid the deliberative democracy framework, it is now necessary to focus on the specifics of Japan's new petit quasi-jury system. Recently, there have been a variety of reforms in the Japanese legal system. For example, the Japanese government has decided to implement a petit quasi-jury system, or Saiban-in Seido beginning in 2009.<sup>141</sup> Additionally, the

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 76 citing CARYN CHRISTENSEN & ANN S. ABBOTT, “*Team Medical Decision Making*”, in DECISION MAKING IN HEALTH CARE 267, 273–76 (Gretchen Chapman & Frank Sonnenberg eds., 2000).

<sup>140</sup> Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, YALE L.J. at 76 (“Hence enclave deliberation might be the only way to ensure that those views are developed and eventually heard. Without a place for enclave deliberation, citizens in the broader public sphere may move in certain directions, even extreme directions, precisely because opposing voices are not heard at all.”).

<sup>141</sup> Saiban'in no sanko suru keiji saiban ni kansuru horitsu, Law No. 63 of 2004.

Japanese government has also begun to revise its grand-jury system.<sup>142</sup> The revision to the grand jury system will give the group of eleven citizens that review prosecutorial decisions the ability to force the prosecutor to bring indictments.<sup>143</sup> This article, however, will focus on the new, petit quasi-jury system and its effects on deliberative democracy. First it will examine the history that led to the reform. Second, it will describe, in detail, the new jury system and then it will examine the flaws in the criminal justice system that the reform is supposed to fix. Finally, it will briefly examine whether or not the new jury system will fix the failures of the criminal justice system.

#### A. HISTORY OF JURIES IN JAPAN

In 1928, the Japanese government implemented a criminal jury system.<sup>144</sup> The government allowed literate, tax-paying males over the age of thirty to compose a twelve-person jury for criminal cases.<sup>145</sup> The juries were used infrequently because they could only find facts and the presiding judge could dismiss them at will.<sup>146</sup> There were only 484 jury trials during the fifteen-year period the option existed in Japan.<sup>147</sup> During the last year, in 1942, there were only

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<sup>142</sup> Keiji Soshohoto no Ichibu O Kaiseisuru Horitsu [Act to Revise the Code of Criminal Procedure etc.] Law No. 62 of 2004 *available* <http://law.e-gov.go.jp/htmldata/S23/S23HO147.html>.

<sup>143</sup> *See Generally* Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L. J. 315 (Spring, 2007).

<sup>144</sup> *See id.* at 312 citing Marmoru Urabe, *A Study on Trial by Jury in Japan*, in THE JAPANESE LEGAL SYSTEM 483–91 (Hideo Tanaka ed., 1976).

<sup>145</sup> *See* Matthew Wilson, *The Dawn of Criminal Jury Trials in Japan: Success on the Horizon?* 24 WIS. INT'L L.J. 835, 840 (Winter, 2007) citing Baishinho [Jury Act of Japan], Kokumin no Shiho Sanka ni Kansuru Saibansho no Iken [Court's Opinion Concerning Public Participation in the Judicial System], Sup. Ct. of Japan 2 (2001), available at <http://www.saibanin.courts.go.jp/shiryō/pdf/24.pdf>.

<sup>146</sup> *See* Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT'L L.J. at 840 citing Joseph J. Kodner, *Reintroducing Lay Participation to Japanese Criminal Cases: An Awkward Yet Necessary Step*, 2 WASH. U. GLOBAL STUD. L. REV. 231, 234–35.

<sup>147</sup> *See* Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT'L L.J. at 840 citing Sabrina Shizue McKenna, *Japanese Judicial Reform: Proposal for Judicial Reform in Japan*, 2 ASIAN-PAC. L. & POL'Y J. 121 (2001).

two jury trials in Japan.<sup>148</sup> In 1943, the right to a jury trial was suspended because of the outbreak of World War II.<sup>149</sup> After World War II, however, the jury system was not re-implemented.<sup>150</sup>

For the fifty years after World War II, the Japanese legal system did not undergo any major reforms.<sup>151</sup> That began to change, however, in the late 1990s. In 1999, Prime Minister Keizo Obuchi created the “Shiho Seido Kaikaku Shingikai” (the Justice System Reform Council) to create official guidelines for judicial reform.<sup>152</sup> In its final report, the Council recommended a mixed tribunal of lay people and judges to determine facts in all criminal cases.<sup>153</sup> The Cabinet Office created committees to implement the recommendations of the

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<sup>148</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT’L L.J. at 840 citing Rob Wakulat, *Japan Looks to West for Judicial Reforms*, FOREIGNER JAPAN, Apr. 2005, <http://www.theforeigner-japan.com/archives/200504/judicialreforms.htm> (last visited Mar. 29, 2007).

<sup>149</sup> See Fukurai, *The Rebirth of Japan’s Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT’L L. J. 315, 321.

<sup>150</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT’L L.J. at 841 citing Erik Luna, *A Place for Comparative Criminal Procedure*, 42 BRANDEIS L.J. 277, 312 (2004) (“After the Second World War, the Supreme Commander of Allied Powers or “SCAP under the direction of General MacArthur was tasked with reconstructing Japan and revamping its rule of law . . . While the new constitution adopted many of the constitutional rights found in the United States, it did not include the right to trial by an ‘impartial jury,’ like that found in the Sixth Amendment of the U.S. Constitution.”).

<sup>151</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT’L L.J. at 841 citing Matthew J. Wilson, *Failed Attempt to Undermine the Third Wave: Attorney Fee Shifting Movement in Japan*, 19 EMORY INT’L L. REV. 1457, 1476 (2005).

<sup>152</sup> See Fukurai, *The Rebirth of Japan’s Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT’L L. J. at 321 citing 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. OF TRANSNAT’L L. 935, 965–66 (2004).

<sup>153</sup> See Fukurai, *The Rebirth of Japan’s Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT’L L. J. at 322 citing Kokuminteki Kiban No Kakuritsu [Establishment of the Popular Base of the Justice System] 106 (June 1, 2001), <http://www.kantei.go.jp/jp/sihouseido/dai62/pdfs/62-4.pdf>.

Council.<sup>154</sup> On March 2, 2004 the Cabinet made public its final proposal for judicial reform and submitted it to the Diet on March 16.<sup>155</sup> Then, on May 21, the Diet passed the proposal and stated that the first quasi-jury trials would commence in May 2009.<sup>156</sup> For contested criminal cases, there will be three professional judges and six lay judges.<sup>157</sup> In an uncontested case, however, there will only be one professional judge and three lay judges.<sup>158</sup>

## B. THE STRUCTURE OF THE NEW JURY SYSTEM

For contested cases, the new Japanese “jury” will consist of three professional judges and six citizen judges.<sup>159</sup> In cases where the defendant has confessed, the jury will consist of four citizen judges and one professional judge.<sup>160</sup> There will be a jury in the following cases: homicide, robbery resulting in bodily injury or death, bodily injury resulting in death, unsafe driving resulting in death, arson of an inhabited building, kidnapping for ransom, abandonment

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<sup>154</sup> See Fukurai, *The Rebirth of Japan’s Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT’L L. J. at 322 citing *Shiho seido kaikaku kentokai* [Justice system Reform Investigation Committees] (Nov. 15, 2006),

<http://www.kantei.go.jp/jp/singi/sihou/kentoukai/index.html>

<sup>155</sup> See Fukurai, *The Rebirth of Japan’s Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT’L L. J. at 322 citing Akira Goto, Saturo Shinomiya, Ken Nishimura, and Mike Kudo *Jitsumuka no tamenō saiban-in hō nyūmon* [A practitioner’s Introduction to the Quasi-jury Law] at 10 (2004).

