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A Foothold for Real Democracy in Eastern Europe

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A Foothold for Real Democracy in Eastern Europe: How Instituting Jury Trials in Ukraine Can Bring About Meaningful Governmental and Juridical Reforms and Can Help Spread These Reforms Across Eastern Europe

*Elizabeth R. Sheyn**

ABSTRACT

Ukraine has never had a criminal or civil jury trial despite the fact that the right to a criminal jury trial is guaranteed by Ukraine's Constitution. The lack of jury trials is one of the factors likely contributing to the corruption and deficiencies inherent in Ukraine's judicial system.

This Article argues that Ukraine can and should make room for juries in its judicial system and proposes a framework for both criminal and civil jury trials. Although the use of juries will not remedy all of the problems plaguing Ukraine, it could bring the country closer to achieving a truly democratic form of government. Specifically, the introduction of a jury trial framework in Ukraine will aid in the legitimization of the Ukrainian government and court system, harmonizing the presently tumultuous relationship between Ukrainian citizens and their government. Once Ukraine puts jury trials into practice, other former Soviet republics could learn and benefit from Ukraine's example.

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I. INTRODUCTION

A judicial system in which bribes are welcome, rather than banned or frowned upon, is difficult to imagine, particularly in light of the prohibitions placed on such conduct in the United States.¹ Yet,

1. For example, bribery is explicitly listed in the U.S. Constitution as a ground for impeachment, alongside treason and "other High Crimes and Misdemeanors." U.S. CONST. art. II, § 4. Judges can also be convicted of obstruction of justice if they accept bribes. See, e.g., *United States v. Maloney*, 71 F.3d 645, 650 (7th Cir. 1995) (affirming the conviction of a judge for various offenses in connection with taking bribes in return for acquittals in bench trials, among other reasons); JAMES TUOHY & ROB WARDEN, GREY LORD: JUSTICE, CHICAGO STYLE 259-61 (1989) (reporting on a U.S. government investigation leading to the conviction of numerous state court judges for, inter alia, taking bribes to fix cases, some of which involved criminal or quasi-criminal offenses); Patrick Donald McCalla, Note, *Judicial Disciplining of Federal Judges is Constitutional*, 62 S. CAL. L. REV. 1263, 1274 (1989) (describing the case of Judge Alcee Hastings, who was charged with conspiracy to take a bribe and

such a system is currently in place in Ukraine.² The lack of a jury system has likely contributed to this corruption.³ Ukraine has never held a single criminal or civil jury trial⁴ despite the fact that the right to a jury trial, at least in criminal cases, is guaranteed by its Constitution.⁵ This Article argues that Ukraine can and should

obstruction of justice). Individuals who bribe judges and jurors, as well as jurors who accept bribes, also face a range of criminal charges. See Louis S. Raveson, *Advocacy and Contempt—Part Two: Charting the Boundaries of Contempt: Ensuring Adequate Breathing Room for Advocacy*, 65 WASH. L. REV. 743, 758 (1990) (“[W]here an individual tampers with a jury, bribes a witness, or insults a judge, there is little question that the administration of justice has been obstructed.”).

2. *Utah Judges, Lawyers Help Set Up Ukraine Judicial System*, ASSOCIATED PRESS, Mar. 31, 2007, <http://www.ksl.com/index.php?nid=148&sid=1053583> [hereinafter *Utah Judges*] (noting that there are significant doubts that a jury system will work in Ukraine, as the country “has been aching with poverty and corruption, despite efforts to reform” and its “judicial system is still based on a bribery system”).

3. Scholars have suggested that juries, at least as they are used in the American judicial system, prevent judges and other actors (such as prosecutors) from abusing their power. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION 237* (2005) (“Unchecked by a jury, a judge might be tempted—quite literally—to go easy on his wealthy friends . . . Particularly in cases where government officials had committed crimes against the citizenry, judges acting alone might be overly inclined to favor fellow government officers.”); Jon P. McClanahan, *The “True” Right to Trial by Jury: The Founders’ Formulation and its Demise*, 111 W. VA. L. REV. 791, 828 (2009) (“Indeed, the Founders did not necessarily think that the majority of judges were prone to abuses of power; instead, they wanted the jury to have the right to decide issues of law to protect against the decision of a rogue judge.”); Benjamin J. Priester, *Structuring Sentencing: Apprendi, the Offense of Conviction, and the Limited Role of Constitutional Law*, 79 IND. L.J. 863, 895 n.167 (2004) (“[C]itizen participation in the adjudication of guilt and particularly the power of jury nullification protects against the abuse of power by legislatures, prosecutors, and judges. For this reason, the jury serves as a fourth institution in the constitutional structure of criminal procedure that is independent of the other three.”); see also Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2341 (2008) (noting that “[a] jury may even have a better sense of justice than a judge does”).

The United States Supreme Court has also supported this suggestion in its decisions. See *Teague v. Lane*, 489 U.S. 288, 314 (1989) (holding that “the purpose of the jury is to guard against arbitrary abuses of power by interposing the commonsense judgment of the community between the State and the defendant”); *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (concluding that “[t]he purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge”); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (noting the jury’s role as a safeguard against a “compliant, biased, or eccentric judge” and contrasting the jury’s “common-sense judgment” with the “more tutored but perhaps less sympathetic” judgment of a judge).

4. *Utah Judges*, *supra* note 2.

5. See Конституція України [Constitution] Title VIII, art. 124 (Ukr.), available at <http://www.president.gov.ua/en/content/chapter08.html> (“The people shall directly participate in the administration of justice through people’s assessors and jurors.”). Several other former Soviet republics—Armenia, Azerbaijan, Georgia, and Kazakhstan—also guarantee the right to a jury trial in their constitutions but have not yet put the jury system into practice. See Stephen C. Thaman, *The Nullification of the Russian Jury: Lessons for Jury-Inspired Reform in Eurasia and Beyond*, 40 CORNELL

make room for juries in its judicial system and proposes a framework for both criminal and civil jury trial implementation. Although the use of juries will not remedy all the problems plaguing Ukraine, it can bring the country closer to achieving a truly democratic⁶ form of government.⁷ Additionally, other former Soviet republics, especially

INT'L L.J. 355, 360, 360 n.15 (2007) (noting that "totalitarian or authoritarian or judge-dominated systems continue to produce significant numbers of erroneous convictions"). Belarus, Estonia, Kyrgyzstan, Latvia, Lithuania, Moldova, Tajikistan, Turkmenistan, and Uzbekistan do not include the right to a jury trial in their constitutions. See John D. Jackson & Nikolay P. Kovalev, *Lay Adjudication and Human Rights in Europe*, 13 COLUM. J. EUR. L. 83, 94, 100 n.88, 101, 109, 122 (2006) (describing the criminal justice systems of these countries). Russia is thus the only former Soviet republic that has included the right to a jury trial in its constitution and actually implemented the jury system. See generally Jeffrey Kahn, *Vladimir Putin and the Rule of Law in Russia*, 36 GA. J. INT'L & COMP. L. 511, 546 (2008) (discussing the development of the Russian legal system and noting the increasing availability of jury trials); Thaman, *supra*, at 357–63 (providing an overview of the development of the jury system in Russia and in other countries).

The use of juries in Russia, however, has apparently not been effective in addressing or ending the widespread corruption that plagues the Russian legal system. See Ellen Barry, *Murder Highlights Russian System's Flaws*, N.Y. TIMES, July 12, 2009, at A6 (stating that the cases of both Anna Politovskaya and Paul Klebnikov, two murdered journalists, "were tried before juries, which are relatively new and rare in Russia and which have proved vulnerable to threats and intimidation. And both cases were so heavily freighted with international political meaning that many concluded that . . . 'powerful sources in the government don't want a successful conclusion to the case'"); Lynda Edwards, *Russia Claws at the Rule of Law*, A.B.A. J., July 2009, at 38, 40 (noting that "four men accused of murdering Anna Politovskaya, a reporter for the Russian newspaper *Novaya Gazeta*" were tried before a Russian jury, but indicating that Politovskaya's attorney was murdered prior to the conclusion of the trial, likely due to his representation of Politovskaya or another one of his clients); see also *infra* notes 287–93 and accompanying text (pointing out some problems associated with the Russian criminal jury trial system that may render juries less effective).

6. Currently, Ukraine is considered to be a fledgling or young democracy—a transitional state rather than an established democracy. See Christopher J. Borgen, *Transnational Tribunals and the Transmission of Norms: The Hegemony of Process*, 39 GEO. WASH. INT'L L. REV. 685, 707 (2007) (describing Ukraine as a "transitional state").

7. See JAMES GOBERT, JUSTICE, DEMOCRACY AND THE JURY 99–160, 223–24 (1997) (discussing the nature of democracy, particularly as related to juries); NANCY S. MARDER, THE JURY PROCESS 10–17 (2005) (describing the different facets of the jury jury and noting the role it plays in aiding democracy); M.O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT'L L. 1069, 1111 (1999).

[The] idealized justification of the American jury system lies in its approximation of the virtues of the democratic principle. Ordinarily, members of the jury are representative of the community, and they bring the various 'voices' of the community to bear on the adjudication," and, moreover, "the process for reaching a decision is not only based on consensus or the persuasion of a supermajority of the jurors, but the end—result is arrived at only after considerable deliberation.

McClanahan, *supra* note 3, at 793–94 ("Founders and their contemporaries around the time of the drafting of the Constitution" meant for the jury to act as "a protector of the

those that closely resemble Ukraine in terms of their economic, political, and cultural characteristics, could learn and benefit from Ukraine's experience.

The implementation of jury trials in Ukraine is particularly important because the country, "once considered a worldwide symbol of an emerging, free-market democracy that had cast off authoritarianism, is teetering. And its predicament poses a real threat for other European economies and former Soviet republics."⁸ Ukraine—widely considered "a linchpin for stability in Europe"⁹—has a population of "46 million people and a highly strategic location . . . [A] collapse in Ukraine could wreck what little investor confidence is left in Eastern Europe, whose formerly robust economies are being badly strained."¹⁰ Furthermore, governmental problems in Ukraine could

cause neighboring Russia, which has close ethnic and linguistic ties to eastern and southern Ukraine, to try to inject itself into the country's affairs. What is more, the Kremlin would be able to hold up Ukraine as an example of what happens when former Soviet republics follow a Western model of free-market democracy.¹¹

Introducing a jury trial framework in Ukraine—particularly one that is more effective than the system currently being used in Russia¹²—will aid in the legitimization of the Ukrainian government and court system,¹³ thereby helping to stabilize the presently tumultuous relationship between Ukrainian citizens and their government.¹⁴

Part II of this Article introduces the concept of the jury and provides the historical context for—and an overview of—some current jury systems, including the English, American, continental

people against overreaching by the government, as a participant in the democratic process, and as a central figure in the administration of justice.").

8. Clifford J. Levy, *Ukraine Teeters as Citizens Blame Banks and Government*, N.Y. TIMES, Mar. 2, 2009, at A1.

9. *Id.* (quoting Olexiy Haran, Professor of Comparative Politics, Kiev Mohyla University).

10. *Id.*

11. *Id.*

12. See Steven Lee Myers, *Russia Overturns Acquittal in Killing of Editor*, N.Y. TIMES, Nov. 10, 2006, at A6 (describing a "worrisome trend: the appeal and, frequently, the reversal of decisions by juries"); Steven Lee Myers, *What Chance Justice is Done? Russia's System is Questioned*, N.Y. TIMES, Nov. 1, 2003, at A1 ("Russia's post-Soviet Constitution arguably offers its citizens rights comparable to those of Europe or the United States, and a new criminal procedural code enshrines such basic concepts as jury trials and habeas corpus. Yet justice in practice remains arbitrary, selective and often corrupt . . ."); see also *infra* notes 287–93 and accompanying text (discussing the problems associated with criminal jury trials in Russia that should be avoided by Ukraine).

13. See *infra* Part IV.A (listing the ways in which a jury helps legitimize the judicial system).

14. See Levy, *supra* note 8 (describing the tumultuous conditions in Ukraine and noting that "people are disillusioned with the government").

(European), and Russian models. Part III describes the current Ukrainian judicial system in both theoretical and practical terms. Part IV discusses whether Ukraine should enforce the provision of its Constitution that provides for the right to trial by jury, concludes that such enforcement is necessary and beneficial, and proposes a framework for criminal *and* civil jury trials.

II. JURY SYSTEM MODELS

The jury likely originated in Athens during the fifth century B.C., where the jury courts, known as *dikasteries*, used hundreds of jurors, known as *dikasts*, to decide cases.¹⁵ The Romans formalized the *dikasteries*: their courts had smaller juries and often featured “rhetorically sweeping arguments by professional advocates, including Cicero. This system may have been transported to the rest of Europe by the Roman conquerors, but it faded between A.D. 300 and 500, apparently because it was too democratic for the [tastes] of the increasingly despotic emperors.”¹⁶

Scholars disagree about how the jury system of Ancient Greece and the Roman Empire found its way to England and continental Europe.¹⁷ The most common opinion is that “trial by jury was introduced into England by William the Conqueror, who added it to the three basic trial methods already practiced in England and on the

15. STEPHEN J. ADLER, *THE JURY: DISORDER IN THE COURTS* 244 n.3 (1994) (indicating that a majority of the *dikasts* was necessary to reach a verdict and that they voted “by dropping a bean or pebble into one of two urns;” the *dikasts* “generally decided both the outcome and the sentence” and they were paid “three obols a day—enough, scholars say, to pay for three salted fish”). *But see* Morris B. Hoffman, *Peremptory Challenges Should be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809, 813–14 (1997) (“The notion of a jury . . . is as old as civilization itself. . . . [J]uries in some form or another were known in Ancient Egypt, Mycenae, Druid England, Greece, Rome, Viking Scandinavia, the Holy Roman Empire, and even Saracen Jerusalem before the Crusades.”).

16. ADLER, *supra* note 15, at 244 n.3; *see also* Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 958 (2003) (explaining that the “Romans inherited the *dikasteria* in an institution they called the *Judice*, which was a group of senators convened to resolve important disputes involving other senators or members of the imperial family[.]” the “trials were held in the Senate before a subgroup of fifty-one senators, who, as with the *dikasteria*, not only decided guilt or innocence, but also imposed punishment”).

17. *See* ADLER, *supra* note 15, at 245 n.3 (noting that the history of the jury during the Middle Ages is murky due to a lack of records); VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 25–26 (1986) (stating that the jury began to replace the trial by ordeal “[s]ometime during the 13th century”); Richard S. Arnold, *Trial By Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 6 (1993) (tracing the origins of the jury system); Roger M. Young, *Using Social Science to Assess the Need for Jury Reform in South Carolina*, 52 S.C. L. REV. 135, 141 (2000) (discussing a dispute over whether the jury system “predated the Norman Conquest in 1066”).

Continent since Charlemagne: trial by compurgation, trial by battle, and trial by ordeal.”¹⁸

Several types of juries are in existence today. The English and American systems (and arguably the Russian system) are primary examples of “pure” jury systems that allow “jurors to deliberate and issue verdicts apart from professional judges.”¹⁹ Many of the continental systems exemplify “‘mixed’ juries that require jurors and judges to deliberate and issue verdicts or sentences together,”²⁰ but some European juries are of the pure variety.²¹ A very small number of countries do not use the jury at all.²²

This Article provides an overview of a number of jury models, including those of England, the United States, continental Europe, and Russia, discussing both the historical development and the current state of each model. The proposed Ukrainian jury borrows certain aspects of these models.

18. Arnold, *supra* note 17, at 6–7 (“The best guess now seems to be that William the Conqueror brought the jury across the Channel to England with the Frankish *inquisitio* in 1066, and that the English jury finally took root at that time, eventually developing into its modern form towards the end of the fourteenth century.”); Hoffman, *supra* note 15, at 816–17.

Trial by compurgation (in which the winning litigant was the one who could bring a designated number of respected people to court willing to swear to the truth of his oath) was generally limited in post-Conquest England to minor civil disputes and misdemeanor criminal offenses. . . . Trial by battle, favored by the Normans, also eventually fell into disuse. For serious criminal cases or other cases involving important issues, trial by ordeal remained the dispute resolution mechanism of choice. . . . Trial by jury during this period remained exceedingly rare.

Id.; see also HANS & VIDMAR, *supra* note 17, at 24–25 (explaining that “prior to William the Conqueror, the jury as we know it did not exist. However, the practice of compurgation in which twelve or more peers took oaths in the court does have some elements of similarity to today’s jury” and this method co-existed, for a time, with trial by battle—used primarily in civil cases—in which “the two parties to the dispute would fight on the battlefield and the winner of the battle won the legal case” and trial by ordeal, in which an individual who was charged with a crime would undergo a particular, frequently painful test with the assumption that “God would intervene on the side of the innocent person.”)

19. Ethan J. Leib, Commentary, *A Comparison of Criminal Jury Decision Rules in Democratic Countries*, 5 OHIO ST. J. CRIM. L. 629, 635–37, 637 n.51 (2008).

20. *Id.* at 635.

