Hastings Journal of Crime and Punishment

Volume 1
Number 3 *Special Issue: Public and Victim Participation in Criminal Justice in Japan: A Tenth Anniversary Symposium*

Article 8

2020

The Limits of Lay Participation Reform in Japanese Criminal Justice

David T. Johnson

Dimitri Vanoverbeke

The Limits of Lay Participation Reform in Japanese Criminal Justice

DAVID T. JOHNSON[1] AND DIMITRI VANOVERBEKE[2]

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

Introduction

This article assesses recent reforms in Japanese criminal justice. It focuses on the effects of three new forms of lay participation that are described in the other articles in this symposium: 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 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. Given that the main aim of the lay judge reform—Japan's most ambitious reform—was to "enhance the power and authority of the judiciary" by increasing public trust in it,[3] the reproduction of substance and outcome in Japanese criminal justice is unsurprising.[4] In that it has enhanced the authority of the judiciary and the procuracy, it could even be called a conservative success.

1. Professor of Sociology, University of Hawaii at Manoa.

2. Dimitri Vanoverbeke is a Professor of Japanese Studies and director of the Department of Area Studies at Katholieke Universiteit Leuven (KU Leuven), a research university in Flanders, Belgium. He is also the author of *Juries in the Japanese Legal System: The Continuing Struggle for Citizen Participation and Democracy* (Routledge, 2015).

3. 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.

4. 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.

We acknowledge that Japan's lay judge reform has had some "pro-defendant" effects.[5] 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.[6]

In addition to these small-to-modest changes in substance, the lay judge reform has induced a "wide range" of "transformational" effects in Japanese criminal procedure.[7] One prominent analyst has 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."[8] On this view, the lay judge system has created more respect for the presumption of innocence,[9] a perception that is shared by some other observers.[10] It has made prosecutors more cautious about charging borderline cases, and hence may be preventing some wrongful convictions.[11] It has led to more

5. RIEKO KAGE, WHO JUDGES? DESIGNING JURY SYSTEMS IN JAPAN, EAST ASIA, AND EUROPE (Cambridge University Press 2017), p. 6.

6. Kage, 2017, pp. 175, 202.

7. M. Inouye, *Citizen Participation in Criminal Trials and Reformation of Criminal Justice in Japan, United Nations Asia and Far East Institute*, RESOURCE MATERIAL NR. 105 (2018) 74-115.

8. D. H. Foote, *Citizen Participation: Appraising the saiban'in system*, MICHIGAN STATE INT'L L. REV., 22.3 (2014) 755, 763.

9. Foote, *supra* note 8, 764.

10. M. Takeda, *'Zaimei ochi' hinpatsu, kisoritsu teika ['Charge Rate Reduced' Frequent, Declining Indictment Rate*], KŌCHI SHIMBUN, *Kenshō Saiban'in seido jūnen* [*Assessing: One Decade of the Lay Judge System*] (Part 1), (Jan. 30, 2019) 12. The other articles in Takeda's series of five are as follows: M. Takeda, *Utagawashiki wa muzai, tettei, Yūzairitsu teika: risshō mujun tsuk* [*Innocent in case of doubt: bringing it home; Declining guilty verdicts, contradictions in the evidence*], FUKUI SHIMBUN, *Kenshō Saiban'in seido jūnen* [*Assessing: One Decade of the Lay Judge System*] (Part 2), (Mar. 3, 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*], KYOTO SHIMBUN, *Kenshō Saiban'in seido jūnen* [*Assessing: One Decade of the Lay Judge System*] (Part 3), (Mar. 23, 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*], YAMAGATA SHIMBUN, *Kenshō Saiban'in seido jūnen* [*Assessing: One Decade of the Lay Judge System*] (Part 4), (Apr. 25, 2019) 6; M. Takeda, *Jitai ka kesseki 8 wari chikaku, shinri chōkika nado yōin: shuhi gimu keiken tsutaerarezu* [*Declining or default for more than 80 per cent, the extension of the deliberation as one of the contributing factors*], KAHOKU SHIMPO, *Kenshō Saiban'in seido jūnen* [*Assessing: One Decade of the Lay Judge System*] (Part 5), (May 22, 2019) 25.

11. Foote, *supra* note 8, 765.

appropriately harsh sentences for some persons convicted of sex crimes.[12] It has led to more use of suspended sentences, which may encourage rehabilitation.[13] 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 than do their professional counterparts on the bench.[14] More broadly, Japan's lay judge reform is significant because it provided the opening for 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.[15]

One advocate for increasing lay participation in Japanese criminal justice has identified six significant procedural changes that were stimulated by the country's lay judge reform.[16] The first two refer to changes in defense lawyering that are invigorating an "unbalanced" adversary system that has long tilted toward the interests of the state.[17]

> (a) A new public defender system provides criminal suspects with legal representation *before* indictment (*higisha kokusenbengo seido*).

12. Foote, *supra* note 8, 766.
13. Foote, *supra* note 8, 766.
14. Foote, *supra* note 8, 767.
15. Foote, *supra* note 8, 773.
16. 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.
17. M. FEELEY & S. MIYAZAWA, (EDS.), THE JAPANESE ADVERSARY SYSTEM IN CONTEXT: CONTROVERSIES AND COMPARISONS (Palgrave 2002). 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 (T. Takano, *Saiban'in seido no kōka: 10 nen o furikaette (*tokushu 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, *Hikokunin no tame no saiban'in saiban ga jitsugen dekiteiru ka: korekara no jūnen ni mukete jūnen o furikaeru* (tokushu 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 prospects for change in Japanese criminal defense lawyering, see David T. Johnson, *War in a Season of Slow Revolution: Defense Lawyers and Lay Judges in Japanese Criminal Justice*, ASIA-PACIFIC JOURNAL, Volume 9, Issue 26 (June 29, 2011), pp. 1-11.

(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 (*renjitsu teki 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 chokusetsushugi—kōtōshugi 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*).

The same analyst believes there have also been significant changes in Japan's "judicial mindset" (*saibankan no maindosetto no henka*),[18] with judges becoming less deferential to the interests of law enforcement. In his view, this is the most important consequences of Japan's lay judge reform, for the country's judiciary has long taken a "conservative" stance on criminal justice issues.[19] Indeed, 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."[20] The presence of lay judges may be slowly transforming 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 this view might be right. The fresh eyes of the amateur are important because, in law as in life, the more one looks at a thing, the less one is able to see it. As G. K. Chesterton observed 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

18. Shinomiya, 2019.

19. D. H. Foote, *Policymaking by the Japanese Judiciary in the Criminal Justice Field*, HŌSHAKAIGAKU, No. 72 (2010), 18.

20. Foote, 2010, 17-18.

> 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.[21]

Lay participation in Japanese criminal justice could correct the judicial tendency to see "the awful court of judgment" as one's own familiar workshop.[22] And some defense lawyers seem to be realizing that in the presence of lay judges, they are no longer "talking to a wall."[23] They are even starting to "rattle the cages" of judicial interpretation that have long constrained the practice of criminal defense.[24] Moreover, in Japan there have not been major reform failures of the kind that have been common in American criminal justice—and lay participation in Japan has not made things worse.[25] In recognizing this we do not mean to damn Japan with faint praise. From an American perspective, heeding the Hippocratic Oath—"first, do no harm"—by avoiding the potentially iatrogenic effects of reform is no small achievement.[26]

Still, 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,[27] 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.[28] We want to stress (again) that it will take more time to discern the full effects of Japan's lay participation reforms. But if the proof of reform is mainly in the

21. G. K. Chesterton, *The Twelve Men*, *in* TREMENDOUS TRIFLES, 1909.

22. 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* N. Sōseki, *Shirōto to Kurōto* [*Amateurs and Experts*], in NATSUME SŌSEKI ZENSHŪ [NATSUME SŌSEKI'S COLLECTED WORKS] (Kadokawa Shoten, Volume 11, 7th edition, 1967), 224–255.

