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WHAT DIFFERENCE DOES A JURY MAKE?

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I. INTRODUCTION

There is a remarkable renaissance in the use of juries and other forms of lay participation worldwide. In recent years, in Asia and elsewhere, countries have revitalized or expanded their existing jury or mixed court systems, or have introduced new decision making bodies that include lay citizens as decision makers.² Historically, before the modern development and maturation of the legal profession, the use of lay citizens to decide legal cases was a widespread practice. Ordinary members of the local community were cheap and readily available to be conscripted into service as decision makers, and they possessed the additional advantage of knowing local norms and customs. Today, there are substantial numbers of lawyers and law-trained judges in most countries around the globe. Even though law-trained decision makers are plentiful, many countries have shown new interest in incorporating lay

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² Nancy S. Marder, *An Introduction to Comparative Jury Systems*, 86 *CHI.-KENT L. REV.* 453 (2011).

citizens into decision making bodies in their legal systems.

Several major approaches to employing lay citizens have been taken. In some countries, jury systems, where the decision making body is composed exclusively of laypersons, are used. In other nations, laypersons and professional judges decide together in mixed courts or mixed tribunals.³ In some jurisdictions, lay judges or lay magistrates, either individually or together in panels, decide legal cases.⁴

Korea and Japan have taken distinctive paths in their efforts to expand lay participation in legal decision making. Korea introduced an advisory jury system during an experimental period that has now spanned four years.⁵ Korean judges, lawyers, and court professionals worked to prepare the public and the courts for the introduction of the new jury system.⁶ Korea's first jury trial in its history took place in February 2008.⁷ The courts have systematically collected data from their bold experiment with direct democracy, and a picture of the first several years of Korea's advisory jury is beginning to emerge.⁸

In contrast, Japan introduced a mixed decision making body, *Saiban-in seido*, which is composed of lay and professional judges who decide on verdicts and sentencing decisions in serious criminal cases.⁹ The first trial was held in 2009 and was accompanied by considerable publicity and acclaim.¹⁰ The Japanese Supreme Court and Japanese and international scholars have accumulated a wealth of information about public reaction to *Saiban-in seido* and the

³ Valerie P. Hans, *Introduction: Citizens as Legal Decision Makers: An International Perspective*, 40 CORNELL INT'L L. REV. 303 (2007); Valerie P. Hans, *Jury Systems around the World*, 4 ANN. REV. L. & SOCIAL SCI. 257 (2008); NEIL VIDMAR, *WORLD JURY SYSTEMS* (2000).

⁴ DORIS M. PROVINE, *JUDGING CREDENTIALS: NON-LAWYER JUDGES AND THE POLITICS OF PROFESSIONALISM* (1986).

⁵ Sang Hoon Han & Kwangbai Park, *Citizen Participation in Criminal Trials of Korea: A Statistical Portrait of the First Four Years*, YONSEI L. J. (this issue); Jae-Hyup Lee, *Korean Jury Trial: Has the New System Brought About Change?*, 12 ASIAN-PAC. L. & POL'Y J. 58 (2010).

⁶ Kwangbai Park et al., *Preparing the Ground: The Case of Korea*, paper presented at the annual meeting of the Law & Society Ass'n, Baltimore, MD (July 7, 2007) (describing the research conducted by members of the Presidential Reform Commission). The survey data were published in Korean in: Presidential Committee on Judicial Reform, Republic of Korea, *Reform for the Judicial Advancement: White Book* (2007).

⁷ *South Korea Holds Its First-Ever Trial by Jury as Part of Judiciary Reforms*, ASSOCIATED PRESS, Feb. 12, 2008, www.law.com; *Jury Bill Gets Parliamentary Go-Ahead*, DIGITAL CHOSUNILBO (English Edition), May 1, 2007, <http://english.chosun.com/w21data/html/news/200705/200705010023.html>. See also Eric Seo, *Creating the Right Mentality: Dealing with the Problem of Juror Delinquency in the New South Korean Lay Participation System*, 40 VAND. J. TRANSNAT'L L. 265 (2007).

⁸ Han & Park, *supra* note 5; Sangjoon Kim, Jaihyun Park, Kwangbai Park & Jin-Sup Eom, *The First Three Years of the Korean Jury System: Judge-Jury Agreement in Criminal Cases*, 10 J. EMPIRICAL LEGAL STUD. (forthcoming 2013).

⁹ Zachary Corey & Valerie P. Hans, *Japan's New Lay Judge System: Deliberative Democracy in Action?*, 12 ASIAN-PAC. L. & POL'Y J. 72 (2010).

¹⁰ *Id.* at 72-73.

outcomes of trials decided by the new tribunal. Taiwan's Judicial Yuan has proposed the implementation of *Guan Shen*, a lay observer system in which ordinary citizens will observe trials and share their views and perspectives with professional judges prior to the professional judges' determination of the verdict.¹¹

This article aims to provide an overview, and to describe the changes – both benefits and detriments – that are likely to accompany these new uses of lay citizens as opposed to professional judges as legal decision makers. It presents empirical research findings from the US jury context and elsewhere that show what differences occur in practice when lay citizens are the decision makers.

