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The Internationalization of Lay Legal Decision-Making: Jury Resurgence and Jury Research

Richard O. Lempert

University of Michigan Law School, rlempert@umich.edu

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The Internationalization of Lay Legal Decision-Making: Jury Resurgence and Jury Research

Richard O. Lempert†

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Introduction: The Resurgent Jury

When I first began to study the jury more than thirty years ago, the topic of this Journal issue, jury systems around the world, was unthinkable. The use of juries, especially in civil litigation, had long been in decline, to the point of near extinction in England, the land of their birth, and the live question was whether the jury system would endure in the United States.¹ It seemed clear that juries would not continue in their classic form, as many U.S. states, with the Supreme Court's eventual approval, mandated juries of less than twelve people and allowed verdicts to be returned by different supermajority votes. Although the federal government was precluded as a constitutional matter from reducing the size of its criminal juries below twelve or allowing non-unanimous verdicts in criminal cases, six-member juries were not only allowed in federal civil cases but became the standard.

The thrust of reform thirty years ago aimed not at improving jury decision-making, but rather at reducing the jury's sway. Scholars and practitioners decried more than praised the jury trial requirements of the Sixth and Seventh Amendments of the U.S. Constitution. The predominant view

† The Eric Stein Distinguished University Professor of Law and Sociology at the University of Michigan.

1. Let me apologize to the reader used to law review writing for not following specific claims with the detailed documentation of which law reviews make a fetish. I regard this brief piece as an informal essay, where such citation would be more affectation than necessity. Those aware of the jury literature will know that what I write is, if not indisputably true, easily supportable by reference to the literature. Those unfamiliar with the literature might find the presence of citations comforting, but I doubt if anyone, except possibly the editors of this Journal, would go out and check them for accuracy. For those interested in what decades of jury research have taught us, as well as studies that support much of what I say here and below, I would recommend Valerie Hans and Neil Vidmar's synthetic overview of jury research and the American jury trial system, NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* (forthcoming 2007). See generally Valerie P. Hans, Introduction: Citizens as Legal Decision Makers: An International Perspective, 40 *CORNELL INT'L L.J.* 2 (2007).

40 *CORNELL INT'L L.J.* 477 (2007)

seemed to be that ordinary lay people could not be expected to decide cases as wisely as the typical trial judge. The push to abolish jury trial in complex civil cases appeared especially strong, and for a time it looked as if the Supreme Court might well give trial judges authority to do just that, or perhaps even mandate the abolition of jury trial in certain cases as a requisite of due process.

American exceptionalism in the use of the jury was itself a point against the abolition of jury trials.² Commentators contrasted continental bench trial and mixed court systems with the American system of lay fact finding, arguing that the American system came off poorly by comparison. They viewed the institution of jury trial as a prime source of unreasonable delay in the American system of adversarial litigation, as well as a major reason why criminal defendants forfeited their right to have their cases heard by accepting plea bargains. Lay jurors, many argued, not only understood the law poorly, but also were less able than experienced judges to resolve difficult factual issues.

The American jury system did have its defenders, to be sure, and research, beginning with the magisterial efforts of Kalven and Zeisel³ to understand jury decision-making, indicated that juries evaluated evidence rationally and had other important strengths. Still the idea that other countries might want to adopt jury trial systems and assign cases heard by judges or mixed tribunals to juries would have struck most American jury researchers and commentators as fanciful, and would have puzzled even foreign observers. Juries had no prominent advocates abroad, and domestically the issue seemed to be whether the American jury system, as traditionally constituted, would long endure.

Fast forward thirty or so years. A number of countries that thirty years ago did not have jury systems have adopted them, or are in the process of adopting them. Other countries, even if not adopting full blown jury trial systems, are altering their trial processes to secure citizen input. The idea of a symposium on lay adjudication systems around the world is no longer a far-fetched idea, as the reader of this Journal can testify, and this is not the first publication to think the topic merited a symposium. What has happened?