21. See, e.g., *id.* at 637 (noting that Spain has a “mostly pure” jury system).

22. “These countries, some of which engage lay participation in trial adjudication in some form, include: Chile, the Czech Republic, Hungary, India, Israel, Mexico, the Netherlands, and South Africa. Many cantons of Switzerland have no jury, but involve (sometimes elected) lay judges in criminal case dispositions.” *Id.* at 631–32.

A. *English Jury System*

1. Historical Development

The role of the jury in England was primarily administrative²³ until the time of Henry II, who was crowned in 1154.²⁴ “By a series of statutory enactments, known as assizes, Henry transformed the jury into a genuine instrument of justice”²⁵ while banning trial by compurgation for most felonies and requiring most felony prosecutions to proceed by ordeal.²⁶ Some scholars suggest that Henry II initially utilized the jury trial to resolve the complaints of tenants “who claimed to have been ‘disseised, that is dispossessed, of [their] free tenement unjustly and without judgment.”²⁷ By using this remedy, known as the assize of novel disseisin, claimants could “submit their case to a jury of at least arguably knowledgeable local citizens rather than engage in trial by combat.”²⁸

Even after the assize of Clarendon, “which is generally recognized as the first significant historical marker in the development of the English jury system, juries were almost never used in criminal cases, and when they were, they were available to the defendant only for a price.”²⁹ As part of the Fourth Lateran Council in 1215, however, “Pope Innocent III forbade the clergy from performing religious ceremonies in association with ordeals, and the

23. See Stephan Landsman, *The Civil Jury in America: Scenes From an Unappreciated History*, 44 HASTINGS L.J. 579, 582–83 (1993).

Accounts of the early history of the jury indicate that the Normans pressed a rudimentary form of jury procedure into service to help them secure an administrative hold on the lands they had seized by force of arms. These early ‘juries’ were bodies of citizens summoned by royal command to testify about property arrangements, local customs, and taxable resources in each neighborhood of the realm. One product of this testimony was the Domesday Book recorded in 1085–86. Another was the establishment of a more efficient governmental infrastructure in England than existed elsewhere in Europe.

Id. This early jury procedure relied “on the exercise of royal authority,” compelled “jurors to participate in the adjudicatory process,” utilized “the men of the neighborhood in a corporate body to provide the information upon which to base decisions,” and was unique “as compared to traditional approaches that relied on the actions of the litigants to settle disputes either by ordeal or combat.” *Id.*

24. *Id.* at 583.

25. *Id.*

26. Hoffman, *supra* note 15, at 818.

27. Landsman, *supra* note 23, at 583 (quoting 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 146 (Lawyer’s Literary Club, 2d ed. 1959) (1895)).

28. *Id.* (citation omitted) (“Novel disseisin was ‘fully organized’ by 1179 and was an overwhelming success. It established a procedural pattern repeatedly copied over the course of the next century to address different sorts of legal claims.”).

29. Hoffman, *supra* note 15, at 818.

English crown rapidly recognized that decree.”³⁰ Trial by jury was left as “the only practical alternative for deciding serious criminal cases.”³¹

Early on, the English jury “was an inquisitorial device, whereby citizens from the neighborhood where the dispute arose were summoned to tell the court what happened. If the summoned jurors did not know what had happened they were required to make inquiries and then swear in court as to the facts.”³² Over several

30. Diane E. Courselle, *Struggling With Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. REV. 203, 214 (2005); see also HANS & VIDMAR, *supra* note 17, at 26 (“The Church in Rome had been opposed [to the ordeal as a means of trial] from as early as the late 9th century, and, in 1215 Pope Innocent III in the Fourth Lateran Council forbid priests to participate in religious rites surrounding the ordeal, thus removing its religious sanction.”). In the same year, on June 12, “the constitutional right to a jury trial was guaranteed by the Magna Charta, signed at Runnymede by King John . . .” Arnold, *supra* note 17, at 13. “The Magna Charta provided that no freeman would be disseized, dispossessed, or imprisoned except by judgment of his peers or by ‘the laws of the land.’ It further stated, ‘[t]o none will we sell, to none will we deny, to none will we delay right or justice.’” *Id.* (citing RICHARD THOMSON, AN HISTORICAL ESSAY ON THE MAGNA CHARTA OF KING JOHN 83, 85 (Gryphon Editions, Ltd. 1982) (1829)). The English kings “reaffirmed the Magna Charta thirty-eight times [during the next hundred years].” *Id.*

31. Hoffman, *supra* note 15, at 819; see also HANS & VIDMAR, *supra* note 17, at 26 (explaining that “sometime during the 13th century the jury began to replace the ordeal”); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 107–31 (Little, Brown, 5th ed. 1956)) (discussing the evolution of the jury); Courselle, *supra* note 30, at 214–15.

One ancient way of initiating proceeding was an appeal brought by a private accuser, which generally resulted in a trial by battle. To prevent abuses, Henry II invented the writ ‘*de odio et atia*,’ by which a person could avoid trial by battle by submitting the question of whether the accuser had brought the appeal ‘from hatred and malice’ to the verdict of recognitors.’ The writ effectively substituted a sort of trial by jury for the trial by battle. The jury became a new form of ordeal—an ordeal that submitted the question of the justness of one’s position to the essentially inscrutable judgment of a group of fellow citizens. Like the highly ritualized [sic] nature of the other modes of proof, submitting a case to the jury became a formalized process.

Id.; Young, *supra* note 17, at 143 (“These early methods of determining guilt or innocence began to attract enough detractors that during the 13th century the trial by ordeal fell out of favor and was replaced by something that began to more closely resemble the present trial by jury.”). Some scholars also argue that “the jury’s growth may also be traced to the economic benefits it offered the Crown.” Landsman, *supra* note 23, at 584. Because “[t]he adoption of jury procedure placed most of the work of the judicial system in the hands of unpaid local citizens. . . . a great deal of judicial business could be handled inexpensively and, at the same time, substantial fees could be charged.” *Id.*

32. Ellen E. Sward, *The Seventh Amendment and the Alchemy of Fact and Law*, 33 SETON HALL L. REV. 573, 576 (2003); see also JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 183–262 (Rothman Reprints, Inc. 1969) (1898) (discussing the history of the jury); Landsman, *supra* note 23, at 584–85 (noting that to increase the jurors’ knowledge about the facts of a case, “statutes enacted as late as 1427 required the sheriff to convey the jurors’ names to the parties at least six days in advance of trial so that the parties could ‘inform’ the veniremen of pertinent

centuries, the English jury—both civil and criminal³³—evolved and gained many characteristics that the American jury has recently possessed or currently possesses.³⁴ For example, “by the late thirteenth century, twelve had come to be the recognized number for juries,”³⁵ and “[i]n 1367, during the rule of Edward III (1327-1377), the requirement of a unanimous verdict of twelve was firmly established.”³⁶ Around this time, juries also began deliberating in secret.³⁷ In addition, beginning in the early fifteenth century, jurors were limited to considering evidence presented in open court.³⁸ As a result, they were “forbidden to base their decisions on personal

facts”). *But see* JOHN P. DAWSON, A HISTORY OF LAW JUDGES 123–25 (1960) (pointing out that although it was never expected that every juror would be an eyewitness, the jury was always required to enter into a collective verdict, which represented the majority’s opinion, rather than individual views of the evidence).

33. *See* Todd E. Pettys, *The Immoral Application of Exclusionary Rules*, 2008 WIS. L. REV. 463, 471 (2008) (“[I]t is clear that by the thirteenth century, jury trials were commonplace in both civil and criminal cases in England.”).

34. *See infra* Part II.B.2 (describing the American jury).

35. Arnold, *supra* note 17, at 8.

36. *Id.*; *see also* Landsman, *supra* note 23, at 586.

It is not clear why unanimity was adopted, but litigant acceptance of juror-driven rather than judge-conducted factual inquiry . . . [and] the tremendous savings in time and money achieved by relying exclusively on juries rather than a corps of inquiring magistrates to sift through the evidence likely motivated this decision.

Id. The unanimity requirement in civil cases continued to be sporadically applied, however, “primarily because it was easier to obtain a verdict from fewer men.” Arnold, *supra* note 17, at 8. Any “variation in [juror] number[s] ended during the reign of Edward IV (1461–1483)[,] when the unanimous verdict of twelve unquestionably and invariably became the law of England, absent consent of the parties.” *Id.*

37. *See* 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 57, 318–19 (6th ed. 1938) (explaining that “[i]n the early courts of the assizes, parties knew the jurors’ names beforehand, thereby creating the temptation to use bribery to obtain a favorable verdict. As a result, during the reign of Edward III, England enacted at least three statutes prohibiting that conduct;” the “simplest method of ensuring that no one communicated with [the jury] while they were functioning as jurors was to keep them physically separate during their consideration of their verdict”); Courselle, *supra* note 30, at 215–16.

38. Arnold, *supra* note 17, at 17; Landsman, *supra* note 23, at 587.

While it may be impossible to determine the precise moment that courtroom procedure shifted to testimonial presentations in open court, such presentations clearly came to dominate over the course of the fifteenth and sixteenth centuries. . . . Statutes requiring the testimony of one or more witnesses began to appear during the 1500s, making in-court inquiry essential in some cases. . . . [and positing that] [t]he final movement towards in-court testimony probably came in the mid-1600s when jurors were isolated from outside influences and were required to decide cases on the basis of what was presented in open court.”

Id.

knowledge.”³⁹ Although these features of the jury initially prompted the exercise of more stringent control over this institution by the English courts,⁴⁰ several decisions handed down in the late 1600s⁴¹ “had the effect of catapulting the jury to popularity ‘as a bulwark of liberty, and as a means of preventing oppression by the Crown.’”⁴²

Scholars argue, however, that “some of the most fundamental attributes of modern Anglo-American criminal procedure,”⁴³ such as the relationship between the judge and the jury, arose in eighteenth-century England.⁴⁴ During this time, the English jury, which was composed of twelve individuals residing in the same venue in which the offense in question occurred,⁴⁵ grew into its role of “public moral arbiter.”⁴⁶ Although the judge announced the sentence, the role of the jury in English criminal trials was significant because the jury

39. Sward, *supra* note 32, at 577; see also Landsman, *supra* note 23, at 585–86 (suggesting that the unanimity requirement “cut the ties that bound jurors to any sort of witnessing role” because “[w]hen jurors are compelled to harmonize their views into one conclusive verdict, their individual witnessing functions inevitably must be subordinated to the group’s need for consensus”).

40. In the sixteenth century,

the English courts began . . . to punish jurors for returning verdicts [in political trials] that were clearly against the evidence. . . . This result severely undermined the jury protection the English had come to value, and it allowed the courts to operate as inquisitors.

Arnold, *supra* note 17, at 9.

41. These cases included the famous *Bushel’s Case*, (1670) 89 Eng. Rep. 2 (C.P.), a habeas corpus action in which a juror sought “his release from prison. The jury upon which Bushel sat had acquitted William Penn of unlawful assembly, despite full and manifest evidence. As a result, Bushel was committed to prison.” Arnold, *supra* note 17, at 9. In *Bushel’s Case*, Chief Justice Vaughan concluded that the jury “was not required to do the court’s bidding, because, if the jurors returned a wrong verdict, they, and not the judge who directed the verdict, would be punished by the attain, a procedure whereby a second jury would convict and punish the first for rendering a false verdict”; because “Chief Justice Vaughan knew that for all intents and purposes the attain was an obsolete form. . . his opinion was in effect a declaration of the independence of the jury, an independence that would continue to ensure its position in English jurisprudence as protector of the individual.” *Id.* at 9–10.

Following the decision in *Bushel’s Case* “the judiciary sought, especially in seditious libel cases, to narrow the options available to jurors by tightly circumscribing the questions they were asked to decide.” Landsman, *supra* note 23, at 590. In 1688, however, the efforts of the English courts “were undermined in the *Seven Bishops Case* when another courageous London jury acquitted seven Anglican bishops of seditious libel for signing a letter that indicated their opposition to the reading of James II’s second *Declaration of Indulgences* in their churches.” *Id.*

42. Landsman, *supra* note 23, at 591 (quoting Austin W. Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 676 (1918)).

43. John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 2 (1983).

44. Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 406–07 (2009).

45. *Id.*

46. *Id.*

was charged with determining the defendant's level of moral culpability, sanctioning the offender, restoring the victim to his or her original state, and repairing the community by publicly denouncing the crime and the criminal.⁴⁷

The English jury not only adapted to the country's new and different needs over the course of its evolution but also contributed to "the establishment of certain fundamental principles of democratic governance. These principles, and the jury itself, came to play a critical part in the tumultuous events leading to the fall of the Stuarts, the rejection of absolute monarchy, and the rise of parliamentary government."⁴⁸ For example, by serving on the jury, "[o]ver the course of 600 years, English jurymen learned to rule themselves When the struggle for political liberty was joined in the seventeenth century, Englishmen who had known and enjoyed self-governance were ready to fight for what they had come to perceive as their rights."⁴⁹ Thus, as it evolved, the English jury "became much more critical in the role of governing society"⁵⁰ and "began to have a role in the assignment of power in government."⁵¹

2. Current Jury System

Currently, the jury trial is seldom used in England.⁵² In the criminal context, individuals who are accused of non-indictable crimes—less serious crimes for which the maximum punishment is less than two years in prison—do not have the right to trial by jury.⁵³

47. *Id.*

48. Landsman, *supra* note 23, at 587–88.

49. *Id.* at 588. "The jury was also responsible for introducing the 'middling sort,' men of neither the aristocracy nor upper gentry but still of independent means, to the responsibilities of governing. Over time these citizens would become the bedrock of English political democracy." *Id.* (citation omitted); see also 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 380 (Univ. of Chicago Press 2d prt. 2002) (1783) (arguing that "sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth and the surest guardians of public justice" because "the most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of trial," and observing that the English jury system thus "preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens").

50. Young, *supra* note 17, at 144.

51. *Id.*

52. See Richard O. Lempert, *The Internationalization of Lay Legal Decision-Making: Jury Resurgence and Jury Research*, 40 CORNELL INT'L L.J. 477, 477 (2007) ("The use of juries, especially in civil litigation, had long been in decline, to the point of near extinction in England, the land of their birth . . .").

53. HANS & VIDMAR, *supra* note 17, at 31. A similar standard is utilized in Australia, Canada, Scotland, and Wales. *Id.*; see also Bruce P. Archibald, *Let My People Go: Human Capital Investment and Community Capacity Building Via*

English common law criminal juries “consist of twelve randomly-selected citizens empanelled for single cases, and they render their verdicts by the consensus of at least ten jurors,”⁵⁴ as the unanimity requirement was abolished in 1967.⁵⁵ Members of the jury can only

Meta/Regulation in a Deliberative Democracy—A Modest Contribution for Criminal Law and Restorative Justice, 16 CARDOZO J. INT’L & COMP. L. 1, 85 n.49 (2008).

[D]espite the constitutional right in the Charter of Rights and Freedoms, section 11, to a jury trial in criminal matters where an accused is liable to a punishment of imprisonment for more than five years, only a tiny fraction of Canadian criminal trials are actually jury trials. Most seasoned observers tend to estimate the number of jury trials as a fraction of all criminal trials, at considerably less than two percent.

Id.; Peter Duff, *The Not Proven Verdict: Jury Mythology and “Moral Panics,”* 41 JURID. REV. 1, 1 (1996) (indicating that in Scotland, less than one percent of those brought to trial in a criminal court have a jury); Jackson & Kovalev, *supra* note 5, at 99 (stating that Justices of the Peace, or lay judges, hear and decide cases involving relatively minor offenses in England, Wales, and Scotland; in England and Wales, Justices of the Peace “sit on a bench of three with legally qualified clerks present to guide them on the law” and decide “cases that can carry as much as two years of imprisonment In Scotland, the maximum penalties available to the district court where the lay judges sit are sixty days imprisonment or a fine of £2500”); Leib, *supra* note 19, at 635–36 (stating that “[t]he common law criminal jury continues to be utilized for some criminal trials (albeit a small percentage of them) in England and Wales,” and explaining that “jury trials are relatively rare in Australia and are reserved for the most serious crimes”); Sally Lloyd-Bostock & Cheryl Thomas, *Decline of the “Little Parliament:” Juries and Jury Reform in England and Wales*, 62 LAW & CONTEMP. PROBS. 7, 15 (1999) (observing that only about one or two percent of criminal trials in England and Wales are tried by jury).

54. Leib, *supra* note 19, at 636 (citing Criminal Justice Act, 1967, c. 80, § 13(1) (Eng.)). There are also no grand juries in England; the use of grand juries was initially suspended during World War I and, although they were reinstated in 1921, the Parliament ultimately abolished them in 1933. Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398, 428 (2006).

55. Leib, *supra* note 19, at 636. The same requirements apply to juries in Wales. *Id.* Because of the elimination of the unanimity requirement, criminal juries in England must deliberate for at least two hours before announcing the verdict. *Id.* (citing Juries Act, 1974, c. 23, § 17(4), (Eng.)); JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 206 n.65 (1977); Juries in Ireland are similar to English juries in all relevant respects. See Leib, *supra* note 19, at 636–37 (discussing the Irish jury system). By contrast, juries in Canada, which are also made up of twelve randomly selected citizens who are chosen to hear a single case, “must reach unanimity for conviction or acquittal.” *Id.* at 636. “Most jurisdictions in Australia allow for supermajority verdicts (11-1 and 10-2) . . . 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.” *Id.* at 635.

