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## Introduction to Juries and Lay Participation: American Perspectives and Global Trends (symposium editor)

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# INTRODUCTION TO JURIES AND LAY PARTICIPATION: AMERICAN PERSPECTIVES AND GLOBAL TRENDS

NANCY S. MARDER\* & VALERIE P. HANS\*\*

## INTRODUCTION

The jury in the United States is fraught with paradoxes. Even though the number of jury trials in the United States continues to decline,<sup>1</sup> jury trials play a prominent role in our culture<sup>2</sup> and continue to occupy headlines in newspapers and top stories on television.<sup>3</sup> Americans might not always agree with the verdict that any given jury renders,<sup>4</sup> but they continue to express their support for the jury system in poll after poll.<sup>5</sup> If jury trials were to disappear altogether in the United

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We thank Editor-in-Chief Heather Collinet and the other members of the *Chicago-Kent Law Review* for their outstanding assistance with this Symposium and the conference that preceded it.

1. Mark Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7 (describing the precipitous decline in trials); Mark Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

2. Jeffrey Abramson, *The Jury and Popular Culture*, 50 DEPAUL L. REV. 497 (2000) (describing contemporary novels and movies that depict jury trials); David Ray Papke, 12 *Angry Men Is Not an Archetype: Reflections on the Jury in Contemporary Popular Culture*, 82 CHI.-KENT L. REV. 735 (2007) (describing portrayals of the jury in popular culture).

3. See, e.g., Katharine Q. Seelye, *Jurors Chosen for Dzhokhar Tsarnaev's Trial in Boston Marathon Bombings*, N.Y. TIMES, Mar. 3, 2015, [http://www.nytimes.com/2015/03/04/us/boston-marathon-bombing-trial.html?\\_r=0](http://www.nytimes.com/2015/03/04/us/boston-marathon-bombing-trial.html?_r=0); Julie Turkewitz, *Jury Pool for Trial in Aurora Shooting is Pressed on Death Penalty*, N.Y. TIMES, Feb. 11, 2015, <http://www.nytimes.com/2015/02/12/us/in-aurora-case-jury-pool-is-pressed-on-death-penalty.html>.

4. See, e.g., Dan Balz & Scott Clement, *On Racial Issues, America is Divided Both Black and White and Red and Blue*, WASH. POST, Dec. 27, 2014, [http://www.washingtonpost.com/politics/on-racial-issues-america-is-divided-both-black-and-white-and-red-and-blue/2014/12/26/3d2964c8-8d12-11e4-a085-34e9b9f09a58\\_story.html](http://www.washingtonpost.com/politics/on-racial-issues-america-is-divided-both-black-and-white-and-red-and-blue/2014/12/26/3d2964c8-8d12-11e4-a085-34e9b9f09a58_story.html) (showing racial and partisan divides and substantial opposition to grand jury decisions not to indict police officers in the killings of Michael Brown in Ferguson, Missouri and Eric Garner in Staten Island, New York).

5. Julian V. Roberts & Mike Hough, *Public Opinion and the Jury: An International Literature Review*, GOV'T SOC. RESEARCH 25 (2009),

<http://www.icpr.org.uk/media/10381/Juries%20MOJ%20report.pdf> (summarizing favorable responses toward the jury system among American poll respondents); *New Poll Shows Strong Support for Jury System; Incoming ABA President Calls on Americans to Act on their Beliefs*, AM. BAR ASS'N (Aug. 9, 2004), <https://americanbarassociation.wordpress.com/2004/08/09/new-poll-shows-strong-support-for-jury-system-incoming-aba-president-calls-on-americans-to-act-on-their-beliefs/> (describing the results of an ABA survey). In a 2014 poll, 85% of U.S. respondents described serving on a jury as either a "very important" or "somewhat important" obligation. *Associated Press/GfK Knowledge Networks Poll*, ROPER CTR. PUB. OPINION RES. (July 2014),

States, many Americans would undoubtedly feel that they had lost an essential protection and an important tradition.<sup>6</sup> They may experience dismay upon receiving a summons for jury duty,<sup>7</sup> but those who actually serve on a jury usually view their experience favorably and form a positive view of the jury.<sup>8</sup> Jury duty, though resisted initially, eventually inspires those who serve on a jury to participate more actively in their democracy, such as by voting.<sup>9</sup> There seems to be a deep-seated trust in the institution of the jury, perhaps because the jury aspires to represent “we the people.”<sup>10</sup> As the French writer Alexis de Tocqueville observed 180 years ago, Americans have a skepticism of centralized power and appreciate that the jury, especially the criminal jury, serves as a check on the power of judges.<sup>11</sup> The jury operates as an antidote to

www.ropercenter.uconn.edu. Another 2014 survey found that 83% of Americans surveyed agreed that serving on a jury is “an act of patriotism.” *Fox News Poll*, ROPER CTR. PUB. OPINION RES. (June 2014), www.ropercenter.uconn.edu.

6. Justice White, writing for the Court in *Duncan v. Louisiana*, described the strength of the jury tradition in the United States as follows: “Jury trial continues to receive strong support. The laws of every State guarantee a right to jury trial in serious criminal cases; no State has dispensed with it; nor are there significant movements underway to do so.” *Duncan v. Louisiana*, 391 U.S. 145, 154 (1968). His observations still ring true today.

7. See, e.g., ROBERT G. BOATRIGHT, IMPROVING CITIZEN RESPONSE TO JURY SUMMONSES: A REPORT WITH RECOMMENDATIONS ix–x (Am. Judicature Soc’y 1998).

8. Shari S. Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 282, 285–86 (Robert E. Litan ed., 1993) (showing that jurors view the jury system more favorably after serving as jurors); John Gastil, Hiroshi Fukurai, Kent Anderson & Mark Nolan, *Seeing Is Believing: The Impact of Jury Service on Attitudes Toward Legal Institutions and the Implications for International Jury Reform*, 48 CT. REV. 124 (2012).

9. See, e.g., JOHN GASTIL, E. PIERRE DEESS, PHILIP J. WEISER & CINDY SIMMONS, THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION (2010) (finding that jury service in criminal trials boosted voting among low-frequency voters); Valerie P. Hans, John Gastil & Traci Feller, *Deliberative Democracy and the American Civil Jury*, 11 J. EMPIRICAL LEGAL STUD. 697 (2014) (finding that jury service in civil trials boosted voting, depending on jury size, unanimity rule, defendant identity and case type).

10. We are getting closer to the ideal of a jury venire drawn from a fair cross section of the population than ever before, with states trying new ways, such as multiple lists and pilot programs, to reach people and summon them for jury duty. However, individual jury venires sometimes fall short of this ideal. See, e.g., *United States v. Green*, 389 F. Supp. 2d 29 (D. Mass 2005); Nancy Gertner, 12 *Angry Men (and Women) in Federal Court*, 82 CHI.-KENT L. REV. 613 (2007). And of course, the petit jury, unlike the venire, does not have to achieve a fair cross section. *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) (“[W]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population.”). The exercise of peremptory challenges can continue to skew the composition of the petit jury as long as they are not exercised based on race, ethnicity, or gender, as established in *Batson v. Kentucky*, 476 U.S. 79, 86 (1986), *Powers v. Ohio*, 499 U.S. 400, 402 (1991), and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994).

11. See ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 275 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835). Although Tocqueville suggested that the jury would act independently of the judge in criminal cases, he thought the jurors would take their cue from the judge in civil cases, and as a result, would learn lessons that they could apply in their daily lives. *Id.* at 274.

overreaching not just by the judiciary, but also by the executive. The U.S. Supreme Court recognized this function of the criminal jury when it described the jury as “an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.”<sup>12</sup>

The jury plays vital and varied roles in American society and these roles are shaped by our history, culture, and traditions. The conference held at Chicago-Kent College of Law in October 2014 (Chicago-Kent conference), entitled “Juries and Lay Participation: American Perspectives and Global Trends,” brought together jury scholars, practitioners, law professors, and law students to explore the roles that the American jury plays, the contemporary challenges that it faces, and the reforms that might help the jury to meet these challenges in the future. Although the predominant focus was on the American jury, the participants recognized that there are lessons to be learned from other countries’ experiences with juries and different forms of lay participation. A number of papers presented at this conference are included in this Symposium. They explore the roles of the American jury, the challenges the American jury faces, and the possible ways to meet these challenges, with an eye to what has been tried with success in other countries.

The Chicago-Kent conference and this Symposium in the *Chicago-Kent Law Review* are part of a larger, ongoing conversation about the jury. Jury scholars have fostered this conversation over the years by participating in presentations, panels, and exchanges at the Law & Society Association (LSA) Annual Meetings and in the Lay Participation in Legal Systems Collaborative Research Network (CRN) of LSA.<sup>13</sup> This conversation has been memorialized every few years through the publication of symposia devoted to the jury in the *Chicago-Kent Law Review*.<sup>14</sup> This conversation was continued more intensely in June 2014

12. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968); *see id.* (describing the jury trial provisions in the federal and state constitutions as reflecting “a fundamental decision about the exercise of official power” and “[f]ear of unchecked power” leading to an “insistence upon community participation in the determination of guilt or innocence”).

13. The Lay Participation in Legal Systems CRN is organized by Valerie Hans, Sanja Kutnjak Ivković, and Mary Rose. The CRN engages in activities to foster intra- and cross-country collaborations and discussions among law and society scholars. For the group’s website, see [http://www.lawschool.cornell.edu/research/lay\\_participation\\_in\\_law/](http://www.lawschool.cornell.edu/research/lay_participation_in_law/).

14. Symposium, *Comparative Jury Systems*, 86 CHI.-KENT L. REV. 449 (2011); Symposium, *The 50<sup>th</sup> Anniversary of 12 Angry Men*, 82 CHI.-KENT L. REV. 551 (2007); Symposium, *The Jury at a Crossroad: The American Experience*, 78 CHI.-KENT L. REV. 907 (2003). Other journals have also featured collections of articles that had their origins in the collaborative work of the CRN. *See, e.g.,*

at a conference entitled “Juries and Mixed Tribunals across the Globe: New Developments, Common Challenges and Future Directions” in Oñati, Spain (Oñati conference), which brought together twenty-five jury scholars from around the world.<sup>15</sup> Each scholar presented a paper examining some dimension of lay participation in legal decision making. Revised versions of a number of these papers will be published in the *Oñati Socio-Legal Series*.<sup>16</sup> The goal of the Oñati conference was to learn about new developments in juries worldwide and to identify common challenges and reforms, but our discussions also revealed differences in legal cultures and traditions and how these differences might affect views about juries and jurors. The goal of the Chicago-Kent conference was to return to issues raised at the Oñati conference, with some of the same participants and some of the same panel topics, but with a focus on the American jury.

In Part I of this Introduction, we identify several issues that were raised at the Oñati conference that unexpectedly produced a diversity of viewpoints among the jury scholars in attendance. In Part II, we describe the articles contained in this volume and consider how they develop several of the issues raised at Oñati, yet focus on the American jury and American perspectives. In Part III, we suggest steps that jury scholars can take to engage in collaborative work that will foster an ongoing conversation about the jury.

