Japan's New Lay Judge System: Deliberative Democracy in Action?

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Japan’s New Lay Judge System: Deliberative Democracy in Action?¹

Zachary Corey² and Valerie P. Hans³

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I. INTRODUCTION

In August 2009, the murder trial of Katsuyoshi Fujii in Tokyo, Japan catapulted to international attention. The crime itself was similar to many other serious crimes in Japan, except, perhaps, for the advanced ages of the murderer and his victim. Seventy-two-year-old Fujii confessed to the fatal stabbing of his elderly neighbor, with whom he had been feuding for years. But rather than these facts, the trial was notable because it marked the debut of the remarkable new Japanese legal institution of Saiban-in seido, a mixed decision making body typically composed of six lay judges and three professional judges that now decides guilt and sentencing in serious criminal cases.⁴ In Mr. Fujii’s case, for the first time in over six decades, Japanese citizens sat in judgment over the fate of a fellow citizen.

¹ Authors’ Note: Earlier versions of this paper were presented at the Inaugural East Asian Law and Society Conference, University of Hong Kong, HK, Feb. 5, 2010; the Baldy Center Series, Theorists and Jurists, Feb. 24, 2010; and a faculty workshop at Loyola-LA Law School, Los Angeles, CA, Apr. 15, 2010. The authors wish to thank Michael Dorf, Hiroshi Fukurai, John Gastil, Peter Tiersma, and Matthew Wilson for helpful comments on our work.

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⁴ Saiban-in seido has been translated multiple ways, including “lay assessor” “jury” and “lay judge” systems. We use “lay judge system” rather than “jury” to distinguish it from other jury systems in which lay decision makers decide independently of professional judges, and we prefer “lay judge” to “lay assessor” as it emphasizes the similarity of roles and tasks of the lay and professional judges under the Japanese law.
During the August trial of Mr. Fujii, the Tokyo District Court building was mobbed by television crews, news reporters, and thousands of people who wanted a chance to witness the inaugural lay judge trial. Only a handful of lucky observers were able to see the trial first-hand; seats were determined by lottery because requests far exceeded capacity. After the judges decided on a guilty verdict and a 15-year sentence for Mr. Fujii, the lay judges participated in a press conference to discuss their experiences. Many major news outlets in Japan and abroad reported their comments and evaluations of the experience of being a Saiban-in. 5

This major reform will continue to produce many changes in the Japanese legal system. In the years leading up to the reform, the Japanese government embarked on an ambitious program to incorporate lay participants into the legal system as decision makers, a project that included building new courtrooms to accommodate the mixed court, as well as a massive educational and publicity campaign with public service announcements, television shows and movies, and even the quintessentially Japanese manga (illustrated books and magazines). Legal actors have altered the way in which they approach trial work. Professional judges now add to their trial duties the requirements of informing lay judges about the relevant law, and deliberating alongside lay citizens to reach collective decisions about verdicts and sentences. Prosecutors’ and defense attorneys’ trial preparation and advocacy have also undergone a remarkable change. They have moved from a dossier-based tradition of the exchange of written documents within a closed professional world toward public oral presentations to both lay and professional judges.

One of the most intriguing potential effects of the new lay judge system is whether and how it will affect the citizens of Japan. Will the experience of direct participation as legal decision makers change the views and perspectives of the Saiban-in? Will they come to think differently about the merits of the Japanese legal system, the professional judiciary, and the institution of Saiban-in seido? Might their experiences lead to greater civic engagement and political activity in other domains? And how will the fact that fellow citizens are now regular participants in the legal machinery affect the broader public’s view about the legitimacy of the legal system?

In this Article, we explore the potential impact on Japanese citizens through the lens of deliberative democracy. In particular, we consider the benefits and limitations of Saiban-in seido as a deliberative democratic reform. Deliberative democracy is a political theory that emphasizes the value of public deliberation in justifying laws and decisions. It urges citizens to engage in reasoned discussions about policy

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5 Hiroko Tabuchi & Mark McDonald, In First Return to Japan Court, Jurors Convict and Sentence, N.Y. TIMES, Aug. 7, 2009, at A4.
preferences. The deeper understandings and conclusions generated through these discussions will, in the deliberative democratic model, be incorporated into political decision-making and will enhance the political system’s legitimacy.

Studies of deliberative democracy, in which citizen groups are organized by the government or by researchers and asked to deliberative about important policy choices, have shown salutary effects of participation in deliberation. The quality of decision-making is improved. In addition, the participants view the process as more legitimate and develop deeper commitment to the policy choices. In some instances they become more engaged as citizens. We draw on this work to evaluate whether and how participating in Saiban-in seido influences its participants. Do their attitudes shift? Do they become more (or less) supportive of courts, judges, and the legal system? And will such experiences lead them to become more engaged in social and political activity?

We begin by defining deliberative democracy and briefly summarizing relevant theoretical analysis and empirical research. We then describe how the experience of lay citizens participating as legal decision makers might produce the same types of greater civic engagement found in deliberative democracy experiments. Finally, we examine the early responses to Japan’s new lay judge system to assess whether lay participation in the Saiban-in system promotes deliberative democracy effects.

