

A Comparison of Criminal Jury Decision Rules in Democratic Countries

Ethan J. Leib*

In this age of renewed enthusiasm for comparative constitutionalism and more focused attention on the legal regimes of foreign democracies, it remains astonishingly difficult to learn about other countries' jury systems. There is no central, short, and easily-accessible English source to which scholars and policymakers interested in how the jury functions worldwide can turn for basic facts about the jury systems used in democratic countries.¹ This paper hopes to fill a portion of that gap by furnishing jury system information about the twenty-eight democracies (excluding the United States) that have been consistently democratic since at least the early 1990s and have a population of five million people or more (with allowance for Mexico and South Africa).²

To narrow the inquiry, I focus here only on the criminal jury (for the civil jury is exceedingly rare)—and the decision rules used to establish guilt and innocence.³

* Associate Professor of Law, University of California's Hastings College of the Law. Thanks to Samira Desai and Cassandra Kuehl for research assistance and to the 1066 Foundation and the Roger Traynor Scholarly Publication Fund for financial support. For comments, I thank Hiroshi Fukurai, John Jackson, Nick Kovalev, Arend Lijphart, Steve Thaman, and Neil Vidmar. All mistakes are my own.

¹ There are two important books on the subject, neither of which is easy to find, cheap to purchase, or comprehensive in coverage. See WORLD JURY SYSTEMS (Neil Vidmar ed., 2000) (\$168) (containing chapters investigating the jury in the United States, England, Australia, New Zealand, Canada, Scotland, Ireland, Spain, Russia, and Japan); UNDERSTANDING WORLD JURY SYSTEMS THROUGH SOCIAL PSYCHOLOGICAL RESEARCH (Martin F. Kaplan & Ana M. Martin eds., 2006) (\$75) (containing chapters discussing juries in the United States, England, Scotland, Australia, New Zealand, Spain, Russia, "Europe," Italy, France, Poland, Germany, and Japan). Much of the Vidmar book can be found at 62 LAW & CONTEMP. PROBS. (1998). A set of very important articles also covers some of this ground—but they too contain omissions, ambiguities, and out-of-date information. See John D. Jackson & Nikolay P. Kovalev, *Lay Adjudication and Human Rights in Europe*, 13 COLUM. J. EUR. L. 83 (2006–07); Edward P. Schwartz & Warren F. Schwartz, *And so Say Some of Us... What to Do When Jurors Disagree*, 9 S. CAL. INTERDISC. L.J. 429 (2000). Some new work by Cornell's jury expert Valerie Hans will help put this understudied area on the proverbial agenda. See Valerie Hans, *Jury Systems Around the World*, ANN. REV. L. & SOC. SCI. (forthcoming 2008).

² These twenty-eight democracies will be explored at greater length in AREND LIJPHART, BERNARD GROFMAN & MATTHEW SHUGART, *A DIFFERENT DEMOCRACY: AMERICAN GOVERNMENT AND POLITICS IN COMPARATIVE PERSPECTIVE* (forthcoming 2008).

³ Decision rules take center stage in some of my recent work, so, given my interests, it is a natural basis for comparison. See Ethan J. Leib, *Supermajoritarianism and the American Criminal Jury*, 33 HASTINGS CONST. L.Q. 141 (2006); Ethan J. Leib, *The Problem of Hung Juries—and How to Solve It*, FINDLAW'S WRIT: LEGAL COMMENT., May 12, 2006, http://writ.news.findlaw.com/commentary/20060512_leib.html; Ethan J. Leib, *Why*

I examine the following countries: Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, India, Israel, Italy, Japan, Mexico, the Netherlands, Poland, Portugal, South Africa, South Korea, Sweden, Switzerland, and the United Kingdom. Owing to jury system differences within the United Kingdom, I treat Scotland, Ireland, and England/Wales as three separate data points, even though one needs to combine the population of Northern Ireland (inside the UK) (1.5 million) with the population of the Republic of Ireland (outside the UK) (4.1 million) to reach the five million person threshold.⁴

In my investigation, a “jury” is defined as a group of more than three unelected laypersons who are selected or appointed to sit in judgment on a criminal case at the trial level; such laypersons are not generally “professionalized” jurors and may be involved in deciding questions of fact, law, and/or punishment.⁵ Groups of professional lay judges who serve over long periods of time, elected laypersons, and very small numbers of lay assessors sitting with professional judges do not constitute a jury for my purposes here.

In what follows, I describe general rules that do not always apply to every crime in every context. In the United States, for example, we tend to use a randomly-selected jury of twelve people that sits for a single case; laws generally require unanimity to convict and unanimity to acquit. Failure to reach unanimity results in a “hung” jury, with the possibility for retrial at the prosecution’s discretion.⁶ To be sure, Oregon and Louisiana allow non-unanimous verdicts in certain contexts, not all jurisdictions use twelve jurors for all crimes, and defendants can waive certain aspects of the jury trial. But the general description remains valid and I am only trying to capture broad generalizations. Still, it should be noted that most of the countries surveyed here that have functioning criminal jury systems circumscribe the level of offense that triggers a jury trial; the United States offers the jury trial much more broadly to criminal defendants than other countries, most of which reserve the jury trial only for the most serious crimes.

Supermajoritarianism Does Not Illuminate the Interpretive Debate Between Originalists and Non-Originalists, 101 NW. U. L. REV. 1905 (2007). There is also a large and growing literature on the role of decision rules in institutional design that would benefit from more comparative perspectives. See, e.g., ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN* WRIT SMALL (2007).

⁴ For population numbers on Ireland, see The World Factbook, Ireland, Central Intelligence Agency, <https://www.cia.gov/library/publications/the-world-factbook/geos/ei.html> (last visited Dec. 3, 2007). It is probably worth noting that Norway has a population of 4.6 million, but is excluded from my study here. See The World Factbook, Norway, Central Intelligence Agency, <https://www.cia.gov/library/publications/the-world-factbook/geos/no.html> (last visited Dec. 3, 2007).