<sup>156</sup> See *Id.*

<sup>157</sup> See Fukurai, *The Rebirth of Japan’s Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT’L L. J. at 322 citing the Quasi-jury Act, art. 2(3).

<sup>158</sup> *Id.*

<sup>159</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT’L L.J. at 844 citing *Saiban-in no Sanka Suru Keiji Saiban ni Kansuru Horitsu* [Law for Implementation of Lay Judge System in Criminal Court Procedures], Law No. 63 of 2004, translated in Kent Anderson & Emma Saint, *Japan’s Quasi Jury (Saiban-in) Law: An Annotated Translation of the Action Concerning Participation of Lay Assessors in Criminal Trials*, 6 ASIAN-PAC. L. & POL’Y J. 233, 237 art. 2(2) (2005) [hereinafter Anderson & Saint].

<sup>160</sup> See *id.* at art. 2(3).

of parental responsibilities resulting in the death of a child, and other rape, drug and counterfeiting cases.<sup>161</sup>

Each individual court will be responsible for making its own list of potential lay judges.<sup>162</sup> When prospective lay judges are summoned to the court, they will be asked whether they have any connection to the people at trial,<sup>163</sup> whether they can make an impartial determination,<sup>164</sup> and if there is any other reason why they cannot serve.<sup>165</sup> Furthermore, if a prospective lay juror has served within the past five years or been summoned as a potential lay judge in the last year, they can refuse service.<sup>166</sup> Certain other people, including seventy-year olds, city council members, students concurrently enrolled in classes, members of prosecutorial review committees, and other individuals who are injured, sick, who have to attend a family member's funeral, or those who have unavoidable child care, elderly care or business obligations

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<sup>161</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT'L L.J. at 844 citing Chihou Saibancho ni Mita Taishou Jikensuu-Heisei 15-17nen [Number of Relevant Cases Seen By the Circuit Courts from 2003–2005], Sup. Ct. of Japan, available at <http://www.saibanin.courts.go.jp/shiryo/pdf/05.pdf>.

<sup>162</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT'L L.J. at 845 citing Anderson & Saint, *supra* note 165 at 249–51 art. 21–23.

<sup>163</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT'L L.J. at 846 citing Anderson & Saint, *supra* note 165 at 247–49 noting that “potential lay jurors may be disqualified if they are the defendant’s or victim’s relative, legal guardian, employee, co-habitant, or if they are a witness, legal counsel, or other party related to the criminal suit.” *Id.*

<sup>164</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT'L L.J. at 846 citing Anderson & Saint, *supra* note 165 at 249 art. 18.

<sup>165</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT'L L.J. at 846 citing Saibanin Senninn Tetsuzuki no Gaiyo [Outline of Lay Judge Selection Process], Sup. Ct. of Japan, available at <http://www.saibanin.courts.go.jp/shiryo/pdf/09.pdf> noting that “[a] citizen may not serve as a lay judge if that person has: (i) not completed compulsory education in Japan; (ii) committed a crime; (iii) mental or physical incapacities that would preclude them from serving . . . . Also, certain members of the community are automatically excluded from the process, including diet members, ministers of state, certain governmental employees, lawyers, patent lawyers, judges, prosecutors, police officers and employees of the police department, certain politicians, notaries, legal apprentices, self defense officers, and others.” Anderson & Saint, *supra* note 165, at 243–44 art. 14–15.

<sup>166</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT'L L.J. at 846 citing Anderson & Saint, *supra* note 165 at 247 art. 16(iv)-(v)

can also exclude a person from service.<sup>167</sup> Furthermore, both the defense and prosecution can strike up to four potential lay-jurors without cause.<sup>168</sup> The court then selects the lay judges from the remaining candidates.<sup>169</sup>

The lay judges, in theory, will have similar responsibilities as the professional judges.<sup>170</sup> The lay judges will be able to determine the guilt of the defendant and help suggest an appropriate sentence.<sup>171</sup> Furthermore, the lay judges have the ability to ask questions of witnesses.<sup>172</sup> Professional judges, however, will have the sole authority to determine questions of law and procedure.<sup>173</sup> Judgments must be given by a majority of the panel, with at least one citizen and one professional judge on the majority's side.<sup>174</sup>

### C. THE NEED FOR REFORM IN THE JAPANESE LEGAL SYSTEM

Prior to the addition of quasi-juries, there had been well-documented criticism of the Japanese legal system.<sup>175</sup> It “has been noted for incessant delays, pressured confessions, and an

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<sup>167</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT’L L.J. at 846 citing Anderson & Saint, *supra* note 165 at 246–47 art. 16.

<sup>168</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT’L L.J. at 846 citing Saibanin Senninn Tetsuzuki no Gaiyo [Outline of Lay Judge Selection Process], Sup. Ct. of Japan, available at <http://www.saibanin.courts.go.jp/shiryoy/pdf/09.pdf>.

<sup>169</sup> *Id.*

<sup>170</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT’L L.J. at 846 citing Anderson & Saint, *supra* note 165 at 240–41 art 6.

<sup>171</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT’L L.J. at 846 citing Robert M. Bloom, *Jury Trials in Japan*, 28 LOY. L.A. INT’L & COMP. L. REV. 35, 37 (2006).

<sup>172</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT’L L.J. at 846 citing Saibanin no Shokumuu no Naiyou Nado [Description of Lay Judge’s Duties], Sup. Ct. of Japan, available at <http://www.saibanin.courts.go.jp/shiryoy/pdf/10.pdf>.

<sup>173</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT’L L.J. at 846 citing Masaki Takasugi, *The New Lay-Judge System in Japan: A Comparison with the Jury System in NSW 1, 2* (2005) available at <http://www.law.usyd.edu.au/anjel/documents/23Feb2005Conf/takasugi2005.pdf>.

<sup>174</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT’L L.J. at 846 citing Robert M. Bloom, *Jury Trials in Japan*, 28 LOY. L.A. INT’L & COMP. L. REV. 35, 38 (2006).

