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Citizen Participation in Judicial Decision Making: Juries, Lay Judges and Japan

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In the late 1920s and 1930s Japan had a jury system.[1] It was suspended in 1943 as a wartime measure, but it had fallen into desuetude long before that. Arguably it was like the Spanish jury, which has several times risen during periods of relative political liberalism or populism and been suppressed during periods of militarism and autocracy.[2] That is, it may be more than a coincidence that use of the Japanese jury fell precipitously during the 1930s as militarism took hold of the Japanese nation. Now the reinstatement of the Japanese jury is again being seriously considered. Similarly it may not be coincidental that this reconsideration is occurring at a time when the postwar hegemony of Japan's Liberal Democratic Party is disintegrating or that the most formidable opponent of reintroducing a jury to Japan appears to be the Japanese Supreme Court and other leaders of the Japanese Judicial Establishment, many of whom are a legacy of the L.D.P.'s political domination.[3]

As Japan decides whether to reintroduce the jury, the most fundamental question it must answer is, "Why should citizens participate in the administration of justice?" This is the question I address in this article.

A first and easy answer is that citizen participation is unavoidable. Citizens today participate in the administration of justice, as plaintiffs and defendants, as witnesses, as police officers who make arrests, as court staff and, of course, as lawyers and judges. Moreover, even when people might avoid participation, they often have a duty to participate. The police officer should not ignore criminal behavior, and the good citizen who witnesses a crime should cooperate with authorities.

This answer, admittedly dodges the issue whether citizens should participate in the administration of justice as jurors or, along with professional judges, as members of mixed tribunals. But to begin by thinking about the many ways that

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[1] Mamoru Urabe, *A Study on Trial by Jury in Japan, in* HIDEO TANAKA, THE JAPANESE LEGAL SYSTEM 483-91 (1976); Richard Lempert, *A Jury for Japan?*, 40 AM. J. COMP. L. 37 (1992).

[2] *See generally* CARMEN GLEADOW, HISTORY OF TRIAL BY JURY IN THE SPANISH LEGAL SYSTEM (2000).

[3] The situation has changed since this article was submitted. The Japanese legal establishment has decided it will incorporate lay participation in trials by establishing mixed tribunals rather than by allowing jury trials.

citizens do participate in the administration of justice, puts the latter issue in perspective. One might ask, why should citizens participate in the administration of justice in every way except as lay jurors or assessors; that is, except as people sharing responsibility for the ultimate decision? In a democracy, shouldn't the burden of proof be on those who want to exclude citizens from judicial decision making? The question suggests an answer, but the answer does not comport with reality, where the burden is always on those seeking change. Hence there must be other answers to the question, "Why should citizens participate in the administration of justice?" I shall provide some, focusing my response on jurors rather than on lay assessors because the system I know best uses juries. Later, however, I shall say a few words about lay participation as assessors and compare this to participation as jurors.

ARGUMENTS AGAINST JURY SYSTEMS

Opponents of the jury system make several arguments. One is that ordinary people do not do a good job of judging; that is, deciding legal cases well requires the kind of experts we call judges. The evidence from the United States, beginning with the classic study of the American jury by Harry Kalven and Hans Zeisel,[4] offers only limited support to this argument. Kalven and Zeisel found that in both criminal and civil cases, judges' verdicts agree with juror verdicts about three-quarters of the time,[5] and when they disagree there is little to suggest that the jurors are mistaken or confused. Rather, cases of disagreement tended to be close on the facts to begin with; that is cases in which reasonable people can disagree.[6] Research since Kalven and Zeisel's work, including research that listens in on and evaluates the deliberations of mock jurors, consistently finds that jurors do a relatively good job in evaluating facts.[7] Moreover, when jurors make factual errors, as in some complex cases, there is often little reason to believe a judge would not have been equally confused, and anecdotal evidence, suggests that often juror confusion is due to the failure of the judges or attorneys to do their job well.[8]

Jurors do not, however, do all their tasks equally well. Mock jury studies and interviews with actual jurors after trials indicate that jurors often misunderstand the law that the court has told them to apply.[9] This does not appear to be because people without legal training cannot grasp the meaning of legal rules. Rather, jurors are often instructed on the law in language so complex that even a law

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[4] HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1986).

[5] *Id.* at 56.

[6] *Id.* at 112.

[7] *See, e.g.*, REID HASTIE, ET. AL., INSIDE THE JURY 230 (1983).

[8] Richard Lempert, *Civil Juries and Complex Cases: Taking Stock after Twelve Years, in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 181, 201 (Robert E. Litan, ed. 1993).