II. DELIBERATIVE DEMOCRACY: HISTORICAL FOUNDATIONS AND CONTEMPORARY THEORY

Democracy has always been linked with deliberation. In ancient Athens, political leaders believed that deliberation was “an indispensable preliminary to any wise action at all.”\(^6\) In his classic treatise on politics, Aristotle praised deliberation. He wrote, “[n]ow 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.”\(^7\) Over two thousand years later, John Stuart Mill urged democratic governments to use large, random samples of citizens to deliberate about broad political issues.\(^8\) In America, Thomas Jefferson wrote that the single greatest

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\(^6\) THUCYDIDES, PELOPONNESIAN WAR 93 (Richard Crawley trans., Forgotten Books 2008) (431 BC).

\(^7\) ARISTOTLE, POLITICS 52 (Benjamin Jowett trans., Digireads.com 2005).

\(^8\) JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT, in ON LIBERTY AND OTHER ESSAYS 225 (John Gray ed., 1991) (1861).
failure of the founding fathers was not creating an institution that encouraged popular deliberative politics.\(^9\)

Although certain writings of Aristotle, John Stuart Mill and Thomas Jefferson are precursors to modern deliberative democratic theory, each of these important political thinkers was also undemocratic. In Aristotle’s ancient Athens, only free men could participate in the deliberations.\(^10\) Furthermore, although Aristotle advocated deliberation by the “masses,” he preferred deliberation by the aristocracy, where the debate would be more sophisticated.\(^11\) Even John Stuart Mill thought that educated people should lead deliberation.\(^12\) Lastly, the deliberation that Thomas Jefferson advocated would not have included slaves\(^13\) or women.\(^14\)

Modern deliberative democratic theories draw on these historical traditions and have become a robust part of contemporary political science scholarship.\(^15\) Deliberative democracy is a political theory that emphasizes the need for public deliberation to justify laws and decisions.\(^16\)

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\(^11\) See id.

\(^12\) *Id.* at 9 citing John Stuart Mill, *Considerations on Representative Government, in Collected Writings*, vol. XIX, ch. XV (1977).

\(^13\) 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 revises the laws in Virginia, Thomas Jefferson prevented a measure that would have gradually emancipated the slaves in Virginia from reaching the floor).

\(^14\) See Martin Gruberg, *Women in American Politics* 4 (1968) (quoting Thomas Jefferson, “[w]here 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”); Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (1998). *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.”).


\(^16\) Joshua Cohen, *Deliberation and Democratic Legitimacy, in The Good Polity* 15 (Alan Hamlin & Philip Pettit eds., 1989) (“By a deliberative democracy I shall
Two prominent 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.”

Deliberative democracy differs from traditional democratic theories such as aggregative democracy, which takes the preferences of citizens as a given and advocates resources accordingly. Deliberative democracy emphasizes the justifications that citizens provide for political preferences, instead of accepting the preferences without further debate. Each theory’s approach to rational disagreement also differs. Aggregative democracy deals with rational disagreement in one of two ways. First, it allows the citizens to vote on the topic and the majority triumphs. Second, officials acknowledge the expressed preferences of the electorate, but “put them through an analytic filter—such as cost-benefit analysis—which is intended to produce optimal outcomes.” In contrast, a deliberative democracy approach encourages citizens to continue to engage in reasoned discussion because reasoned discussion is likely to produce greater appreciation of and respect for the merits of one another’s positions, instead of simply viewing opposing positions as the product of impaired judgments or impure motives. Thus there is considerable emphasis on the merits of sustained and engaged deliberation. Indeed, the presumed benefits of deliberation are seen as so significant that even advocates for other approaches, such as Dorf and Sabel who

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17 GUTMANN & THOMPSON, supra note 10, at 7.

18 Id. (also noting that some aggregative theories would correct preferences based on misinformation).

19 Id. at 13.

20 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.”).

21 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.”)).

22 Id. at 14–15.

23 Id. at 20.
promote the idea of democratic experimentalism, insist on a deliberative component.\footnote{Michael C. Dorf \& Charles F. Sabel, \textit{A Constitution of Democratic Experimentalism}, 98 \textit{Columbia L. Rev.} 267–473 (1998). Professors Dorf and Sabel describe an aspirational form of government activity they identify as “democratic experimentalism.” Power “is decentralized to enable citizens and other actors to utilize their local knowledge to fit solutions to their individual circumstances, but in which regional and national coordinating bodies require actors to share their knowledge with others facing similar problems. This information pooling, informed by the example of novel kinds of coordination within and among private firms, both increases the efficiency of public administration by encouraging mutual learning among its parts and heightens its accountability through participation of citizens in the decisions that affect them.” \textit{Id.} at 267.}

Deliberative democracy theory is not \textit{en vogue} among political theorists simply because it is an interesting idea. Deliberative democracy theorists argue that, compared to other forms of government, deliberative democracy produces greater benefits.\footnote{See discussion \textit{infra} at Part II about the many presumed benefits of deliberative democracy experiences.} From the perspective of the deliberative democratic theorist, because deliberative democracy forces citizens to offer and defend their opinions, it will promote a more informed citizenry. Citizens who engage in such deliberation are also likely to be more politically efficacious, more active in politics and civic life.\footnote{See Mark Button \& Kevin Mattson, \textit{Deliberative Democracy in Practice: Challenges and Prospects for Civic Deliberation}, 31 \textit{Polity} 609ff (1999); Lawrence R. Jacobs \textit{et. al.}, \textit{Talking Together: Public Deliberation and Political Participation in America} 13–14 (2009) (discussing the ways in which democratic deliberation should promote political efficacy).} Deliberation will help lead to mutual understanding and tolerance, and a greater chance of true consensus among citizens. The decisions reached after deliberation, it is asserted, will likely be superior to those reached without it. Deliberative democracy allows the people, instead of government figures largely removed from everyday life, to engage in decision making. These citizens are able to bring their real life experiences to bear on the policy choices. Engaging in the process of reasoned reflection, the likelihood increases that superior ideas will prevail.