⁵ Some countries (such as France and Denmark) engage jurors or lay judges at the appellate level; I ignore that wrinkle here.

⁶ See AMERICAN BAR ASSOCIATION, AMERICAN JURY PROJECT, PRINCIPLES FOR JURIES AND JURY TRIALS 22 (2005), available at <http://www.abanet.org/juryprojectstandards/principles.pdf> (approximately one-third of the cases that produce hung juries get retried).

After specifying which countries do not employ juries and then delineating which do and their preferred decision rules, I offer some concluding ruminations about my findings.

I. COUNTRIES WITHOUT CRIMINAL JURIES

There is a set of democratic countries that have no criminal jury system (as I define the term above) and have no imminent plans to introduce one. These countries, some of which engage lay participation in trial adjudication in some form, include: Chile,⁷ the Czech Republic,⁸ Hungary,⁹ India,¹⁰ Israel,¹¹ Mexico,¹²

⁷ See SERGIO ENDRESS GÓMEZ, *ESSENTIAL ISSUES OF THE CHILEAN LEGAL SYSTEM* (2005), available at <http://www.nyulawglobal.com/globalex/Chile.htm> (cases are tried by three judge panels); see also ENCYCLOPEDIA OF THE NATIONS, *Chile, Judicial System*, <http://www.nationsencyclopedia.com/Americas/Chile-JUDICIAL-SYSTEM.html> (last visited Dec. 3, 2007).

⁸ See MICHAL BOBEK, *AN INTRODUCTION TO THE CZECH LEGAL SYSTEM AND LEGAL RESOURCES ONLINE* (2006), http://www.nyulawglobal.com/globalex/czech_republic.htm. As Bobek reports, “There is no trial by jury. There is, however, . . . laic participation in the administration of justice in the form of laypersons sitting as judges in chambers, hearing cases at first instance. Laypersons are elected by local councils. Two lay judges sit with a professional judge, hearing non-specialised cases” *Id.* at §2.4 (citation omitted). There may be some interest in devising a criminal jury system there, but it does not look like it will be happening anytime soon. See Premysl Liska, *Poroty: mýtus a skutečnost podruhé*, [Juries: Myths and Reality, Part Two], POLICISTA: MĚSÍČNÍK MINISTERSTVA VNITRA [THE POLICE OFFICER: MONTHLY (PUBLICATION) OF THE MINISTRY OF THE INTERIOR] (October 2002), <http://www.mvcr.cz/casopisy/policista/2002/10/poroty2.html>; Zdenek Jemelík, *Před rekodifikací trestního řádu I [Before Recodification of the Criminal Law, Part One]*, BRITSKÉ LISTY [BRITISH PAGES] (March 7, 2007), <http://www.blisty.cz/2007/3/7/art33233.html>. Thanks to Katrina Byrne for translating and confirming these last sources.

⁹ See U.S. DEPT. OF STATE, *2006 COUNTRY REPORT ON HUMAN RIGHTS IN HUNGARY* (2007), <http://www.state.gov/g/drl/rls/hrrpt/2006/78816.htm> (trial by jury was abandoned in 1919); Leonard DeCof, *Jury Trial and the Independent Bar*, in DEAN’S ADDRESSES OF THE INTERNATIONAL ACADEMY OF TRIAL LAWYERS 1 (1981), available at http://www.ial.net/deans/81_jurytrial_2.asp. For some information on the lay judges used by Hungary’s criminal justice system, see Andras Sajo, *The Judiciary in Contemporary Society: Hungary*, 25 CASE W. RES. J. INT’L L. 293, 300 n.5 (1993).

¹⁰ See Jackson & Kovalev, *supra* note 1, at 92 n.42; STEVEN J. ADLER, *THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM xv–xvi* (1994). England exported the jury to India but Gandhi disbanded the jury system in 1960.

¹¹ See RUTH LEVUSH, *A GUIDE TO THE ISRAELI LEGAL SYSTEM* (2001), available at <http://www.llrx.com/features/israel.htm>; Amnon Straschnov, *The Judicial System in Israel*, 34 TULSA L.J. 527, 528 (1999).

¹² See Robert Kossick, *The Rule of Law and Development in Mexico*, 21 ARIZ. J. INT’L & COMP. L. 715, 786 (2004) (Mexico used the jury between 1856 and 1929). In theory, there are proposals to reinstate the jury system in Mexico—but those proposals require all jurors to have law degrees, a requirement that would lead me to classify it as having no peer-based jury system. See *id.* at 786 n.239. There are rare jury trials in Mexico for press offenses against public peace and crimes against the “domestic or foreign safety of the nation.” Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, art.6 § 20, 5 de Febrero de 1917 (Mex.). In such cases, a *political* jury is convened composed of seven members sitting with a professional judge; majority rules. See

the Netherlands,¹³ and South Africa.¹⁴ Many cantons of Switzerland have no jury, but involve (sometimes elected) lay judges in criminal case dispositions.¹⁵

Finland¹⁶ and Sweden¹⁷ present somewhat harder cases for the typology. These countries engage lay judges and give them substantial power: criminal courts often have a single professional judge presiding, but the judge must deliberate and vote with three lay judges who have equal voting power to decide guilt and punishment. Simple majorities prevail (with 2-2 ties leading to verdicts in favor of the defendant), so a judge can be outvoted by laypeople. But given the small size of these panels¹⁸ and the vetting process required to become a lay judge

Schwartz & Schwartz, *supra* note 1, at 447 n.35 (citing *Codigo de Procedimientos Penales para el Distrito Federal* §§ 333, 342, 367, 457).

¹³ See U.S. DEPT. OF STATE, 2006 COUNTRY REPORT ON HUMAN RIGHTS IN THE NETHERLANDS (2007), <http://www.state.gov/g/drl/rls/hrrpt/2006/78830.htm>; see also Jackson & Kovalev, *supra* note 1, at 94 (highlighting that the Netherlands had a jury system very briefly before 1813 and that it was quickly eliminated).

