The Limits of Change in Japanese Criminal Justice

David T. JOHNSON*/Dimitri VANOVERBEKE**

The past is never dead. It's not even past.
William Faulkner, Requiem for a Nun (1951)

I. INTRODUCTION

This article examines a recent wave of institutional reforms in Japanese criminal justice. It focuses on the effects of three new forms of lay participation: the lay judge trial system, victim participation, and mandatory prosecution through citizen review of non-charge decisions. We argue that while many things have been modified in Japan's criminal process, there is much more continuity than change with respect to criminal justice substance (who exercises control) and outcome (who gets what). In this respect, the past is not really past in Japanese criminal justice. Here as in other spheres where "path dependence" is prominent, historically rooted mechanisms of reproduction have locked in many criminal justice patterns, making it not only difficult to change them but actually reinforcing them by

* Professor of Sociology, University of Hawai'i at Mānoa.
** Professor, KU Leuven.

creating the appearance of increased democratic legitimacy.[1] Given that the main aim of the lay judge system – Japan's most ambitious reform – was to "enhance the power and authority of the judiciary" by increasing public trust in it,[2] the reproduction of substance and outcome in Japanese criminal justice is unsurprising.[3] In that it has enhanced the authority of the judiciary and the procuracy, it could even be called a conservative success.

Our article proceeds in four parts. Part one summarizes some of the positive changes in Japan's criminal process that have resulted from lay participation reforms. Part two – the heart of this article – describes ten ways in which Japan's reforms are limited and problematic. Part three suggests that lay participation in criminal justice is limited and problematic in several other societies. And part four states our conclusions and discusses implications for future research about Japanese criminal justice.

II. Positive Results of Reform

Some criminal justice reform in Japan has been partly successful so far. Some things in Japanese criminal justice have improved, though most have to do with process, not substance.[4] In particular, the lay judge reform, the victim participation reforms, and the reform of Prosecution Review Commissions to enable "mandatory prosecution" *(kyōsei kiso)* have directly altered criminal justice procedures and indirectly stimulated other reforms in the criminal process, including the electronic recording of (some) interrogations, and the provision of more meaningful defense representation to criminal suspects and defendants. Process does matter. As U.S. Supreme Court Justice Felix Frankfurter observed, "The history of American free-

1 J. Mahoney, Path Dependence in Historical Sociology, Theory and Society 29 (4) (2000) 507, 515. See also: P. Pierson, Increasing Returns, Path Dependence, and the Study of Politics, American Political Science Review 94.2 (2000) 251.

2 N. Yanase, Deliberative Democracy and the Japanese Saiban-in (Lay Judge) Trial System, Asian Journal of Law and Society 3.2 (2016) 327, 333–334.

3 As Article 1 of the Lay Judge Law states, "[…] Through the participation in criminal proceedings of lay assessors, who have been selected from among the people, with judges, this legislation seeks to contribute to the promotion of the public's understanding of the judicial system and thereby raise their confidence in it." For an annotated translation of this law, see K. Anderson / E. Saint, Japan's Quasi-Jury (Saiban-in) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials, Asian-Pacific Law and Policy Journal 6 (2005) 233.

4 D. T. Johnson, Retention and Reform in Japanese Capital punishment, University of Michigan Journal of Law Reform 49 (2015) 853. See also: D. T. Johnson / S. Miyazawa, Japanese Court Reform on Trial, in: Greenspan et al. (eds.), The Legal Process and the Promise of Justice: Studies Inspired by the Work of Malcolm Feeley (Cambridge 2019) 122.

dom is, in no small measure, the history of procedure."[5] But the distinction between process and substance can also be blurry, as when "the process is the punishment" in misdemeanor cases.[6] Moreover, a preoccupation with procedure in American criminal justice has led to the sacrifice of important substantive values, including factual accuracy,[7] police accountability,[8] human dignity,[9] and the right of criminal defendants to be tried by a jury of their peers.[10] In our view, while procedure matters in criminal justice, sometimes substance matters more. A close look at criminal justice reforms in Japan reveals that even their most ardent proponents had aims that were preoccupied with questions of process.[11] As a result, Japan's criminal court reforms differ from those in the United States both in *kind* (process vs. substance) and in *ambition* (small vs. large).

Japan's most ambitious attempt at implementing lay participation in the criminal process is the lay judge reform, which took effect in 2009. The lay judge system *(saiban-in seido)* is extensive in at least four ways. First, professional judges in Japan have little discretion to determine whether or not a case will be tried by a lay judge panel. In other jury systems (such as Spain and South Korea), judges have broad discretion to determine the scope of cases to be decided by lay participants,[12] and in the United States "plea bargaining's triumph" is so complete[13] that some analysts worry about the "death" of trial by jury.[14] Second, lay judges in Japan are allowed to ask witnesses questions at trial, whereas jurors in the US and UK have little such authority.[15] Third, the decisions made by lay judge panels in Japan are binding – unlike South Korea, where jury decisions can be over-

5 *Malinski v. New York,* 324 U.S. 401, 414 (1945) (separate opinion).

6 M. FEELEY, The Process is the Punishment: Handling Cases in a Lower Criminal Court (New York 1979).

7 D. SIMON, More Problems with Criminal Trials: The Limited Effectiveness of Legal Mechanisms, Law & Contemporary Problems 75 (2012) 167, 210.

8 S. SEO, Policing the Open Road: How Cars Transformed American Freedom (Cambridge 2019) 275.

9 J. SIMON, Mass Incarceration on Trial: A Remarkable Court Decision and the Future of Prisons in America (New York 2014) 4.

10 J. H. LANGBEIN, Torture and Plea Bargaining, The University of Chicago Law Review 46.1 (1978) 3.

11 FEELEY, *supra* note 6.

12 R. KAGE, Who Judges? Designing Jury Systems in Japan, East Asia, and Europe (Cambridge 2017).

13 G. FISHER, Plea Bargaining's Triumph: A History of Plea Bargaining in America (Stanford 2003).

14 R. BURNS, The Death of the American Trial (Chicago 2009).

15 J. ABRAMSON, We, the Jury: The Jury System and the Ideal of Democracy (New York 1994).

ruled by professional judges,[16] and unlike prewar Japan, where judges could override jury verdicts they did not like.[17] Fourth, lay judge panels in Japan make decisions about both verdict and sentence. In the US, Spain, and some other countries, juries issue a verdict ("guilty" or "not guilty"), but they seldom participate in sentencing decisions (the main American exception is capital sentencing).[18]

Japan's lay judge reform is also striking because, ordinarily, "a legal system will do almost anything, tolerate almost anything, before it will admit the need for reform in its system of proof and trial."[19] This resistance to reform is partly practical, for nothing is so embedded in a legal system as the procedures for proof and trial.[20] It is also ideological, for a theory of proof "purports to govern and explain the adjudicative power,"[21] and hence "plays a central role in legitimating the entire system."[22] Whatever else can be said about Japan's lay judge reform, it is a major change in method for assessing proof and trying persons accused of crime. As we shall see, it also has stimulated change in other parts of Japan's criminal process. Practical and ideological objections had to be overcome before this reform could occur.[23]

In comparative perspective, Japan's lay judge reform is also puzzling, for it occurred even though the Japanese public had a much higher level of confidence in "the justice system" (77 percent) than South Korea (51 percent) and Spain (45 percent) did at the time of their own jury reforms.[24] Hence, the design of Japan's lay judge system cannot be explained by public discontent toward Japanese criminal justice, nor is it explained by the desire of ruling elites to enhance judicial independence in case, one day, they are removed from office and find themselves needing the "insurance" and "protection" that independent courts can provide.[25] Instead, the design features of Japan's lay judge system are partly explained by "the crucial role of partisan politics" – and by the preferences and power of "new left" political parties in particular, especially the Democratic Party of Japan and

16 KAGE, *supra* note 12, 163–171.
17 D. VANOVERBEKE, Juries in the Japanese Legal System: The Continuing Struggle for Citizen Participation and Democracy (London et al. 2015) 60–88.
18 KAGE, *supra* note 12, 17.
19 LANGBEIN, *supra* note 10, 19.
20 LANGBEIN, *supra* note 10, 19.
21 LANGBEIN, *supra* note 10, 20.
22 LANGBEIN, *supra* note 10, 20.
23 D. VANOVERBEKE / J. MAESSCHALCK, A Public Policy Perspective on Judicial Reform in Japan, ZJapanR / J.Japan.L. 27 (2009) 11–37.
24 KAGE, *supra* note 12, 28.
25 KAGE, *supra* note 12, 29–33.

the Clean Government Party.[26] Broader "changes in the political climate," including the end of the LDP's political monopoly in the 1990s, also help explain the timing and form of Japan's new trial system.[27]

What about Japan's other lay participation reforms? Reform of the Prosecution Review Commission Law *(Kensatsu Shinsakai-hō*, hereafter PRC) enables a lay body of 11 citizens to override prosecutors' non-charge decisions in some circumstances. The affirmative power to criminally prosecute a person is enormous, but "the negative power to withhold prosecution may be even greater, because it is less protected from abuse."[28] As a result of this PRC reform, which took effect in 2009, Japan is one of only a few countries that permit lay citizens to override non-charge decisions made by professional prosecutors.[29] Japanese prosecutors have long been cautious about how they charge cases, and they have long exercised great control over "who gets what" in the criminal process.[30] In principle, the PRC reform seems to hold promise for altering longstanding prosecutorial patterns. In practice, however, it has had little effect, as we explain in limit 5, below. Similarly, Japan's victim participation reforms have been called "dramatic and unique"[31] because they enable victims – "the forgotten par-

26 KAGE, *supra* note 12, 34–36. Apart from the question of the lay judge system's design, a separate question – and one beyond the scope of this article – concerns where the pressure for criminal court reform came from in the first place (T. GINSBURG, Who Judges? Designing Jury Systems in Japan, East Asia and Europe, Social Science Japan Journal 22.1 (Winter 2019) 160–161, retrieved from *https://doi.org/10.1093/ssjj/jyy034.* Research suggests that it was caused by the confluence of many forces, including support from Japanese big business (VANOVERBEKE/MAESSCHALCK*, supra* note 23), the impacts of internationalization (D. H. FOOTE, Recent Reforms to the Japanese Judiciary: Real Change or Mere Appearance?, Hō-shakai-gaku [Journal of the Japanese Association for Sociology of Law] 66 (2007) 128–161), the influence of grassroots organizations such as the Research Group on Jury Trials (*baishin saiban o kangaeru kai*) (H. FUKURAI, Book Review: Who Judges? Designing Jury Systems in Japan, East Asia, and Europe by Rieko Kage, The Journal of Japanese Studies 45.2 (2019) 450–451), and the intellectual leadership of key individuals, such as University of Tōkyō Professor of Law Kōya Matsuo and longtime jury advocate, lawyer, and professor Satoru Shinomiya (M. FUJITA, Japanese Society and Lay Participation in Criminal Justice: Social Attitudes, Trust, and Mass Media (Singapore 2018) 22).

27 See FUKURAI, *supra note* 26, 448–452.

28 K. C. DAVIS, Discriminatory Justice (Urbana 1971) 188.

29 D. T. JOHNSON/M. HIRAYAMA, Japan's Reformed Prosecution Review Commission: Changes, Challenges, and Lessons, Asian Journal of Criminology 14.2 (2019) 77–102.

30 D. T. JOHNSON, The Japanese Way of Justice: Prosecuting Crime in Japan (Oxford 2002).

31 M. FEELEY, East Asian Court Reform on Trial: Comments on the Contributors, Washington International Law Journal 27.1 (2017) 273, 281.

ty" in criminal justice[32] – to engage in activities at trial (such as the questioning of criminal defendants) that are seldom permitted in the United States and other common law societies.[33] In this respect, the victim participation reform seems to portend the possibility of significant change in Japanese criminal justice. For the most part, though, that is not what we find (see limit 8, below). The PRC and victim participation reforms are mainly reproducing the status quo.

To be sure, Japan's lay judge reform has had some small "pro-defendant" effects.[34] For example, there has been a slight rise in the acquittal rate for defendants charged with serious crimes. There have been declines in use of the two most severe criminal sanctions: life sentences and death sentences. There has been a rise in the percentage of suspended sentences with probation. There has been a drop in the percentage of cases booked by police that end up being charged by prosecutors. There has been an increase in the willingness of judges to deny prosecutors' requests for the detention of suspects and defendants. And there has been a rise in the percentage of detainees released on bail before a trial verdict is issued.[35]

In addition to these small changes in substance, the lay judge reform has induced a "wide range" of "transformational" effects in Japanese criminal procedure.[36] One prominent analyst even concluded that "many issues remain, but when one thinks back on the situation at the time the new system was introduced, the level of success is quite remarkable."[37] On this view, the lay judge system has created more respect for the presumption of innocence,[38] a perception that is shared by some other observers.[39] It has made

32 J. A. WEMMERS, Where Do They Belong? Giving Victims a Place in the Criminal Justice Process, Criminal Law Forum 20.4 (2009). Note, too, that many continental jurisdictions permit victims to join a criminal action instituted by the state as "subsidiary prosecutors" or through an "adhesion" procedure *(partie civile).* See J. DOAK, Victims' Rights in Criminal Trials: Prospects for Participation, Journal of Law and Society 32.2 (2005) 294–316.

33 FEELEY, *supra* note 6, 281.

34 KAGE, *supra* note 12, 6.

35 KAGE, *supra* note 12, 175 and 202.

36 M. INOUYE, Citizen Participation in Criminal Trials and Reformation of Criminal Justice in Japan, United Nations Asia and Far East Institute, Resource Material No. 105 (2018) 74–115.

37 D. H. FOOTE, Citizen Participation: Appraising the Saiban'in System, Michigan State International Law Review 22.3 (2014) 755, 763.

38 FOOTE, *supra* note 37, 764.

39 M. TAKEDA, *'Yūzai ochi' hinpatsu, kisoritsu teika* ['Charge Rate Reduced' Frequent, Declining Indictment Rate], Kōchi Shinbun, *Kenshō saiban'in seido jūnen* [Assessing: One Decade of the Lay Judge System] (Part 1) (30 January 2019) 12. The other articles in the series of five are the following: M. TAKEDA, *Utagawashiki*

prosecutors more cautious about charging borderline cases, and hence may be preventing some wrongful convictions.[40] It has led to more appropriately harsh sentences for some persons convicted of sex crimes.[41] It has led to more use of suspended sentences, which may encourage rehabilitation.[42] And though the evidence is thin, it may have enriched trial deliberations about guilt and sentence by requiring judges to interact with citizens who have different life experiences and perspectives.[43] More broadly, the lay judge reform is significant because it provided the opening for several other major reforms in Japan's criminal justice system, including the strengthening of the defense counsel function, expanded discovery, and increases in the electronic recording of interrogations.[44]

One of the most articulate advocates for increasing lay participation in Japanese criminal justice has identified six significant procedural changes that were stimulated by the lay judge reform.[45] The first two refer to changes in defense lawyering that seem to be invigorating an "unbalanced" adversary system that has long tilted toward the interests of the state.[46]

---

wa muzai, tettei, yūzairitsu teika: rissshō mujun tsuku [Innocent in Case of Doubt: Bringing It Home; Declining Guilty Verdicts, Contradictions in the Evidence], Kōchi Shinbun, *Kenshō saiban-in seido jūnen* [Assessing: One Decade of the Lay Judge System] (Part 2) (3 March 2019) 19; M. TAKEDA, *Genbatsuka no ippō de yūyo ōku; 'Kōi sekinin' tettei, ryōkei ni haba* [Increasing Punitiveness and Also Probation; Bringing the 'Responsibility for Actions' Home, Wide Range in Sentences], Kōchi Shinbun, *Kenshō saiban-in seido jūnen* [Assessing: One Decade of the Lay Judge System] (Part 3) (23 March 2019) 6; M. TAKEDA, *Nagabiku hyōgi 13 jikan ni, chokusetsu shinri e, shōko heri shōnin baizō* [The Deliberations Are Dragging on to 13 Hours, Towards Direct Trials, Fewer Evidence, Double as Many Witnesses], Kōchi Shinbun, *Kenshō Saiban-in seido jūnen* [Assessing: One Decade of the Lay Judge System] (Part 4) (25 April 2019) 6; M. TAKEDA, *Jitai ka kesseki 8 wari chikaku, shinri chōkika tō yōin: shuhigimu keiken tsutaerarezu* [Declining or Default for More Than 80 Percent, the Extension of the Deliberation as one of the Contributing Factors], Kōchi Shinbun, *Kenshō saiban-in seido jūnen* [Assessing: One Decade of the Lay Judge System] (Part 5) (22 May 2019) 25.

40 FOOTE, *supra* note 37, 765.

41 FOOTE, *supra* note 37, 766.

42 FOOTE, *supra* note 37, 766.

43 FOOTE, *supra* note 37, 767.

44 FOOTE, *supra* note 37, 773.

45 S. SHINOMIYA, *Kokumin no shutaiteki, jisshitsuteki sanka wa jitsugen shiteiru ka: Saiban-in seido shikkō jūnen to kongo no kadai* [Has the Participation of the Citizens in an Independent and a Substantial Way Become a Reality? One Decade Since the Implementation of the Lay Judge System and Future Issues, (Special Issue: Welcoming a Decade of Implementation of the Lay Judge System)], Jiyū To Seigi 70.5 (2019) 8–17.

