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THE JURY'S ROLE IN ADMINISTERING JUSTICE IN THE U.S. INTRODUCTION TO SAINT LOUIS PUBLIC LAW REVIEW JURY ISSUE

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The contributors to this splendid issue of the Saint Louis University Public Law Review all took part in the conference: "Lay Participation in the Criminal Trial in the Twenty-First Century," which took place at the International Institute for Higher Studies in the Criminal Sciences in Siracusa, Italy, from May 25-29, 1999. In essence, Professors Darryl Brown, Valerie Hans, Stephan Landsman, Richard Lempert and William Pizzi (along with Professor Neil Vidmar, Professor Shari Seidman Diamond, Tom Munstermann and Judge Michael Dann) constituted the American contingent at this conference which united approximately fifty-five professors, lawyers and judges from twenty-eight different countries to discuss the future of lay participation in the criminal trial in the Twenty-First Century.

Each participant gave a short oral presentation of his or her paper in panels on topics such as the history and philosophy of lay participation, evidentiary problems in trials before juries and mixed courts, problems in evaluating the evidence and formulating the verdict and judgment in jury systems, the two new jury systems in Russia and Spain and lesser-known jury systems, such as those of Nicaragua, Belgium, Denmark, Norway and the Canton of Geneva.[1]

The sheer number of papers presented led to difficulties in publishing them together in the journal of the International Association of Penal Law, the *Revue Internationale de Droit Pénal*. After long discussions with the publishers, a compromise solution was reached: (1) the papers relating to the American jury trial would be published in the Saint Louis University Public Law Review in a special issue; (2) the numerous and lengthy articles in Spanish dedicated to the Spanish jury system and the introduction of lay participation in Argentina were

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1. Although the idea for this conference dates back to 1995 when I was at the Max-Planck-Institute for Foreign and International Criminal Law in Freiburg, Germany, and began discussing it with my *Doktorvater* Professor Albin Eser, another important stepping stone was the Law and Society Meeting in St. Louis in 1997, where I gave a paper on the new Spanish and Russian jury systems in a panel with Professors Brown, Hans, Landsman and Vidmar, which ended up in Vidmar's book WORLD JURY SYSTEMS (Neil Vidmar ed., 2000).

published in book form in Argentina;[2] and (3) the remainder of the papers dealing with the other European countries, South Africa, Japan and China were finally published in the *Revue Internationale de Droit Pénal*.[3]

The idea of the conference was to bring together specialists in the field of lay participation from Anglo-American jury systems and from European jury and mixed court systems to discuss the theoretical and practical aspects of the respective systems, to open up the exchange of ideas by providing a forum for the exchange of ideas among representatives of systems that had otherwise had little opportunity to learn about each other, and to finally try to elaborate some general theses about lay participation for the use of countries undergoing criminal procedure reform. Besides representatives from Common Law and European countries, the conference was enriched by representatives from areas which are currently in the process of active reform efforts and in which the question of lay participation is hotly contested: Latin America, Asia and Africa.

Many new friendships and close working relationships developed in Siracusa. Participants from outside the Common Law were able to benefit greatly from the contributions from the American and British participants, in light of the many years of profound sociological and psychological research into the functioning of juries and the refinement of the law of evidence which has taken place in our jury systems. On the other hand, the Anglo-American contingent was introduced to a plethora of new forms of juries and mixed courts which cannot but provoke one to more critically assess one's own system. Besides several projects undertaken by individual participants which grew out of these new friendships, at least two further meetings have their roots in the 1999 Siracusa Conference.

From June 1 through June 6, 2000, the Japan Federation of Bar Associations organized a conference to address the issue of which form of lay participation should be adopted in Japan in the upcoming judicial reforms. Satoru Shinomiya, one of the leaders of the Japan Federation of Bar Associations and Professor Takashi Maruta, who participated in the Siracusa conference, asked me to help them organize this conference, which eventually included several of the Siracusa participants: Professors Richard Lempert, Albin Eser, John Jackson, Edmundo Hendler, Brazilian lawyer Ana Paula Zomer and myself, as well as Spanish political philosopher Carmen Gleadow, French Judge Marcel Lemonde and Danish Professor Eva Smith.[4] The

2. *See* JUICIO POR JURADOS EN EL PROCESO PENAL (Rubén O. Villela ed., 2000).