¹⁴ See Marshall S. Huebner, *Who Decides? Restructuring Criminal Justice for a Democratic South Africa*, 102 YALE L.J. 961, 971 n.44 (1993); See also Tracy Gilstrap Weiss, *The Great Democratizing Principle: The Effect on South Africa of Planning a Democracy Without a Jury System*, 11 TEMP. INT'L & COMP. L.J. 107 (1997). Lay assessors are, however, used in certain phases of the criminal justice system; the lay assessors can even overrule a finding of fact by a magistrate judge. See U.S. DEPT. OF STATE, 2006 COUNTRY REPORT ON HUMAN RIGHTS IN SOUTH AFRICA (2007), <http://www.state.gov/g/drl/rls/hrrpt/2006/78758.htm>. A previous State Department report from 1999 highlights that the jury system was abolished in 1969 but that a 1998 law enlarged the lay assessor system substantially. See U.S. DEPT. OF STATE, 1999 COUNTRY REPORT ON HUMAN RIGHTS IN SOUTH AFRICA (2000), <http://www.nationbynation.com/SouthAfrica/Human.html>.

¹⁵ See Jackson & Kovalev, *supra* note 1, at 102-03; sources cited *infra* notes 54-57.

¹⁶ See Jackson & Kovalev, *supra* note 1, at 97, 104, 107, 119; see also Virve-Maria de Godzinsky & Kaijus Ervasti, *Layman as Judges*, NAT'L RES. INST. OF LEGAL POL'Y SUMMARY PUB. No. 162 (1999), available at <http://www.optula.om.fi/4915.htm>.

¹⁷ See SWEDISH INSTITUTE, LAW AND JUSTICE IN SWEDEN (1996), http://www.bolag.org/english/sweden/general/e-s-law_and_justice.htm. Putting Sweden in a list of countries without a jury is certainly controversial. See, e.g., Jackson & Kovalev, *supra* note 1, at 95, 97, 103. This is especially so because Sweden uses a large jury panel that deliberates alone in freedom of the press cases. See generally Torbjörn Vallinder, *The Swedish Jury System in Press Cases: An Offspring of Trial by Jury*, 8 AM. J. LEG. HIST. 190 (1987). However, the jurisdiction of this jury is so circumscribed and the appointment process for jurors so unusual that it seems misleading to treat Sweden as having a substantial jury system. Vallinder's article is devoted to trying to persuade readers to embrace a different conclusion; I remain unconvinced.

¹⁸ For very serious crimes, Sweden may use five lay assessors with a single judge. See Stephen C. Thaman, *Japan's New System of Mixed Courts: Some Suggestions Regarding Their Future Form and Procedures*, 2001 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 89, 97 (2001/2002). Despite their numbers, I hesitate to conclude that Sweden has a jury because of the nature of the lay judges, who are more professionalized and politicized than most. See Christian Diesen, *The Advantages and Disadvantages of Lay Judging from a Swedish Perspective*, 72 REVUE INTERNATIONALE DE DROIT PÉNAL 355 (2001), available at http://www.cairn.be/article.php?ID_REVUE=RIDP&ID_NUMPUBLIE=RIDP_721&ID_ARTICLE=RIDP_721_0355.

in these jurisdictions,¹⁹ I characterize Finland and Sweden here as not utilizing meaningful jury systems. Those from less common law-influenced jurisdictions might reach other conclusions about how to classify these Nordic criminal justice systems with “mixed” courts.

Poland also has a “mixed” court system such as I describe above, which employs one professional judge and two lay assessors for lesser crimes—and two professional judges and three lay judges for crimes with sentences of twenty-five years or life imprisonment. Majority verdicts can convict a defendant after all judges—lay and professional—deliberate together.²⁰

A similar criminal justice system reigns in Germany, where one to three professional judges sit collaboratively with two or three lay assessors, who are selected to serve through a process of political appointment (for the most part); the laypeople are ultimately chosen to sit in a particular case through a lottery system, though the pool is not drawn from the population at random, as in the United States.²¹ Majority rule prevails for procedural matters and two-thirds majorities are required to convict and sentence a defendant; failures to achieve convictions are treated as acquittals.²² Again here, these methods of laic involvement in case adjudication are not classified as juries for my purposes. In the German case, the lay judges are treated as members of the court for a term of years rather than as members of the community or public and, accordingly, do not quite serve the same function as a jury of peers.²³

There are, to be sure, a group of nation-states that do not have fully functioning criminal jury systems as of yet, but are actively considering and implementing plans to employ juries in the near future. Argentina, for example, provided for trial by jury in its 1994 Constitution; however, national enacting legislation has not yet been passed and the practice has not taken hold.²⁴ Still,

¹⁹ In Sweden, lay assessors are essentially appointed by party leaders through a system of proportional representation. See Christian Diesen, *Lay Judges in Sweden: A Short Introduction*, 72 REVUE INTERNATIONALE DE DROIT PÉNAL 313 (2001), available at http://www.cairn.be/article.php?ID_REVUE=RIDP&ID_NUMPUBLIE=RIDP_721&ID_ARTICLE=RIDP_721_0313. In Finland, self-selection controls, in part, who serves in the lay judge role. See Jackson & Kovalev, *supra* note 1, at 102 n.99.

²⁰ See Danuta Parlak, *Social-Psychological Implications of the Mixed Jury in Poland*, in UNDERSTANDING WORLD JURY SYSTEMS THROUGH SOCIAL PSYCHOLOGICAL RESEARCH, *supra* note 1, at 165, 166.

²¹ See Walter Perron, *Lay Participation in Germany*, 72 REVUE INTERNATIONALE DE DROIT PÉNAL 181 (2001), available at http://www.cairn.be/article.php?ID_REVUE=RIDP&ID_NUMPUBLIE=RIDP_721&ID_ARTICLE=RIDP_721_0181.

²² See *id.*

²³ See Jackson & Kovalev, *supra* note 1, at 98, 106.

