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Introduction to Juries and Mixed Tribunals across the Globe: New Developments, Common Challenges and Future Directions

NANCY S. MARDER*

VALERIE P. HANS*

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Abstract

The introduction to the special issue describes the goals of the conference on Juries and Mixed Tribunals across the Globe, and identifies themes that emerged as jury scholars from all over the world examined different forms of lay participation in legal decision-making. The introduction focuses on common challenges that different systems of lay participation face, including the selection of impartial fact finders and the presentation of complex cases to lay citizens. The introduction and special issue articles also highlight new developments and innovative practices to address these challenges, including some tools, like decision trees, that remain highly controversial. The introduction closes by emphasizing the enduring political importance of citizen participation in law.

Key words

Jury; jury trial; mixed tribunal; reasoned verdict; decision tree; Saiban-in seido; advisory jury; political role of the jury; lay participation

Resumen

La introducción a este número especial describe los objetivos de la conferencia sobre jurados y tribunales mixtos en el mundo, e identifica los temas que surgieron cuando académicos de todo el mundo especializados en jurados analizaron diferentes formas de participación de legos en la toma de decisiones jurídicas. La introducción se centra en los desafíos comunes a los que se enfrentan los diferentes sistemas de participación de legos, incluyendo la selección de jurados imparciales y

Introduction to the special issue resulting from the workshop “Juries and Mixed Trials across the Globe: New Developments, Common Challenges and Future Directions” held at the International Institute for the Sociology of Law, Oñati, Spain, 12-13 June 2014, and coordinated by Nancy Marder (IIT Chicago-Kent College of Law – Chicago), Valerie Hans (Cornell Law School, Ithaca – New York), Mar Jimeno-Bulnes (University of Burgos–Spain) and Stephen Thaman (Saint Louis University School of Law, St. Louis – Missouri).

* Nancy S. Marder is Professor of Law, Director of the Justice John Paul Stevens Jury Center, and Co-Director of the Institute for Law and the Humanities. IIT Chicago-Kent College of Law. 565 W. Adams St., Chicago, IL 60661 (USA). nmarder@kentlaw.iit.edu

* Valerie P. Hans is Professor of Law, Cornell University. Cornell Law School. 104 Myron Taylor Hall. Ithaca, NY 14853-4901 (USA). valerie.hans@cornell.edu



la presentación de casos complejos a ciudadanos profanos en la materia. La introducción y el número especial también destacan nuevos desarrollos y prácticas innovadoras para afrontar estos retos, incluyendo algunas herramientas, como los árboles de decisiones, que todavía son muy controvertidas. La introducción finaliza, haciendo hincapié en la importancia política duradera de la participación ciudadana en el derecho.

Palabras clave

Jurados, juicios por jurado, tribunales mixtos, veredicto razonado, árboles de decisiones, Saiban-in seido, jurado consultivo, papel político del jurado, participación de legos

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1. The setting

Oñati provided a unique setting in which to hold a conference on “Juries and Mixed Tribunals across the Globe.” Oñati is in the Basque Country, about an hour’s bus ride from Bilbao, home of the Frank Gehry-designed Guggenheim Museum and a Calatrava-designed bridge. The twenty-five conference participants, drawn from all over the globe, met in Bilbao to begin the journey to Oñati. From Bilbao, the bus passed small towns and took winding roads up into the mountains to Oñati. The journey together marked the start of the conference both literally and figuratively.

Once we arrived in Oñati, we gathered for a welcome reception at the Residence. Over wine and Basque appetizers or *pintxos*, we discovered that our group represented well over a dozen countries. Some of those countries have a jury system while others employ a mixed tribunal system in which professional judges and lay people sit together to decide cases. Some of the countries had recently adopted their systems, whereas others had a longstanding tradition of lay participation in law. The common thread uniting conference participants was that all of us were interested in the many ways in which lay participants could serve as decision-makers in a country’s judicial system.

It is only a ten-minute walk from the Residence to the International Institute for the Sociology of Law (the Institute), where the conference took place, but the walk is also a journey back in time. The Institute is an ancient stone Spanish Renaissance building, constructed in 1543, so that young men could attend university without having to travel abroad. The Institute is housed in this ancient building with its elaborate facade, replete with symbols of learning, and even though the building no longer functions as a university, it remains, most definitely, a house of learning (<http://www.iisj.net/iisj/de/about-iisl.asp?nombre=5186>). The Institute hosts conferences from May through July and runs a graduate program with students and teachers from all over the world. So, in this ancient building in Oñati, far from our daily distractions, we prepared to spend two days engaged in extensive discussion about an ancient tradition, the jury, as well as modern variations and contemporary challenges.