Inevitably, there are occasions in which reasonable minds disagree fundamentally about the best policies. The deliberative democratic perspective anticipates that the disagreements will be more thoughtful and accompanied by less demonization of the opposition. Citizens will be better able to recognize the different moral beliefs or other justifications underlying distinctive policy choices.

Even if the policy choices are not superior according to objective measures, however, they will be more legitimate to the public. The opportunity to voice one’s point of view and opinions is a key element in
promoting a sense of procedural justice. Procedural justice researchers have analyzed the most important features of decision making setting, and have discovered that people value the chance to state their case to a decision maker even when doing so has no clear effect on the outcome of the decision making.

Lawrence Jacobs and colleagues report that a deliberative democracy approach should “invigorate citizens, restore the legitimacy of political decisions, and establish authentic democracy.” Jacobs and colleagues go on to lay out the conditions for effective democratic deliberation. To be successful in achieving the laudable goals of its advocates, democratic deliberation must be universal, that is, it must incorporate the views of all affected citizens. Relatedly, it must be fully inclusive, incorporating the range and diversity of citizens in the community and ensuring that all voices are given equal recognition and weight. Democratic deliberation must be based on reason. That means that the discussion should be characterized by providing reasons for opinions, grounding them in evidence and logical arguments, and responding to the arguments and evidence offered by others. If deliberation is based on inclusive and reasoned dialogue, then it is more likely to produce agreements among citizens as well as greater political efficacy.

Critics, however, argue that these conditions for authentic deliberation are unlikely to be met in contemporary society. First, the fundamental conditions of inclusivity and universality are unlikely to be achieved. Self-selection is a serious problem; people with more formal education and greater income are more apt to take, and to value, opportunities to talk and debate with others. Even if it were possible to assemble a fully representative group, people who have extensive experience in group discussion formats are more likely to have the background, knowledge, skills and training to be effective in the group discussion and to make their voices heard. Inequalities among citizens are not eradicated even in group settings that emphasize the value of full participation. The requirement of reason-based discussion may impose “a set of stringent demands on citizens regarding the acquisition and processing of information that is unrealistic for most individuals and invites or perhaps requires a dependence on experts that discourages the


28 Id. at 116.


30 Id. at 10–14.

31 Id. at 14–20.

32 Id. at 43-45, 48-53.
direct engagement promised by deliberationists." The goal of producing some form of agreement as a result of deliberation may encourage false unanimity, suppressing dissent and marginalizing and disillusioning those who do not subscribe to the majority view. Thus, in contrast to the optimistic characterization of deliberation as a means of strengthening citizens’ efficacy and producing better and more legitimate decisions, the critics express concern that deliberation will reinforce existing hierarchies and inequalities, and produce decisions that predominantly reflect elite views.

III. EFFECTS OF DELIBERATIVE DEMOCRATIC EXPERIENCES

A key element in deliberative democracy is the experience of group deliberation. Our analysis of its effects must start by describing what is known about the impact of group discussion. For more than half a century, social psychologists and other scholars have systematically studied the many effects of participation in group discussions and deliberations. Deliberative democratic theorists and legal scholars have built on these early findings to offer hypotheses about the benefits (and sometimes the drawbacks) of group discussion.

One domain of research has compared the quality of group versus individual decision-making. Under ideal circumstances, group decision-making offers a superior opportunity to exchange and pool information and to test inferences drawn from that information. Injuries, for example, individual members of the jury can draw on the insights of all the members of their jury as they attempt to understand evidence and law and reach a group verdict. The group context can produce greater engagement in the process of decision-making, and better commitment to the eventual resolution or decision. Many studies show the superiority of problem-solving groups over individuals faced with the same problems.

Beginning in the 1960s, social psychologists discovered what they initially identified as a “risky shift” in group decisions compared to individual ones, a concept that was eventually broadened and identified as

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33 Id. at 16.

34 An early and influential classic is ROGER BROWN, SOCIAL PSYCHOLOGY 656–708 (1965).


37 Dorf & Sabel, supra note 24; GILOVICH ET AL., supra note 35.
group polarization.\textsuperscript{38} Under some circumstances, deliberation with like-minded others may lead the deliberators to take more extreme or polarized positions than they would have without deliberation. In effect, group participants move to “a more extreme point in the direction indicated by the members’ pre-deliberation tendencies.”\textsuperscript{39} One reason for group polarization is the number and pool of arguments raised in the group discussion. These arguments tend to reflect and reinforce the initial leanings and perspectives of the members of the group. Polarization, then, is partly due to informational influence.