²⁴ See U.S. DEPT. OF STATE, 2006 COUNTRY REPORT ON HUMAN RIGHTS IN ARGENTINA (2007), <http://www.state.gov/g/drl/rls/hrrpt/2006/78877.htm>. Some have highlighted that the Argentine Constitution has provided for jury trials for “150 years.” See Martin Mbugua, *UD Prof in Argentina as Expert on Juries*, UNIV. OF DE. DAILY, Aug. 31, 2004, available at

Argentina will likely adopt trial by jury soon; many different proposals are on the proverbial table.²⁵ And there is, it seems, some evidence that jury trials may be taking root at the provincial level, with the first verdict having been issued in August 2005.²⁶ Argentina seems to be adopting a “mixed” tribunal of judges and jurors, expecting them to deliberate together on factual issues. Only professional judges, however, can decide legal matters and determine sentences and punishments.²⁷

Japan and South Korea are both democratic polities without current jury systems (as of October 2007), but both are planning to institute pilot criminal jury systems in the very near future.²⁸ Japan’s plan—as a three-year experiment commencing in 2009—is to have three judges and six randomly-selected lay jurors sit and deliberate together. A simple majority is all that will be required to reach a verdict, so long as one judge and one juror concur.²⁹ South Korea—as soon as 2008—plans to launch a five-year program introducing a more “pure” jury system, which will allow jurors to deliberate without any judges present.³⁰ Trials will have three judges and five to nine randomly-chosen jurors in cases where a defendant chooses to subject herself to the innovation. However, the jurors’ “verdict” will not bind the judges; the verdict will only be advisory during the pilot period.³¹

<http://www.udel.edu/PR/UDaily/2005/jul/jury083104.html> (describing now-Cornell professor and longtime jury expert Valerie Hans’s trip to advise Argentina on jury design). A copy of the Argentine Constitution is available in English at http://www.servat.unibe.ch/law/icl/ar00000_.html (amended 1994).

²⁵ See Edmundo S. Hendler, *Implementing Jury Trials in Argentina: Is It Possible* (2005), http://www.catedrahendler.org/doctrina_in.php?id=31&PHPSESSID=97b3a756.

²⁶ See Gisela Monge Roffarello et al., *A Research Guide to the Argentine Legal System* (2006), http://www.nyulawglobal.org/globalex/Argentina.htm#_Trial_by_Jury.

²⁷ Hendler, *supra* note 25.

²⁸ See Robert E. Precht, *Japan, the Jury*, N.Y. TIMES, Dec. 1, 2006, at A31 (Japan had a jury system for fifteen years before the Second World War; it was abolished in 1943).

²⁹ See Hiroshi Fukurai et al., *Comparative Analysis of Civic Legal Participation in Japan and the U.S.: Japan’s New Quasi-Jury Trial and America’s Criminal Jury Trial* (July 2006) (unpublished manuscript presented at a Meeting of the Law and Society Association, on file with author).

³⁰ *South Korea Holds Its First Jury Trial*, SAN JOSE MERCURY NEWS, Feb. 12, 2008, available at http://www.mercurynews.com/nationworld/ci_8239161.

³¹ See generally Eric Seo, Note, *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); Lisa Blomgren Bingham et al., *Participatory Governance in South Korea: Legal Infrastructure, Economic Development, and Dispute Resolution*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 375 (2007); Annie I. Bing, *Criminal Cases to Face Juries Next Year*, KOREA HERALD, May 2, 2007, available at https://www.koreaherald.co.kr/archives/result_contents.asp?id=200705020043&query=jury.

II. COUNTRIES WITH CRIMINAL JURIES

One can relatively neatly divide the world landscape of criminal juries between the “pure” juries that allow jurors to deliberate and issue verdicts apart from professional judges, and “mixed” juries that require jurors and judges to deliberate and issue verdicts or sentences together. I consider each form in turn, though some systems present difficulties for the neat typology and could be included in either category.

A. *Countries with (Mostly) “Pure” Juries*

Australia. Although jury trials are relatively rare in Australia and are reserved for the most serious crimes, there is a federally recognized procedure to empanel twelve randomly-selected laypersons as jurors for single cases. Most jurisdictions in Australia allow supermajority verdicts (11-1 and 10-2) for conviction or acquittal but generally require juries to deliberate under a unanimity constraint for three to six hours, depending on the jurisdiction. Still, unanimity is generally required for extremely serious offenses, such as murder or treason. Hung juries are possible under the symmetrical supermajority requirement, as they are, of course, under the few jurisdictions within Australia that have retained the symmetrical unanimity requirement more broadly.³² New South Wales, Queensland, and the Australian Capital Territory continue to maintain symmetrical unanimity requirements for conviction and acquittal; supermajority verdicts are generally accepted in Victoria, Tasmania, South Australia, Western Australia, and the Northern Territory.³³

Belgium. Belgium uses juries of twelve randomly-selected citizens to assist in the adjudication of serious felonies through its “Courts of Assizes.” Jurors sit for single cases.³⁴ Simple majorities produce verdicts,³⁵ and even splits (6-6) are treated as acquittals.³⁶ Jurors ultimately deliberate about proper punishment (the sentencing phase) with the three-judge panels that sit in the Courts of Assizes, so this system is not fully “pure.”³⁷

³² See generally TALINA DRABSCH, NEW SOUTH WALES PARLIAMENTARY LIBRARY RESEARCH SERVICE, MAJORITY JURY VERDICTS IN CRIMINAL TRIALS (2005), available at [http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/421dd46db485e6e1ca2570d10001c16a/\\$FILE/majority%20jury%20final%20and%20index.pdf](http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/421dd46db485e6e1ca2570d10001c16a/$FILE/majority%20jury%20final%20and%20index.pdf).

³³ *Id.* The Northern Territory allows the supermajority verdict in broader circumstances than the other jurisdictions.

³⁴ See Jackson & Kovalev, *supra* note 1, at 106.

³⁵ See *id.* at 113.

³⁶ See BELGIUM FEDERAL PUBLIC SERVICE JUSTICE, COURT OF ASSIZES (2004), <http://www.just.fgov.be/proces-arlon/en/index.html#6>.

³⁷ See Schwartz & Schwartz, *supra* note 1, at 445 n.34 (citing Code d’instruction criminelle [Criminal Instruction Code] 364).

