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## Creating the Right Mentality: Dealing with the Problem of Juror Delinquency in the New South Korean Lay Participation System

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# Creating the Right Mentality: Dealing with the Problem of Juror Delinquency in the New South Korean Lay Participation System

## ABSTRACT

*The Judiciary Reform Committee of South Korea has planned to implement a five year pilot program that will allow public participation in trials. This will be the first time in the nation's judicial history that lay participation will be used. The format of the pilot program will be a mixture of the U.S.-style jury system and the German lay assessor system, with the program being more akin to the U.S. system. As South Korea has never had a lay participation system, it has a unique opportunity to create a system that will avoid problems associated with lay participation. This Note focuses on addressing the problem of juror delinquency in the form of (a) jury duty avoidance and (b) juror misconduct during trial. The Author will examine the history of this problem in the United States and the successes and shortfalls in addressing this problem. The Author argues that the root of the problem of juror delinquency is the mentality of prospective jurors and proposes a system of rules and procedures that will help to avoid what has been a chronic and incurable problem with the U.S. jury system.*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	266
II.	JURY SYSTEMS IN THE UNITED STATES.....	269
	A. <i>Advantages</i> .....	270
	B. <i>Disadvantages</i> .....	271
III.	THE PROBLEM OF JUROR DELINQUENCY IN THE UNITED STATES .....	272
	A. <i>Avoidance of Jury Duty</i> .....	272

	1. History .....	272
	a. 1796–1940 .....	272
	b. 1940–1995 .....	273
	2. Jury Duty Avoidance from 1996-Present ...	274
	a. King’s Survey .....	274
	b. King’s Suggestions.....	277
	B. <i>Juror Misconduct</i> .....	278
	1. Prevention .....	279
	2. King’s Survey .....	280
IV.	SUGGESTIONS FOR SOUTH KOREA .....	281
	A. <i>Role of the Jury</i> .....	281
	1. Different Views of the Role of the Jury .....	281
	2. The View South Korea Should Adopt .....	282
	B. <i>Addressing the Particular Problems</i> .....	283
	1. Jury Duty Avoidance .....	283
	2. Juror Misconduct .....	288
V.	CONCLUSION.....	292

## I. INTRODUCTION

The Judiciary Reform Committee of South Korea has announced that the public will participate in trials during a five year pilot program starting in 2007.<sup>1</sup> This marks the first time in the nation’s judicial history where lay participation will be used.<sup>2</sup> As such, this pilot period will help to determine the final format for a participatory judiciary by 2012.<sup>3</sup> This system is expected to “increase public trust in the justice system and strengthen the democratic legitimacy of the judiciary.”<sup>4</sup> A Judiciary Reform Committee member has said that citizens’ “attention and active participation in fulfilling their duty as participants in the judicial process” is a key element for the successful implementation of the system.<sup>5</sup>

Currently, the South Korean Constitution provides that in criminal cases, “all citizens have the right to be tried in conformity

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1. Kim Rahn, *Public Will Take Part in Trials From 2007*, KOREA TIMES, Nov. 2, 2004, available at [http://search.hankooki.com/times/times\\_view.php?term=jury+trial++&path=hankooki3/times/lpage/200411/kt2004110215205410440.htm&media=kt](http://search.hankooki.com/times/times_view.php?term=jury+trial++&path=hankooki3/times/lpage/200411/kt2004110215205410440.htm&media=kt).

2. *Id.*

3. *Id.*

4. *Id.*; see also *Public Participation in Trial Process*, KBS GLOBAL: NEWS IN ZOOM, [http://english.kbs.co.kr/news/zoom/1335109\\_11781.html](http://english.kbs.co.kr/news/zoom/1335109_11781.html) (last visited Nov. 14, 2006).

5. Rahn, *supra* note 1.

with the Act by judges qualified under the Constitution and the Act.”<sup>6</sup> Under the pilot program, criminal defendants will have the option either to be tried solely by judges or by a mix of lay participants and judges.<sup>7</sup> “In criminal cases where an accused wants a participatory trial, five to nine citizens will take part in the trial to determine the verdict and decide the punishment.”<sup>8</sup> After hearing the case, the citizen panel will decide the verdict as juries do in the United States.<sup>9</sup> If the jury finds the defendant guilty, it will submit a recommendation for the sentence to be applied, similar to how the German system operates.<sup>10</sup> However, during this pilot period, the verdicts and recommendations will be completely advisory and will have no binding effect on judges.<sup>11</sup>

When South Korea implements lay participation in 2012, it will drastically change the Korean Criminal Law system. Under the current system, judges make rulings after applying written definitions and subtle conditions of Korean law to each case.<sup>12</sup> Once the public becomes involved in trials, there will be less focus on record-oriented proceedings, with a shift to oral proceedings where persuasion by attorneys will play an important role. Furthermore, the new system will create a democratic check on judges. A current problem in Korea is the relationship between judges, prosecutors, and private attorneys.<sup>13</sup> “It is a well known secret that serving a certain period as a justice or prosecutor has been regarded as a mandatory procedure to become a capable lawyer at a giant law firm.”<sup>14</sup> As such, it is difficult for junior judges and prosecutors to ignore inappropriate requests from their seniors that were hired by a law firm.<sup>15</sup> Justice Park Chan of the Seoul Central District Court has criticized this customary practice on the internal computer system of the court.<sup>16</sup> He claims that this practice prevents judges from making the right decisions.<sup>17</sup> Implementing a lay participation system with binding verdicts will help to provide a check to prevent judges from giving into these inappropriate requests.

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6. S. KOREA CONST. ch. II, art. 27, *translation available at* <http://www.ccourt.go.kr/english/welcome01.htm>.

7. Rahn, *supra* note 1.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. Lee Jin-woo, *Judiciary Reform Still Has Long Way to Go*, KOREA TIMES, Oct. 31, 2004, *available at* [http://search.hankooki.com/times/times\\_view.php?term=jury+system++&path=hankooki3/times/page/special/200410/kt2004103114185145250.htm&media=kt](http://search.hankooki.com/times/times_view.php?term=jury+system++&path=hankooki3/times/page/special/200410/kt2004103114185145250.htm&media=kt).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

The format of the pilot lay participation system will be a mixture of the U.S.-style jury system and the German lay assessor system.<sup>18</sup> The bulk of the program will be similar to the jury system in the United States.<sup>19</sup> Citizens will be chosen at random and will sit as jurors during trial.<sup>20</sup> Like the German system, upon a determination of guilt, the jury will recommend a proper sentence.<sup>21</sup> During the five year pilot period, jury decisions will not be mandatory and will serve only an advisory function.<sup>22</sup>

As oral proceedings will play a significant role in trials during the pilot period, the pilot system is much more akin to a jury system than a lay judge system.<sup>23</sup> Citizens will not be as actively involved in the trial proceedings.<sup>24</sup> Additionally, they will not sit on the bench with professional judges. As such, judges will not have as much influence over the jurors and vice versa.<sup>25</sup>

If South Korea continues to use a system similar to the pilot system, it will face the same problems as those resulting from the U.S. jury system. One of the most difficult issues to address will be citizens not taking their responsibilities seriously by either avoiding jury duty or engaging in misconduct. A reform committee official has stated that citizens' "active participation in fulfilling their duty as participants in the judicial process" is a key element in successful implementation of the system.<sup>26</sup> Korea has never had a jury system, and the Korean Constitution does not guarantee a right to a trial by a jury. Thus, citizens have never had to participate in trials and may view participation as more of an inconvenience than an important duty. Furthermore, the pilot system only makes a jury trial an option for the criminal defendant. The defendant could opt for a trial by a judge, which may also contribute to citizens feeling that their duties as jurors are not important.