2. Conference goals

One goal of this conference was to bring together jury scholars from across the globe so that we could learn about new jury and mixed tribunal developments worldwide. We organized the conference with the expert assistance of our colleagues Mar Jimeno-Bulnes, a Spanish scholar who has closely examined the development and challenges of the new jury system in Spain (Jimeno-Bulnes 2004, 2007, 2011), and Stephen Thaman, a comparative law scholar who has contrasted the lay participation systems in a wide range of countries (Thaman 2002, 2007, 2011). Their work was invaluable in helping shape the contours of the conference and in identifying the scholars we invited to Oñati for productive conversations.

It is demanding to analyze world jury systems, as close to fifty nations worldwide employ juries of lay citizens (Vidmar 2000, Marder 2011). Jury scholars who write in a language other than English face special challenges in communicating about their work and in reaching a broad audience beyond their own countries. This conference, in which we met face-to-face, gave international scholars an opportunity to present important lay participation developments in their countries to an audience that would otherwise be inaccessible to them. These scholars were able to explain expansions, retrenchments, and other changes in their home country and jury scholars were able to learn about developments they were unlikely to come across any other way. Everyone benefitted from the exchange.

One panel that facilitated this cross-country exchange was entitled “Practices and Innovations.” It included scholars from different countries who reported on developments around the world. The scholars on this panel included Marie

Comiskey (Canada), Valerie Hans (United States), Mar Jimeno-Bulnes (Spain), Jae-Hyup Lee (South Korea), and Stephen Thaman (United States). The idea behind this panel was that a practice tried in one country could serve as an example to other countries. What U.S. Supreme Court Justice Louis Brandeis once wrote about states' experimentation in a federal system is equally true of countries' experimentation in a global system: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country" (New State Ice Co. v. Liebmann 1932, p. 311). If an innovation in citizen participation worked well in one country, other countries could adopt it. If it did not work well, other countries could eschew it.

Another panel that encouraged cross-country exchange was entitled "Lay Participation in Mixed Tribunals." The scholars on this panel, including Claire Germain (United States), Sanja Kutnjak Ivković (United States), and Stefan Machura (Wales), described mixed tribunals in different European countries so that the variations could be compared. Some of the presentations focused on a particular country's use of mixed tribunals and offered a detailed description, whereas other presentations provided an overview of mixed tribunals across many countries so that a broad picture of the different practices emerged.

Another goal of the conference was to take a common problem and to have panelists describe different countries' approaches to that problem. The panel on "Jurors in the Age of the Internet" took this approach. Countries with traditional juries face the problem of jurors who use the Internet and social media to do research about the case on which they are serving or to share their views about the trial even while the trial is ongoing. The panelists, Thaddeus Hoffmeister, Nancy Marder, Caren Myers Morrison, and Caroline Teichner, though all from the United States, discussed different countries' approaches to this challenge in addition to different states' approaches in the United States. Countries, such as the United States, England, and Australia, have tried different strategies from using "sticks" (fines, contempt, and jail) to "carrots" (saving the online discussion of a case and giving it to the jurors after the trial has ended). In the United States, courts have adopted jury instructions that make clear to jurors that they must refrain from using the Internet and social media to communicate about the trial while it is ongoing. These instructions range from the single instruction often employed in federal court to the Illinois instructions repeated to jurors throughout the trial.

Similarly, the panel on "Avoiding Juror Bias" also addressed a common challenge faced by countries that use lay people—whether on juries or mixed tribunals—which is how to ensure that the lay people who are chosen to serve are impartial fact finders. The scholars on this panel, Kwangbai Park (South Korea), Masahiko Saeki (Japan), and Regina Schuller (Canada), described different approaches and techniques to identify or to reduce bias. Their work, much of it empirical, showed the limitations of current approaches to jury bias, and suggested ways in which current techniques could be made more effective.