Brazil. In Brazil, homicide cases, cases involving certain economic crimes, and certain press offenses are prosecuted in front of seven jurors to decide guilt. Majority rules.³⁸ Notably, jurors in Brazil do not deliberate together; rather, the members of the jury are privately polled and their votes control the outcome.³⁹

Canada. Canada's criminal jury is most like that of the United States: twelve randomly-selected members who are chosen to adjudicate a single case must reach unanimity for conviction or acquittal.⁴⁰ Hung juries are possible.

England (and Wales). The common law criminal jury continues to be utilized for some criminal trials (albeit a small percentage of them) in England and Wales.⁴¹ Juries consist of twelve randomly-selected citizens empanelled for single cases, and they render their verdicts by the consensus of at least ten jurors.⁴² The symmetrical unanimity rule was abolished in 1967.⁴³ Since it was abolished, the English require jurors to deliberate for at least two hours before rendering a verdict.⁴⁴

Ireland. As in England, twelve person juries can issue a verdict when ten jurors agree and the jurors have deliberated together for at least two hours.⁴⁵ The

³⁸ See *id.* at 447 n.35 (citing *Codigo do Processo Penal* 457); Luiz Flavio Gomez & Ana Paula Zomer, *The Brazilian Jury System*, 2001 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 75 (2001/2002).

³⁹ See JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 205 (1994) (citing HERMAN G. JAMES, *THE CONSTITUTIONAL SYSTEM OF BRAZIL* 122 (1923)). I was unable to verify the selection methods for choosing jurors in Brazil (other than by anecdotal conversations with Brazilian taxi drivers), though random selection does not seem to be employed very generally.

⁴⁰ See Neil Vidmar, *The Canadian Criminal Jury: Searching for a Middle Ground*, 62 LAW & CONTEMP. PROBS. 141 (1999).

⁴¹ See Erik Luna, *A Place for Comparative Criminal Procedure*, 42 BRANDEIS L.J. 277, 310 (2003/2004). Magistrate courts dispose of eighty percent of criminal cases without juries—and in cases of serious crimes where the jury is required, many cases are disposed of through plea bargaining. See ANDREW ASHWORTH, *THE CRIMINAL PROCESS: AN EVALUATIVE STUDY* 244 (2d ed. 1998).

⁴² See *Criminal Justice Act, 1967*, c. 80, § 13(1) (Eng.).

⁴³ See Jackson & Kovalev, *supra* note 1, at 113–14.

⁴⁴ See JON M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 206 n.65 (1977); Luna, *supra* note 41, at 310; *Juries Act 1974*, c. 23 § 17(4) (Eng.).

⁴⁵ See generally DRABSCH, *supra* note 32, at 16; CITIZENS INFORMATION BOARD, *CITIZENS INFORMATION: JURY SERVICE IN IRELAND* (2008), http://www.citizensinformation.ie/categories/justice/Courtroom/jury_service/?searchterm=Jury.

jury is in use for non-minor offenses and randomly-selected members are empanelled for single cases.⁴⁶

Scotland. Scotland uses fifteen member randomly-selected juries serving for single criminal cases, though trial by jury is not especially common. A vote by eight jurors to convict is sufficient for a verdict of guilty; any fewer votes to convict results in an acquittal.⁴⁷ Acquittals come in two forms: verdicts of “not guilty” and verdicts of “not proven.”⁴⁸ Deciding which version of acquittal is recorded in an individual defendant’s case is a function of majority rule (though no legal consequences follow from the particular form of acquittal). If the acquittal votes are split evenly, the verdict of record is “not proven.”⁴⁹

Spain. Spain reintroduced the criminal jury in a 1995 law. Jury trials are now available for several types of serious crimes. The jury contains nine randomly-selected citizens and two alternates, who sit for single cases. Seven of nine votes are required for any finding adverse to the defendant; not guilty verdicts and requests for clemency or suspended sentences require agreement by five of nine jurors.⁵⁰ This form of decision rule is different from most symmetrical, nearly-symmetrical, or “one-way” decision rules in place virtually everywhere else: the hybrid rule in Spain requires a supermajority to convict and a mere majority to acquit.⁵¹ In theory, this decision rule could lead to hung juries (when five or six jurors wish to convict). Another notable feature of the Spanish jury is that juries are required to assert rationales for their verdicts, a rarity in jury systems worldwide.⁵²

⁴⁶ CITIZENS INFORMATION BOARD, *supra* note 45. The same rules apply in Ireland and Northern Ireland. See Criminal Justice Act (Act No. 22, 29/1984) (Ir.); Criminal Procedure Majority Verdicts (Northern Ireland) Act, 1971, c.37.

⁴⁷ See ALEXANDER THOMSON, *CRIMINAL PROCEDURE IN SCOTLAND (SECOND REPORT)*, CMND. 6218, 194–208 (1975).

⁴⁸ See Peter Duff, *The Scottish Criminal Jury: A Very Peculiar Institution*, in *WORLD JURY SYSTEMS*, *supra* note 1, 249, 272–73.

⁴⁹ *Id.* at 272 n.185.

⁵⁰ See Ley Organica del Tribunal del Jurado [Organic Act on Trials by Jury] (B.O.E. 1995, 122, 275); Stephen C. Thaman, *Europe’s New Jury Systems: The Cases of Spain and Russia*, 62 *LAW & CONTEMP. PROBS.* 233 (1999).

⁵¹ I ultimately recommend a similar system for the United States—supermajority to convict, majority to acquit. For the argument, see Leib, *Supermajoritarianism and the American Criminal Jury*, *supra* note 3. Russia, which adopted a new jury system in 1993, requires seven out of twelve votes for a guilty verdict and six out of twelve votes for a not guilty verdict. Thaman, *supra* note 50, at 254 n.113. This resembles a simple majoritarian rule with ties leading to a verdict in favor of the defendant. Russia also requires its jurors to seek unanimity in the first three hours of deliberations. Thaman, *supra* note 50, at 254 n.114.

