



The impact of victim participation in *Saiban-in* trials in Japan: Insights from the American jury experience[☆]

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The introduction of new lay participation systems such as those in Japan has much to teach scholars of lay adjudication. The Japanese experience with lay participation can offer fresh scientific insights into the role of lay persons as legal decision makers. Many other jury and mixed tribunal systems are generations or even centuries old, making it difficult to identify their effects. Because *Saiban-in seido* is a new system with unique characteristics, its immediate and long-term effects can be studied. One important new feature of the *Saiban-in seido* system is that victims of crime can participate in significant ways in criminal trials (Goto, 2014; Saeki, 2010). Therefore, studying the impact of *Saiban-in seido* has the potential to add to our knowledge about the best methods for incorporating lay decision makers as well as to provide important insights about the effects of victim participation.

Consider the recently concluded *Saiban-in* trial of Tatsuya Ichihashi, a defendant who fled after raping and killing a British English teacher and abandoning her body in his apartment bathtub filled with sand. The family made multiple pleas to the police and to the community to find their daughter's killer. Ichihashi was eventually apprehended and arrested for the murder over two years later, and published a controversial book about his life as a fugitive prior to the trial (Martin, 2011). For these reasons and more, the case generated substantial media coverage, and the *Saiban-in* trial captured public attention (Kamiya and Hongo, 2011; Views from the street, 2009). At the trial, the parents of the victim testified in the courtroom and asked for

[☆]This article is based on a presentation at the 16th World Congress, International Society for Criminology, Kobe, Japan, August 7, 2011. Setsuo Miyazawa organized a superb panel session that showcased the perspectives of scholars from a range of different countries. I learned a great deal from the other panelists. I thank Japan Times reporter Setsuko Kamiya for making available her original transcription of a July 21, 2011 lay judge press conference following the murder trial of Tatsuya Ichihashi. Finally, I wish to acknowledge Judge Takashi Kawase, whose terrific course paper (Kawase, 2009) brought questions about the victim's role in the *Saiban-in* system to my attention.

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the “absolute maximum punishment permissible in this country” (Kamiya, July 9, 2011). At the lay judge press conference following the trial (Kamiya, July 22, 2011), reporters asked the lay judges whether their opinions were influenced in any way by the statements of the victim’s family.¹ All but one of the six *Saiban-in* and the alternate maintained that although they listened carefully to the testimony given by the victim’s family, they were not overly influenced by it in determining the defendant’s sentence. Their comments provide a window into their thinking about the victim and about their own decision making roles and responsibilities:

Saiban-in 1: I thought that it was a good system to allow the victim’s family members to talk to the court. I could agree on that. The family members said they wanted the maximum punishment applicable. I think they not only said this to the court but also to the defendant. Regardless of what the actual sentencing was, I thought it was good to let the family convey their message to the court. I thought this system allowed that to happen. We started our deliberations after the prosecutors demanded the indefinite life term. We actually had considered all possibilities. I thought we also needed to consider what the family said. Our decision is the outcome of going through all that. I don’t think the voice of the victim’s family led us to the sentencing. It was a decision based on all evidence.

Saiban-in 2: I totally agree. I think we all listened to the voices of the victim’s family very sincerely. But we looked at all the evidence and testimony, and decided on that. I think we were careful not to decide based on the voices of the victim’s family.

Saiban-in 3: I paid attention to the victim’s family, but I don’t think what they said influenced our decision on the sentence.

Saiban-in 4: I think it’s natural to feel for the parents of the victims. Maybe if this had to do with guilt or innocence, I may have sided with them. But this wasn’t such a case. And I don’t think it influenced the sentence.

Saiban-in 6: I thought it was a matter of course for the family of the victim to seek a harsh penalty against the defendant. And I did understand that through their testimony. But when we decided on the sentencing, I don’t think we focused too much on that. That was one among the many elements we based our decisions on, and we decided in a reasonable manner.

Saiban-in alternate 1: I don’t think their testimony influenced my decision. But when several pictures of the victim, from when she was very little and through college, were shown... I think we each thought differently as we looked at them, and I think I was looking at them in the father’s shoes. And at that time I really could understand how he felt.

In contrast, one of the *Saiban-in* was unsure about the impact of the testimony on his own decision making:

¹Japan Times reporter Setsuko Kamiya attended the July 21, 2011 lay judge press conference, and translated the content, including the lay judges’ statements about the impact of the family’s testimony quoted here. I edited the comments slightly to improve readability.