Yet another goal of the conference was to explore the unique role that juries can play in a democracy. The French writer Alexis de Tocqueville, who traveled in the United States in the early 1830s and published *Democracy in America* in 1835, observed that the jury is far more than "a judicial institution" (Tocqueville 1835, p. 319). In fact, Tocqueville wrote that this was "the least important aspect of the matter" (Tocqueville 1835, p. 319). Rather, the jury, like the legislature, is "one form of the sovereignty of the people" (Tocqueville 1835, p. 319). Indeed, for Tocqueville, the jury was "above all a political institution" (Tocqueville 1835, p. 319). Tocqueville argued that the American jury was a political institution in the sense that it teaches men (and now women) important lessons in self-governance. He also described it as a political institution in another sense: the jury checks the power of judges by placing ordinary citizens "upon the judges' bench" (Tocqueville

1835, p. 318), and the jury and judges help to check the power of the other two branches, the executive and the legislature. Although a discussion of the jury as a political institution usually focuses on the American jury, other countries, particularly emerging democracies, have recognized the importance of having citizens participate in the court system.

Conference panels on "The Jury as a Political Institution" and "Juries and Democracies" explored the connections between the jury and democracy. The first panel included Robert Burns (United States), Shari Seidman Diamond (United States), Masahiro Fujita (Japan), and Hiroshi Fukurai (United States) and the second panel included John Jackson (England), Nikolai Kovalev (Canada), Richard Lempert (United States), and David Tait (Australia). Scholars, particularly from the United States, tried to convey the ways in which the American jury continues to serve as a political institution and found that Tocqueville's observations still ring true today. Scholars from an array of different countries considered the ways in which participation on a jury might enhance a court system, such as by making court decisions more in line with ordinary citizens' views, and by encouraging greater political participation, such as voting.

The final goal of the conference was to bring together practitioners and jury scholars so that jury scholars could learn from practitioners about how the jury works in practice. The conference setting in Oñati enabled us to draw practitioners from the local area, including a Clerk of the Court, a prosecutor, a defense lawyer, and the magistrate-president of the Gipuzkoa Appeal Court. Participation by a juror from the city of Burgos, who had served as foreperson in a jury trial, added a layperson's perspective to the group. The panel, entitled "Spanish Lawyers, Judges and Jurors: Practitioners' Perspectives," and organized by Joxerramon Bengoetxea, brought together these trial participants, some of whom had served together on several jury trials. They spoke in Spanish and their words were translated into English.

One point that emerged from the fascinating discussion that ensued was that the jury in Spain is still relatively new to practitioners and to citizens. It was passed into law in 1995 (*Organic Law 5/1995*), and there have only been a limited number of jury trials since then (Jimeno-Bulnes 2011, p. 609). The practitioners reported that they were still adjusting to their respective roles in a jury trial. The judge and lawyers on the panel mentioned that they have to remember to speak in clear and straightforward language that the jurors will understand. The defense attorney, who had recently lost a case, was not so sure that Spain was ready for a jury system. He worried that the public was overly influenced by the media and that this affected how impartial jurors could be. Meanwhile, the juror described how unfamiliar the role was to her and yet how seriously she had taken her responsibilities. This juror, like many of those called to serve as jurors around the globe, had hoped she would not be called to serve. When she was called and did not meet any of the criteria to be excused (Jimeno-Bulnes 2011), she embraced her service and tried to perform her new role as well as possible. This reaction, too, is similar to jurors in other countries (Diamond 1993).

Many of the challenges of the Spanish jury system are familiar to practitioners in any country with a jury system, but a few of the challenges, such as the requirement that the jurors give reasons for their verdict, have been limited to the Spanish jury system until recently (Jimeno-Bulnes and Hans 2016 [this issue]). After the European Court of Human Rights' decision in *Taxquet v. Belgium* (2009, 2010), Belgium joined Spain in requiring juries to give reasons for their verdicts (Thaman 2011, p. 663). The interest in having lay citizens provide the reasoning underlying their legal decision-making is only likely to increase.

3. Emerging themes

Although the conference organizers had several goals for the conference, what is so special about a conference is that discussion can proceed in unpredictable ways, and this conference was no exception. Themes emerged that the conference organizers had not anticipated.