⁵² Thaman, *supra* note 50 at 254. As I will discuss *infra*, some juries in Switzerland are required to explain their verdicts. Denmark is about to embrace this requirement more generally as well.

Switzerland. Jury trials continue to exist in some Swiss cantons, though they have been abandoned by many others.⁵³ In the cantons that have retained trial by jury, jurors can sit in two different types of courts: the *cour corectionnelle*, in which a judge presides with six randomly-selected jurors, and the *cour d'assises*, in which a judge presides with twelve randomly-selected jurors. Simple majorities may return convictions and acquittals (with ties resulting in acquittals)—and jurors sit only for single cases.⁵⁴ Juries are expected to give explanations for their verdicts and are involved in assessing a sentence as well.⁵⁵ There is, it should be noted, some suggestion that the jury in Switzerland may disappear in 2010, when the federal government adopts a new unified criminal procedure law.⁵⁶

B. *Countries with (Substantially) "Mixed" Juries*

Austria. Austria's jury system is rather textured and is complicated by its commitment to having lay jurors in some contexts and lay judges in others; both are selected randomly. Lay assessors sit for five days per year over the course of two years and are not empanelled only for single cases.⁵⁷ For offenses that result in shorter prison sentences (usually three years), a single-judge court hears the trial and issues a verdict. For offenses that result in mid-range prison sentences (less than ten years), two professional judges sit with two lay judges. In these courts, majority controls, with 2-2 verdicts entered in favor of the defendant. For crimes that require lengthier terms, however, a more "traditional" jury court has jurisdiction: three professional judges sit with eight randomly-selected jurors. The eight jurors reach a verdict after deliberation isolated from the judges. In this jury court, a simple majority controls, with ties resulting in acquittal. Jurors are often involved in discussions about sentencing, though they no longer function as a "pure" jury at the punishment phase: they deliberate in tandem with the judges.⁵⁸

There are two ways in which the Austrian jury court transforms guilt adjudication itself from a "pure" jury system to a quasi-"mixed" system. First, the three-judge panel can refuse to enter judgment in certain cases if it concludes

⁵³ See Nathalie Gadola-Duerler & Jennifer E. Payne, *The Different Interdependencies and Connections in Criminal Procedure Law, Specifically Between Pretrial Detention and Bail from a Civil and a Common Law Point of View: A Swiss and American Comparative Law Analysis*, 3 TULSA J. COMP. & INT'L L. 205, 207 n.11 (1996).

⁵⁴ See Jackson & Kovalev, *supra* note 1, at 95 n.60, 102, 106, 113.

⁵⁵ *Id.* at 116, 115.

⁵⁶ *Id.* at 119. Note that in Geneva, the jury might be considered a quasi-"mixed" jury because the judge is present during deliberations to answer questions (though the judge may not issue advice or vote on the verdict). See *id.* at 113.

⁵⁷ See *id.* at 102, 106.

⁵⁸ See Neil Vidmar, *The Jury Elsewhere in the World*, in WORLD JURY SYSTEMS, *supra* note 1, at 421, 444. Norway draws three of ten jurors by lot (plus the jury foreperson) to deliberate and vote with three professional judges on sentencing. Majority rules. See Jackson & Kovalev, *supra* note 1, at 115.

unanimously that the jury verdict was erroneous. In such a case, the judges may send the case to a higher court for further consideration, which may recommend a new trial. If a second jury also reaches the original jury's conclusion, however, the judges no longer have the power to suspend the verdict.⁵⁹ Second, if the jury requests—or the judges request with a majority approval from the jury—the judges will deliberate with the jury, though they will not be able to vote with the jury on the verdict.⁶⁰ The verdict continues to require only majority agreement and the judges retain their veto right through unanimous agreement at the backend.

Denmark. The Danish jury system also defies easy classification (and shares a lot in common with the Swedish system, which I have concluded does not have a jury system for the purposes of the typology here). It is important to highlight that virtually all the information currently available in English about the Danish jury system⁶¹ is now outdated on account of a series of new reforms the Danes have undertaken and will implement, effective January 1, 2008.

Here is how the old system worked: For lesser crimes, “mixed” courts were used in which two lay assessors sat with a professional judge. When these cases were appealed, three lay assessors sat with three professional judges, all of whom got one vote. In both of these situations, judges and lay jurors deliberated together, simple majorities controlled, and ties led to a judgment in favor of the defendant.

Something closer to “pure” jury trials were available in cases where prosecutors asked for sentences of four years or more, in cases of political offenses, and in cases where the prosecution was seeking confinement in a mental institution. In these cases, twelve jurors would sit with a panel of three judges, and a majority vote of the judges and an 8-4 vote of the jurors had been necessary to issue a verdict adverse to the defendant, though deliberations among the judges and jurors were conducted separately. There was no such thing as a hung jury in Denmark because a failure to reach either of the required majorities led to an acquittal. A guilty verdict was not generally appealable on account of the “double guarantee” of jurors and judges in the jury court.

⁵⁹ U.S. EMBASSY IN VIENNA, ARREST AND IMPRISONMENT IN AUSTRIA, INFORMATION FOR AMERICAN CITIZENS, <http://vienna.usembassy.gov/en/embassy/cons/arrest.htm#Trail> (last visited Dec. 3, 2007). Code provisions can be found at 10, 14, 20, 300(2), 331 Strafprozessordnung [Criminal Procedure Statute] (cited in Schwartz & Schwartz, *supra* note 1, at 445 n.34). Norway also allows judges to “veto” jury verdicts when the panel of judges unanimously agrees. See Jackson & Kovalev, *supra* note 1, at 113. There is some ambiguity in the relevant sources as to whether the judges may veto only a guilty verdict or a not guilty verdict as well. See E-mail from John Jackson (May 9, 2007) (on file with author).

⁶⁰ E-mail from John Jackson, *supra* note 59. Stephen C. Thaman clarified for me some ambiguities about the Austrian system in the Jackson and Kovalev article. Email from Stephen C. Thaman, Professor of Law, St. Louis University (May 6, 2007) (on file with author).