(a) A new public defender system provides criminal suspects with legal representation *before* indictment *(higi-sha kokusen bengo seido).*
(b) There is increased specialization in criminal defense lawyering *(keiji bengo no senmonka).*
(c) A more formal pretrial process was created, with expanded rights of discovery for defendants to the evidence in prosecutors' possession *(kōhan mae seiri tetsuzuki to shōko kaiji).*
(d) Lay judge trials proceed more continuously and rapidly than traditional trials did *(renjitsuteki kaitei).*
(e) There is more reliance on the principles of "directness" and "orality" at trial, and there is less reliance on written dossiers as *evidence (kōhan ni okeru chokusetsu shugi – kōtō shugi no tettei).* As a result, trials are easier to understand and more interesting to watch.
(f) There is greater transparency in interrogations, largely because they are electronically recorded *(torishirabe no kashika).*

In addition to these procedural reforms, Shinomiya believes there have been significant changes in Japan's "judicial mindset" *(saiban-kan no maindosetto no henka),*[47] with judges becoming less deferential to the interests of law enforcement. In his view, this is the most important consequences of the lay judge reform, for Japan's judiciary has long taken a

46 M. FEELEY / S. MIYAZAWA (eds.), The Japanese Adversary System in Context: Controversies and Comparisons (Basingstoke et al. 2002). Moreover, as described by Takano and Takayama, two of Japan's leading defense attorneys, the lay judge reform has had several positive effects on criminal defense, including these: (1) it has made trials less dependent on dossiers composed by police and prosecutors during pre-trial investigations in which defense lawyers are largely absent, and it has made trials more reliant on the direct and oral testimony of witnesses in open court; (2) it has made defense lawyers more active and aggressive in lay judge trials, a change that has had spill-over effects in non-lay judge trials; and (3) it has stimulated the creation of an improved system for the disclosure of evidence to the defense (*shōko ichiranhyō kōfu seido*) (T. TAKANO*, Saiban-in seido no kōka: 10-nen o furikaette (tokushū: saiban-in saiban shikkō 10-nen o mukaete)* [The Impact of the Lay Judge System: Looking Back on a Decade (Special Issue: Welcoming a Decade of Implementation of the Lay Judge System)], Jiyū To Seigi 70.5 (May 2019) 18–29; I. TAKAYAMA, *Hikoku-nin no tame no saiban-in saiban ga jitsugen dekiteiru ka: korekara no jūnen ni mukete jūnen o furikaeru (tokushū saiban-in saiban shikkō jūnen o mukaete)* [Has the Trial for the Accused Become a Reality? Looking Back on a Decade for the Next Decade (Special Issue: Welcoming a Decade of Implementation of the Lay Judge System)], Jiyū To Seigi 70.5 (2019) 30–36. On the possibility of change in Japanese criminal defense lawyering, see D. T. JOHNSON, American Capital Punishment in Comparative Perspective, Law & Social Inquiry 36.4 (2011) 1033–1061.

47 SHINOMIYA, *supra* note 45.

"conservative" stance on criminal justice issues.[48] Throughout the postwar period, the Japanese judiciary has "adopted, accepted or silently acquiesced in a wide range of interpretations that greatly circumscribed the protections for suspects and defendants, while granting broad authority to the investigators."[49] Shinomiya believes the presence of lay judges is slowly transforming these traditional judicial sensibilities in ways that are making the criminal justice system more fair and just – especially to suspects and defendants. It will take many more years to make a sound assessment of the full effects of Japan's lay judge reform, but in the long run, he could be right. The fresh eyes of the amateur are important because, often, in law as in life, the more one looks at a thing, the less one sees it. As G. K. Chesterton observed more than a century ago,

> "It is a terrible business to mark a man out for the vengeance of men. But it is a thing to which a man can grow accustomed, as he can to other terrible things […]. The horrible thing about all legal officials – even the best—about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), and not that they are stupid (several of them are quite intelligent). It is simply that they have got used to it. Strictly, they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop."[50]

Lay participation in Japanese criminal justice could correct the judicial tendency to see "the awful court of judgment" as one's own familiar workshop.[51] And defense lawyers seem to be realizing that in the presence of lay judges, they are no longer "talking to a wall."[52] Defense lawyers are even starting to "rattle the cages" of judicial interpretation that have long constrained the practice of criminal defense.[53] Moreover, there have not been major failures of the kind that have been common in the United States, and lay participation reforms in Japan have not made things worse.[54] In making

48 D. H. FOOTE, Policymaking by the Japanese Judiciary in the Criminal Justice Field, Hō Shakai Gaku No. 72 (2010) 18.

49 FOOTE, *supra* note 48, 17–18.

50 G. K. CHESTERTON, The Twelve Men, in: Tremendous Trifles (1909).

51 In 1914, one of Japan's most famous novelists seemed to echo Chesterton's insight. In an essay on art and experts, Natsume Sōseki noted that the senses of specialists eventually become dull, which is why they need the help of lay people, who "only get a clear view of Mount Fuji when standing far away from it." See NATSUME SŌSEKI, *Shirōto to Kurōto* [Amateurs and Experts], in: Natsume Sōseki Zenshū [Natsume Sōseki's Collected Works], Volume 11 (7th ed., Tōkyō 1967) 224–255.

52 D.T. JOHNSON, War in a Season of Slow Revolution: Defense Lawyers and Lay Judges in Japanese Criminal Justice, Asia-Pacific Journal – Japan Focus 9.26 (2011).

53 JOHNSON, *supra* note 46.

54 FEELEY, *supra* note 31, 273, 292.

these assessments we do not mean to "damn Japan with faint praise" *(homegoroshi)*. From an American perspective, heeding the Hippocratic Oath – "first, do no harm" – by avoiding the potentially iatrogenic effects of reform is no small achievement.[55]

Nevertheless, on the presently available evidence, after ten years of lay judge trials and "high praise and acclaim from nearly all quarters" for the effects of this reform,[56] our conclusion is that there is more continuity than change in the "mindsets" and practices of Japanese judges and prosecutors. As the next section describes, these legal professionals have circumscribed the influence of ordinary citizens in a variety of ways, much as legal professionals did in response to previous reforms (such as the prewar jury system) that aimed to establish meaningful forms of lay involvement.[57] We stress (again) that it will take more time to discern the full effects of Japan's recent lay participation changes. But if the proof of reform is mainly in the pudding, then we have to conclude that not much has yet changed in Japanese criminal justice.

III. The Limits of Reform

Evaluations of Japan's lay participation reforms tend to converge on two main conclusions. They are believed to have produced major changes in Japanese criminal justice, and the changes are seen as welcome and progressive.[58] In our view, these assessments are too positive about the scope

55 M. Feeley, Court Reform on Trial: Why Simple Solutions Fail (New York 1983).

56 M. J. Wilson / H. Fukurai / T. Maruta, Japan and Civil Jury Trials: The Convergence of Forces (Cheltenham et al. 2015) 38.

57 Vanoverbeke, *supra* note 17.

58 There are dissenting views. Consider three of them. First, Futaba Igarashi argues that Japan's lay judge system must confront "two crises" or it will become an empty and "hollowed out" reform: (a) the failure to provide adequate due process to criminal suspects and defendants, and (b) the failure to really reflect citizens' opinions in criminal justice decision-making (F. Igarashi, *Kō naosanakereba saiban-in saiban wa kūdō ni naru* [If the Lay Judge System Is Not Changed Like This, It Will Become Hollowed Out] (Tōkyō 2016) 3–15. Second, Mark Levin argues that "the more things change [with respect to Japanese criminal justice], the more things stay the same" *("Plus Ca Change, Plus C'est la Même Chose"),* and he concludes that Japanese criminal justice reform has taken "two steps forward and five steps backward" (M. A. Levin, Considering Japanese Criminal Justice from an Original Position, in: Liu / Miyazawa (eds.), Crime and Justice in Contemporary Japan. Springer Series on Asian Criminology and Criminal Justice Research (Cham 2018) 173–188, 185). Third, Matthew J. Wilson observes that lay judge trials occur in only a handful of cases, and officials seem inordinately interested in their "halo effect", for they stress the public support lay judge trials have generated for Japa-

and effects of reform, and they tend to conflate process with substance. This section describes and discusses ten ways in which Japan's lay participation reforms are limited and problematic. We address each one in turn.[59]

1. A Sliver of Cases

Japan's Lay Judge Law states that lay judge panels shall hear cases in two categories: (a) crimes that are punishable by death, imprisonment for an indefinite period, or imprisonment with hard labor; and (b) crimes in which a victim has died because of an intentional criminal act. These two categories might seem to constitute a large slice of Japan's criminal justice pie, but it is actually just a sliver. In 2017, for example, 1,122 persons were charged with criminal offenses that were eligible for a lay judge trial. This was 4 percent more than the 1,077 persons similarly charged in 2016, but it was just 1.6 percent of the total number of persons (69,674) charged with crimes in Japan in 2017 (see *Table 1*). For every person indicted for a lay judge trial, approximately 60 people are indicted for non-lay judge trials. Global descriptions of change in "Japanese criminal justice" based on less than two percent of the system's caseload are as dubious as accounts of life in San Francisco based on the lifestyles of the rich and famous in the city's wealthiest neighborhoods (such as Potrero Hills and Presidio Heights). Similarly, predictions that the lay judge reform will have a "profound effect on Japanese criminal justice" fail to recognize that a sliver of a slice is not the whole pie.[60]

---

nese criminal justice and the sense of efficacy people feel after serving as lay judges, while paying virtually no attention to whether the lay judge system has actually shifted power relations among prosecutors, judges, and defense attorneys (M. J. WILSON, Assessing the Direct and Indirect Impact of Citizen Participation in Serious Criminal Trials in Japan, Pacific Rim Law & Policy Journal 27 (2017) 75, 102–104). But Wilson also believes reform has brought important benefits to Japanese society. As he summarizes, "From the outset, the creation and implementation of the lay judge system have been strongly controlled by the status quo such that direct impact on the outcome of individual criminal trials has been minimized. However, the value of this monumental court reform in Japan has been educational, indirect, and real" (*ibid.* 75). Later in this section we will argue that the "educational" and "indirect" effects of the lay judge reform are far from "monumental."

59 These limits of reform can be placed in three categories: problems inherent in the lay participation reforms (1 and 2); changes that consolidate the status quo (3, 7, and 8), and little or no change (4–6 and 9–10).

60 INOUYE, *supra* note 36, 74.

Table 1: Ratio of Lay Judge Trial Indictments to Total Number of Criminal Indictments, 2009–2017[61]

Year	Lay Judge Trial Indictments (1)	Indictments Total (2)	Percentage 1/(1+2)
2009	1,196	96,541	1.23
2010	1,797	91,322	1.96
2011	1,785	85,586	2.08
2012	1,457	83,823	1.84
2013	1,465	78,774	1.85
2014	1,393	77,405	1.79
2015	1,333	77,268	1.72
2016	1,077	73,060	1.47
2017	1,122	69,674	1.61

Descriptions of Japan's new trial system commonly claim that lay judge panels hear "serious criminal cases" or "heinous criminal cases" or the like. This linguistic shorthand is handy, but it profoundly misstates the matter, for nearly all criminal cases are "serious" in the sense that they result in some combination of incarceration, fine, supervision, tracking, marking, stigmatization, or life disruption.[62] In fact, simply getting arrested in Japan can have catastrophic consequences – regardless of the offense severity, and even when arrest does not lead to indictment. One pernicious myth about criminal justice is that "minor arrests and convictions are not especially terrible for the people who experience them."[63] In Japan as in the United States, this myth is callous to the many people whose lives are adversely impacted by contact with the criminal process. It also contributes to the tendency to conflate Japanese "criminal justice" with the "lay judge system," for if the stakes are mistakenly seen to be low, why bother to discover what actually happens in the other criminal courthouses? Most importantly, the myth of the "minor matter" functions to normalize the "punitive and vexatious" ways in which so-called "petty" *(bizai)* cases are pro-

61 Note: Lay Judge Trial Indictments are calculated from various reports published by Japan's Supreme Court, 裁判員制度の実施状況について【データ】[*Saiban–in seido no jisshi jōkyō ni tsuite: dēta;* About the Implementation Status of the Lay Judge System: Data], retrieved at *http://www.saibanin.courts.go.jp/topics/09_12_05-10jissi_jyoukyou.html*; and total indictments are calculated from 犯罪白書 [*Hanzai hakusho;* White Paper on Crime], retrieved at *http://hakusyo1.moj.go.jp/jp/65/nfm/n65_2_2_2_3_0.html#h2-2-3-02*, figure 2-2-3-02.

62 FEELEY, *supra* note 6.

63 A. NATAPOFF, Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal (New York 2018) 19.

cessed in the nether regions of Japanese criminal justice, where lay judges do not serve and journalists and scholars seldom tread.[64] Thanks to research by Japanese reporters and scholars, we now know a lot about how Japan's lay judge system is operating. Yet we need to be honest about our ignorance too, for we know precious little about how the rest of Japanese criminal justice system is (or is not) working.[65] Ignorance is ignorance, and no right to believe anything can be inferred from it.

Lay judge trials are not only a small sliver of all criminal cases in Japan; they also do not adjudicate many of the country's most serious crimes. In 2016, all of the ten most frequently tried lay judge offenses were street crimes even though corporate crime, white-collar crime, and corruption are widely considered the country's greatest crime problems.[66] In this respect, the lay judge system reflects and reinforces a troubling dualism in Japanese criminal justice: police and prosecutors are enabled to effectively "make crimes" against offenders for most ordinary street crimes,[67] but they are disabled from holding accountable many of the country's most powerful and harmful actors.[68] Lay judge trials thus reinforce Japan's "legal cobweb," which catches small flies but lets wasps and hornets break through in analogy with Jonathan Swift in *A Tritical Essay upon the Faculties of the Mind* (1707).

Japan also has serious problems with sexual assault and other crimes of sexual violence and aggression.[69] Yet another large lacuna in Japan's lay judge system is the exclusion of most serious sex offenses from its jurisdiction. In 2017, for example, there were 115 lay judge trials for "forcible

64 A. PETERS, Some comparative observations on the criminal justice process in Holland and Japan, Journal of the Japan-Netherlands Institute 4 (1992) 247, 291.

65 IGARASHI, *supra* note *58*.

66 A. S. MILLER/S. KANAZAWA, Order by Accident: The Origins and Consequences of Conformity in Japan (Boulder 2000) Ch. 7; D. T. JOHNSON, Prosecutor Culture in Japan and the USA, in: Nelken (ed.) Contrasting Criminal Justice: Getting from Here to There (Ashgate 2000) 157–204; D. LEONARDSEN, Crime in Japan: Paradise Lost? (Basingstoke et al. 2010) 13; M. M. CARLSON/S. R. REED, Political Corruption and Scandals in Japan (Ithaka 2018).

67 See: S. MIYAZAWA/F. G. BENNETT, Policing in Japan: A Study on Making Crime (Albany 1992); JOHNSON, *supra* note 30.

68 D.T. JOHNSON, *Kumo no su ni shōchō sareru nihon-hō no tokushoku* [The Specificities of Law in Japan: the legal cobweb], translated by H. Tanaka, Jurisuto 1.15 (1999); also: D. T. JOHNSON, *Nihon no 'kumo no su': Shihō to kensatsu* katsudō [Japan's Legal Cobweb: The Acticities of the Judiciary and the Prosecutors], in: Ibusuki et al. (eds.), *Keiji shihō o ninau hitobito* [The People in Charge of Criminal Justice], Volume 3 in the series *Keiji shihō o kangaeru* [Thinking of New Horizon in Criminal Justice], translated by M. Hirayama, (Tōkyō 2017) 29–51.

69 C. BURNS, Sexual Violence and the Law in Japan (London et al. 2005); S. ITŌ, Black Box (Tōkyō 2017).

indecency resulting in death or injury", 75 lay judge trials for "sexual assault resulting in death or injury", and 10 lay judge trials for "robbery-rape." In total, these 200 sex offenses comprise 18.6 percent of all lay judge trials (1077) in that year, but they represent only a small fraction of all serious sex crimes.[70] In 2017 Japan's Penal Code was revised to make the first significant changes in its sex crime provisions since 1907. The revised Penal Code now defines various sex "crimes" under Articles 174–179 and Articles 181 and 241, and "attempted [sex] crimes" *(misui-zai)* under Articles 176–179. But the only crimes eligible for lay judge trial are defined in Article 181 (forcible indecency resulting in death or injury) and Article 241 (robbery and forcible sexual intercourse resulting in death).[71] Other sex offenses are not deemed sufficiently serious to qualify for lay judge trial.[72] In fact, until the Penal Code revision of 2017, "gang rape" *(shūdan gōkan-zai)* was not eligible for lay judge trial, and neither was "robbery-rape" *(gōtō gōkan-zai)* if the rape occurred *before* the robbery. Even after the 2017 revision, simple rape ("forced intercourse") and "intercourse or indecent behavior by a custodian" (Article 179) remain ineligible for lay judge trial. As for crimes of sexual molestation *(chikan)*, which are ubiquitous in Japan,[73] the vast majority are excluded from lay judge trial because they are charged under local ordinances in which the maximum punishment is typically set at 1 year (as in Tōkyō) or 6 months (as in many other prefectures). If lay judge trials are supposed to rely on "citizen sensibilities" for making judgments about "the most serious crimes," then the exclusion of the vast majority of sex crimes from the new trial system further illustrates the ironies and contradictions of Japan's "legal cobweb."[74] Some commentators have called for broadening the scope of lay judge trials to encompass more

70 Statistics on sex crimes are published annually by Japan's National Police Agency: see, *https://www.npa.go.jp/publications/statistics/sousa/statistics.html*. See also the following article on the address by the famous sociologist Shizuko Ueno at the matriculation ceremony at the University of Tōkyō in April 2019: Y. NAKAO, Feminist Scholar Calls Japan's Gender Problem "Human Disaster" (KYODO NEWS – 22 June 2019), retrieved from: *https://english.kyodonews.net/news/2019/06/5fbad0a24182-feature-feminist-scholar-calls-japans-gender-problem-human-disaster.html*.

71 Emails from Hakuoh University Professor of Law Mari Hirayama, 26 July 2019 and 9 August 2019.

72 M. HIRAYAMA, Lay Judge Decisions in Sex Crime Cases: The Most Controversial Area of Saiban-in Trials, Yonsei Law Journal 3 (2012) 128; M. HIRAYAMA, A Future Prospect of Criminal Justice Policy for Sex Crimes in Japan – the Roles of the Lay Judge System There, in: Liu / Miyazawa (eds.), *supra* note 58, 303–317.

73 A. SAITŌ, *Otoko ga chikan ni naru riyū* [The Reason Why a Man Becomes a Groper] (Tōkyō 2017).

74 JOHNSON, *supra* note 68.

cases, but most efforts to date have focused on narrowing the scope of eligible offenses, not expanding it.[75]

2. Where are the Police?

Various labels have been used to characterize criminal justice in Japan. "Precise justice" *(seimitsu shihō)* and "prosecutor justice" *(kensatsu shihō)* are two of the most familiar,[76] but "police justice" *(keisatsu shihō)* may be the most telling.[77] We know of no police force in any democracy that is as powerful as the Japanese police.[78] It is hard to say exactly, but half or more of all discretion in Japanese criminal justice is probably exercised by the police.[79] In the aggregate, what police do with their discretion strongly shapes the content and quality of Japanese criminal justice. In this context, it is striking how little attention has been directed at police in Japan's justice reform movement generally, and in its lay participation reforms specifically.