One theme that emerged was the role of the layperson versus the role of the professional judge. There was a division between those who trusted the layperson to reach the best decision and those who placed more faith in the professional judge to reach the best decision, as we discuss in more detail elsewhere (Marder and Hans 2015). Those in the latter group thought that lay people still had a role to play in judicial decision-making, but it was in conjunction with or under the guidance of the professional judge. Those who took this view preferred a mixed tribunal to a traditional jury. In contrast, those who trusted the layperson were happy to allow the independent fact finding that is characteristic of common-law juries. The judge had his or her role during the trial and the jury had its role, but when it came time for deliberations, these scholars preferred that the jury performed its role independent of the judge

A related theme was whether jurors should have to give reasons for their verdicts. This theme had gained prominence ever since the European Court of Human Rights (ECtHR), and subsequently its Grand Chamber, heard *Taxquet v. Belgium*, in which the initial panel suggested that a jury might have to give reasons for its verdict, even though the Grand Chamber backed away from expressing that view as strongly as the panel had done. Again, the divide for the conference participants seemed to be between those who trusted lay people and those who trusted professional judges. Those who trusted lay people to reach a decision on their own suggested that they should not be expected to give reasons for their verdicts in the same way that a professional judge gave reasons. Moreover, to give reasons would be to try to constrain jurors to explain their views in ways that might be difficult for them, either because they might not all share the same reasons or because they might have reached a verdict without being able to identify which precise reasons contributed to that verdict. In contrast, those who trusted judges trusted them because they gave reasons for their decisions. If lay people were to participate as decision-makers, then they, too, had to give reasons. It was one way to ensure that the decision-maker had reached a fair decision and had not been misled by bias. However, those who put their trust in lay people pointed out that there were other mechanisms, such as *voir dire*, peremptory challenges, the oath, and group deliberations, to ensure that individual jurors were not making a decision based on bias. Those who put their trust in lay people, but who lived in Europe, worried about the fate of the traditional jury. They suggested that *Taxquet* might be the writing on the wall that the traditional jury, if it eventually has to give reasons for its verdict, will no longer be a traditional jury, but will move closer to becoming a mixed tribunal.

Finally, another related theme, which also emerged from the layperson-professional judge divide, is the proper tools to give a jury so that it can perform its role effectively. Many tools that help jurors to perform their role, such as taking notes during the trial or having a written copy of the instructions to follow when the judge reads the instructions aloud to the jury, are no longer controversial. However, one tool – the decision tree or decision trail (whose name varies depending on the country) – provoked the most debate. Again, the divide seemed to be along the same lines of trust in lay people versus trust in professional judges. Those who had trust in lay people did not want to require them to follow a decision tree. Instead, the jury should structure its deliberations however it saw fit. Those who took this view worried that whoever wrote the questions for the decision tree would also control the deliberations and this was an area in which the jury should have unfettered control. In contrast, those who supported the use of decision trees took

the view that this tool enabled the judge to give guidance to jurors without being overly intrusive. There was a sense that jurors were in need of guidance and should not be left on their own to figure out how to structure their deliberations and how to reach a verdict.

Although these emerging themes revolved around the question of trust in lay people versus trust in professional judges, this might be too stark a divide. We did not, after all, put these issues to a vote at the conference. Some might well trust lay people as legal fact finders but want to provide them with tools like decision trees to aid them in their decision-making task.

4. The articles

The articles included in this symposium draw from several of the panels that we organized and the themes that emerged during the course of our discussions. We describe the articles briefly below so that readers can glean the topics covered in this symposium. We also point out how particular articles sparked discussion of the emerging themes mentioned above. In addition to the papers presented at Oñati that appear in this symposium, other papers presented were published in the symposium on "Juries and Lay Participation: American Perspectives and Global Trends" in the *Chicago-Kent Law Review*. The conference and these publications constitute part of an ongoing conversation about juries, mixed tribunals, and lay participation.