II. BENEFITS AND DRAWBACKS OF LAY JUDGE DECISION MAKING SYSTEMS

There are two broad theoretical expectations about the effects of introducing a jury or a lay judge system. First, one might expect fact finding differences between lay judges and professional judges. These may occur whether the lay judges decide independently as members of a jury or collaboratively with professional judges in a mixed tribunal. These fact finding differences would be present in the cases decided by lay or professional judges. Second, in addition to expected differences in the outcomes of individual cases, there are also theoretical predictions that the inclusion of lay judges will create broader social and political effects. These might include effects on deterrence, education of the public, and increased legitimacy for the legal system.

Many of those who write about lay adjudication presume that lay and professional judges will decide cases differently. Interestingly, each is thought to bring particular advantages to the fact finding task. Professional judges are drawn predominantly from the elite in a society, are usually better educated, have specialized training in law and legal procedure, and have extensive experience in legal fact finding. In deciding on the outcome for a criminal offense, they will be able to draw on many prior experiences resolving similar kinds of cases. And by possessing broad knowledge about different types of cases, they are

¹¹ Mei-Tong Chen, participant in roundtable, The Role of Professionals in Lay Tribunals, presented at the International Law & Society Conference, Honolulu, HI (June 7, 2012) (describing the proposed lay observer system). For a description of a Taiwanese public opinion poll about the lay observer reform, see Kuo-Chang Huang, *How Do the Taiwanese Citizens Think of Lay Participation of Judicial Decision Making*, paper presented at the Asian Empirical Legal Studies conference, William S. Richardson School of Law, Univ. of Hawaii, Honolulu, HI (June 4, 2012).

better able to place the particular case before them in context.

Those who advocate lay adjudication see a strong advantage in the lay citizen's lack of specialized knowledge and experience. Lay citizens can act as a check on overzealous prosecution or a biased judiciary. Over the years, judicial fact finding becomes routine. Judges may become jaded, habitually favor one party or another, or jump to premature conclusions because of similar fact patterns in prior cases. Lay persons who decide a single case offer a fresh perspective. Because many lay decision making systems draw people from multiple subgroups in the community, a group of jurors or lay judges is more likely to represent the range of views and attitudes of the community at large, in contrast to elite judges. Indeed, in most countries, judges are much less reflective of the population than juries or lay judges. This representativeness contributes directly to fact finding, because life experiences, views, and attitudes shape how people evaluate legal disputes.¹² The fact that lay fact finders are more likely to reflect the community's social and political characteristics helps to ensure that legal judgments are in line with community attitudes.¹³ There are also other benefits that come from the group nature of the decision making. Lay citizens who decide in juries or mixed courts reach their decisions after deliberation. Because these groups include individuals who have diverse backgrounds and experiences, the deliberation of the case is likely to be rich and robust.¹⁴ The deliberation provides an environment within which differing assessments of the evidence can be tested and refined.¹⁵

In sum, professional judges have the advantage of legal expertise, while lay judges bring a diversity of perspectives and a strong grounding in community norms to the fact finding task. All this presumes that judges and lay jurors decide cases with integrity. As in any profession, there is the possibility of corruption in the judiciary. Citizens offer some oversight.¹⁶ Although lay citizens too can be subject to corrupt influence, there is less opportunity for systematic corruption, because the jury decides only one case or a small number of cases. They are not repeat players.

¹² NORMAN J. FINKEL, *COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW* (1995); NEAL FEIGENSON, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS* (2000).

¹³ FINKEL *supra* note 12; John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 6 AM. B. FOUND. RES. J. 195 (1981).

¹⁴ Jeffrey Abramson, *We the Jury: The Jury System and the Ideal of Democracy* 99-101 (Harvard Univ. Press 1994); *see also* Neil Vidmar & Valerie P. Hans, *American Juries: The Verdict* (2007).

¹⁵ Phoebe Ellsworth, *Are Twelve Heads Better than One?*, 52 LAW & CONTEMP. PROBS. 205, 206 (1989) (describing benefits of diversity on the jury); *see also* 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) (demonstrating fact finding benefits of racial diversity).

¹⁶ SANJA KUTNJAK IVKOVIĆ, *LAY PARTICIPATION IN CRIMINAL TRIALS: THE CASE OF CROATIA* (1999).

The specter of corruption brings us to a second broad set of theoretical propositions about the contributions of lay adjudication. Theorists have asserted that participation in judging – as either a juror or a lay judge member of a mixed court – promotes participatory democracy. It is said to educate the public about law and encourage other forms of political participation.¹⁷ Ideas about the political significance of the jury have been around for centuries. The French political thinker Alexis de Tocqueville wrote two centuries ago about the American jury as an ever-open public school that educates the American public about the law.¹⁸ From his perspective, serving as a juror helps to cement the bonds between a citizen and the state. Contemporary scholars likewise maintain that including citizens in mixed courts will have a democratizing influence.¹⁹

Greater legitimacy is a related benefit that is anticipated to come from involving lay citizens in decision making. When legal decisions are exclusively the province of legal elites, even if they reach decisions that are very similar to those that lay judges would reach, the legal elite's decisions may not be granted the same degree of credibility. Especially when the court arrives at a politically unpopular decision, having lay citizen involvement is likely to provide some cover for judges and other legal and political authorities.²⁰