In addition, group polarization results from social influence. Group discussion permits interpersonal comparisons of one’s own views with those of others in the group.\textsuperscript{40} The degree of polarization is related to the group’s sense of solidarity, the confidence and friendliness of those advocating more extreme positions, and the initial position of the group. And some evidence suggests that when group members are very similar in terms of politics, geography, race or sex, polarization is stronger.\textsuperscript{41}

Empirical research on the effects of deliberative democratic experiences has tested many of the claims of the theorists. To date, this work has employed deliberative polls, online communities, and other discussion groups whose members are brought together to discuss controversial and important governmental decisions, such as the locations of nuclear power plants or the introduction of regulatory rules.\textsuperscript{42} Tellingly, some variants of deliberative democracy studies identify their participants as “citizen juries.” In some projects, government agencies or activists


\textsuperscript{39} Myers & Lamm, supra note 38; Cass R. Sunstein, \textit{Deliberative Trouble? Why Groups Go to Extremes}, 110 YALE L.J. 71, 74 (2000).

\textsuperscript{40} Myers & Lamm, supra note 38, at 300–01.

\textsuperscript{41} Sunstein, supra note 39, at 88 (“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.”). See also id. at 92 (citing PATRICIA WALLACE, \textit{THE PSYCHOLOGY OF THE INTERNET}, 73–76 (1999); Dominic Abrams et al., \textit{Knowing What To Think by Knowing Who You Are}, 29 BRIT. J. SOC. PSYCHOL., 97, 113–16 (1990); Russell Spears et al., \textit{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.”)).

\textsuperscript{42} Information about deliberative democracy experiments and related activities may be found at http://www.deliberative-democracy.net/.
have assembled the groups, whereas in others, researchers have done so with the purpose of systematically exploring the social and psychological impact of participating in deliberative democratic experiences.\footnote{The different approaches to promoting and studying deliberative experiences are nicely summarized in GASTIL, POLITICAL COMMUNICATION AND DELIBERATION, supra note 15. For example, he describes the National Issues Forums at 32–33, Public Conversations Project at 34–36, and public meetings with elected officials at 192–199.}

Attitudinal shifts on the topic under discussion following deliberation are commonly found; what is more, some studies have found that participants become more politically active and more supportive of government as a result of their participation in deliberations.\footnote{See id. for information about the effects of participation in deliberative democracy experiments. For an assessment of deliberative polling in Japan, see Debate By Citizens Leads to Mature Opinion: A New Method to Investigate “True Public Opinion”, TOKYO SHIMBUN, Jan. 11, 2010 available at: http://cdd.stanford.edu/press/2010/tokyo-debate.pdf.} Thus, experiments with democratic deliberation regularly show that participants shift their views in light of group discussion and sometimes find effects of greater commitment and enhanced political activity.\footnote{GASTIL, POLITICAL COMMUNICATION AND DELIBERATION, supra note 15.}

Other consequences of a deliberative democratic approach have also emerged, again reproducing some of the findings from social psychological research on group decision-making. Because people typically engage in political discussions with friends, family, and similar others who are like-minded,\footnote{DIANA C. MUTZ, HEARING THE OTHER SIDE: DELIBERATIVE VERSUS PARTICIPATORY DEMOCRACY 26 (2006) (“Closer relationships may breed more frequent political conversations, but in that case they will, in all likelihood, be among those who agree.”).} it is not surprising that polarization often occurs in this naturally occurring form of political talk.

Deliberative democracy exercises typically use random or other methods to put people together into groups, to promote the exchange of different perspectives, views, and information. In theory, that should reduce polarizing tendencies because people will contribute different information and normative values to the group. However, a few studies suggest that an increase in political deliberation with diverse others may, on occasion, paradoxically produce a decrease in political activity.\footnote{See id. at 91 (“[p]otential drawbacks of cross-cutting exposure for one democratic outcome in particular - political participation.”). For a summary of the negative evidence, see id. at 94 (citing DAVID KNOKE, POLITICAL NETWORKS: THE STRUCTURALIST PERSPECTIVE (1990)). See also ANGUS CAMPBELL ET. AL., THE AMERICAN VOTER 83 (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 (1953) (“vacillation, apathy, and loss}
is just the opposite of what deliberative democrats would want and expect for the participants in their studies. For example, data from representative national surveys that collected data regarding respondents’ political conversations and their political participation showed that people with diverse networks of friends with whom they discussed politics took longer to decide whom to vote for and were less likely to participate in political activity, including voting. Cross-cutting exposure may at times work to discourage political participation. Reduced political participation is thought to be 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).  

A substantial amount of deliberative democracy research has been undertaken in the United States, but researchers have expanded their work to examine whether similar consequences of deliberative experiences occur in other countries. Given our focus on Japan in this Article, of special interest is the fact that a recent deliberative polling study took place in Yokohama, Japan. About 150 Japanese citizens gathered to discuss education reform. They talked about the issues among themselves, and also had the opportunity to listen to the views and perspectives of experts. Prior to the debate, 37% were in favor of the present system and 31% supported reform. After deliberating on the subject, however, only 33% were in favor of the current system and 42% supported change. Not only did the major Tokyo newspaper Asahi Shimbun laud the deliberation as “A Revolution in Common Sense,” but deliberative democracy scholars James Fishkin and Yasushi Sone were particularly impressed with the Japanese participants’ responses. Professor Fishkin explained: “The participants were actively trying to obtain information. They were more engaged than participants in other countries. I was quite amazed.” Professor Sone noted: “It is often said that ‘Japanese don’t like to give their opinions’ or are ‘shy’, but that is not the case. They were all seriously considering the issues and debating them.”  