23. Johnson, 2011.

24. Johnson, 2011.

25. Malcolm M. Feeley, *East Asian Court Reform on Trial: Comments on the Contributions*, PACIFIC RIM LAW & POLICY JOURNAL, 27 (2017), 273, 292.

26. MALCOLM M. FEELEY, COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL (Basic Books, 1983).

27. M. J. WILSON, H. FUKURAI & T. MARUTA, JAPAN AND CIVIL JURY TRIALS: THE CONVERGENCE OF FORCES (Edward Elgar Publishing, 2015), p. 38.

28. DIMITRI VANOVERBEKE, JURIES IN THE JAPANESE LEGAL SYSTEM: THE CONTINUING STRUGGLE FOR CITIZEN PARTICIPATION AND DEMOCRACY (Routledge, 2015), pp. 60-87.

pudding, then we need to conclude that not all that much has yet changed in Japanese criminal justice.

The Limits of Form

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.[29] In our view, these assessments are too positive about the scope and impact of reform, and they tend to conflate process with substance. This section—the heart of our article—identifies ten ways in which Japan's lay participation reforms are limited and problematic.[30]

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

29. There are dissenting views. For example, Igarashi Futaba 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* (Gendaijinbunsha, 2016), pp. 3-15. Similarly, Mark Levin argues that "the more things change [with respect to Japanese criminal justice], the more things stay the same" (*Plus Ça Change, Plus C'est la Même Chose*), and he concludes that Japanese criminal justice reform has taken "two steps forward and five steps backward" (Mark A. Levin, *Considering Japanese Criminal Justice from an Original Position*, in CRIME AND JUSTICE IN CONTEMPORARY JAPAN (J. Liu and S. Miyazawa eds.) Springer Series on Asian Criminology and Criminal Justice Research, (Springer, 2018), pp. 173-188). And 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 Japanese criminal justice and the sense of efficacy people feel after serving as lay judges, while paying little 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) 102-104). Note, however, that 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" (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). In limit 10 of this section we will argue that the "educational" and "indirect" effects of Japan's lay judge reform are far from "monumental."

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

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, 1122 persons were charged with criminal offenses that were eligible for a lay judge trial. This was 4 percent more than the 1077 persons similarly charged in 2016, but 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 Potrero Hill or 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.[31]

TABLE 1 Ratio of Lay Judge Trial Indictments to Total Number of Criminal Indictments, 2009-2017

YEAR	LAY-JUDGE TRIAL INDICTMENTS (1)	INDICTMENTS TOTAL (2)	PERCENTAGE OF 1/2
2009	1196	96,541	1.23
2010	1797	91,322	1.96
2011	1785	85,586	2.08
2012	1457	83,823	1.84
2013	1465	78,774	1.85
2014	1393	77,405	1.79
2015	1333	77,268	1.72
2016	1077	73,060	1.47
2017	1122	69,674	1.61

31. M. Inouye, 2018, p. 74.

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】[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 [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.

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 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.[32] In Japan, simply getting arrested 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."[33] In Japan as in the United States, this fiction 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 when 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 processed in the nether regions of Japanese criminal justice, where lay judges do not serve and journalists and scholars seldom tread.[34] Thanks to research by Japanese reporters and scholars, we now know a lot about how Japan's lay judge system is operating. But we need to be honest about our ignorance, too. The truth is, we know little about how the rest of Japanese criminal justice system is (or is not) working.[35] 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

32. A. NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE INEQUAL (Basic Books, 2018).

33. *Id.*, at p. 19.

34. A. Peters, *Some comparative observations on the criminal justice process in Holland and Japan*, JOURNAL OF THE JAPAN-NETHERLANDS INSTITUTE 4 (1992) 247-294, 291.

35. Igarashi, 2016.

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 most serious crime problems.[36] In this respect, the lay judge system reflects and reinforces a troubling dualism in Japanese criminal justice: police and prosecutors are enabled to "make crimes" against offenders for most ordinary street crimes,[37] but they are disabled from holding accountable many of the country's most powerful and harmful actors.[38] And in this sense, lay judge trials reinforce Japan's "legal cobweb," which catches small flies but let's wasps and hornets break through (to paraphrase 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.[39] 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 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.[40] 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" (*misuizai*) 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

36. *See, for example,* ALAN S. MILLER & SATOSHI KANAZAWA, ORDER BY ACCIDENT: THE ORIGINS AND CONSEQUENCES OF CONFORMITY IN JAPAN (Westview Press, 2000), ch. 7; David T. Johnson, *Kumo no Su ni Shōchō Sareru Nihonhō no Tokushoku* (*Japan's Legal Cobweb*), JURISUTO (The Jurist, Special Edition on the 50th Anniversary of the Japanese Code of Criminal Procedure, No. 1148 (January 1-15, 1999), pp. 185-189; DAG LEONARDSEN, CRIME IN JAPAN: PARADISE LOST? (Springer, 2010), p. 13; MATTHEW M. CARLSON & STEVEN R. REED, POLITICAL CORRUPTION AND SCANDALS IN JAPAN (Cornell, 2018).

37. SETSUO MIYAZAWA, POLICING IN JAPAN: A STUDY ON MAKING CRIME (SUNY Press, 1992); DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN (Oxford University Press, 2002), pp. 33-42.

38. David T. Johnson, *Kumo no Su ni Shōchō Sareru Nihonhō no Tokushoku*, JŪRISUTO, No. 1148 (January 1-15, 1999), pp. 185-189; David T. Johnson, *Nihon no 'Kumo no Su' Shihō to Kensatsu no Katsudō*, *in* KEIJI SHIHŌ O NINAU HITOBITO (Volume 3 in the series *Keiji Shihō o Kangaeru*, Iwanami Shoten, 2017) (Ibusuki Makoto et al. eds.), pp. 29-51.

39. CATHERINE BURNS, SEXUAL VIOLENCE AND THE LAW IN JAPAN (Routledge, 2005); ITOH SHIORI, BLACK BOX (Bungei Sunju, 2017).

40. Chizuko Ueno, 2018. *See also,* https://english.kyodonews.net/news/2019/06/5fbad0a24182-feature-feminist-scholar-calls-japans-gender-problem-human-disaster.html.

241 (robbery and forcible sexual intercourse resulting in death).[41] In law, other sex offenses are not deemed sufficiently serious to qualify for lay judge trial.[42] Until the Penal Code revision of 2017, "gang rape" (*shudangōkanzai*) was not eligible for lay judge trial, and neither was "robbery-rape" (*gōtōgōkanzai*) 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,[43] 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 Tokyo) 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 illustrates the ironies and contradictions of Japan's "legal cobweb."[44] Some commentators have argued for broadening the scope of lay judge trials, so as to encompass more cases (including sex crimes and white-collar offenses), but to date, most reform efforts have focused on narrowing the scope of eligible offenses, not expanding it.[45]

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,[46] but "police justice" (*keisatsu shihō*) may be

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

42. Mari Hirayama, *Lay judge decisions in sex crime cases: The most controversial area of saiban-in trials*, YONSEI LAW JOURNAL, 3 (2012) 128; Mari Hirayama, *A Future Prospect of Criminal Justice Policy for Sex Crimes in Japan-the Roles of the Lay Judge System There*, *in* CRIME AND JUSTICE IN CONTEMPORARY JAPAN, (J. Liu & S. Miyazawa eds.) Springer Series on Asian Criminology and Criminal Justice Research (Springer, 2018), pp. 303-317.

43. SAITŌ AKIYOSHI, OTOKO GA CHIKAN NI NARU RIYŪ (Isuto Puresu, 2017).

44. David T. Johnson, *Nihon no 'Kumo no Su': Shihō to Kensatsu Katsudō*, *in* KEIJI SHIHŌ O NINAU HITOBITO, (Makoto Ibusuki et al. eds.) (Volume 3 in the series *Keiji Shihō o Kangaeru*; Mari Hirayama trans., Iwanami Shoten, 2017), pp. 29-51.