The mixed tribunal presents something of a challenge for theorists. Ideally, this form of lay participation combining professional and lay judges offers the potential of an ideal mix: the legal expertise of the professional members combined with the greater diversity and sensitivity to community norms of the lay members. But this happy state of affairs depends on the full participation of both professional and lay judges. If a legal system can achieve this state of equilibrium, then the decisions of a mixed court should combine the strengths and insights of both professional and lay judges. However, most scholars conclude that this is unlikely to occur because they presume that professional judges will dominate the less experienced and less legally knowledgeable lay judges.²¹

¹⁷ See generally JAMES P. LEVINE, JURIES AND POLITICS (1992); see generally Richard Lempert, *A Jury for Japan?*, 40 AM. J. COMP. L. 37 (1992); see also Richard O. Lempert, *Citizen Participation in Judicial Decision Making: Juries, Lay Judges and Japan*, ST. LOUIS-WARSAW TRANSATLANTIC L.J. 1, 9-10 (2002).

¹⁸ ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, VOL. 1, 331-39 (Henry Reeve trans., Schocken Books 1961) (1835).

¹⁹ IVKOVIĆ, *supra* note 16, at 31-62 (describing benefits attributed to lay participation).

²⁰ NANCY MARDER, THE JURY PROCESS (2005).

²¹ Sanja Kutnjak Ivković, *Exploring Lay Participation in Legal Decision Making: Lessons from Mixed Tribunals*, 40 CORNELL INT'L L.J. 429 (2007).

III. TESTING THE IMPACT OF A JURY OR LAY JUDGE SYSTEM

Taking a theoretical perspective, then, we predict that lay adjudicators will arrive at verdicts that are distinctive from those of professional judges in individual cases. We also expect that a jury or lay judge element in a legal system will produce salutary effects on public education and public support for the legal system. Testing whether jury systems and lay assessor systems actually achieve these purposes, though, is quite complicated.

Scholars have adopted a number of different research approaches to studying judge and jury decision making. Some scholars take an archival approach by studying patterns of decisions made by the two types of fact finders, and this can be quite informative. For example, in France during the Vichy regime, France's all-citizen jury system was transformed into a mixed court of professional and lay judges. Conviction rates increased following the change to a mixed court.²² We need to be cautious, though, about concluding on the basis of these data alone that juries are more lenient than mixed courts with professional judges. Other factors, including changes over time in legal doctrines or legal procedures and other changes in the litigation landscape can lead to differences in case outcomes. Shifts in litigation strategies, and in decisions to proceed to trial or to settle a case, can change the composition of the cases heard by professional and lay judges and complicate the making of inferences about any differences that are found. A change in the decision maker – judge or jury – constitutes just one of multiple factors that might explain case outcomes. It seems especially likely that attorneys will adopt different approaches to cases they wish to take to trial when the decision maker is a jury versus a judge. They may share some of the expectations that theorists have about differential fact finding by the two types of decision makers. During the trial, attorneys might present different evidence or assert distinctive arguments, again relying on their presumptions about how professional and lay judges will react. In short, case selection is critical. The trials that judges and juries hear could be very different.

IV. EMPIRICAL TESTS OF PROFESSIONAL JUDGE AND LAY JURY DECISION MAKING

Comparing decisions reached by judges and juries, or professional judges and mixed

²² Valerie P. Hans & Claire Germain, *The French Jury at a Crossroads*, 86 CHI.-KENT L. REV.737 (2011).

tribunals, may not give us a clear picture of how the lay fact finder influences the outcome. One alternative approach to determining the jury's unique contributions to the legal system is to compare the actual verdicts of juries with the views of the professional judges who preside over their cases. We know that in a jury trial, the presiding judge is present in the courtroom. This is something that approximates a scientific control. In addition, the judge's perspective on the case is worthwhile. It allows us to compare the untutored judgment of the lay decision maker with the experienced approach of the professional judge. And, of course, the judge is the most likely alternative decision maker to the jury.

One informative line of jury research compares outcomes in jury trials with the hypothetical verdicts and other judgments of the professional judge presiding over the trial. A substantial number of research projects have taken just this approach.²³

A classic study of the American jury, by Harry Kalven, Jr. and Hans Zeisel, adopted this research angle.²⁴ They sent questionnaires to thousands of American judges, asking them to describe the details of the jury trials over which they presided, and to indicate how they would have decided each jury trial had it been a bench trial. Kalven and Zeisel analyzed the hypothetical decisions of the judges to the actual decisions of the juries to determine rates of agreement between judges and juries. The results were fascinating. In criminal cases, judge and jury agreed on conviction for the defendant 64 percent of the time. In 14 percent of cases, they agreed on an acquittal for the defendant. Hence, the overall agreement on verdict was 78 percent. The remaining 22 percent of cases in which the judge disagreed with the jury verdict revealed a striking difference. In 19 percent of trials, the jury acquitted but the judge would have convicted. In 3 percent of trials, the judge would have acquitted but the jury convicted. This innovative study was the first to suggest that judge and jury overlap is likely substantial. But, importantly, when juries disagree with judicial inclinations, juries are likely to favor the defense.

This basic finding has now been replicated multiple times.²⁵ Replication studies built on

²³ The work is summarized in VIDMAR & HANS, *supra* note 14, at 148-51.

²⁴ HARRY KALVEN JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966).