Saiban-in 5: This is a tough question for me. The victim's family members testified, and they told us how they felt. Honestly I don't know if that led me to the conclusion we came to. I've never experienced what the victim did, and so it was difficult to put myself in their shoes, although I tried hard to appreciate what they told us during their testimony... You know, I don't know how I can answer this question.

Taken together, the comments are thoughtful reflections on the tension between sympathy and the lay judge's duty. The comments recognize the human tendency to feel sympathy for a bereaved family member, yet most are clear in insisting that the lay judges considered the victim's family's testimony appropriately, treating it as one among a broad range of factors relevant to the sentencing of the defendant. Ultimately, the court decided on a life sentence for Ichihashi, a sentence that has been upheld by the Tokyo High Court (Kamiya and Hongo, July 22, 2011; Matsutani, 2012).

Are these lay judges accurate in their self-evaluation about the limited impact of the testimony given by the victim's family? Were they able to listen compassionately, yet consider the family's testimony rationally as one element of the complex sentencing task before them? Whether or not they are right about the likely effect of the family's testimony on themselves as lay judges, did the professionally trained judges who decided the case with them respond differently?

We don't yet have definitive answers to these questions. The empirical research on these twin legal reforms is at an early stage. Many scholars have taken up the challenge of exploring how the introduction of *Saiban-in seido* influences case processes and outcomes in the Japanese criminal justice system (Corey and Hans, 2010; Fujita and Hotta, 2010; Fukurai et al., 2010; Hirayama, 2012; Ibusuki, 2010; Johnson, 2009). Others have begun to investigate the impact of the expansion of victim participation in *Saiban-in* trials (Saeki, 2010, 2012). However, we may obtain some important lessons about the likely effects of victim participation in the *Saiban-in* trials by taking a comparative approach. To that end, this article describes the American jury system, examining the legal landscape and empirical research on the impact of victim participation in criminal trials in the USA. (See Choi, 2014, for a comparison with Korean trials.) The article then considers the relevance of the American experience with juries and victim participation for *Saiban-in seido*, and offers suggestions for future research.

1. The American experience with juries and victim participation

In most criminal trials involving serious charges against an accused person, the American jury decides independently of the judge on the verdict of guilt or innocence (Goldbach and Hans, 2013). Professional judges are given the job of sentencing convicted defendants, with two important exceptions. First, in six states, juries may sentence criminal defendants (King and Noble, 2004, 2005). Second, in death penalty trials, in most states juries decide whether a convicted defendant will live or die (Johnson et al., 2012; Radelet, 2011). This contrasts with the systems in Japan (Saeki, 2010) and many other civil law countries where lay citizens participate in both verdict and sentencing determinations, whether as advisory juries (as in Korea: see Kim et al., 2013) or as members of mixed courts of lay and professional judges (as in Germany: see Rennig, 2001).

There is substantial public support for the American jury system, even in the face of unpopular verdicts (Hans, 2008). Fifty years of empirical research has confirmed the basic soundness of the American jury (Devine et al., 2001; Kalven and Zeisel, 1966; Vidmar and

Hans, 2007). Juries reflect the norms of the community (Finkel, 2001); the strength of the trial evidence is the best predictor of jury verdicts (Eisenberg et al., 2005; Garvey et al., 2004; Hans, 2012); and judges agree with most jury verdicts (Kalven and Zeisel, 1966).

However, because juries reflect the norms and values of the community, and community members may be prejudiced in criminal cases, there is a concern that in some cases involving horrific crimes, extensive pretrial publicity, and inflammatory evidence, juries may be biased in their evaluations. In particular, there is concern that strong sympathy for victims might prejudice the jury against a defendant (Vidmar, 2003; Vidmar and Hans, 2007). We know that the trial testimony given by crime victims is considered to be very important. For example, one major study of felony jury trials found that when victims testify in a criminal case, judges rate their testimony as extremely important to the case (over 6.0 on a 7-point scale), in fact more important on average than the testimony of defendants, eyewitnesses, experts, or the police (Hannaford-Agor et al., 2002, p. 51).