45. I. Takayama, *Hikokunin no tame no saiban'in saiban ga jitsugen dekiteiru ka: korekara no jūnen ni mukete jūnen o furikaeru (tokushu 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), pp. 30-36.

46. One of the defining features of "precise justice" (*seimitsu shihō*) and "prosecutor justice" (*kensatsu shihō*) is reliance on detailed dossiers composed during pretrial investigations (David T. Johnson, 2002, pp. 264-275). Although the lay judge reform has led to somewhat less reliance on

the most telling.[47] Few democratic police forces are as powerful as the Japanese police.[48] It is hard to say exactly, but half or more of all discretion in Japanese criminal justice may be exercised by the police.[49] 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.[50] These include not only the lay judge system, the victim participation system, and the reformed Prosecution Review Commissions (the main foci of this symposium), 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 shien*) for criminal suspects and defendants, and the increased involvement of scientists in criminal justice fact-finding, especially in assessing DNA and other forensic evidence.[51] Japan's recent lay participation innovations also include a "boom" in crime prevention activities by citizen volunteers.[52] Yet 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 other countries.[53] In this sense, police may be the biggest winner in Japan's justice system reform movement. They do not want their position—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

dossiers (Masahiro Takeda, 2019b), many defense lawyers maintain that they continue to play too large a role in criminal trials (Takano Takashi, 2019; I. Takayama, 2019).

47. David 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, Volume 76, No. 2 (February 2004), pp. 8-15.

48. Setsuo Miyazawa, 1992; David T. Johnson, *Retention and reform in Japanese capital punishment*, U. MICH. J.L. REFORM, 49 (2015) 853.

49. On the broad scope of police discretion in the United States, see KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (University of Illinois Press, 1969).

50. ERIK HERBER, LAY AND EXPERT CONTRIBUTIONS TO JAPANESE CRIMINAL JUSTICE (Routledge, 2019).

51. Herber, 2019.

52. Erik Herber, *Crime prevention in Japan: orchestration, representation, and the impact of a volunteering boom*, INTERNATIONAL JOURNAL OF LAW, CRIME AND JUSTICE, 54 (2018), pp. 102-110.

53. SAMUEL E. WALKER & CAROL A. ARCHBOLD, THE NEW WORLD OF POLICE ACCOUNTABILITY (Sage, 2018).

consideration of those reform issues that are innocuous to them.[54] And 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.[55]

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 roles played by power and rationality in the reform process. As other studies have shown, 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.[56] Since

54. P. Bachrach & M. Baratz, *Two Faces of Power*, AMERICAN POLITICAL SCIENCE REVIEW, 56.4 (1962) 941-952.

55. *See* T. Odanaka, *Kompan no shihō seido kaikaku no 'gyakukaikaku' teki honshitsu* [*The "Counter-Reformative" Essence of Today's Judicial Reforms*], HŌ TO MINSHUSHUGI, 360 (July 2001), pp. 36-38; *and see* Dimitri Vanoverbeke, 2015, p. 133 (quoting Odanaka). Concerns about the police being overlooked and ignored by journalists and researchers were also expressed in Suo Masayuki's trenchant analysis of his experiences on a criminal justice reform commission (*hōsei shingikai*) called the "Special Committee on Criminal Justice for a New Era" (*shinjidai 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] (Iwanami Shoten, 2015). Although this book is a harshly critical examination of Japan's reform process, 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" (*daishinpo*) in Japanese criminal justice as a result of the lay judge reform. See the interview by Otani Akihiro, in Fuji News Network & Tōkai Terebi (Aug. 17, 2019), https://www.fnn.jp/posts/00047349HDK/201909301712_THK_HDK?fbclid=IwAR3TWszdd_VgD524-BfibWCCav5D0yo0JUMn1ebzdm8dvJR6S1IkPBxogjo (retrieved October 20, 2019).

56. BENT FLYVBJERG, RATIONALITY AND POWER: DEMOCRACY IN PRACTICE (University of

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.[57] Despite many lay participation reforms in recent years, this crucial fact has not changed.[58] This limit of reform and the next one (on prosecutors) suggest that lay participation reforms have had relatively little impact on some of Japanese law enforcement's most fundamental features.

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 consequences*.[59] The most important consequence of Japan's lay judge reform concerns 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 reluctant to relinquish this gatekeeper role.[60]

From January to May of 2019, Kyodo News journalist Masahiro Takeda wrote a series of five newspaper articles entitled "Ten Years of the Lay Judge

Chicago Press, 1998), p. 36.

57. Christopher Aldous& F. Leishman, *Policing in post-war Japan: reform, reversion and reinvention*, INTERNATIONAL JOURNAL OF THE SOCIOLOGY OF LAW, 25.2 (1997), pp. 135-154.

58. One consequence of marginalizing police in Japan's reform process is a continued reliance on confessions in the criminal justice system (D. H. Foote, *Confessions and the Right to Silence in Japan*, GEORGIA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 21 (1991) 415; Miyazawa, 1992). But there have been noteworthy changes as well. For example, 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 (D. Johnson, 2002, ch.8). At the same time, electronic recording creates a new concern, that video evidence of the interrogation process will "mislead" lay judge panels (Makoto 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, 2019, pp. 1-17, at https://link.springer. com/article/10.1007%2Fs11196-019-09645-0), and "over-influence" their decisions (Toshikuni Murai and Keiichi Muraoka, www.nippon.com, June 26, 2019, https://www. nippon.com/en/japan-topics/c05402/citizens-on-the-bench-assessing-japan%E2%80%99s-lay-jud ge-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 (Setsuo Miyazawa & Mari Hirayama, *Introduction of Videotaping of Interrogations and the Lessons of the Imaichi Case: A Case of Conventional Criminal Justice Policy-Making in Japan*, PACIFIC RIM LAW & POLICY JOURNAL, 27 (2017) 149).

59. Feeley, 1983.

60. Johnson, 2002.

System" (*Saiban'in Seido 10 nen*). The first article in this series makes his most important point—one he has been making for several years.[61] Its title 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*").[62] In this article, Takeda observes that in 2004 (the year the Lay Judge Law was passed), 3800 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 3000 lay judge trials per year after the Law took effect in 2009. That prediction badly missed the mark. In fact, only 2133 criminal cases were eligible for lay judge trial in 2009, and by 2016 the number had fallen to 1122—less than 30 percent of the number that would have been eligible in 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 and other crimes declined partly because of demographics: 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: (a) charging cases received from the police lightly, by reducing the offense severity (*zaimei-ochi jiken*); and (b) not charging cases at all (*kiso*

61. M. Takeda, 2019a.

62. M. Takeda, 2019a = "'Zaimei ochi' hinpatsu, kisoritsu teika" ['Charge Rate Reduced' Frequent, Declining Indictment Rate], *Kōchi Shimbun*, Kenshō Saiban'in seido jūnen [Assessing: One Decade of the Lay Judge System] (Part 1), (January 30, 2019), p. 12. Consider three Japanese expressions that have been used to criticize prosecutorial caution in charging cases for lay judge trial. First, the Japanese characters for "*shirigomi*" (尻込み) literally mean "tight ass" or "closed ass", and they are 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 (David T. Johnson & Setsuo Miyazawa, *Japanese Court Reform on Trial*, in THE LEGAL PROCESS AND THE PROMISE OF JUSTICE: STUDIES INSPIRED BY THE WORK OF MALCOLM FEELEY, Rosann Greenspan, Hadar Aviram, and Jonathan Simon eds. (Cambridge University Press, 2019) pp. 122-138). 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."

ga miokurareta jiken). The numbers are striking.[63] 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. The drop in the charge rate (*kisoritsu*) 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.[64] 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. The "as-is" charge rate for homicide in 2017 was only about half what it was 11 years earlier.