3. 73 REVUE INTERNATIONALE DE DROIT PÉNAL (First and Second trimesters 2001).

4. The papers from this conference will be published in a forthcoming of the SAINT LOUIS - WARSAW TRANSATLANTIC LAW JOURNAL. My contribution to this issue also contains the "Theses of the Conference" elaborated in Siracusa, which were left out of the issue of the *Revue Internationale de Droit Pénal.*

Japanese Justice System Reform Council finally issued a report in June 2001[5] in which it decided to introduce a mixed court, rather than a jury, but the discussion in Japan is continuing as to what type of mixed court system would be best in that country.[6]

Also as a result of the Siracusa conference, Professor Valerie Hans and Dr. Sanja Kutnjak Ivkovich organized the "Collaborative Research Network on Lay Participation in Legal Decision Making" which organized three panels at the Meeting of the Law and Society Association and the Research Committee on the Sociology of Law, which took place from July 4-8, 2001 in Budapest, Hungary, and dealt with world jury systems, jury decision-making and decision-making in mixed courts. Among the Siracusa participants who attended and gave papers were journal authors, Professors Valerie Hans, Stephan Landsman, Richard Lempert and Neil Vidmar as well as John Jackson (Northern Ireland), Katie Quinn (Ireland), Sanja Kutnjak Ivkovich (Croatia-US), Asbjorn Strandbakken (Norway), Stefan Machura (Germany), Ana Paula Zomer (Brazil), Tom Munsterman (US), Marina Nemytina (Russia) and myself.[7] The Collaborative Research Network also attracted new participants in Maria del Mar Bulnes (Spain), Attila Bado (Hungary), Takeshi Nishimura and Hiyoshi Sato (Japan).

The contributions published in this issue of the Saint Louis University Public Law Review, while restricted to discussing the American criminal (and civil) jury system, raise issues that are also relevant to other systems using lay participation. All are implicitly *reform-oriented*, that is, they are aimed at improving the workings of the U.S. jury or, in the case of Professor Pizzi's contribution, calling into question its centrality in our system. The contributions of Professors Brown, Hans, Landsman and Lempert are all aimed at, directly or indirectly, *increasing* the role of jurors in judicial factfinding *and* in increasing their responsibility for assuring the *just nature of their verdict*.

Professor Landsman writes about how American rules of evidence, and specifically the new United States Supreme Court decision in *Daubert v.*

5. The English version is available on the Internet. THE JUSTICE SYSTEM REFORM COUNCIL, RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL: FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY (June 12, 2001), *available at* http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html (last visited Mar. 26, 2002).

6. I was invited to give a talk to the Japan Federation of Bar Associations on December 13, 2001, in Tokyo, to give some suggestions as to the type of mixed court Japan should introduce.

7. My presentation was on the new system of jury and mixed courts introduced in Venezuela in 1998. To show how short-lived reforms can be, the Venezuelan jury courts were eliminated in a partial reform of the Venezuelan Code of Criminal Procedure in November of 2001. Ley No. 54, Ley de Reforma Parcial del Código Orgánico Procesal Penal, reprinted in GACETA OFICIAL DE LA RÉPUBLICA BOLIVARIANA DE VENEZUELA 37,322 (Nov. 12, 2001).