²⁵ Paula L. Hannaford-Agor, Valerie P. Hans, Nicole L. Mott & G. Thomas Munsterman. Are Hung Juries a Problem? Williamsburg, VA: National Center for State Courts (2002), http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesProblemPub.pdf; Valerie P. Hans, Paula L. Hannaford-Agor, Nicole L. Mott & G. Thomas Munsterman, *The Hung Jury: The American Jury's Insights and Contemporary Understanding*, 39 CRIM. L. BULL. 33 (2003); Theodore Eisenberg, Paula L. Hannaford-Agor, Valerie P. Hans, Nicole L. Waters, G. Thomas Munsterman, Stewart J. Schwab & Martin T. Wells, *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven & Zeisel's THE AMERICAN JURY*, 2 J. EMPIRICAL LEGAL STUD. 171 (2005). For a summary of the multiple jury-jury agreement studies, see VIDMAR & HANS, *supra* note 14, at 150-51.

the edifice created by the Kalven and Zeisel project, taking advantage of methodological and statistical developments. The Kalven and Zeisel project was limited to judges, whereas other researchers have surveyed both judges and juries (and, in some cases, attorneys), providing opportunities to compare judge and jury assessments of defendants and trial evidence as well as verdict preferences. Obtaining multiple jurors' responses to the same cases also offers insight into the range of individual responses and how they are combined into group judgments.

In one research project I conducted with collaborators from the National Center for State Courts, we gave questionnaires to judges, jurors, and attorneys in close to 400 felony cases from four jurisdictions in the USA.²⁶ The questionnaires asked jurors for their individual verdict preferences at the start and end of deliberations, and asked judges for the verdict they would have reached had they been deciding the case alone. In addition, questionnaires for both judges and jurors contained many of the same items, such as questions about the perceived strength of the evidence, ratings of the defendant and victim, and views about the complexity of the evidence and the law. Both judges and jurors rated the strength of the prosecution's case and the defendant's case on a 7-point scale that ranged from a low of 1 to a high of 7. That allowed us to compare how the overall strength of the case overlapped or differed for individual jurors and for judges, and how those views were related to the actual jury verdict or the hypothetical judge verdict in the case.

Not surprisingly, the judge's hypothetical verdict is closely associated with the judge's views about the strength of the evidence in the case. When judges evaluate the case as a weak one, judges mostly acquit the defendant. Likewise, in cases with strong evidence, judges tend to convict the defendant. A very similar pattern is found with juries. What is perhaps more surprising is that judges' and juries' evaluations of the case – and their resulting verdicts – are also strongly correlated. The *judge's* view of the evidence strength is also a strong predictor of the *jury's* verdict in the case.

However, the two types of fact finders tend to diverge in the cases that are evaluated as in the mid-range of strength. Here, the judge is more likely to convict the defendant than the jury. Compared to juries, judges are willing to convict in cases seen as less favorable to the prosecution. In fact, even when juries perceive the evidence as mostly favorable to the defense, judges are willing to convict over half the time. Thus, although there is considerable overlap in judge and jury assessments, juries seem to demand more evidence to convict than

²⁶ Hannaford et al., *supra* note 25; Hans et al., *supra* note 25.

do judges. In short, juries appear to adopt a more generous view of the concept of reasonable doubt.²⁷ To estimate how much a difference having a judge or a jury makes on the verdict, we undertook statistical analyses to control for a number of other important factors, including case characteristics and juror characteristics. The analyses discovered that the marginal effect of a judge as decision maker compared to a jury as a decision maker is approximately a 12% increase in the likelihood of conviction.²⁸

Studies of new systems of lay participation in East Asian countries provide an exciting opportunity to add to the body of research on professional and lay adjudication. In Japan, the introduction of the mixed tribunal *Saiban-in seido* added lay members to the decision making body. The criminal defense bar anticipated the possibility that including lay members to the tribunal might shift what they considered to be the strong prosecution proneness of the professional judiciary.²⁹ However, only a handful of acquittals have resulted and no change in the extraordinarily high 99% conviction rate has been observed.³⁰ As with the comparison of judge and jury verdicts in the US, where case selection is an important variable that complicates direct comparisons of conviction rates, whether or not the *Saiban-in* are deciding the same universe of cases as professional judges once did is open to debate. Prosecutors have been extraordinarily cautious, bringing only strong cases to the *Saiban-in*.³¹

The Korean advisory jury reform offers a stronger test of the difference between judge and lay decision making on verdicts. Here, we can be confident that both judge and lay decision makers are deciding the same set of cases. As Han and Park report, Korean judges agree with the advisory jury in a very substantial 91% of the criminal trials with jury participation.³² In the infrequent cases in which they disagree, the disagreement is quite asymmetrical. In 50 of the 54 cases in which the judges disagreed with the jury's advisory verdict, the juries advised an acquittal but the judges convicted the defendants. The judges overrode the jury's advisory verdict of conviction with an acquittal in just 4 of the inconsistent cases.³³

²⁷ Eisenberg et al., *supra* note 25, at 194–96.

²⁸ *Id.* at 196.

²⁹ 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).

³⁰ Makoto Ibusuki, 'Quo Vadis?' *First Year Inspection to Japanese Mixed Jury Trial*, 12 ASIAN-PAC. L. & POL'Y J. 25 (2010).