<sup>175</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT’L L.J. at 835 (“Domestic and international critics have long called for substantial revisions to Japan’s criminal justice system.”).

insufficient number of criminal defense attorneys.”<sup>176</sup> The conviction rate is above 99.5%,<sup>177</sup> which critics attribute to “excessive investigative methods, bureaucratic hierarchy, and insufficient judicial oversight and control.”<sup>178</sup> Advocates of the past judicial system attribute the high conviction rate to the sagacious prosecution of the Japanese prosecutors.<sup>179</sup>

The more damning criticism, and the criticism that the new quasi-jury system addresses, was the lack of lay participation in the system. Prosecutors conduct the initial fact-finding and recommend legal determinations.<sup>180</sup> Judges then determine the law, facts, and applicable procedures.<sup>181</sup> Critics allege that the relationship between judges and prosecutors becomes too comfortable and judges simply authorize the prosecutor’s recommendations without much thought.<sup>182</sup> Therefore, a defendant has already been found guilty before the trial has even begun. Reformers hope that by putting lay people on criminal “juries” they can serve as a buffer to stop the all-too comfortable relationship between prosecutors and judges.

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<sup>176</sup> See *id.* citing Kana Inagaki, *Unlocking the Judicial Door to Public: Lawyer Flood Looms Amid Litigious Trent*, JAPAN TIMES, Aug. 23, 2006; Bruce Wallace, *Slow-to-Judge Japanese Trials Prompt Anger, Return of Juries*, SEATTLE TIMES, Jan. 24, 2005, at A7, available at 2005 WLNR 1010571.

<sup>177</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT’L L.J. at 835 citing Frank K. Upham, *Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary*, 30 LAW & SOC. INQUIRY 421, 432–33 (2005) (book review); Kent Anderson, *Essay Review: The Japanese Way of Justice: An Up-close Look at Japan’s Jack McCoy*, 4 ASIAN-PAC. L. & POL’Y J. 7 (2003).

<sup>178</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT’L L.J. at 835 citing Ichiro Kitamura, *The Judiciary in Contemporary Society: Japan*, 25 CASE W. RES. J. INT’L L. 263, 269 (1993).

<sup>179</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT’L L.J. at 837 citing Interview with judges serving in the General Secretariat of the Supreme Court (July 19, 2006); J. Mark Ramseyer & Eric B. Rasmusen, *Why is the Japanese Conviction Rate So High?* 30 J. OF LEGAL STUD. 53, 62–65 (2001). (“Supporters of the system argue that Japan’s high conviction rate is justified because prosecutors charge and convict only guilty defendants.”).

<sup>180</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT’L L.J. at 836 citing Lester W. Kiss, *Reviving the Criminal Jury in Japan*, 62 LAW & CONTEMP. PROBS. 261, 264 (1999).

<sup>181</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT’L L.J. at 836 citing John Owen Haley, *The Spirit of Japanese Law* 72 (1998).

<sup>182</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT’L L.J. at 836 citing Lester W. Kiss, *Reviving the Criminal Jury in Japan*, 62 LAW & CONTEMP. PROBS. 261, 264 (1999).

#### D. WILL QUASI-JURIES HELP REFORM THE JAPANESE LEGAL SYSTEM?

Reformers have introduced mixed tribunals in Germany, Austria, Denmark, France, Finland, Norway, Sweden, Czechoslovakia, Hungary, Poland, South Africa and the former Yugoslavia.<sup>183</sup> Although reformers may have been hopeful about mixed tribunals promoting justice and equity, introducing community values and local knowledge, bringing a fresh perspective, serving as a deterrent safeguard, and protecting against governmental tyranny,<sup>184</sup> generally speaking, the results of mixed tribunals have been extremely disappointing. Various studies suggest that “lay judges were neither perceived as very active during trials and deliberations, nor were their contributions evaluated as important.”<sup>185</sup> For example, in Poland, two thirds of lay judges did not ask any questions during trials.<sup>186</sup> Another study in Poland found that only one in eleven lay judges read the case file.<sup>187</sup> Furthermore, in Croatia, lay judges, professional judges, state prosecutors and defense attorneys reported that lay judges ask questions “very infrequently” or “never.”<sup>188</sup>

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<sup>183</sup> See Sanja Kutnjak Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, 40 CORNELL INT’L L. J. 429, 430–31 (Spring 2007) citing a variety of sources.

<sup>184</sup> See Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, CORNELL INT’L L. J. at 431–32 citing a variety of sources.

<sup>185</sup> See Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, CORNELL INT’L L. J. at 440.

<sup>186</sup> See Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, CORNELL INT’L L. J. at 441 citing Leszek Kubicki, *Udział Lawnikow W Orzekaniu, in UDZIL LAWNIKOW W POSTEPOWANIU KARNYM [LAY ASSESSOR JUDGES IN PENAL PROCEEDINGS IN THE LIGHT OF EMPIRICAL RESEARCH]* 68, 97–111 (Leszek Kubicki & Sylwesterawadzki eds., 1970).

<sup>187</sup> See *id.*

<sup>188</sup> See Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, CORNELL INT’L L. J. at 441 citing SANJA KUTNJAK IVKOVIC, *LAY PARTICIPATION IN CRIMINAL TRIALS: THE CASE OF CROATIA* (1999).

When lay judges do speak and professional judges disagree with them, the lay judges are the ones that change their opinions.<sup>189</sup> Lay judges rarely use their power to out-vote professional judges.<sup>190</sup> In Sweden, for example, lay judges only out-voted professional judges in 1–3% of all criminal cases.<sup>191</sup> Studies have shown that somewhere between 50–95% of all mixed tribunal verdicts are unanimous.<sup>192</sup> One scholar summed it up nicely, “professional judges dominate deliberations and their voices are more powerful than lay judges’ voices are.”<sup>193</sup>

The fact that mixed tribunals do not really change a judicial system, but can be regarded as positive reform, makes them the perfect faux-reform. This is exactly what happened in South Africa. In a last-ditch effort to legitimize its apartheid government, South Africa allowed professional judges—mostly white—to sit with lay judges—who were mostly black.<sup>194</sup> One study, which examined the use of mixed tribunals in South Africa from 1990–1995, observed that the amount of cases in which there was lay participation was “exceedingly low.”<sup>195</sup> After surveying professional judges in South Africa, the survey determined that the judges were opposed to mixed-tribunals.<sup>196</sup> The study states, “magistrates believe that the only value of assessors is in enhancing the legitimacy of the courts . . . [magistrates believe that] there is

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<sup>189</sup> See Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, CORNELL INT’L L. J. at 441 citing Gerhard Casper & Hans Zeisel, *Lay Judges in the German Criminal Courts*, 1 J. LEGAL STUD. 135 (1972).

<sup>190</sup> See Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, CORNELL INT’L L. J. at 441.

<sup>191</sup> See *id.* citing Christian Diesen, *Lay Judges in Sweden—A Short Introduction* 72 INT’L REV. PENAL L. 225, 314 (2001).

<sup>192</sup> See *id.*

<sup>193</sup> See Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, CORNELL INT’L L. J. at 442.

<sup>194</sup> See Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, CORNELL INT’L L. J. at 449 citing Milton Seligson, *Lay Participation in South Africa from Apartheid to Majority Rule*, 72 INT’L REV. PENAL L. 273, 279 (2001).