4.1. *New developments, practices, and innovations*

Several articles in this issue of the *Oñati Socio-legal Series* explore new developments, practices, and innovations in juries and mixed tribunals around the world. One such article is *Judge-Jury Interaction in Deliberation: Enhancement or Obstruction of Independent Jury Decision-Making?* by Jae-Hyup Lee and Jisuk Woo. They focused on the relatively new Korean advisory jury system, which has two unusual features. The first is that the judge can provide information or opinions to the jury if the jurors cannot reach a unanimous verdict as to conviction or acquittal in criminal cases, and the second is that the jury has before it evidence pertaining to sentencing even while it is deliberating about guilt. Lee and Woo undertook an empirical study in which they used two types of shadow juries—one consisting of prospective jurors not selected to serve on a jury after voir dire and another consisting of people recruited by the court to serve as shadow jurors. They examined the deliberations of both types of shadow juries and assessed them according to six criteria. They found that the quality of the shadow juries' deliberations was "generally high" (Lee and Woo 2016, p. 194). They also examined the judges' interventions during deliberations and found that judges enhanced the jurors' understanding, particularly in complex legal areas where mistakes are more likely, such as using information relevant to sentencing in their determination of guilt. However, Lee and Woo also found that the judges learned from their interactions with the jurors in ways that they might not have learned from fellow judges. In sum, they found that "influence can go in both directions" (Lee and Woo 2016, p. 193).

In *Legal Interpreter for the Jury: The Role of the Clerk of the Court in Spain*, Mar Jimeno-Bulnes and Valerie P. Hans examined the emerging significance of the Clerk of the Court for Spanish jury trials. As we observed earlier, Spanish juries must provide the reasons for their decisions. In the first years after adoption of the jury in Spain, judges and juries struggled with the requirements of the new jury law, which required judges to develop lists of questions to put to the jury, and which demanded that juries compose legally sufficient responses to the questions, including the underlying reasoning for their verdicts. The Clerk of the Court, permitted to enter the jury room to assist the jury with the writing of its responses, has become an important intermediary between the demands of the jury law and

the participation of lay citizens. Jimeno-Bulnes and Hans's research, and that of other scholars, indicates that clerks have been able to help jurors avoid incomplete and contradictory responses. The clerk's helpfulness to Spanish juries is reminiscent of the judicial interventions in Korean advisory juries documented by Lee and Woo (2016 [this issue]). Nonetheless, there can be a thin line between assisting jurors with their writing and guiding jurors in their reasoning. The article raises questions about the proper approaches for clerks to take as they work with juries in their courtrooms.

María Inés Bergoglio, in her article *Citizen Views on Punishment: The Difference between Talking and Deciding*, described the mixed tribunal that the province of Córdoba, Argentina adopted in 2004. In Córdoba at that time, many people expressed a feeling of great insecurity and a need for harsh criminal penalties. Bergoglio reported public opinion data showing widespread agreement with these views. She then assessed whether the newly adopted mixed tribunal, in which three professional judges sit with eight lay citizens (four men and four women), reflected those popular attitudes. She compared the votes of the lay citizens (whose task it is to determine whether the crime charged was committed and whether the defendant was the person who committed it) with those of the professional judges in 213 sentences decided by mixed tribunals in Córdoba between 2005 - 2012, and found that judges and citizens agreed unanimously in 79% of the cases. When the lay citizens' votes differed from those of the professional judges (as they did in 32 out of 48 cases, or 66%), the lay citizens were more lenient than the professional judges. Thus, the attitudes that citizens expressed in the abstract on the need for greater punitiveness did not show up when citizens served as jurors on mixed tribunals and had to vote in actual cases. Interestingly, the greater leniency of lay citizens compared to professional judges in these Argentine tribunals is very much in line with judge-judge agreement patterns elsewhere (Kim *et al.* 2013, Vidmar and Hans 2007).

In *Civil Justice: Lay Judges in the EU Countries*, Stefan Machura examined the various ways in which lay judges are used to decide civil cases in countries that belong to the European Union (EU). He found that most EU countries (19 out of 28) include some form of lay participation in civil cases, but that there is "extraordinary diversity in the use of lay judges in civil matters" (Machura 2016, p. 247). The most prevalent way to use lay judges was to have them work under the guidance of professional judges as part of a mixed tribunal or to have them serve on a specialized court in which special expertise is required. He noted that civil juries in civil cases exist in theory as a vestige of the British Empire in Ireland, Northern Ireland, Scotland, England and Wales, but that in practice, civil juries are rarely used in these jurisdictions. Machura provided a number of reasons why countries find it useful to have lay judges involved in civil cases, regardless of what form that participation takes.