Merrell Dow Pharmaceuticals, Inc.,[8] have taken from the jury to the judge the competence to decide a number of evidentiary issues. This "blindfolding" of the jury, or its treatment like "mushrooms" by being "kept in the dark and fed an ample supply of horse manure," extends also to procedural rules which prevent them from knowing, in criminal cases, the effects of a finding of not guilty by reason of insanity or the magnitude of the punishments which can be imposed upon a finding of guilt.[9] Landsman pleads for a more active role for the jury than current evidentiary and procedural rules allow, and, based on recent social science research, expresses confidence in jurors' ability to function as "active information processors who work diligently to integrate the proof and their life experiences into a narrative that explains and resolves the case before them in light of the legal categories presented for decision." Implicit in Professor Landsman's paper is also support for taking off the jury's blindfold with regard to the threatened punishment.[10] In the new jury systems in Russia (1993) and Spain (1995) juries are not blindfolded as to the threatened sentence and, especially in the case of Russia, may even recommend lenience which will allow sentencing below the statutory minimum sentence.[11]

Professor Richard Lempert's paper, which discusses the recent United States Supreme Court opinion in *Old Chief v. United States*,[12] certainly joins in Professor Landsman's assessment of the capacity of the jury as competent factfinders. He stresses that the jury should not be blindfolded to facts which enrich the "narrative relevance" of the story of the case provided by the parties, basing his analysis also on social science research into the way juries think about and decide cases. As with Professor Landsman, Professor Lempert would not shy away allowing juries to deal with an increasing amount of hearsay, and even evidence related to the facts of the case which could arouse the passions of the jury, such as gory autopsy photos.[13] Both the increased admissibility of hearsay and the emphasis on giving the jury a more complete picture of the evidence, would tend to make American trials look a bit more like their Continental European counterparts, in which the court is trusted to

8. 509 U.S. 579 (1993).

9. *See* Shannon v. United States, 512 U.S. 573 (1994).

10. There is increasing support for returning to jury sentencing in non-capital cases due to the failure of sentencing guidelines and the excessive severity of current U.S. legislation in relation to sentencing. *See* Adriaan Lanni, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?* 108 YALE L.J. 1775 (1999).

11. *See* Stephen C. Thaman, *Europe's New Jury Systems: The Cases of Spain and Russia*, *in* WORLD JURY SYSTEMS 319 (Neil Vidmar ed., 2000).

12. 519 U.S. 172 (1997).

13. He agrees with *Old Chief*, however, that accounts of prior criminal conduct or prior convictions, should be an exception.

"freely evaluate the evidence" in its entirety and, in many jurisdictions, is obligated to attempt to ascertain the truth while acting as an impartial arbiter between the parties.

In their papers, both Professors Landsman and Hans support the Arizona Jury Reform Project's[14] emphasis on allowing juries to actively ask questions during the trial and even to begin discussing the facts of the case before they retire to deliberate. Professor Hans is aware that the more interaction there is between lay and professional judges, the more a jury will begin to look like a Continental European mixed court, where professional and lay judges are theoretically equals in deciding all questions related to fact, law, guilt and punishment.[15] Allowing the parties to divine the leanings of the jury through their questions, will also make their decision making more predictable than where the jury remains "sphinxlike" and inscrutable.[16]

Now clearly the amount of factual evidence given to a jury depends on the breadth of the legal issues deemed to be within their competence. Whereas juries in Continental European systems are often restricted to deciding issues of "naked fact," and it is the professional bench which then applies the law to the facts the juries find to be true in their special verdicts,[17] the American jury has won some significant battles recently in regaining competence which legislation and judicial decisions had transferred to the professional judge. Professor Brown seizes on the decision in *United States v. Gaudin*,[18] which allows the jury to determine elements of a criminal offense which in Europe would definitely be considered to be "legal" in nature and therefore for the professional judge, and the decisions in *Jones v. United States*[19] and *Apprendi v. New Jersey*,[20] which appear put an end to legislative attempts to reinterpret substantive factual elements of criminal offenses as if they were mere "sentencing factors" for the professional judge. While the "conduct rules" of the criminal law must be fixed and clear, so as not to violate due process, the "decision rules" are broader and implicitly give the adjudicator discretion within which to assess the "blameworthiness" of the breach of the conduct

14. On Arizona jury reform, see B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 IND. L.J. 1229 (1993).

15. But research has shown that early English jury trials often looked like modern Continental European mixed courts, with free exchanges between jury and judge, judges using pressure to get juries to change their verdicts, deliberations by the jury in open court in the presence of the judge, etc. *See* John H. Langbein, *The Criminal Trial before the Lawyers*, 45 U. CHI. L. REV. 263, 285-96 (l978).