### I. BACKGROUND: ISSUES RAISED AT OÑATI

The conference at Oñati, which was held in June 2014 and brought together jury scholars from around the world, had as its subject the many and varied ways that countries across the globe have introduced lay participation into their justice systems. One reason to include lay participants is to introduce community values into the justice system.<sup>17</sup> Some countries use traditional juries, like those found in the United States, England, and Wales; other countries, such as France, use “mixed courts” or “mixed tribunals,” consisting of lay people and professional

*Citizens as Legal Decision Makers*, 40 CORNELL INT’L L.J. 303 (2007); *Special Issue: Lay Participation in Law*, 25 LAW & POL’Y 83 (2003).

15. Marder and Hans, along with Mar Jimeno-Bulnes (University of Burgos, Spain) and Stephen C. Thaman (Saint Louis University School of Law) constituted the organizing committee for the jury conference held in Oñati, Spain.

16. See *Juries and Mixed Tribunals across the Globe: New Developments, Common Challenges and Future Directions*, OÑATI SOCIO-LEGAL SERIES (forthcoming 2015).

17. See, e.g., *Duncan*, 391 U.S. at 156 (identifying “the common-sense judgment of a jury” as a reason to turn to a jury rather than to a judge).

judges who work together to reach a decision.<sup>18</sup> It was fitting that this conference, with its international reach, was held in Europe, rather than the United States. The focal point was on different countries' approaches to lay participation, rather than unduly emphasizing the jury system in the United States. It was also fitting that this conference was held in Spain, which is one of the countries that has revived the traditional jury, but it is a jury with a twist: the Spanish jury must give reasons for its decisions. This issue proved to be one of the sticking points for the jury scholars who gathered in this small town in Spain for two days of extensive discussions about citizen participation in legal decision making.

### *A. Reasoned Verdicts*

The question whether juries should give reasons for their verdicts sparked much debate at the conference in Oñati. Spain is a good case study for this issue because its democratic constitution of 1978 provided for jury trials<sup>19</sup> and required juries to provide reasons for their verdicts.<sup>20</sup> The 1995 Jury Law implemented the constitutional right to a jury trial.<sup>21</sup> Following the constitutional imperative, the Spanish jury must provide a "reasoned verdict."<sup>22</sup> Instead of the general verdicts of traditional common-law juries, Spanish juries are required to answer a list of specific questions, and to provide the reasoning supporting each of their answers. The judge then reviews the adequacy of these answers and underlying reasons.

Judicial review of a jury's reasoning in Spain has several ramifications for the jury, as several jury scholars have noted.<sup>23</sup> One challenge

18. Valerie P. Hans & Claire Germain, *The French Jury at a Crossroads*, 86 CHI.-KENT L. REV. 737 (2011).

19. C.E., B.O.E. n. 311, Dec. 29, 1978 (Spain) (Artículo 125: "Los ciudadanos podrán ejercer la acción popular y participar en la Administración de Justicia mediante la institución del Jurado, en la forma y con respecto a aquellos procesos penales que la ley determine, así como en los Tribunales consuetudinarios y tradicionales.").

20. *Id.* (Artículo 120(3): "Las sentencias serán siempre motivadas y se pronunciarán en audiencia pública.").

21. LEY ORGÁNICA DEL TRIBUNAL DEL JURADO [L.O.T.J.], B.O.E. n. 122, May 22, 1995 (Spain).

22. Mar Jimeno-Bulnes, *Jury Selection and Jury Trial in Spain: Between Theory and Practice*, 86 CHI.-KENT L. REV. 585, 585–86 (2011); Stephen C. Thaman, *Should Criminal Juries Give Reasons for their Verdicts?: The Spanish Experience and the Implications of the European Court of Human Rights Decision in Taxquet v. Belgium*, 86 CHI.-KENT L. REV. 613, 629 (2011) [hereinafter Thaman, *Should Criminal Juries Give Reasons for their Verdicts?*]; Stephen C. Thaman, *Spain Returns to Trial by Jury*, 21 HASTINGS INT'L & COMP. L. REV. 241 (1997–1998) [hereinafter Thaman, *Spain Returns to Trial by Jury*].

23. Jimeno-Bulnes, *supra* note 22, at 600–02; Mar Jimeno-Bulnes, *A Different Story Line for 12 Angry Men: Verdicts Reached by Majority Rule—The Spanish Perspective*, 82 CHI.-KENT L. REV.

is that jurors are typically lay people untrained in the law, yet their provision of reasons must conform precisely to legal requirements. They are supposed to answer a list of questions and record the vote of the jurors as to each answer in the Verdict Form.<sup>24</sup> They are also supposed to indicate in the Verdict Reasons which pieces of evidence they have relied on and include an explanation for why they found certain facts to have been proven.<sup>25</sup> A judge, who is trained in the law, has experience in meeting these types of legal requirements, but they pose a greater challenge for novice decision makers.<sup>26</sup> Jurors in Spain sometimes turn to the jury clerk for informal assistance in formulating their reasons,<sup>27</sup> but otherwise they are left on their own to express these reasons in a way that will meet the specifications provided by law. As one scholar of the Spanish jury observed, in the early years of this practice, juries' reasons "were often skeletal and/or conclusory, revealing little information as to why and how the jury reached its conclusions."<sup>28</sup> A large part of the problem, at least in the early years, was that the judges were inexperienced in drafting the special verdicts and instructing the jury.<sup>29</sup>

Finally, because the judge is placed in a position of reviewing the jury's reasons, this undermines the independence of the Spanish jury.<sup>30</sup> If the judge does not find the reasons adequate, he or she can overturn the jury's verdict. Thus, the judge can substitute his or her judgment for that of the jury.

One justification for turning to juries, especially in a high-profile criminal case, is because the jury serves for only one case and can reach a politically unpopular decision. It does not have to worry about ongoing relationships with other governmental actors, as a judge might have to do, or even about public opinion. If the judge has to re-

759, 765-68 (2007); Thaman, *Should Criminal Juries Give Reasons for their Verdicts?*, *supra* note 22, at 628-30, 645.

24. Thaman, *Should Criminal Juries Give Reasons for their Verdicts?*, *supra* note 22, at 628-29.

25. *Id.* at 629.

26. For a description of the requirements that the jury must fulfill in providing reasons, see *id.* at 628-30, 666-67.

27. *Id.* at 629 ("The jury may also summon the secretary of the court, who has a law degree, into the jury room to help them formulate their reasons."); Thaman, *Spain Returns to Trial by Jury*, *supra* note 22, at 374-76 (describing the role played by the secretary in assisting the jury in drafting reasons, based on Spain's first year of jury trials); see also Mar Jimeno-Bulnes & Valerie P. Hans, *Legal Interpreter for the Jury: The Role of the Clerk of the Court in Spain*, OÑATI SOCIO-LEGAL SERIES (forthcoming 2015) (describing the clerk's assistance).

28. Thaman, *Should Criminal Juries Give Reasons for their Verdicts?*, *supra* note 22, at 630.

29. *Id.* at 631.

30. *Id.* at 650.



view the jury's verdict, however, these political pressures can enter into the process, particularly in politically-charged cases. In sum, the jury's verdict can be replaced by the judge's review, and the judge may not be as protected as the jury is from outside influences and pressures. However, even the protections afforded a jury may not be sufficient in all cases, especially when other institutional actors do not perform their roles adequately.<sup>31</sup>

In spite of the drawbacks of the "reasoned verdict" required of the Spanish jury, the European Court of Human Rights (ECtHR) has moved in the direction of supporting this requirement, though the Grand Chamber of the ECtHR (en banc court) has not yet explicitly required that juries provide the reasoning underlying their verdicts in all jury trials. In *Taxquet v. Belgium*,<sup>32</sup> a Belgian jury convicted the defendant (who was one of eight defendants) of the premeditated murder of a government minister and the attempted premeditated murder of his companion; the defendant appealed but to no avail. The defendant then brought his case to the ECtHR, which held that the lack of reasoning by the jury violated the defendant's rights under the European Convention of Human Rights (ECHR). However, the Grand Chamber of the ECtHR, in its 2010 opinion in this case, concluded that the ECHR does not require a jury to give reasons for its decisions.<sup>33</sup> The opinion did, however, contain qualifying language suggesting that a defendant and the public need to understand the basis for the verdict.<sup>34</sup> Some European scholars see this case as the writing on the wall that juries will eventually be required to give reasons for their verdicts.<sup>35</sup>

A number of jury scholars at Oñati, particularly those from Europe, were vocal in extolling the virtues of having juries give reasons.

31. See, e.g., *id.* at 639–54 (describing the *Wanninkhof* case); *id.* at 660 ("The *Wanninkhof* case is a classic example of how an innocent person can be convicted of a murder by a jury through a combination of dishonest and unethical conduct by the police and prosecution, passive and ineffective assistance of counsel, coupled with a hysterical media witch-hunt atmosphere.").

32. *Taxquet v. Belgium*, App. No. 926/05 (Eur. Ct. H.R., Jan. 13, 2009), available at [http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"appno":\["926/05"\]}](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{).

33. *Taxquet v. Belgium* (GC), App. No. 926/05 (Eur. Ct. H.R., Nov. 16, 2010), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101739#{"itemid":\["001-101739"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101739#{) (holding that "the Convention does not require jurors to give reasons for their decision and that Article 6 does not preclude a defendant from being tried by a lay jury even where reasons are not given for the verdict").

34. *Id.* § 90 ("Nevertheless, for the requirements of a fair trial to be satisfied, the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness . . .").

35. See, e.g., Nikolai Kovalev & John Jackson, *Lay Adjudication in Europe: The Rise and Fall of the Traditional Jury*, OÑATI SOCIO-LEGAL SERIES (forthcoming 2015) (manuscript at 29–30) (describing concerns about the ECtHR judgment).

From their perspective, reason giving is important because it limits arbitrary decisions that are not based on the evidence. In contrast, it was our impression that most of the American jury scholars at Oñati resisted the notion of reasoned verdicts. Several of these scholars contended that demanding reasoned verdicts undercuts the political power of the criminal jury. Returning a general verdict of “guilty” or “not guilty” of the crimes charged allows jurors to vote according to their conscience, even though federal and state courts do not instruct jurors that they have this power.<sup>36</sup>

American jury scholars at Oñati pointed out that although juries in the United States do not provide reasons for their verdict, this is not the only way to avoid arbitrariness. Other institutional constraints on juries also help to ensure a fair decision. For example, prospective jurors are drawn from a fair cross section of the community, undergo voir dire, are subject to for cause and peremptory challenges, take an oath, deliberate as a group, and must reach a unanimous verdict (at least in federal criminal and civil cases and in criminal cases in almost all state courts).<sup>37</sup> Indeed, American jury scholars at Oñati explained that the criminal jury does not need to give reasons because its reasons are clear. The jury that convicts in a criminal case is saying that after going through each of the elements the prosecutor had to prove for a particular crime, the jury found that the prosecutor had proven them beyond a reasonable doubt. No additional reasons are required to understand the basis for the verdict.