<sup>195</sup> See *id.*

<sup>196</sup> *Id.* at 100–1.

nothing wrong with the quality of justice which magistrates administer; it is just that the public does not recognize the high quality of this justice.”<sup>197</sup>

Although there is plenty of negative evidence about the lack of lay participation in mixed tribunals, there are a few positive aspects. For example, “[t]he mere presence of lay judges may deter professional judges from being arbitrary, corrupt, or biased.”<sup>198</sup> It may also compel professional judges to disclose the reasoning behind their decisions and discuss these reasons with the lay judges.”<sup>199</sup> There are many examples, however, of judiciaries with strong lay participation where the lay participants are coerced into silence by the punishments for speaking out.<sup>200</sup> Furthermore, lay judges may serve as a “sounding board” for professional judges.<sup>201</sup> Additionally, if judges make a strong effort to ensure that voices are heard, the deliberation of mixed tribunals can be fairly successful.<sup>202</sup> Lastly, mixed tribunals should, at least in theory, increase public confidence in the judiciary system.<sup>203</sup>

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<sup>197</sup> *Id.*

<sup>198</sup> See Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, CORNELL INT’L L. J. at 450.

<sup>199</sup> *Id.* at 450–51

<sup>200</sup> *Id.* at 451 n. 210 (“Past and present experiences of powerless lay participants, such as the Revolutionary Tribunal in Paris from 1793 to 1795, the Volksgesichtshof during the Third Reich, and comrades’ courts in Cuba, indicate that this possibility—the deterrent function—may not be always exercised, especially when any lack of conformity with the professional judge would result in serious consequences for the well-being of lay participants themselves.”).

<sup>201</sup> See *id.* at 451 citing JEREMY SEEKINGS & CHRISTINA MURRAY, LAY ASSESSORS IN SOUTH AFRICA’S MAGISTRATES’ COURT, 94 (1998).

<sup>202</sup> See Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, CORNELL INT’L L. J. at 451 citing AND QUOTING SANJA KUTNJAK IVKOVIC, LAY PARTICIPATION IN CRIMINAL TRIALS: THE CASE OF CROATIA (1999) (“A presiding professional judge who shows genuine interest in lay judges’ contributions and makes reasonable efforts to solicit their input during trial and deliberation creates an environment in which lay judges feel more comfortable. Research studies demonstrate that ‘while the majority of lay judges who perceived that their comments would be evaluated [by a professional judge] as important . . . reported making comments frequently, the majority of lay judges who perceived that their comments would be evaluated as unimportant . . . reported that they made comments infrequently.’”).

<sup>203</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT’L L.J. at 848 citing Minutes from 4th Meeting of the Saiban-in System/Criminal Trial Investigative

Ultimately, there is no compelling evidence that suggests Japan's experiment with mixed-tribunals will reach a different outcome than other countries. In fact, some scholars suggest that the Japanese culture of obedience to legal authority will make it even more difficult for mixed tribunals in Japan to deliberate effectively.<sup>204</sup> One scholar, however, argues that cultural support for obedience to legal authority is created and nurtured by the government and therefore can be overcome.<sup>205</sup> Another factor that cuts against the reform working is the fact that the Supreme Court of Japan—and therefore, most likely the majority of the rest of the judiciary—opposed the move.<sup>206</sup> It does not seem likely that the judiciary would oppose a reform and then go out of their way to make sure the reform is successful, which is what they would have to do in order for the reform to work.<sup>207</sup> Lastly, many of the advocates of reform in Japan really wanted an all-citizen jury and the mixed tribunal was a compromise that was reached after the judiciary stated its opposition to an all-citizen jury.<sup>208</sup>

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Commission, Judicial Sys. Reform Comm'n Headquarters, June 11, 2003, <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai44gaiyou.html>.

<sup>204</sup> See Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L. J. at 331 citing Takashi Maruta, *Shiho eno Kokumin Sanka: Kensatsu Shinsakai o Chushin ni [Citizen's Legal Participation: Mainly on the Prosecutorial Review Commission]*, 30 Konan Hogaku 109, 138 (1990) ("In Japan, due to the strong sense of obedience to legal authority, the difference between disagreeing with a fellow citizen and disagreeing with a professional judge during deliberations is significant.").

<sup>205</sup> See Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L. J. at 332 citing SHELDON GARON, *MOLDING JAPANESE MINDS: THE STATE IN EVERYDAY LIFE* 6 (1997) ("The high level of trust for authority, the strong desire to maintain harmony, and other 'traditional' cultural virtues and traits were thus specifically constructed by the interventionist state to manage and control Japanese society.").

<sup>206</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT'L L.J. at 847. ("The Supreme Court of Japan was diametrically opposed to the introduction of 'jury trials' in any form.").

<sup>207</sup> See *supra* note 200.

<sup>208</sup> See Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L. J. at 331 citing Takashi Maruta, *Shiho eno Kokumin Sanka: Kensatsu Shinsakai o Chushin ni [Citizen's Legal Participation: Mainly on the Prosecutorial Review Commission]*, 30 KONAN HOGAKU 109, 138 (1990).

## IV

### JAPAN'S EMERGING JURY SYSTEM AND DELIBERATIVE DEMOCRACY

Generally speaking, there are reasons to be optimistic about the emerging criminal jury system in Japan,<sup>209</sup> but there are significantly more reasons to be pessimistic.<sup>210</sup> The main contribution of this paper, however, is to determine, from the perspective of a deliberative democrat, whether Japan's jury reform will be successful. In order to make this evaluation, first this paper will determine the benefits of the jury reform, from a deliberative democrat's perspective. Then, it will determine the potential failures or negatives of the jury reform from a deliberative democrat's perspective. Lastly, it will weigh each side and determine whether or not the reform is a success from a deliberative democrat's perspective.

#### A. WHY JAPAN'S JURY REFORM WILL BE SUCCESSFUL FROM A DELIBERATIVE DEMOCRAT'S PERSPECTIVE

There are several reasons to believe that Japan's jury reform will be successful from a deliberative democrat's perspective. The first and most obvious reason is that a mixed tribunal will increase the amount of deliberation that occurs in Japan.<sup>211</sup> The argument can be made that the lay judges and the professional judges are procedurally equal.<sup>212</sup> At least one vote from each

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<sup>209</sup> See *supra* notes 196–201.

<sup>210</sup> See *supra* notes 183–195.

<sup>211</sup> See Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, CORNELL INT'L L. J. at 432 (“Professional and lay judges sit together during trials, hear and examine evidence, and deliberate before making a decision.”).