[9] HASTIE, *supra* note 7, at 231; Robert F. Forston, *Sense and Non-Sense: Jury Trial Communication*, 1975 BYU L. REV. 601, 606 (1975); Marcotte, *The Verdict Is . . .*, A.B.A. J., June 1990, 32.

student would have difficulty understanding it,[10] and in many U.S. courts, jurors are further handicapped because they only hear the instructions on the law and do not receive written copies of them.[11] Hardest to believe is that when jurors know they are confused about the law and ask for clarification, rather than attempt to clear up the jury's confusion, trial judges often just read the confusing instruction again. Indeed, some state supreme courts have said that this is what trial judges must do.[12]

Yet research indicates that if instructions are rewritten with the goal of clarity, juror understanding greatly increases.[13] One of the great puzzles of jury reform in America is why, with the various, sometimes questionable, innovations made in the name of jury reform, few jurisdictions have invested substantially in clarifying their jury instructions, which is the reform most likely to improve the system. In sum, the American experience with jury confusion about the law should not dissuade Japan from adopting a jury system. Rather, if Japan institutes a jury system, it should do it in the right way, which means writing instructions on the law in ordinary language that is clear enough that most jurors will understand them, and being sure that this goal is met by testing instructions for clarity before they are employed.

A second argument against citizen participation in trial decision-making is that ordinary people are biased. It is true that people have biases, but judges are people, too, and it is a mistake to think that judicial training necessarily tames their biases. In fact, there is good reason to believe that the biases of jurors pose less of a danger to justice than the biases of judges. This is because jurors decide cases in groups of from six to twelve people.[14] Usually these groups include people with differing biases, meaning that in the group deliberation process, biases can cancel out.[15] Judges, if they decide as individuals, may be influenced by their biases without realizing it, and even when judges deliberate in groups of three, as they sometimes do in important cases in Japan, their similar training and social status means that they are more likely to share biases than randomly chosen lay people deciding in larger groups. Moreover, judges may be accountable for their decisions in ways jurors are not. In the United States, there is at least anecdotal evidence that concerns about reelection have affected judges' decisions in particular cases, including the decision to sentence to death. In Japan, research

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[10] Robert P. Charrow and Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM L. REV. 1306 (1979).

[11] Anne Bowen Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 U. CIN. L. REV. 1377, 1411-19 (1994) (noting that the most prevalent practice is not to provide written instructions and describing arguments for and against the provision of written instructions).

[12] Houston v. Northup, 460 S.W.2d 572, 575 (Mo. 1970).

[13] Charrow & Charrow, *supra* note 11; AMIRAM ELWORK, ET. AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 3.1-3.4 (1982).

[14] This is the range of jury sizes found in the United States and most jury-using countries, but there are countries like Scotland in which larger juries are used.

[15] Dean C. Barland, *A Comparitive Study of Individual, Majority, and Group Judgment*, 58 J. ABNORMAL & SOC. PSYCHOL. 55, 59 (1959).

by Professor Mark Ramsayer indicates that judges whose decisions do not please the government are more likely than others to receive undesirable judicial assignments.[16]

Moreover, juror biases are not necessarily bad, and they are often not what jury critics expect. Kalven and Zeisel, for example, found that in about 80 percent of the criminal cases in which juries and judges disagreed about verdicts, the jury acquitted a defendant when the judge would have convicted.[17] The jurors, according to Kalven and Zeisel, seemed to be applying a more stringent test of what it means to prove someone guilty beyond a reasonable doubt. Such a leniency bias may be truer to the law's standards than the standards of judges who are so used to seeing mainly guilty defendants that they start with a presumption of guilt other than a presumption of innocence. Perhaps for this reason a recent survey of U.S. judges found that 80% of them said if they were accused of a crime, they would want a jury trial and not a judge trial.[18]

One can, of course, imagine juror biases that are more clearly undesirable in the sense that, unlike the leniency bias, they run counter to the norms of the law. Where people have been injured, for example, jurors are often accused of harboring a general pro-plaintiff bias and, more specifically, biases that favor poorer over wealthier parties in personal injury cases, individuals over corporation in products liability suits, and patients over doctors and hospitals in malpractice actions. But research lends little support to these stereotypes.[19] Taking all civil litigation together, defendants win lawsuits about as often as plaintiffs do.[20] Moreover, Kalven and Zeisel found that when judges and jurors disagreed in personal injury cases, there was no directionality to their disagreement.[21] Judges found for plaintiffs when jurors found for defendants almost as often as jurors found for plaintiffs when judges found for defendants. Medical malpractice and products liability trials, in which pro-plaintiff biases might be thought to be especially likely, show greater *defendant* success rates than most other types of civil litigation. Indeed, the plaintiff win rate in medical malpractice cases brought against doctors is only about 20 percent, lower than plaintiff success rates in all other civil litigation categories with enough cases for separate evaluation.[22]

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[16] J. Mark Ramseyer, *The Puzzling (In) Dependence of Courts: A Comparative Approach*, 23 J. LEGIS. STUDIES 721, 724-25 (1994).