IV. JURIES AND DELIBERATIVE DEMOCRACY

Systems of citizen participation in legal decision-making, including the jury systems of the USA and elsewhere, and the mixed tribunal systems of Japan and other civil law countries, resemble the experimental citizen groups studied by deliberative democracy researchers in a number of ways. Both compose groups with individuals from diverse of interest in conflict-laden issues.”).  

48 Mutz, Hearing the Other Side, supra note 46, at 119–124.  

segments of the community and both require group deliberation about an
important social conflict. There are clear differences as well. Unlike most
deliberative democratic experiments, jury service is mandatory. Legal
rules guide jury decision-making, including what legitimately may be
considered in decision-making. Finally, a binding group decision (often
unanimous) is required of juries and lay judges, whereas deliberative
democratic experiments often envision the regular revisiting of group
recommendations and polls.

Nonetheless, a number of deliberative democracy scholars have
used the American jury system as a prime exemplar of the values and
benefits of reasoned deliberation. The fact-finding advantages of a
representative cross-section of the community that engages in sustained
deliberation have been extensively discussed, with most observers
concluding that juries are sound fact-finders in the vast majority of cases.

Scholars have considered the civic engagement potential of jury
participation, drawing connections between service on a jury and other
forms of political participation. Indeed, supporters of the jury system
often wax eloquent on the ways in which jury service engenders greater
civic engagement, more public understanding and knowledge about law,
more support for verdicts, and greater legitimacy for law and the legal
system. However, until recently, most scholars who argued that juries
produced greater legitimacy for the legal system simply asserted it (with
impressive and flowery language to be sure). Perhaps the most-often
quoted words are those of the French political thinker Alexis de
Tocqueville, who wrote about the American jury’s ability to educate
citizens about self-government and the rule of law. “The jury, and more
especially the civil jury, serves to communicate the spirit of the judges to
the minds of all the citizens; and this spirit, with the habits which attend it,

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50 See AKHIL REED AMAR, THE BILL OF RIGHTS 93–94 (1998); Vikram David
Amar, Jury Service as Political Participation Akin to Voting, 80 CORNELL L. REV. 203,
218–20 (1995); John Gastil et al., Civic Awakening in the Jury Room: A Test of the
Connection Between Jury Deliberation and Political Participation, 64 J. POL. 585
(2002); JOHN GASTIL ET AL., THE JURY AND DEMOCRACY: HOW JURY
DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION (2010); John T.

51 Ellsworth, supra note 36; Valerie P. Hans, Judges, Juries, and Scientific
Evidence, 16 J. L. & POL’Y 19 (2007); Jennifer K. Robbennolt, Evaluating Juries by
Comparison to Judges: A Benchmark for Judging?, 32 FLA. ST. U. L. REV. 469 (2005);

52 Amar, supra note 50; GASTIL ET AL, supra note 50; JAMES P. LEVINE, JURIES
AND POLITICS (1992); Richard Lempert, A Jury for Japan?, 40 AM. J. COMP. L. 37
(1992); Richard O. Lempert, Citizen Participation in Judicial Decision Making: Juries,
Lay Judges and Japan, 8 ST. LOUIS-WARSZAW TRANSATLANTIC L. J. 1, 9–10 (2002).

53 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, VOL. 1, 331-39 (Henry
is the soundest preparation for free institutions. . . . It invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge toward society; and the part which they take in the Government.”

Tocqueville believed that serving on a jury made jurors better citizens; they were more informed about the rule of law, and had stronger ties to the state.

It’s challenging to test claims about the civic engagement effects of jury service. Many factors create support for and engagement with the legal and political systems, and it is hard to isolate the effects of jury service. There is something of a selection problem, too. The voter registration list is one of the major sources of names for the jury pool. Jurisdictions that rely exclusively on the voters’ list for potential juror names therefore limit the pool of jurors to those who are politically active in another domain, that of voting. Therefore, in these jurisdictions, comparing jurors who do and do not serve to get a sense of how jury service affects their political activity is confounded. Their non-voting peers never appear on the jury list. Many jurisdictions today rely on multiple lists including drivers’ licenses, tax filers, and unemployment rolls.

Their aim is to try to produce juries that represent a broad swath of the community, instead of juries composed only of registered voters. In these jurisdictions, we can better separate the effects of jury service and prior political activity, because juries include people with and without voting activity.

Thinking about the relevance of the deliberative democracy research, it bears repeating that in important respects, the deliberations that occur in a jury room are not analogous to naturally occurring social and political discussions. Juries in the USA, and lay judges in Japan, are both chosen from broadly representative lists of the community. Juries and the groups of lay judges in mixed tribunals are thus less likely to fall victim to the kind of systematic selection bias that occurs when people talk about politics with friends and family.

Two lines of investigation indicate that the civic engagement effects found in the deliberative democracy research also follow from jury service. Extensive opinion polling of citizens who have served on juries finds that jurors increase their support for the courts and the legal system following their term of service; what is more, their support is higher compared to those who have not served. In post-trial surveys, jurors report that they have become more positive about the courts and the jury system as a result of their service. For instance, a national survey in the

54 Id. at 336–37.

55 VIDMAR & HANS, AMERICAN JURIES, supra note 51, at 76–81.

United States of over eight thousand jurors who served in sixteen federal and state courts found that the majority of jurors (63%) reported that their impression of jury duty was more favorable after serving, compared to before their service.\(^57\) Other studies find that jurors are more likely to see the courts as fair and to assess the justice and equity of the legal system more favorably following their jury service.\(^58\) Public and juror surveys in other countries with long-standing jury systems also show positive regard for the jury system, even in the face of controversial verdicts.\(^59\)

In countries with newly introduced jury systems, such as Spain and Russia, public support is not as robust, and can be negatively affected by a single controversial jury verdict.\(^60\) Consider the experience in Spain, which introduced the jury system in the mid-1990s. In 1996, a year after the jury’s introduction, more Spanish citizens supported (49%) than opposed (37%) it, with 14% reporting no opinion. Just one year later, after a controversial jury decision in which a Spanish jury found a defendant not guilty of killing two police officers, support for the jury system dropped. Now, only 32% said they supported the jury; more than half reported that they now favored a professional judge.

