

Jury News

NICOLE L. WATERS

Juries in Berlin and Beyond

Jury trials are an important fabric of our U.S. culture. Jurors represent changing community values and allow the voices of our citizens to be heard. The U.S. Constitution recognizes the right to a jury trial as a fundamental component of our civil liberties. However, most other nations do not recognize the right to a jury trial. Juries have evolved from a common law system, and as such, most non-common law nations do not hold jury trials. In fact, about 80 percent of all jury trials across the world take place in the United States.¹

As a member of the Center for Jury Studies, I was afforded a remarkable opportunity to travel across the Atlantic Ocean to participate in the 2007 Berlin International Conference: Law and Society in the 21st Century, held at Humboldt Universität zu Berlin, in July of 2007. This was a joint meeting of the Law and Society Association and Research Committee on Sociology of Law. Jury researchers from across the world gathered together to collaborate and present on their current work. Although, according to John F. Kennedy, "*Ich bin ein Berliner*," (no, not a donut), *wir sind nicht alle Berliner* (we are not all Berliners). In fact, the *Deutsch* language and culture was an adjustment for me, as is typical for many foreign travelers. I was easily identified as a tourist when I ate my *currywurst* with a fork and knife rather than with my fingers!


Our cultural heritage underlies the structure of our legal system. Some cultures, such as that of Japan, have shown resistance to lay participation in their legal system. In 2004, Japan enacted a law establishing that selected citizens, called "Saiban-in" take part in criminal court trials of severe crimes and make decisions together with professional judges. Japan's tradition of submissiveness to authority may lead jurors to be deferential to the judge's opinion. One poll indicated that 70 percent of Japan's population is reluctant to serve as a juror.²

Criminal cases are the most likely candidates for countries proposing a new jury system. In Japan, a mixed tribunal system for serious criminal cases will be fully implemented by May of 2009. Adjudication panels will include three professional judges (one of whom is the chief judge) and six citizens. In preparation for the official adoption of this system, researchers in Japan have implemented mock trials and mock deliberations in district courts (in Sapporo and Matsuyama) to assess the system. The goal of the system is to encourage the lay participants to express their opinions and engage in free discussion. Masahiro Fujita presented on the Japanese system and demonstrated that the communication network between participants in mock trials map lay participants as showing considerable deference to the professional judges.³

On the European continent, Russia and Spain have recently passed laws to enact a new jury system. In 1993, the Russian Jury Law was passed so that a jury court consists of 12 jurors and two alternates, similar to many U.S. juries. Thus far, some critics have claimed that the jurors are too lenient. Acquittal rates were approximately 23 percent in 1997, as compared to general acquittal rates of 1.5 percent in 1995.⁴ As Stephen Thaman, a panelist at the Berlin conference, writes: "the relative lenience of Russian juries can perhaps be explained as a reaction to an excessively severe Soviet criminal justice system, coupled with profound mistrust among the population of criminal investigators and police, who are known to engage in brutal coercive tactics in interrogation and are otherwise distrusted in their testimony."⁵

Nikolay Kovalev presented on the high level of ethnic and racial intolerance toward some minorities in Russia, which raises the possibility of jury prejudice against victims and defendants.⁶ The jury system, which was initially introduced in the Russian Federation in only nine provinces, now exists in all regions of the Russian Federation, except the Republic of Chechnya. Certain types of cases in Russia have received very close public attention and signal a need for re-assessing the role of trial by jury in adjudication of crimes involving racial, ethnic, or religious intolerance.