The fact that police seldom appear in Japan's reform agenda is all the more remarkable because there have been many recent innovations aimed at making "lay and expert contributions" more salient and influential in Japanese criminal justice.[80] These include not only the lay judge system, the victim participation system, and the reformed Prosecution Review Commissions, but also an enhanced role for forensic psychiatrists in making judgments about criminal insanity and diminished responsibility, the provision by social workers of more "support at the entrance" *(iriguchi shi'en)* for criminal suspects and defendants, and the increased involvement of scientists in criminal justice fact-finding, especially in assessing DNA and other forensic evidence.[81] Japan's recent lay participation innovations also include

---

75 TAKAYAMA, *supra* note 46, 36.

76 One of the defining features of "precise justice" (*seimitsu shihō*) and "prosecutor justice" *(kensatsu shihō) i*s reliance on detailed dossiers composed during pretrial investigations (JOHNSON, *supra* note 30, 264–275). Although the lay judge reform has led to somewhat less reliance on dossiers (TAKEDA, *supra* note 39), many defense lawyers maintain that they continue to play too large a role in criminal trials (TAKANO, *supra* note 46; TAKAYAMA, *supra* note 46).

77 D. T. JOHNSON, *Nihon ni okeru shihō seido kaikaku: Keisatsu no shozai to sono jūyōsei* [Justice System Reform in Japan: Where Are the Police and Why It Matters], Hōritsu Jihō 76. 2 (February 2004) 8–15.

78 MIYAZAWA/BENNETT, *supra* note 67; D.T. JOHNSON, Retention and Reform in Japanese Capital Punishment, University of Michigan Journal of Law Reform 49 (2015) 853.

79 K. C. DAVIS, Discretionary Justice: A Preliminary Inquiry (Chicago 1969).

80 E. HERBER, Lay and Expert Contributions to Japanese Criminal Justice (New York 2019).

81 HERBER, *supra* note 80.

a "boom" in crime prevention activities by citizen volunteers.[82] Despite this flurry of reform, there has been little effort to make Japanese police more responsive and accountable to the public that they ostensibly serve.

Citizen oversight of police has proven effective in many other countries and contexts.[83] In this sense, police may be the biggest winner in Japan's justice system reform movement. They do not want their status – much power and little accountability – to change, and they are getting what they want, largely because they have been able to limit the scope of the political process to consideration of only those reform issues that are innocuous to them.[84]

Police power has long been evident in Japanese criminal justice reform. In 2001, eight years before lay judge trials started, Toshiki Odanaka observed that important police issues were missing in the reform agenda. As he put it,

> "The opinion [of the Justice System Reform Council] stresses the primary importance of a fair and rapid sentence but dismisses the importance of a just procedure. Although the JSRC pursued the expansion of investigation methods such as criminal immunity and securing witness cooperation, it clearly states that it will not direct efforts at the improvement of the police detention system (including 'substitute prisons', or *daiyo kangoku)* or police investigations […] This is […] the result of a political calculation driven by ambition for power […] The reform of justice described in the [JSRC's] opinion paper is obviously regressive against the background of constitutional principles such as the protection of human rights, the guarantee of independent justice, the right to a fair trial, and the right to fair procedures."[85]

---

82 E. HERBER, Crime Prevention in Japan Orchestration, Representation and Impact of a Volunteering Boom, International Journal of Law, Crime and Justice 54 (2018) 102–110.

83 S. E. WALKER / C. A. ARCHBOLD, The New World of Police Accountability (Thousand Oaks 2018).

84 P. BACHRACH / M. BARATZ, Two Faces of Power, American Political Science Review 56.4 (1962) 941–952.

85 See T. ODANAKA, *Konpan no shihō seido kaikaku no 'gyaku-kaikaku' teki honshitsu* [The "Counter-Reformative" Essence of Today's Judicial Reforms], Hō To Minshu Shugi [Law and Democracy] 360 (July 2001) 36–38 and VANOVERBEKE, *supra* note 17, 133 (quoting Odanaka). Concerns about the police being overlooked and ignored were also expressed in Masayuki Suo's trenchant analysis of his experiences on a criminal justice reform commission *(hōsei shingi-kai)* called the "Special Committee on Criminal Justice for a New Era" *(shin-jidai no keiji shihō seido tokubetsu bukai)*. See M. SUO, *Sore demo boku wa kaigi de tatakau: Dokyumento keiji shihō kaikaku* [Even So I Will Fight in Committee: Reportage on Criminal Justice Reform] (Tōkyō 2015). This is a harshly critical examination of Japan's reform process. Note, though, that in a 2019 interview, Suo expressed positive views about the effects of lay participation, saying "I had hoped the lay judge reform would go well, but there are aspects of it that are going even better than I expected, and some things [in Japanese criminal justice] have improved dramatically." A summary of Suo's views even states that there has been "great progress" *(dai-shinpō)* in Japa-

By keeping the issues of police power, performance, and accountability outside the realm of public discussion, the constricted scope of criminal justice reform in Japan illustrates a general truth about the role played by power and rationality in the reform process. To wit: power has the capacity to define "reality" by producing knowledge that is useful to it and by suppressing knowledge for which it has no use.[86] Since at least the time of the Occupation (1945–1952), Japanese police have been extraordinarily successful at producing rationalizations that serve their interest and suppressing rationality that would challenge their position of primacy in criminal justice.[87] Despite a plethora of lay participation reforms in recent years, this crucial fact has not changed.[88]

3. An Abundance of Prosecutorial Caution

One axiom about criminal court reform is that it matters *how reforms are implemented*. Another is that court reform routinely has *unintended conse-*

---

nese criminal justice as a result of the lay judge reform. See the interview by Akihiro Otani, in Fuji News Network & Tōkai Terebi (17 August 2019), at: *https://www.fnn.jp/posts/00047349HDK/201909301712_THK_HDK?fbclid=IwAR3TWszdd_VgD524-BfibWCCav5D0yo0JUMn1ebzdm8dvJR6S1 IkPBxogjo*.

86 B. FLYVBJERG, Rationality and Power: Democracy in Practice (Chicago 1998) 36.

87 CH. ALDOUS/F. LEISHMAN, Policing in Post-war Japan: Reform, Reversion and Reinvention, International Journal of the Sociology of Law 25.2 (1997) 135–154.

88 One consequence of marginalizing police in Japan's reform process is a continued reliance on confessions in Japanese criminal justice (D. H. FOOTE, Confessions and the Right to Silence in Japan, Georgia Journal of International & Comparative Law *https://digitalcommons.law.uga.edu/gjicl/* 21 (1991) 415; MIYAZAWA/BENNETT, *supra* note 67) – though there have been some noteworthy changes as well. More criminal suspects and defendants are invoking their right to remain silent. The length of interrogations has declined in recent years. And as of June 2019, interrogations must be recorded in all cases involving lay judges. Despite significant loopholes, the recording requirement increases the transparency of a police (and prosecutor) practice that has long been problematic (JOHNSON, *supra* note 30, Ch. 8). At the same time, electronic recording creates a new concern, that video evidence of the interrogation process will "mislead" lay judge panels (M. IBUSUKI, The Dark Side of Visual Recording in the Suspect Interview: An Empirical and Experiential Study of the Unexpected Impact of Video Images, International Journal for the Semiotics of Law 38 (2019) 831–847), and "over-influence" their decisions (T. MURAI/K. MURAOKA, Harsh Judgment: Japan's Criminal Justice System: Citizens on the Bench: Assessing Japan's Lay Judge System (*www.nippon.com*, 26 June 2019) retrieved from: *https://www.nippon.com/en/japan-topics/c05402/citizens-on-the-bench-assessing-ja pan%E2%80%99s-lay-judge-system.html*). The use of video recordings in the "Imaichi" kidnap-murder trial in Utsunomiya District Court illustrates the potentially pro-law enforcement effects of Japan's recording reform (S. MIYAZAWA/M. HIRAYAMA, Introduction of Videotaping of Interrogations and the

quences.[89] The most consequential result of Japan's lay judge reform is how prosecutors have tried to implement and resist it – with an abundance of charging caution. Although many Japanese reformers did not anticipate this result, in retrospect it seems unsurprising, for prosecutors have long used their discretion to control the inputs into Japan's criminal courtrooms, and they are loath to relinquish this gatekeeper role.[90]

From January to May of 2019, Kyodo News journalist Masahiro Takeda wrote a series of five articles called "Ten Years of the Lay Judge System" *(Saiban-in seido 10-nen)*. The first article in this series makes his most important point – one he has been making for years.[91] The title of the lead article is "Crimes Often Reduced as Charge Rate Declines: Some See Prosecutor Caution as 'Tight-Assed'" *("'Zaimei-ochi' hinpatsu kisoritsu teika: Kensatsu shinchō 'shirigomi' shiteki mo")*.[92] In it, Takeda observes that in 2004 (the year the Lay Judge Law was passed), 3,800 criminal cases would have been eligible for lay judge trial. In the same year, the Justice System Reform Council said it expected there to be approximately 3,000 lay judge trials per year after the Law took effect in 2009. But in 2009, only 2,133 criminal cases were eligible for lay judge trial, and by 2016 the number had fallen to 1,122 – less than 30 percent of the number for 2004.

There are two main reasons for this large drop in the number of cases eligible for lay judge trial. First, crime rates in Japan have declined. From 2004 to 2017, the homicide rate declined by 36 percent, the robbery rate declined by 76 percent, and the total number of Penal Code offenses declined by 73 percent. These crimes declined part because of demographics:

Lessons of the Imaichi Case: A Case of Conventional Criminal Justice Policy-Making in Japan, Pacific Rim Law & Policy Journal 27 (2017) 149.

89 FEELEY, *supra* note 6.

90 JOHNSON, *supra* note 30.

91 TAKEDA, *supra* note 39.

92 TAKEDA, *supra* note 39 (Part 1) 12. Consider three Japanese expressions that have been used to criticize prosecutorial caution in charging cases for lay judge trial. First, *"shirigomi"* (尻込み) is often translated into English as "hesitate" or "flinch." This is one way of disparaging the timid and fainthearted. Second, the perception that Japanese prosecutors are too timid about charging cases has led some scholars and reporters to call them "cowards" (*okubyō* = 臆病); authors' interviews, 2009–2019). Third, a prominent Japanese defense lawyer (Takashi Takano) calls prosecutors "weak-willed" (*hetare* = ヘタレ) because of their excessively cautious approach to charging cases that could be eligible for lay judge trial (JOHNSON / MIYAZAWA, *supra* note 4, 129. In Takano's view, an excess of prosecutorial prudence undermines the point of the lay judge trial, which is to give citizens a significant say in making criminal justice decisions. As defined in the Urban Dictionary, *"hetare"* is *anime* slang signifying "an inept and mentally unstable character" who frequently worries about "something benign." English synonyms include "baby balls" and "nebbish."

the graying of Japanese society means there are fewer young people in the crime-prone years. The second reason for the sharp decline in the number of "object cases for lay judge trial" *(saiban-in saiban no taishō jiken)* is increased "prosecutor caution" *(kensatsu shinchō)*, which comes in two types: charging cases received from the police lightly, by reducing the offense severity *(zaimei-ochi jiken)*; and not charging cases at all *(kiso ga miokurareta jiken)*. Here, too, the numbers are striking.[93] In 2006, Japanese prosecutors charged 57.0 percent of all homicide cases that were sent to their office. By 2009 the figure had fallen to 48.6 percent, and by 2017 it had dropped to 28.2 percent – less than half the percentage from just 11 years earlier. The charge rate *(kisoritsu)* drop for arson of a dwelling is similarly sharp. The "charge rate" for robbery with injury fell from 79.9 percent in 2006 to 32.8 percent in 2013 – a decline of nearly three-fifths. As for sex offenses, the charge rate for rape leading to injury or death dropped from 69.7 percent in 2006 to 43.7 percent in 2017.[94] A similar increase in prosecutorial caution is evident in the percentage of cases that prosecutors charge "as is" *(sōken zaimei kisoritsu)* – that is, the percentage of cases that prosecutors charge with the same crime that was alleged in the paperwork received from the police. For homicide (including attempts), the "as-is" charge rate fell from 40.6 percent in 2006, to 32.9 percent in 2009, to 21.3 percent in 2017. Thus, the "as-is" charge rate for homicide in 2017 was only about half what it was 11 years earlier.

Japan's executive prosecutors claim that because charge rates started declining before lay judge trials started in 2009, the lay judge system cannot be its cause. We disagree. Prosecutors are clearly charging cases in the shadow of lay judge trials – as they have been doing since *before* 2009. "Mock lay judge trials" *(mogi saiban-in saiban)* started soon after the Lay

93 TAKEDA, *supra* note 39 (Part 1).

94 As for sex offenses that are *not* eligible for lay judge trial, the charge rate *(kisoritsu)* for rape *(gōkan)* fell from about 60 percent in 2005 to 34.7 percent in 2014, while the charge rate for forcible obscenity *(kyōsei waisetsu)* fell from over 50 percent to 40.7 percent over the same period of time. In 2018–2019, the Japanese media harshly criticized Japanese courts for acquitting some criminal defendants who had been charged with sex crimes, but as these statistics suggest, the main problems with the handling of sex crime cases in Japanese criminal justice is excessive prosecutorial caution and an "epidemic of disbelief" among Japanese police and prosecutors regarding the statements made by victims (M. KAWAI, *Sei-hanzai muzai hanketsu, hontō no mondai-ten wa nani ka,* [Sex Crimes, Acquittals: What are the Real Issues?], Asahi Ronza, 15 May 2019. In these respects Japan strongly resembles the United States (B. BRADLEY HAGERTY, An Epidemic of Disbelief, The Atlantic (August 2019) at *https://www.theatlantic.com/magazine/archive/2019/08/an-epidemic-of-disbelief/592807/?*).

Judge Law was enacted in 2004, and prosecutors soon realized that lay judge panels were less likely to give them what they want than were the panels of professional judges that they were accustomed to. Prosecutors adjusted their charging standards accordingly, by becoming more cautious. In this they conformed to a norm that has long governed their behavior: a case should not be charged if the court might wonder about its judgment.

Table 2: Japan's Declining Charge Rate, 2000–2016[95]

Year	Decision-to-Charge (1)	Decision-not-to-Charge (2)	Charge Rate 1/(1+2)
2000	86,897	63,962	57.6
2001	93,286	70,780	56.9
2002	100,913	81,376	55.4
2003	105,375	92,494	53.3
2004	110,193	110,346	50.0
2005	109,441	124,184	46.8
2006	110,298	142,852	43.6
2007	102,993	133,196	43.6
2008	98,570	123,457	44.4
2009	96,541	123,184	43.9
2010	91,322	123,591	42.5
2011	85,586	118,802	41.9
2012	83,823	122,269	40.7
2013	78,774	123,672	38.9
2014	77,405	123,887	38.5
2015	77,268	120,522	39.1
2016	73,060	118,115	38.2

To some observers, the most fundamental change in Japanese criminal justice is the "mindset" of professional judges, and the main reason for this change is the presence of lay judges.[96] But if there have been changes in judicial sensibilities, they are being offset by changes in prosecutor practice. Most notably, prosecutors have become significantly more cautious about what crimes to charge – and therefore about what kinds of cases lay

95 *Note:* Figures are calculated from annual 犯罪白書 [*Hanzai hakusho;* White Paper on Crime], retrieved at *http://hakusyo1.moj.go.jp/jp/65/nfm/n65_2_2_2_3_0.html #h2-2-3-02*, figure 2-2-3-02-2.

96 SHINOMIYA, *supra* note 45.

judge panels will adjudicate. Prosecutors have become more cautious about what sentences to seek too, as we will explain below.

Some critics contend that by becoming more cautious, prosecutors are limiting the role lay judges can play and thereby undermining a reform that was meant to give citizens more influence in the criminal process.[97] Prosecutors are also doing what legal professionals have done several times in the past when Japan tried to introduce lay participation into its legal system: they are minimizing the role lay people can play in determining case outcomes.[98] In these respects, prosecutors are trying to maintain control over case outcomes by minimizing the influence of outsiders. If this pronounced prosecutorial prudence continues for another decade or two (and if crime in Japan continues to decline), the lay judge system could become starved for cases, much as the prewar jury system was.[99]

But the prosecution issues are complicated, for (all else equal) more cautious charging policies also mean *less use of the criminal sanction*. For progressives who believe the criminal sanction has limited capacity to do good and great capacity to do harm, the timidity of "tight-assed" prosecutors could be called a welcome development. At the same time, an abundance of prosecutorial caution may be starving the new trial system of the cases it needs to show that trials can be more than empty rituals that "ratify" what law enforcement wants.[100] Whatever one thinks about these normative questions, one conclusion seems clear: for better and for worse, prosecutors continue to control case inputs in Japanese criminal justice. As a result, they largely determine what case outputs will be. As we shall see, judges employ their own professional authority to control criminal sentencing.

4. Conviction Rates

Another manifestation of prosecutorial caution (and criminal justice continuity) can be seen in Japan's conviction rates, which have remained high in the lay judge era, largely because (as explained above) prosecutors have become more cautious about what cases to charge for lay judge adjudication.[101] In the three years before lay judge trials started (2006–2008), the

97 TAKANO, *supra* note 46; TAKEDA, *supra* note 39.

98 K. ANDERSON/M. 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, Vanderbilt Journal of Transnational Law 37 (2004) 935; VANOVERBEKE, *supra* note 17.

99 VANOVERBEKE, *supra* note 17.

100 R. HIRANO, Diagnosis of the Current Code of Criminal Procedure, Law Japan 22 (1989) 129; TAKANO, *supra* note 46.

101 TAKEDA, *supra* note 39.

conviction rate in criminal cases that (if they had occurred at a later date) would have been eligible for lay judge trial was 99.4 percent. Thus, before the 2009 reform, 1 criminal trial in 167 ended in acquittal. In the first 10 years after the reform (May 2009 through December 2018), the lay judge conviction rate was 99.1 percent – so in the lay judge era, approximately 1 criminal trial in 111 has ended in acquittal.[102]

Some believe this is a significant decline,[103] and their claim deserves consideration. As the lay judge system matures, the conviction rate could be slowly eroding – we would need several more years of data in order to be sure.[104] In the three most recent years for which evidence is available (2016–2018), the lay judge conviction rate was 98.4 percent,[105] compared to 99.4 percent for 2006–2008. In this short interval, 1 defendant in 63 was acquitted, and acquittals were 2.7 times more likely than they were in the three years preceding the advent of lay judge trials.