⁶¹ In particular, see Stanley Anderson, *Lay Judges and Jurors in Denmark*, 38 AM. J. COMP. L. 839 (1990); Vidmar, *supra* note 58, at 445–46; Jackson & Kovalev, *supra* note 1, at 102–03, 106; and Schwartz & Schwartz, *supra* note 1, at 445 n.34 (citing Law on Judicial Procedure 6.2, 18.2.3., 687.21, 897.2, 906). I use these sources to sketch my portrait of the old system in the text.

At the sentencing phase in cases when a jury was empanelled, judges and jurors deliberated and voted on a sentence together: each juror had a single vote and each professional judge had four votes to create “parity” between judges and jurors. The weighted majority controlled and ties were resolved by favoring the side recommending the less severe penalty. Sentences were generally appealable to the highest court in the country.

A few changes will go into effect under the reform of the Administration of Justice Act.⁶² First, the lower level courts will now use six lay jurors with three judge panels and the mid-level courts (in which twelve jurors were previously employed) will now use nine lay jurors and three judges. In both cases, a two-thirds majority of jurors (four out of six and six out of nine, respectively) and a majority of judges (two out of three) will be required to reach a guilty verdict. Failure to reach these majorities will lead to acquittal. Jury verdicts will, under the new regime, be subject to appeal on the question of guilt. Most significantly, however, the Danes will now require the judges and jurors to deliberate together in a traditional “mixed” court setting in both instances. This change has been deemed necessary because although the old system did not require explanations from juries, the current reform seeks to require such explanations—and it was thought to be easier to have judges construct these rationales.

Unlike many other jury systems which employ randomly-selected citizens as jurors, lay judges and jurors in Denmark are selected through an appointment process, in which potential lay judges and jurors are first nominated by special representative “Basic List” committees, themselves appointed by city councils in accordance with proportional representation. The committees try to pick consensus laypersons to add to the Basic List, from which lay judges and jurors are drawn. Owing to this quasi-political dimension of appointment, the Danish jury is not wholly recognizable as a citizen jury—though its constitution does help explain why political offenses are a core type of dispute that is resolved by jury. When it comes time to seat lay assessors for a specific case, however, selection is made by lot. Lay judges and jurors must sit for a few days each year (usually about three cases) for four consecutive years.

France. The French jury is the paradigmatic “mixed” jury. It convenes to try crimes with minimum sentences of ten years’ incarceration. At the trial level, three professional judges sit with nine lay jurors, all of whom are randomly selected from lists of eligible voters to sit for singular cases.⁶³ The jurors and judges deliberate together about questions of guilt and punishment and must agree by a margin of 8-4 to render decisions adverse to the defendant. Failure to reach

⁶² I thank Jørn Vestergaard of the University of Copenhagen’s Law School and Morten Heide, a former LL.M. student at UC-Hastings, for walking me through these recent reforms.

⁶³ See Jackson & Kovalev, *supra* note 1, at 97, 106.

the required threshold leads to acquittal or lesser punishment.⁶⁴ A notable feature of the voting rules in the French context is that although deliberation among the adjudicators transpires face-to-face, the ultimate vote is taken in private. Since unanimity is not required, jurors and judges do not necessarily know how their co-panelists vote.⁶⁵

Greece. In contemporary Greece, serious felonies are tried by a mixed court of three professional judges and four randomly-selected jurors. Judges and jurors deliberate together and majority controls (with ties entered in favor of the defendant). Jurors serve for twenty-four days, so might hear more than one case.⁶⁶

Italy. Serious crimes in Italy are adjudicated by jury trial. The “mixed” court includes two professional judges and six lay jurors, the latter chosen through a process of random selection to be seated for a period of time. The decision rule is purely majoritarian, judges and jurors deliberate together, and ties are resolved in favor of defendants.⁶⁷

Portugal. For serious crimes, Portugal uses “mixed” courts of three professional judges and four jurors. Judges and jurors deliberate together and simple majorities control the outcome with ties entered in favor of defendants.⁶⁸ Jurors are randomly selected and are seated for single cases.⁶⁹

⁶⁴ See Schwartz & Schwartz, *supra* note 1, at 445 n.34 (citing Code de procedure penale arts. 244, 248, 249, 296, 355–57, 359); DRABSCH, *supra* note 32, at 17. The two-thirds supermajority is also required at the appellate level, where the French now use twelve lay adjudicators sitting and deliberating with three professional judges. See Jackson & Kovalev, *supra* note 1, at 118–19; see generally Bron McKillop, *Review of Convictions After Jury Trial*, 28 SYDNEY L. REV. 343 (2006).

⁶⁵ See Jackson & Kovalev, *supra* note 1, at 115.

⁶⁶ See *id.* at 98 n.78; Christos Mylonopoulos, *Greece*, in CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY 165–68 (Christine Van Den Wygaert et al. eds., 1993); but see Schwartz & Schwartz, *supra* note 1, at 445 n.34 (citing art. 8 1 Kaodikos Poinikes Dikonomias [Code of Criminal Procedure], for the proposition that “[m]inor crimes are tried by a mixed court of two professional judges and four lay assessors”). Somewhat amusingly, university professors are excluded from being able to participate as jurors in Greece. See Jackson & Kovalev, *supra* note 1, at 102, 103. In an e-mail, Jackson confirmed that Greece decides guilt by majority rule. See E-mail from John Jackson, *supra* note 59.

⁶⁷ This paragraph draws from Stephen P. Freccero, *An Introduction to the New Italian Criminal Procedure*, 21 AM. J. CRIM. L. 345, 348–51 (1994); Schwartz & Schwartz, *supra* note 1, at 445 n.34 (citing original Italian code); Patricia Catellani & Patrizia Milesi, *Juries in Italy: Legal and Extra-Legal Norms in Sentencing*, in UNDERSTANDING WORLD JURY SYSTEMS THROUGH SOCIAL PSYCHOLOGICAL RESEARCH, *supra* note 1, at 125 (same); Jackson & Kovalev, *supra* note 1, at 98.