Traveling to north of the Mediterranean Sea, we learned that Spain had also recently adopted a new jury system. In 1995, the Spanish Jury Law mandated that the jury court comprise nine jurors and two alternates.⁷



Thaman found that other than one “deviant verdict” in the Otegi Case, Spanish juries have not been excessively lenient in their first year. The “deviant verdict” was the acquittal of Mikel Otegi, who committed a double murder of police officers, and the jury found, as a mitigating factor, his diminished capacity due to intoxication. This acquittal “riveted the Spanish public’s attention to the new jury courts following the first trials in May of 1996. The Otegi verdict spawned calls by the ruling Power Party to suspend jury trials in the Basque Country because of public consensus that the verdict was not based on the evidence, but [...] jury sympathy.”⁸

Public reaction to juries is not just reserved for countries with new jury systems. In the United States, the media capitalizes on extreme or unusual verdicts. In fact, the misuse of databases to report on what is typical of jury verdicts is widespread in the United States. The statistical evidence that frequently punctuates news articles, interest group publications, and congressional testimony on the alleged litigation crisis is most often drawn from jury verdict reporters, commercial publications that record the results of jury trials in various jurisdictions throughout the country. A previous paper by my colleague using 2001 data from large, populous counties in the United States found the data published by jury verdict reporters was biased toward high plaintiff awards.⁹

In Berlin, my co-author, Cynthia Lee, and I reported on the use of 2005 data representing jury trials nationwide to explore why policy makers and the media often rely on commercial reporters to summarize jury verdicts through a comparison of these reports with data collected directly from the court.¹⁰ We hypothesize that publishers typically report on only a select segment of jury trials resulting in the appearance of higher plaintiff win rates and award amounts than what is revealed in court files. Publisher data is easily accessible, and hence there is a greater reliance on it as a source for summarizing jury verdicts.

In the best of situations, jurors are provided all the relevant information they need to reach a verdict. However, when the information is not available to jurors, what is the probative versus prejudicial impact of contextual information or other external information? How do jurors handle ambiguous evidence? Three papers presented at the meeting in Berlin addressed this issue.


Neal Feigenson and Jaihyun Park discussed external cues used by jurors to assess litigants and their arguments.¹¹ Evidently, PowerPoint influences jurors where one side (not both) uses the presentation software in cases with evidentiary ambiguity. Jurors assessed the party using PowerPoint as being more prepared.

Valerie Hans presented that the knowledge of a defendant’s criminal record promoted conviction in cases that were deemed “close.”¹² Once again, jurors were using contextual information to better understand the case. However, Hans and Eisenberg report that “this raises the worrisome possibility that jury knowledge of a defendant’s criminal record may lead to erroneous convictions in such cases.”¹³

Much like a vote for a politician, jury verdicts involve compromises and complexities that occur behind the scenes. Shari Diamond presented the work of her team, which investigated “embedded experts” — jurors who have some type of specialized knowledge that helps them decide the case.¹⁴ Twenty percent of those surveyed claimed to have had and have used such knowledge. Either way, the team noted the incongruous directions given to juries. They are told first to “decide what the facts are from the evidence presented here in court.” Later, they hear, “consider all of the evidence in the light of reason, common sense, and experience.”

The year 2007 marks the 50th anniversary of the movie “Twelve Angry Men,” which was the feature of a session in Berlin.¹⁵ This movie offers the only portrayal of a deliberating jury in the history of American filmmaking. The film portrays the jury as a group of 12 ordinary men who learn, in the course of their deliberations, what it means to be a jury. The journey along the way is certainly a learning experience and was marked by clashing personalities and prejudice. Yet, the jurors, led by the star actor, Henry Fonda, eventually put aside their prejudice and anger to assemble the evidence with a critical eye and deliver a not-guilty verdict.

Even though the movie offers a fictional account of jury deliberations, it provides a glimpse into what happens behind the closed door of the deliberation room. The film still today raises questions such as: Is this how a



jury should deliberate? How do audiences in other countries view this classic American film on the jury? Film director Nikita Mikhalkov took this last question one step further and released the Russian film, “12” to correspond with the 50th anniversary of the American version of “Twelve Angry Men.” The Russian film “12” will be met with some resistance, as the Russian jury system has not yet fully established itself in the public’s eye. Moreover, one review reports that, “Russian judges and prosecutors remain deeply skeptical of the jury system. Not-guilty verdicts are routinely reversed by the country’s supreme court, and some defendants are put on trial three or four times until they are found guilty.”¹⁶