63. Takeda, 2019a.

64. As for sex offenses that are *not* eligible for lay judge trial, the charge-rate (*kisoritsu*) drop 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 (Mikio Kawai, Seihanzai Muzai Hanketsu, *Hontō no Mondaiten wa Nani ka*, ASAHI RONZA, May 15, 2019). In these respects Japan resembles the United States (Barbara Bradley Hagerty, *An Epidemic of Disbelief*, THE ATLANTIC, August 2019, at https://www.theatlantic.com/magazine/archive/2019/08/an-epidemic-of-disbelief/592807/?).

TABLE 2 Japan's Declining Charge Rate, 2000 – 2016

YEAR	DECISION-TO-CHARGE (1)	DECISION-NOT-TO-CHARGE (2)	CHARGE-RATE (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

Note: Figures are calculated from annual 犯罪白書 [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.

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 charging cases in the shadow of lay judge trials, and they have been doing so since *before* 2009. "Mock lay judge trials" (*mogi saiban'in saiban*) started soon after the Lay 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. They were adapting in order to conform to a norm that has long governed their behavior: "a case should not be charged if the court might wonder about its judgment" (*saibansho ga handan ni mayou jiken wa kiso shinai*).

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.[65] But if there have been changes in judicial sensibilities, they are being at least partly 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 judge panels will adjudicate. As we will explain below, prosecutors have also become more cautious about what sentences to seek.

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.[66] 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.[67] In these respects, prosecutors are trying to maintain control over case outcomes by minimizing the influence of amateurs and 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.[68]

Yet the prosecution issues are complicated, because more cautious charging policies also tends to 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

65. Shinomiya, 2019.

66. Takano, 2019; Takeda, 2019a.

67. Kent Anderson & Mark Nolan, *Lay participation in the Japanese justice system: A few preliminary thoughts regarding the lay assessor system (saiban-in seido) from domestic historical and international psychological perspectives*, VAND. J. TRANSNAT'L L., 37 (2004) 935; Vanoverbeke, 2015.

68. Vanoverbeke, 2015.

could be a welcome development. At the same time, an abundance of prosecutorial caution may be denying the new trial system the cases it needs to show that trials can be more than empty rituals which "ratify" what law enforcement wants.[69] Whatever one thinks about these normative issues, one conclusion seems clear: For better and for worse, prosecutors continue to control case inputs in Japanese criminal justice. In this way, they largely determine what case outputs will be.

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.[70] In the three years before lay judge trials started (2006-2008), the 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, which means that approximately 1 criminal trial in 111 has ended in acquittal in the lay judge era.[71]

Some believe this is a significant decline,[72] 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.[73] In the three most recent years for which evidence is available (2016-

69. R. Hirano, *Diagnosis of the current code of criminal procedure*, LAW IN JAPAN, 22 (1989) 129; Takano, 2019.

70. Takeda, 2019b.

71. Takeda, 2019b.

72. Takeda, 2019b.

73. If the conviction rate is declining, one contributing cause is defense attorneys, who have become more aggressive and adept at doing criminal defense (Johnson, 2011; Takano, 2019; Takayama, 2019). According to prosecutor Kikuchi Hiroshi, 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 (*mokuhiken*). 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*], in KEISATSU RONSHŪ, 72.6 (2019), pp. 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 Gotō Sadato quoted in: Y. Gōda, *Saiban'in saiban seido shikkō 10 nen toiu sujime ni omou koto* [*What to Think a the Milestone of a*

2018), the lay judge conviction rate was 98.4 percent,[74] compared to 99.4 percent for 2006-2008. In this 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 "thoroughly implementing" a principle that has long been respected in the breach by Japan's criminal courts: that "defendants should receive the benefit of the doubt" when there is reasonable doubt about the evidence.[75] But in our view, there is more continuity than change with respect to conviction rates. First, when 98 or 99 defendants in 100 are being convicted at trial, it seems fair to say that the conviction rate remains "extremely high"—as it has been for decades in Japan.[76] 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. 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 (and we expect they will), this crime-specific acquittal rate will fall in the future. Finally, 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.[77] Prosecutors are appealing lay

Decade that the Saiban'in Trial System in in Effect], in KEISATSUGAKU RONSHŪ, 72.6 (2019), pp. 1-27 and 35.

74. Takeda, 2019b.

75. Takeda, 2019b.

76. Johnson, 2002, p. 215. For example, Germany's conviction rate in 2013 was 85 percent, and in most recent years it has ranged between 85 percent and 90 percent. *See* J. M. JEHLE, CRIMINAL JUSTICE IN GERMANY: FACTS AND FIGURES (Forum Verlag Godesberg GmbH, 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 August 23, 2019). In India, the world's largest democracy, the conviction rate in the megalopolis of Mumbai ranged from 18 percent to 25 percent before falling to "an all-time low of 4 percent in 2000." *See* S. MEHTA, MAXIMUM CITY: BOMBAY LOST AND FOUND (Vintage, 2004), 175.

77. 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, 2019b). 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

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 Tokyo High Court in 2013 and by Japan's Supreme Court in 2014.[78] Nonetheless, a 10 percent reversal rate for acquittals on appeal is significant in a system in which the 60 courts (50 District Courts and 10 branch courts) that hold lay judge trials produce less than a dozen acquittals per year.[79] When a substantial proportion of these 60 courts have not issued a single acquittal in the first decade of the new trial system, the slight uptick in the number of not-guilty verdicts does not seem very significant.

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. One 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."[80] 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

courts find so much more error in not-guilty verdicts than in convictions is further testament to their essentially "conservative" nature (Foote, 2010, p. 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.

78. Takeda, 2019b.

79. Takeda, 2019b.

80. Hiroshi Fukurai, *Japan's Quasi-Jury and Grand Jury Systems as Deliberative Agents of Social Change: De-Colonial Strategies and Deliberative Participatory Democracy*, CHI.-KENT L. REV., 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; and 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.

deliberation of criminal cases."[81]

In reality, Japan's reformed PRCs are almost "all hat and no cattle,"[82] for they have had little effect on prosecutorial practice, as empirical research shows.[83] The two most fundamental research findings are that few complaints about nonprosecution are brought to PRCs in the first place, and few of the complaints that are brought result in recommendations to prosecute or mandatory prosecution.[84] Hence, 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 were 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,[85] and the other involving a rape case that received little media coverage in Japan.[86]

81. Fukurai, 2011, p. 42.

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

83. David T. Johnson & Mari Hirayama, *Japan's Reformed Prosecution Review Commission: Changes, Challenges, and Lessons*, ASIAN JOURNAL OF CRIMINOLOGY, 14.2 (June 2019), 77-102.

84. Empirical research on Japan's reformed PRCs has reached at least nine findings: (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 (*kenjisei*). (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 9 cases of mandatory prosecution, involving a total of 13 defendants, only 2 defendants were convicted, and both received light punishment: a fine of 9000 yen ($90) for one, and a one-year prison term suspended for three years for the other. For more on the effects of Japan's PRC reform, see Johnson & Hirayama, 2019, pp. 77-102.

85. Kawai Mikio, *Kiso Sōto o Daseru koto ga Keiji Shihō Kaikaku no Pointo*, ASAHI RONZA, Aug. 11, 2015.

86. David McNeill, *Justice Postponed: Itoh Shiori and Rape in Japan*, ASIA-PACIFIC JOURNAL, Volume 16, Issue 15, Number 1 (Aug. 1, 2018), pp. 1-6, at https://apjjf.org/2018/15/McNeill.html.