### *B. Appropriate Tools for Jurors*

This divide on whether juries should give reasons or not also affects which tools jurors should be given so that they can perform their task as best they can. One tool that created a stir at the Oñati conference is the “decision tree” or “question trail.” It goes by different names in different countries. This tool has been embraced by some courts in

36. See, e.g., Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 956–57 (1999) [hereinafter Marder, *Nullifying Jury*]. In most cases, criminal trials require general verdicts. See, e.g., FED. R. CRIM. P. 31; *United States v. Spock*, 416 F.2d 165, 180–83 (1st Cir. 1969) (reversing a conviction of conspiracy to counsel evasion of the draft because the trial court had put to the jury ten special questions in addition to a general verdict). Courts have employed questions in two specific contexts in criminal cases: treason trials and sentencing matters. *Id.* at 182 n.41. Courts have also found questions acceptable in extremely complex criminal trials when they are employed to reduce juror confusion. See *United States v. Palmeri*, 630 F.2d 192, 202 (3d Cir. 1980). Special verdicts and general verdicts with special questions are permitted in civil cases, at least in federal court. See FED. R. CIV. P. 49.

37. See Marder, *Nullifying Jury*, *supra* note 36, at 943–47.

Canada, the United Kingdom, New Zealand, and Australia.<sup>38</sup> Courts that make use of this tool give jurors a set of questions to answer and a way to proceed based on their response to each question. The decision tree is organized in a logical fashion and helps jurors conduct their deliberations according to that logic. They are advised to answer each question posed by the court before moving onto the next one.

The difficulty created by decision trees is that they constrain jurors in their deliberations. They give the jury a structure to follow and questions to answer, rather than allowing jurors to decide how to organize their own deliberations. Courts in the United States are reluctant to intrude into how the jury conducts its deliberations. At most, a court might instruct jurors to listen to each other, to be open to each other's arguments, and to treat each other with respect.<sup>39</sup> Some courts might even go so far as to distribute the brochure prepared by the American Judicature Society (AJS) called *Behind Closed Doors*, which provides juries with very general information about how to proceed with deliberations.<sup>40</sup> For example, the brochure suggests that jurors wait before taking an initial vote so that they can avoid forming coalitions early in their deliberations and focusing too quickly on the verdict; instead, the brochure recommends going around the table and having each juror give his or her views so that the jury engages in a fuller discussion about all the evidence.<sup>41</sup> The view of most judges in the United States, however, is that it is up to the jurors, not the judge, to structure the deliberations as the jurors see fit.

Several of the American jury scholars at Oñati noted that whoever structures the decision tree is taking away power from the jury to organize its own deliberations. The court-determined organization could subtly influence the jury to reach one result rather than another. Leaving jurors to decide how to approach the evidence and how to manage their own deliberations may lead jurors to interpret the evidence in a way that differs from the court. Indeed, some scholars have written about jury deliberations as an effort by jurors to construct a compre-

38. See, e.g., Marie Comiskey, *Tempest in a Teapot—Does the Decision Tree Violate the Right to a Jury Trial?* ONATI SOCIO-LEGAL SERIES (forthcoming 2015); James Ogloff et al., *Improving Judicial Communication with Jurors: Some Lessons from Trans-Tasman Research*, Presentation at the 11<sup>th</sup> Annual Australasian Jury Research and Practice Conference (Nov. 7, 2014) (notes on file with authors) (describing a mock jury study of “question trails” in New Zealand).

39. See, e.g., John L. Kane, *Giving Trials a Second Look*, JUDGES' J., Fall 2004, at 29, 30–31 (providing instruction).

40. AM. JUDICATURE SOC'Y, *BEHIND CLOSED DOORS: A GUIDE FOR JURY DELIBERATIONS* (1999).

41. *Id.*; REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* 163–65 (1983) (contrasting verdict-driven versus evidence-driven deliberation styles).

hensive narrative or story that is consistent with all the evidence.<sup>42</sup> If the evidence is broken down question by question, as it would be with a decision tree, and jurors never reach some of the evidence, the use of a decision tree could lead to a verdict different from the one the jurors would have reached on their own. Thus, many of the American jury scholars at Oñati, though open to giving jurors tools that would help them perform their job more effectively, stopped short when it came to endorsing decision trees even though other common-law countries use them.

### *C. Trusting Jurors or Judges*

Yet another divide that surfaced among the jury scholars at Oñati was between those who had trust in jurors versus those who had trust in judges. Indeed, this divide may help to explain the differences of opinion that emerged on reasoned verdicts and decision trees. Some of those who came from civil-law traditions tended to have more faith in legal professionals, and expressed some reservations about whether lay people, who had no legal training, could perform equally as well as professionally-trained judges. They viewed certain requirements, such as reasoned verdicts and decision trees, as ways of helping jurors perform more like judges. They expressed uneasiness about having lay people make decisions that professionals were trained to make without any guidance or assistance from the professionals. Those who came from countries with mixed courts or tribunals shared this view as well. They took comfort from the fact that lay people worked with professionals in reaching decisions in the criminal justice system.

In contrast, those from common-law traditions, and in particular the American jury scholars, were more inclined to put their trust in jurors rather than judges. They shared Justice White's view that "[i]f the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it."<sup>43</sup> They also might have shared Justice White's observation that faith in jurors stems from "a reluctance to entrust plena-

42. W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* (1981) (introducing the story approach); Robin H. Conley & John M. Conley, *Stories from the Jury Room: How Jurors Use Narrative to Process Evidence*, 49 *STUD. L. POL. & SOC'Y* 25 (2009) (describing how jurors use stories in their deliberations); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 *CARDOZO L. REV.* 519, 521-33 (1991) (providing an overview of how the story model operates in legal cases).

43. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

ry powers over the life and liberty of the citizen to one judge or to a group of judges.”<sup>44</sup> That perception harkens back to Tocqueville’s observations about Americans’ distrust of judges in criminal cases because in such cases “society is fighting a single man” and the judge becomes “the passive instrument of social authority.”<sup>45</sup> Although jurors lack the professional training of judges, they bring to the jury room a range of experiences and perspectives that a single judge lacks. In so doing, they provide the parties with “the commonsense judgment of the community.”<sup>46</sup> They also perform their task as a group, which means that they can depend on each other to recollect different facts, challenge each other’s views and misconceptions, and reach a shared judgment, which requires all of the jurors, who come from different backgrounds and walks of life, to agree that the evidence is strong enough to justify a unanimous verdict.<sup>47</sup>

To sum up, it was our impression that compared to other participants from around the globe, American jury scholars at Oñati expressed a greater willingness to trust jurors. In turn, that trust shaped their views about jury trial procedures and their opposition to imposing such devices as reasoned verdicts and decision trees. Of course, by painting in broad-brush strokes some of the differences that we saw emerge over two days of friendly and lively discussion, we run the risk of mischaracterizing individual preferences. After all, we did not put any of these issues to a vote at Oñati. Nonetheless, some of the differences in scholars’ reactions were striking.

The jury conference at Chicago-Kent provided a new venue and focus to continue the promising discussions about lay participation in legal decision making that began in Oñati. The Chicago-Kent conference included several participants from the Oñati conference, who joined other scholars to consider questions of lay participation in law, including many of the issues raised at the Oñati conference. The Chicago-Kent conference focused on the distinctive institution of the American jury.

44. *Id.*

45. TOCQUEVILLE, *supra* note 11, at 275.

46. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

47. *Ballew v. Georgia*, 435 U.S. 223, 232–38 (1978).

## II. PAPERS AND PANELS AT CHICAGO-KENT—CONNECTIONS TO THE OÑATI CONFERENCE

The focus on the American jury at the Chicago-Kent conference allowed further exploration of the political role that the jury has played, and continues to play, in American society. An appreciation of the jury's political role could help to explain American jury scholars' resistance at the Oñati conference to requiring jurors to give reasons for their verdict. Indeed, several authors of articles in this volume speak directly to the debate over reasoned verdicts.<sup>48</sup>

### A. *The Jury as a Political Institution*

#### 1. Tocqueville's Observations

The influential French thinker Alexis de Tocqueville wrote compellingly about the political nature of the American jury. Therefore, it is appropriate to begin our discussion by situating several of the articles within the context of Tocqueville's work. After his tour of the United States in the early 1830s, which served as the basis for *Democracy in America*, Tocqueville concluded that the jury is "above all, a political institution."<sup>49</sup> He explained that "it is from that point of view that [the American jury] must always be judged."<sup>50</sup> One way in which the jury is a political institution is that it gives jurors the opportunity to participate in their own self-governance. The jury serves as a training ground—a "free school"<sup>51</sup>—in which citizens participate in a democratic institution and then return to their private lives, guided by the lessons they have learned from their jury duty. The civil jury, even more than the criminal jury, plays this role because jurors can take what they have learned from their experience on the jury and apply it to their day-to-day business affairs. Tocqueville suggested that the reach of the civil jury is even greater than that of the criminal jury because most jurors would not have further dealings with the criminal justice system after their jury service, but they would likely encounter civil issues in their everyday lives.<sup>52</sup> Tocqueville also suggested that jurors would look to the judge for guidance in civil cases more so than in

48. See *infra* note 157 (identifying articles).

49. TOCQUEVILLE, *supra* note 11, at 272.

50. *Id.*

51. *Id.* at 275.

52. *Id.* at 274.

criminal cases.<sup>53</sup> The judge could teach jurors how to think judiciously. Jurors could then take this lesson with them when they returned to their lives as private citizens.<sup>54</sup>

Tocqueville regarded the jury as a political institution in another sense as well. It raises ordinary citizens “to the judges’ bench.”<sup>55</sup> The jury, along with the judges, constitutes one of the three branches of government. The jury is an essential check on the power of the judges, and as part of the judicial branch, the jury is in dialogue with and helps to check the other two branches of government. Thus, for Tocqueville, the jury’s role “simply as a judicial institution”<sup>56</sup> was too narrow a view of the jury; in fact, it was “the least important aspect of the matter.”<sup>57</sup> Rather, the jury, like the legislature, is “one form of the sovereignty of the people.”<sup>58</sup>

## 2. Observations in this Symposium

Richard Lempert, in *The American Jury System: A Synthetic Overview*,<sup>59</sup> takes a broad look at the American jury, highlighting its role as a political institution in several of the ways suggested by Tocqueville. Lempert observes that most discussions of the jury as a political institution focus on the criminal jury, in part because the focus is usually on cases in which the jury’s verdict might have been the result of jury nullification. In cases of nullification, which could be for good or bad purposes, the jury has decided not to apply the law. In addition to the “iconic” and “political” cases,<sup>60</sup> such as *Bushell’s Case*<sup>61</sup> and the trial of John Peter Zenger,<sup>62</sup> or the cases that achieve that celebrated status for a particular generation, such as the trial of the Chicago Seven,<sup>63</sup> the American criminal jury can serve as a political institution even in ordinary criminal cases. For example, just the possibility of a jury trial can

53. *Id.*

54. *Id.*

55. *Id.* at 273.

56. *Id.* at 272.

57. *Id.* at 273.

58. *Id.*

59. Richard Lempert, *The American Jury System: A Synthetic Overview*, 90 CHI.-KENT L. REV. 825 (2015).

60. *Id.* at 829.