In Scotland, unlike in Australia, Canada, England, and Wales, the jury is made up of fifteen randomly selected members who serve on a single case; the vote of eight jurors supports a conviction while “any fewer votes to convict results in an acquittal.” *Id.* at 637. An acquittal can come in the form of a “not guilty” verdict or a “not proven” verdict. *Id.* “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.’” *Id.*

be challenged and removed for cause.⁵⁶ At the conclusion of the case, and prior to the start of the jury's deliberation process, "an English judge will summarize and even comment on the evidence for the jury's edification, a measure unheard of in the United States."⁵⁷

Although England has preserved the criminal jury trial, it has essentially eliminated the civil jury trial.⁵⁸ The Supreme Court Act of 1981,⁵⁹ which governs the English jury system today, permits jury trials as a matter of right "in four types of cases: libel and slander; malicious prosecution; false imprisonment; and fraud."⁶⁰ Even in cases involving these causes of action, "the litigant must petition the court to empanel a jury."⁶¹ Additionally, a court still might decide that a civil jury is unavailable in a particular case—even if jury trial is permitted as a matter of right and the litigant petitioned for the empanelment of a jury—if the judge determines that "the trial requires any prolonged examination of documents or accounts, or any of scientific or local investigation which cannot be made with a jury."⁶² Despite the fact that the court retains discretion, pursuant to the Supreme Court Act of 1981, to try any case before a jury, "this discretion is rarely exercised."⁶³

56. Erik Luna, *A Place for Comparative Criminal Procedure*, 42 BRANDEIS L.J. 277, 310 (2004); see also Nancy Amouri Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 46 n.183 (2002) (stating that "[g]rounds for challenge have been effectively restricted to '(a) ineligibility or disqualification and (b) reasonable suspicion of bias'"). Pre-trial questioning of jurors about their potential personal interest in the case and about their personal beliefs and prejudices generally—otherwise known as the practice of voir dire—is typically absent in England and Canada. See HANS & VIDMAR, *supra* note 17, at 31 ("Except for special circumstances, questioning jurors about their beliefs is forbidden. English and Canadian jurors are more or less randomly selected from the jury pool.")

57. Luna, *supra* note 56, at 310.

58. See HANS & VIDMAR, *supra* note 17, at 31 (noting that "outside North America, the civil jury has all but disappeared").

59. Supreme Court Act, 1981, c. 54, § 69 (Eng.).

60. CATHERINE ELLIOT & FRANCES QUINN, *ENGLISH LEGAL SYSTEM* 154–55 (Pearson Educ. 4th ed. 2002) (citing Supreme Court Act, 1981, c. 54, § 69 (Eng.)).

61. Justin C. Barnes, Comment, *Lessons From England's "Great Guardian of Liberty": A Comparative Study of English and American Civil Juries*, 3 U. ST. THOMAS L.J. 345, 360 (2005).

62. ELLIOT & QUINN, *supra* note 60, at 155.

63. Lord Scott of Foscote et al., *The Role of "Extra-Compensatory" Damages for Violations of Fundamental Human Rights in the United Kingdom & the United States*, 46 VA. J. INT'L L. 475, 490 (2006) (citing Supreme Court Act, 1981, c. 54, § 69(3) (Eng.)); see also ELLIOT & QUINN, *supra* note 60, at 155 (noting that the right was most often exercised in defamation actions, but even that use has become more limited). In deciding whether to exercise discretion

over the issue of trial by jury, the English judge must be guided by the Court of Appeal's decision in *Ward v. James*, a personal injury case in which the issue was whether trial by jury should be ordered under Rules of Court of the Act then in force

B. American Jury System

1. Historical Development

English colonists brought the jury trial to America in the early 1600s,⁶⁴ and nearly all colonial charters soon possessed a clause specifying that “unless convicted by a jury consisting of twelve men of the neighborhood, no one could lose life, liberty, or property in a civil or criminal case.”⁶⁵ Although the King of England tried to “water down” the colonists’ right to trial by jury through numerous tactics—including the issuance of “mandates to colonial governors, who then attempted to circumvent the right to trial by jury by expanding admiralty jurisdiction,”⁶⁶ and the promulgation of “various Acts of Parliament that deprived colonists of their right to jury trial”⁶⁷—the

Joseph C. Wilkinson, Jr. et al., *A Bicentennial Transition: Modern Alternatives to Seventh Amendment Jury Trial in Complex Cases*, 37 U. KAN. L. REV. 61, 70–71 (1988) (citing *Ward v. James*, 1 Q.B. 273 (1966)); see also *Ward*, 1 Q.B. at 285 (discussing the discretion of a judge in ordering a trial by jury). The Court of Appeals ruled in *Ward* that

[t]he judge ought not, in a personal injury case . . . order trial by jury save in exceptional circumstances. Even when the issue of liability is one fit to be tried by a jury, nevertheless he might think it fit to order that the damages be assessed by a judge alone.

Id. at 303. As a result,

trial by jury in any civil case is now extremely rare in England; there is in effect no right to trial by jury in civil cases in England other than for defamation and related cases. Even in defamation cases, many feel that juries should be the exception and that the right to a jury should be withdrawn.

Wilkinson et al., *supra*, at 71.

64. See LEONARD W. LEVY, *THE PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY JURY* 69 (1999) (providing an overview of the jury system as it was implemented by the English colonists in America in the 1600s).

65. *Id.* at 73; see also Appleman, *supra* note 44, at 407 (“It is these particular aspects of criminal jury trials—the size, the vicinage, the aspects of compassion or restorative justice, and role of moral arbiter—that made their way across the ocean to the British colonies. All of these would become imperative to the ideals of American community justice.”); Arnold, *supra* note 17, at 13. Scholars have read the 1606 charter given by James I to the Virginia Company as incorporating the right to jury trial. Landsman, *supra* note 23, at 592.

66. Arnold, *supra* note 17, at 14.

67. Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 53–54 (2003) (positing that, given the importance of the jury, “one of the aggravating factors leading to the American Revolution was the perception that the Crown had been attempting to emasculate colonial juries” and noting that “[a]mong the jury-related events leading to the American Revolution, some of the greatest instigators were the various Acts of Parliament that deprived colonists of their right to jury trial,” these events included the Stamp Act, which “earned its infamy as an instance of taxation without representation . . . [and required] that violators of the Act were to be tried in admiralty courts in London, thereby depriving them of a local jury”); Landsman, *supra* note 23, at

colonists resisted, holding congresses to protest this oppression.⁶⁸ These congresses ultimately resulted in the development of the Declaration of Independence,⁶⁹ “which lists the denial of the ‘benefits of trial by jury’ as one of the colonists’ grievances which led to the Revolution.”⁷⁰

Despite the clear importance of the civil and criminal jury trial right to the colonists,⁷¹ the right to jury trial in civil cases was not included in the original draft of the Constitution⁷² even though it was mentioned by several delegates to the Philadelphia Constitutional

595 (citations omitted) (contending that the “denial of jury trials was a strong irritant in relations between America and Great Britain, featuring prominently in formal colonial complaints in the 1760s and 1770s” and arguing that, as a result, the “Stamp Act Congress of 1765 specifically declared that ‘trial by jury is the inherent and invaluable right of every British subject in these colonies.’ The clear purpose of this declaration was to challenge the denial of the right to jury trial pursuant to the provisions of the Stamp Act”).

68. See Barkow, *supra* note 67, at 53–54 (citations omitted) (explaining that “when the First Continental Congress passed the 1774 Declaration and Resolves, which encouraged colonists to boycott English goods, it attacked [the various] Acts [of Parliament] for ‘depriv[ing] the American subject of trial by jury . . . and [for being] subversive of American rights’” and that “the Second Continental Congress [in 1775] listed England’s interference with the right to trial by jury among its grievances in the Declaration of the Causes and Necessity of Taking Up Arms”).

69. Arnold, *supra* note 17, at 14.

70. *Id.* (citation omitted); Barkow, *supra* note 67, at 53–54 (stating that the “Declaration of Independence in 1776 restated many of the complaints in the first two Declarations, including the ‘depriv[ation] in many Cases, of the Benefits of Trial by Jury,’” and arguing that the “right to jury trial, then, was a key concern of Revolutionary America[.] [t]he jury was seen as . . . a valuable check on government action”).

71. Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 NW. U. L. REV. 144, 154–55 (1996) (citation omitted) (suggesting that “Americans of the Revolutionary era place so great a value on juries” because, for them, “the right to trial by jury was an essential element in their definition of restrained government. Juries checked official power by ensuring that government was less arbitrary;” in other words, “[j]uries secured the right to property by providing determiners of facts who (1) were disinterested and not associated with the Crown, and (2) shared with the litigant a community interest in the security of his property”).

72. Arnold, *supra* note 17, at 14. The right to jury trial in criminal cases, however, was included in the original text of the Constitution. *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., dissenting) (citing U.S. CONST. amend. VI).

The Sixth Amendment provides: ‘In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.’ . . . When this Court deals with the content of this guarantee—the only one to appear in both the body of the Constitution and the Bill of Rights—it is operating upon the spinal column of American democracy.

Id.; Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870 (1994) (“The right to jury trial in criminal cases was among the few guarantees of individual rights enumerated in the Constitution of 1789, and it was the only guarantee to appear in both the original document and the Bill of Rights.”).

Convention of 1787.⁷³ Modern scholars have argued that this seemingly glaring oversight was actually brought about by the Federalists'⁷⁴ belief that "the fledgling country could ill afford to protect liberty in such a costly way"⁷⁵ and that, following the Revolution, "the need for juries to counterbalance judges hand-picked by England had been eliminated[,] . . . [as] the elected representatives of the people would adequately protect the rights of the individual."⁷⁶ Drafting issues also prevented the inclusion of the jury trial right in the Constitution before the Bill of Rights.⁷⁷

Although the Anti-Federalists⁷⁸ were unable to prevent the adoption of the Constitution, the protests surrounding the omission of the right to civil jury trial from the Constitution⁷⁹ prompted the Federalists, particularly Alexander Hamilton, to extol "the virtues of

73. Arnold, *supra* note 17, at 14–15. The official aim of the Philadelphia Convention "was to recommend amendments to the Articles of Confederation, a charge [that the delegates] ignored nearly from the first day." Karl Manheim & Edward P. Howard, *A Structural Theory of the Initiative Power in California*, 31 LOY. L.A. L. REV. 1165, 1194 n.197 (1998). Instead, the delegates undertook a "full-scale revision of the government," with Edmund Randolph proposing the Virginia Plan, pursuant to which "the Articles would be replaced by a new government with an elected president, a judiciary, and a bicameral legislature. This Virginia Plan, modified by a guarantee that each of the states would have equal representation in the Senate, became the Constitution proposed for ratification by the states." Maxwell A. Miller & Mark A. Glick, *The Resurgence of Federalism: The Case for Tax-Exempt Bonds*, 1 TEX. REV. L. & POL. 25, 35 (1997).

74. The Federalists "sought a larger central government more capable of securing commercial interests. The [Anti-Federalists] sought better but less powerful national government and favored an agrarian political economy, largely because of its promise for securing civic virtue." John J. Janssen, *Dualist Constitutional Theory and the Republican Revolution of 1800*, 12 CONST. COMMENT. 381, 386 n.14 (1995).

75. Arnold, *supra* note 17, at 15; *see also* Landsman, *supra* note 23, at 597 (arguing that because the "delegates who drafted a new plan of government were, for the most part, creditor-oriented nationalists. . . [who] were deeply troubled by recent events in the country and were committed to creating a strong national government that would put an end to the threat of anarchy," they "spent most of their time and energy fashioning the executive and legislative branches of this new, stronger central government").

76. Arnold, *supra* note 17, at 15; Landsman, *supra* note 23, at 598.

77. Levy, *supra* note 8, at 96 (suggesting that the Framers thought that "the differences among the states concerning trial by jury militated against prescribing one form for all states. . . Equity cases, prize cases, and others involving international law also posed obstacles to the imposition of a uniform jury system"); Edith G. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 293–94, 299 (1966) (explaining that at the Philadelphia Convention, "[t]he few speakers who approached [the civil jury right] at all seemed well aware that there was great diversity of practice in the several states," and positing that "at least partly for that reason the federal convention had not succeeded in drafting a clause that would satisfy everyone").

78. *See supra* note 74 (defining the term "Anti-Federalist").

79. *See* Landsman, *supra* note 23, at 598 (The omission of the civil jury triggered a firestorm of protest.); *see also* Wilkinson et al., *supra* note 63, at 82 ("In the states' ratification conventions, particularly in Pennsylvania, South Carolina, Virginia, and Massachusetts, strong exception was taken, to the absence of a guarantee of jury trial for civil cases from the main body of the [C]onstitution.").

the jury, refer[] to it as 'the very palladium of free government,' and aver[] that the omission of the right to a civil jury was not intended to abolish the right entirely."⁸⁰ Ultimately, the Constitution's drafters had to promise "that a Bill of Rights would be among the first acts of the First Congress."⁸¹ To fulfill this promise and to avoid the Anti-Federalists' call for a second Constitutional Convention,⁸² James Madison introduced the Bill of Rights, which included the right to a jury trial in the Seventh Amendment.⁸³ The Bill of Rights was "adopted with almost no discussion of—and certainly no strong objection to—[the] inclusion of the jury trial guarantee."⁸⁴

2. Current Jury System

In the United States, the right to trial by jury is currently guaranteed by the Fifth, Sixth, and Seventh Amendments to the U.S. Constitution "for all criminal cases and in all civil suits exceeding twenty dollars."⁸⁵ Similarly, each state affords its citizens the right to civil and criminal jury trials.⁸⁶

Although 80% of the world's jury trials occur in the United States,⁸⁷ scholars and practitioners have observed that both civil and criminal jury trials are on the decline in U.S. courts.⁸⁸ In the civil

80. Arnold, *supra* note 17, at 16 (quoting THE FEDERALIST No. 83, at 257–58 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed. 1966)).

81. *Id.* at 17.

82. See Michael J. Klarman, Review Essay, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 784 (1992) ("Madison became the Bill of Rights' champion when endorsement appeared necessary to secure victory in his contest against James Monroe for a seat in the first Congress and to deflect the Anti-Federalists' call for a second constitutional convention.").

83. See Wilkinson et al., *supra* note 63, at 80 (discussing the historical background of the Seventh Amendment).

84. *Id.* at 83. The final text of the Seventh Amendment, which was included in the Bill of Rights, read:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII. The right to civil jury was also found in the Judiciary Act of 1789. An Act to Establish the Judicial Courts of the United States (Judiciary Act), ch. 20, 1 Stat. 73, 77 (1789). This Act "held equity in check while emphasizing remedies at law and the jury trial." Arnold, *supra* note 17, at 18.

85. HANS & VIDMAR, *supra* note 17, at 31; see also U.S. CONST. amends. V–VII (guaranteeing jury trial rights).

86. HANS & VIDMAR, *supra* note 17, at 31.

87. *Id.*

88. See Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 12–14 (documenting a decline, over the past century and increasingly in the past two decades, in both the absolute number and rate of "federal and state, civil and criminal jury and

context (and in federal courts), the right to a jury trial is guaranteed by the Seventh Amendment to the U.S. Constitution or by relevant federal statutes.⁸⁹ This right, however, is not self-executing.⁹⁰ “On any issue triable of right by a jury,”⁹¹ a litigant must demand a jury trial by serving a timely written demand on the other parties or by filing a demand with the court.⁹² Otherwise, the litigant waives the right to jury trial⁹³ and the case is tried before the court.⁹⁴

Civil juries in the U.S. federal courts (also known as petit juries) must be composed of at least six and no more than twelve members.⁹⁵ The jurors are summoned for service at random⁹⁶ and ideally represent “a fair cross section of the community in the district or division wherein the court convenes.”⁹⁷ Prospective jurors must be U.S. citizens and sufficiently proficient in the English language; they cannot have a physical or mental infirmity that would prevent them

bench” trials). The rise of plea-bargaining in the criminal context and the use of alternative dispute resolution or mediation in the civil context are some likely contributors to this decline. See Nancy Jean King, *The American Criminal Jury*, 62 LAW & CONTEMP. PROBS. 41, 59 (1999) (“A remarkably small percentage of felony cases go to trial [in the state courts], only three to ten percent. Plea bargaining or ‘settlement’ is the norm, due to powerful incentives to avoid the risk and expense of trial, incentives that influence both prosecution and defense.”); Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 UCLA L. REV. 1935, 1942–43 (1997) (discussing the impact of defects in the civil jury system and the growth of alternative dispute resolution methods on the collapse of the American jury system).

89. FED. R. CIV. P. 38(a).

90. Jarod S. Gonzales, *A Tale of Two Waivers: Waiver of the Jury Waiver Defense Under the Federal Rules of Civil Procedure*, 87 NEB. L. REV. 675, 683 (2009).

91. FED. R. CIV. P. 38(b).

92. *Id.* 38(b)(1)–(2). When a jury trial is demanded under Rule 38, a jury trial must take place “on all issues so demanded” unless: “(1) the parties or their attorneys file a stipulation to a nonjury trial or so stipulate on the record; or (2) the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial.” FED. R. CIV. P. 39(a).