<sup>212</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT'L L.J. at 846 citing Anderson & Saint, *supra* note 165 at 240–41 art 6. (“At trial, lay judges will have, at least theoretically, much the same authority and rights as the three professional judges.”). *But see* Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT'L L.J. at 847 citing Masaki Takasugi, *The New Lay-Judge System in Japan: A Comparison with the Jury System in NSW 1, 2* (2005), <http://www.law.usyd.edu.au/anjel/documents/23Feb2005Conf/takasugi2005.pdf> (“It should be noted that professional judges will retain sole authority to reach decisions on questions of law and procedure.”).

side is needed to reach a verdict.<sup>213</sup> Professional judges, however, may generally be more educated and articulate than the average lay juror, especially while discussing legal topics.<sup>214</sup> Inequality of education, skill, intelligence, and oratory skills, however, will always be a part of deliberation. Meaningful deliberation may be able to still occur as long as each person is fundamentally—procedurally—equal.<sup>215</sup>

Another potential benefit of the Japanese jury reform from a deliberative democrat's perspective is that by increasing deliberation, it will increase the legitimacy of the Japanese criminal justice system. One of the reasons for the jury reform was that, "concerns about the criminal justice system have been limited to academics and criminal defense lawyers, however, these concerns have started spreading to the public as well."<sup>216</sup> If the public knows that there are lay people helping to adjudicate criminal cases, they will likely think that the process is more fair and subject to less corruption.<sup>217</sup>

Another way in which the new Japanese jury system will increase the public opinion of the criminal justice system is through word of mouth.<sup>218</sup> If almost everyone who serves on a mixed-tribunal has a positive experience and has increased faith in the criminal justice system, once a substantial amount of people have served on mixed tribunals, the overall approval of the criminal justice system will improve dramatically. In other countries, studies have shown that

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<sup>213</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT'L L.J. at 846 citing Bloom, *Jury Trials in Japan*, 28 LOY. L.A. INT'L & COMP. L. REV. 35, 41 (2006).

<sup>214</sup> See Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, CORNELL INT'L L. J. at 436–440 ("Professional judges in mixed tribunals are law school graduates who have completed their legal training, have passed the bar exam, and have a certain number of years of experience working on legal issues after passing the bar exam. Lay judges are neither educated in law nor experienced in resolving legal issues.").

<sup>215</sup> See *supra*, note 22.

<sup>216</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT'L L.J. at 836 citing Joseph J. Kodner, *Reintroducing Lay Participation to Japanese Criminal Cases: An Awkward Yet Necessary Step*, 2 WASH. U. GLOBAL STU. L. REV. 231, 233 (2003).

<sup>217</sup> See *supra*, note 201.

<sup>218</sup> However, since there is a confidentiality requirement, it would have to be spoken about in generalities.

positive jury experiences leads to greater confidence in the overall system of justice.<sup>219</sup>

Although the mixed tribunal reform has not occurred yet, there has been lay participation in the form of Japanese grand juries—otherwise known as the Prosecutorial Review Commission (hereinafter PRC).<sup>220</sup> According to a recent study, where researchers interviewed members of the Japanese public who had been called into service for the PRC and subdivided the group into those who deliberated and those who did not,<sup>221</sup> both groups had near-unanimous confidence in Judges<sup>222</sup> and Prosecutors.<sup>223</sup> Those who deliberated, however, had significantly higher confidence in defense attorneys,<sup>224</sup> jurors<sup>225</sup> and the police.<sup>226</sup> Furthermore, everyone who deliberated, and the vast majority of people that did not deliberate felt that their PRC experience was a positive one.<sup>227</sup>

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<sup>219</sup> See Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L. J. at 340 citing John Gastil et al., *Seeing is Believing: The Impact of Jury Service on Attitudes Toward Legal Instructions and the Implication for International Jury Reform*, (2006) (unpublished manuscript on file with author); cf. John Gastil, *Deliberation at the Margins: Participant Accounts of Face-to-Face Public Deliberations at the 1999–2000 World Trade Protests in Seattle and Prague*, 5 QUALITATIVE RESEARCH REPORT, 1 (2004).

<sup>220</sup> See *supra*, note 141.

<sup>221</sup> See Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L. J. at 333–34.

<sup>222</sup> See Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L. J. at 341 noting that people who deliberated had 98.5% confidence in judges and 100% of those who did not deliberate had confidence in judges.

<sup>223</sup> *Id.* noting that 99.2% of those who deliberated had confidence in prosecutors and 100% of those who did not deliberate had confidence in the prosecution.

<sup>224</sup> *Id.* noting that 93.9% of those who deliberated had confidence in defense attorneys whereas only 83.0% of those who did not deliberate had confidence in defense attorneys.

<sup>225</sup> *Id.* noting that 90.5% of those who deliberated had confidence in jurors whereas only 86.5% of those who did not deliberate had confidence in jurors.

<sup>226</sup> *Id.* noting that 93.2% of those who deliberated had confidence in the police whereas only 85.4% of those who did not deliberate had confidence in the police.

<sup>227</sup> *Id.* at 337 noting that 100% of the people that deliberated felt that their PRC experience was a positive and that 95.6% of those who did not deliberate thought their PRC experience was a positive one.

Another way in which the emerging jury system in Japan may be successful from a deliberative democrat's point of view is because it is new and can adopt changes and fix problems as they emerge.<sup>228</sup> So far, the process of creating the new system has been fairly open and thoughtful.<sup>229</sup> It will be difficult, however, to create the perfect system on a first try. Therefore, it will be important to observe the system and figure out what works and what does not. Furthermore, listening to the advice of other parties may also improve the system.

In a recent article, for example, Matthew Wilson advances several suggestions to improve the system. First, he recommends that the government spend more time educating the citizenry about the importance of lay participation.<sup>230</sup> He notes that as of April 2006, approximately 60% polled were reluctant to participate in mixed juries.<sup>231</sup> Next, he recommends that the government help facilitate better cooperation with the private sectors.<sup>232</sup> Although there are some regulations in place, they must be more specific in order to be effective.<sup>233</sup> Last and most importantly, he writes that there must be special efforts to make the lay judges feel empowered.<sup>234</sup> The lay judges must be educated about their rights and responsibilities before and during the trial.<sup>235</sup> Furthermore, it would help if attorneys focused their presentations on lay judges.<sup>236</sup>

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<sup>228</sup> This is a kind of "meta" deliberation. In a sense, they are deliberating about how they can improve the deliberation.

<sup>229</sup> See Matthew Wilson, *The Dawn of Criminal Jury Trials in Japan: Success on the Horizon?* 24 WIS. INT'L L.J. 835, 843–44 (Winter, 2007) (describing the process used to adopt the mixed jury system in Japan).

<sup>230</sup> *Id.* at 860–61.

<sup>231</sup> *Id.* at 861 (citing Toyota May Give Paid Leave for Lay Judge Participants, JAPAN TIMES ONLINE, Aug. 6, 2006, <http://search.japantimes.co.jp/cgi-bin/nn20060806a6.html> "The survey, conducted in January and February, covered about 8,300 people 20 or older, of whom 5,172, or 62 percent, gave valid responses").

<sup>232</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT'L L.J. at 862–63.

<sup>233</sup> *Id.* at 863 ("Although the government applies these rules to lay jury duty, they are not specific enough. Employers should go beyond mere compliance with the law and actually pay employees while they are serving as lay judges.").

<sup>234</sup> *Id.* at 865–66.

<sup>235</sup> *Id.* at 865.