In March 2019, a PRC in Osaka ruled that "non-prosecution is inappropriate" (*fukiso futō*) after the Special Investigation Division (*tokusōbu*) of the Osaka 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 Osaka 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 Osaka did just that, resulting in the non-prosecution of 10 people who had supposedly been "reinvestigated."[87] In this case as in many other corruption cases in postwar Japan, prosecutors "let the wicked sleep"[88]—and PRCs did little to hold them accountable. Indeed, when an Osaka 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 Osaka PRC to disclose documents that their PRC counterparts in Tokyo had disclosed in previous cases, the Osaka 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 Osaka. 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.[89] We need more research on this subject.

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

87. *Osaka Prosecutors Close Moritomo Gakuen Case after Reconfirming No Bureaucrats Will Be Indicted over Scandal*, JAPAN TIMES (Aug. 10, 2019), 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.

88. David T. Johnson, *Why the Wicked Sleep: The Prosecution of Political Corruption in Postwar Japan*, ASIAN PERSPECTIVE, Volume 24, No. 4 (2000), pp. 59-77.

89. *See* N. Kataoka, *Moritomo Jiken meguri Shimin Dantai ga Kaiken: 'Osaka Kensatsu Shinsakai no Fukaiji wa Ijō'* [*Citizen Group's Press Conference about the Moritomo Incident: The Osaka Prosecutor Review Commission's Decision not to Disclose is Not Normal*] (*Shūkan Kinyō Onrain*, YAHOO, Aug. 20, 2019), at https://headlines.yahoo.co.jp/article?a=20190820-00010000-kinyobi-soci; and N. Yagi, *Sōzō no Nanamejō o Kite Kureta Ōsaka Kensatsu Shinsakai no Kaiji* [*The decision by the Osaka Prosecutor Review Commission is above and beyond imagination*] (BLOGOS, July 17, 2019), https://blogos.com/article/391856/.

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 Tokyo upheld the decision of Tokyo prosecutors not to prosecute Yamaguchi.[90] The criminal case died there, though at the time of this writing in November 2019, Itō's civil lawsuit against Yamaguchi is ongoing.

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[91] as before it.[92] The acquittal of three TEPCO executives on September 19, 2019, will do nothing to make this watchdog more likely to bark or bite.[93] 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.[94] Some 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.[95] In our view, this reform—as one analyst advocates, putting a "grown up" in the PRC room—could reproduce the problem that has long plagued efforts to implement lay participation in Japanese criminal justice. Several times in the past century, Japan's government officials and legal professionals have "coopted" the citizens who are asked to serve and thereby "marginalized" their influence.[96]

90. Itoh Shiori, 2017, pp. 187-215. For a documentary about Itoh's case, see "Japan's Secret Shame" (BBC Two, 60 minutes, 2018), at https://www.bbc.co.uk/programmes/b0b8cfcj.

91. Johnson & Hirayama, 2019.

92. Mark D. West, *Prosecution review commissions: Japan's answer to the problem of prosecutorial discretion*, COLUM. L. REV., 92 (1992), 684.

93. S. Abe, *Former TEPCO Execs Cleared Over Role in 2011 Nuclear Accident*, ASAHI SHIMBUN ASIA & JAPAN WATCH, Sept. 19, 2019.

94. For critiques of the reformed PRCs, see these three newspaper articles: *Kyōsei Kiso o Kangaeru: Konnan na Risshō Muzai Aitsugu* [*Thinking about Mandatory Prosecution: Continuous acquittals because of difficulties to prove*], SANKEI SHIMBUN, May 18, 2019, p. 31; *Kyōsei Kiso o Kangaeru: Yūzai Tamerau Saibankan* [*Thinking about Mandatory Prosecution: Judges are hesitant to convict*], SANKEI SHIMBUN, May 21, 2019, p. 22; and *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*], TOKYO SHIMBUN, May 21, 2019, p. 3.

95. Goodman, 2013.

96. Anderson & Nolan, 2004.

6. Criminal Sentencing

We have argued that despite the lay judge and Prosecution Review Commission reforms, there is much substantive continuity in Japanese prosecution. Now we will 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,[97] 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.[98] 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.[99] 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.[100]

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. This decline occurred because 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

97. Hirayama, 2012.

98. FUJITA MASAHIRO, JAPANESE SOCIETY AND LAY PARTICIPATION IN CRIMINAL JUSTICE: SOCIAL ATTITUDES, TRUST, AND MASS MEDIA (Springer, 2018), pp. 51-64.

99. Johnson & Miyazawa, 2019, p. 130.

100. Takeda, 2019c.

future lay judge panels about what will and will not be tolerated. The judiciary sent memos and organized training courses for front-line judges, to stress the importance of sentencing consistency and continuity. 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.[101] The main effect of these judicial interventions was to control the deviant sentencing desires of ordinary citizens by making them conform to judicial expectations.[102] And the main arena where this conformity is accomplished is the deliberation room (*hyōgishitsu*), where judges and lay judges discuss verdicts and sentences,[103] 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.[104]

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" (*kazarimono*) 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.[105] Former lay judges often use the words "facilitator" (*matomeyaku*) 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*).[106] 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

101. Judge Gōda Yoshimitsu (2019, pp. 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."

102. Takeda, 2019c.

103. Takeda, 2019c.

104. Fujita, 2018, pp. 131-171.

105. Vanoverbeke, 2015; Shinomiya, 2019.

106. Vanoverbeke, 2015, ch.6.

[of sentencing precedents] and professional judges."[107] When there are differences of opinion between judges and lay judges, a "professional rule of thumb" (*shokugyōteki keikensoku*) tends to prevail over the "common sense" (*jōshiki*) of citizens.[108] In short, judges routinely play the role of parent and teacher, with lay judges as their children and pupils.[109] 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!"[110] 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.[111]

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 July 15, 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" (July 23, 2010). But judges remain determined to script lay judge trials so as to keep the judicial train running on time.[112] Even potentially capital trials are scripted to maximize efficiency and minimize the "burdens" (*futan*) imposed on lay judges.[113] The contrast with American-style "super due process" is striking.[114]

We do not welcome "professional rules of thumb" and "judicial

107. Masahiko Saeki & Eiichiro Watamura, *The Impact of Previous Sentencing Trends on Lay Judges' Sentencing Decisions*, *in* CRIME AND JUSTICE IN CONTEMPORARY JAPAN, Jianhong Liu and Setsuo Miyazawa eds., (Springer, 2018), p. 288.

108. Shinomiya, 2019, p. 10.

109. Takayama, 2019.

110. Takano, 2019, p. 24.

111. Takano, 2019, p. 25.

112. Takano, 2019.

113. David T. Johnson, *Capital punishment without capital trials in Japan's lay judge system*, ASIA-PACIFIC JOURNAL, 8.52 (2010), pp. 1-38.

114. DAVID T. JOHNSON, AMERIKAJIN NO MITA NIHON NO SHIKEI (Iwanami Sinsho, 2019), pp. 25-52.

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 normative 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.[115] 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 occur in lay judge trials, appellate courts usually revise them in a *downward* direction—towards leniency, not severity.[116] In this way, judicial conservatism tends to serve the interests of criminal defendants, much as prosecutorial conservatism does with respect to criminal charging. We end our analysis of this limit of lay participation with a question that admits no easy answer: should judicial control of sentencing outcomes, the marginalization of lay judge voices, and continuity in sentencing substance be welcomed by progressives who believe criminal sanctions have immense 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 10 or more death sentences 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, which is 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.

115. David T. Johnson, 2002, pp. 147-178.
116. Takeda, 2019c.

TABLE 3 Japan's Death Sentencing Rate before & after the Lay Judge Reform of 2009, by Number of Victims Killed

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

Source: Takeda Masahiro, "Higai Hitori de Shikei 4nin: Higaisha Kanjo o Ishiki", *Kyoto Shimbun*, March 23, 2019, p.6.