Marie Comiskey, in *Tempest in a Teapot—The Role of the Decision Tree in Enhancing Juror Comprehension and Whether It Interferes with the Jury's Right to Deliberate Freely?*, examined the practice of giving jurors a decision tree to guide their deliberations. After describing what a decision tree is and why it might be of use to jurors, she addressed the constitutional problems decision trees might encounter in the United States, particularly in criminal cases. Comiskey argued that a decision tree does not interfere with a criminal defendant's right to a jury trial. She also canvassed the different countries that use decision trees. She summarized the empirical studies that have been done in those countries, particularly in Australia and England, to show that decision trees tend to improve jurors' understanding of their task, though she acknowledged that the studies were limited. Comiskey tried to address the skepticism with which this tool is likely to be greeted in the United States by arguing that it should be viewed as an aid to jurors—one that will enhance their comprehension of their task—and that is how it is seen in a number of countries that make use of this practice.

If conference participants' responses are any indication, the decision tree is likely to face resistance in the United States. As we discussed above, a number of conference participants from the United States saw the decision tree as too intrusive and a limitation on the jury's prerogative to structure its deliberations as the jury sees fit. They saw it less as an aid and more as an intrusion. They worried that it shifted power away from the jury and to the judge because it would be the judge who formulates the questions and places them in a particular order for the jury's consideration. Others worried that the jurors might arrive at a verdict by taking a big-picture view of the case, and that a question-by-question approach might deny them that overarching perspective. However, conference participants from countries with mixed tribunals did not have the same adverse reaction as many of the American participants did. Rather, they saw the decision tree as one way for the professional judge to provide guidance, just as he or she does when professional judges and lay people serve on mixed tribunals together.

4.2. Common challenges

One common challenge that traditional juries and mixed tribunals face is how to ensure that lay participants will be impartial. Jane Goodman-Delahunty, Natalie Martschuk, and Anne Cossins, in *Programmatic Pretest-posttest Research to Reduce Jury Bias in Child Sexual Abuse Cases*, tested several interventions to see which was the most effective at reducing juror bias in child sexual abuse trials in Australia. One challenge that jurors face in sexual abuse cases is in assessing the credibility of a child's testimony. Jurors tend to believe that children are overly susceptible when they are questioned by adults, complicating the assessment of reliability.

Goodman-Delahunty and her colleagues used a pretest-posttest research approach to compare the impact of particular interventions designed to help jurors assess child testimony. The different forms of intervention included specialized information presented by a clinical psychologist expert witness, specialized information presented by a research psychologist expert witness, and a judicial instruction. The mock jurors who received each form of intervention were compared to mock jurors in a control condition who heard the same evidence but did not receive any intervention. All the interventions were effective in reducing misconceptions about child sexual abuse. Goodman-Delahunty and colleagues found that the mock jurors who received information from the clinical psychologist expert witness had the lowest score in terms of misconceptions.

Goodman-Delahunty *et al.* added a deliberation component to their design to examine whether the positive effects of these interventions persisted in group decision-making. Although deliberating mock jurors who had the benefit of one of the three interventions had fewer misconceptions than those in the control condition, unexpectedly, their mock juries tended to acquit the defendant at higher levels, compared to control groups of deliberating juries. The authors will carry out further analyses to discover how the interventions might have influenced the deliberation content and produced the unanticipated results.

Regina A. Schuller and Caroline Erentzen also focused on juror bias, with an emphasis on criminal trials in Canada. Their article, *The Challenge for Cause Procedure in Canadian Criminal Law*, examined the use of challenges for cause, which defendants may use when they are concerned that a prospective juror might be biased against them because of their race. Schuller and Erentzen explain that prospective jurors are presumed to be impartial, but defendants who belong to racial minorities can raise a challenge for cause based on race when there is a "realistic potential" that the community might be biased against members of that race. However, the challenged juror is asked only to respond to a single question about whether he or she can serve without bias, and to respond with only a "yes" or "no" answer.

Canada has a unique form of jury selection. Two individuals are selected from the jury panel, and they become "triers," who decide whether the third person whose name has been called from the jury panel can be impartial and serve as a juror (Schuller and Vidmar 2011). If the third person can serve, then the first trier is excused, and the second trier and the first juror decide about the next person called from the panel. If that person can serve, then the second trier is excused, and the first two jurors decide about the next name called. The second and third jurors then decide about the next name called. This process continues until the required number of jurors has been seated. Thus, jury selection is decided by lay people or fellow jurors.