61. *Bushell’s Case*, (1670) 124 Eng. Rep. 1006, 1009 (C.P.) (holding that jurors may not be fined or imprisoned for their verdict).

62. See JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 73–74 (1994) (describing the case of John Peter Zenger).

63. Lempert, *supra* note 59, at 829.

influence prosecutors in their decision whether to bring a case.<sup>64</sup> In high-profile cases, the jury can also provide cover for a judge because the jury is protected from outside pressure and influence in ways that a judge might not be, particularly an elected state court judge who worries about reelection.<sup>65</sup>

Consistent with Tocqueville's observations about the importance of civil juries, Lempert also focuses on the civil jury as a political institution. The McDonald's coffee case<sup>66</sup> is one of the most well-known examples. In that case, the jury found McDonald's negligent for selling coffee at a temperature that exceeded the industry standard and caused severe burning of a woman who purchased a cup of the coffee from the drive-in window of a McDonald's.<sup>67</sup> Lempert points out that juries, such as the one in the McDonald's case, hold companies liable, not because of animus toward business or sympathy for the "little guy," but because businesses have "a greater capacity to learn about and correct problems" than individuals do.<sup>68</sup> Damage awards can be viewed as political judgments by the jury in that they communicate the community's considered judgment about the worth of an injury.<sup>69</sup> The civil jury also serves as a political institution by deciding cases without creating precedents. Litigants can bring cases, such as those challenging the tobacco companies' failure to provide adequate warning about the addictive nature of cigarettes, until the legislature eventually feels pressure to act.<sup>70</sup> Thus, the civil jury can prod other branches of government to respond, and in that sense, the jury is a political institution that engages in a dialogue with the other branches of government until they take action.<sup>71</sup>

Lempert's article reminds us that neither a jury system nor a judge system is infallible. Systems are not perfect. He points out that anecdotal and empirical evidence suggests that jurors take their job

64. *Id.* at 830–31.

65. *Id.* at 834, 851.

66. See *Liebeck v. McDonald's Rests., P.T.S., Inc.*, No. CV-93-02419, 1995 WL360309, at \*1 (D.N.M. Aug. 18, 1994).

67. Andrea Gerlin, *A Matter of Degree: How a Jury Decided that a Coffee Spill is Worth \$2.9 Million*, WALL ST. J., Sept. 1, 1994, at A1.

68. Lempert, *supra* note 59, at 844.

69. Valerie P. Hans, *What's It Worth? Jury Damage Awards as Community Judgments*, 55 WM. & MARY L. REV. 935, 936–37 (2014).

70. Lempert, *supra* note 59, at 835.

71. *Id.*; see also Marder, *Nullifying Jury*, *supra* note 36, at 909–10; Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. CHI. LEGAL F. 87, 113–17.



seriously and strive to do the right thing.<sup>72</sup> They try to find facts that tell a coherent story and they attempt to apply the law according to the instructions the judge has given them.<sup>73</sup> They do not always get it right, any more than judges do, but requiring jurors to give reasons, as some of the Oñati participants suggested, is no guarantee of a better outcome, in Lempert's view. Reasons can mask the true basis for a decision, just as they sometimes do for a judge, who has to give reasons, and sometimes gives reasons that simply make a decision reversal-proof. Moreover, there are other constraints on juries, such as being sequestered, being limited to information that the judge and attorneys wish to present, or having to make a group decision, that provide juries with protections that judges lack.

In *Four Models of Jury Democracy*, Jeffrey Abramson focuses on the American criminal jury, though he acknowledges the power that Tocqueville ascribed to the civil jury,<sup>74</sup> as he seeks to find a theory of democracy that will serve as a model for the jury. Although the summoning of prospective jurors from a broad swath of the community suggests a theory of "direct democracy," the rejection of prospective jurors during voir dire, through for cause and peremptory challenges, suggests that this theory is not a good fit to describe the jury. Although juries do deliberate, a theory of "deliberative democracy" is also not a good fit because a jury does not give reasons for its decisions. Indeed, Abramson points to "[s]ubstantial evidence" that suggests that the very fact of having to give reasons might alter a jury's deliberations and leave the jury acting less independently and impartially than if no reasons are given and jurors deliberate in secrecy.<sup>75</sup> Although he notes that juries are supposed to be representative of the larger community, jurors do not represent constituents the way in which a theory of "representative democracy" posits, and thus, this theory too falls short in providing an adequate model for the jury.

Abramson offers a fourth model, which he calls "representative deliberation,"<sup>76</sup> which recognizes that a diverse group of jurors, who have different life experiences and perspectives to draw from, will enhance the jury's deliberations and lead to an impartial verdict. He fo-

72. Lempert, *supra* note 59, at 842-44.

73. *Id.* at 846-47.

74. Jeffrey Abramson, *Four Models of Jury Democracy*, 90 CHI.-KENT L. REV. 861, 862 n.3 (2015).

75. *Id.* at 875.

76. *Id.* at 883.

cuses on representative deliberation because it “shows how diversity provides the conditions under which jurors do the best job of turning many different minds to the common task of deliberating to a just verdict.”<sup>77</sup>

In describing “representative deliberation” as an apt model for the jury, Abramson draws from mock jury research done by Samuel Sommers.<sup>78</sup> Sommers, who used mock juries, found that having a mixed jury of black jurors and white jurors instead of an all-white jury led to more probing deliberations because white jurors on the mixed juries “parsed the evidence with more care and less bias, at least as measured in terms of demonstrable misstatements of fact or failures of recall.”<sup>79</sup> As a practical matter, however, there are obstacles that still stand in the way of creating fully representative juries, such as limited lists from which to summon jurors and summonses that never actually reach the prospective jurors. Abramson suggests that such juries are worth striving for and that they will have advantages over “judges or panels of experts when it comes to acting on our behalf in rendering verdicts[.]”<sup>80</sup>

Robert P. Burns, in *Some Limitations of Experimental Psychologists' Criticisms of the American Trial*,<sup>81</sup> examines the “promise” and “limitations”<sup>82</sup> of experimental psychologists’ assessment of the American trial by using Dan Simon’s book, *In Doubt*,<sup>83</sup> as a jumping-off point. Whereas Abramson finds the work of experimental psychologist Sam Sommers useful in thinking about how the jury fits into a model of representative deliberation, Burns finds psychologists’ laboratory experiments to be less useful as a basis for suggesting ways to reform the American trial. The laboratory experiments fail to capture the unique mix of procedures, interactions, and setting that constitute a trial; the simulations fail to recreate “the conditions that prevail at trial.”<sup>84</sup>

77. *Id.*

78. See, e.g., Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006); see also Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997 (2003).

79. Abramson, *supra* note 74, at 892.

80. *Id.* at 882–83.

81. Robert P. Burns, *Some Limitations of Experimental Psychologists' Criticisms of the American Trial*, 90 CHI.-KENT L. REV. 899 (2015).

82. *Id.*

83. DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* (2012).

84. Burns, *supra* note 81, at 911.

Simon criticizes the trial for not being able to get the most accurate answers to factual questions, but as Burns argues, this is not the only function of a trial. The trial, which is a “consciously hybrid institution[],” is a response to “a very broad range of competing values *all* of which have to be kept in view when evaluating it or proposing alternatives.”<sup>85</sup> Burns sees the trial, with its competing narratives and opportunities to challenge witnesses, evidence, and arguments, as the best method we have “to allow triers of fact to properly interpret and evaluate the human actions that are always the topics of criminal trials.”<sup>86</sup> The jury plays a unique role in the trial. It is called upon not just to find facts—or as Tocqueville would say not just to perform “simply as a judicial institution”<sup>87</sup>—but to interpret the meaning of those facts. In that sense, it performs as a political institution.

From Burns’s account, Simon seems to have greater trust in professionals, such as judges and experts, than in lay people who make up the jury.<sup>88</sup> This tendency leads Simon to embrace new exclusionary rules whereas Burns thinks they should be used only as a last resort. He refers to Henry James’s description of evidence as a “lumpy pudding,” and Judge Jack Weinstein’s description of evidence for jury consideration as “a gestalt or synthesis of evidence which seldom needs to be analyzed precisely,” and rejects Simon’s recommendation to limit what the jury hears.<sup>89</sup> Instead, he places his trust in jury deliberations, which he believes will allow jurors to sort through the evidence in a holistic manner. Contrary to those scholars at Oñati who suggested that courts give jurors guidance as to how to proceed in their evaluation of the evidence, piece by piece, Burns urges recognition that “[t]heoretical holism is in play at trial: the meaning of each individual piece of evidence is dependent on the whole, and the meaning of the whole is dependent upon the meaning of each bit of evidence.”<sup>90</sup>

85. *Id.* at 907, 908.

86. *Id.* at 905.

87. TOCQUEVILLE, *supra* note 11, at 272.

88.

There is a kind of natural sympathy between the professor and the judge. Each wields his own kind of authority. They tend to trust one another. This, in my view, can result in an overestimation of the power of the law of evidence, where the judge, not the jury, holds sway.

Burns, *supra* note 81, at 923.

89. *Id.* at 921, 924.

90. *Id.* at 921.

In *Juror Bias, Voir Dire, and the Judge-Jury Relationship*, Nancy S. Marder examines the role that voir dire plays in the trial.<sup>91</sup> Lawyers and judges believe that voir dire enables them to discover biased jurors and remove them from the jury.<sup>92</sup> Marder questions whether voir dire actually fulfills this function, especially as it is currently designed, but even if it falls short as an “impartiality detector,” it does play other roles that are vital to both the jury and the judge.<sup>93</sup> One critical, albeit unacknowledged, role that voir dire plays is that it helps the prospective juror make the transition from a “reluctant citizen,” who thinks about excuses to avoid serving, to a “responsible juror,” who wants to serve and who takes seriously his or her role as juror.<sup>94</sup> Voir dire begins this transformation through the questions the judge asks, the judge’s introduction to the case, and the judge’s description of the jury’s role. Voir dire marks the prospective jurors’ introduction to the jury as a “free school,”<sup>95</sup> as Tocqueville characterized it. During voir dire, prospective jurors begin to put aside their quotidian concerns and focus instead on the parties, the issues at stake, and the jury’s role in resolving them. As prospective jurors move from private citizen to juror, they begin to participate more fully in their democracy.

Another key but unrecognized function of voir dire is to provide a foundation for a good judge-jury relationship.<sup>96</sup> The judge and jury each have separate roles to play throughout the trial, yet they work together and rely on each other. Voir dire marks the starting point of this relationship. For example, the judge can use voir dire to set a tone of respect for the jury and the important work it will do.<sup>97</sup>

One way to view the judge-jury partnership is as a dialogue. Voir dire begins this dialogue, literally and figuratively, and this dialogue continues throughout the trial, and even after the trial. The judge-jury interactions throughout the trial, such as the judge’s instructions to jurors, jurors’ questions of witnesses via the judge (in courtrooms that permit juror questions), the jury’s notes to the judge with questions they have during their deliberations, and the jurors’ post-verdict meet-

91. Nancy S. Marder, *Juror Bias, Voir Dire, and the Judge-Jury Relationship*, 90 CHI-KENT L. REV. 927 (2015).

92. See, e.g., SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL* 50 (1988).

93. Marder, *supra* note 91, at 933–39.

94. *Id.* at 939–42.