There are two main reasons for this decline in capital outcomes. First, Japan's homicide rate has fallen in recent years (as explained above, so 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.[117] 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.[118] From 1980 to 2009, prosecutors sought a death sentence (*shikei kyūkei*) for an average of 11.5 homicide defendants per year. From 2010 to 2018, the

117. D. Johnson, 2019, pp. 111-123.
118. D. Johnson, 2019, pp. 111-123.

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.[119] 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.[120] 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.[121] 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.[122]

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.[123] Here again we find evidence of Japan's judicial bureaucracy policing the sentencing decisions of lay judges.

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 judges and prosecutors are marginalizing the role lay 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

119. Leah Ambler, *The People Decide: The Effect of the Introduction of the Quasi-Jury System (Saibanin Seido) on the Death Penalty in Japan*, NORTHWESTERN JOURNAL OF INTERNATIONAL HUMAN RIGHTS, Volume 6, Issue 1 (Fall 2008), pp. 1-24, at https://scholarlycommons.law.northwestern.edu/njihr/vol6/iss1/1/.

120. Carol S. Steiker, *The Marshall Hypothesis Revisited*, HOWARD LAW JOURNAL 52 (2008) 525.

121. 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. *See* YOMIURI SHIMBUN SHAKAIBU, SHIKEI (Chūō kōron shinsha, 2013), p. 274.

122. Takeda, 2019c.

123. Takeda, 2019c.

impulses of lay judges—could be to bolster the legitimacy of Japanese capital punishment. Indeed, the key consequence of Japan's lay judge reform could be that in making the death penalty smaller it has "entrenched ever deeper what remains" of it.[124] We call this a *bonsai* theory of capital punishment. Its key claim is that a smaller death penalty may be more durable if it appeals to the ambivalent sensibilities of a country that has long resisted the transnational trend toward abolition.[125]

8. Victim Participation

Victims were long neglected and ignored in the criminal justice systems of many countries.[126] In Japan, too, the criminal justice system "provided virtually no protection for victims before the turn of the twenty-first century."[127] In recent years, however, Japan and other countries have moved victims closer to center stage of the criminal process.[128] 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).[129] But the results of victim-centered reform are more complicated than these critiques claim, and they are also more modest. As shown 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 participation impacts sentencing practices—or fact finding practices, for that matter."[130] 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

124. Hugo Adam Bedau, *An Abolitionist's Survey of the Death Penalty in America Today*, *in* DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? THE EXPERTS FROM BOTH SIDES MAKE THEIR CASE, Hugo Adam Bedau and Paul Cassell eds., (Oxford, 2004), p. 24.

125. David T. Johnson, *A Factful Perspective on Capital Punishment*, JOURNAL OF HUMAN RIGHTS PRACTICE, Volume 11, Issue 2 (July 2019), pp. 334-345; and David T. Johnson & Franklin E. Zimring, *The Death Penalty's Continued Decline*, CURRENT HISTORY, Volume 118, No. 811 (November 2019), pp. 316-321.

126. KENT ROACH, DUE PROCESS AND VICTIMS' RIGHTS: THE NEW LAW AND POLITICS OF CRIMINAL JUSTICE (University of Toronto Press, 1999).

127. Shigenori 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.

128. Matsui, 2011; DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR (The New Press, 2019).

129. Setsuo Miyazawa, *The Politics of Increasing Punitiveness and the Rising Populism in Japanese Criminal Justice Policy*, PUNISHMENT & SOCIETY, Volume 10, No. 1 (January 2008), pp. 47-77; and Maiko Tagusari, *Does the Death Penalty Serve Victims?*, United Nations Human Rights Office of the High Commissioner, *Death Penalty and the Victims* (UN, 2016), pp. 41-48.

130. Herber, 2019, p. 126 (emphasis added).

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.[131] 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.[132]

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.[133] 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.[134] 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.[135]

Considering how badly victims used to be neglected and manipulated in Japanese criminal justice,[136] these changes can be called progress.[137] But efforts to bolster victim participation are also limited and troubling in several respects. For starters, some new practices seem to be "traumatizing" victims.[138] More fundamentally, most victims of crime never report it to the police,[139] and when victimization reports do get made, the police do not

131. MASAHIKO SAEKI, HANZAI HIGAISHA NO SHIHŌ SANKA TO RYŌKEI (Tōkyō Daigaku Shuppankai, 2016).

132. Herber, 2019, p. 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, 2019, p. 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 limit 1, "A sliver of cases"), we know much more about victim participation in lay judge trials than we do in criminal trials presided over only by professional judges.

133. MASAHIKO SAEKI, HANZAI HIGAISHA NO SHIHŌ SANKA TO RYŌKEI (Tōkyō Daigaku Shuppankai, 2016).

134. David T. Johnson, *Capital punishment without capital trials in Japan's lay judge system*, ASIA-PACIFIC JOURNAL, 8.52 (2010), pp. 1-38.

135. Herber, 2019, p. 115.

136. D. Johnson, 2002, pp. 201-210.

137. MASAHIKO SAEKI, HANZAI HIGAISHA NO SHIHŌ SANKA TO RYŌKEI (Tōkyō Daigaku Shuppankai, 2016); Matsui, 2011.

138. Herber, 2019, pp. 115-121.

139. Herber, 2019, p. 106.

bother to record some of them.[140] Victims of crime are also excluded from the pretrial processes where trial schedules are decided and case outcomes are shaped.[141] Most importantly, the "vast majority of victims choose not to participate" in the VPS.[142] 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.[143]

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" (*seishin teki futan*) of viewing the corporeal consequences of crime.[144]

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.[145] 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 the defense to the prosecution,[146] and reliance on the tropes of "repentance, confession, and absolution," even when such expressions are insincere.[147] In the end, Japan's new forms of victim participation "play a role in service of

140. Herber, 2019, p. 106.
141. Herber, 2019, p. 109.
142. Herber, 2019, p. 124.
143. Herber, 2019, p. 111.
144. Takeda, 2019c.
145. Herber, 2019, p. 114.
146. Setsuo Miyazawa, *Introduction: An Unbalanced Adversary System: Issues, Policies, and Practices in Japan, in Context and in Comparative Perspective*, in THE JAPANESE ADVERSARY SYSTEM IN CONTEXT: CONTROVERSIES AND COMPARISONS, Malcolm M. Feeley and Setsuo Miyazawa, eds., (Palgrave Macmillan, 2002), pp. 1-11.
147. D. Johnson, 2002, 179-201.

traditional criminal justice goals,"[148] by keeping defense lawyers docile,[149] and by pressuring defendants to submit to authority.[150]

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

Our penultimate point about the limits of lay participation in Japanese criminal justice focuses on a cluster of three 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.

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,[151] 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."[152] In Japan, however, nearly 80 percent of lay judge candidates do not accept the call to serve.[153] Three-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.

148. Herber, 2019, p. 125.

149. D. Johnson, 2002, pp. 71-85.

150. D. Johnson, 2002, pp. 185-192.

151. Mona Chalabi, *What Are the Chances of Serving on a Jury?*, FIVETHIRTYEIGHT, June 5, 2015, https://fivethirtyeight.com/features/what-are-the-chances-of-serving-on-a-jury/. As 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 million 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.

152. STEPHEN J. ADLER, THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM (Times Books, 1994), p. 52; ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL (University of Chicago Press, 2009).

153. 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, 2019e).

See Table 4.[154]

TABLE 4 Japan's Lay Judge Selection Process, 2009-2018

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

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）[Report on the results of the implementation of lay judge trials (from implementation to the end of May 2019)], 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.

154. 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, 1994; Takayuki Ii, *Anata mo asu wa saiban'in!?* [*You will also become a* Saiban'in *tomorrow!?*] (Nihon Hyōronsha, 2019). But we wonder if no-shows might sometimes be a blessing in disguise. As an Oahu resident Stuart Taba wrote in a letter to the *Honolulu Star-Advertiser* (August 20, 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.