Schuller and Erentzen tested the effectiveness of this process in screening out biased jurors by attending court or reviewing the transcripts of the challenge process in 23 Canadian criminal trials involving 32 defendants. They found that only 6.5% of prospective jurors said that they would not be able to hear the case impartially (Schuller and Erentzen 2016, p. 325), but that the "triers" excluded 20% of the prospective jurors who were asked if they could hear the case impartially (Schuller and Erentzen 2016, p. 326). The authors concluded from their research that only a small percentage of prospective jurors admit to bias, and that even fewer admit to bias when they must do so before the entire jury panel in the courtroom. They also found that the yes-no format of a single question is not well designed to lead to admissions of bias by prospective jurors, particularly given that it is difficult for individuals to recognize their own bias. Although jury selection in other countries is conducted without lay input, the problems with Canadian jury selection echo complaints about the difficulty of ascertaining bias in prospective jurors in many other countries (Vidmar 2000).

4.3. *The jury as a political institution*

Several articles in this issue focus on the jury's critically important role as a political institution. Tocqueville recognized this function of the American jury more than 180 years ago, and found it to be far more significant than the jury's role as simply a "judicial institution" (Tocqueville 1835, p. 319). Today, however, juries are under pressure to perform both roles well.

In *Popular Sovereignty and the Jury Trial*, Robert P. Burns took Tocqueville's observation seriously and explored the different ways in which the jury is a political institution. He pointed out that the standard account of the jury as a political institution is when the criminal jury engages in nullification. At that moment, the jury seems to be going outside the rule of law and exercising its sovereignty to reject the law or its application in a particular case. However, Burns saw the jury as a political institution every time it had to make factual and normative judgments. He also looked to the history of the American jury and noted that the jury was not just trier of fact, but also trier of law. Although the modern jury has lost some of this law-finding function, it has not lost it altogether. Vestiges of it remain particularly in the criminal jury, where the jury renders a general verdict and can interpret law and fact to reach its verdict. The American jury's political role is important because of the suspicion that Americans have of centralized power. Juries serve as a check on judges. He noted the "uneasy tension between distrust of the people's decision-making powers and an even greater distrust of what may be the easily corruptible (or ideological) power of the judge" (Burns 2016, p. 341). Burns also reminded readers of a useful constraint on the jury as a political institution: it performs its role within the confines of a trial, which provides discipline to its decision-making and limits the range of common-sense norms that it will be able to consider.

Masahiro Fujita, Nahoko Hayashi, and Syūgo Hotta, in *Trust in the Justice System: Internet Survey after Introducing Mixed Tribunal System in Japan*, explored the factors that influence the trust that people have in their justice system. Japan

adopted a mixed tribunal system, known as *Saiban in seido*, in which lay people participate alongside professional judges in criminal cases involving serious crimes. One reason for the adoption of *Saiban in seido* was to enhance the public's trust in the court system. Fujita and his coauthors undertook an empirical study, using online surveys sent to people in the Kanto area of Japan, to investigate whether peoples' interest in their justice system affected their trust in that justice system. The authors thought that, with the new system of mixed tribunals, the public would have more interest in the justice system because citizens could be called to serve on mixed tribunals, and that this interest might increase their trust. Among the authors' findings were that peoples' trust in the justice system did affect their general trust. They also found the reverse: that if people think they can trust other people, then they have more trust in their justice system. However, their data did not show that peoples' interest in the justice system promoted trust in the justice system, but it did show that trust in the justice system was determined by "the expectation of trial fairness and quality" (Fujita *et al.* 2016, p. 362). Thus, one way to increase peoples' trust in the justice system is to ensure that trials are conducted fairly.

The question of trust, and whether the public is more inclined to trust lay people or professional judges, came to the foreground in John D. Jackson and Nikolai P. Kovalev's article, *Lay Adjudication in Europe: The Rise and Fall of the Traditional Jury*. They undertook a survey of lay participation in both Eastern and Western Europe and found several trends that they find disturbing. Several Eastern European countries, such as Ukraine, which aspired to have a jury system, have not been able to implement one. Russia reintroduced its jury system during the glasnost following the fall of the USSR, but jury trials there have been undermined by police, prosecutors, and judges. Several Western European countries, such as Denmark, which had a jury system, have recently abandoned juries altogether or replaced them with mixed tribunals in which lay and professional judges decide together, as in Germany and France.