The story begins, I expect, in the United States where jury research became something of a cottage industry. Careful research exploded myths about jury biases and incompetence, questioning assumptions that judges would decide cases differently or more competently than juries do. At the same time this research identified difficulties juries confronted and suggested ways, such as allowing note taking and providing written instructions, to improve jury performance. In particular, those outside the

2. The jury, of course, is not unique to the United States. Great Britain, many former British Colonies, and a few other countries have employed juries for particular circumstances but the use of juries in these countries often was restricted considerably. Scholars viewed the United States as the major country where the system of jury trial, in civil as well as criminal cases, flourished.

3. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966).

academic community who are the closest observers of juries—attorneys, judges, news reporters, and citizens who have served on juries—regularly gave juries and the experience of being a juror high marks. Except in a few areas, such as punitive damages and tort litigation where well-financed interest groups have kept up a drumbeat of attack on individuals who sue and occasionally on juries that award them damages, the result has been that the institution of jury trial seems well-supported in the United States today. United States exceptionalism in the legal authority it accords ordinary citizens is no longer regarded as an anachronism that contrasts unfavorably with legal procedures in continental countries and elsewhere around the globe.

At the same time that research blunted attacks on juries and engendered new respect for them in the United States, the U.S. rose to a position of unparalleled power and prestige in the world system. The U.S. was winning the Cold War, and both economically and militarily other nations came to acknowledge the United States as the world's only true superpower. United States culture was only slightly less hegemonic, as American television and music developed followings throughout the globe, while English became the most commonly understood international language and the world's language of choice for communication in the spheres of science, education, and business. Especially important was the place the United States occupied in post-secondary education before the 2001 attack on the World Trade Center. Although comparative tests scores cast doubt on the relative quality of primary and secondary education in the United States, the United States' elite colleges and graduate schools were regarded as without parallel in the world of higher education. As a result, bright students from around the globe, including such erstwhile enemies as China and Russia, flocked to the United States for their college and graduate education. Some studied law, and, when they returned to their home countries, they brought with them models of legal procedure as practiced in the United States, including the use of juries to resolve factual disputes.

Not all foreigners who studied law in the United States left enamored of juries. It is probably safe to say that most did not pay much attention to the American jury system, or, if they did, were not convinced it was superior to their home country's procedures. However, enough did so that in some countries, such as Japan, Korea, and Russia, there were at least small numbers in the academy and elsewhere interested in the possibility of incorporating lay voices into their legal fact finding systems. The American model of citizen participation in trials became disseminated around the globe, particularly in academic circles, with admiration it previously had not enjoyed. Only favorable soil was necessary for the idea to grow.

I. Democratic Institution or Institution of Democracy

That favorable soil existed. It was the spread of democracy to formerly authoritarian or one-party dominant regimes. In the minds of some, juries and democracies went together. While the example of Western Europe

makes it clear that juries are not essential to democratic governance, they are antithetical to rigid authoritarian rule. A government that seeks hegemonic domination must control the application of legal power, and dispersing the ultimate power to determine who has committed a crime or suffered a compensable injury to a randomly selected group of citizens undercuts the state's power. Thus, it is not surprising that movements toward jury justice have occurred in countries such as Spain, Russia, South Korea, and South Africa in the aftermath of authoritarian rule, and in Japan when the long term one-party domination of the Liberal Democratic Party began to diminish. Nor is it surprising that these movements largely have been confined to the criminal jury, since politically motivated criminal punishment has long been a central instrument of authoritarian control.

Thus, it is easy to celebrate the jury as a democratic institution, and advocates for the jury in this country and abroad do just this. However, we should be careful in what we celebrate. While the jury is supposed to be a non-bureaucratic popular institution of self-government, in an important sense it is not intended to be democratic. Rather it is supposed to accurately assess fault, no matter what public opinion is on a matter and no matter what outcomes people prefer. This is an important distinction because outcomes of democratic processes are not always benign. Democracy elevated Hamas from a terrorist organization to a partner, if not the dominant force, in governing the Palestinian territories. The current leader of Iran, who has denied the Holocaust and pushed for the development of a nuclear state, was elected in a democratic election due to the popularity of his populist policies.⁴ Vladimir Putin, who appears hell-bent on strangling Russia's progress toward democracy, originally prevailed in a reasonably fair election, and he enjoys a level of popularity in public opinion polls that suggest broad-based popular support for many of his authoritarian actions.