Looking at the views of the individuals who serve on juries, researchers and court officials have typically discovered that jurors have a great deal of positive regard for the court system following jury duty. Summarizing the juror surveys showing that jurors had enhanced positive regard for the jury system and the courts, Shari Diamond concluded, “The simplest explanation for the more favorable reaction of trial jurors to jury service is that participation stimulates a commitment to [a] specific jury and its verdict that is powerful enough to include the system as a whole.”\(^61\) However, as we noted above, those who are more positive about juries are more apt to agree to serve, so it is challenging as a scientific matter to disentangle initial favorability and the impact of jury service.

An ambitious research program by researchers associated with The Jury and Democracy Project, described in the book *The Jury and Democracy*, attempts to get around this problem.\(^62\) The Jury and Democracy Project researchers conducted two studies to examine the links between juror participation and civic engagement. In the first study, the researchers analyzed pre- and post-jury service voting frequency for

\(^{57}\) Id. at 285.

\(^{58}\) Id. at 286.


\(^{60}\) Id.

\(^{61}\) Diamond, *supra* note 56, at 287.

approximately eight hundred residents of Thurston County, Washington (USA) who served as jurors in criminal trials. Their analysis examined whether jurors who served on a criminal jury were more likely to vote, controlling for prior voting levels. They found that jurors who deliberated and reached a verdict voted more frequently in subsequent elections than jurors who were dismissed, were alternates, or were on hung juries that could not reach a verdict.63

A second study expanded the inquiry, examining court and voting records in seven additional counties across the United States, ultimately including over 13,000 jurors in the combined dataset.64 The large sample size permitted the researchers to determine whether the initial findings could be replicated in other jurisdictions, and also allowed them to explore the effects of different types of jury experiences.

The findings confirmed that for some, but not all, groups of jurors, the experience of serving on a jury increased other forms of civic engagement, including voting. Jurors who had voted infrequently before their jury duty showed a significantly greater likelihood of voting afterwards. These less engaged citizens who served on a criminal jury that deliberated—whether the jury reached a verdict or was declared hung—were significantly more likely to vote after their jury service. There were no detectable effects on voting for citizens who voted regularly prior to their jury service. Furthermore, the voting effect was limited to criminal cases; civil jurors did not change their voting behavior, even those who were infrequent voters to start with. Thus, the research confirms that a meaningful deliberative experience can promote other types of political participation, but it is a limited effect and depends on the type of deliberative experience as well as the citizen’s prior level of civic engagement.

V. MIXED TRIBUNALS AND DELIBERATIVE DEMOCRACY

With this as background, we now consider deliberative democracy and Japan’s Saiban-in seido reform.65 Certain elements of a lay judge system are likely to promote sound decision making and in turn greater public legitimacy for the Japanese court’s verdicts. The mere presence of lay judges on panels may serve as something of a deterrent to professional judges if they are inclined to be arbitrary, hasty, corrupt, or biased.66

63 Gastil et. al., Civic Awakening in the Jury Room, supra note 50, at 591–92.


Professional judges must disclose the reasoning behind their decisions and discuss these reasons with the lay judges. Furthermore, lay judges may serve as a sounding board for professional judges. Additionally, if judges make a strong effort to ensure that voices are heard, the deliberation of mixed tribunals can be fairly successful. For these reasons, mixed tribunals should, at least in theory, increase public confidence in the judiciary system.

Some research evidence indicates that forms of lay participation other than the jury can promote more positive views of the legal system. In the most relevant research to our interests here, the important scholar of international lay participation Hiroshi Fukurai systematically studied the Japanese Prosecutorial Review Commission (“PRC”). The PRC members are selected from the citizenry at large, and provide citizen oversight of prosecutorial decision-making. Fukurai discovered that participation on the PRC increased regard for the Japanese legal system. The PRC members were very positive about their service, were willing to serve again, and expressed high levels of confidence in judges and other legal actors. These results support the legitimizing effects of lay participation in the Japanese legal context.

Although it uses a different form for lay participation, the lay judge role is arguably more central to legal decision making than PRC participation, and we might expect that legitimizing effects would increase at least as much and perhaps even more than those found with the PRC participants. Ivković discovered that lay members of Croatian mixed tribunals had very positive views of the tribunals and the courts following their service. Although these are promising results, the projects share the limitations noted above for jury research such as the post-hoc nature of the

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67 See id. at 451 (citing JEREMY SEEKINGS & CHRISTINA MURRAY, LAY ASSESSORS IN SOUTH AFRICA’S MAGISTRATES’ COURTS 94 (1998)).