[17] KALVEN & ZEISEL, *supra* note 5, at 58-59.

[18] Allen Pusey, *Judges Rule in Favor of Juries*, DALLAS MORNING NEWS, May 7, 2000, at 1J.

[19] *See generally* VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY (2000).

[20] *See* EXAMINING THE WORK OF STATE COURTS, 1998 8 (Brian J. Ostron & Neal B. Kauder eds., 1999) (noting that, "[o]n average, plaintiffs won nearly half of all general civil trials in the 75 largest counties in 1996").

[21] Harry Kalven, Jr., *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158, 178 (1958).

[22] *See* Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything about the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 596 & Table

Jury experiments by Valerie Hans and others are consistent with these results. Professor Hans finds that although there is some tendency in negligence cases for mock jurors to find against large corporations when on the same facts they would find for individual defendants, this does not result from prejudices favoring poorer litigants over wealthier ones or individuals over corporations. Rather, it is because jurors hold large corporations to higher standards of responsibility than they hold ordinary people.[23] This is not unreasonable. A large corporation, which can collect accident data or do safety research, is better able to foresee possibilities of danger than individuals engaging in the same kinds of activities. Greater foreseeability should be associated with findings of negligence and awards of punitive damages, since tort law often makes these awards turn on foreseeability.

Closely related to the bias argument is the argument that juries are irrational in other ways. No one who has argued that juries are irrational has ever supported the argument with systematic evidence. Rather, support is sought in "crazy jury" stories, or anecdotal evidence of jury verdicts that seem so absurd as to condemn the jury system. Some of these juror "horror stories" have even reached Japan. But I doubt if the full stories are reported there, for seldom do they make the news, even in the United States. Often, when the full story is known, it turns out that the jury's decision was a rational verdict, given the case it heard.

For example, in Japan as in the United States the McDonald's coffee spill case is offered as an example of not just the flaws but the sometimes ridiculousness of jury justice.[24] In that case, a Texas jury awarded about $200,000 in actual damages and $2.7 million dollars in punitive damages to a 79-year-old woman named Stella Liebeck, who burned herself when she spilled a cup of hot coffee that a local McDonald's franchise had sold her. It is easy to understand why the verdict strikes many people as crazy. A company must pay almost $3 million for the carelessness of an elderly woman who spilled coffee on herself. On these facts, which is all most people know of the McDonald's case, it appears that the jury has either lost its sense or is playing "Robin Hood" with a large corporation's money. In fact several jurors in the McDonald's case sat down to hear Mrs. Liebeck's claim convinced it was baseless. When they heard the case briefly described during the jury selection stage, they thought that her request for damages was outrageous, and several later said they wanted to be on the jury so that they could decide for McDonald's and make a statement condemning greedy, irresponsible plaintiffs. But once these ordinary people were on the jury, they learned facts that most people who know of the verdict do not know. They

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2 (1998) (citing plaintiff win rates for medical malpractice cases at 23% for federal court cases and 16% for state cases, while those for other types of cases more closely approximate the 50% rate for civil cases in general).

[23] Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327, 349 (1998).

[24] The facts below are from Andrea Gerlin, *A Matter of Degree: How Jury Decided that a Coffee Spill is Worth 2.9 Million McDonald's Callousness was Real Issue, Jurors Say, in Case of Burned Woman B How Do You Like It?*, WALL ST. J., Sept. 1, 1994, at A1.

learned that McDonald's kept its coffee 20 degrees hotter than other fast food restaurants, at a temperature that could scald people. Not only did McDonald's know that its coffee was dangerously hot, but it had had more than 700 coffee burn complaints in the year before Mrs. Liebeck burned herself. Yet the company still required its franchisees to serve their coffee scalding. Nor was Mrs. Liebeck a greedy plaintiff. Instead, she was a woman who had been burned so severely she had been hospitalized, and her daughter, a nurse, had had to take a week off from work to care for her. Despite her pain and expenses, Mrs. Liebeck originally asked McDonald's for just $8,000 to cover her hospital and medical expenses. McDonald's, however, only offered her $800. Later, McDonald's turned down other offers to settle, and the company also rejected a substantial arbitrator's award for Mrs. Liebeck. So, far from being irrational, the *McDonald*'s jury's verdict reflects a justified popular reaction to the callousness of a company that had tolerated hundreds of coffee burn victims (settling threatened suits in some cases) and apparently would have been willing to tolerate hundreds more had a jury not sent a message that its indifference to the injuries it caused was outrageous.