The recent decline in propensity to convict has been hailed as evidence that lay judge panels are (finally) "thoroughly implementing" a principle long respected in the breach by Japanese criminal courts: that "defendants should receive the benefit of the doubt" when there is reasonable doubt about the evidence.[106] But in our view, there are four reasons not to give a full-throated cheer for the recent downturn. First, when 98 or 99 defendants in 100 are being convicted at trial, it seems fair to say that the conviction

102 TAKEDA, *supra* note 39.

103 TAKEDA, *supra* note 39.

104 If the conviction rate is declining, one contributing cause is defense attorneys, who have become more aggressive and adept at doing criminal defense (JOHNSON, *supra* note 52; TAKANO, *supra* note 46; TAKAYAMA, *supra* note 46). According to prosecutor Hiroshi Kikuchi, two leading indicators of improvement in Japanese defense lawyering are an increase in the number of cases in which defendants deny the charges against them *(hinin jiken),* and an increase in the frequency with which suspects and defendants exercise their right to silence *(mokuhi-ken).* H. KIKUCHI, *Saiban-in saiban seido shikkō 10-nen o furikaette: kensatsu no tachiba kara (tokushū saiban-in saiban seido shikkō 10-nen no keiki ni kangaeru)* [Reflecting on the Lay Judge Trial System in Effect for One Decade], Keisatsu Ronshū 72.6 (2019) 29–53. As a prominent defense lawyer put it, "In this era of recording interrogations *(kashika jidai),* it has become easier to carry through the right to silence. Hence, when we defense attorneys consider the most appropriate strategy for our clients, we first and foremost consider the right to silence. The result is that we advise suspects and defendants to exercise their right to silence more frequently" (defense lawyer Sadato Gotō quoted in: Y. GŌDA, *Saiban-in saiban seido shikkō 10-nen to iu sujime ni omou koto* [What to Think the Milestone of a Decade that the Saiban-in Trial System is in Effect], Keisatsu Gaku Ronshū 72.6 (2019) 1–27 and 35.

105 TAKEDA, *supra* note 39.

106 TAKEDA, *supra* note 39.

rate remains "extremely high" – as it has been for decades in Japan.[107] Second, when lay judge trials constitute less than 2 percent of all criminal trials in Japan ("a sliver of cases"), a small decline in the lay judge conviction rate has no discernable effect on the overall conviction rate. Third, 40 percent (39/99) of all the acquittals that occurred in the first ten years of Japan's new trial system were issued for one kind of crime – trafficking in methamphetamines – even though these cases constituted only 7.9 percent of all lay judge trials during that decade. That is, acquittals for methamphetamine trafficking are five times more common than the meth caseload would predict (40/7.9 = 5). If Japanese prosecutors become more careful about charging meth cases (as we expect they will), this crime-specific acquittal rate will fall in the future. Fourth, in the first 10 years of the lay judge system, there were 99 acquittals – about 10 per year, on the average. Ten of the 99 (10 percent) were overturned by High Courts after prosecutors appealed.[108] Prosecutors are appealing lay judge acquittals less aggressively than they did in the pre-reform period, partly out of respect for the principle that legal professionals should defer to the decisions made by lay participants, as articulated by the Tōkyō High Court in 2013 and by Japan's Supreme Court in 2014.[109] Nonetheless, a 10 percent reversal rate for acquittals on appeal is significant in a system in which the 60 courts (50 District

107 JOHNSON, *supra* note 30, 215. For example, Germany's conviction rate in 2013 was 85 percent, and in most recent years it has ranged between 85 and 90 percent. See J. M. JEHLE, Criminal Justice in Germany: Facts and Figures (6th ed., Mönchengladbach 2015). Among defendants charged with a felony in American state courts, 68 percent were convicted (59 percent of a felony and the remainder of a misdemeanor), with felony conviction rates higher for defendants originally charged with motor vehicle theft (74 percent), driving-related offenses (73 percent), murder (70 percent), burglary (69 percent), and drug trafficking (67 percent); conviction rates were lower for defendants originally charged with assault (45 percent). See U.S. BUREAU OF STATISTICS OFFICE OF JUSTICE PROGRAMS, at *https://www.bjs.gov/index.cfm?ty=qa&iid=403* (retrieved 23 August 2019). In India, the world's largest democracy, the conviction rate in the megalopolis of Mumbai ranged from 18 to 25 percent before falling to "an all-time low of 4 percent in 2000". See S. MEHTA, Maximum City: Bombay Lost and Found (New York 2004) 175.

108 In addition to the 10 lay judge acquittals that Japan's High Courts overturned from 2009 to 2018, they also changed 17 "guilty" verdicts (out of 11,429) to "not guilty" (TAKEDA, *supra* note 39). Of course, not all acquittals and convictions are appealed, but the contrast is still striking: 1 acquittal in 10 is overturned on appeal, compared with 1 conviction in 667. The fact that Japanese appellate courts find so much more error in not-guilty verdicts than in convictions is further testament to their essentially "conservative" nature (FOOTE, *supra* note 48, 8). The 66 to 1 disparity also reflects the tendency of District Courts to convict in the first place, for (with few exceptions) it is trial losers who file appeals – and Japanese prosecutors seldom lose.

109 TAKEDA, *supra* note 39.

Courts and 10 branch courts) that hold lay judge trials produce less than a dozen acquittals per year.[110] When a substantial proportion of these 60 courts have not issued a single acquittal in the first decade of the new trial system, how significant is the recent uptick in the number of not-guilty verdicts?

5. PRCs and Mandatory Prosecution

In 2009, a reform of Japan's Prosecution Review Commission Law of 1948 enabled panels of 11 citizens on the country's 201 Prosecution Review Commissions (PRCs) to institute "mandatory prosecution" *(kyōsei kiso)* in some cases. On paper, this reform appears to address the problem of excessive charging caution summarized in the preceding paragraphs, for it provides a way for lay people to override the non-charge decisions of professional prosecutors. Some scholars expected this reform to have large effects. For example, Hiroshi Fukurai predicted that "the new binding power bestowed upon the PRC can exert a significant authority over, and insert public sentiments and equitable judgments into, prosecutorial decisions on politically sensitive cases or controversial issues that may affect the broader public interest. In addition, the PRC can help expose the fortified terrain of special protection and immunity given by the Japanese government to influential political heavyweights, high-ranking bureaucrats, and business elites."[111] On this view, PRCs have "become an important channel through which ordinary people's moral sentiments – their sense of justice, fairness, and accountability – can be expressed, articulated, and reflected in the deliberation of criminal cases."[112]

In reality, Japan's reformed PRCs are almost "all hat and no cattle,"[113] for they have had little effect on prosecutorial practice, as empirical research shows.[114] The two most fundamental research findings are that few complaints about non-prosecution are brought to PRCs in the first place, and few of the complaints that are brought result in recommendations to

110 TAKEDA, *supra* note 39.

111 H. FUKURAI, Japan's Quasi-Jury and Grand Jury Systems as Deliberative Agents of Social Change: De-Colonial Strategies and Deliberative Participatory Democracy, Chicago-Kent Law Review 102.70 (2011) 4; see also: C. F. GOODMAN, Prosecution Review Commissions, the Public Interest, and the Rights of the Accused: The Need for a 'Grown Up' in the Room, Pacific Rim Law & Policy Journal 22.1 (2013) 1–48; see also: H. FUKURAI / Z. WANG, Proposal to Establish the Federal Civil Grand Jury System in America: Effective Civic Oversight of Federal Agencies and Government Personnel, Journal of Civil & Legal Sciences 3 (2014) 1–6.

112 FUKURAI, *supra* note 111, 42.

113 This expression refers to big talk without action, power, or substance (see *https://en.wiktionary.org/wiki/all_hat_and_no_cattle*).

114 JOHNSON / HIRAYAMA, *supra* note 29.

prosecute or mandatory prosecution.[115] Thus, the net effect of the PRC reform is little impact on the policies or practices of Japanese prosecutors. What is more, the rarity of PRC challenges to prosecutors' non-charge decisions (only 9 cases of mandatory prosecution in the first 10 years) and the low rate of conviction after mandatory prosecution (just 2 of the first 13 defendants were convicted, for a conviction rate of 15 percent) may vindicate the view of professional prosecutors that their non-charge decisions are appropriate and that most cases of mandatory prosecution are wrong to override their professional judgment.

Japan's reformed PRCs could also be described as "all bark and no bite," except that even after the 2009 reform there has been little "bark." Consider two examples: one involving crimes of the powerful, which were supposed to be a main focus of PRC review,[116] and the other involving a rape case that received little media coverage in Japan.[117]

115 A summary of the empirical evidence on Japan's reformed PRCs should include the following points. (1) Few cases are reviewed by the reformed PRCs. (2) There has been no post-reform increase in the number of cases reviewed by the reformed PRCs. (3) There have been few PRC recommendations to charge cases that prosecutors originally decided not to charge. (4) Most cases reviewed by PRCs are relatively low salience. (5) Some of prosecutors' non-charge categories (such as "no suspicion" and "no crime") seem protected from PRC review, which may create a perverse incentive for prosecutors to put some non-charge cases in these protected categories. (6) Reformed PRCs have issued few policy recommendations to executive prosecutors (*kenji-sei*). (7) There are few PRC-inspired trials, and when such trials do occur, the outcomes for defendants tend to be lenient. (8) In PRC-inspired trials, there have been more acquittals after the 2009 reform than before it, which suggests that occasionally prosecutors do charge more aggressively when facing the prospect of mandatory prosecution. (9) In the first 8 cases of mandatory prosecution (involving a total of 10 defendants), only 2 defendants were convicted, and both received light punishment (a fine of 9,000 yen ($ 90) for one, and a one-year prison term suspended for three years for the other). (10) On 19 September 2019, a panel of three professional judges in the Tōkyō District Court acquitted the three former executives of the Tōkyō Electric Power Company who were subject to mandatory prosecution for "professional negligence resulting in death and injury", for allegedly failing to prevent the nuclear meltdowns following the earthquake and tsunami in Fukushima and neighboring areas of northern Honshū on 11 March 2011. The "designated attorneys" *(shitei bengo-shi)* who played the prosecutorial role in this case requested five-year prison terms for all three defendants. For more on the effects of the PRC reform, see: JOHNSON/HIRAYAMA, *supra* note 29.

116 M. KAWAI, *Kiso soto o daseru koto ga keiji shihō kaikaku no pointo* [The Point of the Criminal Justice Reform is to the Possibility to Rule that Prosecution is Appropriate], Asahi Ronza, 11 August 2015.

In March 2019, a PRC in Ōsaka ruled that "non-prosecution is inappropriate" *(fukiso futō)* after the Special Investigation Division *(tokusōbu)* of the Ōsaka District Prosecutors Office decided not to charge 38 people (including former Ministry of Finance senior bureaucrat Nobuhisa Sagawa) in the Moritomo Gakuen cronyism scandal that implicated the wife and the administration of Prime Minister Shinzō Abe. Many observers criticized the Ōsaka PRC for not ruling that "prosecution is appropriate" *(kiso sōto)*, which would have put considerably more pressure on prosecutors to charge than its decision that "non-prosecution is inappropriate," and which also would have maintained the possibility of mandatory prosecution if prosecutors decided not to charge for a second time. In August 2019, prosecutors in Ōsaka did just that, resulting in the non-prosecution of 10 people who had supposedly been "reinvestigated."[118] In this case as in many other corruption cases in postwar Japan, prosecutors "let the wicked sleep"[119] – and PRCs did little to hold them accountable. Indeed, when an Ōsaka NGO (the Citizens Committee to Raise Voices for a Healthy State Ruled by Law, *kenzen na hōchi kokka no tame ni koe o ageru shimin no kai)* asked an Ōsaka PRC to disclose documents that their PRC counterparts in Tōkyō had disclosed in previous cases, the Ōsaka PRC refused to disclose many documents and blacked out almost all of the words on the documents that they did disclose. The NGO also noted how strange it was for all of the case work in the big Moritomo case to be performed by just one of the four PRCs in Ōsaka. In these ways, the non-prosecutions in the Moritomo case raise serious questions about the independence and integrity of Japanese prosecutors and of the reformed PRCs.[120] We sorely need more research on this case and this subject.

---

117 D. MCNEILL, Justice Postponed: Ito Shiori and Rape in Japan, The Asia-Pacific Journal 16.15 (1 August 2018) article ID 5179, retrieved at *https://apjjf.org/2018/15/McNeill.html*.

118 "Osaka Prosecutors Close Moritomo Gakuen Case after Reconfirming No Bureaucrats Will Be Indicted over Scandal", Japan Times, 10 August 2019 retrieved at*: https://www.japantimes.co.jp/news/2019/08/10/national/crime-legal/osaka-prosecutors-close-moritomo-gakuen-case-reconfirming-no-bureaucrats-will-indicted-scandal/#.Xbf-yi2ZM_U*.

119 JOHNSON, *supra* note 30.

120 See N. KATAOKA, *Moritomo jiken meguri shimin dantai ga kaiken: 'Ōsaka kensatsu shinsa-kai no fukaiji wa ijō'* [Citizen Group's Press Conference about the Moritomo Incident: The Ōsaka Prosecutor Review Commission's Decision Not to Disclose is Not Normal], Shūkan Kinyō Onrain, Yahoo, 20 August 2019 retrieved at *https://headlines.yahoo.co.jp/article?a=20190820-00010000-kinyobi-soci*; and N. YAGI, *Sōzō no naname-jō o kite kureta ōsaka kensatsu shinsa-kai no kaiji* [The decision by the Ōsaka Prosecutor Review Commission is Above and Beyond Imagination], Blogos, 17 July 2019, retrieved at *https://blogos.com/article/391856/*.

There was also a puzzling degree of PRC passivity in the rape case involving a freelance journalist named Shiori Itō and Noriyuki Yamaguchi, a prominent TV journalist and the biographer and friend of Prime Minister Shinzō Abe. Despite considerable evidence that Yamaguchi had raped Itō in May 2015 (perhaps after giving her a "date rape drug"), including hotel surveillance video of a stumbling Itō, the testimony of a taxi driver who had driven Itō and Yamaguchi to the hotel, and Itō's repeated statements about inexplicably falling unconscious and waking up with Yamaguchi on top of and inside her, a PRC in Tōkyō upheld the decision of Tōkyō prosecutors not to prosecute Yamaguchi.[121] The criminal case died there, though Itō filed a civil lawsuit against Yamaguchi and in December 2019 the Tōkyō District Court awarded her 3.3 million yen (about 27,000 Euro or 30,000 Dollars).[122]

In our view, the main lesson to learn from the non-prosecutions in the Moritomo Gakuen and Shiori Itō cases is that Japan's PRCs remain as passive and pusillanimous after the 2009 reform[123] as before it.[124] The acquittal of three TEPCO executives on 19 September 2019 will do nothing to make this watchdog more likely to bark or bite.[125] Indeed, the results of their mandatory prosecution for "professional negligence resulting in death and injury" as a result of the Fukushima nuclear meltdown in March 2011 may increase calls to restrict the powers of Japan's reformed PRCs.[126] Some

121 ITŌ, *supra* note 69, 187–215. For a documentary about this case, see "Japan's Secret Shame", BBC Two, 60 minutes (2018) at *https://www.bbc.co.uk/programmes/b0b8cfcj*.

122 Itō has become an important symbol in a country where sexual abuse continues to be severely under-reported. On her civil suit, in which Judge Akihiro Suzuki concluded that her testimony was "highly trustworthy" and that Yamaguchi had committed "an illegal act" by engaging in sexual intercourse with Itō without her consent, see M. TAKEDA, *Gō'i no nai seikō'i, shōko tsumiage nintei Itō Shiori san shōso, kensatsu wa 'saiki' kanō* [Sexual Intercourse Without Consent, Acknowledging the Vast Amount of Evidence, Victory in Court for Ms. Shiori Itō, the Prosecutor's 'Comeback' is Possible], 47 News, 21 December 2019 at: *https://news.goo.ne.jp/article/47news_reporters/nation/47news_reporters-20191220215335.html*.

123 JOHNSON/HIRAYAMA, *supra* note 29.

124 M. D. WEST, Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion, Columbia Law Review 92 (1992) 684.

125 S. ABE, Former TEPCO Execs Cleared Over Role in 2011 Nuclear Accident, Asahi Shinbun Asia & Japan Watch, 19 September 2019.

126 For critiques of the reformed PRCs, see: "*Kyōsei kiso o kangaeru: Konnan na risshō muzai aitsugu* [Thinking about Mandatory Prosecution: Continuous Acquittals Because of Difficulties to Prove]", Sankei Shinbun 18 May 2019, 31; "*Kyōsei kiso o kangaeru: Yūzai tamerau saiban-kan* [Thinking about Mandatory Prosecution: Judges Are Hesitant to Convict]", Sankei Shinbun, 21 May 2019, 22; and:

analysts even argue that government officials or legal professionals should be given authority to train and supervise PRCs, in order to prevent "inappropriate" acts of mandatory prosecution that damage the public interest or "game" the criminal process for political advantage.[127] In our view, this kind of reform – putting a "grown up" in the PRC room – would likely reproduce the problem that has long plagued efforts to implement lay participation in Japanese criminal justice. For the last century, government officials and legal professionals have coopted the citizens who are asked to serve and thereby marginalized their influence.[128]

6. Criminal Sentencing

We have argued that despite recent lay participation reforms, there is much substantive continuity in Japanese prosecution. In this limit we show that there is striking continuity in criminal sentencing as well.