Closer to home, when we look at how popular sentiments have influenced our own jury justice, we see times and places where juries have frequently, if not routinely, acquitted drunk drivers, blamed women for walking into situations where they were sexually assaulted, and, in the South particularly, refused to convict whites who beat, raped, or killed African Americans. Moreover, had the Supreme Court not intervened in the case of *New York Times v. Sullivan*,⁵ juries might have destroyed the institution of the free press by granting large awards to people who sued unpopular publications for libel.⁶

4. Certain candidates, who might have been formidable foes, were not allowed on the ballot in Iran—hardly a perfect democratic regime. However, the United States poses almost insurmountable barriers to the effective running of third party campaigns. So while our situation is nothing like that in Iran, we too cannot boast of perfect democracy. Similarly Japan, regarded as a democracy since the United States' occupation ended, was a country with one party rule for half a century.

5. 376 U.S. 254 (1964).

6. See KALVEN & ZEISEL, *supra* note 3 (documenting that juries systematically under-enforced crimes in the 1950s). There are fewer examples of Southern juries

Rather than view juries as democratic institutions and glorify them for this reason, I think juries are better viewed as institutions of democracy. Juries neither create democracies nor are they essential to them, and we seldom want their verdicts to reflect popular sentiments, but I believe that only democracies can tolerate true jury justice. Jury systems, once in place, support democratic forms of government, as they are uncongenial to authoritarian rule. This is largely because juries are one-shot decision-makers, concerned only with justice in a particular case. As such, juries interpose a non-bureaucratic element, beyond the direct control of state authorities, into criminal conviction processes. Even when most jurors support a regime's policies, there are likely to be differences of opinion among the jurors, and even regime supporters are likely to take seriously their task assignment, which is to find facts in a particular case without regard to political or other preferences. Jurors also work to shield judges from politics because judges cannot be held responsible for jurors' decisions, and the presence of jury trial reduces incentives to buy or pressure judges. Moreover, the experience of serving on a jury may itself bolster civic democratic commitments.

Perhaps the best test of this thesis lies in changes made in trial processes as a democracy expands or contracts. I already have alluded to the resurgence of juries and of interest in the institution of jury trial in countries that have moved from more authoritarian to more open and democratic regimes. An even more telling example is the fate of the Russian jury that Stephan Thaman documents in this issue.⁷ His tale is not one of the jury's birth in conjunction with a resurgence of democracy.⁸ Rather it is a story of restrictions on jury power and finality of jury verdicts that has been part and parcel of the Putin regime's efforts to return Russia to one party and one-person rule.

II. Internationalizing Jury Research

A major theme of the Citizen Participation in East Asian Legal Systems Conference, where the papers in this volume were originally presented, was the desirability of cross-national research on citizen involvement in legal systems. Although my explicit focus to this point has been on juries, citizen involvement can take many forms. Indeed, in the broadest perspective, meaningful citizen involvement in justice systems is almost inevitable because citizens serve as witnesses, complainants, and police officers, and it is hard to imagine systems in which these and similar citizen inputs did not play important roles. However, our concern is with a narrower sphere

acquitting whites, who killed or raped blacks, simply because prosecutors seldom brought these cases. Perhaps the most celebrated example, because it resulted in a trial, of an acquittal and a later admission—to a journalist—of guilt, is the Emmett Till case. See, e.g., STEPHEN J. WHITFIELD, *A DEATH IN THE DELTA: THE STORY OF EMMETT TILL* (1988).

7. See Stephen C. Thaman, *The Nullification of the Russian Jury: Lessons for Jury Inspired Reform in Eurasia and Beyond*, 40 *CORNELL INT'L L.J.* [—](2007).

8. See Stephen C. Thaman, *The Resurrection of Trial by Jury in Russia*, 31 *STAN. J. INT'L L.* 61 (1995).

of citizen involvement, namely official citizen participation in judging the legal implications of allegedly untoward behavior.