A fourth reason to deny ordinary citizens the right to participate as decision-makers in the justice process is that juries cost money. It is true that citizen participation is likely to be more expensive than a system that relies entirely on judges for legal decisions, particularly if the value of the time jurors spend hearing cases is considered a cost. The question is what to make of this. Although jurors represent an added expense, if the Japanese system is like the American one, the cost of having a jury system is only a small fraction of the costs of administering justice, and will be trivial when compared to sums we are willing to invest for other purposes.[25]

More important, however, are less tangible possible costs.[26] If Japan were to adopt a jury system, changes in the way trials and appeals are handled and, indeed, the way lawyers are trained, would probably have to follow. Trials to juries would, no doubt, be concentrated proceedings rather than proceedings that might extend over several years. Pretrial proceedings would become more important than they are today, and a need for extensive discovery might arise. Young lawyers would have to be trained not only in the art of creating a dossier to please a judge, but also in how to argue orally to convince ordinary people. The

[25] Armster v. United States District Court for the Central District of California, 792 F.2d 1423, 1429 (9th Cir. 1986) ("We have previously noted that the cost of the civil jury system nationwide is 'minimal at best,' that in 1979 the cost was about equal to that of 'two jet fighters,' and that the cost factor is not a justification for restricting the use of civil juries. We would only add that in 1986 the total cost of providing both the civil and criminal jury system nationwide, is but one-sixtieth the cost of building one new space shuttle.") (citations omitted).

[26] While jury fees per person are not high, in the aggregate add up unless you can fill in the blank. An additional cost is imposed by the relatively longer time that jury trials take.

Koso appeal,[27] in which facts and law are both reviewed, would probably be replaced in jury cases by appeals where only questions of law were heard, as was the case when Japan last had a jury system.

But although these changes are possible costs, they may also bring with them benefits. Pretrial discovery procedures might, for example, foster settlements, leading to the quicker resolution of many cases and lower costs. Concentrated trials, if they promoted speedier case resolution, might lower financial costs and would surely lower the psychological costs that people pay when they must wait years for verdicts. No outsider can tell the Japanese people how to balance these costs and benefits, but they are surely factors Japanese policy makers will want to consider in deciding whether to adopt a jury system.

My discussion of the issue of citizen participation in the administration of justice has to this point proceeded in a somewhat backwards fashion. I first pointed out that citizens in fact participate in the administration of justice in many different ways. I then asked why, with all this citizen participation in the justice drama, should ordinary citizens be excluded from the final act, the point at which litigation culminates in judgment. This question led me to present some of the arguments commonly given against citizen participation as jurors, and to share with you my belief that what some people see as telling arguments do not hold up well when confronted with empirical evidence.

In short, I have examined arguments against lay participation in the administration of justice but have not attempted to make the positive case. Just because the jury system does not have the kinds or degrees of flaws some attribute to it, does not mean that it would be wise for a country like Japan to adopt a jury system. There must be positive virtues to lay participation to justify a jury or mixed court system. In the next section, I shall look at the virtues of lay participation.

VIRTUES OF CITIZEN PARTICIPATION

Perhaps the strongest argument in favor of juries is that, at least when they are asked to find facts, citizens serving as jurors usually do a good job. Not only are they most often similar to professional judges in their decisions, but in some instances when jury verdicts disagree with judge verdicts, jury verdicts are superior. They may, for example, have a higher threshold for proving guilt than judges,[28] and their threshold may be more consistent with the law's requirement that guilt be proved beyond a reasonable doubt.[29] Moreover, when jurors do not conform strictly to the law, it may, from a social policy or moral standpoint, be a good thing to allow the law to be slightly leavened with popular values.

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[27] *Kosso* appeals are *de novo* and on the written record of the case. K. Takayanagi, *A Century of Innovation: The Development of Japanese Law 1868 – 1961, in* ARTHUR T. VON MEHRAN, LAW IN JAPAN, 5-40 (1963).

[28] KALVEN & ZEISEL, *supra* note 5, at 182-90.

[29] Rita James Simon & Linda Mahan, *Quantifying Burdens of Proof: A View from the Bench, the Jury and the Classroom,* 5 LAW & SOC'Y REV. 319, 325-29 (1971).