³¹ *Id.*

³² Han & Park, *supra* note 5.

³³ *Id.* at 10 (manuscript page).

V. COMMON SENSE JUSTICE OF THE JURY

There is a recurring joke about juries that helps to illustrate the circumstances under which judge and jury verdicts might differ. The jury considers the justice of the situation, but it is “common sense” justice rather than the formal legal system’s application of justice. Consider the following joke about a Tennessee jury that heard evidence in a criminal trial about the defendant’s theft of a mule:

As the proof developed in the trial, the evidence was rather overwhelming that the man in fact did steal the mule. But the proof also showed that the defendant was basically an honorable and decent fellow who was really down on his luck and desperately needed the mule to help him on his family farm. After deliberating, the jury returned and the foreman announced the verdict: “Not guilty, but he has to give back the mule.” The wise and learned judge said, “ladies and gentlemen of the jury, I must reject your verdict. It is an inconsistent verdict, and I must request that you resume your deliberations and return a consistent verdict.” The jurors looked at one another and then filed back into the jury room. Five minutes later they returned. “Have you reached another verdict?” inquired the judge. “Yes, we have, Your Honor,” reported the foreman. “Not guilty and he can keep that mule!”³⁴

Like the mule thief’s humorous case, in some circumstances the strict application of legal rules might not lead to the appropriate result. Sometimes, circumstances arise that lawmakers did not anticipate, or there are contextual factors that make a conviction an undesirable outcome. Judges are bound to follow the law, wherever it leads, but juries can apply a dose of common sense as they interpret the evidence and apply the law. In common law jurisdictions, juries need not explain their verdicts in most criminal cases. Therefore, if juries apply common sense in a way that deviates from the strict legal requirements, it may remain subterranean. That is not likely to be possible in a mixed court where professional judges will presumably insist on strictly applying the law.

Jury research has explored the extent to which jurors incorporate common sense into

³⁴ Valerie P. Hans, *Jury Jokes and Legal Culture*, paper presented at the 18th Annual Clifford Symposium, A Celebration of the Thought of Marc Galanter, DePaul College of Law, Chicago, IL (Apr. 26, 2012) (quoting a joke from ROY HERRON & L.H. “COTTON” IVY, *TENNESSEE POLITICAL HUMOR: SOME OF THESE JOKES YOU VOTED FOR* (2000)).

their legal judgments.³⁵ In a number of ways, the jury (or a group of lay judges on a mixed court) constitutes an ideal body for the injection of community sentiment. Communities are heterogeneous, differing along many dimensions such as gender, race, ethnicity, religion, and income. If the selection system succeeds in drawing broadly from these multiple subgroups in a community, the deliberation allows for the exchange of diverse perspectives on the case. In this way, the community's ideas about what is fair and just in a case is injected into the process of jury and lay judge decision making.

Theoretical and empirical work on the story model of juror decision making suggests that jurors develop a narrative account, or a story, of the case.³⁶ Jurors process evidence presented during the trial, arranging it into a coherent story about what happened. Jurors draw on their own world knowledge, previous experiences, preconceptions, and beliefs to construct the story. They are also inclined to fill in gaps and resolve conflicts in ways that are consistent with the overall story. At the end of the trial, jurors match the available verdict options (guilty, not guilty, guilty of a lesser offense) to the story they have developed. Because jurors draw on their own experiences and beliefs as they construct the narrative story of the case, this provides a vehicle for community standards and expectations to be incorporated into verdicts. An interesting question is whether judges also approach legal fact finding with a story model approach. If they do, judges' world knowledge, experiences, and attitudes are likely to differ from those of jurors. Hence, we would expect at times that judge and jury narratives would differ.

Both judges and jurors may be biased by evidence and extra-legal factors in criminal trials. There is a widespread presumption that juries are more susceptible to bias than professionally trained judges. Perhaps judges' extensive training and experience do help to counteract common forms of bias. As we suggested earlier, it could create bias too. As experienced fact finders, judges might become jaded over time, or may jump quickly to conclusions in a current case based on familiar patterns. We know that political scientists studying appeals court outcomes have found differences in selected case outcomes for Republican versus Democratic judges.³⁷ Researchers who have studied judicial decision making have found judges are prone to some of the same influences that affect lay

³⁵ FINKEL, *supra* note 12.

³⁶ Reid Hastie, *What's the Story? Explanations and Narratives in Civil Jury Decisions*, in CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL AND LEGAL PERSPECTIVES 23-34 (Brian H. Bornstein, Richard L. Wiener, Robert F. Schopp & Steven L. Willborn eds., 2008).

³⁷ JEFFREY A. SEGAL & HAROLD SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

adjudicators. For example, both judges and jurors are influenced by a defendant's criminal record information, even when they are explicitly told to disregard it.³⁸ Judges and jurors both show the common human tendency called the hindsight bias, in which the outcome of an action influences how the person perceives that action.³⁹

In sum, both judges and jurors are undoubtedly influenced by their backgrounds, life experiences, beliefs, and attitudes as they engage in legal fact finding. Both are affected by some extra-legal factors. Although commonalities of background and perspective may lead judge and jury to overlap in many cases, jurors bring a common sense justice approach into the law which at times may diverge from a judicial approach.