Research also reveals that characteristics of the victim influence case outcomes in jury trials (Vidmar and Hans, 2007, 198–206). Indeed, extensive research documents the fact that defendants who injure white and high status victims are treated more severely (Baldus et al., 1990; Johnson et al., 2012; Vidmar and Hans, 2007, pp. 248–249).

As for sympathetic responses on the part of jurors, felony jurors surveyed about their trial impressions shows that jurors, understandably, express more sympathy on average for victims than for defendants (Hannaford-Agor et al., 2002, p. 51). For example, felony jurors in juries that reached a verdict on average rated their sympathy for the victims who testified as 3.85, close to the midpoint, compared to their sympathy for defendants which was a point lower (2.94) on a 7 point scale (Hannaford-Agor et al., 2002, p. 51). However, the mid-point average suggests that sympathy toward the victim is not ubiquitous among jurors. Indeed, other jury research has uncovered instances of outright hostility toward some crime victims. In sexual assault cases in particular, juries may blame the victim rather than the defendant for the crime (Vidmar and Hans, 2007, 198–201). And even in instances with victims who are not blamed, juries may acquit a defendant despite their strong positive sentiments toward a victim. Consider the high profile Casey Anthony murder trial, which captured public attention during the summer of 2011 (Zhuravitsky, 2012). This trial involved the killing of a young toddler who disappeared and whose body was subsequently found buried and mutilated. The mother was charged with her murder, and many Americans followed the televised trial, weighing in on their views of the trial proceedings regularly on social media sites. When Casey Anthony was acquitted of the murder, over 350,000 immediately voiced their reactions on Twitter, with most strongly disapproving of the verdict (<http://mashable.com/2011/07/06/casey-anthony-sentiment/>; Zhuravitsky, 2012). ABC News reported that the jurors were “sick to our stomachs” after concluding there was not enough evidence to convict the Florida mom of killing her young daughter (Burke et al., 2011). All of this suggests that Japan’s expanded role for victims might well affect case outcomes in *Saiban-in* trials, but the likely effects deserve closer scrutiny.

2. Victim impact statements in the United States: legal background

In the United States, the legal status of testimony about the crime’s psychological, emotional, financial, or other impact on the victim has changed over time. Like many common law countries, the federal government and the states now permit victim impact information to be submitted during the sentencing phase of a trial (Blume, 2002–2003; Roberts and Manikis,

2011). Earlier legal rulings in the U.S. raised concerns about the potentially emotionally biasing effects of statements about a crime's impact by the victim, or by the victim's family. For example, in 1986, the U.S. Supreme Court struck down Maryland's practice of permitting a victim impact statement during the sentencing phase of a capital trial (*Booth v. Maryland*, 1986). In that case, John Booth was convicted of murdering an elderly couple in Maryland, and a sentencing hearing ensued. The prosecutor submitted a victim impact statement that included information from interviews with members of the victims' family, including comments about the positive qualities of the victims, the reactions of the family members to their deaths, and information about some of the problems that the family members had experienced following the deaths.

The Court held in a 5-to-4 vote that such a statement violated the Constitution because the victim impact statements "serve no other purpose than to inflame the jury and divert it from deciding the case on...relevant evidence..." (*Booth v. Maryland*, 1986, pp. 508–509). The majority opinion expressed concern that this sort of testimony would shift the jury's attention from what it viewed as the proper subject of the sentencing hearing, which was to evaluate the defendant's unique characteristics and his blameworthiness. The Court also was worried about the capital defendant's ability to counter victim impact evidence. But in a sharp dissent, Justice Scalia observed that public discussions of victims' rights reflected desires to expand victims' participation in criminal trials:

Many citizens have found one-sided and hence unjust the criminal trial in which a parade of witnesses comes forth to testify to the pressures beyond normal human experience that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced—which (and not moral guilt alone) is one of the reasons society deems his act worthy of the prescribed penalty.

Booth v. Maryland, 1986, Scalia, J., dissenting, p. 520

In a subsequent case, *South Carolina v. Gathers* (1989), the U.S. Supreme Court faced another challenge to limits on crime victim evidence. In the guilt phase of a capital trial, the prosecution presented evidence of materials found in the murdered victim's pockets. They included a voter registration card and a piece of religious writing called the "Game Guy's Prayer." The defendant Gathers was convicted. During the final summation of the capital sentencing phase of the trial, the prosecutor read the prayer to the jury and commented on the victim's commitment to the community. The jury sentenced Gathers to death. However, the South Carolina Supreme Court ordered a new sentencing hearing on the grounds that the prosecutor's summation suggested that death was the appropriate sentence because the victim was a voter and a religious man. The state appealed that decision, but the U.S. Supreme Court ultimately upheld the order for a new sentencing hearing, again by a 5-to-4 vote.