Perhaps the most important attribute that juries have is that where they exist they are the one non-bureaucratic element in the system of administering justice. The presence of decision-makers for whom cases are not routine means that each case is addressed individually with fresh eyes and is not decided on the basis of superficial resemblances to prior decided cases. Moreover, as an outsider the jury does not have ongoing experiences or relationships with other justice system "regulars," like the police or prosecutors. Jurors' decisions are not likely to reflect either blind faith in the ability of these other justice system actors or a need to get along with them.

It is important that people do not make a career of jury duty. This allows jurors to return unpopular verdicts without fear of government retribution, such as an assignment to an unimportant court in an obscure and cold community in Northern Japan. Jurors also do not face personal consequences if their verdicts are misinterpreted. But judges might reasonably fear that distorted media portrayals of their verdicts, like the verdict against McDonald's, could affect their esteem in the community or chances of reelection or promotion. Thus they might be reluctant to reach correct but hard to explain verdicts. Also, in some states in the United States, a judge's decisions might lead wealthy individuals, corporations, or unions to spend large sums of money to defeat the judge when he ran for reelection.[30] It is hard for a person to ignore threats like these. But a jury does not have to fear unwelcome consequences if it offends powerful parties.

More controversially, juries can nullify the law. Nullification is controversial not only because it appears to offend the rule of law and to interfere with the law's predictability, but also because nullification does not always serve good causes. During the civil rights era, for example, a jury in Mississippi nullified the law by acquitting two white men who had killed a black youth named Emmett Till, allegedly because Till had whistled at a white woman.[31] (But the white trial judge who presided over the trial would most likely have done the same thing.) Juries have also nullified more common but unpopular crimes, like hunting out of season and, at one time, drunk driving.[32]

There are, however, celebrated as well as less publicized cases in which jury nullification protected people from oppressive legislation, or stood between them and the state in situations where ordinary laws were violated but charges were brought not to vindicate these laws but to punish people for asserting freedom and

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[30] *See, e.g.*, Nancy Perry Graham, *The Best Judges Money Can Buy,* GEORGE Dec. 1, 2000, at 76, 92) (describing the three million dollars spent by big business to defeat a judge in Ohio described as "anti-business," and noting record spending in judicial races in general, such as the nearly nine million dollars spent in Ohio for two Ohio Supreme Court races, and the nearly ten million spent in Michigan for three contested Supreme Court positions); see also Warren Richey, *Justice for Sale? Cash Pours into Campaigns,* CHRISTIAN SCIENCE MONITOR, Oct. 25, 2000 at 2 (describing increased spending on judicial campaigns); Emily Heller & Mark Ballard, *Big Business Blows Big Bucks in Judicial Races,* THE RECORDER, October 31, 2000 at 6 (same).

[31] *See* RANDALL KENNEDY, RACE, CRIME AND THE LAW 60-63 (1997) (describing the murder of Emmett Till and the acquittal of the two men who killed him).

[32] KALVEN & ZEISEL, *supra* note 5, at 288, 293-94.

challenging authority.[33] Jury nullification in these circumstances not only thwarts oppressive legal actions, but it also sends a powerful message to authorities about official overreaching and uses of state power that the people will not tolerate. More commonly and less symbolically, nullification writ small can soften the harshness of the formal law in particular circumstances. Thus, from medieval times juries have returned verdicts that freed people who had killed in self defense but could not meet the law's formal requisites for acquittal,[34] and today mercy killers are seldom convicted of 1st degree murder, although their crime fits the letter of the law.[35] Jurors also acquit people who are probably innocent in cases that are so politically charged that a judge might not be able to resist the pressure to convict.[36]

I do not mean by this discussion of nullification and the jury's ability to resist political pressure to claim that a jury system is required for a free society. If I were so foolish, examples like those of Japan or the Netherlands would immediately contradict me. But I do suggest that when citizens participate in the administration of justice in the powerful role of jurors, it is difficult for an oppressive government to maintain itself. Hence, I think it no coincidence that

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[33] The most historically celebrated cases are probably the trial in Britain of William Penn and William Mead and the trial in the United States of John Peter Zenger. *See* WILLIAM PENN, THE PEOPLE'S ANCIENT AND JUST LIBERTIES ASSERTED IN THE TRIAL OF WILLIAM PENN & WILLIAM MEAD (1670) (describing the trial and acquittal of Penn and Mead for unlawful assembly and disturbance of the peace for preaching the Quaker faith. At trial, Penn and Mead refused to challenge the evidence brought against them and instead challenged the validity of the law. The judge therefore instructed the jurors to find Penn and Mead guilty. When they refused to do so, fines were levied against the jurors. Four of the jurors, including the foreman, Bushell, refused to pay the fine and were jailed as a result. The jurors were later released in a historic decision recognizing the ability of jurors to choose their verdict for any reason.); JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER (1963) (describing the 1735 trial and acquittal of John Peter Zenger for seditious libel for the printing of the New York Weekly Journal which often contained satirical portrayals and political attacks on Governor Cosby).