VI. PUNISHMENT DIFFERENCES

Another important question is whether judges and juries prefer different criminal punishment. The judge-jury verdict agreement studies in criminal trials suggest that there is substantial overlap in the factors considered and decisions reached by judges and juries, but when they disagree, lay persons tend to be somewhat more lenient. Although in other countries it is not uncommon for professional and lay judges to decide on both guilt and sentence collaboratively in mixed courts, jury sentencing in the United States is mostly limited to the capital punishment context.⁴⁰ In the handful of U.S. jurisdictions with felony jury sentencing, prosecutors have used the fear of punitive juries to encourage plea bargaining with felony defendants.⁴¹

³⁸ Stephan Landsman & Richard Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113 (1994) (judges); Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353 (2009) (jurors).

³⁹ DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (demonstrating judges' susceptibility to common cognitive biases); *but see* Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Probability, Probable Cause, and the Hindsight Bias*, 8 J. EMPIRICAL LEGAL STUD. 72 (2011) (showing that judges can resist some common cognitive biases in making certain decisions).

⁴⁰ Nancy J. King & Rosevelt E. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885 (2004) (describing a small number of states that use jury sentencing outside the capital punishment context); Hans, *Jury Systems around the World*, *supra* note 3 (describing use of lay and professional judge decision making about guilt and sentencing in other countries); VIDMAR, *supra* note 3 (2000) (also describing use of lay and professional judge decision making about guilt and sentencing in other countries).

⁴¹ King & Noble, *supra* note 44.

Looking more directly at the studies of capital decision making in the United States, there is some evidence pointing to the likelihood that a jury capital sentencing regime may be more favorable to defendants than a judge or hybrid approach. For example, consider judicial overrides of life recommendations when the state permits it. Michael Radelet's examination of judicial overrides in the small number of states that allow judges to overturn jury determinations of life or death sentences show that the bulk of the overrides are judicial impositions of the death penalty after jury recommendations of life imprisonment.⁴² In Florida, the jury makes an advisory recommendation to the judge, who has the final say. Florida judges have overridden jury recommendations for life and imposed death 166 times; they have imposed life when the jury recommended death 91 times.⁴³ In Alabama, judges have overridden 98 jury decisions favoring life but only 9 jury recommendations of death.⁴⁴

In a current research project, my Cornell Law School colleagues and I are using the change over time in the state of Delaware's death penalty procedure to examine what difference a jury makes in capital punishment.⁴⁵ Our project examines time patterns from 1977 to 2007, a thirty year period of capital punishment. In Delaware, starting in 1977, juries decided whether a capital defendant should be sentenced to death or life in prison. They had to be unanimous to recommend a death sentence. Very few death sentences occurred during this period. However, after a notorious capital trial in 1991, in which the jury could not agree unanimously on death sentences for four defendants who were convicted of murdering two armored truck guards, the legislature changed the procedure. In the revised procedure, juries made only an advisory recommendation to the judge, who made the binding decision. This hybrid approach bears some similarity to Korea's current advisory jury system. Finally, in 2002, the US Supreme Court decided an important case that reasserted the role of the jury in capital trials.⁴⁶ This required an additional change in Delaware's procedure. To preserve the jury's role in determining whether the case was eligible for a death sentence, the Delaware capital jury was required to determine, unanimously and beyond a reasonable doubt, the existence of at least one statutory aggravating factor. Once the jury finds at least one statutory

⁴² Michael L. Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem*, 2011 MICH. ST. L. REV. 798 (2011).

⁴³ *Id.* at 795. However, Radelet observes that the last judicial life-to-death override occurred in 1999, suggesting the practice has fallen out of favor. *Id.*

⁴⁴ Equal Justice Institute, *The Death Penalty in Alabama: Judge Override*, http://eji.org/eji/files/Override_Report.pdf (July 11, 2011).

⁴⁵ Sheri Lynn Johnson, John H. Blume, Theodore Eisenberg, Valerie P. Hans & Martin T. Wells, *The Death Penalty in Delaware: An Empirical Study*, IOWA L. REV. (forthcoming).

⁴⁶ *Ring v. Arizona*, 536 U.S. 584 (2002).

aggravating factor, the jury provides an advisory recommendation and the judge makes the binding decision.

The Delaware experience allows us to take advantage of naturally occurring variation to observe the difference it makes to have a judge or a jury as the final sentencer. The comparison is striking. Until the shift to greater judge involvement in sentencing in 1991, Delaware's death sentence rate did not differ much from those of other states. However, once judges became the key decision makers in capital punishment, Delaware's rate became high and volatile through 2002. In 2002, following the key Supreme Court decision, Delaware's rate declined. Even so, if we compare the death sentencing rate under judge and jury regimes, there is a significant difference. Replacing the jury with a judge made a substantial and significant difference in increasing the likelihood of a death sentence.

These punishment patterns reinforce the conclusions of the judge-jury agreement studies that lay decision makers – at least in the US -- tend to be more lenient than professionally trained judges. Of course, even if jury sentencing is more likely to be favorable to defendants in many capital cases, there are other cases – cases with highly unpopular defendants, or those involving mental illness or mental retardation defenses - in which judicial determinations might be more favorable to defendants.

In the future, as more data accumulate, it will be interesting to observe whether lay participation changes punishment choices in the Japanese, Korean, and Taiwanese systems. One distinctive feature of the Japanese system is that each *Saiban-in* panel reviews a chart of previous sentences before they reach a decision in the current case. The chart review may reduce the likelihood of change over time.