Korea faces the problem of how to create a system that will promote responsible action by potential and actual jurors. There are two main ways in which Korea could deal with this problem: (1) using negative reinforcement in the form of punishments for avoidance of jury duty and for misconduct or (2) taking away the disincentives for participating in juries, as well as creating procedural rules that will minimize the opportunity for misconduct. In order to determine the best way that Korea can accomplish this goal, it is helpful to examine how the U.S. system has approached these particular problems. Part

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18. Rahn, *supra* note 1.

19. *See id.*

20. *See id.*

21. *Id.*

22. *See id.*

23. *See id.*

24. *See id.*

25. *See id.*

26. *Id.*

II of this Note provides a brief description of the U.S. jury system as well as its advantages and disadvantages. Part III critically analyzes the problem of citizens avoiding jury duty and other forms of juror misbehavior in the United States. It also examines the successes and shortfalls of the U.S. system in addressing this problem. Part IV of this Note uses the history of the U.S. juror delinquency problem to propose a solution for South Korea.

## II. JURY SYSTEMS IN THE UNITED STATES

The right to a jury in criminal cases is firmly rooted in the U.S. Constitution.<sup>27</sup> This right was the only guarantee to appear in both the original Constitution and the Bill of Rights.<sup>28</sup> Alexander Hamilton wrote in *Federalist* 83:

The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury[.] . . . the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.<sup>29</sup>

“After two hundred years, the right to a jury continues to be a valued fundamental right of American people.”<sup>30</sup>

Today, all criminal defendants have the right to a jury trial. The Sixth Amendment states that “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”<sup>31</sup> Potential jurors are selected for each case at random from a master jury pool.<sup>32</sup> Each district court creates a jury selection plan, and either a jury commission or the clerk of the court manages the selection process.<sup>33</sup> Generally, “no person or class of persons” may be excluded or exempted from jury service.<sup>34</sup> However, under the U.S. system, prospective jurors may be excused or excluded by a peremptory challenge or a challenge for cause.<sup>35</sup>

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27. U.S. CONST. amend. VI.

28. 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).

29. THE FEDERALIST NO. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

30. Di Jiang, *Judicial Reform in China: New Regulations for a Lay Assessor System*, 9 PAC. RIM. L. & POL'Y J. 569, 576 (2000).

31. U.S. CONST. amend. VI.

32. 28 U.S.C. § 1863 (2006).

33. *Id.* § 1863(a), (b)(1).

34. *Id.* § 1866(c).

35. *Id.*

### A. Advantages

One advantage of the U.S. system is that it “provides an opportunity for the expression of ‘popular sovereignty’ and a ‘barrier to governmental abuse.’”<sup>36</sup> Common law juries represent society as a whole and not any specific group, so they therefore “most directly represent[] the sovereignty of the people.”<sup>37</sup> Juries also act as a barrier to governmental abuse of power by “injecting public opinion into the adjudication of governmental defendants.”<sup>38</sup> This check in turn “adds legitimacy to the administration of law and increases public confidence” in the judiciary.<sup>39</sup>

Another advantage of the U.S. system is that it allows for the incorporation of “common sense” into the judicial process.<sup>40</sup> Jurors are thought to be good finders of fact because of the knowledge “they have gained through their ordinary experiences as members of the community.”<sup>41</sup> They are perceived as superior to judges in this capacity, because judges may not have the same ability to account for the experiences of average members of society when deciding a factual issue.<sup>42</sup>

The number of jurors is another advantage of the U.S. system. “The jury may be a superior institution to fill the factfinding role if for no other reason than that it is a group decisionmaking body rather than a single individual, such as the judge.”<sup>43</sup> The interaction among the individual jurors will allow for an actual debate among people with different backgrounds who have had different experiences.<sup>44</sup> This diversity may make it less likely that there will be an error in judgment from the influence of extraneous factors such as emotion or prejudice. Furthermore, as the jury represents society, it “keeps the administration of the law in accord with the wishes and feelings of the community.”<sup>45</sup>

Finally, where cases of a similar type tend to be repetitive to a judge who has heard them many times before, the jury system provides a fresh perspective and assures that at least that particular group of people are hearing that type of case for the first time.<sup>46</sup>

36. Jiang, *supra* note 30, at 580 (quoting Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 470–75 (1997)).

37. Jiang, *supra* note 30, at 580.

38. *Id.*

39. *Id.*

40. Smith, *supra* note 36, at 484–86.

41. *Id.* at 484.

42. *Id.*

43. *Id.* at 485.

44. *Id.* at 485–86.

45. Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 459–60 (1899).

46. Smith, *supra* note 36, at 486.

Unlike the current Korean system, where judges hear all cases, a different jury composed of a different group of citizens is used for each trial under the U.S. system. If judges hear the same cases all the time, there is a possibility that they will fall into a pattern of reaching similar outcomes in certain types of cases. This trend could lead to judges deciding cases without giving full consideration to the unique character of each particular case.<sup>47</sup> As such, there is a possibility that the law will become stagnant and not evolve with changed circumstances.<sup>48</sup> Jury members likely have little experience, if any, in deciding the matter before them. This freshness enables jury members to scrutinize the facts of a particular case carefully and apply the law to those facts.

### B. Disadvantages

Although the U.S. common law jury system has many advantages, much debate about its disadvantages persists: "The jury has been criticized for its inferior truth-determining and decisionmaking capacity."<sup>49</sup> It has been questioned whether juries have the competency to reach the proper result, especially in complex cases.<sup>50</sup> Some argue that judges are generally "more intelligent, better trained, more disciplined, and more experienced in handling cases than are jurors."<sup>51</sup> Other criticisms of the jury system include:

- (1) the length and cost of trials;
- (2) jury trials result in decisions that are contrary to the principles of law that judges would apply;
- (3) jurors are more likely to be prejudiced than professional judges;
- (4) jurors give no reasons for their decisions; and
- (5) jury decision making leads to legal uncertainty.<sup>52</sup>

Two other problems have attracted far less attention from scholars—the avoidance of jury duty and juror misconduct.<sup>53</sup> "Today, high rates of jury avoidance seem to be a localized phenomenon," with extreme problems in some jurisdictions and near perfect compliance in others.<sup>54</sup> Similarly, jury misconduct poses a threat to the finality and efficiency of the trial process.

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47. *Id.*

48. *See id.*

49. *Id.* at 489.

50. *Id.*

51. *Id.*

52. *Id.* at 489–90.

53. Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796-1996*, 94 MICH. L. REV. 2673, 2673 (1996).

54. *Id.* at 2697.



### III. THE PROBLEM OF JUROR DELINQUENCY IN THE UNITED STATES

#### A. Avoidance of Jury Duty

##### 1. History

###### a. 1796–1940

From 1796 to 1870, the main reason for jury duty avoidance was the disincentives faced by prospective jurors.<sup>55</sup> These disincentives included finding a place to sleep while serving and significant travel to get to the county seat.<sup>56</sup> Prospective jurors during this time also faced disincentives similar to those faced today, “such as the inconvenience of being kept from one’s daily affairs and one’s family for the duration of service.”<sup>57</sup> Fines were a universal response to dodging jury duty throughout the colonial period.<sup>58</sup> However, contempt citations were viewed as a privilege, and not a burden, because exemption from jury duty was a privilege that money could buy.<sup>59</sup> Furthermore, there was little interest in ensuring that a fair cross section of the community served on juries.<sup>60</sup> It was a right reserved for white men with property.<sup>61</sup>

In the decades between the Civil War and World War II, disincentives remained the primary reason for avoiding jury service.<sup>62</sup> Of the disincentives, inconvenience and financial loss were still the main reasons for avoidance.<sup>63</sup> “The most defining feature of juror recruitment during this era was the widespread criticism that the wealthy and educated classes were escaping jury service . . . .”<sup>64</sup> Although fines were established, the fines were not greater for the wealthy, thus enabling them to bear the risk of paying fines rather

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55. *Id.* at 2678.