93. *Id.* 38(d).

94. *Id.* 39(b). “[T]he court may, on motion, order a jury trial on any issue for which a jury might have been demanded.” *Id.*

95. *Id.* 48(a).

96. See Laurens Walker, Essay, *A Model Plan to Resolve Federal Class Action Cases by Jury Trial*, 88 VA. L. REV. 405, 439–40 (2002) (citing 28 U.S.C. § 1863(b)(2)) (stating that the Jury Selection and Service Act of 1968 “requires a jury to be randomly selected by drawing names from voter registration lists . . . district courts may supplement this method . . . [by] combin[ing] lists of voters, licensed drivers, and other public lists that ‘are broadly inclusive of the adult population’”). In actually compiling a federal jury, the court first fashions “a ‘master file’ of at least one-half of one percent of the total names of possible jurors in a district,” and then it “randomly draws a smaller group from the master file[] and sends these persons questionnaires to determine their eligibility for, or exemption from, jury service.” Byron G. Stier, *Another Jackpot (In)Justice: Verdict Variability and Issue Preclusion in Mass Torts*, 36 PEPP. L. REV. 715, 730 (2009) (citations omitted). The eligible individuals “comprise the ‘jury wheel,’ from which a random list of prospective jurors is made to summon to the courthouse as a ‘jury venire’ or ‘jury panel.’” *Id.* (citations omitted).

97. 28 U.S.C.A. § 1861 (West 2010).

from serving on a jury; and they must not have been convicted of a state or federal felony offense or have such charges pending against them.⁹⁸

In selecting a panel of jurors from the randomized jury pool, either the court or the parties may examine the prospective jurors.⁹⁹ Each party is entitled to three peremptory challenges,¹⁰⁰ as well as to an unlimited number of challenges for cause or favor (bias).¹⁰¹ At the close of the case, or at any time before the jury is discharged, the judge instructs the jury on the applicable law.¹⁰² Each juror must participate in the verdict, unless dismissed by the judge for good cause,¹⁰³ and “the verdict must be unanimous and must be returned by a jury of at least [six] members” unless the parties stipulate otherwise.¹⁰⁴

The jurors’ verdict may take the form of a general or a special verdict.¹⁰⁵ While general verdicts are much more common, special verdicts provide a means to “guide, control, and check the jury”¹⁰⁶ in civil cases by “guid[ing] the jury step by step through its evaluation of the case or . . . check[ing] that the jury answered key questions in the case.”¹⁰⁷ Once it is rendered, neither the trial judge nor an appellate

98. *Id.* § 1865(b)(1)–(5).

99. FED. R. CIV. P. 47(a). This examination is also known as voir dire. *See supra* note 56 and accompanying text (discussing voir dire). Prior to the start of voir dire, the court can dismiss jurors for hardship. Stier, *supra* note 96, at 730.

100. “Traditionally, the peremptory challenge could be based on any reason and did not require explanation. In a line of cases beginning with *Batson v. Kentucky*, however, the Supreme Court has interpreted the Equal Protection Clause to forbid the exercise of peremptory challenges based on race or sex.” Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497, 1533 (2007); *see also* *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 145–46 (1994) (sex); *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (race).

101. *See* 28 U.S.C.A. § 1870 (West 2010) (providing that each party shall have three peremptory challenges, but including no limit on challenges for cause); *see also* FED. R. CIV. P. 47(b) (stating that peremptory challenges shall be given as allowed under 28 U.S.C. § 1870). These challenges, presented during voir dire, attempt to control for jurors’ specific bias—any predisposition “toward the right outcome in the case before the court.” Stier, *supra* note 96, at 731.

102. FED. R. CIV. P. 51(b)(3).

103. *Id.* 48(a).

104. *Id.* 48(b). On a party’s request, or sua sponte, the court may poll the jurors individually following the verdict, “but before the jury is discharged. . . . If the poll reveals a lack of unanimity or lack of assent by the number of jurors that the parties stipulated to, the court may direct the jury to deliberate further or may order a new trial.” *Id.* 48(c).

105. *Id.* 49.

106. Anne Bowen Poulin, *The Jury: The Criminal Justice System’s Different Voice*, 62 U. CIN. L. REV. 1377, 1420 (1994).

107. *Id.*; *see also* FED. R. CIV. P. 49(a)–(b). Rule 49 states that the court can require a jury to return a special verdict in lieu of a general verdict in the form of a written finding on each submitted issue by:

court can overturn a civil jury's verdict unless "there is no 'legally sufficient evidentiary basis for a reasonable jury to find for the party' on an issue and 'a claim or defense . . . [cannot] under the controlling law . . . be maintained or defeated with[out] a favorable finding on that issue.'"¹⁰⁸

While obvious variations are present in some elements of state civil jury trial practice, such as the jury selection process and the number of jurors required to make up a panel, a constitutionally based right to civil jury trial exists in all but two states. Louisiana and Colorado "provide the [civil jury trial] protection by statute and by court rule, respectively."¹⁰⁹ Furthermore, "recent systemic evidence suggests that[,] on the whole[,] there are no radical differences between the outcome of much private civil litigation in federal and state trial courts."¹¹⁰

There are many similarities between federal civil and criminal jury trials in the United States. For example, the jury pool and the petit jury selection processes proceed in much the same fashion in both federal civil and criminal trials, with the only significant difference being the number of peremptory challenges afforded to each party following voir dire.¹¹¹ Furthermore, at the close of the

(A) submitting written questions susceptible of a . . . brief answer; (B) submitting written forms of the special findings that might properly be made under the pleadings and evidence; or (C) using any other method that the court considers appropriate [and that] (1) [t]he court may submit to the jury forms for a general verdict, together with written questions on one or more issues of fact that the jury must decide.

Id.

108. FED. R. CIV. P. 50(a)(1); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150–51 (2000). "In criminal cases [, however,] . . . [a] court may not direct a verdict in the government's favor, and may not overturn a jury's verdict of acquittal." Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 297 n.172 (1995). Such a refusal "to interfere with the jury's decision flows from the desire . . . to give the jury power to refuse to convict no matter how clear the evidence of guilt. This power allows a jury to exercise mercy or express its displeasure at the government's actions in particular cases." *Id.* Defendants may appeal unfavorable verdicts or convictions. FED. R. CRIM. P. 58(c)(4), (g)(2)(B).

109. Margaret L. Moses, *The Jury Trial Right in the UCC: On a Slippery Slope*, 54 SMU L. REV. 561, 565 (2001).

110. Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1, 52 (1998).

111. Under FED. R. CRIM. P. 24(b), each side has twenty peremptory challenges in capital cases, the government has six challenges and the defendant has ten challenges in other felony cases, and each side has three challenges in misdemeanor cases. *See also supra* note 101 (describing the peremptory challenges in petit jury selection).

case, the judge instructs the jury on the applicable law,¹¹² and the jury verdict, which cannot be a special verdict, must be unanimous.¹¹³

One significant difference between civil and criminal juries in federal trials is that an indictment handed down by a grand jury (unless the indictment is waived by the defendant) is a prerequisite to criminal jury trial for a capital or felony offense.¹¹⁴ The federal grand jury is selected in the same manner as a petit jury and the basic qualifications for serving on the grand jury are the same as those for petit jurors.¹¹⁵ Unlike petit juries, grand juries consist of between sixteen and twenty-three people,¹¹⁶ with the agreement of at least twelve people being necessary for the indictment—or “true bill”—to issue.¹¹⁷ The members of a grand jury are selected by a district court judge or magistrate through a very limited voir dire process.¹¹⁸ Regular grand juries¹¹⁹ sit for eighteen months, unless their term is extended, and “determine whether there is sufficient evidence to return federal charges and conduct investigations into possible federal criminal activity.”¹²⁰

The constitutional grand jury requirement does not apply to state crimes,¹²¹ however, and many states have reduced or eliminated the role of grand juries.¹²² Some states require grand jury indictments for certain categories of crimes.¹²³ In the states that do not require “a grand jury indictment to prosecute any type of criminal offense, . . . all criminal prosecutions can begin by information.”¹²⁴

112. FED. R. CRIM. P. 30(c).

113. *Id.* 31(a). The government also cannot appeal a verdict of acquittal while the defendant can appeal a verdict of conviction. *See supra* note 108 (discussing the defendant’s, but not the government’s, right to appeal a criminal verdict).

114. U.S. CONST. amend. V; *see also* FED. R. CRIM. P. 7(a)–(c) (codifying the indictment requirement); *Green v. United States*, 356 U.S. 165, 183 (1958) (stating the indictment requirement).

115. John F. Decker, *Legislating New Federalism: The Call for Grand Jury Reform in the States*, 58 OKLA. L. REV. 341, 353 (2005) (citing 28 U.S.C. §§ 1861, 1865(b)). Like the composition of a petit jury, the composition of a grand jury must comply with constitutional requirements; prospective grand jurors cannot be excluded from grand jury service solely on the basis of their race or gender. *See Campbell v. Louisiana*, 523 U.S. 392, 398–400 (1998) (race); *Ballard v. United States*, 329 U.S. 187, 193 (1946) (gender).

116. FED. R. CRIM. P. 6(a)(1).

117. Decker, *supra* note 115, at 353.

118. *Id.*

119. Special grand juries, on the other hand, sit for a longer length of time and deal with more complex offenses such as Racketeer Influenced and Corrupt Organizations Act (RICO) offenses. *Id.* at 353–54.

120. *Id.* at 353.

121. *See Hurtado v. California*, 110 U.S. 516, 534–35 (1886) (holding that grand jury indictment is not a right inherent in due process).

122. Decker, *supra* note 115, at 354.

123. *See, e.g., ALASKA CONST.* art I, § 8 (requiring a grand jury indictment for a capital or otherwise infamous crime).

124. Decker, *supra* note 115, at 354.

The size of the grand jury and “the number of jurors required to concur in a decision to indict [also] var[y] among states.”¹²⁵

Accounting for procedural variations among the states,¹²⁶ state criminal trials are quite similar to federal criminal trials. The constitution of every state protects the right to jury trial in criminal cases.¹²⁷ The make up of criminal juries, however, does differ based on whether the case is tried in state or federal court. If the case is tried in federal court, a twelve-person jury must be impaneled unless the parties stipulate in writing that the jury may consist of less than twelve persons and obtain the court’s approval of the stipulation.¹²⁸ If the case is tried in state court, however, the jury may be composed of less than twelve (but at least six) members.¹²⁹ Furthermore, a state criminal jury, unlike a federal criminal jury, need not unanimously decide the issue of guilt or innocence.¹³⁰

125. *Id.* at 354–55.

126. *See King, supra* note 88, at 43–44.

[T]he Supreme Court has construed the Sixth Amendment to dictate many aspects of the [state criminal] jury trial, such as juror selection procedures and jury size. Yet the Sixth Amendment does not regulate every detail of the criminal jury trial in the United States. Individual state courts and legislatures have considerable room to experiment with different jury procedures consistent with the minimum protections of the Sixth Amendment, and have sometimes expanded upon its guarantees, providing more protection than the United States Constitution requires.

Id.

127. *See Duncan v. Louisiana*, 391 U.S. 145, 154 (1968) (“Jury trial continues to receive strong support. The laws of every State guarantee a right to jury trial in serious criminal cases; no State has dispensed with it; nor are there significant movements underway to do so.”).

128. FED. R. CRIM. P. 23(b).

129. *Williams v. Florida*, 399 U.S. 78, 86 (1970) (holding that the Sixth Amendment does not forbid states from using less than a twelve-person jury in criminal cases).

Although some states reduced the size of the jury in criminal prosecutions to six persons . . . following the *Williams* decision, most states currently retain twelve-person juries in felony cases. Only six states permit juries of fewer than twelve in felony prosecutions, and of those only four permit six-person juries.

Alisa Smith & Michael J. Saks, *The Case for Overturning Williams v. Florida and the Six-Person Jury: History, Law, and Empirical Evidence*, 60 FLA. L. REV. 441, 443 (2008).

130. *Apodaca v. Oregon*, 406 U.S. 404, 406 (1972); *see also Burch v. Louisiana*, 441 U.S. 130, 138 (1979) (“[C]onviction for a nonpetty offense by only five members of a six-person jury presents a similar threat to preservation of the substance of the jury trial guarantee [as the use of five-member juries] and justifies our requiring verdicts rendered by six-person juries to be unanimous.”); *cf.* FED. R. CRIM. P. 31(a) (“The jury . . . verdict must be unanimous.”).

C. *European (Continental) Jury Systems*

1. Historical Development

“[F]rom the later Middle Ages to the French Revolution, the administration of justice on the Continent was dominated by professional adjudicators.”¹³¹ The gradual evolution of the English jury “from an institution of customary law to a check on despotism” in the late seventeenth and early eighteenth centuries caused the jury trial right to become “a battle cry in the French Revolution and the antimonarchist movements on the European Continent that followed.”¹³² Following the French Revolution, nearly all European countries, with the exception of the Netherlands, introduced some form of trial by jury.¹³³

The rise of totalitarian dictatorships, which supplanted European monarchies in the wake of World War I, led to the abolition of the jury trial or its replacement by other models of lay adjudication in central Europe, as well as in France, Spain, Italy, Portugal, Greece, and Germany.¹³⁴ For example, Spain eliminated all lay participation from its judicial system;¹³⁵ France and Italy maintained a mixed court called an “assizes court” that combined lay assessors and judge participation;¹³⁶ and Germany utilized a mixed court comprising “a panel of one professional judge and two lay assessors collegially deciding all questions of law, fact, and punishment.”¹³⁷

2. Current Jury Systems¹³⁸

A small number of countries in continental Europe have retained the pure jury trial system solely for the resolution of a limited class of criminal offenses.¹³⁹ “The prevailing contemporary continental

131. Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 492 (1975).

132. Thaman, *supra* note 5, at 361 (citations omitted); *see also supra* Part II.A.1 (chronicling the rise of the English jury trial as a democratic institution).

133. Thaman, *supra* note 5, at 361–62. Some aspects of the English jury trial, such as broad jury discretion, the general verdict, the unanimity requirement, the prohibition on proceeding to trial in the absence of the defendant, and the ability to waive the jury trial right were not imported to continental Europe. Damaška, *supra* note 131, at 492, 492 n.18.

134. Jackson & Kovalev, *supra* note 5, at 89; Thaman, *supra* note 5, at 362.

135. Thaman, *supra* note 5, at 362.

136. *Id.*

137. *Id.*

138. The following is a brief overview of the major jury systems or mixed court systems of various countries in continental Europe. This overview is designed to be informative, but not exhaustive.

139. Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 510 n.4 (1973); *see*

system[, however,] is that of a unified bench in which the professional judge or judges are flanked by lay assessors,"¹⁴⁰ otherwise known as the mixed or collaborative court system.¹⁴¹

Austria, Belgium, Malta, Norway, Spain, Sweden, and some Swiss cantons retain the continental jury system, employing a panel of six to twelve lay jurors.¹⁴² In addition to the jury panel, however, these countries also utilize "a professional panel of one or three judges."¹⁴³ Typically, these two panels "sit in one type of court and generally exercise no appellate jurisdiction."¹⁴⁴ In these countries, juries are "usually reserved for the most serious criminal cases: homicide, aggravated rape, robbery, in some jurisdictions, political offences (Austria, [and] Belgium), and violations of press laws (Belgium and Sweden)."¹⁴⁵

This model of lay adjudication follows the English and American tradition of affording criminal juries the exclusive "function of determining the defendant's guilt without the input of professional judges."¹⁴⁶ The role of the professional judge or panel of judges in the continental jury systems also mirrors those of judges in the English and American criminal jury systems.¹⁴⁷ These judges "have the responsibility of directing juries on the law and of guiding the jury on

also 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, 445–46 n.34 (2000) (listing these countries and specifying the kinds of crimes that are tried by a jury in each country). Additionally, one country in South America, Brazil, uses a seven-member jury to hear "homicide cases, cases involving certain economic crimes, and certain press offenses. Majority rules. Notably, jurors in Brazil do not deliberate together; rather, the members of the jury are privately polled and their votes control the outcome." Leib, *supra* note 19, at 636.

140. Damaška, *supra* note 139, at 510 n.4. "Adjudication solely by professional judges, while not unknown (for example, such is the practice in the Netherlands), is usually employed in the disposition of minor offenses and is definitely not representative of the modern continental style." *Id.* Some countries, such as Austria and Norway, employ both jury trial and mixed-court systems. Schwartz & Schwartz, *supra* note 139, at 445 n.34.