Although the U.S. Supreme Court acknowledged that information about the victim might be admissible if it was related to the circumstances of the offense, it concluded that the prosecutor went beyond that in the summation. Hence, in this instance, as in *Booth*, information about the victim was seen as not relevant to the defendant's moral culpability. Again, however, there was strong dissent, including Justice O'Connor's assertion that conveying the uniqueness of the individual victim was relevant to the sentencer's moral judgment. Her argument echoed Scalia's *Booth* dissent in criticizing the imbalance between the broad range of information capital defendants could offer and the limited information victims and their families could provide.

Two years later, the U.S. Supreme Court switched course. In the landmark case of *Payne v. Tennessee* (1991), the U.S. Supreme Court upheld the constitutionality of the introduction of victim impact statements. The case involved the murder of a woman and her two-year-old daughter and the attempted murder of her three-year-old son. In poignant language during the sentencing phase of Payne's capital trial, the prosecutor invited the jury to consider how the young son's life would be forever affected by the loss of his mother and sister ("His mother will never kiss him good night or pat him as he goes off to bed, or hold him and sing him a lullaby" (*Payne v. Tennessee*, 1991, p. 816)). In contrast to its previous cases, the Court concluded in *Payne* that evidence and arguments about the impact of a crime on its victims were consistent with the Constitution.

Writing for the majority, Justice Rehnquist took issue with the conclusions reached in the earlier cases that victim impact bore no proper relationship to the sentencing task. On the contrary, Rehnquist now concluded, a crime's harm to a victim was a relevant consideration in sentencing, and victim impact evidence could provide the sentencer with a vivid picture of that harm. In response to the charge that sentencers might be especially harsh toward defendants who killed victims who were held in high regard in their communities, the Court asserted that such evidence was not offered for comparative purposes but rather to show the victim's uniqueness as a human being. In sum, the Court decided that victim impact evidence could be used to document the effects of the crime on the victims or their survivors, and to show the victim's individuality. The victims' opinions about the defendant, the crime, and the appropriate sentence still were not allowed.

The dissenting opinion by Justice Stevens took issue with the majority, asserting his view that victim evidence that sheds no light on the defendant's guilt or moral culpability violated the Constitution, and "thus serves no purpose other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason" (*Payne v. Tennessee*, 1991, Stevens, J., dissenting, p. 856).

Following *Payne*, many U.S. jurisdictions expanded their use of victim impact statements and evidence in capital trials. Blume's survey of jurisdictional practices found that, as of 2003, the federal government, the military, and 33 of the 38 jurisdictions that had a death penalty allowed victim impact evidence and argument in capital trials (Blume, 2002–2003, p. 268, Table 1). The victim's role has also expanded in non-capital trials. Most jurisdictions permit fact finders to consider both written and oral statements about the impact on the victims. In some states, victim impact may also be demonstrated through the use of video presentations (for reviews, see Austin, 2010; Blume, 2002–2003). Scholarly analysis finds that the content of victim statements is not particularly well-regulated; despite holdings to the contrary, for example, some states permit the victim to express views about the appropriate sentence (Blume, 2002–2003; Roberts and Manikis, 2011).

3. Victim impact statements in the United States: empirical evidence of their effects on juries

What difference does it make to a sentencer to hear victims and their families describe the impact of a crime? Scholars and Supreme Court justices disagree fundamentally on the normative and legal issues about whether victim testimony is an appropriate factor to consider and how much weight it should receive. Setting aside these questions for the moment, what are the empirical consequences of the post-*Payne* regime or other expansions of a crime victim's role?

Victim testimony may provide evidence about the harm done by an offender. That evidence of harm might influence the sentencer quite independently of any emotional response, as the sentencer attempts to balance the equities between the offender and the victim (Myers and Greene, 2004). But hypotheses about the impact of victim impact testimony have emphasized the emotional component of the sentencer's reaction. Justice Stevens was of the view that victim testimony about the impact of a crime would create an emotional rather than a rational response to fact finding, and would push jurors toward deciding on death in capital cases. One can imagine the range of emotions that might be experienced — sympathy, empathy, and sorrow for the victim, along with more negative emotions about the defendant such as hostility, anger, and a desire for revenge. Consistent with this view about the effects of victim testimony, empirical research has discovered evidence of an “identifiable victim effect” in which individualized and identifiable victims produce stronger emotional responses and desires to help than faceless statistical victims, even if the number of faceless victims is substantial (Small and Loewenstein, 2003).