[34] Thomas A. Green, *Societal Concepts of Criminal Liability for Homicide in Mediaeval England*, 47 SPECULUM 669, 682-83 (1972).

[35] *See, e.g.*, Valerie Basheda, *"Nightmare" Ends for Dad Acquitted in Death. Jury Decides Removal of Life Support Wasn't Manslaughter*, DETROIT NEWS, Feb. 3, 1995 at A1 (describing acquittal of Dr. Messenger on manslaughter charges that had been brought for his actions in unplugging his prematurely born son from a respirator, allowing his son to die); *Farmer Cleared of Mercy Killing*, N.Y. TIMES, Apr. 6, 1991 at Section 1, page 25 (describing acquittal of man who had been charged with second-degree murder for allegedly killing his sickly brother); Ann Alpers, *Criminal Act or Palliative Care? Prosecutions Involving the Care of the Dying*, 26 J. LAW, MED. & ETHICS 308 (1998) (detailing the prosecutions of doctors for their alleged involvement in the death of their dying patients).

[36] *See* MARY TIMOTHY, JURY WOMAN (1974) (describing the trial and acquittal of Angela Y. Davis for the kidnapping and murder of Judge Harold J. Haley and for conspiracy to release the "Soledad Brothers" from San Quentin prison). The text's point must not, however, be overemphasized. Jurors are part of their society and themselves may be caught up in the political currents that surround celebrated cases.

jury systems, which spread throughout continental Europe after the French revolution, disappeared in countries like Spain, Germany, and Russia when these countries came under authoritarian control.[37] I have already pointed out that Japan itself may be an example. Its jury law was enacted in 1923 and was most extensively used in the late 1920s, a pre-war period when democratic freedom seemed to be increasing in Japan. As more militaristic elements came to dominate the Japanese government, the use of juries in Japan diminished substantially, so that by the time they were suspended, in the midst of the Second World War, they were hardly being used at all.[38]

Thus, I suggest that to invest in a jury system is to invest in democracy, for juries are incompatible with unpopular, authoritarian rule. As long as jury service is open to most adults, the jury is a fundamentally democratic institution. Juries are people governing themselves. Indeed, citizens serving on juries take responsibility for government action in a more involving, immediate, and consequential way than they do as voters in free elections, that other quintessentially democratic institution. A commitment to democratic self-government is another reason to involve ordinary citizens in the administration of justice.

A final reason why citizens should be involved in the administration of justice is that people like jury duty. Not every juror is happy with the experience and some people, primarily for financial reasons or reasons of convenience, try to avoid jury duty, but most jurors when questioned after their service report that it was a largely positive experience, and many say that they came away from their service thinking better of the legal system than they did before they started.[39] Members of juries that have reached unanimous verdicts are particularly likely to be satisfied and to feel that their jury reached the correct decision.[40]

JURIES VS. MIXED TRIBUNALS

I have to this point equated citizen participation in the administration of justice with juror participation. But as I recognized at the outset of this paper, in many countries citizen participation in the justice system takes a different form; citizens participate alongside professional judges as lay assessors in mixed tribunals. Citizen participation of this sort can have some of the virtues of juror participation and avoid some of the drawbacks. Lay assessors, like jurors, don't have the careerist interest in verdicts that judges sometimes have, and citizen judges in mixed tribunals, like citizens on juries, are actively engaged in their own government. Moreover, lay assessors are unlikely to have the problems

[37] For a discussion of Spanish history, which has several times seen the jury emerge under liberal regimes and disappear under authoritarian ones, see GLEADOW, *supra* note 2.

[38] Lempert, *supra* note 2, at 37, 38.

[39] *See, e.g.*, Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors, in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 282, 285 (Robert E. Litan ed., 1993); JAMES P. LEVIN, JURIES AND POLITICS 16 (1992).

[40] JOHN GUINTHER, THE JURY IN AMERICA 83 (1988).

understanding the law that jurors have, for they deliberate with judges who can explain what laws mean. Mixed tribunals also allow more flexibility in how cases are presented. Juries seem to demand concentrated trials, but mixed tribunals might be adapted to a trial at intervals system like that in Japan, though the time these trials stretch out would still probably be considerably shorter than it now often is.