56. *Id.*

57. *Id.*

58. *Id.* at 2683; see also DONNA J. SPINDEL, CRIME AND SOCIETY IN NORTH CAROLINA, 1663–1776, at 24, 95 (1989) (noting the steady increase in statutory fines as a sign that insufficient juries was a problem for the Carolina court).

59. King, *supra* note 53, at 2684 (noting that, while less wealthy veniremen complied in order to avoid fines, exemption was a perquisite that money could buy).

60. *Id.* at 2685.

61. *Id.*

62. *See id.*

63. *Id.*

64. *Id.* at 2686.

than attending jury duty.<sup>65</sup> Furthermore, the wealthy could use their money or influence to gain an exemption from jury service.<sup>66</sup>

Due to this lack of representation, “influential segments of society” began to lose faith in the ability of juries to reach the right results.<sup>67</sup> It was argued that the absence of the influential segments of society was both “harmful and unfair” and that reforms were necessary.<sup>68</sup> In response to this criticism, selection criteria with stricter guidelines were adopted.<sup>69</sup> Reformers also targeted the removal of disincentives that deterred businessmen from service and supported “more vigorous enforcement of summonses” through fines in order to target avoidance by the wealthy.<sup>70</sup>

b. 1940–1995

From 1940 to 1995, there was an expansion of efforts to remove disincentives, as well as a shift to targeting underrepresented groups on juries, such as racial and ethnic minorities and women.<sup>71</sup> Despite the considerable improvements for jurors by the second half of the twentieth century, “working people still found it difficult to remove themselves from jobs and family for jury service.”<sup>72</sup> However, compensation for jury service increased, and trials were shortened to reduce the burdens on jurors.<sup>73</sup> As a result, there was an improvement in compliance.<sup>74</sup>

Although disincentives for attending jury duty were reduced, dodging jury duty became easier than ever.<sup>75</sup> During this period, there was a shift from qualification interviews to qualification by mail in most jurisdictions.<sup>76</sup> Jury dodgers no longer had to make excuses or pay fines. Instead, they could avoid duty by simply tossing their jury questionnaires in the trash.<sup>77</sup>

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65. *Id.* at 2690.

66. *See, e.g.*, STANLEY F. BREWSTER, TWELVE MEN IN A BOX 19 (1934) (noting the use of politicians as a common means for avoiding jury service).

67. King, *supra* note 53, at 2686.

68. *Id.*

69. *Id.* at 2692.

70. *Id.* at 2692–93. Fines ranged from \$5 to \$500. *Id.* at 2693 n.77.

71. *Id.* at 2694.

72. *Id.* at 2695. One main burden on working jurors was loss of income. The average lost earnings for one term of service in 1975 was more than \$1000. *Id.*

73. *Id.*

74. *See, e.g.*, JANICE T. MUNSTERMAN ET AL., THE RELATIONSHIP OF JUROR FEES AND TERMS OF SERVICE TO JURY SYSTEM PERFORMANCE 24 (1991) (stating that many courts reported improved yields and reduced terms of service).

75. King, *supra* note 53, at 2696.

76. *Id.*

77. *Id.*

## 2. Jury Duty Avoidance from 1996-Present

Today, a high rate of jury avoidance is not a “nationwide epidemic,” but a “localized phenomenon.”<sup>78</sup> Statistical studies show that there are “extremely low response rates . . . in some jurisdictions, and near-perfect compliance in others.”<sup>79</sup> However, the problem of jury duty avoidance still exists in the United States. The reasons why people resist jury duty today include, “apprehensi[on] about lost income, the inconvenience of being absent from work and family, unpleasant working conditions, and long waits.”<sup>80</sup> Additionally, some people may want to “avoid attention from litigants or the press,” or they may wish to “protest a system they feel is unjust.”<sup>81</sup>

There is also a problem with futility: “Even if judges could drag every resisting citizen into a venire, peremptory challenges have left judges powerless to prevent litigants from excluding unwilling jurors during voir dire.”<sup>82</sup> Judges also do not have the means to prevent venire members from misrepresenting their beliefs during voir dire in order to avoid service.<sup>83</sup> Finally, even if it were worth the effort to bring unwilling jurors to the courthouse, the costs of processing contempt citations has steadily increased due to the increase in the size of dockets.<sup>84</sup>

### a. King’s Survey

In November 1995, Professor King conducted a survey to reveal how, if, or when judges enforce jury summonses. The results from 562 judges’ responses suggest that most trial judges do not consider jury avoidance to be a serious problem.<sup>85</sup> For example, most responding judges who had been on the bench for seven years or more responded that compliance was about the same as it had been for the last seven years.<sup>86</sup> However, those judges that did believe that conditions had changed believed that they had worsened.<sup>87</sup> Of nearly two hundred judges who commented on the use of contempt to enforce jury summonses, “only a dozen suggested that the rate of

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78. *Id.* at 2697.

79. *Id.* at 2697; *see also id.* at 2697 n.89 (comparing statistical studies).

80. *Id.* at 2697.

81. *Id.* at 2697–98.

82. *Id.* at 2677.

83. *Id.*

84. *Id.*

85. *Id.* at 2699.

86. *Id.*

87. *Id.* The survey showed that 11% believed that a smaller percentage of summoned persons were ignoring their summonses today as compared to seven years ago and 34% believed that a greater percentage of summoned persons are ignoring their summonses today. *Id.* at 2699 n.95.

noncompliance was high or was a problem in their courts.”<sup>88</sup> Forty seven judges noted that there was adequate or complete compliance in their courts, and less than one-sixth said “that they had issued a show cause order to a person who had failed to comply with a jury summons within the past three years.”<sup>89</sup>

Professor King’s results do, however, show that the problem with jury duty avoidance has improved over the last two hundred years. One can credit this improvement to the changes in the methods of enforcement of jury summonses that have taken place. The results of King’s survey suggest that courts that have addressed the problem of jury duty avoidance prefer to remove disincentives to serve rather than punish.<sup>90</sup> For example, according to G. Thomas Munsterman, Director of the Center for Jury Studies of the National Center for State Courts, “very few courts follow up on those citizens who do not return their qualification questionnaires, and most do nothing even when summoned jurors do not respond.”<sup>91</sup>

A number of measures have been taken by the courts to remove disincentives from attending jury service. Many courts have attempted to remove disincentives by implementing reforms such as employer-mandated pay and one-day trials.<sup>92</sup> More courts are replacing hardship excuses with a one time deferral of service to a more convenient time.<sup>93</sup> Finally, some jurisdictions have found success with automated follow-up notices and well coordinated systems for scheduling deferral dates.<sup>94</sup>

However, courts have not completely abandoned the use of penalties such as contempt citations. They have instead opted to use them as a last resort when the removal of disincentives fails to resolve the problem adequately.<sup>95</sup> Before seeking a contempt action, courts will usually wait until a juror has failed to respond many times

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88. *Id.* at 2700; *see also id.* at 2700 n.97 (noting examples of survey responses suggesting a serious problem with noncompliance).