Nonetheless, Mari Hirayama observes that the sentencing in cases of sexual assault under the *Saiban-in* regime appears to have shifted toward greater severity.⁴⁷ Whether the increased severity is due to the participation of lay *Saiban-in* is open to debate. There are more women on the *Saiban-in* panels than on panels consisting of professional judges only. A substantial body of research confirms that men and women tend to take different perspectives in trials of sexual assault, with women finding victims more credible and believable.⁴⁸ This gender difference in the composition of the fact finding body might help to explain an observation of greater severity of punishment. But another legal change occurred about half a year prior to the introduction of

⁴⁷ Mari Hirayama, *Lay Judge Decisions in Sex Crime Cases: The Most Controversial Area of Saiban-in Trials*, YONSEI L.J. (this issue).

⁴⁸ VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* (1986) (citing gender differences in rape and sexual assault cases).

Saiban-in seido – victim participation in trials.⁴⁹ Victims are now entitled to participate in the criminal trial, question witnesses, and provide statements about the impact the crime has had on them. Any increased severity in sentencing might well be due to the enhanced role of crime victims.

VII. LEGITIMACY

One strong motivation for introducing new lay adjudication systems is to produce change at the societal level. Low regard and negative public views of the judiciary and the legal system have stimulated activists in many countries to call for the inclusion of lay fact finders. Citizen participation in legal decision making is said to improve public understanding of law and legal procedure, greater support for verdicts, and enhance legitimacy of the judiciary and the legal system.⁵⁰ Democracy is also thought to be strengthened. As citizens engage directly in one civic activity, they may be more likely to engage in others.⁵¹

We noted earlier that it was challenging as a scientific matter to determine the differences between lay judges' and professional judges' fact finding. The scientific challenge of determining whether lay participation has broader societal-level effects is even more substantial. A host of variables contribute to views and perceptions of a nation's legal system. In existing systems of lay adjudication, such as the common law jury system or the mixed courts of Germany, the systems have been in place for centuries and it may be impossible to tease apart the distinctive effects of the jury or the lay judges. Even in countries with new systems where it should be easier to identify potential effects, other new programs and new laws may be introduced and complicate the determination of causality. We saw this in Japan, where a new law expanding victim participation was introduced shortly before *Saiban-in seido*.

As a starting point in our inquiry, it is useful to assess how individuals who participate directly as jurors or lay assessors respond to the experience. Post-trial surveys of those who

⁴⁹ Valerie P. Hans, *Juries and the Impact of Victim Participation in Criminal Trials: Insights from the American Experience*, paper presented at the 16th World Congress of the Int'l Soc'y for Criminology, Kobe, Japan (Aug. 7, 2011); Masahiko Saeki, *Victim Participation in Criminal Trials in Japan*, 38 INT'L J. L. CRIME & JUST. 149, 151-53 (2010).

⁵⁰ Corey & Hans, *supra* note 9.

⁵¹ *Id.*

have served in juries in the US regularly show very positive assessments of their jury service; what is more, jurors report that they have more favorable attitudes toward the courts and the jury system as a result of their service.⁵² In one large study of over 8,000 US jurors from 16 federal and state courts, 63% said that their view of jury service was more favorable after serving.⁵³ Other studies find that jurors are more apt to say that they see the courts as fair, assessing the justice and equity of the legal system more favorably.⁵⁴ Public opinion about the jury also tends to be quite favorable. In countries with long-standing jury systems, surveys reveal that the jury is evaluated highly, even though on occasion the public concludes that an individual high profile jury trial is wrongly decided.⁵⁵ Nations with new jury systems show greater volatility in public support, and favorability toward the jury can be driven down by a single high profile jury verdict with which the public disagrees.⁵⁶

A fascinating project has explored whether and how citizen participation in legal fact finding promotes other forms of civic engagement. The Jury and Democracy Project was developed to expand insights from a line of theory and research on deliberative democracy.⁵⁷ The essential idea behind deliberative democracy is that citizen involvement in face-to-face debates over political issues offers a useful vehicle for encouraging meaningful civic engagement. The relationship to jury service is obvious. The Jury and Democracy Project researchers have done several research projects to study the links between jury service and other forms of civic engagement, most notably voting.⁵⁸

In an initial study, researchers analyzed the statistical relationship between voting and jury service. They compared pre- and post-jury service voting of approximately 800 jurors who served in criminal cases in Thurston County, Washington. Jurors who deliberated on a jury and reached a verdict in criminal cases voted more frequently than would have been expected given their previous voting records.⁵⁹

In subsequent work, the project was expanded to seven additional counties and

⁵² Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 282, 284–86 (Robert E. Litan ed., 1993).

⁵³ *Id.* at 285.

⁵⁴ *Id.* at 286.

⁵⁵ Hans, *Jury Systems around the World*, *supra* note 3.

⁵⁶ *Id.*

⁵⁷ The Jury and Democracy Project, <http://depts.washington.edu/jurydem/index.html>.

⁵⁸ *See generally* The DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE TWENTY-FIRST CENTURY (John Gastil & Peter Levine eds., 2005).