Mixed tribunals come in many forms. They differ in the number of judges and in the ratio of lay to professional judges, in how lay judges are chosen, in the length of the terms that lay judges serve, and in the degree of agreement that is needed to return a verdict. Assessments of mixed tribunals and of the value of the citizen input they allow depend on how the tribunals are organized in these and other respects. Nevertheless, from my perspective as a person who has done jury research in the United States, citizen participation in mixed tribunals lacks some of the advantages that come with citizen participation through jury systems. This is because the evidence suggests that mixed tribunals are dominated by their professional judges, even when lay assessors outnumber the professional judges on panels.[41] Judicial dominance is not surprising. Most jurors want guidance from the judge presiding over the case. They complain about too little judicial help, rather than too much. If the trial judge actually deliberated with the jury, it is likely that jurors would feel a strong, if not overwhelming temptation to defer to his knowledge and experience. But in jury deliberations the judge is not present to defer to. Since judges are necessarily present in mixed tribunals, deference by the lay assessors is natural and seems regularly to occur. In Japan, where deference to age and status is built into the culture more than in most Western societies, lay assessors would be likely to be even more influenced by professional judges' opinions than the lay participants in European mixed tribunals. Also, although lay assessors could, in theory, be chosen to serve for any length of time, even for single cases, in practice lay assessors in mixed tribunal systems serve for extended periods of time, sometimes several years, and for some people lay judging becomes a primary job or a vocation. Thus, many of the advantages that accrue from the non-bureaucratic aspects of citizen involvement diminish over time. After six months or a year of lay assessing, a citizen may no longer have a fresh eye and may enjoy much the same relationship with courtroom regulars that professional judges do.

Lay assessor systems also compare poorly to juries as institutions that democratize participation in the administration of justice. Rather than being chosen at random, lay assessors are often people who seem specially qualified to take on the role of judge. In addition, far fewer lay assessors than jurors are needed to hear cases in a given period, so citizen participation in the justice system is not nearly so widespread. Moreover, if a regime leans toward the authoritarian, the mixed court provides less of a barrier to the destruction of the law's autonomy than a jury system. This is because in a mixed court system the

[41] Gerhard Casper & Hans Zeisel, *Lay Judges in the German Criminal Courts*, 1 J. LEGAL STUD. 135, 189-91. (1972).

regime picks who will serve as lay judges and professional judges are present in the deliberations to make the party line clear and intimidate those who would make anti-state arguments.

The argument that defenders of mixed tribunals and professional judges often see as their strongest is that both mixed tribunals and purely judicial tribunals give reasons for their decisions while juries do not. This argument is weak if not specious. First, the reasons mixed tribunals or judges advance may not disclose the motivation of the verdict. The professional judges who write these opinions know how to provide an adequate legal bases for a decision regardless of what actually motivated it. No German judge, for example, is going to write that she decided to convict a Turkish defendant because she is biased against Turks or because the people won't stand for an acquittal or because she didn't understand the evidence. Indeed, in some countries with mixed tribunals, judges write up the reasons that support verdicts they disagreed with. Here the temptation to list reasons that will lead an appellate court to reverse can be overwhelming.[42]

The argument from reason-giving also ignores the fact that the formal reasons for a jury's decision are almost always discernable from the instructions and the jury's verdict. The instructions describe for the jury what they must find to convict a defendant or decide for a civil plaintiff. Hence if a jury reaches a particular verdict, the court knows the facts it must, as a matter of law, have found. If some facts have been the subject of conflicting testimony, the court knows which testimony must have been believed. If this is not enough, juries may be given elaborate verdict forms to answer so that their findings may be known in detail, or they may even, as in the Spanish system, be asked to provide reasons.[43] Of course, a jury's verdict may disguise impermissible motives, and it may be that an observer would be mistaken to think a jury convicted because the witnesses who testified to the defendant's guilt seemed credible rather than because the jury was biased against the defendant. However, the misunderstanding would be the same if a judge or mixed tribunal reached the same verdict for the same impermissible reason, since a judge explaining her verdict would surely indicate that the elements of the crime had been established rather than that she was biased against the defendant.

If Japan chooses to involve ordinary citizens as decision makers in the administration of justice, the temptation to move to a system of mixed tribunals and not a jury system will be strong, since the mixed tribunal is a far smaller step and one less disruptive of current procedures than a move to a jury system. But if Japan chooses the timid option, it will be out of step with developments around the world, where countries like Spain and Russia, which once had and then

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[42] At the Japanese conference, one European judge who sat on mixed tribunals noted that in the rare case where judges were out-voted by the panel's lay assessors, this might happen.