95. TOCQUEVILLE, *supra* note 11, at 275.

96. Marder, *supra* note 91, at 942–45.

97. *Id.* at 942–43.

ing with the judge (in courtrooms in which the judge maintains this practice), develop the judge-jury dialogue and relationship that began during voir dire.<sup>98</sup> Both judge and jury are needed, as Tocqueville recognized, because each makes a unique contribution to the jury trial process. In addition, the jury serves as a check on the power of the judge, and both jury and judge serve as a check on the power of the executive and legislature.

### *B. Appropriate Tools for Jurors*

In *Decision-Making in the Dark: How Pre-Trial Errors Change the Narrative in Criminal Jury Trials*, Kara MacKillop and Neil Vidmar lament the incomplete or misleading evidence that juries are given in some criminal trials that lead them to formulate inaccurate narratives and verdicts, through no fault of their own.<sup>99</sup> MacKillop and Vidmar point out that most jurors take their responsibilities seriously and most juries try to do the right thing.<sup>100</sup> During deliberations, jurors typically perform their fact-finding function by putting the evidence together in a way that tells a coherent story.<sup>101</sup> The verdict they arrive at is one that fits with the narrative they have developed from the evidence. But what happens when the evidence is unreliable, such as false or misleading testimony from witnesses, or incomplete, such as material that was not turned over by the prosecutors as required by Supreme Court precedent?<sup>102</sup> In such cases, juries can reach erroneous verdicts, which might not be overturned on appeal because the errors are typically regarded as “harmless.”<sup>103</sup> A defendant is entitled to a fair trial, but not a perfect trial.<sup>104</sup> MacKillop and Vidmar argue that these evidentiary errors are not harmless because they lead juries to construct incomplete or inaccurate narratives. Defendants have difficulty

98. *Id.* at 948–55.

99. Kara MacKillop & Neil Vidmar, *Decision-Making in the Dark: How Pre-Trial Errors Change the Narrative in Criminal Jury Trials*, 90 CHI.-KENT L. REV. 957 (2015).

100. *Id.* at 960; *see also* Lempert, *supra* note 59, at 842–44.

101. MacKillop & Vidmar, *supra* note 99, at 960–61; *see also supra* note 42 (providing sources that describe the story-telling model).

102. *See, e.g.*, Brady v. Maryland, 373 U.S. 83 (1963) (holding that prosecutors’ withholding of evidence favorable to the defendant is a violation of due process).

103. MacKillop & Vidmar, *supra* note 99, at 965.

104. *See* Bruton v. United States, 391 U.S. 123 (1968) (“A defendant is entitled to a fair trial but not a perfect one.” (quoting Lutwak v. United States, 344 U.S. 604, 619 (1953))).

bringing these errors to light except when Innocence Projects, such as the one at Duke Law School, take up their cases.<sup>105</sup>

MacKillop and Vidmar see the need for police and prosecutors to turn over this evidence to the defense and they argue that without it, juries cannot perform their role adequately. There are Supreme Court precedents, such as *Brady v. Maryland*<sup>106</sup> and *Napue v. Illinois*,<sup>107</sup> that require police and prosecutors to turn over this evidence to defense counsel. The problem is that it is not always done. As a result, juries are denied tools that have been recognized as integral to a fair trial. Although some police departments and district attorneys are beginning to reopen closed cases and reexamine the evidence, the process should not depend on the work of Innocence Projects, after the fact, to bring these errors to light. MacKillop and Vidmar point to the account of one juror, who wrote about his experience as a holdout in a capital case, though he eventually capitulated.<sup>108</sup> The experience was not the reaffirming learning experience that Tocqueville envisaged for jurors. Instead, it was a frustrating and emotionally draining experience for the juror, who only learned of the gaps in the evidence after his jury service. Of course, it was a far more devastating experience for the defendants, who still remain in prison.

### C. Lessons from Abroad

Although the focus of the Chicago-Kent conference was the American jury, there are lessons from other countries that could be useful for the American jury. Jury systems face common challenges, such as how to keep jurors from doing their own research online or how to ensure that a venire is drawn from a fair cross section of the community, and yet different countries have developed different solutions. In some instances, the American jury could benefit from what has worked well abroad.

Thaddeus Hoffmeister observes in *Preventing Juror Misconduct in a Digital World* that American courts can learn from how other countries have addressed the problem of jurors performing outside re-

105. MacKillop & Vidmar, *supra* note 99, at 970–74 (describing some of the Duke Wrongful Convictions Clinic's cases).

106. *Brady*, 373 U.S. at 83.

107. 360 U.S. 264, 269 (1959) (holding that the presentation of false evidence by the state is a violation of due process).

108. MacKillop & Vidmar, *supra* note 99, at 974–79 (describing the juror account provided in J. L. HARDEE, JUSTICE OR INJUSTICE (2012)).

search on the Internet or sharing their views on social media.<sup>109</sup> Just as Justice Louis Brandeis had written that states can “serve as a laboratory” and try “novel social and economic experiments without risk to the rest of the country,” so, too, can other countries.<sup>110</sup>

Hoffmeister looks abroad to see how other countries have handled the problem of jurors turning to the Internet or social media. He finds that some countries, such as Australia, England, and Wales, have passed laws that prohibit jurors from engaging in this misconduct and impose jail time or fines as penalties.<sup>111</sup> He notes, however, that in some places, such as in New South Wales, Australia, these laws have not been enforced.<sup>112</sup> A less stringent approach is to hold jurors in civil contempt for such misconduct, but in some countries, such as England, contempt has included jail time for the most egregious violations.<sup>113</sup>

Hoffmeister points out that a number of countries have also used education to reach out to citizens, so that they understand the importance of jury duty as a civic obligation and are therefore amenable to following the court’s instructions and admonitions when they are called to serve. He mentions a booklet, *Your Guide to Jury Service*, used in England, which explains to jurors that they cannot discuss the case with anyone, either in-person or online.<sup>114</sup> Courts in the United States could use this booklet as a template; there is no need to reinvent the wheel. The exchange of jury practices can be a two-way street. The United States has developed model instructions that explain to jurors why they cannot use the Internet and social media to communicate about the trial; other countries could look to our model federal and state instructions if they want to use instructions to educate jurors.<sup>115</sup>

Now that we live in a digital world, countries have to consider how to ensure that jurors do not turn to the Internet and social media during the trial, and instead, adhere to the court’s instructions and the jurors’ oath to decide the case based only on the evidence presented in court. An approach that works in one country might well work in another. At the very least, the experimentation in different countries provides an array of approaches from which American courts can choose.

109. Thaddeus Hoffmeister, *Preventing Juror Misconduct in a Digital World*, 90 CHI-KENT L. REV. 981 (2015).

110. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

111. Hoffmeister, *supra* note 109, at 982–83.

112. *Id.* at 982.

113. *Id.* at 986–87.

114. *Id.* at 996.

115. *Id.* at 997–99 (providing a sample instruction).

Another problem that has plagued jury systems in a variety of countries is how to guarantee that the venire is drawn from a fair cross section of the community. Marie Comiskey, in *A Tale of Two Countries' Engagement with the Fair Cross Section Right: Aboriginal Underrepresentation on Ontario Juries and the Boston Marathon Bomber's Jury Wheel Challenge*, focuses on two high-profile cases, one in Canada and the other in the United States, to examine how each country grapples with a challenge to the fair-cross-section requirement.<sup>116</sup> She is interested in discovering "whether the questions raised in these two cases have any lessons with general principles applicable to each country."<sup>117</sup>

In Canada, one challenge for the jury system is the lack of representation of Aboriginal people on the jury rolls. This problem received attention in *R. v. Kokopenace* in which one of the defendants was convicted of first-degree murder and claimed that the jury rolls in the district in which he was tried did not represent Aboriginal people fairly.<sup>118</sup> This case followed a government report by Canadian Justice Frank Iacobucci, in which he studied the problem and identified many of the reasons Aboriginal people were not adequately represented on jury rolls. He found multiple barriers, from their lack of knowledge about the jury system and their distrust of the criminal justice system to requirements that they declare their Canadian citizenship and respond within five days in English or French to their jury summons or face punishment.<sup>119</sup> His report led to a government commitment to reach out to Aboriginal people, to educate them on the role of the jury, and to change some of the practices that deterred them from participating. In the case of *Kokopenace*, the Ontario Court of Appeal did find a violation of the fair-cross-section requirement and held that the government had not met its constitutional obligation to ensure representativeness.

Comiskey contrasts the successful challenge to the jury rolls in *Kokopenace* with the unsuccessful challenge to the jury-wheel in the trial of Dzhokhar Tsarnaev, who was charged with multiple murders in the bombing at the Boston Marathon.<sup>120</sup> Although Tsarnaev claimed

116. Marie Comiskey, *A Tale of Two Countries' Engagement with the Fair Cross Section Right: Aboriginal Underrepresentation on Ontario Juries and the Boston Marathon Bomber's Jury Wheel Challenge*, 90 CHI.-KENT L. REV. 1001 (2015).

117. *Id.* at 1002.

118. *R. v. Kokopenace*, 2013 ONCA 389, [2013] O.J. No. 2752 (Can. Ont. C.A.).

119. Comiskey, *supra* note 116, at 1007–11 (describing the main findings in FRANK IACOBUCCI, FIRST NATIONS REPRESENTATION ON ONTARIO JURIES: A REPORT OF THE INDEPENDENT REVIEW CONDUCTED BY THE HONOURABLE FRANK IACOBUCCI (2013)).

120. *See id.* at 1020; *see also* Seelye, *supra* note 3.



that African-Americans and those over the age of seventy were not fairly represented in the jury wheel, the district court judge did not find the latter group distinctive and did not find a significant disparity between African-Americans' representation in the wheel versus their proportion in the community based on an absolute disparity methodology.<sup>121</sup> The juxtaposition of the Canadian and American cases suggests to Comiskey that Canada might be open to making greater strides in this area, and that it might even be a "watershed moment"<sup>122</sup> in Canada given the government report and the Court of Appeal opinion in *Kokopenace*. Although *Kokopenace* has not reached the Canadian Supreme Court yet, the direction that Canada has taken so far could serve as a model for the United States.

Sanja Kutnjak Ivković's *Ears of the Deaf: The Theory and Reality of Lay Judges in Mixed Tribunals* examines the roles of lay judges and professional judges on mixed tribunals in a number of countries, and draws from empirical studies of these mixed tribunals that have found that the professional judges play a more active role than the lay judges.<sup>123</sup> She applies "status characteristics theory" to mixed tribunals. Professional judges enjoy high status and have specific status characteristics, such as legal training and legal reasoning. According to status characteristics theory, professional judges would be expected to play a more active role in mixed tribunals than lay judges. Mixed tribunals can be viewed as heterogeneous, formal groups that have been charged with the particular tasks of determining guilt or innocence and deciding on sentencing.<sup>124</sup> Although other characteristics, such as gender, age, and race, can play a role, they are "diffuse" characteristics. They are less likely to influence expectations of the professional and lay judges on the mixed tribunal when there are "specific" characteristics, such as legal training and skills, which are qualities that are directly relevant to the performance of the group's tasks.<sup>125</sup>

Kutnjak Ivković also looks at empirical studies of mixed tribunals in different countries. The practices and procedures of mixed tribunals vary from country to country. Yet the studies all demonstrate the dominant role of the professional judges, as predicted by status character-

121. Comiskey, *supra* note 116, at 1024–26.

122. *Id.* at 1028.