⁶⁸ See Schwartz & Schwartz, *supra* note 1, at 445 n.34 (citing Da Constituicao Do Tribunal,Codigo de Processo Penal arts. 1, 2, 365(2); Autorizacao Legislativa Em Materia De Processo Penal art. 365(5)); Jorge de Figueiredo Dias & Maria Joao Antunes, *Portugal*, in CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY 317–19 (Christine Van Den Wygaert et al. eds., 1993).

⁶⁹ See Jackson & Kovalev, *supra* note 1, at 98 n.78, 102, 106.

III. CONCLUSIONS

This survey of democratic criminal jury systems leaves many questions unanswered. It does nothing to explain the historical evolution of the various jury systems under review. It does nothing to explain why the systems are designed as they are. And it does nothing to explore countries' different aspirations for their juries, along with their different degrees of efficacy at achieving their potentially disparate goals. Moreover, it does not purport to paint a comprehensive portrait of the mechanics of criminal adjudication in the twenty-eight democracies under investigation. Nor does this survey furnish any details about who is eligible to serve on juries, how (if at all) jurors are trained to do their jobs, or how and if jurors may be challenged by parties. Nevertheless, with all its omissions and gaps, the survey provides access to very difficult-to-find information about the decision rule design choices of big democracies and it enables one to make a few sound observations about criminal jury systems from a global perspective.

First, the survey clearly evidences that criminal jury systems are not necessary to the design of democratic polities. Although juries may have certain salutary effects, no one should think a criminal jury is a necessary qualification for a democracy in the contemporary global community. Indeed, about half of the big democracies reject jury systems altogether. Lay adjudication in some form certainly appears dominant among the world's democracies, but the form that lay adjudication takes varies a great deal—and the “jury of peers” model to which many in America have grown accustomed is not necessarily a marker of democratic triumph. There may be good normative justifications for promoting the jury, but it is not a necessary indicator of democratic achievement. Only the United States offers the jury trial right to such a broad a class of defendants.

Second, even among the class of countries that embraces the jury, the unanimous decision rule for guilt and acquittal generally enforced by the American system is very much an anomaly. Although Canada and some jurisdictions in Australia maintain unanimity as a requirement (for conviction *and* acquittal), more relaxed majoritarian and supermajoritarian rules clearly dominate the global jury system landscape. All major democracies are committed to defendants' rights in some form and virtually all formally presume innocence.⁷⁰ But only the United States, Canada, and a few Australian jurisdictions translate those preferences into a symmetrical unanimous decision rule, which hardly can be said to give the accused any benefit of the doubt because acquittal requires unanimity too. Also notable is that the more newly designed systems that are entering the world stage—in Spain, Russia, Japan, and South Korea—do not use unanimity as their preferred decision rule. Avoiding hung juries seems to be a priority among the world jury systems and very few world jury systems allow for them.

⁷⁰ See *id.* at 112 (highlighting the various principles of “beyond a reasonable doubt,” “presumption of innocence,” “deep-seated conviction,” and “*in dubio pro reo* (in doubt you must decide for the defendant)” that constrain jurors from casually voting to condemn a defendant).

Third, juries come in all different sizes. Although I excluded very small groups of lay decision-makers by definitional fiat, the size of juries varies a great deal. Notwithstanding these differences, there is no reason to think that decision rules are tied to size. Although some might suggest that smaller juries should be subjected to more stringent agreement requirements,⁷¹ there is no evidence among the democratic polities which employ juries that smaller juries approach a unanimity rule. In fact, the smaller juries tend to be able to render verdicts by purely majoritarian agreement.⁷² Perhaps oddly, many juries retain even numbers of jurors—but many of those jury systems award ties to the defendant. That is a way to build into the institutional design a true presumption of innocence.

Fourth, not only does size vary but so does shape: the members who compose juries in various democracies are chosen in rather different ways. Although I exclude the most professionalized and politicized lay judges from consideration in my survey, it does seem that random selection of laypersons is the dominant method of juror selection in the countries that use juries. Brazil and Denmark are notable exceptions here, but their status as outliers helps reinforce the rule.

Finally, the countries that choose to utilize jury systems are more or less evenly divided about whether judges should deliberate with jurors. There are plausible normative accounts for why it makes sense to have jurors be directed by judges and plausible rationales for why jurors should be left to their own devices during deliberations. The global empirical perspective on democratic criminal jury systems bears out only that jury systems in existence have not settled on one answer to that question: Japan, Denmark, and Argentina⁷³ seem headed for the “mixed” jury; South Korea and Spain have recently chosen the “pure” form.

As more and more countries pursue various democratization strategies and “rule of law” reforms of their legal systems, many states have considered and will consider adopting criminal jury systems. Now institutional and constitutional designers can more easily and accessibly compare and contrast the decision rules and general composition of the jury systems in operation worldwide among the larger democracies. To be sure, any particular design choice must remain sensitive to a given polity’s history and political culture.⁷⁴ And, of course, countries do not all embrace jury systems or pursue reforms of their jury systems with the same objectives in mind. Nevertheless, taking stock of the global landscape can help

⁷¹ See, e.g., *Burch v. Louisiana*, 441 U.S. 130 (1979) (arguing that smaller jury size should require heightened agreement threshold for conviction).

⁷² Some, of course, argue that heterogeneity of population is a relevant vector worth considering in decision rule (and size) design choices.

⁷³ Edmundo S. Hendler, *Juries or Mixed Tribunals in Argentina*, http://www.catedrahendler.org/doctrina_in.php?id=34&PHPSESSID=ddd524efc893ead6bf75726cd87b44da (last visited Feb. 26, 2008).

⁷⁴ I make this case—with reference to jury reform in China—in Ethan J. Leib, *Pragmatism in Designing Popular Deliberative Institutions in the United States and China*, in *THE SEARCH FOR DELIBERATIVE DEMOCRACY IN CHINA* 113 (Ethan J. Leib & Baogang He eds., 2006).

shed important light on the menu of available options and can help identify some potentially significant trends within the world community.