[43] Stephen C. Thaman, *Europe's New Jury Systems: The Cases of Spain and Russia*, WORLD JURY SYSTEMS 319-351 (N. Vidmar Ed. 2000)(Professor Thaman points out that the reasons given are often not very elaborate (e.g. believed certain witnesses) but even such reasons may honestly describe what determined the verdict. Indeed, deciding which witnesses to credit is the fundamental task the law assigns juries.

abolished jury systems, are reinstating them, sometimes replacing the jurisdiction of mixed tribunals. Yet more importantly, if Japan moves to a system of mixed tribunals, it will not secure most of the gains that a move to a jury system will bring, particularly with respect to criminal procedure.

I am an outsider and hesitate to judge a country I don't know well, but it appears from where I stand in the United States that Japanese democracy is robust enough and its citizens civic minded enough to make a success of the jury system. The mixed tribunal system is a compromise. If Japan wants the reality of meaningful citizen participation rather than just the appearance of citizen involvement, I believe it should opt for a jury system.[44]

There are, however, some benefits that the Japanese people should not expect from a move to either a jury system or a system of mixed tribunals. The movement in Japan to involve ordinary citizens in deciding legal cases received, I have been told, great momentum from several cases in which judges convicted men and sentenced them to death for murders the men did not commit. Indeed, at the conference at which this paper was presented, one of these men who had been wrongfully imprisoned appeared and expressed his conviction that if his case had been tried to a jury the injustice he experienced would not have happened. He may well have been wrong. Avoiding mistaken verdicts is not guaranteed by greater citizen participation in the administration of justice. All humans and human institutions make mistakes. A jury might well have decided this man's case just as the judges who heard it did, and the citizen judges on a mixed tribunal would very likely have endorsed the professional judges' judgment. And even if a jury would have decided this man's case correctly, there would be other cases where a jury would be mistaken when a judge or a mixed tribunal would have decided correctly. The case for greater citizen involvement in the administration of justice in general and for involvement through a jury system in particular does

[44] *See* Lempert, *A Jury for Japan?*, *supra* note 1. (I suggested that Japan should move toward a jury system in an experimental, incremental fashion. I still believe this because there is no way to be certain in advance, how a jury system would operate in Japan. My suggestion for the Japanese judiciary, which is resistant to a jury system, and to Japanese reformers, who are not, is that for a period of several years Japan try out an advisory jury system. Attorneys who are willing would have their cases tried to a judge and advisory jury. The incentive to participate would be the promise of case resolution in a far shorter time than now is often the case. Judges would, as they do now, decide the cases. However, before the judge announced his decision in a case, the jury would deliberate and reach a verdict. The judge could then meet with the jury and have the jurors explain their reasons for their decision before announcing his own verdict. In this way, without introducing a binding jury, judges and others could evaluate the quality of jury justice and explore problems that might exist were a jury system formally adopted. One might also have judges hear some cases with lay assessors so that the jury and mixed tribunal systems can be compared. I recognize the "experiment" I propose is not an easy one to implement because it would require that agreement be reached or a set of procedures for discovering evidence and for presenting evidence to the jury. Also jury instructions would have to be written. But these difficulties are not insurmountable. In recent years Russia and Spain have adopted jury systems, while in the United States there is considerable experience with arbitration and other ADR tribunals in which private actors have written workable rules setting forth procedures and defining admissible evidence).

not lie in the avoidance of mistakes a judge would make. Rather, it turns on the other virtues of citizen participation, particularly the virtues associated with the link between citizen participation and democracy, and with the value of having as decision-makers a group of people who are not part of the ordinary justice bureaucracy.

It is said that people make their own identities. They define themselves by their acts. So it is with nations. The reinstitutionalization of the jury system in Spain and Russia[45] is not just a move toward a more democratic, less state-dominated justice system, but is also a symbol of each country's aspirations for freer, more democratic government. The continuing demise of the jury system in England,[46] the land of its birth, is a sign of that country's centralization of governmental power and an increasingly efficiency-oriented bureaucracy. Japan's decision on whether and how to introduce lay participation into its justice system will not just be a move toward greater or lesser state control of trial justice, but it will also be a sign of how the Japanese conceive of themselves and their nation at the start of the 21st century. What is at stake as the Japanese choose between their current system, lay assessors or a jury system is not just how law cases are processed, but the very conception of Japanese democracy. No matter what trial system is adopted, most cases are likely to be decided the same way, and in those instances where the tribunal form determines verdicts, rarely will anything of great social import turn on the decision. Hence the passion of Japan's jury reformers and the resistance of its high court judges and others may betoken a struggle to define the new Japan's legal soul as much as it is a struggle over how cases are decided.

[45] Thaman, *supra* note 43.

[46] *See* Sally Lloyd-Bostock and Cheryl Thomas, *The Continuing Decline of the English Jury System, in* WORLD JURY SYSTEMS 53-91(N. Vidmar ed. 2000).