89. *Id.* at 2700.

90. *Id.* For example, in Houston, there was a \$100 fine for failure to appear for jury service. *Id.* at 2700–01 n.100. One citizen included a check for \$100 with his completed questionnaire, explaining that he could not serve. *Id.* The judge found out that the reason the citizen could not serve was that his employer would not pay him during jury service. *Id.* Rather than accepting the fine payment, the judge called the employer and arranged for it to pay the employee during jury service. *Id.*

91. *Id.* at 2701.

92. *Id.*

93. *Id.*

94. *Id.* For example, deferrals have had success in the Central District of California. *See* Joanna Sobol, Note, *Hardship Excuses and Occupational Exemptions: The Impairment of the “Fair Cross-Section of the Community,”* 69 S. CAL. L. REV. 155, 170 (1995); *see also* G. Thomas Munsterman, *Jury News: What to Do, Oh What to Do with Persons Who Don’t Answer the Summons?*, THE CT. MANAGER, Summer 1995, available at [http://www.ncsconline.org/wc/publications/Res\\_Juries\\_JuryNewsWhat2DoPub.pdf](http://www.ncsconline.org/wc/publications/Res_Juries_JuryNewsWhat2DoPub.pdf) (noting success in counties in Colorado, San Diego, Detroit, and Atlanta).

95. King, *supra* note 53, at 2701.

or has been found to have no valid reason for not serving.<sup>96</sup> The reason is that "many people who fail to respond to their jury questionnaires do not receive them, are disqualified, or have a legitimate excuse for not serving."<sup>97</sup>

Furthermore, many jurisdictions have eliminated the ability for citizens to buy themselves out of service. In these jurisdictions, even if people are fined, they are still required to serve.<sup>98</sup> In one St. Louis case, for example, a juror who tried to pay the fine instead of serving as a juror was forced to sit in the courthouse until he agreed to serve at a later date.<sup>99</sup> In these jurisdictions, citizens cannot buy themselves out of jury service.

King's survey results also show that only a small percentage of judges use their contempt powers and that many judges are reluctant to use contempt as a remedy.<sup>100</sup> Of the judges who did use their contempt powers, 43% used their orders sparingly, only issuing one or two.<sup>101</sup> "Ninety judges noted that using contempt to enforce jury summons was too costly or inefficient."<sup>102</sup> Eighty-five judges were concerned that coerced jurors would make bad jurors. Of the judges who have ordered jury duty avoiders to come to court and explain their noncompliance, less than half have held a juror in contempt and either sentenced or fined them.<sup>103</sup> "The responses indicate that even those judges who perceive compliance with jury summons to be a problem would prefer not to secure attendance through contempt procedures, and that many judges who do issue orders to show cause often do not follow with a penalty."<sup>104</sup>

Judges have also struggled to remedy the problem of potential jurors misrepresenting the truth during voir dire to avoid service.<sup>105</sup> Intelligent panel members realize that certain responses will enable them to avoid service and use them to get dismissed.<sup>106</sup> Most judges who were convinced that a venire member was being dishonest dismissed that person.<sup>107</sup> Another popular response in the survey

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96. *Id.*

97. *Id.* at 2701-02; *see also* Munsterman, *supra* note 94 (discussing many who fail to respond to questionnaires have not received them or are unqualified or exempted).

98. King, *supra* note 53, at 2702.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 2703; *see also id.* at 2703 n.110 (listing the typical comments by judges that gave this response).

103. *Id.* at 2703. Of the ninety-five judges, only forty-two cited at least one potential juror with contempt. *Id.* at 2703 n.114.

104. *Id.* at 2704.

105. *Id.*

106. *Id.*

107. *Id.* Of the judges surveyed, 238 stated that they dismissed dishonest venire members. *Id.* at 2704 n.118.

was to do nothing and allow the attorneys to take care of it.<sup>108</sup> However, few judges used their contempt powers against these venire members.<sup>109</sup>

The results imply that jury dodging does not trouble most judges, but it does pose a serious problem in some courts. Judges are for the most part unwilling to use their contempt powers to enforce jury service and instead use the removal of disincentives to approach the problem. The survey also suggests that a potential juror can still fairly easily get away with misrepresenting the truth to avoid service.

b. King's Suggestions

King believes her study shows that there is a trend in the U.S. system to target the causes of juror resistance rather than using punishments to enforce jury duty.<sup>110</sup> The reasons for this shift are as follows. First, the desire to increase participation by all "cognizable" groups has shifted the focus to getting people into court rather than punishing them for not coming.<sup>111</sup> Also, the cost of punitive as compared to preventive solutions is much higher.<sup>112</sup> Furthermore, punitive measures can be avoided because an unwilling juror can easily misrepresent the truth to avoid service.<sup>113</sup>

King's study found a number of effective ways to target the causes of juror resistance. Shortening terms of service, making employers liable for juror wages, and using deferred service instead of hardship excuses can help to ensure an adequate supply of jurors.<sup>114</sup> Adopting a system of combined summons and qualification, along with automated tracking of those summoned for jury service, was also found to be effective.<sup>115</sup>

However, a number of issues still need to be addressed. For example, child care problems for potential jurors have not been adequately addressed.<sup>116</sup> Also, there has not been an effort to reduce the time consuming features of trial, such as the amount of time a litigant has to present evidence.<sup>117</sup> Judges and lawmakers have for the most part focused on the trial with litigants in mind. King

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108. *Id.* at 2704. Of the judges surveyed, 184 allowed attorneys to handle the problem. *Id.* at 2704 n.118.

109. *See id.* at 2704–05 (noting that sixteen judges reported they had threatened contempt and four judges actually imposed contempt).

110. *Id.* at 2705.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 2707.

117. *Id.* at 2707–08.

suggests that perhaps more attention should be focused on the effects of certain procedures on jurors and the jury system.<sup>118</sup>

### B. Juror Misconduct

Another problem that has not received much attention is juror misconduct during trial. "[T]he opportunities for juror misconduct have expanded due to longer trials and increasing demands on juror behavior."<sup>119</sup> Furthermore, because trials have many recesses and breaks, jurors are allowed more opportunities to do things such as "expose themselves to outside influence, conduct experiments, visit the scene of the event," and discuss evidence before deliberation.<sup>120</sup>

Criminal trials today generally take three days or longer to complete.<sup>121</sup> There are a variety of causes of the lengthening of trials. Some of the lengthening can be attributed to attorneys.<sup>122</sup> Voir dire has become longer, and there are more objections and arguments.<sup>123</sup> Longer trials are also a result of the changes in the law of evidence.<sup>124</sup> As the code has become more developed, there has been more "ammunition for argument during trial."<sup>125</sup> Also, the volume of evidence has increased due to modifications in the evidentiary code.<sup>126</sup> Finally, "proof of guilt has become more complex."<sup>127</sup> With the introduction of expert testimony, and the pleading out of most "simple cases," the determination of guilt often involves complex matters.<sup>128</sup> Furthermore, the number of defendants in each case has increased, along with the number of complex criminal conspiracies.<sup>129</sup>

The advent of new technologies that enable more expansive and easily accessible news coverage has also contributed to juror misconduct. News and comment has expanded, and today there are even television stations that are 100% devoted to covering news from the court room. When there is a big trial, it is covered by every major

118. *Id.* at 2708.

119. *Id.*

120. *Id.* at 2712, 2715.

121. *Id.* at 2709; see also DALE ANNE SIPES ET AL., ON TRIAL: THE LENGTH OF CIVIL AND CRIMINAL TRIALS 17-18, 79 (surveying criminal jury trial time in nine jurisdictions).