123. Sanja Kutnjak Ivković, *Ears of the Deaf: The Theory and Reality of Lay Judges in Mixed Tribunals*, 90 CHI.-KENT L. REV. 1031, 1056 (2015).

124. *Id.* at 1040–45.

125. *Id.* at 1046.

istics theory. For example, the professional judges prepare in advance of the trial because they have access to the dossier or file, which lay judges are not always given.<sup>126</sup> A professional judge is the presiding judge during the trial, and is largely responsible for asking questions and controlling the proceedings.<sup>127</sup> Lay judges, who are unfamiliar with the procedures especially at the beginning of their tenure as lay judges, tend to ask few questions. During deliberations, the professional judge is more likely to be able to sway the lay judges' views than the other way around.<sup>128</sup> Interestingly, professional judges often report that lay judges do not contribute much of significance to the decision-making process, whereas lay judges usually think that they do, especially when they have particular expertise in the subject matter or can educate the professional judge about community views.<sup>129</sup>

The perceptions of professional judges on mixed tribunals recall the earlier discussion at Oñati in which scholars from civil-law countries tended to have greater trust in the work of professional judges than lay participants.<sup>130</sup> Kutnjak Ivković points out that countries with civil law or socialist traditions are more likely to have adopted mixed tribunals than those with common-law traditions.<sup>131</sup> The apparent marginality of lay judges in mixed courts also supports the concerns of the American jury scholars at Oñati. The American jury scholars noted the hazards of judicial control over jury decision making; in particular, they saw it as a threat to the jurors' independence.<sup>132</sup>

Although Kutnjak Ivković focuses on mixed tribunals and the dynamics between professional and lay judges, her article raises questions for traditional juries as well. Traditional juries consist primarily of lay people, who are supposed to be equal in the jury room; however, there still are status differences that could affect the dynamics of their deliberations.<sup>133</sup> To what extent are jurors aware of these differences and to what extent should the judge play a role in alerting them to their

126. *Id.* at 1054–56.

127. *Id.* at 1058.

128. *Id.* at 1056–60.

129. *Id.* at 1061–63.

130. *See supra* Part I.C.

131. Kutnjak Ivković, *supra* note 123, at 1031.

132. *See supra* Parts I.A. and I.B.

133. *See, e.g.,* Erin York Cornwell & Valerie P. Hans, *Representation through Participation: A Multilevel Analysis of Jury Deliberations*, 45 *LAW & SOC'Y REV.* 667 (2011); Nancy S. Marder, *Gender Dynamics and Jury Deliberations*, 96 *YALE L.J.* 593 (1987).

possible effects?<sup>134</sup> Kutnjak Ivković's work focuses on the more pronounced differences in status between professional and lay judges on mixed tribunals, but it could also open the door to questions about the difference in jurors' status on traditional juries and how that might affect the dynamics of their deliberations.

#### *D. Learning from Practitioners*

Jury scholars can learn a lot about juries from practitioners. Working with jurors during trials, judges and lawyers have many opportunities to observe the jury system. Former jurors can provide feedback about their actual experience as jurors. At both the Oñati and Chicago-Kent conferences, practitioners shared their diverse experiences and informed perspectives with participants.

##### 1. Learning from Judge Holderman's Experiences with Juries

Judge James F. Holderman, a federal district judge in the Northern District of Illinois, shared his insights in a Keynote Address at the Chicago-Kent conference and in the *Foreword* to this Symposium.<sup>135</sup> In his remarks and *Foreword*, Judge Holderman was able to draw on his experience in working with juries over many years. He observed that jurors want to do a good job and need basic tools, such as understandable jury instructions and the opportunity to ask questions of witnesses, so that they can fulfill their role as effectively as possible. Judge Holderman's participation in the Seventh Circuit American Jury Project provided a key link between jury research and jury practice.<sup>136</sup> He and other judges took innovations that jury researchers had recommended and implemented them in their courtrooms to see how they worked and how they were regarded by the trial participants. As Judge Holderman described in his *Foreword*, jurors, lawyers, and other judges were largely supportive of these innovations.<sup>137</sup> In fact, Judge Holderman found that several of these innovations worked so well that he made them a permanent part of his courtroom, even after the pilot

134. See, e.g., Marder, *supra* note 133, at 606–12 (suggesting ways in which judges could make jurors more aware of the effects that gender can have on jury deliberations).

135. James F. Holderman, *Foreword*, 90 CHI.-KENT L. REV. 785 (2015).

136. SEVENTH CIRCUIT AM. JURY PROJECT COMM., SEVENTH CIRCUIT AMERICAN JURY PROJECT FINAL REPORT (Sept. 2008),

<http://cymcdn.com/sites/www.7thcircuitbar.org/resource/resmgr/imported/7th%20Circuit%20American%20Jury%20Project%20Final%20Report.pdf>.

137. Holderman, *supra* note 135, at 787.

program had ended. What better support can there be for these innovations?

## 2. Learning from Practitioners' Panels at Chicago-Kent and Oñati Conferences

At both the conferences at Oñati and Chicago-Kent, practitioners' panels<sup>138</sup> allowed jury researchers to learn from judges, lawyers, and former jurors about their experiences with juries.<sup>139</sup> One lesson that emerged from both panels, and especially from the former jurors on both panels, is that jurors try to do the best job they can. The judges on the panels, who said that they typically talk to jurors after the verdict and have found that jurors are serious about their role, reinforced this lesson.<sup>140</sup> Indeed, as the former juror on the Practitioners' Panel at the Chicago-Kent conference explained, he felt a deep and abiding sense of failure on the part of his jury because it did not reach a verdict on most of the counts it had to consider.<sup>141</sup> He had served as the foreperson of the jury in the first criminal trial of former Illinois Governor Rod Blagojevich, and the jury ended as a hung jury on all counts except one.<sup>142</sup> Although this former juror recognized that a hung jury is an accepted

138. The practitioners' panel at the Oñati conference consisted primarily of practitioners from the Basque Country in Spain, including a judge, a prosecutor, a defense attorney, a jury clerk, and a former juror from another part of Spain. The practitioners' panel at the Chicago-Kent conference consisted of practitioners from Chicago, including a federal district court judge, a former state court judge, a defense lawyer, a plaintiff's attorney, a jury consultant, and a former juror.

139. The Oñati practitioners' panel also included a jury clerk, who assists the jury and who sometimes helps jurors to draft the reasons for their verdicts, as required by Spanish law. See Jimeno-Bulnes & Hans, *supra* note 27 (manuscript at 4). The Chicago-Kent practitioners' panel also included a jury consultant, who often helps with jury selection and with tailoring arguments to the jury. Trial consulting appears to be a predominantly American development. See NEIL J. KRESSEL & DORIT F. KRESSEL, STACK AND SWAY: THE NEW SCIENCE OF JURY CONSULTING 64 (2004); Maureen E. Lane, *Twelve Carefully Selected Not So Angry Men: Are Jury Consultants Destroying the American Legal System?*, 32 SUFFOLK U. L. REV. 463 (1999).

140. David Erickson et al., Practitioners' Perspectives, Panel Presentation at the Chicago-Kent Law Review Symposium: Juries and Lay Participation: American Perspectives and Global Trends (Oct. 10, 2014) (notes on file with authors). American trial judges are among the most enthusiastic supporters of the jury system. Valerie P. Hans, *Attitudes toward the Civil Jury: A Crisis of Confidence?*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra* note 8, at 248, 261–65 (summarizing studies of judges and documenting their overall favorable views of the jury system).

141. Erickson et al., *supra* note 140 ("I failed to convince [the hold-out juror] of the truth I saw; it was not my fault, but we [the jury] failed.") (quoting James Matsumoto) (notes on file with authors).

142. See, e.g., Monica Davey & Susan Saulny, *Jurors Fault Complexity of the Blagojevich Trial*, N.Y. TIMES, Aug. 18, 2010, [http://www.nytimes.com/2010/08/19/us/19jury.html?\\_r=1&ref=us&pagewanted=print](http://www.nytimes.com/2010/08/19/us/19jury.html?_r=1&ref=us&pagewanted=print) (noting that the jurors convicted the defendant on one charge but "could not agree on the 23 other counts, including the most serious ones").

part of the American jury system,<sup>143</sup> he still felt that his jury had failed because it had been unable to reach a verdict on all counts. His sense of failure suggested how seriously he took his responsibilities as juror and foreperson. An audience member pointed out, though, that the apparent “failures” of jurors are often the result of mistakes made by others in the trial.

The former juror on the Practitioners’ Panel at the Oñati conference sat on a jury that did reach a verdict, but she too had felt an enormous sense of responsibility as a juror. At first, she had hoped to avoid jury duty. When she received her summons, she hoped to be just on the reserve list. Her next hope was to be excused, but she soon realized that she did not satisfy any of the reasons for an excuse. When she appeared for jury selection, she explained that she was “shocked” to find that those who had been summoned came from so many different walks of life.<sup>144</sup> She also found that once she was in court, she wanted to serve as a juror.<sup>145</sup> As a juror, she found the experience to be “a strange new situation,” but one in which she and the other jurors “worked hard” and took their role seriously.<sup>146</sup> In sum, she found that her time as a juror “was a positive experience.”<sup>147</sup>

One difference between the jury experience described by the practitioners at the Oñati conference and the practitioners at the Chicago-Kent conference was how new the jury experience still seemed to the practitioners in Oñati. The jury system went into effect in Spain in 1995 with the passage of the Jury Law.<sup>148</sup> However, jury trials have not been frequent.<sup>149</sup> Thus, many Spanish practitioners have had only lim-

143. See HARRY KALVEN JR. & HANS ZEISEL, *THE AMERICAN JURY* 453 (1966) (noting the fact that although a hung jury is a failure to deliver a verdict, it is also a “valued assurance of integrity, since it can serve to protect the dissent of a minority”); Hans Zeisel, ... *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 719 (1971) (explaining that the hung jury is “treasured because it represents the legal system’s respect for the minority viewpoint that is held strongly enough to thwart the will of the majority”).

144. Joxe Ramon Bengoetxea et al., *Spanish Lawyers, Judges & Jurors: Practitioners’ Perspectives*, Panel Presentation at the Juries and Mixed Tribunals across the Globe: New Developments, Common Challenges and Future Directions Conference (June 13, 2014) (notes on file with author). Although this panel was conducted in Spanish, it was simultaneously translated into English by Sarah Line.

145. See Marder, *supra* note 91, at 939–42 (describing the transformation prospective jurors in the United States undergo during voir dire—from wanting to be excused to wanting to serve).

146. Bengoetxea et al., *supra* note 144.

147. *Id.*

148. LEY ORGÁNICA DEL TRIBUNAL DEL JURADO [L.O.T.J.], B.O.E. n. 122, May 22, 1995 (Spain) (amended by Organic Law 8/1995 and Organic Law 10/1995).