<sup>236</sup> *Id.* at 866

Additionally, installing a procedural safeguard where lay judges could report overpowering judges would also help facilitate better deliberation.<sup>237</sup> Although it is probably not realistic to implement all changes that commentators recommend, by keeping an open mind and by deliberating about deliberation the new jury system in Japan can set itself up for success.

The final reason why the new jury system in Japan may be successful from a deliberative democrat's perspective is because it allows lay judges and judges to focus on their strengths in deliberation. Jury research has indicated that lay juries tend to accurately deliberate with regard to facts, but struggle with regard to law.<sup>238</sup> In the Japanese mixed tribunal system, the professional judges will handle all questions of law.<sup>239</sup> Therefore, judges will be able to steer the lay judges to the correct conclusions while they are discussing law while allowing the lay jurors more latitude while discussing the facts of the case.

## **B. WHY JAPAN'S JURY REFORM WILL NOT BE SUCCESSFUL FROM A DELIBERATIVE DEMOCRAT'S PERSPECTIVE**

As shown above, there are several reasons why Japanese jury reform may be successful from a deliberative democrat's perspective.<sup>240</sup> Unfortunately, however, there are at least as many reasons why the reform will not be successful. First, deliberative democracy is premised on

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<sup>237</sup> *Id.* ("Procedural safeguards might be implemented to avoid undue judicial influence as well. As discussed above, Japan might consider implementing a debriefing or evaluation system where citizens have the opportunity to file reports about overpowering judicial conduct in the deliberation room.")

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<sup>239</sup> Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT'L L.J. at 847 citing Masaki Takasugi, *The New Lay-Judge System in Japan: A Comparison with the Jury System in NSW I*, 2 (2005), <http://www.law.usyd.edu.au/anjel/documents/23Feb2005Conf/takasugi2005.pdf> ("It should be noted that professional judges will retain sole authority to reach decisions on questions of law and procedure.").

<sup>240</sup> *See supra notes 209–236* (It will increase the amount of discussion that is occurring in Japan, it will bring legitimacy to the Japanese criminal justice system, it will increase the legitimacy of the Japanese criminal justice system through word of mouth, since it is new, it can adopt and change depending on suggestions, and it allows professional judges to help lay judges with understanding the law, which is what lay jurors usually mess up).

reasoned discussion between equals, which will not take place in the new Japanese jury system.<sup>241</sup> Second, another important component of deliberative democracy is that the subject matter of the debate be equally accessible to all parties.<sup>242</sup> Legal debate is less logical and accessible than regular policy debate. Third, deliberative democracy also values explaining and justifying decisions, which will not be possible from jury deliberations.<sup>243</sup> Finally, the conversations that are likely to occur will likely lead to a high polarization instead of meaningful deliberation.<sup>244</sup>

Reasoned discussion between equals is a fundamental part of deliberative democracy.<sup>245</sup> In theory, lay judges and the professional judges are procedurally equal.<sup>246</sup> One vote from each side is required to reach a verdict.<sup>247</sup> As stated above, professional judges, however, may generally be more educated and articulate than the average lay juror, especially while discussing legal topics.<sup>248</sup> Inequality of education, skill, intelligence, and oratory skills, however, will always be a part of deliberation and may be overcome.

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<sup>241</sup> See *infra notes*

<sup>242</sup> See *infra notes*

<sup>243</sup> See *infra notes*

<sup>244</sup> See *infra notes*

<sup>245</sup> See GUTMANN & THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* at 7.

<sup>246</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT'L L.J. at 846 citing Anderson & Saint, *supra* note 165 at 240–41 art 6. (“At trial, lay judges will have, at least theoretically, much the same authority and rights as the three professional judges.”). *But see* Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT'L L.J. at 847 citing Masaki Takasugi, *The New Lay-Judge System in Japan: A Comparison with the Jury System in NSW 1, 2* (2005), <http://www.law.usyd.edu.au/anjel/documents/23Feb2005Conf/takasugi2005.pdf> (“It should be noted that professional judges will retain sole authority to reach decisions on questions of law and procedure.”).

<sup>247</sup> See Wilson, *The Dawn of Criminal Jury Trials In Japan: Success on the Horizon?* WIS. INT'L L.J. at 846 citing Bloom, *Jury Trials in Japan*, 28 LOY. L.A. INT'L & COMP. L. REV. 35, 41 (2006).

<sup>248</sup> See Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, CORNELL INT'L L. J. at 436–440 (“Professional judges in mixed tribunals are law school graduates who have completed their legal training, have passed the bar exam, and have a certain number of years of experience working on legal issues after passing the bar exam. Lay judges are neither educated in law nor experienced in resolving legal issues.”).

In mixed tribunals, however, the inherent inequality between lay and professional judges is too great and it will be impossible to deliberate successfully. The professional judges will not only have higher education, skill, intelligence, and oratory skills, which is typical in group deliberations, but they will also have a higher status in the group because of their position and the task the group is assigned to meet. Joseph Berger and colleagues explained interactions in small, task-oriented groups with status characteristics theory.<sup>249</sup> Members of the group develop expectations about the potential contributions of group members towards the resolution of the task.<sup>250</sup> There are two types of status characteristics; Specific status characteristics, which are directly relevant to the successful completion of the task;<sup>251</sup> and diffuse status characteristics, which may only indirectly relate to the task of the group.<sup>252</sup>

In mixed tribunals, there are a variety of different diffuse characteristics that will factor into the group's decision-making process.<sup>253</sup> Regardless of the diffuse characteristics of the group, however, professional judges will always possess two specific status characteristics that lay judges do not possess: legal education and legal decision-making experience.<sup>254</sup> According to the aggregation hypothesis of character status theory, the expectations of each member of the group will depend on each person's specific or diffuse characteristics, weighed appropriately to

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<sup>249</sup> See *Id.* at 436 citing JOSEPH BERGER ET AL., STATUS CHARACTERISTICS AND SOCIAL INTERACTION (1977); Joseph Berger et al., *Status Organizing Processes*, 6 ANN. REV. SOC. 479 (1980); Joseph Berger et al., *Status Cues, Expectations, and Behavior*, 3 ADVANCES IN GROUP PROCESSES 121 (1986).

<sup>250</sup> See Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, CORNELL INT'L L. J. at 436 citing Joseph A. Bonito, *A Longitudinal Social Relations Analysis of Participation in Small Groups*, 32 HUM. COMM. RES. 302 (2006) ("The theory states that individuals in task-oriented groups develop expectations about the potential contributions of group members toward the resolution of the task.").

<sup>251</sup> See *Id.*

<sup>252</sup> See Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, CORNELL INT'L L. J. at 436 citing James W. Balkwell, *Status*, in GROUP PROCESS: SOCIOLOGICAL ANALYSES 119, 124 (MARTHA FOSCHI & EDWARD J. LAWLER EDS., 1994).

<sup>253</sup> See Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, CORNELL INT'L L. J. at 437. Examples of important diffuse status characteristics are age, gender, and occupation for lay jurors.