After Japan's lay judge and victim participation reforms, sentence severity increased for some offenses, including rape, sexual molestation, and assault with injury. The increased severity for sex offenders has received considerable attention,[129] but the heightened harshness must be called modest. The average sentencing increases can be measured in months, not in the large leaps of severity that American sentencing reforms have often generated.[130] For other crimes such as homicide, robbery, arson, and trafficking methamphetamines, Japan's pre-reform and post-reform sentencing patterns are so similar that when sentencing averages are plotted over time on the same graph, they look almost indistinguishable.[131] In lay judge trials, there has been a small increase in the use of suspended sentences *(shikkō yūyo)* with supervision, apparently because lay judges are more likely than professional judges to believe in the possibility of rehabilitation through state supervision. On the whole, however, there was much more continuity in criminal sentencing than change during the first decade of Japan's lay participation reforms.[132]

"*Kyōsei kiso seido 10-nen hikari to kage: Umoreta jijitsu, hanmei keiki* [Light and Shadow of one Decade of Mandatory Prosecution: Hidden Evidence, An Opportunity to Clarify]", Tōkyō Shinbun, 21 May 2019, 3, retrieved at: *https://www.tokyo-np.co.jp/article/national/list/201905/CK2019052102000126.html.*

127 GOODMAN, *supra* note 111.

128 ANDERSON / NOLAN, *supra* note 98.

129 HIRAYAMA (2018), *supra* note 72.

130 FUJITA, *supra* note 26, 51–64.

131 JOHNSON / MIYAZAWA, *supra* note 4, 130.

132 TAKEDA, *supra* note 39.

This sentencing continuity is hardly accidental. Its key proximate cause is the same conservatism of Japanese legal professionals that we saw in our discussion of charging practices, except here it is the conservatism of judges, not prosecutors. After the lay judge reform took effect in 2009, there was a noticeable surge in sentencing harshness for some crimes, as can be seen in the frequency of cases in which the actual sentence imposed by a lay judge panel *(ryōkei)* exceeded the sentence requested by prosecutors *(kyūkei)*. From 2010 to 2013, there were 48 of these "extra harsh" sentences – an average of 12 per year. But from 2014 to 2017, the number of "extra harsh" sentences plummeted to 9 (about 2 per year), a decline of 81 percent. How did this happen? Japan's judicial bureaucracy intervened, by taming the tendency of ordinary citizens to sock-it-to-some-defendants at sentencing.

The judicial bureaucracy employed several mechanisms to reign in the wayward sentencing impulses of lay judges. Appellate court decisions reduced many of the "extra harsh" sentences and thereby sent messages to future lay judge panels about what will and will not be tolerated. The judiciary sent memos and published manuals about sentencing in lay judge trials in order to stress the importance of sentencing consistency and continuity.[133] Most fundamentally, Japan's professional judiciary lobbied to establish a lay judge trial policy of relying on sentencing norms based on *pre-reform practices*, through a computerized data base known as the "sentence search system" *(ryōkei kensaku shisutemu)*, which can be viewed by prosecutors and defense lawyers too.[134] The main effect of these judicial interventions was to control the deviant sentencing desires of ordinary citizens by making them conform to judicial expectations.[135] And the main arena where this conformity is accomplished is the deliberation room *(hyōgi-shitsu)*, where judges and lay judges discuss verdicts and sentenc-

133 TAKEDA, *supra* note 39 (Part 3) 6. The manual on sentencing that was published by the judiciary is: THE LEGAL TRAINING AND RESEARCH INSTITUTE OF JAPAN (eds.), *Saiban-in saiban ni okeru ryōkei hyōgi no arikata ni tsuite* [On the Way to Deliberate about Sentencing in Lay Judge Trials] (Tōkyō 2012).

134 Judge Yoshimitsu Gōda (GŌDA, *supra* note 104, 24–25) has defended this conservative "framework for sentencing" (*handan wakugumi*) as follows: "You often hear the opinion 'wouldn't it be better to arrive at a more objective conclusion in deliberations by having lay judges state their opinions more autonomously, free from the framework for sentencing established by professional judges that is often imposed on lay judges?' […] Actually, the framework for sentencing we use is the result of an accumulation of countless cases in the era when professional judges made sentencing decisions on their own. If this method and the practical rules of thumb from that time are considered worthless, then I think this would amount to nothing other than throwing away a clearly rational framework."

135 TAKEDA, *supra* note 39.

es,[136] and where judges possess more information about cases because they participated in a pretrial process *(kōhan mae seiri tetsuzuki)* where evidence is discussed expansively and where the trial schedule is decided. Social psychological experiments show that when lay judges do not participate in the pretrial process, their unequal access to case information handicaps them in deliberations with judges.[137]

In post-trial surveys and press conferences, the large majority of lay judges say they felt able to speak their mind during deliberations, but there are enough statements from lay judges who complain about professional judges who talked too much, or who steered the panel toward a "preexisting conclusion" *(ketsuron ariki)*, or who made lay participants feel more like "decorations" *(kazari-mono)* than adjudicators, that it appears one common pre-reform prediction is being realized: in the deliberations of a mixed panel of professional judges and ordinary citizens, the former tend to dominate the latter.[138] Former lay judges often use the words "facilitator" *(matome-yaku)* to describe the role judges play in deliberations. They also say that judges brought lay-judges "back on track" *(kidō shūsei)* after the amateurs went "off-track" *(dassen)*.[139] Mock trial experiments arrive at similar conclusions, for lay judges tend to "obey the previous sentencing trends, rather than adhering to their original opinions by resisting the pressure from the graph [of sentencing precedents] and professional judges."[140] When there are differences of opinion between judges and lay judges, a "professional rule of thumb" *(shokugyōteki keiken-soku)* tends to prevail over the "common sense" *(jōshiki)* of citizens.[141] In short, judges routinely play the role of parent and teacher, with lay judges as their children and pupils.[142] They behave like "overprotective parents" who monitor and control the behavior of their children by saying "You should not see this!" and "You should not touch that!"[143] As a defense lawyer sardonically summarizes,

> "Japanese judges will, based on their vast knowledge and vision, politely explain everything to lay judges in a way the latter can easily understand. And lay judges will accept this, by participating in the trial knowing that, no matter what, the 'kind' judges will explain whatever they do not understand."[144]

---

136 TAKEDA, *supra* note 39.
137 FUJITA, *supra* note 26, 131–171.
138 VANOVERBEKE, *supra* note 17; SHINOMIYA, *supra* note 45.
139 VANOVERBEKE, *supra* note 17, Ch. 6.
140 M. SAEKI / E. WATAMURA, The Impact of Previous Sentencing Trends on Lay Judges' Sentencing Decisions, in: Liu / Miyazawa (eds.), *supra* note 58, 288.
141 SHINOMIYA, *supra* note 45, 10.
142 TAKAYAMA, *supra* note 46.
143 TAKANO, *supra* note 46, 24.

The extent to which judges orchestrate lay judge deliberations can also be seen in how they schedule trials. Their aim is to keep lay judge trials as "compact" *(konpakuto)* as possible. To achieve this end, judges admit a limited amount of evidence for the lay judge panels to consider, and they schedule every trial session down to the minute, including the timing of each break *(kyūkei)* and the day and hour the verdict will be pronounced. This judicial orchestration reached an extreme on 15 July 2010, when the chief judge of Tottori District Court waived a stopwatch at a defense lawyer to warn him to stay within his allotted speaking time. Soon afterwards the Tottori Bar Association protested by releasing a "Presidential Statement on Showing a Stopwatch in Court" (23 July 2010). But judges remain determined to script lay judge trials so as to keep the judicial train running on time.[145] Even potentially capital trials are scripted to maximize efficiency and minimize the "burdens" *(futan)* imposed on lay judges.[146] The contrast with American-style "super due process" is striking.[147]

We are not fans of "professional rules of thumb" and "judicial orchestration" that schedules the hour a verdict will be announced before the trial has even started. Yet as we saw with the cautious charging policies of Japanese prosecutors, there is complexity here too. On the one hand, the commitment of Japan's judiciary to continuity in sentencing serves the value of "consistency" in Japanese criminal justice.[148] This conservatism can be criticized, for what is the point of empowering citizens to decide criminal sentences if their preferences must conform to those of professional judges? On the other hand, when deviations from preexisting sentencing norms do occur in lay judge trials, appellate courts usually revise them in a *downward* direction – towards leniency, not severity.[149] In this way, judicial conservatism tends to serve the interests of criminal defendants, much as prosecutorial conservatism does with respect to criminal charging. So we end our analysis of this limit of lay participation by asking: should judicial control of sentencing outcomes, the marginalization of lay judge voices, and continuity in sentencing substance be welcomed by progressives who

144 TAKANO, *supra* note 46, 25.

145 TAKANO, *supra* note 46.

146 D. T. JOHNSON, Capital Punishment Without Capital Trials in Japan's Lay Judge System, Asia Pacific Journal 8.52 (2010) 1–38.

147 D. T. JOHNSON, *Amerika-jin no mita nihon no shikei* [An American Perspective on Capital Punishment in Japan] (Tōkyō 2019) 25–52. An English version of this book, D.T. JOHNSON, The Culture of Capital Punishment in Japan (Cham 2020), is available through Open Access at *https://link.springer.com/content/pdf/10.1007%2F978-3-030-32086-7.pdf.*

148 JOHNSON, *supra* note 30, 147.

149 TAKEDA, *supra* note 39.

believe criminal sanctions have great capacity to harm people and little potential for helping them?

7. Death Sentencing

In the decade before lay judge trials started, the number of death sentences in Japan surged. The country had double-digit death sentences (10 or more) per year from 2000 to 2007, and in the 2000s (2000–2009) a total of 123 death sentences were imposed by Japanese district courts – an average of 12.3 death sentences per year. In the nine years since then (2010–2018), lay judge tribunals have imposed only 36 death sentences – an average of 4 death sentences per year. From the 2000s to the 2010s, the number of death sentences declined by two-thirds. See *Table 3.*

Table 3: Japan's Death Sentencing Rate before and After the Lay Judge Reform of 2009, by Number of Victims Killed[150]

Years	# of Victims	# of DS Requested	# of DS Imposed	DS Percentage
1980–2009	1	100	32	32%
	2	164	96	59%
	3 or more	82	65	79%
	All	346	193	56%
2010–2018	1	8	4	50%
	2	32	19	59%
	3 or more	13	13	100%
	All	53	36	68%

There are two main reasons for this decline in capital outcomes. First, Japan's homicide rate has fallen in recent years (as have Japanese crime rates more generally). As the total number of murders declined, so did the number of heinous homicides for which prosecutors could reasonably seek a sentence of death.[151] Second, in the shadow of a new trial system in which outcomes are less predictable and lay judges may want to deviate from the judiciary's long established death sentencing norms, prosecutors became more selective about when to seek a sentence of death.[152] From 1980 to

150 *Source*: M TAKEDA, *Satsugai hitori de shikei 4nin: Higaisha kanjō o ishiki* [Four People Who Murdered One Person Sentenced to the Death Penalty: Considerations for the Victims' Feelings], Kyōto Shinbun, 23 March 2019, 6.

151 JOHNSON (2019), *supra* note 147, 111–123.

152 JOHNSON (2019), *supra* note 147, 111–123.

2009, prosecutors sought a death sentence *(shikei kyūkei)* for an average of 11.5 homicide defendants per year. From 2010 to 2018, the comparable figure is just 5.6 defendants per year. Prosecutors' increased selectivity in seeking a sentence of death is another way in which they have become more cautious in their decision-making, so as to maintain control over trial outcomes in the new system.

Before 2009, many analysts expected that the participation of lay judges would make Japanese courts less likely to impose the ultimate punishment when prosecutors sought a sentence of death.[153] Such predictions echoed the so-called "Marshall Hypothesis," which posits that the more you know about the death penalty (or in Japan's case, the more lay judges think about it), the less you (or they) will like it.[154] But that has not happened. As *Table 3* shows, from 1980 to 2009, panels of three professional judges imposed a sentence of death in 56 percent of the cases that prosecutors sought the ultimate punishment.[155] By comparison, in the post-reform period of 2010–2018, lay judge panels imposed a sentence of death in 68 percent of the cases that prosecutors sought one. The likelihood of a death sentence being imposed when prosecutors seek one has risen most notably in cases in which three or more persons are killed. In the thirty years before the lay judge reform, 79 percent (65/82) of such cases resulted in a sentence of death, compared with 100 percent (13/13) in the nine years from 2010 to 2018.[156]

These data suggest that changes in Japanese death sentencing have been small in the lay judge era. Moreover, when lay judge panels have imposed a sentence of death on a defendant who killed "only" one person, as they did 4 times in the first 9 years of the new trial system, 3 of them were reduced on appeal to a life sentence.[157] Here again we see evidence of the judicial bureaucracy policing the sentencing decisions of lay judges. If Japan's judiciary had a motto it might be "professionals know best."

But there is also complexity, for the lay judge system has made prosecutors more cautious about seeking a sentence of death in the first place. If

153 L. AMBLER, The People Decide: The Effect of the Introduction of the Quasi-Jury System (Saiban-In Seido) on the Death Penalty in Japan, Northwestern Journal of Human Rights 6.1 (2008), retrieved at: *https://scholarlycommons.law.northwestern.edu/njihr/vol6/iss1/1*.

154 C. S. STEIKER, The Marshall Hypothesis Revisited, Howard Law Journal 52 (2008) 525.

155 In the years immediately preceding the lay judge reform, Japan's death sentencing rate was 66 percent. That is, District Court panels of three professional judges imposed a sentence of death about 2 times out of every 3 that prosecutors sought one (YOMIURI SHINBUN SHAKAIBU, *Shikei* [Capital Punishment] (Tōkyō 2013) 274).

156 TAKEDA, *supra* note 39.

157 TAKEDA, *supra* note 39.

judges and prosecutors are marginalizing the role that participants play in capital sentencing, they are doing so in ways that often benefit criminal defendants. The broadest effect of this double dynamic – prosecutors seeking fewer sentences of death, and judges reigning in the populist impulses of lay judges – could be to bolster the legitimacy of Japanese capital punishment. Indeed, the lesson of Japan's lay judge reform may be that in making the death penalty smaller it has "entrenched ever deeper what remains" of it.[158] This can be called a "*bonsai* theory of capital punishment." A smaller death penalty could be more durable if it appeals to the sensibilities of a country that has long bucked the transnational trend toward abolition.[159]

8. Victim Participation

Victims were long neglected and ignored in the criminal justice systems of many countries,[160] and "Japan provided virtually no protection for victims before the turn of the twenty-first century."[161] In recent years, however, some countries, including Japan and the United States, have moved victims closer to center stage of the criminal process.[162] Critics contend that a punitive victims' rights movement has made Japanese criminal justice worse, by undermining fairness and due process (a procedural claim), and by making sanctions significantly harsher (a substantive claim).[163] But the results of victim-centered reform are more complicated than these critiques claim, and they are also more modest. As noted by Erik Herber in his insightful account of "victim participation" in Japanese criminal justice, the available evidence does "*not allow for clear conclusions* as to how victim participa-

158 H. A. BEDAU, An Abolitionist's Survey of the Death Penalty in America Today, in Bedau / Cassell (eds.), Debating the Death Penalty: Should America Have Capital Punishment? The Experts from Both Sides Make Their Case (Oxford 2004) 24.

159 D. T. JOHNSON, A Factful Perspective on Capital Punishment, Journal of Human Rights Practice 11.2 (July 2019) 334–345; and D. T. JOHNSON / F. E. ZIMRING, The Death Penalty's Continued Decline, Current History 118.811 (November 2019) 316–321.

160 K. ROACH, Due Process and Victims' Rights: The New Law and Politics of Criminal Justice (Toronto 1999).

161 S. MATSUI, Justice for the Accused or Justice for Victims? The Protection of Victims' Rights in Japan, Asian-Pacific Law & Policy Journal 13.1 (2011) 55.

162 MATSUI, *supra* note 161; D. SERED, Until We Reckon: Violence, Mass Incarceration, and a Road to Repair (La Vergne 2019).

163 S. MIYAZAWA, The Politics of Increasing Punitiveness and the Rising Populism in Japanese Criminal Justice Policy, Punishment & Society 10.1 (January 2008) 47–77; M. TAGUSARI, Does the Death Penalty Serve Victims?, in: United Nations, Human Rights Office of the High Commissioner, Death Penalty and the Victims (UN 2016) 41–48.

tion impacts sentencing practices – or fact finding practices, for that matter."[164] In this domain of lay participation, we again find evidence of substantive continuity.

To increase the role that victims play in Japanese criminal justice, the country's Code of Criminal Procedure (CCP) has been revised twice: first in 2000, to enable victims (or their legal representatives) to make Victim Statements of Opinion (VSO) regarding their case; and then again in 2008, to create a Victim Participation System (VPS) that gives victims various rights in some serious criminal cases, including the right to attend the trial, the right to express an opinion to prosecutors about how their authority should be exercised, the right to question witnesses in court, and the right to make a statement about the facts of a case and the application of the law.[165] Note, though, that the law says victims *may* do these things: the actual nature and extent of victim participation depends on the characteristics of a case and the judges' exercise of discretion.[166]

Japan's VSO and VPS reforms have had an impact on criminal sanctions in certain cases – typically by making sentences a little harsher, especially for sex crimes.[167] These reforms have also made some criminal cases more emotional *(uetto)*, especially in homicide trials, where tears often flow, and where anger and outrage are common.[168] At the same time, victim participation has made Japanese criminal justice more "therapeutically oriented," by fostering practices that are meant to improve the "emotional and psychological well-being" of crime victims and survivors.[169]

Considering how badly victims used to be neglected and manipulated in Japanese criminal justice,[170] these changes can be called progress.[171] But efforts to bolster victim participation are also limited and troubling in sev-

164 HERBER, *supra* note 80, 126 (emphasis added).

165 M. SAEKI, *Hanzai higai-sha no shihō sanka to ryōkei* [The Participation of Crime Victims in the Judicial Process and Sentencing] (Tōkyō 2016).

166 HERBER, *supra* note 80, 106. According to the Japanese Ministry of Justice *White Paper on Crime* for 2017, "about 30 percent of the trials in which victims participate are lay judge trials" (HERBER, *supra* note 80, 122). Since lay judge trials constitute only about 2 percent of all criminal trials in Japan, victim participation is approximately 15 times more likely to occur in lay judge trials than in trials before a single professional judge or a panel of three professional judges. Because of the scholarly and journalistic neglect of non-lay judge criminal trials in Japan (discussed above in "A sliver of cases"), we know much more about victim participation in lay judge trials than we do in trials that do not involve lay judges.