The high and rising no-show rate has many interacting causes.[155] 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.[156] 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 (*bōryokudan*), lay judges were approached by gangsters outside the courtroom. News about this kind of contact may be inhibiting citizens from serving in similar cases.[157] 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.[158]

In addition to the foregoing causes, Japan's high no show-rate is also shaped by two forces that are 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 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"

155. Takeda, 2019e.

156. 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] (Gendaijinbunsha, 2013), p. 48.

157. Takeda, 2019e.

158. Coverage of the lay judge system by some Japanese media has been largely negative. For example, in 2001 and 2002, *Nihon Keizai Shimbun* (Japan's *Wall Street Journal*) 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 articles by more than 3 to 1 (Fujita, 2018, p. 247).

matters that they heard and saw at trial[159]—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,[160] the vast majority of citizens who serve as lay judges say they want to preserve it.[161] 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."[162] Similarly, while the obligation of confidentiality contradicts the principles of transparency and accountability that have motivated many of Japan's justice system reforms,[163] 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.

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.[164] 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."[165] More generally, Japan's judiciary states that "the [lay judge] system has been

159. Mark Levin & Virginia Tice, *Japan's New Citizen Judges: How Secrecy Imperils Judicial Reform*, THE ASIA-PACIFIC JOURNAL, 19 (2009) 6-09.

160. Ii, 2019.

161. 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, 2019e). Apparently the facile conflation of "micro-aggressions" and serious acts of violence is not confined to the United States (Scott O. Lilienfeld, *Microaggressions: Strong Claims, Inadequate Evidence*, PERSPECTIVES ON PSYCHOLOGICAL SCIENCE, Volume 12, Issue 1 (January 2017), pp. 138-169).

162. Yanase, 2016, p. 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 (Dimitri Vanoverbeke, *Berugi kara Mita Saibanin Seido*, in Ii, 2019, pp. 177-182).

163. Frank K. Upham, *Japanese Legal Reform in Institutional, Ideological, and Comparative Perspective*, HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW, 36 (2013) 567.

164. Ii, 2019.

165. JAPAN TIMES, May 16, 2019, 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.

accepted positively by the public,"[166] a claim which research supports.[167]

Claims about "legitimacy" are difficult to prove or disprove.[168] 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.[169] 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.[170]

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.[171] 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.[172] 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"[173] has long been evident in the status-quo preserving ways that legal professionals have responded to lay participation reforms in Japan's legal system.[174]

What about the third point in this problematic triangle—the lengthening of lay judge trials and deliberations? The increased complexity suppresses

166. *Lay Judge System Needs Tweaking, Chief Justice Says*, JAPAN TIMES, May 17, 2019, p. 2.

167. Fujita, 2018, p. 275.

168. 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 University Press, 2017).

169. Van Ham, J. Thomassen, K. Aarts & R. Andeweg, 2017.

170. Takayama, 2019.

171. Takano, 2019.

172. As Kage (2017, p. 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).

173. Bachrach & Baratz.

174. Anderson & Nolan, 2004.

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.[175] 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.[176] Similarly, the percentage of former lay judges who said that trial proceedings, prosecutors, and defense lawyers were "easy to understand" (*wakariyasukatta*) declined markedly.[177] In sum, lay judge trials have become more 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,[178] these issues are the subject of much media coverage.[179]

175. Takeda, 2019d. The trial duration and deliberation duration increases 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 and H. Fukurai, *Lay Participation in the Criminal Trials of Japan: A Decade of Activity and its Socio-Political Consequences*, *in* JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE, S. Kuntjak Ivkovic, V. Hans, S. Diamond & N. Marder, eds. (Cambridge University Press, forthcoming 2020).

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

177. 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 (Herber, 2019).

178. Takayama, 2019, p. 34.

179. Herber, 2019, p. 182.

TABLE 5 Duration of Lay Judge Deliberations in Hours, 2009-2018

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

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).

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.[180] The present system of plea bargaining allows suspects and defendants to negotiate deals with prosecutors in exchange for information on other offenders.[181] Although the scope of Japan's current plea bargaining law is narrow, it has been criticized for creating incentives for suspects and defendants to make false and self-serving statements that could lead to

180. *See* JAPAN TIMES, May 31, 2018, https://www.japantimes.co.jp/news/2018/05/31/national/crime-legal/japanese-style-plea-bargaining-debuts-authorities-fear-spread-false-testimony/#.XbyO9697mM8.

181. S. Murakami, *Japanese-style plea bargaining debuts but authorities fear spread of false testimony*, JAPAN TIMES, May 31, 2018.

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.[182] 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."[183] 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.[184]

10. Seeing the Forest

Around the time of the 10th anniversary of the lay judge reform, the Chief Justice of Japan's Supreme Court (Otani Naoto) 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 also stressed that, all in all, the new trial system "has been accepted positively by the public" and by lay judges in particular.[185] Survey evidence supports his claims. On the whole, "Japanese people are positive" about the lay judge system,[186] and a survey of 100 former lay judges found that more than 90 percent support the new system and want to see it maintained.[187] 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

182. Langbein, *Torture and Plea Bargaining*, U. CHI. L. REV., 1978.

183. Hans Zeisel, *The Offer That Cannot Be Refused*, *in* THE CRIMINAL JUSTICE SYSTEM: MATERIALS ON THE ADMINISTRATION AND REFORM OF THE CRIMINAL LAW, Franklin E. Zimring & Richard S. Frase eds. (1980), pp. 559-60.

184. FUTABA IGARASHI, KŌ NAOSANAKEREBA SAIBANIN SAIBAN WA KŪDŌ NI NARU (Gendaijinbunsha, 2016).

185. *Lay Judge System Needs Tweaking, Chief Justice Says*, JAPAN TIMES, May 17, 2019, p. 2.

186. Fujita, 2018, p. 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 nonresponses are excluded from this survey, the figure rises to 33 percent. *See* https://www.nhk.or.jp/bunken/research/yoron/pdf/20190521_1.pdf.

187. YOMIURI SHIMBUN, *Honsha 100nin Chōsa: Saibanin Keikensha 9wari Shiji*, May 19, 2019, p. 1.

"citizen sensibilities" were well reflected in judicial opinions.[188] More broadly, evidence compiled by Japan's judiciary shows that the vast majority of lay judges say they had a good experience.[189] According to a survey of 5392 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.[190] 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*).[191] 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."[192] 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.[193] More

188. TOKYO SHIMBUN, *Hanketsu ni 'Shimin Kankaku' 92%, 'Shinri ni Sutoresu' 34%*, May 21, 2019, p. 1 (Summarizing the Kyodo Results); Mainichi Shimbun, "'Hanketsu ni Shimin Kankaku,'" May 21, 2019, p. 1 (Summarizing the Kyodo Results).

189. 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.

190. Herber, 2019, p. 180.

191. Ii, 2019, p. 149.

192. *See* JAPAN TIMES, May 21, 2019, p. 2, 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.

193. David T. Johnson, *Capital punishment without capital trials in Japan's lay judge system*, ASIA-PACIFIC JOURNAL, 8.52 (2010), pp. 1-38; DAVID T. JOHNSON, THE CULTURE OF CAPITAL PUNISHMENT IN JAPAN (Palgrave Macmillan, forthcoming, 2020), ch.2. 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 (Takahashi Akihiko) 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 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

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."[194]

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.[195] 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.[196] 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.[197]

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.[198] 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, is that a good thing?[199] Similarly, the high level of support among former lay judges seems better than deep dissatisfaction, but if it is also a sign that judges are

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.

194. MARCUS AURELIUS, MEDITATIONS (The Modern Library, 2003), p. 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 (2019, p. 29) 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."

195. Kage, 2017, pp. 10-15.

196. YOMIURI SHIMBUN, *Saibanin Seido 10nen: Saibanchō 50nin Ankēto: Shimin Kankaku Shinri Shinpū*, May 21, 2019, pp. 1, 13.