149. See, e.g., Jimeno-Bulnes, *supra* note 22, at 609 (noting that jury trials have occurred less often than expected).

ited experience with the jury system. The practitioners on the panel reported that they are still adjusting to the jury system, and that there is a lot of work associated with it. For example, the prosecutor has to be sure to explain the cases in language that is clear to lay people.<sup>150</sup> She has to be careful to avoid technical language that the jurors would not understand. The presiding judge must ensure that the jury understands and respects the presumption of innocence. As described earlier, the presiding judge also has to prepare a series of questions that the jury will answer as part of giving reasons for its verdict.<sup>151</sup> The clerk sometimes assists the jury in answering these questions.<sup>152</sup> Indeed, the defense attorney, who had lost a high-profile case before a jury, was not convinced that the jury was a good fit for Spain's criminal justice system. He worried that jurors were influenced by the media and by their own prejudices. He liked the jury system in theory, but had misgivings about it in practice.<sup>153</sup> He admitted that he was "not used to this procedure" and suggested that it was still so new that he thought the people of Spain "were still not used to it."<sup>154</sup> Nonetheless, even the U.S. practitioners said they wanted to know how to guide jury decision making more effectively. Jurors are often given little direction about how to manage their tasks. As one juror on the Blagojevich jury said, the court in effect tells jurors: "'Here's a manual, go fly the space shuttle.'"<sup>155</sup>

### III. GOING FORWARD

The jury, with all of its paradoxes and possibilities, demands further study by scholars and practitioners in the United States and abroad. New questions have emerged and other issues have become more pressing because of legal and policy changes as well as discussions among jury researchers around the globe. We close this Introduction by identifying research questions and suggesting approaches for collaboration.

150. Bengoetxea et al., *supra* note 144.

151. *See supra* Part I.A.

152. *See supra* note 27 and accompanying text.

153. Bengoetxea et al., *supra* note 144.

154. *Id.*

155. Davey & Saulny, *supra* note 142 (quoting juror Steve Wlodek).

### A. A Research Agenda

Research issues that came to light during the Oñati and Chicago-Kent conferences could keep an army of jury scholars busy for decades. Here, we highlight a few specific research questions that have implications for the continuing health and functioning of the jury in contemporary society.

One issue to explore is reasoned verdicts. As described earlier,<sup>156</sup> the question whether lay citizens should provide reasons for their verdicts appeared to divide the participants at Oñati and is examined in several of the articles in this issue.<sup>157</sup> In describing the Oñati debate, we noted the apparent differences of opinion between American scholars and those from other countries. Scholars from civil-law countries assert that requiring reasoned verdicts strengthens the quality of decision-making. American scholars express two concerns. First, they worry about jury independence in a regime in which verdicts are accepted only if they meet professional judges' criteria. Second, as Jeffrey Abramson notes in his article,<sup>158</sup> requiring reasons could change the very nature of jury deliberation and decision making. This debate is an important one, but we do not have evidence one way or another about the accuracy of the underlying assertion—that requiring reasons promotes better legal fact-finding.

Some fascinating work in moral psychology suggests that reason giving, especially once a decision has been made, could be less causally important than we think.<sup>159</sup> Jonathan Haidt's model of moral judgment holds that people embark on reasoning to justify decisions reached primarily on their intuitions about what is right.<sup>160</sup> His work casts doubt on the causal role of reasoning, suggesting instead that intuition comes first and reasoning comes later. In Haidt's words, "the reasoning process readily constructs justifications of intuitive judgments, causing

156. See *supra* Part I.A.

157. See Lempert, *supra* note 59, at 846–47; Abramson, *supra* note 74, at 875; Burns, *supra* note 81, at 921.

158. See Abramson, *supra* note 74, at 875–76.

159. JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (2012).

160. Jonathan Haidt, *The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814 (2001) (describing his model). For applications of Haidt's theory to jury decisions, see Kayla A. Burd, *Moral Foundation Theory and Jury Decision Making* (Apr. 29, 2014) (unpublished manuscript) (on file with authors). For applications of Haidt's theory to law more generally, see Colin Prince, *Moral Foundation Theory and the Law*, 33 SEATTLE U. L. REV. 1293 (2010).

the illusion of objective reasoning.”<sup>161</sup> How might this apply to the process of offering reasoned verdicts in legal cases? This is an unexplored question worthy of study.

Even if reasoned verdicts are little different in quality, they could be important to a legal system’s legitimacy. This point, too, deserves systematic investigation. On this issue, it is interesting to consider the argument made by Kate Stith-Cabranes, who maintains that the American jury, with its secret deliberation and its general verdict, is at odds with much of contemporary legal culture in the United States.<sup>162</sup> Stith-Cabranes observes:

[The jury] does not fit comfortably into our modern constitutional and political culture. Many preeminent constitutional values of the founding period—private liberty, federalism, and local control—were well served by a requirement of jury verdicts in criminal trials. Over the past two hundred years, these values have been challenged, if not eclipsed, by competing values. Some essential characteristics of the jury . . . are difficult to reconcile with certain of the social and political values that characterize the latter half of the twentieth century.

....

The values that have become ascendant in the modern era, in constitutional decisionmaking as well as the larger legal culture, are rationality, equality, and freedom of expression.

....

[These three values] combine synergistically to condemn the exercise of unreviewable discretion . . . [A] commitment to equality, an abhorrence of disparity, and a demand for accountability in criminal trials . . . are difficult to reconcile with the essentially non-rationalistic and discretionary institution of the jury.<sup>163</sup>

Is Stith-Cabranes right? Interestingly, in the United States, which vigorously protects the secrecy of the jury deliberation, and in most criminal cases requires only a general verdict, it is becoming routine for jurors in high-profile cases to grant interviews with the press following the conclusion of their trials.<sup>164</sup> Perhaps these post-trial efforts

161. Haidt, *supra* note 160, at 822.

162. Kate Stith-Cabranes, *Faults, Fallacies, and the Future of Our Criminal Justice System: The Criminal Jury in Our Time*, 3 VA. J. SOC. POL’Y & L. 133 (1995).

163. *Id.* at 135–37.

164. See, e.g., Dana Ford, *George Zimmerman was ‘Justified’ in Shooting Trayvon Martin*, *Juror Says*, CNN (July 17, 2013), <http://www.cnn.com/2013/07/16/us/zimmerman-juror/> (CNN interview with a juror in George Zimmerman’s criminal trial on charges related to his killing of Trayvon Martin); Alyssa Newcomb, *George Zimmerman Juror Says ‘In Our Hearts, We Felt He Was Guilty’*, ABC NEWS (July 25, 2013), <http://abcnews.go.com/US/george-zimmerman-juror-murder/story?id=19770659> (ABC interview with a juror in George Zimmerman’s criminal trial on charges related to his killing of Trayvon Martin).



to explain the jury's verdict are motivated by the very value imperatives that Stith-Cabranes identifies.

Following the introduction in Japan of *Saiban-in seido*, a mixed court of professional and lay citizen judges, the practice arose for lay judges to give press conferences.<sup>165</sup> At the press conferences, lay judges talked about their reactions to the cases they heard and discussed their experiences as *Saiban-in*. The *Saiban-in* are limited by law as to what they can reveal about their deliberations with professional judges.<sup>166</sup> Even so, the Japanese press continues to value these opportunities to hear from the lay decision makers and the press continues to regard them as newsworthy.

The question of how citizen participation in legal decision-making affects a system's legitimacy arises multiple times in the articles in this Symposium. It is a key justification for the presence of jury systems. Commentators from Tocqueville onward, including the two of us, regularly point to the jury as a paradigmatic example of democracy in action. Understandably, a great deal of empirical jury research has focused on how well the jury performs, and how its performance might be improved.<sup>167</sup> Although this is a laudable goal, it has meant that we still know relatively little about the connections between the jury and democracy, and how having a lay participation system in place supports democratic practices. Empirical research on voir dire, for example, has uncovered some evidence of its limited effectiveness in weeding out biased jurors.<sup>168</sup> But that research focus means that we know much less about how citizens learn to perform their roles and to develop working relationships with judges during voir dire, which are purposes that Marder identifies as equally crucial.<sup>169</sup>

Another example is the effort to develop effective instructions to limit jurors' use of the internet and social media during trial.<sup>170</sup> Empiri-

165. See, e.g., Setsuko Kamiya, *Lay Judges Relieved Case Over But Enthusiastic about Experience*, JAPAN TIMES, Aug. 7, 2009, <http://www.japantimes.co.jp/news/2009/08/07/national/lay-judges-relieved-case-over-but-enthusiastic-about-experience/#.VRCd-fnF8k0> (reporting lay judges' remarks during a press conference following the first *Saiban-in* trial); see also Valerie P. Hans, *The Impact of Victim Participation in Saiban-in Trials in Japan: Insights from the American Jury Experience*, 42 INT'L J. L. CRIME & JUST. 103 (2014) (describing Japanese lay judges' post-trial discussions about the impact of victim statements on the lay judges).

166. See, e.g., Matthew J. Wilson, *Japan's New Criminal Jury Trial System: In Need of More Transparency, More Access, and More Time*, 33 FORDHAM INT'L L.J. 487, 516–19 (2010).

167. DENNIS DEVINE, *JURY DECISION MAKING: THE STATE OF THE SCIENCE* (2012) (summarizing empirical research on the jury).

168. See Marder, *supra* note 91, at 933–35.

169. See *id.* at 929–30 (describing additional purposes of voir dire).

170. See Hoffmeister, *supra* note 109, at 996–99.

cal research on effectiveness thus far is limited to how often jurors violate these instructions.<sup>171</sup> But, like voir dire, whether such instructions actually curtail juror behavior is just one of the dimensions that merits study. Draconian measures, such as criminal contempt penalties, could be quite effective, but they might have radiating consequences, such as a greater reluctance of citizens to serve or a decreased sense of trust between judges and jurors. High-profile news stories about the punishment of juror violations also might lead to a decline in the perceived legitimacy of jury verdicts. As Burns persuasively argues, the jury trial serves a broad range of values and any robust evaluation of it must attend to these values.<sup>172</sup> The point is that as we continue to study the jury system, we should pay attention to both the practical operation and the symbolic significance of juries.

Developments around the globe—with juries and other citizen decision-making bodies introduced in some countries and declining or eliminated in others—offer a prime moment for jury researchers to assess the democratic significance of juries.<sup>173</sup> Two provinces in Argentina, Neuquén and Buenos Aires, have introduced the world's newest jury systems.<sup>174</sup> In the 1990s, Russia, following the breakup of the Soviet Union, and Spain, after the death of the dictator Francisco Franco, reintroduced juries into their legal systems as part of democratizing reforms.<sup>175</sup> The country of Georgia introduced a jury system as well, though few jury trials have been held to date.<sup>176</sup> In Asia, Japan and Korea also passed laws to allow citizens to participate in legal decision

171. See, e.g., Nancy S. Marder, *Jurors and Social Media: Is a Fair Trial Still Possible?*, 67 SMU L. REV. 617, 633–41 (2014) (describing the empirical studies to date).