167 SAEKI, *supra* note 165.

168 JOHNSON, *supra* note 146.

169 HERBER, *supra* note 80, 115.

170 JOHNSON, *supra* note 30, 201–210.

171 SAEKI, *supra* note 165; MATSUI, *supra* note 161.

eral respects. For starters, some new practices seem to be "traumatizing" victims.[172] More fundamentally, most victims of crime never report it to the police,[173] and when victimization reports do get made, the police do not bother to record some of them.[174] Victims of crime are also excluded from the pretrial processes where trial schedules are decided and case outcomes are shaped.[175] Most importantly, the "vast majority of victims choose not to participate" in the VPS.[176] When victims do participate, their statements tend to be well-rehearsed and highly scripted, with prosecutors playing the role of director. Preparatory meetings between victims and prosecutors are frequent and intense, with "witness tests" *(shōnin tesuto)* repeated several times before they are enacted at trial.[177]

Prosecutors are not the only legal professionals to shape what victims do at trial. Judges have influence too, especially by deciding which victims can participate and by monitoring and restricting the content of their statements. In acts that have been praised by progressives but lamented by police, prosecutors, and victims (and by some lay judges as well), judges are even requiring photographic evidence of victims' injuries (and corpses) to be softened and blurred *(kakō suru)* before being shown in court, in order to reduce the potential for inflammatory and prejudicial effects on lay judges, and in order to protect lay judges from the "emotional and psychological burden" *(seishinteki futan)* of viewing the corporeal consequences of crime.[178]

In addition, Japan's new forms of victim participation are substantively "conservative" in the sense that they reinforce traditional patterns in Japanese criminal justice. As surveys show, many Japanese defendants and defense lawyers "feel constrained" by the victims' presence at trial because it is difficult to challenge the accuracy of victims' assertions or the authenticity of their feelings without seeming to disrespect them.[179] Some defense lawyers even say it is difficult to speak in their client's defense because they fear lay judges will think they are "blaming the victim" or that the defendant is insufficiently remorseful, thereby increasing the risk of conviction and punishment. In these ways, the victim participation systems perpetuate two patterns in Japanese criminal justice: the subordination of

172 HERBER, *supra* note 80, 115–121.
173 HERBER, *supra* note 80, 106.
174 HERBER, *supra* note 80, 106.
175 HERBER, *supra* note 80, 109.
176 HERBER, *supra* note 80, 124.
177 HERBER, *supra* note 80, 111.
178 TAKEDA, *supra* note 39.
179 HERBER, *supra* note 80, 114.

the defense to the prosecution,[180] and reliance on the tropes of "repentance, confession, and absolution", even when such expressions are insincere.[181] In the end, Japan's new forms of victim participation "play a role in service of traditional criminal justice goals,"[182] by keeping defense lawyers docile,[183] and by pressuring defendants to submit to authority.[184]

9. No-shows, the Duty of Confidentiality, and the Length of Trials & Deliberations

Our penultimate point about the limits of lay participation in Japanese criminal justice concerns a cluster of three connected criticisms that are frequently directed at the lay judge system: (a) the vast majority of Japanese citizens refuse to serve as lay judges; (b) those who do serve are bound by an "obligation of confidentiality" *(shuhi gimu)* that severely limits what aspects of their trial experience can be disclosed and discussed; and (c) the length of lay judge trials and deliberations has increased significantly since the new system started in 2009. In our view, the latter two facts (longer trials and lay judge confidentiality) are contributing causes of the no-show problem.

Perhaps the most unflattering fact about Japan's lay judge system is how few citizens are willing to serve in it. Of course, many citizens try to avoid jury duty in the United States too,[185] where "the flight from jury service is as old as the jury system itself," though it seems to have intensified in recent years as jury duty lost some of its "aura of honor."[186] In Japan, however, nearly 80 percent of lay judge candidates do not accept the call to serve.[187] Three-

180 S. MIYAZAWA, Introduction: An Unbalanced Adversary System-Issues, Policies, and Practices in Japan, in: Feeley/Miyazawa (eds.), The Japanese Adversary System in Context: Controversies and Comparisons (New York 2002) 1–11.

181 JOHNSON, *supra* note 30, 179–201.

182 HERBER, *supra* note 80, 125.

183 JOHNSON, *supra* note 30, 71–85.

184 JOHNSON, *supra* note 30, 185–192.

185 M. CHALABI, What Are the Chances of Serving on a Jury?, FiveThirtyEight, 5 June 2015, retrieved at: *https://fivethirtyeight.com/features/what-are-the-chances-of-serving-on-a-jury/*. As Mona Chalabi explains, the U.S. National Center for State Courts (NCSC) has estimated that "in a given year, 32 million people get summoned for service – though only 8 millions of them actually report for jury duty (there are lots of reasons for that difference, including the 4 million summonses returned by the post office marked as undeliverable and the 3 million people who fail to appear). It's estimated that only 1.5 million people are eventually selected to serve on a jury in a state court each year [approximately 1 adult in 150]." These numbers come from a 2007 survey conducted by the NCSC.

186 S. J. ADLER, The Jury: Trial and Error in the American Courtroom (New York 1994) 52; BURNS, *supra* note 14.

quarters of this 80 percent are people who get "excused" *(jitai)* for reasons the judiciary regards as legitimate, such as old age, illness, work or school commitments, and family responsibilities. The other one-quarter of no-shows do not show up in court on the designated day *(kesseki)*. We call the combined effect of these two types of refusal Japan's "no show" problem. See *Table 4*.[188]

Table 4: Japan's Lay Judge Selection Process, 2009–2018[193]

Year	Total Candidates (A)	Summons Sent (B)	Cancellation Accepted (C)	In-Court Appearance (D)[a]	In-Court Appearance Rate (%)[b]	Total Appearance Rate (%)[c]
2009	13,423	9,638	3,185	5,415	83.9	40.3
2010	126,465	94,220	34,147	48,422	80.6	38.3
2011	131,880	94,109	37,756	44,150	78.4	33.5
2012	135,535	97,047	42,443	41,543	76.0	30.6
2013	135,207	95,541	43,451	38,527	74.0	28.5
2014	123,059	86,304	40,351	32,833	71.5	26.7
2015	132,831	92,076	43,806	32,598	67.5	24.5
2016	127,811	88,326	41,563	30,313	64.8	23.7
2017	120,187	84,176	41,707	27,152	63.9	22.6
2018	127,490	87,787	44,907	28,961	67.5	22.7
Total	1,173,888	829,224	373,316	329,914	75.2	30.4

187 TAKEDA, *supra* note 39. When Japan's lay judge system started in 2009, the no-show rate was already 61 percent. This rate is higher in rural and regional courts than in urban ones, and it is higher for women than for men. Surveys also show that people who want to serve as a lay judge are more likely to serve than people who do not want to serve (TAKEDA, *supra* note 39).

188 In most writing about jury and lay judge "no-shows" in the United States and Japan, the reluctance and refusal of citizens to serve is assumed to be problematic (ADLER, *supra* note 186; T. II (ed.), *Anata mo asu wa saiban-in!?* [You Will Also Become a *Saiban-in* Tomorrow!?] (Tōkyō 2019), but we wonder if no-shows might be a blessing in disguise. As Oahu resident Stuart Taba wrote in a letter to the Honolulu Star-Advertiser (20 August 2019, p. A10), "The American method of jury selection – conscription, like the old-school military draft – must be replaced by a method that produces willing jurors. Willing jurors will more likely be effective at their assignment than would reluctant jury members." We know of no research that tests this hypothesis, but if Mr. Taba's hunch is true, then concerns about Japan's high "no-show" rate would be much ado about nothing.

189 *Note*: This table is adapted from Supreme Court of Japan, 2019, 裁判員裁判の実施状況について（制度施行~令和元年５月末・速報）[*Saiban-in saiban no jisshi jōkyō ni tsuite (seido shikō Reiwa gannen 5gatsumatsu sokuhō);* Report on the results of the implementation of lay judge trials (from implementation to the end of May 2019)],

The high and rising no-show rate has many interacting causes.[190] First, it is easy to escape lay judge duty in Japan, because the judiciary excuses almost anyone who asks to be excused, and because absentees without excuse are never fined. This *laissez-faire* approach to lay judge service creates a moral hazard, by creating incentives *not* to serve. Second, by law, the pay for serving as a lay judge is modest (up to 10,000 yen per day), and many citizens who serve do not get adequately compensated by their employer for the days of work missed. Some even have to use days of paid leave or (if that is not permitted) are pressed to take unpaid leave from work.[191] Third, changing employment patterns in the Japanese economy have resulted in more people working in part-time or irregular jobs for which the no-show rate is higher than for people in full-time, regular occupations. In Japan, absence from work can damage one's reputation. Fourth, affordable child care is hard to find in Japan. This helps explain why the no-show rate is higher for women than for men. Fifth, in some cases involving defendants with connections to organized crime *(bōryoku-dan)*, lay judges were approached by gangsters outside the courtroom. News about this kind of contact may be inhibiting citizens from serving in similar cases.[192] Sixth, as the lay judge system has matured, media coverage has declined, and so has citizen interest in serving. Some trial events are no longer considered newsworthy because they are no longer new.[193] In addition to these causes, Japan's high no show-rate is also driven by two forces that are more proximate to the new trial system: an "obligation of confidentiality" *(shuhi gimu)* for lay judges, and a significant increase in the length of lay judge trials and deliberations *(shinri-hyōgi jikan)*. We discuss each in turn.

Under penalty of fine or imprisonment, lay judges and former lay judges must not disclose to outsiders (people who did not serve on their lay judge

---

retrieved from *http://www.saibanin.courts.go.jp/vcms_lf/r1_5_saibaninsokuhou.pdf (see also Vanoverbeke and Fukurai, 2019).*

a) These cases were either dropped or transferred to different jurisdictions.

b) The number of candidates summoned to appear in court divided by the number of in-court appearances.

c) The total number of candidates divided by the number of in-court appearances.

190 TAKEDA, *supra* note 39.

191 M. TAGUCHI, *Saiban-in no atama no naka: 14-nin no hajimete monogatari* [Inside the Heads of the Jurors: The Unique Story of 14 People] (Tōkyō 2013) 48.

192 TAKEDA, *supra* note 39.

193 FUJITA, *supra* note 26, Ch. 5. Coverage of the lay judge system by some Japanese media has been largely negative. For example, in 2001 and 2002, Nihon Keizai Shinbun (Japan's Wall Street Journal or Financial Times) published roughly equal numbers of positive and negative articles about the new trial system, but in the subsequent decade the number of negative articles exceeded the number of positive ones by more than 3 to 1 (FUJITA, *supra* note 26, 247).

panel) many aspects of their trial and deliberation experiences, including how judges and lay judges voted, what they think of the trial outcome, and who said what during deliberations. Many observers believe this rule imposes large emotional and psychological "burdens" *(futan)* on lay judges, who are forever forbidden from discussing "potentially traumatizing" matters that they heard and saw at trial[194] – not to mention other matters that are interesting and important. The obligation of confidentiality also makes it impossible to share some *positive* impressions and experiences which could encourage more citizens to serve as lay judges. In its most subjective form, concern about confidentiality can be expressed as a simple question: why do something that is interesting, important, unusual, and challenging if you cannot even talk about it?

Although many analysts believe the obligation of confidentiality should be relaxed or even eliminated,[195] the vast majority of citizens who serve as lay judges say they want to preserve it.[196] In one survey by the Supreme Court's General Secretariat, "nine times more ex-*saiban-ins* thought the confidentiality clause was necessary than those who requested reducing it."[197] Similarly, while the obligation of confidentiality contradicts the principles of transparency and accountability that have motivated many of Japan's justice system reforms,[198] it is welcomed by professional judges, who are protected from public scrutiny and criticism by an expansive policy of secrecy that is kept intentionally vague in order to maximize its conversation-discouraging effects.

---

194 M. LEVIN / V. TICE, Japan's New Citizen Judges: How Secrecy Imperils Judicial Reform, The Asia-Pacific Journal: Japan Focus 19 (2009) 1–16.

195 II, *supra* note 188.

196 Among the minority of former lay judges who feel burdened by the obligation of confidentiality, some have likened their own situation to that of the "hidden Christians" *(kakure kirusuchan)* who were tortured and killed by the *bakufu* government in the Tokugawa era (TAKEDA, *supra* note 39). It seems the facile conflation of micro-aggressions and serious acts of violence is not confined to the United States (S. O. LILIENFELD, Microaggressions: Strong Claims, Inadequate Evidence, Perspectives on Psychological Science 12.1 (2017) 138–169.

197 YANASE, *supra* note 2, 345. This is similar to the situation in Belgium, where a penalty could be imposed on former jurors who do not keep the appropriate secrets (though the sanction has never been used). In the Belgian context, the penalty is considered a tool to protect jurors from excessive media attention and from pressure to reveal names and the personal opinions of other jurors. See: D. VANOVERBEKE, *Berugi kara mita saiban-in seido – hendō suru ni okeru shimin no kōki* [The Lay Assessor System in Today's Japan as Seen from Belgium: An Opportunity for Citizens in a Changing Society], in: Ii (ed.), *supra* note 188.

198 F. K. UPHAM, Japanese Legal Reform in Institutional, Ideological, and Comparative Perspective, Hastings International and Comparative Law Review 36 (2013) 567.

It is sometimes said that Japan's high no-show rate undermines the legitimacy of lay judge trials. On this view, the lay judge system might not be sustainable if many citizens continue refusing to serve.[199] The official position of Japan's judiciary is that the no-show rate is a concern, but it is "not high enough to affect the operation of the lay judge system."[200] More generally, Japan's judiciary states that "the [lay judge] system has been accepted positively by the public,"[201] a claim which research supports.[202]

Claims about "legitimacy" are difficult to prove or disprove.[203] But if lay judge participation rates reach a point of crisis, there is a ready solution: Japan could (as permitted by law) start convening lay judge trials with a panel of 1 professional judge and 4 lay judges (instead of 3 and 6, respectively). This would reduce the number of citizen-participants by one-third. But in the first 10 years of the new system (more than 12,000 lay judge trials), the more compact tribunal was never used even though guilt was uncontested in about half of all cases.[204] The non-use of small panels is all the more striking when one considers how much anxiety Japanese journalists and judges express about the heavy "burdens" *(futan)* purportedly imposed on lay judges, and how much energy the judiciary spends trying to streamline lay judge trials.[205]

The main reason for avoiding smaller lay judge panels is the judiciary's concern that a judge's capacity to control the course of deliberations would be significantly curtailed if he or she does not have professional allies on the bench.[206] Research shows that smaller groups deliberate more actively than larger groups do. Smaller groups also reduce the power of factions – which the lone judge could easily be (or be a part of) on a smaller panel.[207]

---

199 II, *supra* note 188.

200 "Japan Supreme Court chief says lay judge system well received but tweaks needed to spur interest", The Japan Times, 16 May 2019, retrieved at *https://www.japantimes.co.jp/news/2019/05/16/national/crime-legal/japanese-supreme-court-chief-justice-says-lay-judge-system-well-received-improvements-needed-spur-public-interest/#.XbvDkK97mM8.*

201 "Lay Judge System Needs Tweaking, Chief Justice Says", in: Japan Times, 17 May 2019, 2.

202 FUJITA, *supra* note 26, 275.

203 C. VAN HAM/J. THOMASSEN/K. AARTS/R. ANDEWEG (eds.), Myth and Reality of the Legitimacy Crisis: Explaining Trends and Cross-National Differences in Established Democracies (Oxford 2017).

204 VAN HAM/THOMASSEN/AARTS/ANDEWEG, *supra* note 203.

205 TAKAYAMA, *supra* note 46.

206 TAKANO, *supra* note 46.

207 As Kage (KAGE, *supra* note 12, 115) summarizes in her discussion of system design, "A smaller number of lay judges, then, might actually *enhance* the power of lay judges vis-à-vis professional judges" (emphasis in original).

Since the risk of a professional judge failing to stay "on top" of the lay judges is perceived to be higher with a ratio of 1 professional to 4 amateurs instead of 1 to 2, a simple solution to the "no-show" problem is being rejected because it does not serve the interests of professional judges and because it increases the risk of damage to their professional reputations. In this respect, Japanese judges are like their professional counterparts in the police and the procuracy, for they have been able to limit the scope of criminal justice reform to issues they consider safe. This "second face of power"[208] has long been evident in the status-quo preserving ways that legal professionals have responded to lay participation reforms in Japan's legal system.[209]

What about the third point in this problematic triangle – the lengthening of lay judge trials and deliberations? The increased complexity suppresses the lay judge service rate by imposing a larger burden on the citizens who serve. In economic terms, longer trials and deliberations raise the "price" of participation. In 2009, the average lay judge trial took 3.7 days, and the average lay judge deliberation was 6.6 hours. As *Table 5* shows, by 2018, the comparable durations were 10.8 days and 12.9 hours – a near tripling and a near doubling, respectively.[210] Over the same period of time, there was a marked decline in the average amount of material evidence (including dossiers, or *chōsho*) investigated at trial, and there was a doubling (from 1.5 to 3.0) in the average number of witnesses questioned at trial.[211] Similarly, the percentage of former lay judges who said that trial proceedings, prosecutors, and defense lawyers were "easy to understand" *(wakari yasukatta)* declined markedly.[212] In sum, lay judge trials have become more

208 BACHRACH / BARATZ, *supra* note 84.

209 ANDERSON / NOLAN, *supra* note 98.

210 TAKEDA, *supra* note 39. The trial duration and deliberation duration increase occur in both lay judge trials in which the defendant confesses *(jihaku jiken)* and in lay judge trials in which the defendant does not confess *(hinin jiken),* but the latter increase is especially sharp, with the average length of a "denial trial" tripling from 4.7 days in 2009 to 14.0 days in 2018. The percentage of all lay judge trials that are denial trials has increased sharply as well, from roughly 20 percent in 2009, to more than 40 percent in 2011, to more than 50 percent in 2017 and 2018 (D. VANOVERBEKE / H. FUKURAI, Lay Participation in the Criminal Trials of Japan: A Decade of Activity and its Socio-Political Consequences, in: Ivković / Diamond / Hans / Marder (eds.), Juries, Lay Judges, and Mixed Courts: A Global Perspective (Cambridge 2020, forthcoming).

211 Some Japanese defense attorneys call this "a shift from paper to people" (authors' interviews, May 2019).

212 Although there has been a decline in the percentage of lay judges who say that trials, prosecutors, and defense attorneys are "easy to understand," lay judges continue to report, as they have since the new system's inception, that prosecutors are (by a wide margin) easier to understand than defense attorneys see: HERBER, *supra* note 80.

complicated, time-consuming, and difficult to comprehend. In a culture that treats lay judges as "guests" and "clients" whose "satisfaction" must be maximized and "burdens" minimized,[213] these issues are the subject of much media coverage.[214]

Table 5: Duration of Lay Judge Deliberations in Hours, 2009–2018[215]

Year	Aggregate	Confession	Denial
2009	6.6	6.2	7.9
2010	8.4	7.3	10.3
2011	9.4	7.8	11.6
2012	10.3	7.9	13.1
2013	10.5	8.3	12.9
2014	11.2	8.8	13.9
2015	11.9	9.0	15.2
2016	12.1	9.3	15.2
2017	12.6	9.6	15.2
2018	12.9	9.7	15.9

But does it matter that lay judge trials are getting longer and more complicated? On the one hand, this change might be welcomed in light of the tendency (described above) of prosecutors and judges to script trials in ways that marginalize the influence of lay participants. On the other hand, the complexification of lay judge trials could be cause for concern if it creates incentives for legal professionals to avoid this type of trial. Beyond some point, trial complexity could even create momentum to expand the practice of plea bargaining, which Japan legalized for the first time in 2018.[216] The present system of plea bargaining allows suspects and defendants to negotiate deals with prosecutors in exchange for information on other offenders.[217] Although the scope of Japan's current plea bargaining law is narrow, it has been criticized for creating incentives for suspects and defend-

213 TAKAYAMA, *supra* note 46, 34.

214 HERBER, *supra* note 80, 182.

215 *Note*: Adapted from Supreme Court of Japan, "Report on the State of Implementation of Lay Judge Trials (from the implementation of the system until the end of May 2019).