68 See Ivković, supra note 66, 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.”’)).


71 Ivković, supra note 66.
work and the complication that more favorably inclined citizens more frequently participate as lay decision makers.

Some other features of lay participation in mixed decision-making bodies, however, bode less well for potential civic engagement effects. Although advocates of mixed tribunals believe these tribunals can promote justice and increase confidence in the justice system, the research on the role and importance of lay members of mixed tribunals indicates that they typically play only a modest role. Lay citizens are very likely to agree with the professional judges who decide cases with them, although knowing the substantial agreement between American judges and juries who decide independently, this should not surprise us, nor (perhaps) even concern us. Lay judges rarely use their power to out-vote professional judges. Indeed, the majority of mixed tribunal verdicts are unanimous.

From a deliberative democracy perspective, what is more worrisome than the overlap in judgments is the evidence from some studies that lay assessors in other countries participate in trials and deliberations at a very low rate, and refrain from reviewing case materials and case files even when they are made available, leaving those tasks to the professional judges. Ivković summarized the available research studies, including her own work in Croatia, and concluded that in general lay judges were not particularly active during trials and deliberations; and furthermore, their contributions to deliberations were not considered to be very significant. One study in Poland, for example, found that only one in eleven lay judges read the case file and two-thirds asked no questions during trial. In Ivković's work with Croatian mixed tribunals, lay judges, professional judges, state prosecutors and defense attorneys all agreed that lay judges asked questions only infrequently. In sum, across different countries, compared to lay judges in mixed decision-making bodies, professional judges are more dominant in the trial, the deliberations, and the decision making. Ivković found that status characteristics, and in particular, the legal expertise of the professional judge, helped to explain why the professional judges were so dominant.

The research has uncovered something of a paradox. The most important determinant in ensuring significant and meaningful lay judge

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72 Id at 431–32.
73 Id.
74 Id.
75 Id. at 440.
76 Id. at 441 citing Leszek Kubicki, Udzial Lawników 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 & Sylwester Zawadzki eds., 1970).
77 Ivković, supra note 66, at 440.
participation is the support and guidance of the professional judges in the mixed tribunal. Studies of lay and professional judges have found that if the professional judge is enthusiastic about the potential contributions of the lay judges, and manages the trial and decision making so as to encourage the lay judges, lay citizens are able to play a greater role. Under these circumstances, lay judges not only participate more, but also they are more positive about their experiences and the courts.

VI. JAPAN’S LAY JUDGE SYSTEM AND DELIBERATIVE DEMOCRACY

Based on research done with juries and mixed tribunals in other countries, we predict that the lay judge system in Japan has the potential to create legitimizing and civic engagement effects, but whether it will do so may well rest in the hands of the professional judiciary. A review of Japan’s history of lay legal decision-making, and early information about the introduction of the Saiban-in system, offers some informative background material.

Saiban-in seido is not the first time that Japanese citizens have had the opportunity to participate directly as legal decision makers. In 1928, the Japanese government implemented a criminal jury system. The government limited jury service to literate, tax-paying males over the age of thirty. But juries were used infrequently, in part because the costs of discretionary jury trials were borne by the litigants who requested them. There were only 484 jury trials during the fifteen-year period the option existed in Japan. During the last year, in 1942, only two jury trials were held. In 1943, the right to a jury trial was suspended because of the outbreak of World War II. After World War II, however, the jury system was not reinstated.

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81 Wilson, supra note 79, at 840 (citing Sabrina Shizue McKenna, Japanese Judicial Reform: Proposal for Judicial Reform in Japan, 2 ASIAN-PAC. L. & POL’Y J. 121 (2001)).

82 Id. at 840.


84 See Wilson, supra note 79, at 841 (citing Erik Luna, A Place for Comparative Criminal Procedure, 42 BRANDEIS L.J. 277, 312 (2004) (“After the Second World War,
For the fifty years after World War II, the Japanese legal system did not undergo major reform. That began to change, however, in the late 1990s, toward the end of the so-called “lost decade” in which the financial bubble burst and caused an economic downturn. To spur economic growth, the government engaged in widespread deregulation and began to consider other social and political reforms, including legal reforms. In 1999, Prime Minister Keizo Obuchi created the “Shiho Seido Kaikaku Shingikai” (the Justice System Reform Council) to create official guidelines for judicial reform.

The addition of the lay judge system in Japan is consistent with the spirit of the deregulatory movement, because it limits government involvement in criminal trials by shifting some of the legal responsibility to ordinary citizens. Although there was considerable discussion about the form of lay participation in the legal system, and strong advocates for a jury system similar to those in common law countries, in the end, the Council recommended a mixed tribunal of lay people and professionally trained judges who would determine together the verdicts and sentences in selected serious criminal cases. The Japanese Diet passed a law providing for these lay judge trials to commence in May 2009. As described earlier, the first trial was Mr. Fujii’s in August 2009, with three professional judges and six citizen judges deciding his murder trial.

Except for the presiding judge, who is professionally trained and has the responsibility for managing the trial, the lay judges, in theory, are formally equivalent to and have similar fact-finding responsibilities as the professional judges. They determine the guilt of the defendant and


86 Id. at 71 (“The lost decade was marked by deregulation that allowed free-market forces more power than at any time in Japan’s post-war history.”).