Jackson and Kovalev noted that even some common-law countries, such as England and Wales, with a strong tradition of juries, have begun to cut back on the right to a jury trial. One pressure on the jury system in England, Wales, and elsewhere is a demand that juries be more accountable for their decisions. There is growing distrust that those who serve as jurors will be impartial. Another pressure on the jury system is coming from decisions from the European Court of Human Rights (ECtHR), which has suggested that defendants have a right to know the reasons underlying the verdict. Some countries, like Spain, already have the requirement that juries must provide reasons for their verdicts; other countries, like Belgium, have recently added that requirement. Although the ECtHR has not gone so far as to say that traditional juries that do not provide reasons violate a defendant's human rights, the authors worry that the ECtHR is moving in that direction. Jackson and Kovalev pointed to a number of steps that some countries, such as England and Wales, are already taking on their own, such as providing jurors with decision trees. They expressed concern that such tools are being used not to aid jurors in their comprehension, but to exert judicial control over the verdicts of jurors.

This was one of the points on which conference participants disagreed. Those who place their trust in judges believe the effort by judges to exert more influence over jurors is a good one. Those who place their trust in citizens find this trend alarming. The decision tree can be seen as a tool by which judges can assist jurors to perform their task in a more organized and logical manner or it can be seen as a tool by which judges are trying to wrest power from jurors. Jackson and Kovalev's article made clear "which way the wind is blowing" for traditional juries in Western and Eastern Europe, but whether one finds those trends disturbing or encouraging depends on one's perspective.

5. After Oñati: next steps

After the conference at Oñati, and a bus trip back to Bilbao, we went our separate ways. However, just a few months later, in October 2014, some of us gathered in Chicago for a follow-up conference on "Juries and Lay Participation: American Perspectives and Global Trends," held at Chicago-Kent College of Law. The focus of the conference was on the American jury, but it built upon many of the themes discussed at Oñati. Conference participants continued to explore the jury's role as a political institution, appropriate tools for jurors, and lessons that could be drawn from juries and mixed tribunals in other countries. The Chicago-Kent conference included a practitioners' panel that mirrored the Oñati conference panel. The Chicago practitioners' panel, consisting of a former state court judge, a federal district court judge, a defense attorney, a plaintiff's attorney, a jury consultant, and a former juror, all came from Chicago (Marder and Hans 2015, p. 814 n. 139). The papers from the Chicago-Kent conference were published as a symposium in the *Chicago-Kent Law Review* (Marder and Hans 2015).

One lesson from the Oñati conference, reinforced by insights from the follow-up conference at Chicago-Kent, is the importance of bringing together jury scholars from all over the world. Whether we meet in Oñati, Chicago, or some other city, the important point is to meet and engage in face-to-face discussions. As Jackson and Kovalev's article suggested, juries, and the ways they are regarded, are changing. The changes in trial by jury, and the forces behind these changes demand scholarly attention, debate, and critique. A gathering that draws jury scholars from around the world helps us to stay current on new international developments and offers a broad perspective on global changes.

A second lesson is that these conferences, and the publications that result from them, need to be viewed as part of an ongoing conversation about juries and other forms of lay participation. The debates that emerged at the Oñati conference, such as trust in professional judges versus trust in ordinary citizens, are ongoing discussions about the contested meaning and varying significance of lay legal decision-making. These two lessons suggest the importance of undertaking collaborative research that examines similar issues with lay participation systems in a range of countries. There is a great need for jury scholars to examine the impact of employing the independent fact finding of juries versus the mixed decision-making of joint tribunals, the effectiveness of different technical and legal approaches to aiding citizen decision-makers, and the democratic potential of the jury (Hans et al. in press, Marder and Hans 2015). The introduction of new lay participation systems in Japan, Korea, and most recently Argentina (Bertoia 2014, Lorenzo 2014) offers a unique and valuable moment to undertake such collaborative work.

A third lesson that is unique to the Oñati conference is that scholarly exchange flourishes when scholars have the opportunity to leave behind their everyday concerns, journey to a remote location free from modern-day distractions, and spend two days thinking and talking about virtually nothing else but their subject: lay participation in the justice system. (Admittedly, we did talk about the *pintxos*.) We had that rare opportunity in the summer of 2014, thanks to the Institute at Oñati. It is up to us to make sure that too much time does not pass before we create another such opportunity.

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