197. SANKEI SHIMBUN, *Keikensha Fuereba, Shakai ga Yoku Naru*, May 19, 2019, p. 24.

198. Feeley, 1983, Feeley, 2017, and Feeley, 2018.

199. Takano, 2019.

successfully satisfying their "clients,"[200] hosting their "guests,"[201] and parenting their "children,"[202] the net effect could 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.[203] As Tocqueville and others have observed, trials pursue broad and intangible goals, including civic education and democratization.[204] 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 claims made by some 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."[205] Based on this evidence, some observers believe Japan's new trial system is serving as a "school for democracy."[206] Similarly, research on "lay judge lounges" (*saibanin 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.[207] Other analysts regard Japan's lay judge reform as "monumental" because of its "indirect" and "educational" effects on Japanese society.[208] On this view, the lay judge system is "the greatest achievement" of justice system reform in Japan,[209] and lay participation should be extended into other realms of Japanese law.[210] 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.[211]

We are skeptical. For one thing, there is no solid or systematic evidence that lay participation is reshaping Japanese society and democracy. For

200. Herber, 2019, p. 182.
201. Takayama, 2019, p. 34.
202. Takano, 2019.
203. SADAKAT KADRI, THE TRIAL: FOUR THOUSAND YEARS OF COURTROOM DRAMA (Random House, 2005), p. 346.
204. JOHN GASTIL, E. PIERRE DEESS, PHILIP J. WEISER, AND CINDY SIMMONS, THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION (Oxford University Press, 2010).
205. Kage, 2017, p. 6.
206. Kage, 2017, p. 6.
207. Takayuki II, *Anata mo Ashita wa Saibanin!?* (Nihon Hyōronsha, 2019).
208. Wilson, 2017.
209. Fukurai, 2013, p. 565.
210. Wilson, Fukurai, and Maruta, 2015.
211. Vanoverbeke and Fukurai, forthcoming, 2020.

another, the high no-show rate for citizens who are asked to serve as lay judges hardly reflects an enthusiastic societal endorsement of citizen involvement in government.[212] 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.[213] 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.[214] Per capita, therefore, jury service in the United States appears to be at least 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 U.S.[215] There is some evidence that in America "jury deliberation promotes civic engagement and political participation," but the effects are small and, for the most part, are limited to people who were *not* civically engaged or politically active before serving as jurors.[216] The main finding from the best American research is that jury service generates a 4 percent to 7 percent increase in average voter turnout for jurors who previously had "a relatively spotty voting record."[217] And the effect of criminal jury participation on voting "*does not hold* for those voters who are already active."[218]

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 democratizing effects of lay judge service in Japan. In our view, 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.[219] But until we see evidence to the contrary, we will continue to believe in the null hypothesis.

212. Herber, 2019, ch.6.
213. Foote, 2014, p. 14.
214. Mona Chalabi, 2015, https://fivethirtyeight.com/features/what-are-the-chances-of-serving-on-a-jury/.
215. Robert P. Burns, 2009.
216. Gastil, Deess, Weiser, and Simmons, 2010, pp. 173-176.
217. Gastil et al., 2010, p. 48.
218. Gastil et al., 2010, p. 48, emphasis added.
219. Fujita, 2018, pp. 273-275.

Conclusion

Many of the limits of criminal justice reform in Japan can be seen in other countries. In these respects, Japan seems to be an ordinary country and a fairly typical case.[220] And compared to criminal justice 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 "glass half full" perspective is so common among legal professionals and scholars of law and society that we consider it the Orthodox View. Yet in evaluating Japan's lay participation reforms, using the U.S. as the main point of comparison seems to be setting the bar rather low.[221] And 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 might be called "the glass half-empty," except we believe this label is too cheerful too, as the previous pages have explained. I n many important respects—prosecution, sentencing, capital punishment, victims, and so on—changes on the surface of Japanese criminal justice have affected reality on a deeper level by cementing the status quo. We originally planned to call this article "Two Cheers for Criminal Justice Reform in Japan," but after analyzing the evidence we changed the title because we could muster only enough enthusiasm for a single, highly qualified 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 Japan's criminal justice outcomes. Moreover, references to democracy and popular sovereignty do not even appear in the Lay Judge Law. As stated in Article 1 of that Law, the primary purpose of the lay judge reform is to promote public understanding of the judicial system and thereby raise confidence in it. As one scholar put it, the lay judge system "was established to enhance the power and authority of the judiciary," not to democratize it.[222] In the context of these conservative ambitions and the almost perennial control of national government by the conservative Liberal Democratic Party, the limits of Japan's lay participation reforms may have been all but inevitable. For Japanese progressives the main message of criminal justice reform might be that nothing fails like success.

Understanding the present also requires remembering the past. Lay participation reforms have been marginalized several times in Japanese

220. John D. Jackson & Nikolai P. Kovalev, *Lay Adjudication in Europe: The Rise and Fall of the Traditional Jury*, ONATI SOCIO-LEGAL SERIES, Volume 6, No. 2 (2016), pp. 368-395.

221. Feeley, 2018.

222. Yamase, 2016, p. 334.

history, mostly by legal professionals who found their powers threatened by greater citizen involvement.[223] This legacy is prominent not only with respect to lay judges, victims, and prosecution review commissioners. It is evident in other reforms that were meant to enhance the role of "outsiders" in Japanese criminal justice,[224] including the Penal Institution Visiting Committees (*keiji shisetsu shisatsu iinkai*) that began operating in Japanese prisons and jails in 2007. Prison inmates in Japan are sometimes now able to read and write uncensored letters, and they can be interviewed by PIVC members without prison or jail staff present. These are welcome changes, but the main effect of this reform has been to strengthen support for traditional penal practices—to make them more legitimate by making them seem more democratic.[225] 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 of which 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 little more than incidental music; and be skeptical of strong claims about large positive effects, because criminal justice reform is hard. Future studies should also try to explain how the cultural and structural contexts of Japanese criminal justice constrain citizen influence and reform outcomes. And 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[226] and by prosecutors in shaping "the Japanese way of justice" through their charge decisions.[227] 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 without regard for the "site fights" that occurred

223. Anderson and Nolan, 2004. 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, 2015, pp. 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 Baishinhō: Sono Naiyō to Jisshi Katei no Mondaiten* [*The Jury Act in Japan: Problems with Content and Operation*], JIYŪ TO SEIGI, 35 (1984), pp. 4-12.

224. Herber, 2019.

225. Stacey Steele, Carol Lawson, Mari Hirayama, and David 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).

226. SETSUO MIYAZAWA, POLICING IN JAPAN: A STUDY ON MAKING CRIME (SUNY Press, 1992).

227. DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN (Oxford University Press, 2002).

around the issue of where to locate nuclear reactors[228] or for the regulatory failures that preceded and enabled the nuclear meltdowns in Fukushima.[229] 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 law enforcement officials.[230]

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

228. Daniel P. Aldrich, *The crucial role of civil society in disaster recovery and Japan's preparedness for emergencies*, JAPAN AKTUELL, 3 (2008), pp. 81-96.

229. Jeff Kingston, *Japan's Nuclear Village*, ASIA-PACIFIC JOURNAL, Volume 10, Issue 37, No. 1 (2012), https://apjjf.org/2012/10/37/Jeff-Kingston/3822/article.html.

230. On Japanese police, see David T. Johnson, *Policing in Japan*, in THE SAGE HANDBOOK OF MODERN JAPANESE STUDIES, James D. Babb ed. (Sage, 2015), pp. 222-243. And on Japanese prosecutors, see David T. Johnson, *Japan's Prosecution System*, in PROSECUTORS AND POLITICS: A COMPARATIVE PERSPECTIVE, Michael Tonry ed. (*Crime and Justice: A Review of Research*, University of Chicago Press, Volume 41, 2012), pp. 35-74.