<sup>254</sup> *Id.*

the current situation.<sup>255</sup> With regard to mixed tribunals, “specific status characteristics . . . will have a stronger impact on the overall expectations surrounding the judges’s ability to decide legal cases than diffuse status characteristics such as gender or age.”<sup>256</sup> In other words, a professional judge’s status as a professional judge will trump any status characteristics that a lay judge may have.<sup>257</sup>

Not only do status characteristics affect expectations for group members, it also affects how the group treats each respective member.<sup>258</sup> High status members of the group tend to receive more time to speak<sup>259</sup> and other group members take their opinions seriously.<sup>260</sup> Furthermore, high status group members interrupt other group members more frequently, are more successful when interrupting,<sup>261</sup> speak first during interactions,<sup>262</sup> speak more quickly<sup>263</sup>

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<sup>255</sup> *Id.* citing Balkwell, *Status*, in *GROUP PROCESS: SOCIOLOGICAL ANALYSES* 119, 124 (“Thus, according to the aggregation hypothesis, the performance expectation and power of each group member will include information about all status characteristics, be they specific or diffuse, but different weights will be attached to them.”).

<sup>256</sup> Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, CORNELL INT’L L. J. at 437

<sup>257</sup> *See id.* (“ . . . a relatively inexperienced young female professional judge will have a lower status than an experienced older male professional judge. However, the relative strength of specific status characteristics suggests that the status of either of these two professional judges in the tribunal would be higher than the status of, for example, an older male serving as a lay judge.”).

<sup>258</sup> *See id.* at 439.

<sup>259</sup> *See id.* citing Balkwell, *Status*, in *GROUP PROCESS: SOCIOLOGICAL ANALYSES* 119, 124.

<sup>260</sup> *See* Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, CORNELL INT’L L. J. at 439 citing Joseph Berger et al., *Status Organizing Processes*, 6 ANN. REV. SOC. 479 (1980)

<sup>261</sup> *See* Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, CORNELL INT’L L. J. at 439 citing WILLIAM M. O’BARR, *LINGUISTIC EVIDENCE: LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM* (1982); Derek Roger & Willfried Nesshoever, *Individual Differences in Dyadic Conversational Strategies*, 26 BRIT. J. SOC. PSYCHOL. 247 (1987); William T. Rogers & Jones, *Effects on Dominance Tendencies on Floor Holding and Interruption Behavior in Dyadic Interaction*, 1 HUM. COMM. RES. 113 (1975).

<sup>262</sup> *See* Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, CORNELL INT’L L. J. at 439 citing Theodore A. Lamb, *Nonverbal and Paraverbal Control in Dyads and Triads: Sex or Power Differences?*, 44 SOC. PSYCHOL. Q. 49 (1981); Cecilia L. Ridgeway et al., *Nonverbal Cues and Status: An Expectation States Approach*, 90 AM. J. SOC. 955 (1985).

and loudly.<sup>264</sup> Furthermore, even when low-status members of the group behave in a similar way to high status members, higher status members are evaluated more positively.<sup>265</sup> Researchers hypothesize that this occurs because other group members perceive low status group members as less competent and as over-stepping their limits when they do speak-out.<sup>266</sup> The two exceptions to this rule occur when a leader explicitly puts a low status member in a leadership or when low status members are perceived as trying to help the group resolve the task instead of achieving their own goals.<sup>267</sup>

The different status levels of professional and lay judges will make it impossible for deliberation to occur in the new mixed tribunals in Japan. As applied to mixed tribunals, character status theory provides the psychological framework for what many other studies have observed.<sup>268</sup> High status members of the mixed tribunals (professional judges) will win arguments not necessarily because of the strength of their arguments, but because of their status within the group.<sup>269</sup> Furthermore, given the Japanese judiciary's opposition to the reform—and

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<sup>263</sup> See Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, CORNELL INT'L L. J. at 439 citing Richard M. Sorrentino & Robert G. Boutillier, *The Effect of Quantity and Quality of Verbal Interaction on Ratings of Leadership Ability*, 11 J. EXPERIMENTAL SOC. PSYCHOL. 403 (1975).

<sup>264</sup> See Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, CORNELL INT'L L. J. at 439 citing William T. Packwood, *Loudness as a Variable in Persuasion*, 11 J. EXPERIMENTAL SOC. PSYCHOL. 403 (1975).

<sup>265</sup> See Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, CORNELL INT'L L. J. at 439 citing Ronald Humphrey, *How Work Roles Influence Perception: Structural-Cognitive Process and Organizational Behavior*, 50 AM. SOC. REV. 242 (1985).

<sup>266</sup> See Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, CORNELL INT'L L. J. at 439 citing B. F. Meeker & P. A. Weitzel-O'Neill, *Sex Roles and Interpersonal Behavior in Task-Oriented Groups*, 42 AM. SOC. REV. 91 (1977).

<sup>267</sup> See Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, CORNELL INT'L L. J. at 440 citing Linda L. Carli, *Gender, Status, and Influence*, 8 ADVANCES IN GROUP PROCESSES 89 (1991).

<sup>268</sup> See *supra* notes 181–195.

<sup>269</sup> See Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, CORNELL INT'L L. J. at 440 citing JOSEPH BERGER ET AL., STATUS CHARACTERISTICS AND SOCIAL INTERACTION (1977); Joseph Berger et al., *Status Organizing Processes*, 6 ANN.

human nature's reluctance to willingly give up power—it does not seem likely that the judges will go to great lengths to elevate low status members of the group to leadership positions, which would be necessary for deliberation to occur.<sup>270</sup>

Although the above analysis is true for all mixed tribunals, it is particularly detrimental to the Japanese mixed tribunal. As Hiroshi Fukurai wrote about Japanese culture, “In Japan, due to the strong sense of obedience to legal authority, the difference between disagreeing with a fellow citizen and disagreeing with a professional judge during deliberations is significant.”<sup>271</sup> In Japan, even moreso than other countries, it is unlikely that deliberation will occur in a mixed tribunal because of the difference in status between the lay judges and the professional judges.

Another reason why the emerging mixed tribunal system in Japan will not be effective from a deliberative democrat's perspective is because legal debate is fundamentally different and less accessible than the typical subjects tackled by deliberation. As shown above, deliberative democracy can be successful when the subject is equally accessible to all participants.<sup>272</sup> Legal deliberations, however, are not equally accessible to all participants. For example, when the topic of deliberation is a typical policy deliberation, such as adopting the Euro as a country's currency, a person with common sense or a strong analytical mind can contribute to the conversation. The discussion is generally logical and anyone can contribute. Discussing what the law is and applying it to facts is a different than discussing what a policy ought to be. Law is not necessarily logical or intuitive like policy debate.

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REV. SOC. 479 (1980); Joseph Berger et al., *Status Cues, Expectations, and Behavior*, 3 ADVANCES IN GROUP PROCESSES 121 (1986).

<sup>270</sup> See *supra* note 201.

<sup>271</sup> Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L. J 315, 331 (Spring, 2007).