16. *See* MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 44 (1997).

17. *See* Thaman, *supra* note 11.

18. 515 U.S. 506 (1995).

19. 529 U.S. 848 (2000).

20. 530 U.S. 466 (2000).

rules. This discretion borders on "jury nullification" in some instances, unless the jury is also given discretion in assessing punishment.[21]

If we lump together the views of Professors Brown, Hans, Landsman and Lempert we see an active jury which will be treated as the mature and responsible finder of virtually all of the facts relevant to an assessment of guilt, and also will be given the power to determine whether or not a conviction should flow from the finding of the facts, and if so, what the parameters of the judicial sentencing power will be.

Professor Pizzi gives us a much more skeptical view of the American jury. While juries are theoretically available in all but the most petty of misdemeanors, the pressure put on defendants by Draconian sentencing parameters, excessive power in the hands of prosecutors, and compliant judges who "punish" unsuccessful defendants who go to trial , lead most defendants (even some innocent ones)[22] to give up the right to trial by jury and enter plea bargains to minimize their losses. Ironically, one of the results of our system of plea-bargaining, enforced by the threat of Draconian sentences is that, as in Europe, usually only the most serious cases (ones where no acceptable plea bargain is forthcoming) or where the defendant definitely insists on his or her innocence, does the case go to trial.

The lessons Professor Pizzi draws from these shortcomings of the American system are, however, different than those that the other authors apparently would choose. In a progressive, humane criminal justice system with rational sentencing alternatives,[23] innocent people would not forego a trial due to fear of vindictive sentencing. Yet the solution is not necessarily to develop a simpler method of trying cases, such as introduction of smaller Continental European style mixed courts, but rather to develop a fair and just way to differentiate between cases that should be tried, i.e., where there are clear questions of guilt or innocence, and those that need not be–where guilt is

21. Much of so-called jury nullification, historically, was "sanction nullification," that is, the jury refusing to convict because it was convinced the sanctions were too severe. To avoid this, many European jury systems brought the jury into the sentencing decision, preferring to have a "true" decision on the facts at the cost of lenience in sentencing. On England, see Thomas A. Green, *The English Criminal Trial Jury and the Law-Finding Traditions on the Eve of the French Revolution*, in THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY: 1700-1900 *at* 44-45 (Antonio Padoa Schioppa ed., l987); on France, see FRANÇOISE LOMBARD, LES JURÉS: JUSTICE REPRÉSENTATIVE ET REPRÉSENTATIONS DE LA JUSTICE 272-74 (1998).

22. Stephen C. Thaman, *Is America a Systematic Violator of Human Rights in the Administration of Criminal Justice?* 44 ST. LOUIS U. L.J. 999, 1015-16 (2000).

23. For a compelling legal-philosophical justification of "minimal" criminal law, see LUIGI FERRAJOLI, DIRITTO E RAGIONE: TEORIA DEL GARANTISMO PENALE 326-482 (5th ed. 1998).

clear due to the flagrancy of the crime, a voluntary confession given in the presence of counsel or the otherwise convincing nature of the proof.[24]

Professor Pizzi also does not apparently trust in the jury's ability to be competent factfinders in cases involving DNA and other complicated evidence, though he points to no evidence why single American judges (chosen as they often are largely due to political rather than scholarly or intellectual clout) would, either alone or with a couple of lay assessors, do any better in such cases than twelve more or less randomly selected citizens.