172. See Burns, *supra* note 81, at 907–08.

173. Valerie P. Hans, Hiroshi Fukurai, Sanja Kutnjak Ivković & Jaihyun Park, *Global Juries: A Plan for Research*, in THE PSYCHOLOGY OF JURIES: CURRENT KNOWLEDGE AND A RESEARCH AGENDA FOR THE FUTURE (Margaret Bull Kovera ed., forthcoming).

174. See, e.g., Luciana Bertoia, *BA Province Begins Trial by Jury*, BUENOS AIRES HERALD, May 21, 2014, <http://www.buenosairesherald.com/article/159982/ba-province-begins-trial-by-jury>; Leticia Lorenzo, *Las Enseñanzas del Primer Juicio por Jurados [Lessons from the First Jury Trial]*, PODER JUDICIAL DE NEUQUÉN, Apr. 11, 2014, [http://www.jusneuquen.gov.ar/index.php?option=com\\_content&view=article&id=3515](http://www.jusneuquen.gov.ar/index.php?option=com_content&view=article&id=3515).

175. Thaman, *Should Criminal Juries Give Reasons for Their Verdicts?*, *supra* note 22, at 628 (describing the reintroduction of the Spanish jury); Stephen C. Thaman, *The Good, the Bad, or the Indifferent: 12 Angry Men in Russia*, 82 CHI.-KENT L. REV. 791, 791–94 (2007) (describing the reintroduction of the Russian jury).

176. Anna V. Dolidze & Valerie P. Hans, *Jury Trial as Legal Translation: The Case of the Republic of Georgia* (May 30, 2013) (unpublished manuscript) (on file with authors).

making by serving on *Saiban-in seido* in Japan and advisory juries in Korea.<sup>177</sup> Taiwan is considering whether to take a similar step.<sup>178</sup>

As these new systems begin, there is a unique opportunity to study the immediate effect of lay fact finding on verdicts. In particular, they allow us to estimate how lay and professional judges agree in their verdict choices.<sup>179</sup> The experiences of these countries also will offer practical insights into how legal personnel are trained and how legal systems are modified to include lay citizens as decision makers. In addition, these new jury systems give us a chance to examine the long-term democratic effects of citizen participation in law. Surveys can track support for government, the rule of law, and the legal system before and after the introduction of a jury system. Assertions that jury service enhances civic engagement can be tested on populations that have just been given the opportunity to decide legal cases. Jury systems in established countries like the United States,<sup>180</sup> and in countries in which jury systems face serious challenges or are in decline, like Russia,<sup>181</sup> can provide important comparative data.

### *B. Collaborative Approaches*

To tackle these significant questions about the influence and operation of juries around the globe, jury researchers must address major methodological challenges. Hans and her colleagues have observed that some of the theoretical questions that have emerged about the role and impact of new and existing jury systems demand a range of methodological approaches.<sup>182</sup> Some questions can be readily answered by using traditional jury research methods. Consider, for example, testing to gauge the quality of jury fact finding. Mock jury

177. Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L.J. 315 (2007); Jae-Hyup Lee, *Getting Citizens Involved: Civil Participation in Judicial Decision-Making in Korea*, 4 U. PA. E. ASIA L. REV. 177 (2013).

178. Kuo-Chang Huang & Chang-Ching Lin, *Rescuing Confidence in the Judicial System: Introducing Lay Participation in Taiwan*, 10 J. EMPIRICAL LEGAL STUD. 542 (2013).

179. Sangjoon Kim, Jaihyun Park, Kwangbai Park & Jin-Sup Eom, *Judge-Jury Agreement in Criminal Cases: The First Three Years of the Korean Jury System*, 10 J. EMPIRICAL LEGAL STUD. 35, 42–43 (2013) (building on the judge-jury approach taken in early American jury research, and finding high rates of judge-jury agreement in the Korean advisory jury system). *See generally* KALVEN & ZEISEL, *supra* note 143, at 56 (finding in their empirical study that judge-jury verdict agreement occurred about three-quarters of the time).

180. Lempert, *supra* note 59, at 825–36 (providing a brief history of the American jury).

181. Stephen C. Thaman, *Nullification of the Russian Jury: Lessons for Jury-Inspired Reform in Eurasia and Beyond*, 40 CORNELL INT'L L. J. 355 (2007).

182. *See, e.g.*, Hans, Fukurai, Kutnjak Ivković & Park, *supra* note 173 (manuscript at 16).

research can be used to assess whether decision trees improve fact finding, as Comiskey and others have done.<sup>183</sup> But the comparative question of whether juries, lay judges, or mixed courts are superior fact finders is a more challenging question to test empirically.

Another key issue, as mentioned, is the need to study the connection between systems of citizen decision making and democracy.<sup>184</sup> Researchers can survey jurors to assess to what extent their attitudes toward the courts might have changed because of their jury service. Indeed, such surveys routinely demonstrate that former jurors' opinions tend to become more favorable toward government after their jury service.<sup>185</sup> This highlights one mechanism by which the presence of lay decision makers in a country's legal system could lead to greater public support and legitimacy for the system. But how can we study the diverse historical, legal, political, and contextual influences that lead one country to adopt mixed courts and another to adopt an independent jury system? Do these different approaches do equally well in promoting democracy? Some of these broader research questions seem to demand systematic case studies or other forms of comparative and historical research, which are approaches that are not typically in the methodological toolbox of most jury scholars.<sup>186</sup> Thus, work that addresses the broad effects of jury systems on citizens' attitudes would benefit from collaborations among jury researchers from different disciplines and with different methodological skills.

This observation leads us to our final point, which is the desirability of fostering collaboration among jury researchers around the world. At both the Oñati and Chicago-Kent conferences, conference participants addressed what they considered the most pressing research questions that should drive the next generation of jury research. As this Symposium illustrates, there is no shortage of ideas. But to maximize the potential of our research, it is important that researchers collaborate across methodological and geographical boundaries. To date, only a handful of jury studies have taken such a broad comparative approach.<sup>187</sup>

183. See, e.g., Comiskey, *supra* note 38; Ogloff et al., *supra* note 38.

184. See *supra* note 9 and notes 167–178 and accompanying text.

185. Diamond, *supra* note 8, at 285–86.

186. Geoffrey Samuel, *Comparative Law and its Methodology*, in RESEARCH METHODS IN LAW 100 (Dawn Watkins & Mandy Burton eds., 2013); Hans, Fukurai, Kutnjak Ivković & Park, *supra* note 173 (manuscript at 16).

187. See, e.g., Hans, Fukurai, Kutnjak Ivković & Park, *supra* note 173.

We propose that jury researchers use existing networks, as well as create new ones, to develop specific research projects that span across methodologies and countries but examine common theoretical and practical questions. The Lay Participation in Legal Systems Collaborative Research Network (CRN) of the Law and Society Association (LSA) is one such network already in place, and members regularly exchange information about their latest projects at the annual meetings of the LSA.<sup>188</sup> International Research Collaborative groups can likewise provide a structure for focused scholarly exchange on a specific project.<sup>189</sup> Consider research initiatives such as the Global Indicators Group, which is based on an interest in understanding the myriad effects of increasing reliance on social, economic, and political indicators around the world. This group consists of a network of researchers from multiple countries who have agreed to conduct “individual case studies of selected indicators and situations and [to] collaborate through a series of meetings and seminars in order to develop a theoretical framework for the way indicators act in practices of global governance.”<sup>190</sup> Another example is the Global Class Actions Exchange.<sup>191</sup> The group’s director, Deborah Hensler, outlined a framework for collaborative research at the start of the project and identified common research questions and techniques.<sup>192</sup> Researchers from more than a dozen nations are undertaking case studies of class actions in specific countries.

These and other approaches are useful models for collaboration that jury scholars might employ to work together on jury research. Specialized conferences, such as those held at Oñati, Chicago-Kent, and Cornell Law School, can provide meeting places where scholars can debate research questions and specific methodological choices, advise

188. *Lay Participation in Law International Research Collaborative*, CORNELL UNIV. LAW SCH., [http://www.lawschool.cornell.edu/research/lay\\_participation\\_in\\_law/](http://www.lawschool.cornell.edu/research/lay_participation_in_law/) (last visited May 29, 2015).

189. See, e.g., VALERIE HANS, DAVID ENGEL, SALLY MERRY, MASAYUKI MURAYAMA & BARBARA YNGVESSON, NSF AWARD 1126004: TRANSFORMING CROSS-NATIONAL THEORY AND RESEARCH THROUGH INTERNATIONAL RESEARCH COLLABORATIVES: FINAL REPORT TO THE NATIONAL SCIENCE FOUNDATION (2013), available at [http://www.lawandsociety.org/news/IRC-Final-Report\\_7-8-13.pdf](http://www.lawandsociety.org/news/IRC-Final-Report_7-8-13.pdf).

190. *Welcome to the Website of the Indicators as a Global Technology/Governance by Information Project*, INST. FOR INT’L L. & JUST., <http://www.iilj.org/research/indicatorsproject.asp> (last visited May 29, 2015).

191. See *About*, GLOBAL CLASS ACTIONS EXCHANGE, <http://globalclassactions.stanford.edu/about> (last visited May 29, 2015).

192. Deborah Hensler, *A Framework for Collaborative Research on Class Actions and Group Litigation*, GLOBAL CLASS ACTIONS EXCHANGE, [http://globalclassactions.stanford.edu/sites/default/files/documents/Hensler\\_Framework\\_pres\\_2008.pdf](http://globalclassactions.stanford.edu/sites/default/files/documents/Hensler_Framework_pres_2008.pdf) (last visited May 29, 2015).

one another on promising lines of inquiry, report on progress, and share their work with a broader audience by publishing it in Symposia such as this one.<sup>193</sup> Websites hosted by our respective universities are already set up to disseminate findings from collaborative jury research.<sup>194</sup>

### CONCLUSION

In sum, our hope is that the articles in this Symposium will spark further discussions and lead to new projects on the jury. We encourage collaborative research that will lead to novel approaches to studying the jury and other forms of lay participation in legal decision-making. Our further hope is that jury scholars and practitioners continue to meet on a regular basis—whether in Oñati, Chicago, or somewhere in between—and maintain an ongoing conversation about the jury so that the institution that Tocqueville observed during his travels to America in the 1830s remains a vibrant institution that continues to play essential roles in the American justice system and society.

193. See generally *Citizens as Legal Decision Makers*, *supra* note 14; Symposium, *Comparative Jury Systems*, *supra* note 14; Symposium, *The 50<sup>th</sup> Anniversary of 12 Angry Men*, *supra* note 14; Symposium, *The Jury at a Crossroad: The American Experience*, *supra* note 14.

194. At IIT Chicago-Kent College of Law, there is the Justice John Paul Stevens Jury Center. *The Justice John Paul Stevens Jury Center*, IIT CHICAGO-KENT COLL. OF LAW, <http://www.kentlaw.iit.edu/institutes-centers/jury-center/> (last visited Mar. 23, 2015). At Cornell Law School, there is the Lay Participation in Law website, [http://www.lawschool.cornell.edu/research/lay\\_participation\\_in\\_law/](http://www.lawschool.cornell.edu/research/lay_participation_in_law/).