87 See Fukurai, supra note 69, at 322 (citing Akira Goto et. al., Jitsumuka no tameno saiban-in ho nyumon [A Practitioner’s Introduction to the Quasi-jury Law] at 10 (2004)).

determine the sentence. Furthermore, unlike some other mixed tribunal systems, the lay judges in the Japanese system may directly question witnesses, and indeed did so in the first trial. Professional judges, however, have the sole authority to determine questions of law and procedure. Judgments must be given by a majority of the panel, with at least one citizen and one professional judge on the majority’s side.

In two surveys several years apart, but preceding the beginning of the lay judge system, Japanese citizens were asked about their views of the Saiban-in system and about their willingness to participate in it if they were called to serve as lay judges. The results were startling. Many Japanese expressed strong reluctance to participate as lay judges. The first survey was conducted in 2005, and its findings sent shock waves throughout Japan and the legal community. According to the initial survey, 70% of the Japanese public did not want to participate as a lay judge. A substantial public education campaign, including volunteer participation in mock trials, ensued. Nonetheless, before the official start of the lay judge system, the public remained generally negative about the prospect of service as a Saiban-in.

That was worrisome to the judges who embarked on the first trials under the new system. However, the early experience has allayed some concerns. The Japanese citizens who have served thus far have participated in striking numbers, have participated actively as lay judges, and have expressed highly positive views about their experiences. In the first Tokyo lay judge trial of Mr. Fujii, a total of 49 Japanese citizens were summoned to serve. Fully 47 of those 49 reported to the courthouse for their service. In a second lay judge trial shortly thereafter in Saitama, 41 of the 44 citizens called reported for lay judge duty. This is a stunning 95 percent turnout rate.

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The active participation by Japan’s new lay judges at trial also appears on the surface to be quite different from the reported passivity of lay judges in mixed tribunals in other countries. Recall the typical approach found in other countries that lay judges do not often take a direct role in proceedings by asking questions, and are not particularly influential in the discussions of the tribunal, deferring instead to the professional judges. In Mr. Fujii’s trial in Tokyo, lay judges asked multiple questions during the trial itself, a pattern of active engagement that has been repeated in subsequent lay judge trials. What is more, many lay judges in these early Japanese trials have followed the example of Mr. Fujii’s lay judges, and participated at well-attended press conferences, describing their overall impressions of lay judge service and their views of the trial and deliberation process. Although their remarks are by necessity limited to describing their general impressions, because of the confidentiality limits on the content of the deliberations that are prescribed by Japanese law, on the whole, the lay judge comments have been quite positive. A number of lay judges have indicated that they were pleasantly surprised that they were able to speak easily, to ask questions during the trial, and to participate in the private discussions with the professional judges. Some lay judges noted that the professional judges had worked to encourage them to speak up. Most lay judges felt that they were able to participate as much as they wanted in the deliberations.

A systematic look at lay judge experiences was provided by a study recently conducted by the Supreme Court of Japan. It bears out the enthusiastic reports offered by the lay judges during their press conferences. In the first half-year of the implementation of *Saiban-in seido*, 142 cases were tried under the new system. Most of the trials have been relatively short affairs, with about 90 taking three days or less. The two longest trials took nine days time. A total of 838 lay judges, including alternates, were selected for these trials. The Supreme Court of Japan’s lay judge survey revealed that before serving as lay judges, 56% of them said that they had a negative response to being called for duty. However, afterwards, 97% said they found the lay judge service a good experience. Fully 71% said they could easily understand the evidence in the trials they heard. With an average deliberation time of 6.6 hours, 76% of the lay judges were satisfied with the experience.

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95 Id.


judges found their deliberations were of adequate length (compared to 6% who said that more deliberation was required). The evidence thus far is admittedly limited, but it suggests that Japanese lay judges are following a similar pattern of greater support for lay participation following their service as a *Saiban-in*.

VII. CONCLUSION

Research on the experiences of Japanese lay judges is in its infancy. Indeed, the first year of *Saiban-in seido* offers one of the first opportunities to take stock of early evidence about lay judges’ reactions and the ultimate potential for greater civic engagement as a result of participation. Unfortunately, our ability to study the phenomenon, and even to examine the legitimizing effects of participation itself, is greatly hampered by the strict confidentiality rules in place. This limits what researchers can discover about the new “black box” of legal decision-making in Japan. Even more importantly, it will interfere with the posttrial discussions among friends and family that serve to communicate the nature of the experience to a broader array of the public beyond those who are called to serve. That in turn may lessen the radiating effects of the positive experiences of lay judges. As researchers assess the emerging evidence, and as legal reformers offer suggestions for modifications to the lay judge system, we urge scholars to continue to examine the potential civic engagement effects of lay judge service.

The introduction and expansion of new systems of lay participation offers a unique and timely opportunity to test civic engagement claims for citizen decision making in law. To date, much of the research on the civic engagement effects of lay judging has been undertaken in the context of existing jury systems with long-settled trial practices and stable and generally supportive public and elite views about the merits of trial by jury. Comparative work on new systems of lay participation like *Saiban-in seido*, including time series studies that track general social and political support for the government, the rule of law, and the legal system before and after the introduction of a jury or lay judge system, can allow us to test civic engagement claims with populations that are newly introduced to the opportunity to participate directly in legal decision making. Of course, the work on new lay participation systems will be challenging, in part because of the need to take into account the diverse political, legal, and cultural contexts of different nations. However, it has great potential payoff.

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Japan’s lay judges can contribute much to our understanding of the theory and practice of deliberative democracy.