216 S. MURAKAMI, Japanese-style Plea Bargaining Debuts But Authorities Fear Spread of False Testimony, The Japan Times, 31 May 2018, retrieved at: *https://www.japantimes.co.jp/news/2018/05/31/national/crime-legal/japanese-style-plea-bargaining-debuts-authorities-fear-spread-false-testimony/#.XbyO9697mM8*.

217 MURAKAMI, *supra* note 216.

ants to make false and self-serving statements that could lead to wrongful convictions. In the long run, the larger concern is that if lay judge trials become too long and complicated, the system's professional incumbents could try to make it prohibitively costly for defendants to exercise their right to a lay judge trial, by imposing large "trial taxes" on them, as routinely happens in the United States.[218] It would be ironic if a lay participation reform that was intended to improve the quality of criminal trials and the level of public trust in Japanese criminal justice ends up resembling an American system of "justice without trial" that relies on giving defendants an "offer that cannot be refused."[219] Moreover, if lay judge trials continue to become more complicated, Japanese prosecutors could become even more cautious about charging cases for trial in this forum, thereby "hollowing out" a system that many reformers regard as the most promising and progressive change in Japanese criminal justice in more than half a century.[220]

10. Seeing the Forest

Around the time of the 10th anniversary of the lay judge reform, the Chief Justice of Japan's Supreme Court (Naoto Ōtani) said that the new trial system "needs tweaking" to stimulate greater public interest and to ease the "burdens" on lay judges and thereby reduce the number of no-shows, but he stressed that, all in all, the new trial system "has been accepted positively by the public" and by lay judges in particular.[221] Survey evidence supports his claims. On the whole, "Japanese people are positive" about the lay judge system,[222] and a survey of 100 former lay judges found that more than 90 percent support the new system and want to see it maintained.[223]

---

218 LANGBEIN, *supra* note 10.

219 H. ZEISEL, The Offer That Cannot Be Refused, in: Zimring / Frase (eds.), The Criminal Justice System: Materials on the Administration and Reform of the Criminal Law (Boston / Toronto 1980) 558, 559–560.

220 IGARASHI, *supra* note 58.

221 "Lay Judge System Needs Tweaking", *supra* note 201.

222 FUJITA, *supra* note 26, 275. Note, however, that an NHK opinion survey in April 2019 (n=2819) found that 28 percent of respondents said they think it was "not good" that the lay judge system was introduced. When non-responses are excluded from this survey, the figure rises to 33 percent. See *https://www.nhk.or.jp/bunken/research/yoron/pdf/20190521_1.pdf*.

223 *Honsha 100-nin chōsa: Saiban-in keiken-sha 9-wari shiji* [Survey of a 100 People by this Newspaper: 90 Percent of the Former Lay Judges Are in Favor], Yomiuri Shinbun, 19 May 2019) 1; see also: *Saiban-in seido 10-nen, jitairitsu no zōka ga kigakari da* [A Decade of the Saiban-in System, The Increasing Refusal to Act as a Saiban-in is a Real Problem]. Yomiuri Shinbun, 19 May 2019). Retrieved from Yomidas Rekishikan Yomiuri Database Service.

Similarly, a Kyodo News survey of 342 former lay judges found that 98 percent had a favorable experience as a lay judge, with 92 percent saying "citizen sensibilities" were well reflected in judicial opinions.[224] More broadly, evidence compiled by Japan's judiciary shows that the vast majority of lay judges say they had a good experience.[225] According to a survey of 5,392 citizens who served, 96 percent said their experience was either "extraordinarily good" (62 percent) or "good" (34 percent), even though before their experience as a lay judge started, half did not want to participate.[226] This before-after gap in lay judge positivity parallels a similar before-after disparity among citizens who serve on Prosecution Review Commissions. One survey of former PRC members found that 70 percent said that at the time they were selected to serve they "did not really want to do it" *(amari kinori shinakatta)*, but by the time their six-month period of service had ended, 96 percent said "it was a good experience" *(yoi keiken datta)*.[227] The evidence from former lay judge and PRC participants suggests that relaxing the rules of confidentiality that currently restrict them could encourage greater participation in both systems.

Despite high levels of anxiety in Japanese media and society about the physical and psychological burdens that lay judges purportedly feel, the Kyodo News survey found that only 3 percent of former lay judges said their experience was "very stressful," while another 31 percent said it was "somewhat stressful."[228] In our view, the stress of being a lay judge receives so much attention in Japanese media and society that the secondary aim of reducing the "burden" of serving threatens to displace the primary aims of criminal adjudication, such as fairness, justice, and accuracy.[229]

---

224 "*Hanketsu ni 'shimin kankaku' 92%, 'Shinri ni sutoresu' 34%* ['Citizens' Sense' in the Verdicts: 92%, Stress when deliberating: 34%]", Tōkyō Shinbun, 21 May 2019, 1; "*Hanketsu ni shimin kankaku* [Citizens' Senses in the Verdicts]", Mainichi Shinbun, 21 May 2019, 1.

225 For data on the first ten years of Japan's lay judge reform, see *http://www.saibanin.courts.go.jp/topics/09_12_05-10jissi_jyoukyou.html*.

226 HERBER, *supra* note 80, 180.

227 II, *supra* note 188, 149.

228 "Third of Japan's Lay Judges Say Experience Was Stressful, but System Viewed Positively Overall", Japan Times, 22 May 2019 2. Retrieved at *https://www.japantimes.co.jp/news/2019/05/21/national/crime-legal/third-japans-lay-judges-say-experience-stressful-system-viewed-positively-overall/#.XbySi697mM8*.

229 JOHNSON, *supra* note 52. For example, after a lay judge trial in Sendai in 2013, a 62-year-old former lay judge who was diagnosed with Acute Stress Disorder sued the government for 2 million yen ($ 20,000), arguing that her lay judge service had caused the disorder. In a trial in which the defendant (Akihiko Takahashi) was eventually sentenced to death for murdering a married couple, the lay judges had viewed photos of the corpses and heard the recorded voices of the victims in an emergency

More fundamentally, stress is inevitable in many human activities. As Marcus Aurelius observed, "for a human being to feel stress is normal – if he's living a normal human life."[230]

Judges had the most to lose because of Japan's lay judge reform, for when amateurs participate in criminal adjudication, professionals lose some control over guilt and sentencing decisions.[231] In this context, the high levels of judicial support for the new trial system are striking. In an article published on the 10th anniversary of the lay judge reform, Japan's largest newspaper reported that all 50 chief judges in the nation's District Courts believe that, overall, "the lay judge system has had a good influence" on Japanese law and society.[232] In their view, the reform made trials easier to understand (47/50 judges), decisions *(hanketsu)* more persuasive (43/50 judges) and trials shorter (37/50 judges). What is more, 48 of the 50 chief judges said the lay judge system has been a net "plus" for them as individuals, because it caused them to think more deeply about law, helped improve their communication skills, and made them more conscious of public opinion. A *Sankei* newspaper interview of 20 other judges revealed similarly positive views.[233]

---

call. According to the lawsuit, the lay judge vomited on the first day of trial after seeing photos of the crime scene, and she suffered numerous nightmares and flashbacks thereafter. The legal basis for her claim was that the Lay Judge Law violates Article 18 of Japan's Constitution (which forbids "bondage of any kind" and "involuntary servitude"), and Article 13 (which states that "All of the people shall be respected as individuals"). Cases such as this fueled calls to remove death-penalty decision-making from the jurisdiction of lay judges, but in official reviews of the lay judge reform, this change was not recommended. See *https://www.japantimes.co.jp/news/2013/05/08/national/crime-legal/japanese-citizen-judge-sues-government-for-mental-suffering/#.XVA2xkd7mM8.*

230 In M. AURELIUS, Meditations (New York 2003) 76. To clarify, we do not claim that lay judge trials are seldom stressful for the citizens who serve. Moreover, Article 51 of the Lay Judge Law stipulates that judges, prosecutors, and defense attorneys should try to conduct trials in ways that do not impose an "excessive burden" *(futan ga kajū na mono)* on lay judges. Our concern is that, in practice, "excessive burden" is too often taken to mean "any burden at all." As defense attorney Takashi Takano has argued, if politicians were as concerned with "stress" as professional judges are, so that they went to great lengths avoid "burdening" the electorate with excessive information, it would be tantamount to "corrupt and dangerous government." TAKANO, *supra* note 46, 29.

231 KAGE, *supra* note 12, 10–15.

232 "*Saiban-in Seido 10-nen: Saiban-chō 50-nin ankēto: Shimin kankaku shinri shinpū* [One Decade of the Lay Judge System: Survey with 50 Presidents of the Courts: The Sense of the Citizen as a New Wind at the Deliberations]", Yomiuri Shinbun, 21 May 2019, 1, 13.

233 "*Keiken-sha fuereba, shakai ga yoku naru* [With More People Experiencing (the Lay Judge System), Society Will Become Better]", Sankei Shinbun, 19 May 2019, 24.

In some respects it is good that judges support the lay judge reform, for judicial resistance could have undermined the reform – a phenomenon frequently seen in the United States.[234] On the other hand, the extremely high levels of judicial support for Japan's lay judge system suggest that this reform is doing little to make judges uncomfortable. If the point of reform is to produce meaningful change in Japanese criminal justice, this might not be a good thing.[235] Similarly, the high levels of support among former lay judges seems better than deep dissatisfaction, but if it is also a sign that judges are successfully satisfying their "clients,"[236] hosting their "guests,"[237] and parenting their "children,"[238] the net effect might be to render lay judges passive in the criminal process, thereby marginalizing their influence as well.

And let us not miss the forest for the trees. Our essay has focused on the limits of lay participation by focusing mainly on its effects in the criminal justice system. But of course, judging these reforms solely in terms of their effects on criminal justice makes no more sense than evaluating a wedding or a funeral in terms of its accuracy.[239] As Alexis de Tocqueville and others have observed, trials pursue broad and intangible goals, including civic education and democratization.[240] These effects are hard to measure, but the possibility of positive change in Japan's society and polity needs to be considered, especially considering the strong claims made by many analysts.

As we have seen, survey responses from citizens who served as lay judges "overwhelmingly indicate that they found the experience rewarding, empowering, and educational."[241] Based on this evidence, some observers believe Japan's new trial system is serving as a "school for democracy."[242] Similarly, research on "lay judge lounges" *(saiban-in raunji)* concludes that "it is not over when it's over" because lay judges continue to meet, think, and talk about their experiences long after their service has ended.[243] Other analysts regard Japan's lay judge reform as "monumental" because of its "indirect" and "educational" effects on Japanese society.[244] On this view,

234 FEELEY, *supra* note 6.
235 TAKANO, *supra* note 46.
236 HERBER, *supra* note 80, 182.
237 TAKAYAMA, *supra* note 46, 34.
238 TAKANO, *supra* note 46.
239 S. KADRI, The Trial: Four Thousand Years of Courtroom Drama (New York 2005) 346.
240 J. GASTIL/E .P. DEESS/P. J. WEISER/C. SIMMONS, The Jury and Democracy: How Jury Deliberation Promotes Civic Engagement and Political Participation (Oxford 2010).
241 KAGE, *supra* note 12, 6.
242 KAGE, *supra* note 12, 6.
243 II, *supra* note 188, 88–139.

the lay judge system is "the greatest achievement" of justice system reform in Japan,[245] and lay participation should be extended into other realms of Japanese law.[246] These optimistic interpretations presume that lay participation fosters the civic consciousness of citizens about state affairs and provides citizens with an unprecedented platform for monitoring state action and holding state actors accountable.[247]

We are not so sanguine. For one thing, there is no solid or systematic evidence that lay participation is reshaping Japanese society and democracy. For another, the high no-show rate for citizens who are asked to serve as lay judges hardly reflects an enthusiastic societal endorsement of greater citizen involvement in government.[248] There is also the matter of scale and plausibility. A little yeast can have a large effect, but if lay judge service in Japan is "resulting in a greater sense of civic engagement by those who have experienced it, the numbers" – about 12,000 persons serve as lay judges each year, or less than 1 Japanese adult in 8,500 – "remain so small it is likely to take many years before the impact will become visible" – if it becomes visible at all.[249] By comparison, approximately 1.5 million people are selected each year to serve on a jury in an American state court, which is about 1 American adult in 150.[250] Per capita, therefore, jury service in the United States is more than 50 times more common than lay judge service in Japan (8,500/150 = 56.7), even though jury trials are "vanishing" and perhaps even "dying" in the US.[251] There is some evidence that in America "jury deliberation promotes civic engagement and political participation," but the effects are small and are, for the most part, limited to people who were *not* civically engaged or politically active before serving as jurors.[252] In fact, the main finding from American research is that jury service generates a 4 to 7 percent increase in average voter turnout for jurors who previously had "a relatively spotty voting record."[253] The effect of criminal jury participation on voting "*does not hold* for those voters who are already active."[254]

---

244 WILSON, *supra* note 58.

245 H. FUKURAI, A Step in the Right Direction for Japan's Judicial Reform: Impact of the Justice System Reform Council Recommendations on Criminal Justice and Citizen Participation in Criminal, Civil, and Administrative Litigation, Hastings International and Comparative Law Review 36.2 (2013) 565.

246 WILSON / FUKURAI / MARUTA, *supra* note 56.

247 VANOVERBEKE / FUKURAI, *supra* note 210.

248 HERBER, *supra* note 80, Ch.6.

249 FOOTE, *supra* note 37, 14.

250 CHALABI, *supra* note 185.

251 BURNS, *supra* note 14.

252 GASTIL / DEESS / WEISER / SIMMONS, *supra* note 240, 173–176.

253 GASTIL / DEESS / WEISER / SIMMONS, *supra* note 240, 48.

The small size and narrow scope of the jury service effect in the United States is hardly a solid basis for making bold pronouncements about the large effects of lay judge service in Japan. Indeed, Japan's lay judge service rate is so low that a more realistic prediction would be little effect of lay judge service on voting behavior (and on other civic activities) because the 20 percent of citizens who are asked to serve and actually do are (probably) already active in civic affairs. We join the call for researchers to collect data on the relationships between lay participation and civic engagement in Japan,[255] but until we see evidence to the contrary, we will continue to believe in the null hypothesis.

IV. Japanese Reforms in Comparative Perspective

In criminology as in other social research, we understand what is empirically normal and distinctive about a system or place – and what is praiseworthy and problematic – by examining it in comparative perspective. As Seymour Martin Lipset observed, "those who know only one country know no country." [256] Many of the limits of criminal justice reform in Japan can be seen in other countries. In comparative perspective, Japan seems to be an ordinary country and a fairly typical case.[257]

In France, a reform to enable lay participation in criminal trials has been called an "alibi" for existing practices.[258] The French story is reform in the service of maintaining existing practices. In Belgium, efforts to reform criminal courts have been waged for three decades but these reforms are contested, largely because lay influences are being marginalized by the judiciary.[259] And in Germany, where two or three lay assessors sit with one to three professional judges, "studies unanimously point to the limited influence of lay judges" at criminal trial.[260] As one analyst found, "Profes-

254 Gastil/Deess/Weiser/Simmons, *supra* note 240, 48, emphasis added.

255 Fujita, *supra* note 26, 273–275.

256 S. M. Lipset, American Exceptionalism: A Double-Edged Sword (New York 1996) 17.

257 J. D. Jackson/N. P. Kovalev, Lay Adjudication in Europe: The Rise and Fall of the Traditional Jury, Oñati Socio-legal Series 6.2 (2016) 368–395.

258 A. Giglio-Jacquemot/A. Jellab, Les jurés à l'épreuve des assises: description et portraits d'une expérience marquante [Putting Jurors to the Test at the Assises Court: Description and Portraits of a Significant Test], Les Cahiers de la Justice 1.1 (2012) 31–44, retrieved at *https://www.cairn.info/revue-les-cahiers-de-la-justice-2012-1-page-31.htm*.

259 J. Maesschalck, When Do Scandals Have an Impact on Policy Making? A Case Study of the Police Reform Following the Dutroux Scandal in Belgium, International Public Management Journal 5.2 (2002) 169–193.

260 W. Perron, Lay Participation in Germany, Revue Internationale De Droit Pénal 72 (2001) 181–196, at *https://www.cairn.info/revue-internationale-de-droit-penal-2001-1-page-181.htm*.

sional and lay judges [in Germany] do not often disagree, and the few discordances they have usually relate to the sentence rather than the question of guilt. If an agreement cannot be reached, it is usually the professional judges who assert themselves against their lay colleagues."[261]

Lay participation is also contained and marginalized in East Asia. In the People's Republic of China, the Lay People's Assessor's Law was revised in 2018, ostensibly to give lay assessors more voice and influence at trial. In practice, however, lay assessors are "reticent" to speak and deliberations are "virtually nonexistent," rendering the citizens who serve "decorations" who play a "trivial role" in the criminal process.[262] In South Korea, a jury system was introduced in 2008, but its effects have been minimal, perhaps because the new system delegates little real power to jurors. A jury trial is held only if a defendant requests it *and* judges approve it, and even then the jurors' decision is advisory, for it can be overruled by the judges. Jury trials in South Korea are also rare events. Between 2008 and 2013, less than 40 percent of defendants who applied for a jury trial received one, for an average of 175 jury verdicts per year.[263] Lay judge trials in Japan constitute a small fraction of all criminal cases in that country, but both per capita and per unit of crime, jury trials in South Korea are even less common. The net effect of these design deficiencies is a "weak" jury system.[264] In Taiwan, lay participation

261 PERRON, *supra* note 260, 193.

262 See CUHK (Centre for Chinese & Comparative Law, School of Law, City University of Hong Kong), Lay Participation in the Chinese Courts, in: RCCL Policy Brief Series: (January 2017) 1–8, at *http://www.cityu.edu.hk/slw/lib/doc/RCCL/RCCL_Policy_Brief-No_1_of_2017.pdf*. Of course, it is hardly a surprise that citizen influence is minimized in a legal system that remains under the thumb of the Chinese Communist Party, but it is interesting *how* this effect is achieved. Article 14 of the aforementioned Law stipulates that lay assessors shall be randomly selected for cases, but "actual participation in court hearing is concentrated in a tiny proportion of assessors" who are sometimes called "professional assessors" (CUHK, 2017, 4). In a Shanxi district court, for example, three lay assessors participated in more than 100 cases each, and in a criminal court in coastal China, one lay assessor in his sixties participated in every trial during the period under study (CUHK, 2017, 4). As the authors of this study conclude, "Two factors have contributed to the poor performance of lay assessors [in the PRC]. The primary reason is the mixed tribunal institution. While the law stipulates that lay assessors are vested with the same powers as judges, the latter can manipulate decisions through their superior professional knowledge and status. On the other hand, since the judges are embedded in the particular legal, political, and bureaucratic environment, they have little reason to share decision-making power with the lay assessors" (CUHK, 2017, 3). As described in our section on "Limits," these mechanisms of marginalization also operate in Japan.