⁵⁹ John Gastil, E. Pierre Deess & Phil Weiser, *Civic Awakening in the Jury Room: A Test of the Connection Between Jury Deliberation and Political Participation*, 64 J. POL. 585, 591-92 (2002).

thousands of jurors who served across the US.⁶⁰ The combined data set of all eight counties included over 13,000 jurors. This substantial and diverse sample allowed the researchers to attempt to replicate the basic finding and to explore the effects of different types of jury experiences.

Jurors with a low record of prior voting showed a statistically significant effect from their experience serving on a criminal jury that deliberated, whether the jury was able to reach a verdict in the case or not. These individuals had been only minimally engaged prior to their jury service, and jury duty boosted their likelihood of voting. Jurors who regularly voted before their jury service were not influenced; they continued to vote regularly after jury service, and no boost was found. Finally, the voting effect was found in criminal cases but not in civil trials.⁶¹ Thus, the research confirms that a meaningful deliberative experience as a legal fact finder can boost other forms of civic engagement and political participation. The data we have so far suggest that the civic engagement effect depends on the type of jury experience and an individual's prior level of political activity.

Although to date there are no comparable studies of lay adjudication and other forms of civic engagement in other countries, Hiroshi Fukurai's important work on the Japanese grand jury system reveals some striking effects for citizen participation in this form of lay adjudication.⁶² Fukurai discovered that Japanese citizens who were members of the grand jury evaluating the non-indictment decisions of prosecutors increased their positivity toward the Japanese legal system. This suggests that the experience of direct engagement with other grand jurors about this legal determination is a positive one for those who are involved, and it works to help legitimize the legal system in Japan. Ivković also found that lay members of Croatian mixed tribunals reported very positive views of the institution.⁶³

Although work on societal level effects is not as frequent as work on fact finding differences, new projects that specifically address these potential effects in the recently introduced systems in East Asia offer great promise from both scientific and practical perspectives. There are some suggestive results, although it is early. In both Korea and Japan, lay judges and jurors report being very positive about their experiences. In Korea, 63% of

⁶⁰ JOHN GASTIL, ET AL., *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* (2010).

⁶¹ *Id.*

⁶² For evidence that participation in Japanese grand juries enhanced regard for the justice system, see Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: Cross-National Analysis of Legal Consciousness and Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT. L. J. 315 (2007).

⁶³ Ivković, *supra* note 21.

jurors who were surveyed by the court reported more positive feelings after jury service; just 2% said they felt more negatively.⁶⁴ Similarly, in Japan, 94% of the lay judges reported that their service was a “good experience.” Japan’s lay judges are often active participants at trial, questioning witnesses directly. Many lay judges participate in the regular press conferences that follow the trials.⁶⁵ The Japanese public also seems to have attended more to *Saiban-in* trials. A 2011 survey undertaken by the Supreme Court of Japan discovered that trials and the justice system have become more familiar (increasing from 9% to 68%); trial processes and content are more comprehensible (6% to 45%). Judgments of trial outcomes, though, remain unchanged, with their fairness rated positively 46% before and 47% after the introduction of *Saiban-in seido*.⁶⁶

VIII. CONCLUSION

This article has attempted to summarize what we currently know about the differences that lay adjudication brings to a legal system. Some of the efforts to introduce new systems of citizen participation in the legal systems of Asian countries are motivated by ideas about what lay voices might contribute to case deliberations and case outcomes. I tried to highlight what empirical research suggests about the differences between lay and legally trained judges. Research that compares judge and jury decisions finds that in many cases, having a jury or mixed tribunal decide the case instead of a professionally trained judge might not make much difference in the case outcome. The evidence indicates that juries are generally competent fact finders, and their verdicts overlap substantially with those that a professional judge would reach. Instances in which the two fact finders disagree, however, show a consistent pattern. Jurors appear to require more evidence to convict a defendant, and as a result, the jury verdict is more likely to favor the defendant. Jurors and professional judges have divergent backgrounds, education, and experiences, all of which lead them to evaluate the case somewhat differently. The jury’s experiences are likely to reflect to a greater degree the common sense justice of the community. Finally, there are tantalizing new findings about the legitimizing influences of the presence of a jury in a legal system, and the ways in which jury service itself helps to promote political engagement, suggesting its value as a democratizing

⁶⁴ Valerie P. Hans, *Lay Citizens and Legal Decision Making Around the World: Insights for Taiwan’s Proposed System*, colloquium presented at College of Law, Nat’l Taiwan Univ., Dec. 12, 2011.

⁶⁵ *Id.*

⁶⁶ *Id.*

influence too.

This is a remarkable moment that offers new opportunities to expand our understanding of citizen participation. The introduction and expansion of new systems of lay participation – like the new jury system of Korea, *Saiban-in seido* in Japan, and the lay observer system proposed for Taiwan - offer unparalleled opportunities to do scientific tests of the effects of lay adjudication. Careful survey research studies can track general social and political support for government, the rule of law, and the legal system before and after the introduction of a jury system. Claims that jury service promotes civic engagement can be tested on populations that are newly introduced to the opportunity to participate directly in legal decision making. The work on new lay participation systems will be challenging, of course, but it is a truly wonderful opportunity to understand how this form of democratic participation can best support the interests of justice. All of this work will enable us to better answer the question in the title of this piece: What difference does a jury make?

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