Two broad lines of empirical research have explored jury reactions to victim impact evidence. Much of the empirical scholarship thus far has been focused on juries rather than on professionally trained judges, probably because of the jury's central role in death penalty decisions, the presumption that juries are more open to emotional influence, and the ease of studying them.

First, researchers have studied the effect of victim impact evidence in actual trials (Aguirre et al., 1999; Eisenberg et al., 2002–2003; Roberts and Manikis, 2011). Most of the research in the U.S. examines victim impact evidence in death penalty trials. Researchers have taken advantage of the natural variation in changes over time in the use of victim impact evidence in the United States. In particular, they have compared case outcomes before and after the *Payne* decision allowed victim impact evidence. As a natural experiment, this type of research on the behavior of actual juries offers a valuable perspective on the way in which victim testimony has changed over time. However, the research approach may not be able to control for other changes over time or other important variables, or may not be sensitive enough to detect small or moderate victim impact effects.

Nonetheless, the comparisons of the pre- and post-*Payne* cases are interesting. Aguirre et al. (1999) explored the effect of victim impact evidence in California capital trials before and after the *Payne* decision was accepted there. Comparing the 76 pre- and 75 post-*Payne* California capital trials, they found no overall difference in the rate of death sentences, with a 60.5% rate of death sentences before *Payne* and a 61.33% rate following *Payne*. However, in the post-*Payne* period, the subset of cases in which victim impact evidence was actually presented to the sentencer resulted in an elevated death sentencing rate of 70.5%, although the authors did not report statistical significance tests. The authors note some apparent interactions among victim impact evidence, defendant and victim race, and the death penalty, but without statistical testing, we cannot assess their significance.

Eisenberg et al. (2002–2003) analyzed responses from 214 South Carolina jurors who were participants in the Capital Jury Project, a national survey of capital jurors. A total of 103 of these jurors decided cases after the South Carolina Supreme Court adopted the *Payne* decision; and about half of them arrived at a death sentence in their cases. Compared to jurors whose cases preceded *Payne*, jurors who decided cases after *Payne* were more likely to say that their juries discussed the suffering of the victim and the victim's family. Furthermore, they found the victims more admirable. However, a careful statistical analysis using a range of appropriate control variables found no significant pre- and post-*Payne* difference in the likelihood of a death

sentence. Eisenberg et al. (2002–2003) caution that the nature of their data or other methodological limits may have made it difficult to detect a victim impact effect. Nonetheless, Karp and Warshaw's (2006) later analysis of the full sample from the Capital Jury Project also found no difference in jury death sentencing decisions when the families and friends of the murder victims did or did not testify. Outside the U.S. and the capital case contexts, Roberts and Manikis (2011) reviewed a number of empirical tests of the introduction of victim impact evidence regimes. Drawing on diverse projects from South Australia, Victoria, Canada, Scotland, England and Wales, they reach the conclusion that "sentencing practices do not become harsher following the introduction of victim impact statement regimes" (Roberts and Manikis, 2011, p. 30).

A different picture emerges in mock juror studies that have varied the presence or absence of victim impact evidence. In these experiments, some mock jurors hear the details of the case along with victim impact evidence, whereas others hear all the evidence except for the victim impact evidence. Reactions and decisions to the case are then compared. In contrast to comparing real decisions in actual cases with and without victim impact testimony, the experimental approach offers more control over relevant factors. Carefully calibrated case materials can provide more sensitive tests of the effects of victim impact statements. However, the mock jury approach is limited in that the procedures differ substantially from actual trials and the study participants are not deciding anyone's fate.

In the mock jury studies, exposure to victim impact statements increases the participants' positive regard for the victim. In some (but not all) studies, victim impact evidence increases the severity of the recommended sentence. A number of early mock juror studies used convenience samples of university undergraduates, provided them with brief written synopses of cases, and asked them to respond to a varied range of questions about their views about the victim (see Myers and Greene, 2004). Although a number of these studies used capital case scenarios, they did not always "death-qualify" the participants, that is, limit the sample to those who would be eligible to serve as capital jurors. Hence, the results might not apply to the circumstances of actual juries reaching decisions about capital or non-capital defendants.