122. King, *supra* note 53, at 2710.

123. See *id.*; see also John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 11 (1978) (noting that extended voir dire, exclusionary rules and other evidentiary barriers caused the protraction of the modern U.S. jury trial).

124. King, *supra* note 53, at 2711.

125. *Id.*

126. *Id.* For example many more witnesses are commonly heard in criminal trials today and hearsay rules have been relaxed. *Id.* at 2711 & nn.140-41.

127. *Id.*

128. *Id.* at 2712.

129. *Id.* Between 1990 and 1994, the number of federal jury trials with four or more defendants increased by 35%. JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 12 (1995).

television network and is addressed throughout the day in news programs. Newspapers and magazines are also easily accessible. As such, it is more difficult for jurors not to read, listen to, or watch news about criminal cases during trial.

It is also difficult to prove juror misconduct. Today judges selectively allow juror affidavits about misconduct.<sup>130</sup> However, even though this type of evidence can be used to get a new trial or a mistrial, the number of new trials that have been granted as a result of jury misconduct has fallen in the last two decades.<sup>131</sup> Judges are “quick to find jury misconduct harmless.”<sup>132</sup> Misconduct that occurs during trial and before the verdict has been decided can be harmless, because it will usually not affect the outcome of the case. Delinquent jurors can be replaced by an alternate, or the delinquent juror can be eliminated from taking part in deciding the verdict.<sup>133</sup>

Furthermore, new trials and mistrials were traditionally aimed at deterring misconduct on the part of the repeat players of trials—judges and attorneys. The juror is a one time participant, and the grant of a new trial is unlikely to have any effect on the behavior of future jurors.<sup>134</sup>

## 1. Prevention

The courts have tried a number of tactics to defend against juror misconduct. Until the early nineteenth century, courts used sequestration, or jury separation.<sup>135</sup> However, sequestration rules were lifted as trials became longer and with the introduction of women as jurors in the 1920s.<sup>136</sup> The lifting of sequestration rules made misconduct more difficult to prevent, since jurors had the opportunity to misbehave “individually and away from the watchful eyes and ears of the court officers.”<sup>137</sup> Judges also give extensive instructions for jurors not to misbehave, such as the instruction not to deliberate prior to the deliberation period and not to take into account

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130. King, *supra* note 53, at 2721. Rule 606 of the Federal Rules of Evidence excludes the use of juror testimony/affidavits for the purposes of determining the validity of a verdict except in specific situations. See FED. R. EVID. 606. Rule 606 has been strictly interpreted by the Supreme Court. See *Tanner v. United States*, 483 U.S. 107, 125 (1987) (holding that juror affidavits were not admissible as proof that jurors were intoxicated and using drugs during trial).

131. King, *supra* note 53, at 2722.

132. *Id.* at 2724.

133. *Id.* at 2726–27.

134. *Id.* at 2724–25.

135. *Id.* at 2713.

136. *Id.* Judges did not want female jurors to have to “endure the close company of male strangers.” *Id.* As a result, shortly after women jurors were allowed, statutes were passed to eliminate this possibility. *Id.* at 2714.

137. *Id.*



any outside influences.<sup>138</sup> Finally, judges who allow the jurors to separate “have taken care to question returning jurors concerning exposure to outside influences before” resuming trial.<sup>139</sup> As a result, the ability for judges to ignore hints and allegations of jury misconduct has been limited.<sup>140</sup>

## 2. King’s Survey

[A]s jury misconduct has posed a greater threat to the finality and efficiency of the trial process, courts have adopted two strategies in response: (1) managed tolerance, in the form of trial procedures and review standards that obviate the need for new trials whenever misconduct is revealed, and (2) prevention, in the form of efforts to assist jurors to behave properly.<sup>141</sup>

However, despite “isolated improvements in preventing jury misconduct, the overwhelming response of courts seems to have been to contain costs, not to diagnose and cure its causes.”<sup>142</sup> King suggests that this may be due to the causes of misconduct being too difficult to identify and to eliminate.<sup>143</sup> It could also be that the “band-aid approach has persisted because judges have not considered jury misconduct to be a significant problem.”<sup>144</sup> Her survey results reveal that “judicial impressions of jury misconduct today” support the second explanation.<sup>145</sup> The survey results show that for the most part, judges did not observe misconduct during trials.<sup>146</sup> Furthermore, most judges believed that misconduct had either stayed the same or improved over a seven year period from 1988 to 1995.<sup>147</sup>

The survey also revealed other problems. First, 73% of all responding judges reported that potential jurors lied during voir dire in at least one case they had tried in the last three years.<sup>148</sup> Additionally, 69% of the judges reported cases in which jurors had fallen asleep (estimates showed that this occurred in more than 2,300 cases).<sup>149</sup> Finally, 8% responded that jurors, after being sworn in, had not reported to court or had reported late.<sup>150</sup>

138. *Id.* at 2715, 2717, 2729.

139. *Id.* at 2719.

140. *See, e.g.,* *Remer v. U.S.*, 347 U.S. 227 (1954) (holding that defendant, upon hearing post-verdict of possible jury tampering, was entitled to a hearing).

141. King, *supra* note 53, at 2708.

142. *Id.* at 2729.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 2732.

147. *Id.* at 2733.

148. *Id.* at 2732.

149. *Id.*

150. *Id.*

The most surprising result of the survey was that “[f]ew judges reported that they cited or even threatened to cite offending jurors with contempt for most forms of misconduct.”<sup>151</sup> Sleeping jurors were usually awakened without reprimand, and some judges left it up to the attorneys to take action.<sup>152</sup> However, judges were more interested in coercing compliance for behavior linked to avoiding service.

#### IV. SUGGESTIONS FOR SOUTH KOREA

How South Korea deals with the problem of juror delinquency will depend in part upon the way in which the jury is defined for South Korean society. Sherman J. Clark argues that the social meaning of the jury is crucial to getting citizens to act “nobly and bravely.”<sup>153</sup> He suggests that the jury’s responsibility is important primarily because of what that role says about the community.<sup>154</sup> In other words, if the jury is understood as an expression of community identity, jurors will be more likely to take their responsibilities seriously. Using this idea of the importance of the role of the jury, one must first address the issue of how South Korea should define that role. This definition will lay the foundation from which to base the particular rules that the South Korean jury system should adopt to deal with the problems of jury duty avoidance and juror misconduct.

##### A. *Role of the Jury*

“Future attempts to regulate the behavior of those who are called for jury service must respond to the continuing shifts in sentiment regarding the jury’s proper function.”<sup>155</sup> There are several competing views of the role of the jury in criminal trials. These views, in turn, have “influenced the enforcement of compulsory jury service in America.”<sup>156</sup>

##### 1. Different Views of the Role of the Jury

There are three dominant views on the role of the jury. One view is that the jury is “an educational institution that teaches

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151. *Id.* at 2741.

152. *Id.* at 2741–42.

153. Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381, 2390 (1999).

154. *Id.* at 2382.