141. Two other systems of justice used in continental Europe—the expert-assessor collaborative court model and the pure lay-judge model—do not employ juries at all. See Jackson & Kovalev, *supra* note 5, at 98–99. The expert-assessor model utilizes specialists in a particular field, such as pedagogy, medicine or engineering; "two or three such specialists, along with at least one judge who is a lawyer, sit in a court for a specific [complex criminal] case, where their special expertise is required." *Id.* Expert assessors are accorded the same rights as the professional judge. *Id.* at 99. The pure lay-judge model utilizes lay judges, sometimes referred to as magistrates, who resolve cases on their own, without the presence of professional judges. *Id.* Typically, lay judges' jurisdiction is limited to minor or petty offenses. *Id.*

142. Jackson & Kovalev, *supra* note 141, at at 95.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 95–96.

147. Cf. *supra* Parts II.A–B (discussing the structure of the English and American jury systems).

matters of fact, sometimes by means of special questions that are put to juries.”¹⁴⁸ Significantly, professional judges in the continental jury systems cannot deliberate with their juries.¹⁴⁹

Jurors in the continental jury systems typically have to satisfy certain minimum qualifications relating to their age, citizenship or residence, and command of the relevant country’s official language.¹⁵⁰ Depending on the country, prospective jurors can be disqualified from service if they have been convicted of criminal offenses; if they hold certain public or religious offices; or if they are “professionals associated with criminal justice, such as lawyers, judges, prosecutors, and police officers.”¹⁵¹

The process of selecting the pool of prospective jurors varies across the nations of continental Europe. In some countries, such as Austria, Belgium, Malta, Spain, and Switzerland, prospective jurors are selected randomly by officials from the register of electors.¹⁵² In other countries, such as Norway and Sweden, jurors are appointed.¹⁵³ All nations utilizing lay juror panels permit the prosecution and defense to challenge any juror for cause, although it is often difficult to succeed on such challenges because only two European jurisdictions, Norway and Spain, have a *voir dire* procedure “to enable the parties to question jurors in order to ascertain their suitability for trying the case.”¹⁵⁴ Several European countries, including Belgium, Malta, Spain, and Switzerland, do permit parties to challenge jurors without cause, affording each side the same

148. Jackson & Kovalev, *supra* note 5, at 96. Most jurisdictions “require the presiding judge to instruct jurors in open court,” although Austrian jurors “receive their instructions in the deliberation room . . . from the presiding judge who compiles them after consultation with two other members of the bench.” *Id.* at 112. The level “of judicial control that is exercised over the jury by way of jury instructions varies from country to country. In some jurisdictions, such as Austria, Spain, and the Swiss canton of Geneva, judges should only explain questions of law to the jurors.” *Id.* In other countries, “judges also summarize evidence heard in court without formally expressing their personal opinions about the evidence.” *Id.* Finally, in a third set of countries, including Belgium, Malta, and Norway, “judges direct jurors on the law and may also comment on the evidence.” *Id.* Additionally, jurors in Austria, Belgium, and Spain are limited in their evaluation of evidence “by two principles: the presumption of innocence and *in dubio pro reo* [(‘in doubt you must decide for the defendant’)].” *Id.*

149. *Id.* at 96.

150. Jackson & Kovalev, *supra* note 5, at 101.

151. *Id.*

152. *Id.* at 102.

153. “Appointment is a two-phased procedure. At the first stage, candidates are nominated by officials of an executive authority, by representative bodies, by interest groups, by courts, by a group of citizens, or by candidates themselves.” *Id.* At the second stage, the list of juror candidates is approved, usually by local legislative assemblies. *Id.*

154. *Id.* at 104.

number of peremptory challenges, which ranges from two to six challenges per side.¹⁵⁵

Once they are selected, jurors in continental Europe typically serve for the duration of a single case.¹⁵⁶ However, one major difference between some continental jury systems and the Anglo-American jury systems is that jury duty in several European countries may last beyond a single trial: in Austria, for example, jurors serve five days per year for two years.¹⁵⁷

Verdicts need not be unanimous in continental jury systems; depending on the jurisdiction, either a simple or qualified majority of the jury may be sufficient to convict a defendant.¹⁵⁸ Judges in these systems have the ability to set aside not-guilty verdicts, usually by a unanimous decision of the professional judge or judicial panel.¹⁵⁹ Once a defendant is pronounced guilty by a continental jury, and if the verdict is not set aside, jurors usually have some say in sentencing by voting for the desired sentence alongside the professional judge or judges.¹⁶⁰

The so-called German and French collaborative court models also employ both lay individuals and professional judges in resolving criminal cases.¹⁶¹ The German collaborative court model—found in a range of continental systems including those of Austria, Bulgaria, Croatia, Czech Republic, Denmark,¹⁶² Finland, Germany, Hungary, Liechtenstein, Macedonia, Norway, Poland, Serbia, Slovakia,

155. See *id.* at 104–05 (listing the peremptory challenge rules of several European countries). Switzerland’s *cour d’assises* allows up to eight challenges. *Id.*

156. *Id.* at 106 (noting that lay adjudicators in Belgium, France, Portugal, Russia, Spain, and Switzerland try a single criminal case).

157. *Id.*

158. See *id.* at 113 (describing the required decision margins in several jury systems).

159. See *id.* (noting the ability of judges to set aside not guilty verdicts in Austria and Norway).

160. See *id.* at 113 (listing three countries that leave sentencing decisions completely in the hands of judges). In some continental jury systems, lay jurors and professional judges have equal voting rights when it comes to sentencing, while in others professional judges’ votes carry greater weight than lay jurors’ votes. *Id.*

161. *Id.* at 96–98 (describing the German and French collaborative court models).

162. Until January 1, 2008, Denmark utilized a pure jury system, as well as a German collaborative court-type system. See Leib, *supra* note 19, at 639 (providing an overview of Denmark’s old jury system). Following this date, however, pursuant to the Administration of Justice Act “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.” *Id.* at 640. A majority of jurors is required to reach a guilty verdict in both types of courts, and all verdicts will “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.” *Id.* These reforms are considered to be necessary because the old system did not require explanations of verdicts from juries, “and it was thought to be easier to have judges construct these rationales.” *Id.*

Slovenia, Sweden, and Switzerland—typically consists of one professional judge and two lay assessors.¹⁶³ Although the composition of such courts varies across countries, the number of lay judges generally does not exceed the number of professional judges by more than one.¹⁶⁴ The jurisdiction of courts adhering to the German collaborative court model “varies from only serious cases, such as aggravated murder and other crimes punishable by imprisonment of more than eight years, in [countries including] Hungary . . . to the vast majority of criminal cases in Germany, Finland, and Norway.”¹⁶⁵

Accounting for variations among countries, lay assessors or judges must meet the same minimum qualifications as lay jurors.¹⁶⁶ The vast majority of lay judges are appointed, not selected at random.¹⁶⁷ Lay judges, like lay jurors, can be challenged for cause or without cause in those countries that permit peremptory challenges.¹⁶⁸ Once they are selected, lay judges serve a fixed term with the possibility of reelection; the length of the term depends on the country or jurisdiction.¹⁶⁹ “This practice can lead to lay judges in the German collaborative model becoming more experienced in their role.”¹⁷⁰ Further, although juries receive no special training prior to their service, some countries do train lay judges through special councils organized by the relevant court, either before the lay judges commence their duty (in the Czech Republic, Germany, Poland, and, for lay magistrates, France) or during their term (in Bulgaria and Finland).¹⁷¹

163. Jackson & Kovalev, *supra* note 5, at 97.

164. *Id.*

165. *Id.*

166. See *supra* notes 150–51 and accompanying text (describing types of continental lay juror minimum qualifications).

167. See *supra* Part II.C.1 (providing an overview of the juror selection processes on the Continent). In some European countries or jurisdictions, such as the Swiss canton of Zurich, “lay judges are elected by the people directly.” Jackson & Kovalev, *supra* note 5, at 102–03. Further, in other countries, including Sweden, “lay judges are ‘selected by political parties in proportion to the votes for the county council,’ or are ‘appointed in proportion to the number of members of the interested organization,’ as in Slovenia.” *Id.* at 103. Aside from countries like Croatia and Norway, where lay judges are summoned from a list provided by legislatures, the relevant court usually conducts the selection of lay judges for a specific trial or term of service by selecting “the candidates by lot, as in Denmark and Germany, or by appointment, as in Bulgaria and Slovenia. In some jurisdictions, such as Sweden, the relevant court is allowed to examine the eligibility of the elected lay judges.” *Id.*

168. See *id.* at 104–06 (describing the possibility of using peremptory challenges against both lay jurors and lay judges).

169. *Id.* at 106.

170. *Id.* As a result, some scholars argue that the lay judge panels involved in German collaborative courts should not be “classified as juries. . . . 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.” Leib, *supra* note 19, at 633.

171. Jackson & Kovalev, *supra* note 5, at 107.

In these courts, the lay judges and professional judges deliberate together on questions of guilt, and the professional judges can employ their legal experience to sway their lay colleagues.¹⁷² The number of lay judges in the courts following the German collaborative model cannot exceed the number of professional judges by more than one—except in Finland and Sweden.¹⁷³ A simple majority vote is generally sufficient for a guilty verdict, meaning that “the court can convict the defendant if all professionals and half, or in some cases, even a minority, of lay judges concur.”¹⁷⁴

The French collaborative court model strikes a compromise between the continental jury courts and the German collaborative court.¹⁷⁵ Courts adhering to this model try “only the most serious offences punishable by the minimum sentence of ten years of imprisonment, [and] consist[] of three professional judges who join . . . nine [jurors] as one panel at the deliberation stage.”¹⁷⁶ They differ from the German collaborative courts and from the continental jury systems in several respects.¹⁷⁷ For example, the “ratio of lay adjudicators to professional judges in the joint panel is much greater in the French court than in the German one, and deliberation practices also differ, with juries in the [French court] voting secretly after deliberation.”¹⁷⁸ Additionally, in the French model, the jurors

172. *Id.* at 115.

173. *Id.* “Finland and Sweden present somewhat harder cases for the typology.” Leib, *supra* note 19, at 632. These countries’ 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 . . . so a judge can be outvoted by laypeople.” *Id.* In light of the small size of the lay judge panels and the lay judge selection process, some scholars “characterize Finland and Sweden . . . as not utilizing meaningful jury systems.” *Id.* at 632–33.

174. Jackson & Kovalev, *supra* note 5, at 115.

175. *Id.* at 97.

176. *Id.*

177. Despite these differences, “a number of jurisdictions such as Italy, Greece, and Portugal adopt a combination of both French and German features in their systems, and, therefore, it is difficult here to characterize them as either French or German.” *Id.* at 98. For example, in Greece and Portugal, the number of lay assessors in collaborative courts exceeds the number of professional judges by no more than one (as in the German model), but lay jurors in these countries are selected randomly (as in the French model). *Id.* Similarly, although the ratio of lay jurors to professional judges in Italian courts is like that of the French collaborative court, the Italian courts may reach a guilty verdict by a simple majority of votes, similar to the German model. *Id.*

178. Jackson & Kovalev, *supra* note 5, at 98.

The jurors and judges . . . must agree by a margin of 8–4 to render decisions adverse to the defendant. Failure to reach the required threshold leads to acquittal or lesser punishment. . . . Since unanimity is not required, jurors and judges do not necessarily know how their co-panelists vote.

Leib, *supra* note 19, at 640–41.

are selected at random from the community as a whole, rather than being appointed to their position.¹⁷⁹

Unlike verdicts rendered by juries, with respect to which there is generally no right to appeal on questions of fact, verdicts issued by collaborative courts can be reconsidered on appeal:

In Norway, for example, a jury is used for the purpose of reconsidering the verdict of the first instance court, which consists exclusively of professionals, or lay assessors and professionals. In other European jurisdictions, appellate review is affected by collaboration between professional and lay judges. The ratio of lay judges to professional judges in the collaborative appellate courts either remains the same as that at the first instance, as in Greece, Liechtenstein, and Macedonia, or is reduced, as in Denmark, Germany, Norway, and Sweden. The only jurisdiction with an increased ratio of lay assessors in the appellate courts is France, where twelve lay assessors sit together with three professional judges in the *cour d'assises d'appel*.¹⁸⁰

D. Russian Jury System

1. Historical Development

The Russian legal system first incorporated trial by jury during the 1864 judicial reforms of Tsar Alexander II.¹⁸¹ Around this time, in the wake of the French Revolution, nearly all European countries began using juries.¹⁸² These judicial reforms replaced Russia's purely inquisitorial system with public trials, which featured "a contest between two attorneys, presented before an audience composed of a judge, jury and spectators."¹⁸³ Some scholars suggest that these reforms gave Russia "one of the best legal systems anywhere in Europe" at the time.¹⁸⁴ For example, the Russian courts "became independent of administrative interference," judges were able to resist corruption because they were sufficiently paid, defendants were guaranteed the right to counsel, criminal trials proceeded under the presumption that the defendant was innocent, and attorney membership in a professional bar association raised the general level of advocacy.¹⁸⁵

179. Jackson & Kovalev, *supra* note 5, at 98.

180. *Id.* at 118.

181. Thaman, *supra* note 5, at 361. "Prior to 1864, the Russian courts were subservient to notoriously corrupt provincial governors and doled out justice to the highest bidder." *Id.* at 362.

182. See *supra* Part II.C.1 (describing the introduction of the jury trial on the Continent).

183. Jay B. Rosman, *Justice in Transition: Jury Trials in Post-Soviet Russia*, 33 NOVA L. REV. 545, 555-56 (2009).

184. *Id.* at 556.

185. *Id.* at 556-57.

In 1917, however, the Bolsheviks “put an end to the independent judiciary and replaced the jury with a mixed court composed of one career judge, elected for a term of five years by the local party officials, and the two ‘people’s assessors’, selected by party-controlled worker, peasant, or housing collectives.”¹⁸⁶ Commentators have argued that the Bolshevik mixed-court model, and not the German collaborative-court model (the earliest modern model of a mixed court), was “the most influential global [mixed-court] model, serving as an example for mixed courts in the former Soviet republics, Eastern Europe, China and Vietnam.”¹⁸⁷

Following a push for reform of the Bolshevik mixed-court system in the late 1980s and the early 1990s,¹⁸⁸ the right to trial by jury was introduced on a limited basis in several regions of Russia in late 1993 and early 1994.¹⁸⁹ At the same time, the new Constitution of the Russian Federation, adopted in December 1993, contained the right to jury trial.¹⁹⁰ On November 23, 2001, the Russian State Duma (Russian assembly) “voted to eliminate its mixed court entirely in favor of jury courts for the most serious cases (usually aggravated murders) and professional courts for all the rest.”¹⁹¹ Russia is the only former Soviet republic that has put into practice a constitutional or statutory jury trial right.¹⁹²

2. Current Jury System

The criminal jury in Russia, considered broadly, greatly resembles the American criminal jury in theory, if not in practice, as its primary features include the presence of twelve jurors and one professional judge.¹⁹³ A Russian jury, however, only requires a majority verdict.¹⁹⁴ Russian citizens who are twenty-five years old or

186. Thaman, *supra* note 5, at 362–63 (citation omitted); *see also* Luna, *supra* note 56, at 311 (suggesting that although verdicts in these courts “were reached by agreement of two judges, meaning that lay members could outvote their professional counterparts. . . assessors tended to be pawns of the professional judge.”).

187. Thaman, *supra* note 5, at 363.

188. *See* Stephen C. Thaman, *The Resurrection of Trial by Jury in Russia*, 31 STAN. J. INT’L L. 61, 68–72 (1995) (chronicling reforms from the 1950s until the early 1990s that led to the reestablishment of trial by jury in Russia).

189. *See id.* at 81–82 (describing the reintroduction of the jury in Russia in the early 1990s).

190. Thaman, *supra* note 5, at 358.

191. Stephen C. Thaman, *Japan’s New System of Mixed Courts: Some Suggestions Regarding Their Future Form and Procedures*, ST. LOUIS-WARSAW TRANSATLANTIC L.J., 2001–2002, at 89, 91.

192. *See supra* note 5 (listing the other former Soviet republics that have included, but not yet implemented, the right to jury trial in their constitutions).

193. *Compare* Thaman, *supra* note 188, at 91–92 (describing these characteristics in the modern Russian criminal jury), *with supra* Part II.B.2 (discussing the modern American jury system).

194. Thaman, *supra* note 191, at 91–92.

older, "who are registered residents of the judicial district in which the trial takes place, and who have a knowledge of the Russian language are eligible for jury service,"¹⁹⁵ although the following individuals are disqualified from such service: "(1) citizens with pending criminal cases or unexpunged criminal convictions; (2) citizens with disabilities which would prevent service; and (3) those whose professions prevent their service as jurors, such as soldiers, certain government officials, individuals working in the administration of justice, doctors, teachers, pilots, monks, or priests."¹⁹⁶ The lists of eligible individuals are first compiled by the local administrative officials in each municipality and are then consolidated into an "annual list" containing proportional representation from "each area of the region, to correspond to the particular needs of the regional court in the upcoming year."¹⁹⁷

Once they are selected, "jurors are required to serve only once a year for no longer than ten days, or until the end of the trial."¹⁹⁸ Significantly, Russian jurors are well compensated: they are paid their salary or one-half of the judge's salary, whichever is higher.¹⁹⁹

Under the new Russian Jury Law, the accused can choose trial by jury only in cases involving "serious felonies punishable by death or ten to fifteen years imprisonment."²⁰⁰ Cases in which the accused cannot choose trial by jury will continue to be decided by the previously existing Russian mixed court, which employs people's

195. Thaman, *supra* note 188, at 83.

196. *Id.* (citation omitted).

197. *Id.* at 84.

198. *Id.* at 83 (citation omitted).