Despite these limitations, the mock jury studies do help to show how humanizing a victim through the testimony of family members has the potential to affect a decision maker's emotional reactions to the case and their ultimate judgments. For instance, Luginbuhl and Burkhead (2005) gave capital trial summaries to participants, half of whom received a short victim impact statement. Those who did not receive the victim's statement recommended a death sentence 20% of the time, compared to 51% of the mock jurors who read the victim impact statement. Myers and Arbuthnot (1999) also found a dramatic increase in death penalty recommendations in their experiment that used a videotaped trial simulation. When testimony by the victim's mother was included, 67% of those jurors who voted to convict the defendant reached a death sentence, compared to 30% who did not view that testimony.

Paternoster & Deise's well-designed experiment (2011) of the effect of victim impact evidence finds compelling evidence of the impact of such testimony. It also offers new data about the psychological mechanisms through which victim impact testimony influences the sentencing process. The researchers were able to improve upon prior experimental studies in several ways. Their mock jurors were community members who were drawn from jury lists. Only participants whose views on the death penalty would make them eligible to serve as capital jurors were included in the study. Even more significantly, the researchers were given the opportunity to use a video recording of the sentencing phase from an actual capital trial in Maryland. The recording included approximately 20 min of victim impact testimony by the

sister of the murder victim. The researchers edited the recording to a manageable length of 3.5 h. Mock jurors were provided an overview of the case facts, were told that the defendant had been convicted, and were informed that their job was to determine the appropriate sentence. The mock jurors then watched the video. Half of the mock jurors heard a version of the recording that included the sister's victim impact testimony; the other half heard the recording without the victim impact evidence. The sister discussed the positive character of the victim, who was a police officer; talked about the deleterious effects of his murder on family members; and suggested that "a just punishment for an unjustifiable death" was deserved. Following the video, the mock jurors completed questionnaires and provided their individual sentencing decisions.

The results are among the most striking of any victim impact study to date. Victim impact evidence shifted key emotional responses of the mock jurors and dramatically increased the willingness of these mock jurors to recommend a death sentence. Mock jurors who heard the victim impact testimony felt significantly more sympathy and empathy toward the victim and the victim's family. They also reported being more upset, hostile, angry, and vengeful. Of those who saw the victim impact testimony, 62.5% said that if they had been jurors, they would have voted for a death sentence, compared to just 17.5% of those who viewed the recording without the victim impact evidence (Paternoster and Deise, 2011, p. 149). The researchers then conducted a mediational analysis to determine which emotions were most important in the decision to impose death, and concluded that the effect of victim impact evidence on the death penalty determination was mediated most importantly by empathy and sympathy for the victim.

The effects of the sister's testimony during the sentencing phase might have been particularly strong in the Paternoster & Deise study because the mock jurors did not participate in the guilt phase of the trial, receiving only a summary of the case facts. As the authors acknowledge, information about the victim and the victim's family often emerges during the guilt phase of a trial, which would likely reduce the effects of the information about the victim presented during the second sentencing phase. Nonetheless, the results support Justice Stevens's prediction that victim impact evidence will create emotional responses that push jurors toward death.

It's comforting when results from different methodological approaches converge. However, in the case of victim impact evidence, the results of real world studies appear to diverge from the results of the mock juror experiments. The experiments regularly find that victim impact evidence affects sentencers' emotions and pushes them toward favoring more severe sentences. Yet most of the studies of the introduction of victim impact regimes do not find observable, statistically significant changes in sentencing (Eisenberg et al., 2002–2003; Roberts and Manikis, 2011).

It's possible that the full experience of hearing evidence and reaching a verdict about guilt in real trials is sufficient to generate an identifiable victim effect for sentencers. During the sentencing hearing, the additional information and testimony that victims and their families provide may not be necessary to produce the identifiable victim effect and the increases in sympathy and empathy that go along with it. It's also possible that victim impact evidence has a discernible effect only in particular trials, ones in which the decision could go either way. Eisenberg and Hans (2009) found that a defendant's criminal record appeared as a significant effect on jury decision making primarily in cases with ambiguous evidence, when either a conviction or an acquittal could be justified. Combining cases in which victim impact testimony is likely to influence the sentencer with the mass of cases where the evidence is very strong or very weak, or where a criminal sentence is largely determined by sentencing guidelines, may make it difficult to detect the impact. The strength of evidence in a case is the most important

determinant of a trial outcome (for verdicts, see Garvey et al., 2004), and might swamp other effects.