155. King, *supra* note 53, at 2675.

156. *Id.*

jurors . . . lessons about democratic self governance.”<sup>157</sup> Under this view, citizens who dodge jury duty “deprive themselves of important knowledge and undermine the political order.”<sup>158</sup> Another view is that the jury is a special kind of law-making body that must fairly represent all demographic groups in a community.<sup>159</sup> Under this view, the jury must represent a fair cross-section of the community. Proponents of this view would support “vigorous enforcement efforts” of jury service if these efforts would help alleviate the underrepresentation of certain groups on juries.<sup>160</sup> Finally, some “consider these various roles [of the jury] unimportant compared to the mission of the criminal jury to determine, accurately, the facts of a case.”<sup>161</sup> Those who support this view seek measures that promise to increase compliance by jurors with the most education.<sup>162</sup> Alternatively, they would look less favorably upon measures that would increase the compliance rates of those with less education.<sup>163</sup>

## 2. The View South Korea Should Adopt

If South Korea adopts the view that the jury is an educational institution, the proper incentives for a juror to behave will not exist. As the jury experience teaches the juror about democratic self governance, those who dodge jury duty are depriving themselves of this knowledge. The focus of this view is more on the benefit to the individual juror from serving on the jury, rather than on the jury system as a whole. It could be argued that this education will, in the long run, benefit society and the success of the jury system. However, under this view, because the jury is a means for the jurors to become educated, jurors could choose to forego this education. No real element of duty underlies this understanding of the jury, and as such, it does not create an incentive for the juror to choose to serve rather than avoid.

It will also be problematic if South Korea views the role of the jury as subordinate to determining the facts of a case accurately. This view is better than the educational view because it does have an element of duty. Under this view a juror will understand that he should try his best to determine the facts of the case accurately and arrive at the “right” answer.<sup>164</sup> However, as stated above, proponents of this view seek to maximize only the compliance of jurors with the

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157. *Id.*

158. *Id.*

159. *Id.* at 2676.

160. *Id.*

161. *Id.* at 2676–77.

162. *Id.* at 2677.

163. *Id.*

164. *Id.*

most education.<sup>165</sup> As such, the focus is only on a fraction of the society. While this view may promote better educated juries, by failing to focus on society as a whole, it does not completely address the problem of avoidance. Furthermore, if the focus is only on maximizing compliance by the most educated portion of society, then only that segment will feel burdens or annoyances associated with serving. As such, they may feel that it is unfair that only they should have to participate, and they may be less inclined to serve.

South Korea would be able to encourage the highest level of compliance by emphasizing that the jury is a special kind of law-making body. The reasons for this are that the entire community would be included, and it promotes an underlying element of duty. The entire community would be included because the jury must fairly represent all demographic groups.<sup>166</sup> As such, there would not be any exclusion based on factors such as age, wealth, occupation, educational background, and gender. Under this view, the goal would be to seek compliance by society as a whole, so that the pool of potential jurors will actually include all demographic groups. Also, since the jury will be a special law-making body, the decisions of juries will represent the views of society. Citizens may therefore be more inclined to participate to ensure that their opinions are considered.

An underlying element of duty would be created for two reasons. First, the jury would be understood as a law-making body that has the responsibility of determining the guilt or innocence of a defendant. Second, because the jury would represent society as a whole, there would be an incentive for jurors to take their responsibilities seriously because their decisions would represent what the community believes is or is not acceptable behavior.

### B. *Addressing the Particular Problems*

#### 1. Jury Duty Avoidance

The first important consideration in addressing the problem of jury duty avoidance is representation. If South Korea were to adopt the view that the jury is a special law-making body that must represent a fair cross-section of the community, the system must promote representation by all demographic groups as much as possible. The representation of all people would help get jurors to take their responsibilities seriously. South Korea must seek to create an understanding that the jury is representative of each and every type of person and that every person has a duty to serve. As such,

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165. *Id.*

166. *Id.* at 2676.

South Korea must adopt a system that addresses the problem of jury duty avoidance by *all* people. In other words, it should adopt a system that aims at ensuring that all cognizable groups participate. As South Korean society begins to understand that jury duty actually represents the opinions of society, jury duty will hopefully be viewed as an important duty owed to the country and to society as a whole. This Note proposes that this understanding of jury service as an important duty is the key to cutting down on juror misconduct during trial. This interrelationship will be discussed later in this section.

South Korea can accomplish this goal by designing a system that makes it difficult for citizens to avoid jury duty. Professor King has noted that in the United States there has been a shift in focus to getting people into court, rather than punishing them for not coming.<sup>167</sup> However, removing disincentives would not avoid the problem of unwilling jurors lying to avoid service. As such, the system should remove the disincentives that keep many people from attending jury duty and also enforce the obligation to serve.

South Korea should first take steps to remove certain minor disincentives. Two examples of such minor disincentives are the problems of lost time at work and finding child care during jury duty. To address the problem of lost work time, South Korea should require employers to be liable for wages while citizens serve on juries. A system of compensation for self-employed citizens should also be created. This fix would allow people to attend jury duty without worrying about lost wages. Second, to address the problem of child care during jury service, South Korea should set up child care facilities at courthouses or provide for child care services in some alternate way. This improvement would allow parents to come to jury duty without worrying about what to do with their children.

One of the greatest disincentives to serving on a jury is the inconvenience associated with being unexpectedly summoned to service. To remove the disincentive of inconvenience, South Korea should require every citizen to devote a standard minimum amount of time to jury service.<sup>168</sup> For example, each citizen should have to devote one week a year to jury service. Each citizen would declare well in advance which weeks or timeframes are most convenient for them.<sup>169</sup> The court would then notify jurors well in advance as to when they would be serving. By allowing each citizen to schedule a week that is convenient and then giving proper notice, the government would alleviate any inconvenience associated with jury service. Citizens would be able to plan ahead for the responsibilities that are associated with their service and be less burdened than they

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167. *Id.* at 2700.

168. Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1178 (1995).

169. *Id.* at 1178-79.

would be with a time period selected by another person. Furthermore, since jury summons would not come as a surprise, jurors would not be able to defer their service until a later date during one of their declared time periods unless there was a genuine emergency.<sup>170</sup>

To enforce this obligation, there must also be some sort of punitive measure. Most of the courts in King's survey use punishment as a last resort.<sup>171</sup> They often wait until a juror has failed to respond many times or has been found to have no valid reason for not serving.<sup>172</sup> However, these punishments do not serve enough of a deterrent purpose if they are rarely used. South Korea should impose punishment every time a juror fails to attend service during one of his declared time periods. The threat of punishment would cause jurors to think seriously about which time periods they declare as "convenient times" for jury service. They would therefore be deterred from haphazardly declaring their convenient time periods. Furthermore, once their time period is scheduled, the threat of punishment will cause jurors to be less likely to avoid their obligation.

What should the punishment be? It has been suggested that one solution is to impose stiff fines, such as paying double the amount of salary you would have made during your week of service.<sup>173</sup> The use of stiff fines according to salary or wages would help to cure the problem of wealthier people buying their way out of jury duty. Since the fine would be a function of the amount one earns, wealthier people would feel a similar effect to lower wage earners. Furthermore, the fine would be greater than the amount one would earn, causing the benefits of avoiding service to be outweighed by the cost of the fine. For people who do not earn a wage, a standard amount should be set. This minimum should take into account the amount the person is worth. Just as a wealthy worker can buy his way out of jury service, a wealthy retiree can do the same. By taking into account the wealth of a person who does not work, the effects of the fine will be felt more equally across all economic classes that are not employed. Stiffer fines will therefore make it more difficult and unprofitable for citizens to buy their way out of service.

Some may argue that the use of any type of fine would not encourage behavior out of a sense of duty to perform, but would instead force compliance out of fear of punishment. Although this sentiment may be true, there must be some meaningful check on citizens who can afford to skip service. The fines would likely serve

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170. A procedure would have to be adopted for determining what constitutes a genuine emergency. It should probably require documented proof of the emergency.