199. *Id.* By comparison, "the average American juror is currently paid \$23.85 per day for her [state court jury] service." Evan R. Seamone, *A Refreshing Jury COLA: Fulfilling the Duty to Compensate Jurors Adequately*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 289, 340 (2002). This amount "falls short of the 2000 poverty threshold by \$10.61 per day" and it is \$17.35 less per day than the 2000 "federal minimum wage (\$41.20 per day)." *Id.* at 340-41. "Although the average federal juror fares a bit better than her state counterpart, with a compensation rate of \$40.00 per day, she nonetheless will face similar challenges as the amount would still leave her \$71.14 below the average daily income for each day she serves." *Id.* at 341.

The directive providing for Russian juror compensation was put in place to encourage citizens to participate in the jury process; "the penalty for a juror's non-appearance is merely a minor fine; the judge has no power to issue a bench warrant or to jail a recalcitrant prospective juror." Thaman, *Resurrection*, *supra* note 188, at 83. *But see* Duncan DeVille, *Combating Russian Organized Crime: Russia's Fledgling Jury System on Trial*, 32 GEO. WASH. J. INT'L L. & ECON. 73, 99-100 (1999) (stating that juror participation in Russia has declined from 92 percent of those summoned for jury duty "to 35%, mostly due to errors in compiling jury lists and the irregular and uncertain remuneration of jurors. These financial problems make the chances of jury trials in civil cases highly unlikely in the foreseeable future.").

200. Thaman, *supra* note 188, at 85. "The Jury Law calls for a jury composed of twelve regular and two alternate jurors who sit with one professional judge." *Id.* at 86.

assessors.²⁰¹ Following the completion of a preliminary investigation, investigators generally advise defendants whether they have a right to trial “by jury or by a panel of three judges, as an alternative to a trial with people’s assessors.”²⁰²

If the accused demands trial by jury following the preliminary investigation, then the judge sets a preliminary hearing in which the judge confirms this demand.²⁰³ During this hearing, the judge also “(1) sets a trial on the charges contained in the prosecutor’s indictment or on lesser-included charges supported by the evidence; (2) dismisses the case for lack of sufficient evidence or on procedural grounds; (3) refers the case to another jurisdiction; or (4) returns the case to the investigator for supplementary investigation.”²⁰⁴

Immediately prior to jury selection, the judge holds a preliminary hearing at which she “issues an order requesting the appearance of a given number of prospective jurors (in no case less than twenty) on the trial date,” after which the court administrator summons the potential jurors and selects the needed number by lot.²⁰⁵ When the prospective jurors “appear on the trial date, the judge informs them of the type of case before the court and explains the procedure of jury selection and the criteria for jury eligibility.”²⁰⁶

Before juror selection begins, certain individuals—“persons who are 60 years old or older, women with small children, persons whose religious beliefs prevent them from serving, and persons whose professions are deemed necessary to the public, such as doctors, teachers, and pilots”—can request to be excluded from serving on a jury.²⁰⁷ After any such individuals are excused, the judge may ask the remaining potential jurors questions to determine whether they might be challenged for cause.²⁰⁸ If more than eighteen prospective jurors remain, then the judge randomly selects eighteen individuals by choosing their numbers from a box; after this time, the parties can make peremptory challenges.²⁰⁹ Peremptory challenges whittle the

201. See *id.* at 85–86 (noting the continued parallel existence of people’s assessors and juries).

202. *Id.* at 85.

203. *Id.* at 88.

204. *Id.* The judge can also “exclude illegally gathered evidence at the preliminary hearing if he or she can make such a determination on the basis of the preliminary investigation dossier alone.” *Id.* at 90.

205. *Id.* at 95.

206. *Id.*

207. *Id.* at 95, 95 n.217.

208. See *id.* at 95–96. Parties may challenge a juror for cause “if the juror has an interest in the case or cannot be impartial. . . . [by submitting] questions in written form to the judge, who then decides if they are pertinent to the development of a challenge for cause before posing them to the jury.” *Id.* at 96.

209. *Id.* at 96 n.224.

potential juror pool down to fourteen jurors,²¹⁰ from which the judge randomly selects twelve jurors and two alternates.²¹¹ In a departure from other jury systems, after the jury is selected, "any of the parties may challenge the entire panel on the basis that it will be unable, due to its composition, to arrive at an objective verdict."²¹² If the judge denies this motion or if the jury goes unchallenged, then the jurors proceed to elect a foreperson.²¹³ If the judge grants this motion, however, then the jurors are excused and the process starts over.²¹⁴

Before the trial begins, the judge also advises the jurors of their rights and duties, "explaining the rules of evidence, the presumption of innocence, the burden of proof, the trial procedure, and the principles of adversarial procedure."²¹⁵ During the trial, jurors may take written notes, submit written questions through the judge for the defendant and witnesses, participate in the taking of all evidence, and ask for explanations of the law.²¹⁶ However, "[t]hey may not leave the courtroom without [the] permission of the judge, talk with anyone about the case, or gather evidence about the case."²¹⁷

After the parties present their respective evidence and arguments, "the jury decides the following questions: (1) Were the acts charged in the indictment committed?; (2) Did the defendant commit the charged acts?; (3) Is the defendant guilty of the crime alleged?; and (4) Does the defendant deserve leniency or special leniency?"²¹⁸ The judge is responsible for deciding "all other questions of fact and law."²¹⁹

Some judges give "lengthy, American-style, introductory instructions to the jurors,"²²⁰ but they are not required to do so; the jury instructions can be more limited.²²¹ Judges must also prepare a

210. The prosecution can have up to two peremptory challenges while the defendant "is allowed from two to four peremptory challenges, depending on how many the prosecution used." *Id.* at 96 n.225. The number of jurors cannot be reduced below fourteen through the use of peremptory challenges, however. *Id.*

211. Once fourteen potential jurors remain, the judge randomly selects twelve individuals to serve as jurors by choosing their numbers from a box; "the remaining two persons constitute alternate jurors." *Id.*

212. *Id.* at 97.

213. *Id.* "They then swear to decide the case honestly and impartially, based only on the evidence adduced in court, and 'according to their inner conviction and conscience as befits a free citizen and just person.'" *Id.* (citation omitted).

214. *Id.* at 97.

215. *Id.* at 102.

216. *Id.* at 102 n.257.

217. *Id.*

218. *Id.* at 102.

219. *Id.*

220. *Id.* at 102.

221. The instructions "must contain the contents of the indictment, an explanation of the pertinent criminal statute, a summary of the incriminating and exonerating evidence presented in court, the positions of the prosecutor and defense, and an explanation of the rules of evaluating the evidence in its totality." *Id.* at 123.

list of questions for the jury to answer, including three basic questions as to each charge: “(1) Has the prosecution proven that the charged acts took place?[] (2) Has the prosecution proven that the defendant committed the acts?[] and (3) Is the defendant guilty of committing the acts?”²²² Questions that involve legal issues, such as those concerning “prior convictions, recidivist status, or the legal qualification of the acts found to be true by the jury,” are not put to the jury and are instead “left to the judge following a guilty verdict.”²²³

Following the judge’s summation that includes the jury instructions and jury questions, “the jury retires to deliberate and reach a verdict. The jurors may not discuss their deliberations with the judge or any other person; only the twelve regular jurors are permitted in the jury room.”²²⁴ Although the jurors are instructed to try to reach a unanimous verdict, if they are unable to reach such a verdict within three hours of deliberations, they may decide the case by a majority vote; “tie votes inure to the benefit of the defendant.”²²⁵ In a departure from the American jury system,²²⁶ jury nullification is permitted in the Russian jury system:²²⁷ “[t]he Jury Law allows the

Additionally, the judge must “instruct the jury that the defendant is presumed innocent, and that they should resolve any doubt in favor of the accused.” *Id.* In the event that “the defendant does not testify, the judge must instruct the jury not to interpret this as evidence of guilt. The judge must also instruct the jury that their verdict may be based only on evidence adduced in court and not on anything the court has ruled inadmissible.” *Id.* Finally, the judge must tell the jury that they are permitted to “recommend ‘lenience’ or ‘special lenience’ if they render a guilty verdict. To facilitate this recommendation, the judge’s summation to the jurors includes the possible range of sentences for each crime charged, including the possibility of the death penalty, a practice expressly prohibited in American trials.” *Id.* at 124. Throughout the summation, “the judge is prohibited from expressing an opinion as to how any of the jury questions should be answered.” *Id.* at 123.

222. *Id.* at 114. The judge may also ask the jurors “questions about circumstances that aggravate or mitigate guilt, or those that excuse or justify the defendant’s actions. Questions may also address lesser included offenses.” *Id.* All of the parties may “examine the list of questions, to object to it, and to recommend changes.” *Id.*

223. *Id.*

224. *Id.* at 124–25. “During deliberations, the jurors may ask the court to allow them to hear additional evidence in the case, to explain or reformulate the questions, or to give supplementary explanations of the applicable law.” *Id.* at 125.

225. *Id.* at 125.

226. See VALERIE P. HANS & NEIL VIDMAR, *AMERICAN JURIES* 227 (2007) (“[S]ince the late nineteenth century, American courts have consistently held that although juries have the power to disregard the law . . . they do not have the legal right to do so.”); Jackson & Kovalev, *supra* note 5, at 116 (“Jury nullification is tolerated in certain common law systems but is not permitted within the continental jury model.”).

227. See Thaman, *supra* note 188, at 114–15. “The drafters of the Jury Law saw this procedure as a necessary democratic corrective to state oppression, either in prosecuting an individual case or in applying unpopular laws.” *Id.* at 115.

jury to find a defendant not guilty despite its determination that the defendant committed the charged misdeed.”²²⁸

When the jurors reach a verdict, they return to the courtroom.²²⁹ After the judge reviews the verdict to ensure that it is not contradictory,²³⁰ the judge proclaims the verdict, discharges the jury, and “holds a hearing to discuss the consequences of the verdict,” during which the parties may discuss the “legal qualification of the verdict,” but may not question the verdict’s validity or refer to excluded evidence.²³¹ At this point, the judge “qualifies the verdict, taking into consideration evidence not presented to the jury, such as the official position of the defendant, any prior criminal record, and other facts demanding juridical evaluation.”²³²

The parties, the victim, or the victim’s representative “may appeal judgments of conviction and acquittal to the Cassational Panel of the Supreme Court of the Russian Federation.”²³³ The following are the only grounds for appeal of jury verdicts:

- (1) one-sided or incomplete trial due to: (a) erroneous exclusion of evidence affecting the verdict; (b) failure to hear evidence essential to the outcome of the case, including evidence that could have been gathered had the judge returned the case for supplementary investigation; or (c) erroneous admissions of evidence affecting the verdict; (2) substantive violation of the Code of Criminal Procedure; (3) incorrect application of the law to the circumstances of the case; and (4) imposition of an unjust sentence.²³⁴

228. *Id.* at 114.

229. *Id.* at 125.

230. “If the verdict is found contradictory, the jury receives further explanations and is instructed to return to the jury room to correct the defects. This process may warrant further alterations of the question list and may even necessitate reopening the argument and providing a supplementary summation by the judge.” *Id.* at 125–26.

231. *Id.* at 126.

232. *Id.* at 126. The judge may “vacate a guilty verdict and call for a new trial if he or she believes that sufficient evidence exists for an acquittal. The judge may also enter a judgment of acquittal despite a guilty verdict if the elements of the charged crime are absent.” *Id.* at 126. Prior to pronouncing the judgment,

the judge must hear the arguments of the parties and the last word of the defendant. . . . [S]he must also take into consideration the statutory aggravating and mitigating circumstances and the recommendation of the jury as to ‘lenience’ or ‘special lenience.’ Even if the jury has not recommended ‘lenience,’ in extraordinary circumstances the judge may impose a sentence lighter than the minimum required by law.

Id. at 126–27. “Finally, if the judge has reason to believe that the defendant is mentally ill and is therefore not capable of being criminally responsible, the judge must discharge the jury and initiate psychiatric commitment procedures.” *Id.* at 127.

233. *Id.*

234. *Id.* at 128.

III. UKRAINIAN JUDICIAL SYSTEM

A. General Overview

Pursuant to a 2002 law, Ukraine's court system "is made up of courts of general jurisdiction and the Constitutional Court of Ukraine. Courts of general jurisdiction form the unified system of courts. The Constitutional Court of Ukraine is the single body of constitutional jurisdiction in Ukraine."²³⁵ Courts of general jurisdiction include local district courts, regional courts of appeal, the Court of Appeals of Ukraine, the Court of Cassation of Ukraine,²³⁶ the highest specialized courts, and the Supreme Court of Ukraine.²³⁷

A special body of state authorities that "executes the higher supervision of law observance . . . on behalf of the Verkhovna Rada and Cabinet of Ministers,"²³⁸ the Procuracy of Ukraine, functions alongside the country's court system. The Procuracy is entrusted with:

- (1) prosecution in court on behalf of the State; (2) the representation of the interests of a citizen or of the State in court; (3) the supervision of laws observance by bodies that conduct detective and search activity, inquiry and pre-trial investigation; (4) the supervision of laws observance in the execution of judicial decisions in criminal cases, and also in the application of other measures of coercion related to the restraint of the personal liberty of citizens.²³⁹

The Procurator General, appointed with the consent of the Verkhovna Rada, heads the Procuracy and can be dismissed from office by the President of Ukraine.²⁴⁰

The Constitutional Court of Ukraine determines the constitutionality of laws and other legal acts, providing "the official interpretation of the Constitution and laws."²⁴¹ This court is

235. Laws of Ukraine, Annotation: On Judicial System of Ukraine, No. 3018-III (2002), available at <http://zakon.rada.gov.ua/cgi-bin/laws/annot.cgi?nreg=3018-14> [hereinafter Laws of Ukraine].

236. This court has appellate proceedings followed by appeal on specific legal issues. Kirill Koroteev & Sergey Golubok, *Judgment of the Russian Constitutional Court on Supervisory Review in Civil Proceedings: Denial of Justice, Denial of Europe*, 7 HUM. RTS. L. REV. 619, 621 n.6 (2007).

237. See Laws of Ukraine, *supra* note 235 (describing the Ukrainian judicial system).

238. Myroslava Kryvonos, *A Research Guide to Ukrainian Law*, 31 INT'L J. LEGAL INFO. 1, 11 (2003).

239. *Id.*

240. *Id.* at 12.

241. *Id.*; see also КОНСТИТУЦІЯ УКРАЇНИ [Constitution] Title XII, art. 147 (Ukr.) (spelling out the powers of the Constitutional Court).

composed of eighteen judges.²⁴² The President, the Verkhovna Rada, and the Congress of Judges each appoint six of these judges,²⁴³ and every Constitutional Court judge serves for a term of nine years without the possibility of reappointment.²⁴⁴

Courts of general jurisdiction deal with all matters that are not within the province of the Constitutional Court.²⁴⁵ Judges serving on these courts are “elected without a time-limit by the Verkhovna Rada of Ukraine on the basis of recommendations provided by the Highest Qualification Commission of Judges of Ukraine upon proposal of the Head Judge of the Supreme Court of Ukraine.”²⁴⁶ Courts of general jurisdiction resolve both civil and criminal cases.²⁴⁷ The applicable codes of procedure provide parties proceeding in these cases with certain rights.²⁴⁸ In particular, the parties may

review the materials in the court clerk’s files; copy those files; participate in the court’s hearings; submit evidence; file applications and claims; submit oral and written statements; defend against claims, evidentiary submissions and arguments of the opposing party; provide

242. *Id.* art. 148. A judge who is appointed to any Ukrainian court must be a lawyer and “have at least three years of experience as a practicing lawyer. A judge cannot be a member of any political party or trade union, nor may he or she participate in any political activities. Also, judges cannot occupy any other paid positions, except certain scientific, teaching or creative positions.” Torsten M. Kracht & Oleh O. Beketov, *Recognition of Foreign Money Judgments in the United States With a Special Emphasis on the Recognition of Ukrainian Judgments*, 21 INT’L L. PRACTICUM 50, 52 (2008). Ukrainian law “envisages establishing qualification commissions within the judicial system of Ukraine. . . . The ground for allowing an individual to fulfill their duties of a professional judge shall be their successful passing of a qualification examination.” Laws of Ukraine, *supra* note 235.

243. КОНСТИТУЦІЯ УКРАЇНИ [Constitution] Title XII, art 148 (Ukr.).

244. *Id.*

245. See Richard C.O. Rezie, Note, *The Ukrainian Constitution: Interpretation of the Citizens’ Rights Provisions*, 31 CASE W. RES. J. INT’L L. 169, 187 n.111 (1999) (discussing the province of courts other than the Constitutional Court). Ukraine also has commercial courts that “resolve disputes in commercial matters between legal entities, or between legal entities and the state or its agencies, according to the rules of the Commercial Procedure Code.” Kracht & Beketov, *supra* note 242, at 52. On the other hand, “disputes that relate to civil, land, family, labor and housing matters are considered by the general courts under the rules of Civil Procedure Code.” *Id.*

246. Laws of Ukraine, *supra* note 235.

247. See Kracht & Beketov, *supra* note 242, at 52 (noting the exclusively constitutional jurisdiction of the Constitutional Court). Civil law in Ukraine “includes the legal rules governing the ownership and non-property relations, as well as personal relations between the objects of public relation in order to satisfy their demands.” Kryvonos, *supra* note 238, at 6. “Taking into account new constitutional approaches to the human being and his/her inalienable rights,” the Civil Code of Ukraine “fixes individual non-property rights of a person and governs relations which enforce these rights.” *Id.* Criminal law “includes the legal rules defining criminal acts, forms of guilt, punishment making, discharge or mitigation. The main source of criminal law is the new Criminal Code of Ukraine.” *Id.* at 7. The Civil Procedural Code and the Criminal Action Code set out the procedure for the Ukrainian courts’ consideration and resolution of civil and criminal cases, respectively. *Id.* at 7–8.