<sup>272</sup> GUTMANN & THOMPSON, WHY DELIBERATIVE DEMOCRACY? 7. (define deliberative democracy as “a form of government in which free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are *mutually acceptable and generally accessible*, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future.”) (emphasis added)

The third reason why the emerging mixed tribunal system may not be successful from a deliberative democrat's perspective is because deliberative democracy values explaining and justifying decisions, which will not be possible from jury deliberations. Two noted deliberative democracy scholars Amy Gutmann and Dennis Thompson, define deliberative democracy as, "a form of government in which free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible . . ." <sup>273</sup> In Japan, jurors will not be able to explain the basis for their decisions to the outside world. The only people that will know why a particular jury reached a particular decision are the members of the jury. Therefore, the type of "deliberation" that will be occurring in mixed tribunals in Japan simply misses an important part of what constitutes successful deliberation from a deliberative democrat's perspective.

The last reason why the emerging jury system in Japan will not be successful from a deliberative democrat's perspective is because the type of discussions that will likely occur when the juries speak about cases will not be deliberative—in the sense that there is back and forth and disagreement—and will therefore lead to polarization. As shown above, since the juries will be mixed tribunals where the professional judges will likely dominate the discussions, there will not be a lot of disagreement or back and forth discussion. There are several factors that will lead the mixed tribunals in Japan towards polarization. First, when group members feel a sense of solidarity toward each other, the polarization that occurs in the group will likely be more extreme. <sup>274</sup> The Japanese jury will likely feel a sense of solidarity with each other (as law-abiding) against the criminal.

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<sup>273</sup> GUTMANN & THOMPSON, WHY DELIBERATIVE DEMOCRACY? 7.

<sup>274</sup> Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, YALE L.J. 71, 92 citing PATRICIA WALLACE, THE PSYCHOLOGY OF THE INTERNET, 73–76 (Cambridge University Press, 1999), Dominic Abrams et al., *Knowing What To Think by Knowing Who You Are*, 29 BRIT. J. SOC. PSYCHOL. 97, 113–16 (1990), Russell Spears et al., *De-Individuation and Group Polarization in Computer-Mediated Communication*, 29 BRIT. J. SOC. PSYCHOL. 121, 130–31.

As Professor Mutz points out, however, a lack of deliberation is not necessarily a bad thing. Her research indicates that the more a person deliberates—defined as discussing politics with people whom he disagrees—the less likely he is to participate in democracy.<sup>275</sup> Conversely, if a person discusses politics with people who have similar views, they are likely to participate more in the democracy.<sup>276</sup> Therefore, although the emerging jury system in Japan will not necessarily cultivate more deliberation, it may cultivate more participation in democracy.

**C. JAPAN’S NEW JURY SYSTEM WILL NOT BE A SUCCESS FROM A DELIBERATIVE  
DEMOCRAT’S PERSPECTIVE.**

Although there are strong arguments on both sides, it is unlikely that Japan’s emerging jury system will be a success from a deliberative democrat’s perspective. Although it would seem that establishing a new jury system would increase deliberation in Japan, ultimately, it will not. Since the jury system is a mixed tribunal, the professional judges will dominate the discussion and the lay participants will not be able to deliberate. Furthermore, while it is true that the new jury system may increase the public’s confidence in the Japanese legal system and it will increase the public’s confidence in the Japanese legal system by word of mouth, those are not benefits that really deal with deliberative democracy. The increase of public opinion of the Japanese jury system has more to do with the fact that citizens can safe-guard innocent

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(“If people think of themselves as part of a group having a degree of solidarity, group polarization is all the more likely, and it is likely to be more extreme.”) Considerable evidence suggests that when politics, geography, race or sex united a group, polarization is heightened. *Id.* citing JOHN C. TURNER ET AL., REDISCOVERING THE SOCIAL GROUP, 159–62, (1987) Abrams et al., *Knowing What To Think by Knowing Who You Are*, BRIT. J. SOC. PSYCHOL. at 98–99, Spears et al., *De-Individuation and Group Polarization in Computer-Mediated Communication*, BRIT. J. SOC. PSYCHOL. 121, 130–31.

<sup>275</sup> See HEARING THE OTHER SIDE: DELIBERATIVE VERSUS PARTICIPATORY DEMOCRACY, DIANA C. MUTZ at 114. (“Drawing on every available indicator of political participation across these two surveys, my findings are extremely consistent: cross-cutting exposure discourages political participation.”)

<sup>276</sup> *Id.*

defendants from being wrongfully convicted than with deliberation. Additionally, the the positive feelings that people have after serving in a jury that will increase the public's opinion of the jury system through word of mouth predominantly occur because of a lack of deliberation. As professor Mutz shows, when there is a lot of back and forth, people are less likely to feel good about the political process and participate. If, however, there is general agreement and everyone bands together and convicts the criminal, then people feel even better about their experience because of the lack of deliberation.

Ultimately, the fact that the deliberations will likely be controlled by a judge and the lay jurors will not stand up to the judge makes the new jury system a failure from a deliberative democrat's perspective. Furthermore, because the judge will dominant the discussion there will be little deliberation, but the professional judges and the lay jurors will likely band together and feel positive about their experience which will lead to an increase in participation in democracy, but not in deliberation.

### CONCLUSION

In this paper, I set out to analyze whether the emerging criminal jury system in Japan will be a success from the perspective of a deliberative democrat. In order to do so, in Part I of this paper I defined deliberative democracy and evaluated its history and more importantly, recent, relevant scholarship. Deliberative Democracy "is a form of government in which free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible with the aim of reaching conclusions that are binding in the present on all citizens but open to the challenge in the future."<sup>277</sup>

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<sup>277</sup> GUTMANN & THOMPSON, WHY DELIBERATIVE DEMOCRACY? 7.

Next, in Part II of the paper, I determined that deliberative democracy was a desirable goal for policy to try to achieve. There are several valid criticisms of deliberative democracy. First, an increase in deliberation may lead to a decrease in participatory democracy. Furthermore, the certain types of deliberation can lead to polarization. Polarization occurs when the group of people takes a more extreme position than any one of the individuals of the group would have taken on its own. Despite the validity of these criticisms, deliberative democracy is a worthwhile goal because there needs to be a balance between deliberation and participation and because polarization only occurs in certain circumstances and can be controlled.

Then, in Part III, I described Japan's emerging petit quasi-jury system. I examined both the history of the jury in Japan and the structure of the new system. Then, I looked at the need for reform in the Japanese criminal justice system and how the jury reform would cure its deficiencies.

Lastly, in Part IV, I attempted to explain the reasons, from a deliberative democrat's perspective why the jury reform might be successful and why it might be a failure. Ultimately, there are more compelling reasons, at least from a deliberative democrat's perspective, as to why it will fail rather than why it will succeed. The purpose of Part IV, and of the whole paper was to evaluate the new jury system from the perspective of a deliberative democrat. Saying it will be a failure from a deliberative democrat's perspective is not the saying it will be a failure overall. Many kinds of reform can be a failure from a deliberative democrat's perspective but may achieve some other important policy end.