GOALS OF THE SEMINAR

1. The Problem  Jury trial is perhaps one of the most controversial institutions of the democratic state. It is an ancient institution which preceded the creation of the professional judge as a participant in the resolution of conduct and social conflicts punishable under what we now call the criminal law. It is a local institution, an institution of popular rule even before it became a democratic institution. In the 17th Century in England and the 18th and 19th Centuries in America and on the European Continent it became a symbol of freedom against oppressive monarchies and part of most European systems of criminal justice. But the freedom of juries to reject the law as written, to import into its decisions (for better or worse) its local opinions as to the justice of the case (or the law) rankled the judiciary and theoreticians of democracy who felt that the law should be equally applied to all. Juries were never completely accepted on the European Continent and were eliminated in many countries in the first half of the 20th Century (usually by totalitarian governments). In their place came courts with lay assessors (mixed courts) where lay judges sit with professional judges on unified panels and decide all questions of law, fact, guilt and sentence together. Most European judges prefer this system because they can still usually get the lay judges to follow their recommendations in the secret deliberations. But the battle between professional judges and lay judges over who gets to decide the important issues in criminal cases (questions of fact, questions of law, guilt and sentence) still is alive in Europe, as two countries have returned to trial by jury after earlier totalitarian dictatorships had eliminated it (Russia and Spain) and in the U.S., where legislation and judicial decisions have attempted to limit the importance of the jury in deciding the crucial questions in a criminal case.

2. Focus of Research I want us to cover in some detail the following areas of importance. First, the history of lay participation in the beginnings of European criminal procedure is important in understanding how the issues we will address have developed, so we will read some texts on this subject. The development of the criminal jury in England is the most important in this respect, especially because our jury system is based thereon. We should then spend some time on how the criminal jury trial developed in America from Colonial times up to the present. We will then spend some time on the forms of jury trial which were developed on the European Continent in the 19th and early 20th Centuries (and which continue in certain European countries today) and appraise the different approaches taken there (majority verdicts, special verdicts in the form of question lists, appealability of acquittals, requirement of reasons). Finally it is important to explore the plausibility of the main competitors with the Anglo-American jury: the European mixed court, or a trial by one or more professional judges. Finally, students in their papers (and we in our discussions) should try to develop opinions on: (1) whether lay participation in the
decision of criminal cases is an indispensable democratic institution; (2) should lay participation be in the form of the jury and should this form be: (a) completely autonomous (right to nullify the law, non-appealability of acquittals, right to determine the law, etc.); (b) loosely guided by professional judges (no express right to nullify the law, removal of nullifying jurors) or (c) under the strict hand of the judge (right to prevent nullification, appealability of irrational acquittals); (3) should lay participation be in the form of a mixed court, (a) under effective control by the professional judge or judges as in Germany; or (b) with more effective counterbalance to the professional judge, as in France; (4) should juries be able to actually decide the guilt question or should they only decide what facts have been proven and leave the legal characterization of the acts to professional judges; (5) should juries also decide punishment or at least be advised of what punishment faces the defendant; (6) does the nature of the substantive criminal law, i.e., criminalization of human conduct, threatened punishments, effect your opinion as to what form is most appropriate?

3. Class Participation In relation to the articles listed for each class session, while it would be excellent for all participants to read each of the listed ones, I will assign one or two students to definitely read and report on the important articles and cases during each session.

4. Papers Ideally, I would like each of you to take a different foreign country, discuss that country’s approach to lay participation in the criminal trial, and then address the various, political, philosophical and legal problems mentioned above (and others if you wish), comparing that system with the American approach (and other approaches we have discussed, if you wish). I will provide you with English language materials to the best of my ability on other systems you choose. If you can read in a foreign language, then I can also help you find materials in that language. Papers shall be between 20-30 pages, double-spaced, with footnotes.


Croteau, 23 Vt. 14, 47 (1848); Commonwealth v. Anthes, 5 Gray 185 (Mass. 1855); United States v. Morris, 26 F.Cas. 1323 (No. 15,815 (C.C.D. Mass. 1851); R. v. Dudley and Stephens, 14 Q.B.D. 273 (1884); Sparf and Hansen v. United States, 156 U.S. 51 (1895).


CLASS SIX (Sept. 23). Modern European Systems of Mixed Courts
Walter Perron, Lay Participation in Germany, in LAY PARTICIPATION IN THE CRIMINAL TRIAL IN THE XX1ST CENTURY, 72 REVUE INTERNATIONALE DE DROIT PENAL (2001), at 181-95.
Christian Rennig, Influence of Lay Assessors and Giving Reasons for the Judgement in German Mixed Courts, ibid, at 481-94.
STEPHEN C. THAMAN, COMPARATIVE CRIMINAL PROCEDURE, pp. 202-15


CLASS EIGHT (Oct. 7): The Modern Nullification Debate
Darryl K. Brown, Jury Nullification Within the Rule of Law, 81 MINN. L. REV. 1149 (1997)
Nancy J. King, Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom, 68 U. CHI. L. REV. 433 (1998)
United States v. Spock, 416 F.2d 165, 182 (1st Cir. 1969)
United States v. Dougherty, 473 F.2d 1113 (D.C.Cir. 1972)
United States v. Thomas, 116 F.3d 606 (2d Cir. 1997)
People v. Engelman, 121 Cal.Rptr.2d 862 (Cal. 2002)

CLASS NINE (Oct. 14) Reform?
Harris v. United States, 122 S.Ct. 2406 (2002)

CLASS TEN (Oct. 28) Student Presentations (or writing)
CLASS ELEVEN (Nov. 4) Student Presentations (or writing)

CLASS TWELVE (Nov. 11) Student Presentations (or writing)

CLASS THIRTEEN (Nov. 18) Student Presentations (or writing)

CLASS FOURTEEN (Nov. 25) Student Presentations (or writing).