248. Kracht & Beketov, *supra* note 242, at 53.

the court with an opinion as to any question that arises in the court hearing; participate in the investigation of evidence; and challenge the neutrality of the particular judge considering the case.²⁴⁹

Furthermore, “[a]ccording to each of the Codes, the defendant must be properly notified of the allegations being made against him and of the time and place of all court hearings.”²⁵⁰ This notice “is the basis upon which the personal jurisdiction of a Ukrainian court over that party comes into existence.”²⁵¹

Any decision by a Ukrainian trial court or court of first instance can be appealed.²⁵² If an appeal fails, parties may also file a petition for certiorari to contest the judgment in the relevant high court—the High Commercial Court in commercial cases and the Supreme Court of Ukraine in general jurisdiction cases.²⁵³

Although current law states that people’s assessors and jurors are to be used in some cases,²⁵⁴ a recent draft law suggests that lay adjudication in Ukrainian courts may only be implemented after January 1, 2010.²⁵⁵

B. Practical Implications

On its face, the Ukrainian legal system²⁵⁶ “presents many elements that are familiar to a casual Western observer.”²⁵⁷ For

249. *Id.*

250. *Id.* at 53.

251. *Id.*

252. *Id.* at 52.

253. *Id.* at 52–53. “Under certain limited circumstances, petitions for certiorari of judgments of the High Commercial Court may also be made to the Supreme Court of Ukraine.” *Id.* at 53.

254. See Laws of Ukraine, *supra* note 235 (stating that “[p]eople’s assessors shall be Ukrainian citizens who, in cases determined by procedural law, settle cases together with professional judges” and that “[j]urors shall be Ukrainian citizens who, in cases envisaged by procedural law, shall be involved in the administration of justice”).

255. Verkhovna Rada of Ukraine—Legislative Activities, Draft Law of Ukraine, On Judicial System in Ukraine, available at http://gska2.rada.gov.ua/site/eng_zp/eng_zp_docs/_E4541.html (last visited Apr. 2, 2010). The Ukrainian Draft Criminal Procedure Code of March 10, 2009 indicates that jury trials will be introduced for “crimes of grave and especially grave severity.” Joachim Herrmann, *Expert Opinion on the Draft Criminal Procedure of Ukraine* 6 (Council of Eur., 2009), available at <http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/projects/UPAC/Technical%20papers/344%20-%20CPC%20Ukraine%20Expertise%20Sep%20%202009.pdf>.

This Draft Code leaves unanswered many questions with respect to the use of juries in Ukraine, however, such as whether the judge may question the jurors during voir dire (or if the questioning may only be conducted by the parties); whether the jurors may be present during the formulation of the questions that they will ultimately have to decide; what type of information must the judge include in her summation; whether everything said and done during jury deliberation will be kept secret; and whether the jurors must give reasons for their verdict. *Id.* at 6–7.

256. This section focuses on the criminal aspect of the Ukrainian legal system. Ukraine’s civil legal system is quite different from that of the United States. A panel of

example, “[t]rials are presided over by a judge, the state is represented by a prosecutor, and the defendant normally has counsel.”²⁵⁸ Additionally, “[t]he courtrooms look like courtrooms as we know them, with two important exceptions: there is no jury box, and there is usually a large, conspicuous metal cage in which the defendant (if he or she has been detained pending trial) sits.”²⁵⁹ Criminal trials in Ukraine are “generally open to the public, including the press. Judges may or may not wear robes; everyone else is in street clothes. As in the United States, security personnel might be present in the courtroom if the defendant has been ordered into pretrial custody.”²⁶⁰ Finally, as in the United States, the ultimate sentencing decision rests with the judge.²⁶¹

In reality, however, there are many significant differences between the American and Ukrainian legal systems. Indigent defendants in Ukraine are not entitled to counsel,²⁶² and a detained defendant may be jailed for days following an arrest before she sees a judge.²⁶³ In addition, if the arrest is upheld on procedural grounds, then the defendant can be held in jail while “the prosecutor files a formal charge against [her], and continues the investigation.”²⁶⁴ There is also no plea bargaining—the defendant is either convicted, the charges are dropped, or the case is returned to the prosecutor for

three judges considers civil cases in the first instance, and the panel’s decision can be appealed. Laws of Ukraine, Annotation: The Civil Procedural Code of Ukraine, No. 1618–IV (2005), available at <http://zakon.rada.gov.ua/cgi-bin/laws/annot.cgi?nreg=1618-15>. Civil cases implicate the “protection of violated, non–recognized or disputed rights, freedoms or interests, which arise from civil, housing, land, family, labor relations, as well as other legal relations.” *Id.* “Generally, lawyers need not be present at civil affairs and judges encourage that issues be settled out of court.” Roman Woronowycz, *Ukraine’s Court System: The Court of General Jurisdiction*, UKR. WKLY., Mar. 30, 1997, No. 13, available at http://www.brama.com/law/courts.html#Court_of_General_Jurisdiction.

257. Christopher Lehmann, *Defending Sergei: Today’s Post–Soviet Ukrainian Criminal Justice System*, 14 CRIM JUST. 13, 13 (1999).

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* at 19.

262. *Id.* at 14–15.

263. See Lehmann, *supra* note 257, at 14 (noting that up to seventy-two hours may pass before judicial intervention occurs following an arrest).

264. *Id.* at 15.

Whether defendant remains in physical custody for the duration of the investigation is left solely to the prosecutor, and is not subject to judicial review. Only when the prosecutor is finished with the investigation, and formally forwards the case to the court for a trial, does the judiciary again become involved.

Id.

further investigation.²⁶⁵ Acquittal following trial virtually never occurs.²⁶⁶

Moreover,

[t]rials in Ukraine are, by American standards, a bit of a free-for-all. . . . Prosecutors are notorious for not showing up for court (defense counsel less so), but in such cases the judge normally proceeds without them. There is no court reporter, although there may be a clerk taking notes.²⁶⁷

Similarly, witness testimony “often consists of long rambling narratives offered in response to open-ended questions,”²⁶⁸ and nearly everyone present in the courtroom—the judge, attorneys, the victim, and the defendant—may ask the witnesses questions.²⁶⁹ Frequent *ex parte* communication add to the informal atmosphere; “not only . . . the prosecutor and the defense counsel, but the defendant, or even the defendant’s family members may sit down for a private chat with the judge, out of earshot of the opposing parties.”²⁷⁰

IV. RIGHT TO TRIAL BY JURY IN UKRAINE: NECESSITY AND IMPLEMENTATION

Despite the decreasing occurrence of jury trials worldwide in both civil and criminal cases,²⁷¹ Ukraine must implement a jury trial system. Lay citizen participation in the judicial system is vital generally, and it is even more important in a fledgling democracy seeking to rid itself of corruption and instill trust in the work of its government and the rule of law. Thus, Ukraine must first enforce the provision of its constitution that provides for the right to trial by jury

265. *Id.* at 16. “With the result of the trial largely a foregone conclusion, a defense counsel’s primary focus is to mitigate the sentence. To this end, counsel looks for ways to minimize the defendant’s apparent culpability.” *Id.* at 18. For example, counsel may focus “on the defendant’s [good] character, establish[] . . . that the acts charged were . . . not part of a pattern of criminal activity by the defendant . . . [and] attack the weaknesses in the prosecutor’s case.” *Id.*

266. *See supra* note 265.

267. Lehmann, *supra* note 257, at 17.

268. *Id.* at 18.

269. [Q]uestioning may alternate back and forth between the judge and both lawyers. The defendant may also ask questions, even if he or she is represented by counsel. Questioning of one witness may be interrupted while a question is put to someone else for a point of clarification—say, a previous witness who has stepped down but is still in the courtroom, or perhaps even the defendant.

Id.

270. *Id.*

271. *See* 2 J. KENDALL FEW, IN DEFENSE OF TRIAL BY JURY 453–56 (1993) (warning of the “insidious screw of judicial aristocracy” and decrying the elimination of the jury trial in England).

in criminal cases. Once this right is enforced regularly, Ukraine must introduce a jury trial system for civil cases.

A. *Necessity of Jury Trials in Ukraine*

The necessity of lay participation in a judicial system is particularly resonant in the context of a new democracy like Ukraine, which is especially vulnerable to corruption both from the bottom up and from the top down.²⁷² In the criminal context, the jury provides a check on the judiciary, protecting against such potential threats as:

- (1) possible dependence of the judiciary on organs of the executive branch or on political parties;
- (2) substantial dependence of the judiciary on public opinion;
- (3) in a society with serious class, ethnic or social divisions, the judges may belong to the ruling class, the main ethnic group, or to a social elite;
- (4) the routinization of judging or the case-hardening of judges after long years on the bench;
- (5) overbureaucratization of the judiciary, reflected, for instance, in judicial decision-making influenced by a desire to rise in the judicial bureaucracy;
- (6) an excessive judicial formalism in procedure, practice and language.²⁷³

Moreover, "lay participation in the administration of justice has traditionally been seen as a 'right-duty' of a democratic citizenry. It is supposed to serve to legitimate the imposition of criminal punishments in the eyes of the people and educate them to be law-abiding citizens."²⁷⁴

The civil jury serves "four primary functions: (1) resolving disputes; (2) overriding arbitrary or unfair government conduct; (3) legitimizing case outcomes; and (4) providing a forum for deliberative democracy."²⁷⁵ Most of these functions echo the reasons supporting the need for criminal jury trials.²⁷⁶

The jury legitimizes civil resolution of disputes because it decreases party inequality by minimizing the influence of relative wealth,²⁷⁷ increases societal confidence in trial results by dividing the

272. See DeVille, *supra* note 199, at 104 (arguing that although a nation could "have a successful democracy without the right to trial by jury," countries like Russia and Ukraine, which have a "long history of official persecution," need juries to "provide a much needed measure of credibility to state prosecutions").

273. Thaman, *supra* note 191, at 94.

274. *Id.* at 95 (citing *Duncan v. Louisiana*, 391 U.S. 145, 187–88 (1968) (Harlan, J., dissenting)).

275. Steven S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 705, 748 (2000).

276. See, e.g., Appleman, *supra* note 44, at 407 ("It is these particular aspects of criminal jury trials—the size, the vicinage, the aspects of compassion or restorative justice, and role of moral arbiter—that made their way across the ocean to the British colonies. All of these would become imperative to the ideals of American community justice.").

277. See ELLEN E. SWARD, *THE DECLINE OF THE CIVIL JURY* 30–31 (2001) (noting the effects of juries on wealth neutralization); see generally *Developments in the Law—*

decision-making authority between twelve decision makers rather than one,²⁷⁸ and reflects community values in its decisions.²⁷⁹ The civil jury also curbs governmental power by “keeping judges in check, whether they be corrupt or merely biased in favor of upper-class, well-educated litigants with whom they can sympathize,”²⁸⁰ and by checking the legislature through nullifying and threatening to nullify laws with which it disagrees.²⁸¹

Finally, the civil jury provides a forum for deliberative democracy in several ways. First, the civil jury encourages “deliberation between citizens, state officials, and the state itself. The stronger those institutions, the more a citizen’s dominion is enhanced.”²⁸² Second, the civil jury promotes the accessibility of the law by making laws understandable to lay individuals and by

The Civil Jury, 110 HARV. L. REV. 1408, 1421–43 (1997) (discussing the impact of juries on the civil law system) [hereinafter *Civil Jury*].

278. *Civil Jury*, *supra* note 277, at 1433–34; *see also* R.R. Co. v. Stout, 84 U.S. 657, 664 (1874) (“It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.”).

279. *See* SWARD, *supra* note 277, at 24 (describing value expression in the civil jury system); *Civil Jury*, *supra* note 277, at 1434 (analyzing the value of a civil jury system).

280. Note, *The Twenty Dollars Clause*, 118 HARV. L. REV. 1665, 1668 (2005) (discussing the contention that the strongest argument in favor of the civil jury was that it protected against corrupt or biased judges).

281. *Id.* at 1668–69.

282. David F. Partlett, *The Republican Model and Punitive Damages*, 41 SAN DIEGO L. REV. 1409, 1421 (2004) (footnote omitted); *see also* *Civil Jury*, *supra* note 277, at 1438 (footnote omitted) (arguing that the civil jury is valuable not only due to “the independent substantive desirability of any particular outcomes that result [from its existence], but [also] because it is an institution of democratic procedure . . . through which ordinary citizens can participate in government. In this sense, the jury is intrinsically valuable as a concrete manifestation of democratic process”). On the one hand, “the value of such deliberation lies in the cultivation of civic virtue, a cultivation that becomes pressing upon the realization that politics and the pursuit of the good life are inescapably collective enterprises and that civic virtue is required to sustain this collectivity.” *Id.* at 1440. On the other hand, the significance of deliberation “takes on a slightly different color given that moral and political disagreement is a characteristic feature of society Not only is the jury’s deliberative process intrinsically valuable, but also the jury produces substantively desirable communal solutions to the problem of moral and social disagreement.” *Id.* at 1440–41. Thus, “[i]f deliberative democracy is the appropriate response to dissension and conflict, then the jury is the proper judicial and political institution for the resolution of questions with moral dimensions.” *Id.* at 1441.

imposing “a regimen of clarity on lawyers.”²⁸³ Third, the civil jury functions “as an *ad hoc* school of government for citizens.”²⁸⁴

B. Implementation of Jury Trials in Ukraine

The importance of both criminal and civil juries to the furtherance of a strong democratic government,²⁸⁵ combined with Ukraine’s desire to become a true liberal democracy,²⁸⁶ necessitates the introduction of jury trials in that country.

Ukraine’s first priority should be the implementation of the right to trial by jury in criminal cases. In doing so, Ukraine should strive to avoid the problems associated with criminal jury trials that have arisen in Russia—such as the overburdening of juries and judges and the curtailing of defendants’ rights²⁸⁷—by (1) expanding jury trials to all serious criminal cases,²⁸⁸ (2) assigning the burden of proof to the prosecutor, and dismissing frivolous cases without permitting courts to send “cases back for ‘further investigation,’ thereby giving the prosecut[or] two (or more) bites at the apple,”²⁸⁹ (3) “allow[ing] the

283. *Id.* at 1439. “[M]aintaining the accessibility of the law effectuates substantive democratic values, as democracy is surely hindered if citizens cannot even comprehend the laws by which they supposedly govern themselves,” particularly because the notion of democracy “is premised on faith in the ability of mass political processes to generate a kind of collective wisdom, and the epistemological accessibility of the law is a condition of this faith.” *Id.*

284. *Civil Jury*, *supra* note 277, at 1439.

285. See 1 J. KENDALL FEW, IN DEFENSE OF TRIAL BY JURY 213 (1993) (quoting Thomas Jefferson) (“I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.”); Barbara Allen Babcock, *The Jury System Should be Retained*, in THE JURY SYSTEM 22, 24 (Mary E. Williams ed., 1997) (“Like universal suffrage—a vote for every citizen regardless of class, race, or gender—the jury drawn from the community with absolute power to protect the accused from the state is fundamental to . . . democracy.”).

286. See Steven Lee Myers, *Stalled by Conflict, Ukraine’s Democracy Gasps for Air*, N.Y. TIMES, June 1, 2007, at A4, available at <http://www.nytimes.com/2007/06/01/world/europe/01ukraine.html?scp=1&sq=ukraine%20democracy&st=cse> (noting that, although “Ukraine is immeasurably freer than it was in 2004,” it has “failed to consolidate its democracy, even as it has embraced the theatrics of democratic politics,” and that “[t]he biggest concern in Ukraine is that elections are unlikely to significantly change the makeup of Parliament. They could simply prolong the failures to bolster the institutions necessary to allow democracy to flourish, including prosecutors and courts independent of presidential decrees and street protests.”).

287. See DeVille, *supra* note 199, at 101, 107 (stating that some practices in an observed Russian trial “clearly would not have passed review by American appellate courts,” and that the introduction of jury trials in Russia put “tremendous strains” on the courts).

288. See *id.* at 106 (arguing that Russia should expand the use of jury trials to all of its geographical regions).

289. See *id.* at 114–20 and accompanying text.

By ending this practice . . . courts would force prosecutors to bring to trial only cases with sufficient evidence. This practice not only would result in improved judicial economy in jury trial courts but also would decrease the number of

supervised use of guilty pleas and plea bargaining;”²⁹⁰ (4) permitting courts “to sever defendants’ cases;”²⁹¹ (5) implementing a law permitting justices of the peace or magistrates to handle all minor criminal cases, such as offenses for which the punishment does not exceed six months;²⁹² and (6) transcribing or recording all court proceedings.²⁹³

Ukrainian citizens who have reached the age of eighteen, are registered residents of the judicial district in which the trial takes

citizens forced to spend unnecessary time in Russia’s horrible pretrial detention facilities.