This participation may, of course, take many forms. Sanja Kutnjak Ivković's symposium contribution reviews the literature on mixed tribunals and the limited power that lay participants typically have within them,⁹ while Hiroshi Fukurai describes Japan's reformed Prosecutorial Review Commissions, which seem more jury-like than the mixed tribunals that, beginning in 2009, will constitute the *Saiban-in-Seido*, or petit quasi-jury system in Japan.¹⁰ Moreover, as Frank Munger reminds us in his contribution to this issue,¹¹ whether and how citizen involvement takes root in a country is more than just a matter of how democratic the country is or aspires to be. Rather, modes of citizen involvement are inextricably linked to country cultures, and similar forms of participation may have different symbolic meanings, depending on a country's history and understandings. One reason the Russian jury has proven to be such a fragile institution of democracy may be because there is a long tradition in Russia of trials courts as instruments of centralized social control. Thus, the assertion of central control to reverse jury verdicts may not seem nearly as odd or threatening to Russians, including Russian proponents of political democracy, as similar attempts to reverse jury decisions would appear in the United States.

The global spread of juries and related institutions has opened new vistas for research, and there are scholars around the world who believe that the time is ripe for coordinated cross-national research into institutions that involve ordinary citizens in legal decision-making. I share this view and shall indicate below issues on which a research program might focus. To ease my explication, I shall occasionally use the terms "jury" and "jurors" expansively to refer not just to true jury systems, as they exist in the United States and other countries, but also to the variety of institutional arrangements that give lay citizens input into case-based legal decision-making, including, most importantly, mixed tribunals of various sorts.

The first task that any attempt at coordinated research on juries and related institutions must accomplish is the identification of variables that can be used to distinguish and evaluate different arrangements for giving citizens input into legal decision-making. One set of variables that should be evaluated on some common metric concerns the breadth and depth of citizen involvement. We want to be able to answer on a comparative basis such questions as: How many people serve on juries? How are jurors chosen? How many cases do the juries hear? What kinds of cases do jurors sit

9. See Sanja Kutnjak Ivković, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, 40 CORNELL INT'L L.J. [__](2007).

10. See Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: Cross-National Analysis of Legal Consciousness and Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L.J. [__](2007).

11. See Frank Munger, *Constitutional Reform, Legal Consciousness, and Citizen participation in Thailand*, 40 CORNELL INT'L L.J. [__](2007).

on? Do they sit only as lay decision-makers or are they members of mixed tribunals? If citizens serve with professional judges, what is the ratio of lay judges to professional judges and how are responsibilities divided among them? What questions are given to jurors to answer, and what rules govern their decisions? Under what circumstances may jury verdicts be overturned immediately or on appeal? For what reasons may verdicts be overturned, and what are the consequences of a verdict reversal? Are cases retried to a different jury or can an appellate court enter the verdict it prefers?

Answers to these and similar questions will allow the creation of a taxonomy of lay adjudicator power in legal decision-making systems around the world and an assessment of the likelihood that lay adjudication will serve as a check on authoritarian exercises of power. The more insulated juror selection processes are from authority, the more independent jurors are of judges, the broader the questions entrusted to jurors and the more limited the grounds for overturning jury verdicts, the more power jurors will have vis-à-vis other institutions of government. To some extent, the answers to these questions will be conceptual and turn on the analysis of official rules regulating lay participation. Detailed analysis of procedural rules often will reveal that power is allocated differently in what, on the surface, seem to be similar systems. For example, in some but not all mixed tribunals the presiding judge writes the official explanation of the tribunal's verdict, which will be the basis for any appeal, even if the judge disagrees with that verdict. This procedural rule enhances a judge's ability to subvert a verdict despite being outvoted in the tribunal.

A taxonomy of official rules and regulations governing lay fact finding is important, but answers to questions of interest will also require careful empirical investigation. Professor Kutnjak Ivković, for example, reviews a body of literature, that suggests that when lay people sit on mixed tribunals they tend to have little influence on the tribunal's decisions. Surely, however, there is some variance. In criminal cases, for example, it appears that lay judges influence sentencing decisions to a greater degree than they influence findings of guilt or innocence. We need to understand the variance in lay influence associated with different institutional arrangements and whether differences in the latter drive the variance we identify. For example, in some mixed court systems that follow an inquisitorial model, lay judges have little or no opportunity to review the case dossier before trial, while in other systems they have this opportunity. What effect does this difference have? Are lay judges more active participants in the latter tribunals than in the former? Do lay judges have more say over verdicts when they have had a chance to review the case dossier before trial? Similar questions might be asked about the period for which lay judges serve, which may range from a single case to cases heard during a term that lasts a year or longer. Does lengthy service as a lay judge encourage arguing with professional judges because of greater experience and a sense of competence? Does greater decision-making responsibility and experience transform the lay judge into a yet more faithful clone of a tribunal's profes-