171. King, *supra* note 53, at 2701.

172. *Id.* at 2702.

173. Amar, *supra* note 168, at 1179.

as a check on outliers in society, rather than as a motivating factor for everyone to participate. The citizens who would actually pay to get out of service will probably fall in the minority, because the introduction of a lay participation system will in and of itself create a desire to serve. The fact that the South Korean government has decided that citizens should participate in the judicial process will create a sense of importance.

Furthermore, if South Korea wishes to instill the idea that jury service is an important duty, the punishment for failure to serve must be severe enough that people will not take the responsibility for granted. As the society begins to understand the importance of jury service, the fine hopefully would be imposed rarely, and would serve its maximum deterrent purpose. These fines may also help to instill an understanding of the social value of juries, thus helping to ease the problem of juror misconduct.

Some may also argue that these penalties are too harsh and that a lesser punishment should be used. However, the use of harsh punishments has been used to deter the avoidance of another important duty in South Korea: mandatory military duty for male citizens. South Korea requires male citizens between the ages of twenty and thirty to serve a term of between twenty-four and twenty-eight months in military service.<sup>174</sup> In 2004, the Military Manpower Administration of South Korea “announced a new conscription system to improve the detection of draft-dodgers and increase their punishment.”<sup>175</sup> The new system punishes those who avoid the draft by damaging their bodies or committing fraud with three to five years in prison.<sup>176</sup> This change responded to the discovery of fifty professional baseball players who had avoided their military duties by manipulating urine tests.<sup>177</sup> As a result, it targeted not only the average citizen, but those people who had the means to dodge service, such as professional players, entertainers, and sons of high-ranking officials.<sup>178</sup> This harsh rule was therefore aimed at ensuring participation by *all* male members within the appropriate age range. Similarly, if South Korea wishes to communicate the idea that jury service is an important duty, it should use harsh punitive measures to ensure compliance by all eligible citizens.

One problem in the U.S. system is that jurors will lie to avoid jury service. The existence of challenges for cause and peremptory

174. CENT. INTELLIGENCE AGENCY, THE WORLD FACT BOOK: SOUTH KOREA, available at <https://www.cia.gov/cia/publications/factbook/index.html>.

175. Kim Rahn, *Draft-Dodgers to Get Heavier Punishment*, KOREA TIMES, Sept. 9, 2004, available at <http://times.hankooki.com/lpage/200409/kt2004090916555610160.htm>.

176. *Id.*

177. *Id.*

178. *Id.*

challenges creates this phenomenon. These mechanisms provide an opportunity for potential jurors to lie or to act in a certain way so that the attorneys will dismiss them. To avoid this problem, challenges for cause should be extremely limited.<sup>179</sup> For example, persons related to the defendant should be removed for cause. However, persons should not be removed for the ideas that they hold.<sup>180</sup> As stated by Professor Amar, "a juror should have an open mind but not an empty mind."<sup>181</sup> By limiting challenges for cause in this way, potential jurors would not be easily dismissed for the opinions they hold. This would limit the ability of attorneys to remove jurors for cause, thus making it more difficult for potential jurors to lie to get out of jury service.

A problem with both challenges for cause and peremptory challenges is that they allow attorneys to shape and chisel a jury that is not a representative cross-section of the community. If the jury is to be viewed as a special law-making body that represents every demographic group of the community, every group must be represented. Thus, the venire *and* the actual panel must both represent a fair cross-section of the community.<sup>182</sup> Limiting the grounds for challenges for cause as discussed above can alleviate this problem.<sup>183</sup> The problem would also be alleviated if peremptory challenges are not allowed at all in South Korea.<sup>184</sup> Peremptory challenges allow jurors to be dismissed based on often unfounded and invalid hunches of lawyers.<sup>185</sup> Since no reason is necessary for these dismissals, they allow attorneys the opportunity to create a non-representative jury. By eliminating peremptory challenges and placing extreme limitations on challenges for cause, attorneys would not have the ability to keep the actual jury panel from representing a fair cross-section of the community.<sup>186</sup>

Arguably the limitation on challenges for cause may not provide for an unbiased jury. However, this Note argues that the jury's role should be viewed as a special law-making body. The opinions of the jury should reflect the opinions of society. Biases exist within any society. People have different opinions about what is and is not acceptable behavior. If the jury is to represent a cross-section of the community, these differing opinions must be included as well. Although juries under such a proposed system would not be completely unbiased, they would more accurately reflect society's

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179. Amar, *supra* note 168, at 1180.

180. *Id.*

181. *Id.*

182. *Id.* at 1182.

183. *Id.* at 1180.

184. *See id.* at 1182.

185. Justice Marshall addressed the elimination of peremptory challenges in his concurrence in *Batson v. Kentucky*, 476 U.S. 79, 102-03 (1986).

186. Amar, *supra* note 168, at 1182-83.



judgment of the guilt or innocence of the criminal by allowing for dialogue among different people with differing opinions. Also, this Note will later discuss a unanimity rule for juries which would help to check the problems of bias.

Limiting challenges for cause and eliminating peremptory challenges would help to promote the role of the jury as a special law-making body. If the jury is to actually represent society's opinion of whether the defendant has acted right or wrong, people with different opinions and backgrounds should be allowed to participate. By limiting challenges for cause, it is more likely that a jury would actually be a representative cross-section of society. By not allowing peremptory challenges, attorneys would not be able to remove potential jurors for unstated reasons, such as having a "bad feeling" about the juror. If challenges were limited, attorneys would be less able to shape juries into representing the parts or sections of society that are most likely to support their case. As a result, rather than the venire only representing a fair cross-section of the community, the actual jury would also represent a fair cross-section of the community. "Juries should represent the people, not the parties. Democracy is well served if juries force together into common dialogue a fair cross section of citizens who might never deliberate together anywhere else."<sup>187</sup>

## 2. Juror Misconduct

As discussed earlier, the problem of juror misconduct in the United States has been attributed in part to longer trials.<sup>188</sup> Longer trials have been attributed in part to the length of voir dire.<sup>189</sup> There are many objections and extensive arguments during this phase of the trial.<sup>190</sup> If South Korea adopted a system that minimizes challenges for cause and does away with peremptory challenges, it would help to alleviate this problem, since there would be fewer objections and arguments regarding the dismissal of jurors. The shortening of trials in this manner would give jurors less opportunity to misbehave and may help to alleviate the juror misconduct problem.

Another factor contributing to the increase in juror misconduct is the advent of new technologies that enable more expansive and easily accessible news coverage.<sup>191</sup> This problem could be addressed by keeping jurors completely locked away from any sort of media exposure. However, this sequestration would have the effect of making jury duty more burdensome and, in turn, cause citizens to be

187. *Id.* at 1182

188. King, *supra* note 53, at 2708.

189. *Id.* at 2710.

190. *Id.*

191. *Id.* at 2716-17.

more likely to avoid duty. Another option would be to impose severe punishments for people who are found to have read the paper, listened to the radio, or watched the news on television. However, this option would also be problematic, as it would be difficult to prove that this type of misconduct occurred.

The difficulty in proving juror misconduct is the greatest challenge to designing post-misconduct remedies and pre-misconduct prevention. Since jury trials will be a new experience in South Korea, the system could take steps to make it easier to prove juror misconduct. For example, it could allow taping of jury deliberations. If jurors knew that their actions could be reviewed, they may be less likely to misbehave. Monitoring jurors in the courtroom may be plausible, but it would be more difficult to monitor their behavior outside of court. South Korea could institute a system where jurors who serve on a trial are not allowed contact with outsiders, including watching television, reading the paper, etc. However, while this process may not be very burdensome for trials that last one day, juries in longer trials would be isolated for longer periods of time. Longer periods of isolation may be very inconvenient for some jurors, and very unappealing to many others. As such, although this idea may help to cure the problem of juror misconduct, it may aggravate rather than alleviate the problem of jury duty avoidance.