Germany, the host country of the conference, does not hold traditional jury trials; they do use mixed tribunals. Their mixed court, or Schoeffen, is a German lower criminal court that consists of one professional judge and two lay participants. Conference coordinators hosted a field trip to see these courts in action. Germany’s history is fraught with events that emphasize the power of its people. For example, the populace held tremendous influence during resistance to Nazi rule. When the Berlin Wall, iconic of Berlin’s history, was dismantled in 1989 and in the days and weeks that followed, the wall was plagued by members of the general public known as *mauerspechte* (wall woodpeckers) who vigorously participated in the wall’s destruction.

A lesson I learned from our international colleagues is that our jury system is a defining feature of our country’s democratic history. In the face of evidence that jury trial rates are declining in the United States, it would be wise to evaluate why this has happened and to consider what the implications of diminished power of the people will have on our society. What is the impact of questioning jury competence and limiting the scope of what juries decide? It appears that countries across the world are integrating citizen participation and juries into their legal system and recognize this involvement as a worthwhile endeavor. Certainly, it has reminded me why jury trials are such an important, and hopefully steadfast, cornerstone of our legal system.

NOTES

1. Valerie P. Hans and Neil Vidmar (1986). *Judging The Jury*. Plenum Press: New York, NY. P. 31.
2. Norimitsu Onishi (July 16, 2007). “Japan Learns Dreaded Task of Jury Duty,” *The New York Times*.
3. Masahiro Fujita. *Lay Participation in Japan: Lessons from Mock Mixed Jury Trials by Real Professional Judges and Citizens*. (Paper presented at the 2007 Law and Society Association Meeting).
4. See Spravaka, Memorandum of A.P. Shurygin, President of the Cassation Panel of the SCRF (1998); A. Gagarsky, “Miniust podvodit itogi raboty sudov,” 8 *Rossiyskaia Yustitsiia* (1996) at 4.
5. Stephen C. Thaman, (1995). “The Resurrection of Trial by Jury in Russia,” 31 *Stanford Journal of International Law* at 66-67, 91-94, 130.
6. Nikolay Kovalev. *Ethnic Tensions and Trial by Jury in Russia*. (Paper presented at the 2007 Law and Society Association Meeting).
7. Stephen C. Thamn (1999). “Europe’s New Jury Systems: The Cases of Spain and Russia,” 62 *Law and Contemporary Problems*, at 258.
8. See *id.*
9. Paula L. Hannaford-Agor and Thomas Cohen. (unpublished paper). *Treading on Uncertain Ground: The Reliability of Jury Verdict Reporters Statistics*.
10. Nicole L. Waters & Cynthia G. Lee. *Know Your Source: Uses and Abuses of Commercial Jury Verdict Reporters*. (Paper presented at the 2007 Law and Society Association Meeting).
11. Neal Feigenson. *Effects of Powerpoint on Juror Decision Making*. (Paper presented at the 2007 Law and Society Association Meeting).
12. Valerie P. Hans & Ted Eisenberg. *Taking a Stand on Taking the Stand*. (Paper presented at the 2007 Law and Society Association Meeting).
13. See *id.*
14. Shari Seidman Diamond, Mary R. Rose, Beth Murphy & Andrea Krebel. *Balance in Deliberations: Over Time, By Case Type, and Across Jurors*. (Paper presented at the 2007 Law and Society Association Meeting).
15. Participants in this session included: Nancy Marder who chaired the session along with Robert Burns, *A Jury Between Fact and Norm*; Mar Jimeno-Bulnes, *A Different Argument for “12 Angry Men” from the Spanish Perspective: The Rule of the Majority for the Verdict*; Austin Sarat *Fathers in Law: Violence and Reason in Twelve Angry Men*; and Stephen Thaman, *The Good, the Bad, and the Indifferent: “Twelve Angry Men” in Russia*.
16. Nora FitzGerald. (September 29, 2007; C01). “Russia’s Jury System, Cross-Examined in ‘12.” *The Washington Post*.