sional judge or judges? Not only are answers to questions like these empirical, but answers may differ depending on national cultures or other tribunal characteristics.

Those who seek to reform lay justice systems to enhance popular involvement in justice need country-specific answers to these and other questions, and not just because they are matters of academic interest. The reality is that movements to increase popular participation by instituting independent jury trial are likely to meet resistance and, as in Japan, may result not in a lay jury system but in the "compromise" institution of the mixed tribunal. As I have already indicated, considerable research suggests that this is hardly a compromise, for professional judges dominate decision-making in mixed tribunals to the point that the benefits of lay fact-finding may be largely, if not entirely, lost. This outcome may, however, not be a necessary one. Some institutional arrangements can make lay participation on mixed tribunals far more influential than other institutional arrangements. Consider as a thought experiment a rule that would require lay judges on mixed tribunals to deliberate on their own until they reach a tentative verdict, and only then involve the professional judge or judges in the discussion. Such a system might stiffen the spines of a tribunal's lay members, and would preclude perception of a professional judge's factual characterization as an "of course" truth. Identifying the implications of different institutional arrangements for lay influence can allow researchers in countries reluctant to adopt American-style juries to still make a case for meaningful popular involvement.

Research focused on enhancing the power of lay judges without moving to an independent American style jury might learn from the relationship between jury research and jury reform in the United States. Many jury reforms began not in trial courts, but in psychology laboratories where researchers systematically explored the implications of different jury sizes, different decision rules, the presentation of written instructions, the use of grammatically simplified instructions, the effects of different evidentiary rules, and other rules and procedures that might affect jury decision making. While there is always some distance between a social science laboratory and the real world, proving the feasibility and potential desirability of a reform in the laboratory can pave the way for experimental or quasi-experimental implementation in the real world and ultimately lead to systemic reform. While obvious problems exist with replicating the dynamics of a mixed tribunal in the laboratory, approximations of such authority relationships should be possible, and the implications of different arrangements for lay participation can be studied. A particularly propitious time for such research is prior to the institution of a new decision-making system, as it will usually be easier to influence the design of a system not yet implemented than to change entrenched procedures.

A second criterion for evaluating lay participation world-wide looks beyond the micro-level parameters of jury power and participation, and instead focuses on the institutional role of juries in governmental systems and the deployment of state power. This perspective asks: to what extent

do juries check state power and contribute to the ongoing viability of a democratic government and its supporting institution? Professor Thaman's description of the Russian jury system indicates that a jury system may appear democratic and independent in that jurors are chosen at random, many people share jury duty, and jurors have a relatively free hand in returning verdicts. However, the system may contribute relatively little to institutional democracy because jurors can be barred from hearing relevant evidence or their verdicts, if unwelcome, can be rejected by the trial judge or easily overturned on appeal.

A third set of questions, admittedly difficult to investigate empirically, concerns the relationship between systems of lay adjudication and legal procedures. For example, although it has been said that the hearsay rule is a creature of the jury system, continental systems are wary of hearsay even if they do not exclude it. It is, in fact, not clear why some of the complex rules of evidence associated with American-style jury systems exist. The reason usually given is that juries cannot be trusted to properly evaluate certain kinds of evidence. Another explanation, however, is that verdicts that emanate, without justifying explanations, from black box decision-makers like English or American juries make for difficulties in the exercise of hierarchical appellate control. Elaborate rules of evidence are a way of giving trial and appellate courts, and hence the state, greater control over case outcomes. At trial, judges have considerable leeway to determine what evidence juries can hear for what purposes, while on appeal, appellate courts that wish to reverse verdicts can almost always find an evidentiary error on which to pin a reversal. Although these rules may appear binding on courts, most often they are not, for trial judges typically have considerable discretion in making evidentiary rulings while appellate judges, including Supreme Court Justices, are adept at ignoring or finding harmless evidentiary errors when they wish to uphold a verdict. It is hardly proof of the judicial control hypothesis, but it is interesting to note that the Anglo-American evidentiary rules arose when other methods of controlling jury verdicts, such as threatening jurors whose verdicts displeased courts with attain, were becoming difficult to implement or were banned.