See also U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS. AND LABOR, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES IN UKRAINE (2008), <http://www.state.gov/g/drl/rls/hrrpt/2007/100590.htm> (last visited Apr. 2, 2010) (“Problems with the police and the penal system remained some of the most serious human rights concerns [in Ukraine]. [These] [p]roblems included torture in pretrial detention facilities; harsh conditions in prisons and pretrial detention facilities; and arbitrary and lengthy pretrial detention.”).

Additionally, Ukraine could implement the American rule of requiring an indictment that is handed down by a grand jury as a prerequisite to the start of the criminal detention process with respect to a suspect. *See supra* text accompanying notes 114–20 (describing the process through which a criminal defendant enters the legal system in the United States). Although the indictment requirement would curtail the incidence of prosecutors getting multiple chances to bring a case against an individual, it would also require Ukraine to put into practice a grand jury system—a significant obstacle because this country has not yet initiated a petit jury system.

290. DeVile, *supra* note 199, at 107; *see also* Woronowycz, *supra* note 256 (stating that, in the future, the Ukrainian “courts will not be allowed to accept plea bargains, as is widely done in the United States. . . . Judges in the U.S. use the plea bargain to move cases along and keep their dockets under control. Ukrainian judges will not have that option.”).

291. DeVile, *supra* note 199, at 107. This practice would ensure that defendants are not prejudiced at trial and eliminate unnecessary inefficiencies and delays that seem “almost inevitable when a case involves a dozen or more defendants and their attorneys. These delays are especially troublesome in jury trials, as jurors often are forced to sit unpaid.” *Id.* at 108.

292. *See id.* (recommending that Russia institute such a law); *see also* Victor Yushchenko, *Ukraine Needs Constitutional Change*, OFFICIAL WEBSITE OF PRESIDENT OF UKR., Apr. 28, 2009, <http://www.president.gov.ua/en/news/13679.html> (indicating that proposed revisions to Ukraine’s Constitution, submitted in March 2009, “were prompted by the need to reform the judiciary and the law-enforcement system, including, for example, by stripping the prosecutor’s office of the Stalinist right to conduct pretrial investigations and introducing a Justice of the Peace system instead”).

293. *See* DeVile, *supra* note 199, at 109 (“The lack of reliable transcripts makes falsification of records a simple matter, which severely weakens the right to appeal. . . . [It] also makes the trial of lengthy, complex organized crime cases even more difficult.”); *see also* INT’L NETWORK TO PROMOTE THE RULE OF LAW, COURT PROCEEDINGS: TRANSITIONING TO AUTOMATED COURT RECORDINGS 5 (2009), <http://inprol.org/files/CR09004.pdf> (stating that in “Ukraine, the legal procedural requirements do not require the recording of court proceedings unless: a) one or both of the parties make a specific request, or b) the judge on his or her own initiative determines that doing so is appropriate” and, as a result, “most proceedings continue to be recorded pursuant to the old method of the judge summarizing the proceedings with a courtroom clerk taking the dictation either by hand, via a typewriter, or on a PC.”).

place, and have a command of the Russian language, the Ukrainian language, or the other languages of the national minorities of Ukraine²⁹⁴ should be eligible for jury service. Individuals should be disqualified from jury service in Ukraine for the same reasons as those that would disqualify a juror in the United States: physical or mental infirmity that would prevent jury service, conviction of a criminal offense with a punishment of more than one year in prison, or pending criminal charges for similarly serious crimes.²⁹⁵ Prospective jurors should not be automatically disqualified from jury duty on the basis of their occupation or other personal characteristics.

Administrative officials in each judicial district should compile a list of eligible prospective jurors from the list of registered district residents and send questionnaires to a randomly selected group of individuals constituting some percentage of the list, such as 5% or 10%, to determine these individuals' eligibility for jury service.²⁹⁶ The eligible individuals would then comprise the "jury wheel," from which a random number of prospective jurors would be issued summonses to appear at the courthouse.²⁹⁷

The assembled jury pool should be subjected to at least a cursory voir dire examination, like that conducted in the United States and European countries such as Norway and Spain, with the judge (or the attorneys proceeding with the permission of the judge) ascertaining the jurors' suitability for trying the case.²⁹⁸ The parties' attorneys should be permitted to challenge prospective jurors for cause, as is allowed in England, the United States, most European countries, and Russia.²⁹⁹ Additionally, the parties should be permitted to make peremptory challenges, as is allowed in the United States, some European countries including Belgium, Malta, Spain, and

294. See Summary to the Decision of the Constitutional Court of Ukraine no.8-rp/2008 dd., Apr. 22, 2008, <http://www.ccu.gov.ua/doccatalog/document?id=18155> (stating that although court proceedings in Ukraine are conducted in the state language, this "fact by no means limits the rights of citizens who have insufficient or no command of the state language. . . . Article 10.3 of the Constitution guarantees their right to use Russian and other languages of national minorities of Ukraine during the court process").

295. See *supra* text accompanying note 98 (discussing juror disqualification in the American system).

296. See *supra* Part II.B.2 (providing an overview of American jury selection procedures).

297. See *supra* note 96 (explaining the jury wheel process).

298. See Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 549, 556-57 (1975) (contending that "without a reasonable amount of information about the prospective jurors, the litigant cannot realize his right to 'select' the jury by challenges for cause and by peremptory strikes," and that "limited voir dire does prevent and embarrass the right of challenge because it leaves the parties without access, provided by the judicial system, to a reasonable amount of information for making challenges").

299. See *supra* notes 56, 101, 154-55, 209 and accompanying text (discussing juror challenge procedures in various countries).

Switzerland, and, on a limited basis, Russia.³⁰⁰ Affording each party a limited number of peremptory challenges is a better and more calculated means of whittling down the jury pool than drawing juror tickets at random and subsequently dismissing these jurors without any accompanying examination or input from the parties.³⁰¹ Ultimately, a panel of twelve jurors should be seated.³⁰²

Once they are selected, jurors in Ukraine should be required to serve for the duration of a single trial. Although budget constraints will likely make this achievement difficult,³⁰³ these jurors should be paid at a daily rate that is close to the one paid to Russian jurors—the higher of either their current salary or one-half of the prorata salary of a judge.³⁰⁴

During trial, jurors in Ukraine, much like jurors in Russia, should be permitted to take written notes, submit written questions through the judge for the attorneys and witnesses, participate in the taking of all evidence, and ask for explanations of the law.³⁰⁵ As in Russian courts, however, jurors should not be able to leave the courtroom without the judge's permission, talk about the case, or independently gather evidence.³⁰⁶

300. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 147 (1994) (O'Connor, J., concurring) (quoting *Holland v. Illinois*, 493 U.S. 474, 484 (1990)) ("Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of eliminat[ing] extremes of partiality on both sides, thereby assuring the selection of a qualified and unbiased jury."). In the same opinion, Justice Scalia argued that the greatest benefit of peremptory challenges is the appearance of justice they create—not their actual effect on the impartiality (or lack thereof) of the jury. 511 U.S. at 161 n.3 (Scalia, J., dissenting).

301. See *supra* notes 205–13 and accompanying text (referencing Russian jury selection procedures).

302. See Nancy S. Marder, *Bringing Jury Instructions Into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 469 (2006) (stating that empirical studies indicate that a jury of less than twelve members "would limit the number of minorities . . . mak[ing] it more difficult for hold-outs to maintain their position, and increase the chance of producing outlier verdicts").

303. See Judy Dempsey, *International Monetary Fund Withholds \$3.5 Billion Loan to Ukraine*, N.Y. TIMES, Dec. 11, 2009, at B3, available at <http://www.nytimes.com/2009/12/11/business/global/11ukraine.html> (reporting the International Monetary Fund's decision not to make a loan to Ukraine due to "the inability of the country's politicians to get the budget under control" and noting major spending by the country's leaders "[d]espite a rising deficit").

304. See *supra* note 199 and accompanying text (discussing the payment of American jurors).

305. See *supra* note 216 and accompanying text (listing actions that Russian jurors are permitted to undertake in connection with an ongoing trial); see also Patrick J. Fitzgerald, Address, *Thoughts on How the Legal System Treats Jurors*, 2009 WIS. L. REV. 1, 18 (stating that the "best way to ensure that the jury does a good job or a terrific job is . . . [by involving] the jurors by letting them take notes . . . [and] by letting them ask questions").

306. See Thaman, *supra* note 188, at 102 (describing similar procedures, as they are used in Russian courts).

The judge's instructions to the jury can either resemble those given to jurors in the United States or perhaps be slightly less detailed, containing information similar to the instructions given to Russian jurors.³⁰⁷ Specific questions should not be put to the jury, however, because these questions are often phrased in a convoluted manner, can be excessive in number, are extremely confusing for jurors, and can thus prevent juries from reaching the correct verdict.³⁰⁸ Additionally, such lists of questions resemble special verdicts, the use of which is strongly disfavored in criminal trials.³⁰⁹ Instead, jurors in Ukraine should be given a general verdict form, similar to the forms used in criminal trials in the United States.³¹⁰ The jurors should be required to reach a unanimous verdict.³¹¹ In a

307. See *supra* note 221 and accompanying text (discussing various types of jury instructions).

308. See Thaman, *supra* note 5, at 408, 427 (stating that, in Russia, "[t]he most common reason for reversals of jury judgments, especially acquittals, has been purported errors in the formulation of the question list by trial judges" and recommending that the Russian jury "should either adopt the Anglo-American general verdict, or should explicitly instruct jurors as to the juridical meaning of each of the questions asked in the special verdict or question list").

309. See Ellen E. Sward, *Justification and Doctrinal Evolution*, 37 CONN. L. REV. 389, 429 n.191 (2004) (discussing the availability of special verdicts); see also *United States v. Spock*, 416 F.2d 165, 180 (1st Cir. 1969) (noting that special verdicts in criminal trials face "a formidable array of objections"); Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 594 n.265 (1997) (noting that "American law disfavors special jury verdicts in criminal cases"); Katherine L. Harvey, Note, *Criminal Law—United States v. Canino and the Continuing Criminal Enterprise: Do Drug Kingpins Have a Right to Specific Juror Agreement?*, 15 W. NEW ENG. L. REV. 271, 308 (1993) (citations omitted) ("Courts view special verdicts in criminal cases as judicial interference with the jury's duty because eliciting such specific responses creates a threat of judicial overbearance on the jurors, who should be free 'from judicial pressure, both contemporaneous and subsequent.'").

310. See *supra* notes 105–07 and accompanying text (discussing American verdict forms).

311. Several reasons support the need for unanimous verdicts such as the fact that they minimize the potential of erroneous outcomes. Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARDOZO L. REV. 1417, 1432 (1997) ("One of the primary virtues of the unanimity rule is that it minimizes the potential for incorrect verdicts"). Additionally, if majority rule juries are employed in criminal trials:

when majority-rule juries are used in criminal trials: (1) it takes less time to reach a verdict; (2) votes are taken earlier in the process so that factions and dissenters are identified and potentially singled out for coercion before much deliberation takes place; (3) smaller factions are less likely to voice dissent; (4) jurors join larger factions more quickly; (5) holdout jurors are more likely to remain entrenched; and (6) verdict-driven deliberation style is more frequently adopted, and less effort is made to marshal the evidence before expressing verdict preferences.

Emil J. Bove III, Note, *Preserving the Value of Unanimous Criminal Jury Verdicts in Anti-Deadlock Instructions*, 97 GEO. L.J. 251, 267 (2008). The unanimity requirement also enhances the role of the jury as arbiter of justice and as a democratic institution

departure from the American convention, juror nullification should be permitted, at least initially, in an effort to override prosecutorial and juridical overreaching or corruption.³¹²

Only defendants should be permitted to appeal unfavorable jury verdicts, while neither victims nor prosecutors should be permitted to appeal acquittals, as is the practice in the United States.³¹³ Such a practice aligns most effectively with the presumption of innocence and with the notion of double jeopardy.³¹⁴

Once criminal jury trials are in place and functioning, Ukraine should implement jury trials in civil cases. As discussed above, the civil jury serves many of the same important functions as the criminal jury.³¹⁵ Juror participation in civil matters offsets the authority of the judiciary³¹⁶ and “enhances the effectiveness of the adversary process” by providing “the most neutral and passive decision maker available.”³¹⁷ Jurors are capable of giving “each case the fullest and freshest attention”³¹⁸ and reinforcing the adversarial objectives of a sharp and climactic trial.³¹⁹ A civil jury system would “help to legitimize judicial activity,”³²⁰ persuading “onlooking citizens that their courts speak for them and are attuned to their

because it “attaches significance to every juror’s vote and prevents any individual’s voice from being ignored before a verdict is entered against another citizen,” *id.* at 269, and adds authority and finality to a jury’s pronouncement, thereby making it “more likely that the public will accept the jury’s decision,” *id.* at 27.

312. See *supra* note 3 (explaining the practice and benefits of jury nullification).

313. See *supra* note 108 and accompanying text (describing American procedures in this context).

314. See *supra* note 108 and accompanying text (describing American procedures in this context).

315. See *supra* notes 275–82 and accompanying text (discussing the function of the civil jury system).

316. Stephan Landsman, *Appellate Courts and Civil Juries*, 70 U. CIN. L. REV. 873, 880 (2002).

317. *Id.* at 882–83.

The jury is not charged with any of the managerial tasks of the judge and generally will not be drawn into the fray. The jury is not involved with the parties in any way and hears only evidence already screened for prejudicial material. It is, therefore, less likely to develop feelings or ideas that might jeopardize its indifference between the claimants. Moreover, the jury consists of a group of individuals who can be scrutinized for bias before trial. If, even after this examination, a juror manifests animosity toward one side or the other, the remainder of the jury is there to check the biased juror’s inclinations. Judges, unlike jurors, cannot be vigorously examined for bias through questioning processes like *voir dire*. Judges sit singly and are likely to be exposed to provocative material. In the end, no single judge can provide as much assurance of neutrality as can a properly selected and utilized jury.

Id. at 883.

318. *Id.* at 884.

319. *Id.*

320. *Id.*

concerns . . . [and] foster[ing] a sense of heightened respect for the system among jurors themselves.”³²¹ Civil jury trials also

provide a series of practical benefits. First, there is a vast body of social science research on the jury that has concluded that jurors are good factfinders and generally dispatch their tasks effectively. . . . Second, the jury’s structure enhances adjudicatory quality. . . . Civil juries are also practically advantageous because they ease the burden on trial judges.³²²

Furthermore, the civil jury excels at fixing damages,³²³ and its presence “disciplines both lawyers and judges The temptation to use discontinuous hearings is thus checked and the need for celerity underscored.”³²⁴

The Ukrainian civil jury system should utilize the same method of juror selection, voir dire procedure, and length of juror service as the proposed Ukrainian criminal jury. The jurors’ rights during trial should also be the same in both the civil and criminal contexts. Unlike the criminal jury in Ukraine, the civil jury may have as few as six members (although twelve jury members would be optimal);³²⁵ the number of peremptory challenges directed at the prospective civil jury members should be smaller; the civil jury may be allowed to issue special verdicts (although such a practice should be discouraged because of the additional complexities it invites); and a jury verdict in a civil trial can be appealed by the losing party and has the potential of being overturned if, for example, “there is no legally sufficient evidentiary basis for a reasonable jury to find for that party” on an issue and “a claim or defense . . . [cannot] under the controlling law . . . be maintained or defeated without a favorable finding on that issue.”³²⁶

321. *Id.* at 884.

322. *Id.* at 885.

323. *Id.* at 886.

324. *Id.*

325. See Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1498 (1999) (advocating for the restoration of “the size of the civil jury to the traditional twelve (from six to eight, its size in the federal system at present)” because a twelve-person jury provides a “greater diversity of experience, which is important because determining probabilities with regard to the sorts of uncertainty involved in a trial draws heavily on the adjudicators common sense, which is shaped in turn by people’s experiences,” exploits “the Condorcet jury theorem on the superiority of collective to individual judgment,” and reduces variation in verdicts “by drawing on a larger, though still small, sample of the community”).

326. FED. R. CIV. P. 50(a)(1); *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150–51 (2000).

V. CONCLUSION

Ukraine should implement criminal and civil jury trials, hewing as closely to the framework proposed in this Article as possible—not only to put into practice the right to a criminal jury trial included in its constitution but also to help combat widespread corruption. Providing jury trials would make Ukraine’s judicial system—and potentially the nation as a whole—more fair and democratic. Due to its economic, political, and social status, Ukraine plays a pivotal role among and between the former Soviet republics, Europe, and the Western world.³²⁷ As a result, Ukraine’s enforcement of the jury trial right would not only elevate its status among these countries but also be instructive for Russia and for the other former Soviet republics that are currently grappling with governmental and juridical problems that are similar to those Ukraine faces.

327. See *supra* notes 8–11 and accompanying text (describing the importance of Ukraine to the stability of Eastern Europe).