263 KAGE, *supra* note 12, 171.

264 KAGE, *supra* note 12, 163–172.

in criminal trials has not yet been instituted despite reform efforts that have been ongoing for more than two decades.[265] Taiwan's model for a mixed tribunal resembles Japan's system in several respects. Most notably, there are three professional judges and six lay judges (as in Japan), and the decision rules for criminal sentencing are much the same as in Japanese lay judge trials. A study of mock trials in Taiwan found three problems with the nascent system: professional judges often dominate lay judges in deliberations about guilt and sentence (as in Europe and other East Asian settings); lay judges have difficulty comprehending the law; and lay judges are confused and misled by Taiwan's deficient rules of evidence.[266] To rectify these problems, some analysts recommend "training sessions" for "both lay judges and legal professionals."[267] In our view, official efforts to "train" lay participants would likely limit their influence even more.[268]

And then there is the United States, where there have been many serious and sustained efforts to reform criminal courts.[269] Almost all of them have failed – often by making matters worse. The pattern is so pronounced that there is even "Feeley's law of court reform," which holds that "Unless a host of heroic conditions are present to overcome the myriad of built-in constraints, failure will almost certainly ensue."[270] Despite decades of reform efforts, the end result is "a near consensus" among scholars that "other countries do a better job of administering criminal justice than we [in America] do."[271] Of course, analysts should avoid the historical fallacy of assuming that criminal courts in the United States used to work substantially better than they do now. As Feeley observes, "as bad as the American criminal justice system is, it is probably as good as it has ever been."[272] But if American criminal courts are better now than they used to be, they are still bad.

---

265 KAGE, *supra* note 12.

266 M. CHIN, Lay Participation in Taiwan: Observations from Mock Trials, Asian Journal of Law and Society 6.1 (2019) 181–207. doi:10.1017/als.2019.8, retrieved at *https://www.cambridge.org/core/journals/asian-journal-of-law-and-society/article/lay-participation-in-taiwan-observations-from-mock-trials/BC98B1A9C903DF0D73EB79DAD792E9CB.*

267 CHIN, *supra* note 266.

268 GOODMAN, *supra* note 111 on PRCs.

269 FEELEY, *supra* note 6. See also: FEELEY, *supra* note 55 and the other important publications by Malcom Feeley about criminal court reform: M. FEELEY, Court Reform on Trial: Why Simple Solutions Fail (New York 1983); M. FEELEY, East Asian Court Reform on Trial: Comments on the Contributions, Washington International Law Journal 27.1 (2017) 273–294; M. FEELEY, How to Think About Criminal Court Reform, Boston University Law Review 98 (2018) 669–726.

270 FEELEY, *supra* note 6, 275.

271 FEELEY (2018), *supra* note 269, 721.

272 FEELEY (2018), *supra* note 269, 722.

There are three structural reasons for the repeated failure to reform American criminal courts: a dysfunctional adversary process in which there is too much cooperation, collaboration, and collegiality between legal professionals who are (in principle) supposed to be antagonists; a fragmented criminal justice system in which different parts and participants work at cross-purposes; and a fragmented governmental system which frequently fails to consider the big picture and coordinate the many moving parts of reform.[273] None of these causal forces has the same impact in Japan, where the adversary process is strongly tilted toward state interests,[274] and where the criminal justice and governmental systems are far more centralized than their counterparts in the United States.[275] But a broad socio-legal approach to studying Japan is still essential. When diagnosing the problems of criminal justice administration in this or any other nation, "we must dig deeper and seek to understand them in light of culture and governmental structure."[276] Future research should explain in more detail how the cultural and structural contexts of criminal justice in Japan constrain the consequences of reform.[277]

V. Conclusion

Compared to criminal court reform in the United States, Japan's attempts to implement lay participation can be called a qualified success, for they have led to real change in many criminal justice procedures, and they have not made many things worse. In Japan, this perspective – "the glass half full" – is so common among legal professionals and students of law and society that we consider it the Orthodox View. But in evaluating Japan's lay participation

273 Feeley, *supra* note 6, 277. Feeley argues that "any serious discussion of criminal court reform in the United States" should be "deeply informed by the perspectives of three scholars": John Langbein (1978 and 1979), Mirjan Damaska (1986), and Robert A. Kagan (2001), all of whom "disparage the American system as hopelessly fragmented and chaotic, with Langbein holding it incapable of rendering meaningful justice" Feeley (2018), *supra* note 269, 721. For insightful critiques of American criminal courts that also offer solutions, see D. P. Mears, Out-of-Control Criminal Justice: The Systems Improvement Solution for More Safety, Justice, Accountability, and Efficiency (Cambridge 2017); W. R. Kelly / R. Pitman / W. Streusand, From Retribution to Public Safety: Disruptive Innovation of American Criminal Justice (Lanham et al. 2017); M. A. R. Kleiman, When Brute Force Fails: How To Have Less Crime and Less Punishment (Princeton 2009); and the fine collection of articles in E. Luna (ed.), Reforming Criminal Justice, Volume 3: Pretrial and Trial Processes (Phoenix 2017), at *http://academyforjustice.org/volume3/*.

274 Feeley / Miyazawa, *supra* note 46.

275 Johnson, *supra* note 30.

276 Feeley, *supra* note 6, 726.

277 Suo, *supra* note 85.

reforms, using the US as the main point of comparison is setting the bar rather low.[278] Moreover, when it comes to the substance of Japanese reform, there is striking continuity in both who wields control in the criminal process and in who gets what from it. This view could be called "the glass half-empty" except we believe it is too cheerful too, as the previous pages have explained. In many respects, changes on the surface of Japanese criminal justice have affected reality on a deeper level mainly by cementing the status quo. We almost titled this article "Two Cheers for Criminal Justice Reform in Japan," but we changed our minds after analyzing the evidence because we could muster only enough optimism for a single half-hearted cheer.

The limits of reform in Japanese criminal justice should not be surprising. After all, the main aim of the lay judge reform was not to transform the distribution of power in Japanese criminal justice or to radically reshape criminal justice outcomes. References to democracy and popular sovereignty do not even appear in the Lay Judge Law. As stated in Article 1 of that Law, its primary purpose is to contribute to the promotion of the public's understanding of the judicial system and thereby raise confidence in it. As one scholar puts it, the lay judge system "was established to enhance the power and authority of the judiciary," not to democratize it.[279] In the context of these conservative ambitions and the control of national government by the conservative LDP, the limits of Japan's lay participation reforms can be called all but inevitable. For progressives the main message might be: nothing fails like success.

Understanding the present also requires remembering the past. Lay participation reforms have been marginalized several times in Japanese history, largely by legal professionals who found their powers threatened by greater citizen involvement.[280] The legacy of this history is prominent not only with respect to lay judges, victims, and Prosecution Review Commissions. It is evident in other reforms that were meant to enhance the role of "outsiders" in Japanese criminal justice,[281] including the Penal Institution Visiting Committees *(keiji shisetsu shisatsu i'inkai)* that began operating in Japanese prisons and jails in 2007. Inmates in Japan are now able (some-

278 FEELEY (2018), *supra* note 269.

279 YANASE, *supra* note 2, 334.

280 ANDERSON/NOLAN, *supra* note 98. The most important historical instance of the marginalization of lay participation by Japanese legal professionals was the prewar jury system, which operated from 1928 to 1943 (VANOVERBEKE, *supra* note 17, 60–87). On the whole, that system was conceived by state authorities to control citizens, not to control state action through citizen participation. See N. TOSHITANI, *Nihon no baishin-hō: Sono naiyō to jisshi katei no mondai-ten* [The Jury Act in Japan: Problems with Content and Operation], Jiyū To Seigi 35 (1984) 4–12.

281 HERBER, *supra* note 80.

times) to read and write uncensored letters, and they can be interviewed by PIVC members without prison or jail staff present. While these are welcome changes, the main effect of this prison reform has been to strengthen support for traditional penal practices – to make them more legitimate by making them seem more democratic.[282] Ultimately, Penal Institution Visiting Committees represent reform in the service of conservative interests. This is also a theme of the story we have just told.

This article has several implications for future research on criminal justice reform in Japan. The first three are important but prosaic: study the law in action, not just the law on the books; do not conflate process and substance, for change in the former might be incidental music; and be skeptical of strong claims about large positive effects, because criminal justice reform is hard. Future studies should also aim to explain how the cultural and structural contexts of Japanese criminal justice constrain citizen influence and reform outcomes. Most importantly, future research on criminal justice reform in Japan should pay more attention to the crucial roles played by *police* in "making crime" through their investigations[283] and by *prosecutors* in shaping "the Japanese way of justice" through their charge decisions.[284] Describing criminal trials in Japan with little regard for the discretionary decisions that police and prosecutors make in the pre-trial process makes no more sense than explaining the triple disaster of March 11, 2011 with little regard for the "site fights" around nuclear reactors[285] or the regulatory failures that enabled the nuclear meltdowns in Fukushima.[286] If information is the currency of democracy, then Japanese citizens and law and society scholars lack a key to the treasury of truths concerning these important but neglected actors.[287]

---

282 S. STEELE / C. LAWSON / M. HIRAYAMA / D. T. JOHNSON, Lay Participation in Japanese Criminal Justice: Prosecution Review Commissions, the Lay Judge System, and Penal Institution Visitation Committees, Asian Journal of Law & Society (forthcoming 2020).

283 MIYAZAWA / BENNETT, *supra* note 67.

284 JOHNSON, *supra* note 30.

285 D. P. ALDRICH, The crucial role of civil society in disaster recovery and Japan's preparedness for emergencies, Japan aktuell 3 (2008) 81–96.

286 J. KINGSTON, Japan's Nuclear Village, The Asia-Pacific Journal: Japan Focus, 10.37.1 (9 September 2012), retrieved at *https://apjjf.org/2012/10/37/Jeff-Kingston/3822/article.html.*

287 On Japanese police, see D. T. JOHNSON, Policing in Japan, in: Babb (ed.) The Sage Handbook of Modern Japanese Studies (London 2015) 222–243. And on Japanese prosecutors, see: D. T. JOHNSON, Japan's Prosecution System, in: Tonry (ed.), Prosecutors and Politics: A Comparative Perspective (Chicago 2012) 35–74.

Finally, we call for socio-legal scholars who are interested in criminal courts to pay more attention to the cultural and structural contexts of reform over long periods of time. As Carmines and Stimson have noted, many scholars resemble political journalists in that they "have an excessive tendency to concentrate on the here and now, [and] a blindness toward movements on a grander time scale."[288] Politics is about the "strong and slow boring of hard boards,"[289] and change is often difficult and unlikely. Moreover, since institutions – in our case criminal courts, the legal professions, and related practices – are "path dependent,"[290] it can be hard to change them because of their tendency toward "increasing returns"[291] and because they tend to be "sticky,"[292] even when it is obvious that they are not performing in an optimal way. Careful attention to historical processes and to the changing cultural and structural contexts can help us explain why criminal justice in Japan is more inclined to continuity than to change. A broad historical and sociological focus will also help us better understand when and why reforms are effective – and when and why they are not.

We have argued that the past is not dead in Japanese criminal justice – and that it is not even past. For a country that has been ruled by a conservative political party almost continuously since that party was founded in 1955, perhaps this is a conclusion Japan-watchers should have expected?

SUMMARY

In recent years several new forms of lay participation have been introduced in Japanese criminal justice, including a lay judge trial system, a victim participation system, and mandatory prosecution through the review of non-charge decisions by citizens serving on Prosecution Review Commissions. This article focuses on the effects of these reforms. We argue that while many things have been modified in Japanese criminal procedure, there is more continuity than change with respect to criminal justice substance (who has control) and outcome (who gets what). This argument proceeds in four parts. Part one summa-

288 E. G. CARMINES/J. A. STIMSON, Issue evolution: Race and the transformation of American politics (Princeton 1989). Quoted in: P. PIERSON, Big, Slow-moving, and … Invisible, in: Mahoney/Rueschemeyer (eds.), Comparative Historical Analysis in the Social Sciences (Cambridge 2003) 177.

289 M. WEBER, Economy and Society, transl. by E. Fischoff/G. Roth/C. Wittich (Berkeley 1968, originally 1921). Quoted in: PIERSON, *supra* note 288, 178.

290 MAHONEY, *supra* note 1.

291 PIERSON, *supra* note 1, 251–267.

292 PIERSON, Politics in Time: History, Institutions, and Social Analysis (Princeton 2011).

rizes some of the positive changes in Japan's criminal process that have resulted from recent lay participation reforms.

Part two – the heart of this article – describes ten ways in which Japan's reforms are limited and problematic: (1) lay judge trials constitute only a small fraction of all Japanese criminal trials; (2) the police have largely been omitted from Japanese criminal justice reform; (3) prosecutors' increased caution about charging cases has resulted in far fewer cases being tried by lay judge panels than reformers anticipated; (4) conviction rates in lay judge trials remain very high; (5) Prosecution Review Commissions seldom challenge or change prosecutors' non-charge decisions; (6) with few exceptions, criminal sentencing in lay judge trials closely resembles the criminal sentencing decisions that were made by professional judges in the preexisting system; (7) the advent of lay judge trials has resulted in prosecutors seeking fewer sentences of death, but when a death sentence is sought, lay judge panels are more likely to impose one than professional judges were in the pre-lay judge period; (8) the victim participation system has not had clear or strong effects on criminal court outcomes; (9) many citizens called to serve as lay judges refuse to serve, and those who do serve are bound by a duty of confidentiality to keep secret most aspects of their experience; and (10) there is no credible evidence that lay participation reforms in Japanese criminal justice are invigorating Japanese democracy.

Part three of this article suggests that the limits of lay participation in Japanese criminal justice can be seen in some other countries' criminal justice systems. And part four states our conclusion, that changes on the surface of Japanese criminal justice have affected reality on a deeper level mainly by cementing the status quo.

ZUSAMMENFASSUNG

In den vergangenen Jahren sind mehrere neue Formen der Beteiligung von Laien in die japanische Strafjustiz eingeführt worden, unter anderem Laienrichterverfahren, ein Verfahren für die Opferbeteiligung und die Möglichkeit der Klagerzwingung im Wege der Überprüfung staatsanwaltschaftlicher Entscheidungen, von einer Anklageerhebung abzusehen, durch Bürger, die Mitglied einer Kommission zur Überprüfung von Strafverfolgungen sind. Der Beitrag befasst sich mit den Auswirkungen dieser Reformen. Die Verfasser argumentieren, dass zwar viele Aspekte der Strafverfolgung in Japan geändert wurden, insgesamt aber mehr Kontinuität als Veränderungen mit Blick auf das Wesen der Strafjustiz (wer hat die Macht?) und die Ergebnisse (wer bekommt was?) zu beobachten sei. Die Begründung ist in vier Abschnitte unterteilt. Der erste Abschnitt gibt einen zusammenfassenden Überblick über einige der positiven Veränderungen, welche die Beteiligung von Laien bewirkt hat.

Der zweite Abschnitt – der Hauptteil des Beitrages – beleuchtet Aspekte, die zeigen, dass die Reformen in Japan sachlich begrenzt und problematisch sind: (1) Laienrichterverfahren bilden nur einen Bruchteil aller Strafverfahren in Japan; (2) die Polizei ist von den Reformen weitgehend nicht erfasst worden; (3) die wachsende Vorsicht japanischer Staatsanwälte, überhaupt eine Anklage zu erheben, hat dazu geführt, dass wesentlich weniger Verfahren unter Beteiligung von Laienrichtern durchgeführt werden, als die Reformer erwartet hatten; (4) die Verurteilungsraten in Laienrichterverfahren sind nach wie vor sehr hoch; (5) die Kommissionen zur Überprüfung von Strafverfolgungen gehen nur selten gegen Entscheidungen von Staatsanwälten, von einer Anklageerhebung abzusehen, vor oder ändern diese ab; (6) von wenigen Ausnahmen abgesehen, gleichen die in den Laienrichterverfahren verhängten Strafurteile denjenigen, die von den Berufsrichtern im vorherigen System verhängt wurden; (7) die Einrichtung des Laienrichterverfahrens hat dazu geführt, dass Staatsanwälte heute weniger oft auf die Todesstrafe plädieren, aber wenn auf sie plädiert wird, tendieren Laienrichter dazu, häufiger ein Todesurteil auszusprechen, als dies früher Berufsrichtern taten; (8) die Opferbeteiligung hat keine klar erkennbaren und nennenswerten Einflüsse auf die Ergebnisse der Strafverfahren gehabt; (9) viele der Personen, die aufgefordert werden, sich als Laienrichter aufstellen zu lassen, weigern sich, und diejenigen, die dazu bereit sind, unterliegen der Verpflichtung, die allermeisten Aspekte ihrer Tätigkeit strikt vertraulich zu behandeln; ferner findet sich (10) kein Beleg dafür, dass die Laienbeteiligung in Strafverfahren zu einer Belebung der Demokratie in Japan geführt hat.

Im dritten Abschnitt wird argumentiert, dass sich die Grenzen der Beteiligung von Laien an japanischen Strafverfahren auch in anderen Ländern finden lassen. Der vierte Abschnitt präsentiert die Schlussfolgerung der Autoren: Die an der Oberfläche der Strafverfahren in Japan zu beobachtenden Veränderungen haben im Ergebnis lediglich dazu geführt, den Status Quo zu verfestigen.

(Die Redaktion)