Other procedural matters worth investigating in cross-national perspective include the degree of adversary in legal procedure in relation to tribunal type, including the role of counsel, discovery and institutions for the adversarial production of information, and methods for handling expert evidence. Sorting out issues of causality and the relationship between procedure and the degree of lay involvement in decision-making will be exceedingly difficult, for the empirical association of certain procedures with juries, on the one hand, or mixed courts or professional benches, on the other, may not necessarily reflect any relationships or even particularly functional ones. Procedures may have developed alongside modes of decision-making without being entailed by them, and the consistency of associations may simply reflect the fact that countries tended to borrow rules of case processing from each other as complete packages. A

good example is the participation of the parties in the development of evidence. Although this once seemed to be a defining characteristic of the Anglo-American trial system, some continental countries have moved substantially in this direction without changing the composition of tribunals.¹²

The resurgence of jury trials may be of particular value in sorting out relationships between rules of trial procedure and tribunal characteristics. Examining the evidential and procedural accoutrements of newly institutionalized Anglo-American style juries can provide insight into what is functional and what is simply cultural coincidence. Investigations into how different systems deal with the special challenges of modern evidence, such as the challenges posed by complex contested expert evidence, will also be informative. We do not know today how the relative roles lay and professional adjudicators play in deciding cases affect the ways of meeting this challenge.

A final topic for comparative analysis is assessing the cultural role of adjudicatory systems in different societies. In the United States and England, for example, some jury verdicts have achieved iconic status. *Bushell's Case*¹³ and the trial of John Peter Zenger¹⁴ have come to stand for popular resistance to government tyranny and the high value Anglo-American culture places on free speech and a free press. Verdicts in other cases, such as the O.J. Simpson trial or the acquittal of police accused of beating Rodney King, have come to symbolize the country's racial divisions and their intractability. Interest groups have also tried to make icons of verdicts to advance their own political or financial agendas. The punitive damage award in the McDonald's coffee spill case has been marketed¹⁵ as an example of popular biases against big business, a reason why juries cannot be trusted to award punitive damages and a means to bemoan an alleged rise of a culture of victimization and the erosion of personal responsibility. Then there are films like *Twelve Angry Men* that present a different image of the citizen juror. These films make principled heroes of the ordinary guy—if Henry Fonda can be thought ordinary—who serves on a jury.

Do trial verdicts have a similar status in other countries or are they less likely to serve as such cultural icons because they do not symbolize the biases of lay fact-finders or the rebellion of citizens against authority? If they do serve as cultural icons, do they serve only as testimony to state power and corruption, such as in the Stalinist purges of the 1930s? How is the role of the investigating magistrate treated in the myths and fictions of other nations? This position seems to allow for heroic action against the

12. See, e.g., Mirjan R. Damaska, *Models of Criminal Procedure*, 51 ZBORNIK (Collected Papers of Zagreb Law School) (2001).

13. 124 Eng. Rep. 1006 (C.P. 1670).

14. See, e.g., LIVINGSTON RUTHERFURD, *JOHN PETER ZENGER: HIS PRESS, HIS TRIAL, AND A BIBLIOGRAPHY OF SENER IMPRINTS* (1906).

15. I intentionally use the word "marketing," as the facts of the McDonald's coffee spill case paint a picture far different from the case's popular image. See Andrea Gerlin, *A Matter of Degree: How a Jury Decided That a Coffee Spill Is Worth \$2.9 Million*, WALL ST. J., Sep. 1, 1994, at A1.

odds. It enjoys no exact counterpart in the United States, though crusading prosecutors and incorruptible police officers may share some of the same aura. What kind of image do investigating magistrates have, and does the judge's role in deciding cases, rather than investigating them, play any part? Comparative research into the cultural symbolism of trial procedures and their key actors could prove fascinating, as might research into whether and how these symbols change with transformations in legal procedure and the role of lay decision-makers.