Pizzi also criticizes the time-consuming and hyper-complicated way we select juries in criminal cases as being a reason why they are used less today than before and suggests the elimination of peremptory challenges, relying on England's step in that direction and Justice Marshall's concurring opinion in *Batson v. Kentucky*.[25] Some of the difficulties of picking juries are also averred to in the report on the U.S. jury provided by Orem, Abrami and Brown and form the gist of Professor Vidmar's first-hand account of his work as a jury consultant in a number of civil and criminal cases. The question is, of course, whether a fair jury can be picked in our diverse society, without considerable attorney *voir dire* and use of peremptory challenges. One could, of course, eliminate the requirement of unanimity, which was done in England and has been permitted by the U.S. Supreme Court,[26] but many think this would result in the marginalization of minority jurors. Clearly the requirement of unanimous juries compels both sides (and especially the prosecutor) to bend over backwards to find uncooperative and potentially nullifying jurors. Another possibility would be a method of ensuring that each panel of jurors summoned to a criminal court at the beginning of jury selection more or less represented a racial, sexual and social cross-section of the community in the judicial district. The Supreme Court has, however, limited the fair cross-section requirement of the Sixth Amendment to the compilation of jury lists for the entire judicial district, and not for the panel called for a particular case.[27]

Although it is interesting to think of how mixed courts would work on American soil,[28] it is unlikely that our Supreme Court would, even in the

24. For a comparative selection of statutes and case law relating to various European modes of avoiding the full trial, see STEPHEN C. THAMAN, COMPARATIVE CRIMINAL PROCEDURE: A CASEBOOK APPROACH (forthcoming 2002) (manuscript at 141-63, on file with author).

25. 476 U.S. 79 (1986).

26. See Apodaca v. Oregon, 406 U.S. 404 (1972), which allowed verdicts of ten of twelve jurors. All European jury systems also allow majority or qualified majority verdicts.

27. See United States v. Nelson, 277 F.3d 164 (2d Cir. 2002), in which the trial judge tried to ensure just such a cross-section by manipulating the use of peremptory challenges and challenges for cause, leading to reversal in a notoriously controversial New York case.

28. Because of innate American anti-authoritarian attitudes, lay assessors here might not be the acquiescent "nodders" or "ornaments" they are accused of being in countries like Germany

distant future, allow mixed courts to masquerade as the *juries* contemplated by the Framers in Article III and the Sixth Amendment.[29] Thus we must read these contributions, with the exception only of Professor Pizzi's, as providing an optimistic view of the ability of American juries, given thoughtful reform efforts to improve their ability to digest evidence in complicated and longer trials, to competently handle *all* the evidence and *all* the issues in criminal (and civil) cases and, what's more, to use its discretion in its role as *conscience of the community*, to flexibly fashion just results based on this fact-finding, in a way that positivistic Continental European legal philosophers would frown upon. Though these contributions relating to American law have been plucked out of the context of a comparative law conference, their sophisticated analysis, based as it is on legal, sociological and psychological studies into how juries (and human beings in general) make decisions, cannot help but be valuable to jurists in other countries with Anglo-Saxon or Continental European jury courts or with mixed courts in grappling with the difficult problems relating to the finding of facts, appreciation of its legal significance, and the reaching of the moral decision of how society should respond in the event of a condemnation.

and the former Soviet bloc. In the first full year of Venezuela's new system of juries (for the most serious crimes) and mixed courts (for mid-range crimes), juries (292 trials) acquitted thirty-three percent of the time and the mixed court (one professional judge and two lay assessors, in 1,233 trials) acquitted forty-one percent of the time! REPUBLICA BOLIVARIANA DE VENEZUELA, OFICINA NACIONAL DE PARTICIPACIÓN CIUDADANA (2001) (statistics on file with author).

29. Germany, France and Italy transformed their juries into mixed courts while maintaining the name of "jury" or "assizes court." The conservative *Partido Popular* in Spain is trying to interpret its constitutional provision for "trial by jury" in the same way to transform Spain's new jury into a mixed court. *See* ANABEL DÍEZ & JULIO M. LÁZARO. *El Pacto de la Justicia mantiene en manos del Congreso la elección del Poder Judicial*, EL PAÍS. May 29, 2001, at 15. Venezuela eliminated its two-year old jury system in November of 2001 in favor of the mixed court. Ley No. 54, Ley de Reforma Parcial del Código Orgánico Procesal Penal, reprinted in GACETA OFICIAL DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA 37,322 (Nov. 12, 2001).