Finally, victim impact evidence might produce emotional reactions in actual jurors, as the mock jury experiments suggest, but through self-control, adoption of debiasing strategies, or responding to judicial instructions, the effect on decision making is reduced or eliminated. Future research employing different methodologies to explore the potential interaction between case ambiguity and victim statements might shed light on these possibilities.

4. Victim impact statements in the United States: empirical evidence of their effects on judges

The American research literature on victim impact statements is very much oriented toward examining the effects of such statements on juries rather than judges. The change over time in the use of such statements in capital trials makes the focus on juries understandable, since juries decide on death in most U.S. jurisdictions (Johnson et al., 2012). However, professionally trained judges do the bulk of sentencing in the U.S., and of course are members of the *Saiban-in* mixed court. Therefore, it's of interest to explore the effects of such statements on professional judges.

What is clear in the U.S. and elsewhere is that professional judges regularly acknowledge the important role of victims in the sentencing process. A comprehensive survey of international experiences with crime victim statements in court (Roberts and Manikis, 2011) reports that judges from a range of jurisdictions state that judges find victim statements at the trial (often in the form of victim impact statements) to be useful inputs to the sentencing process. They help to calibrate the seriousness of the crime, and they may also identify needed compensation for the crime victim. Furthermore, judges often include some recognition of the harm to the victim as they list the reasons underlying their sentences in their formal sentencing reports. Thus, professionally trained judges appear to acknowledge that the statements and experiences of the victim contribute to their decisions. Nonetheless, as previously discussed, Roberts and Manikis (2011) find that a jurisdiction's adoption of a practice of employing victim statements does not produce observable increases in criminal sentences.

The question of whether judges respond as emotionally as lay sentencers to victim impact testimony is an interesting one. Chris Guthrie, Jeffrey Rachlinski, and Andrew Wistrich have undertaken an ambitious research agenda with American judges, discovering that they are often influenced by cognitive biases just as lay citizens are (Guthrie et al., 2001). Judges, it turns out, are human. However, in some instances, they appear to be able to resist particular biases that influence ordinary people (Guthrie et al., 2007; Rachlinski et al., 2011).

In a recent set of six scenario studies with judges on the effects of a defendant's apology on judicial sentencing preferences, Rachlinski et al. (2013) included one experiment that varied whether judges heard a victim impact statement. In that study, 244 Minnesota judges read a hypothetical sentencing scenario for a defendant convicted of robbery. After reading the basic facts of the case, some judges heard a victim impact statement; others learned that the defendant apologized. One short victim impact statement was as follows:

"I want the court, and the defendant, to understand how this incident has affected me. Ever since this happened, I have been afraid to go outside. Also, when I fell and hit my head, I suffered a concussion. I have had really bad headaches ever since and sometimes I can't remember what I just did. Because I can't concentrate and remember things, I lost

my job. I have been trying to find work, but in this economy, it isn't easy. Look at me Mr. Nyquist. You ruined my life. Your Honor, I hope you send him to prison for a long time (Rachlinski et al., 2013, p. 1242)."

In the study, judges read one of the scenarios and then determined an appropriate criminal sentence. Rachlinski et al. (2013) found that both the victim impact statement and the defendant's apology affected judges' hypothetical sentencing decisions. A statement by the victim significantly increased the judges' average sentence, and an apology consistently reduced the judges' average sentence. The effects were additive rather than interactive. Although the reaction of professional judges to victim testimony has not been extensively studied using controlled scenarios, the similar increase in sentencing severity for both lay and professional judges after exposure to a victim impact statement is notable.

5. Questions about the impact of victim participation in *Saiban-in* trials

In sum, the American scholarship on victim impact testimony shows it to be a significant source of information about the harm caused by an offender and suggests that it has the potential to create strong emotional reactions. Under some circumstances, these strong emotional responses to victim testimony may translate into more severe sentences, as demonstrated in experiments, but thus far the introduction of victim impact statements has not seemed to produce detectable changes in actual sentence severity by either judges or juries.