The best approach for South Korea is to create an understanding in society that the jury serves an important role. South Korea should adopt the view that the jury is a special law-making body.<sup>192</sup> This view would help to establish a sense of duty and importance for citizens serving on juries, as their actions would represent those of society. If a true sense of importance and duty can be achieved, citizen jurors will be more likely to act properly, not for fear of punishment or social criticism, but instead because they wish to represent society by taking this important responsibility seriously.

South Korea has a system in which males between the age of eighteen and thirty must serve a mandatory term in military service. The continuing success in having high rates of compliance can be attributed in part to the societal understanding of the importance of this service. Similarly, if South Korea can establish an understanding that juries are an important and integral part of the country's legal system, the problem of juror misconduct can be avoided. Citizens will take their duties seriously because of the importance of their role as representatives of society. Juror misconduct is very difficult to discover and thus difficult to attack using traditional methods such as punishment. By attacking the problem at its source, the mentality of the individual juror, South

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192. See *supra* Part IV.A.2.

Korea will have the best chance of avoiding the juror misconduct problem.

One important step would be for South Korea to make the jury trial mandatory and not optional. If criminal defendants have no choice but to argue their case before a jury of their peers, the importance of the jury will be much greater. They would be the sole decider of the outcome of the case and would be more like a distinct and special law-making body. Alternatively, if the system allows the option of judge or jury, the jury would not be a distinct entity with unique duties. Instead, it would serve a less important function, since it would be an alternative to the judge, rather than sharing similar responsibilities.

Arguably, the defendant should have the option to choose between a jury trial and a bench trial. If the defendant feels that he may have a better chance presenting his case only to the judge, he should be able to do so. However, if the defendant is given an option to choose between judge and jury, jurors may not feel that their function as jurors serves a distinct and important purpose. They may feel that "somebody else" could do the job, therefore diminishing the importance of their role.<sup>193</sup>

South Korea should also allow active participation by the jurors during trial. In the German lay judge system, lay persons do not serve the passive role that jurors in the United States do.<sup>194</sup> In contrast, they may question witnesses during trial. Through active participation, the jury would play a greater role in the trial. As a result, the importance of the jury would be amplified. Rather than just being spectators at the trial, they would be more akin to a separate special entity that works alongside the attorneys and the judges.

Furthermore, by adopting this more inquisitorial approach rather than an adversarial one, some of the reasons for misconduct would be eliminated. When trials are long and jurors sit and watch witness examinations for hours at a time, it is easy to get lulled into boredom. Allowing jurors to take part in the questioning would make it less likely that jurors would get bored during trial. Jurors may pay closer attention knowing they have the opportunity to participate in the proceedings. Jurors would also gain a better understanding of the case and the applicable laws and would be more likely to reach a better informed decision.<sup>195</sup>

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193. This is related to the importance of letting jurors know that they have the last word and that their word is binding. See discussion *infra* notes 201-05 and accompanying text.

194. Jiang, *supra* note 30, at 584.

195. *Id.*

Some may object that allowing active participation by jurors would cause undue delay and unfair prejudice.<sup>196</sup> Proponents of this objection would argue that allowing jurors to participate would unnecessarily lengthen trials.<sup>197</sup> The time taken to accommodate an active jury could in turn cause unfair prejudice.<sup>198</sup> However, empirical data indicates that participation by jurors in the adjudicatory process would result neither in a major increase in trial delay nor unfair prejudice.<sup>199</sup> It has been suggested that “a more active role for the jury might actually reduce delay and allow the jury to function more efficiently as a finder of fact.”<sup>200</sup>

Another step that South Korea should take is to ensure that jurors know that they have the last word and that their decision is binding. In other words, jurors need to “understand themselves to be acting, rather than merely deciding.”<sup>201</sup> They must know that no one stands between them and the fate of the defendant.<sup>202</sup> This concern was addressed by the U.S. Supreme Court in *Caldwell v. Mississippi*.<sup>203</sup> In that case, the Court reversed a death sentence conviction because the prosecutor had emphasized that any decision the jury reached would be subject to appeal.<sup>204</sup> In its opinion, the Court stated that “the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an *intolerable danger* that the jury will in fact choose to *minimize the importance of its role*.”<sup>205</sup>

Using the *Caldwell* doctrine as guidance, South Korea should create rules to ensure that jurors understand that they have the great responsibility of deciding the fate of the defendant. As in *Caldwell*, these rules should not tolerate any statements by attorneys that may lead jurors to minimize the importance of their role.

South Korea should also adopt a unanimity rule to further emphasize the importance of the jurors’ responsibilities. By doing so,

196. Smith, *supra* note 36, at 550.

197. Steven I. Friedland, *The Competency and Responsibilities of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 218 (1990).

198. *Id.*

199. Smith, *supra* note 36, at 550.

200. *Id.*

201. Clark, *supra* note 153, at 2427.

202. *Id.*

203. 472 U.S. 320 (1985).

204. The prosecutor said,

Now they would have you believe that you’re going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. . . . For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court.

*Id.* at 325–26.

205. *Id.* at 333 (emphasis added).

jurors would not feel that a defendant would have been convicted with or without their participation.<sup>206</sup> Traditionally, it has been argued that a unanimity requirement is the only way that criminal trials can adequately protect defendants.<sup>207</sup> Theorists have also argued that the unanimity requirement forces jurors to deliberate and to engage in active conversation, taking into consideration the opinions and perspectives of others.<sup>208</sup> In *McKoy v. North Carolina*, Justice Kennedy in his concurrence stated that the unanimity requirement "is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room and that the jury's ultimate decision will reflect the conscience of the community."<sup>209</sup>

The unanimity requirement's effect on jurors feeling that their individual participation is important can be illustrated by the following hypothetical: Imagine a court that uses a majority rule in a jury of ten. Eight out of ten possible votes are needed for conviction. If the actual vote comes out to be nine out of ten or ten out of ten, each juror may believe that his vote had no effect because there were more than enough votes for conviction.<sup>210</sup> However, with a unanimity rule, this problem would be avoided, since the vote of each juror would be necessary for conviction. This requirement in turn would help to strengthen society's understanding of the importance of jury duty by making it clear that each juror's vote is vital for conviction or acquittal.

## V. CONCLUSION

South Korea will soon enter an exciting new era in which lay persons will participate in the adjudicatory process. As with any new system, South Korea will ultimately face many problems. The problems of jury duty avoidance and juror misconduct are two examples. This topic has not been frequently addressed in the United States, and that may be due in part to the existence of the jury for many years. South Korea has the unique opportunity to examine and learn from the successes and pitfalls of the lay assessor systems in other countries. In regard to jury duty avoidance and juror misconduct, this Note proposes that the root of the problem is the mentality of the prospective juror. If South Korea adopts this Note's proposals, its jury system will help to create a social understanding that the jury is an important institution and that jury service is an important duty. By attacking the problem at the beginning of the life

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206. Clark, *supra* note 153, at 2440.

207. *Id.*

208. *Id.*

209. 494 U.S. 433, 452 (1990).

210. Clark, *supra* note 153, at 2440.

of the jury system, South Korea may be able to avoid what seems to be a chronic and incurable problem with the U.S. jury system.

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