Conclusion

It is an exciting time to be a jury researcher. In the United States, new data sets have allowed sophisticated quantitative research into jury verdict patterns, generating new insights and confirming old ones about how judges and juries decide particular cases.¹⁶ Other research has led to and tested the results of jury reforms, such as preinstructing juries, allowing jurors to take notes, and permitting or even encouraging juror questions.¹⁷ Also for the first time since Kalven and Zeisel's aborted attempt to record jury deliberations in the 1950s, jury researchers have been able to observe and code the deliberations of enough actual juries for scholars to assess the strengths and shortcomings of mock jury research while generating important insights into how actual juries behave.¹⁸

The cross-national study of juries and other institutions that provide for lay input into legal decisions is a research frontier. The United States and its researchers have in the past taken a rather imperialistic view of juries and jury research. Juries have been regarded as a quintessentially American institution. England, having abrogated the right to jury trials in most cases, is thought to have largely forfeited its birthright claim to a special relationship to the jury and the existence of jury trials in many of the former English colonies has received almost no attention from American scholars. Jury trials in countries lacking an English heritage, such as the trial of homicide cases in Brazil, have until recently almost entirely escaped notice as examples of the genre.

Jury research has similarly been an almost entirely American enterprise. Following promising early work, English law was changed to preclude the kinds of research with actual juries that American scholars do. Except for comparative lawyers, most of whom are without an empirical bent, and a few scholars who thought the example of Germany and other

16. A leader in this area has been Theodore Eisenberg. See e.g., Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743 (2002); Theodore Eisenberg & Martin T. Wells, *Trial Outcomes and Demographics: Is There A Bronx Effect?*, 80 TEX. L. REV. 1839 (2002); Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's The American Jury*, 2 J. EMPIRICAL LEGAL STUD. 171 (2005).

17. See, e.g., Valerie P. Hans, *U.S. Jury Reform: The Active Jury and the Adversarial Ideal*, 21 ST. LOUIS U. PUB. L. REV. 85 (2002).

18. See, e.g., Shari Seidman Diamond et al., *Inside the Jury Room: Evaluating Juror Discussions During Trial*, 87 JUDICATURE 54 (2003).

continental countries suggested ways to rationalize and improve American judicial processes, attention to the methods and implications of non-jury lay participation in legal decision-making has received little attention from within the United States.¹⁹

This situation has changed. An international conference on lay participation in judicial decision-making, with an emphasis on juries and jury-like systems, was organized by Stephen Thaman and held in Sicily almost eight years ago. It opened the eyes of many of the United States's jury researchers to the fact that the institution they were studying was not unique, but was rather one variation on the theme of lay legal decision-making.²⁰ Efforts by Japanese lawyers and academics to institute jury systems, and the development of juries in countries like Russia and Spain, had a similar effect on the horizons of American jury researchers, while recruiting researchers to this topic from countries around the world. Today there is an active coterie of scholars researching juries, jury-like institutions, and other systems of lay and professional adjudication. They gather regularly and share papers at Law and Society Association meetings and international conferences. Their comparative scholarship on juries and other systems of lay adjudication is becoming widely published.²¹ American scholarship no longer provides the only lens with which to view jury research, and American scholarship is better for it. Other systems of lay adjudication are now more than a distant mirror. Rather, they allow a comparative perspective that can shed new light on the socio-political role of legal decision-making in countries throughout the world. The Cornell Citizen Participation in East Asian Legal Systems Conference, at which the papers in this issue were presented, is testimony to the interest in and implications of comparative research on lay participation in legal decision-making and what we might learn from it. We are, however, still at an early stage in empirically answering numbers of fascinating questions.

19. The writings of Mirjan Damaska are a notable exception. *See, e.g.*, MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986).

20. *See generally* ST. LOUIS-WARSAW TRANSATLANTIC L.J. (2001-2002).

21. *See, e.g.*, *WORLD JURY SYSTEMS* (Neil Vidmar ed., 2000).