Whether the reactions found in the U.S. research would also apply to Japan legal fact finders is eminently worthy of study. In a remarkable essay, Miyazawa (2008) describes the rise over time in Japan of "penal populism," that is, increasing punitiveness in criminal justice policies. He traces the development of greater punitiveness in policies to the victims' rights movement in Japan. Conservative politicians worked with outspoken members of the victims' group to promote and enact a variety of punitive measures for the criminal justice system. The victims' group played a major role in ensuring the passage of the victim participation act that expanded the role of victims in Japanese criminal trials. Indeed, the victim has the right to participate directly in the criminal trial through questioning witnesses, including the defendant, and offering an opinion about the appropriate sentence, a role that is much greater than the role victims play in criminal trials in common law countries (Goto, 2014; Honjo, 2011; Saeki, 2010). Even if the circumscribed victim impact statement does not have a detectable effect in U.S. criminal sentencing, might these expanded roles for Japanese crime victims affect the *Saiban-in*?

Masahiko Saeki has developed a significant line of research on the question of victim participation in sentencing in *Saiban-in* trials (Saeki, 2010, 2012). Early results of this project employed a hypothetical experiment with students and were published in the *International Journal of Law, Crime and Justice* in 2010. In this initial experiment that employed a mock murder trial video, Saeki varied whether the widow of a murder victim or a prosecutor participated in questioning the defendant. It also varied whether the study participants received no information about the widow, or heard either through the prosecutor or the widow directly about the impact of the murder on her and her son, the fine personal characteristics of the murdered man, and a request for the harsh punishment. Those who heard either from the prosecutor or the widow about the impact of the crime increased the severity of the sentence, compared to those who heard nothing, in line with the typical results of experimental studies of victim impact statements in the U.S. Victim participation in questioning did not affect

sentencing. Saeki's (2012) current research includes the comparison of judicial cases from Tokyo District Court in which victims do or do not provide impact statements. Other scholars have also begun to analyze the distinctive features of the Japanese victim participation system, analyzing the patterns over time to assess whether sentences for particular types of cases have increased now that victims play an expanded role in prosecution (Goto, 2014; Honjo, 2011).

There are numerous challenges to undertaking strong empirical tests of the role of victims in Japanese criminal trials. The joint decision making of lay and professional judges in the *Saiban-in* trial means that the typical "mock juror" approach will be able to study only part of the living institution of *Saiban-in seido*. It is vital to understand the interaction between lay and professional judges as they proceed through the decision making task. Do professional judges instruct lay judges about the need for and importance of setting aside emotional responses to victims, for example? If so, how do such instructions affect the relationship between emotional response and sentencing decision? Platania and Berman (2006) find some potentially effective language for dealing with victim impact statements in the U.S. context.

U.S. judges and jurors show strong overlap, but whether that applies to Japanese professional and lay judges remains to be seen. It would be fascinating to replicate the identifiable victim study and the Rachlinski et al. (2013) experiment on apologies and victim impact statements with Japanese lay and professional judges. Apology plays a highly significant role in Japanese society. Yet, Japanese professional judges undergo extensive training in legal judgment and decision making prior to joining the bench. Are they affected in the same way as American judges (and by their lay colleagues) by apologies and by victim statements?

Another challenge comes from the fact that the *Saiban-in* hear all the evidence relevant to guilt and sentencing, and then retire to deliberate on the case. Most experiments tend to study only the sentencing process. Does victim evidence influence guilt decisions, sentencing judgments, both, or neither? It would be a useful empirical project to examine the potential interaction between guilt and sentencing decisions in Japan. Results might inform decisions about the ideal way to structure the guilt and sentencing decisions among the *Saiban-in*.

Miyazawa (2008) makes a compelling case that the Japanese public supports victims' rights and expanded roles for victims in Japanese criminal trials. Victim impact testimony has salutary effects, including documented increases in the satisfaction of victims and their families (Roberts and Manikis, 2011). Both of these facts suggest that victims will continue to play significant roles in *Saiban-in* trials. By demonstrating the types of reactions that victim testimony produces, empirical research may contribute to the normative debate over the scope and appropriateness of victim participation at trial. The international community of research scholars is poised to learn much as we consider the ways in which victim participation and lay decision making – two elements of Japan's democratic experiment – can best be integrated to serve justice.

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