RECOMMENDED READING

1. The Roots of Lay Participation in Criminal Trials

**WILLIAM FORSYTH,** **TRIAL BY JURY** (New York, 1971) (originally published in 1878) (1-43).
**Repp.**
**THORL. GUDM. REPP, A HISTORICAL TREATISE ON TRIAL BY JURY, WAGER OF LAW, AND OTHER CO-ORDINATE FORENSIC INSTITUTIONS FORMERLY IN USE IN SCANDINAVIA AND ICELAND (1832).**

2. The Development of English Trial by Jury

**JOHN PHILIP DAWSON, A HISTORY OF LAY JUDGES.** (Harvard 1960): pp. 115-
**THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800** (Univ.of Chicago, 1985).

3. The Development of American Trial by Jury

**Stanton D. Krauss,** *An Inquiry Into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111-214 (1998)
4. Nineteenth Century European Jury Systems
A. ESMEIN, *A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE WITH SPECIAL REFERENCE TO FRANCE* (Boston 1913).

5. Modern Systems Using Lay Participation in Criminal Trials
5.1 Pure Jury Systems

*Australia*


*Belgium*


*England and Wales*


*Brazil*


*British Commonwealth*


*Canada*


*Ireland*


*New Zealand*


*Russia*


*Scotland*


Christopher Gane, *The Scottish Jury*, in *Lay Participation in the Criminal Trial in the*

Spain


5.2 Mixed Court Systems

Argentina


China


Croatia

Sanja Kutnjak Ivkovich, Mixed Tribunals in Croatia, in Lay Participation in the Criminal Trial in the XXIst Century, 72 Revue Internationale de Droit Penal (2001), at 57-86.

France


Germany

Felix Herzog, Philosophical and Social View of the Jury: Could It Have a Renaissance in Germany?, in Lay Participation in the Criminal Trial in the XXIst Century, 72 Revue Internationale de Droit Penal (2001), at 553-57.
John H. Langbein, Mixed Court and Jury Court: Could the Continental Alternative Fill the

South Africa

Tracy Gilstrap Weiss, Comment. The great democratizing principle: the effect on South Africa of planning a democracy without a jury system, 11 TEMP. INT'L & COMP. L.J. 107-130 (1997).

Sweden


Venezuela


5.3 Both Jury and Mixed Court Systems

Denmark

Stanley Anderson, Lay Judges and Jurors in Denmark, 38 AM. J. OF COMP. LAW 839 (1990)

Norway

Asbjorn Strandbakken, Lay Participation in Norway, in LAY PARTICIPATION IN THE CRIMINAL
5.4 Systems Undergoing Reform

Japan


6. The Modern Nullification Debate


7. Reform of Lay Participation


RECOMMENDED BOOKS (on reserve)

JOHN PHILIP DAWSON, A HISTORY OF LAY JUDGES. (Harvard 1960)
WILLIAM FORSYTH, TRIAL BY JURY (New York, 1971) (originally published in 1878).
THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800 (Univ. of Chicago 1985)
HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (Univ. of Chicago, Chicago and London) (1966), Phoenix Ed. of 1971

RECOMMENDED ARTICLES

Nancy J. King, Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom, 68 U. CHI. L. REV. 433 (1998)
Andrew D. Leipold, Rethinking Jury Nullification, 82 VA. L. REV. 253 (1996)
Wigmore, A Program for the Trial of a Jury, 12 AM. JUD. SOC. 166 (1929)

RECOMMENDED CASES

Throckmorton’s Case, 73 Eng. Rep 215 (K.B. 1554)
Rex v. Lilburne, 4 Howell’s St. Trials 1270 (1649)
Bushell’s Case, 6 Howell’s State Trials 999 (1670)
Penn & Meads’ Case, 6 Howell’s 951 (1670)
Georgia v. Brailsford, 3 U.S. (3 Dall.) 1,4 (1794)
United States v. Battiste, 24 F.Cas. 1042 (No. 14,545)(C.C.D. Mass. 1835)
Commonwealth v. Porter, 10 Metc. 263 (Mass.1845)
State v. Croteau, 23 Vt. 14, 47 (1848)
Commonwealth v. Anthes, 5 Gray 185 (Mass. 1855)
United States v. Morris, 26 F.Cas. 1323 (No. 15,815 (C.C.D. Mass. 1851)
R. v. Dudley and Stephens, 14 Q.B.D. 273 (1884)
Sparf and Hansen v. United States, 156 U.S. 51 (1895)

Slansky v. State, 63 A.2d 599 (Md. 1949)
United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969)
United States v. Boardman, 419 F.2d 110 (1st Cir. 1969)
United States v. Spock, 416 F.2d 165, 182 (1st Cir. 1969)
Duncan v. Louisiana, 391 U.S. 145 (1968)
Shaw v. Director of Public Prosecutions, [1961] 2 W.L.R. 897, 2 All. E.R. 446 (H.L.)
United States v. Simpson, 460 F.2d 515 (9th Cir. 1972)
United States v. Dougherty, 473 F.2d 1113 (D.C.Cir. 1972)
United States v. Thomas, 116 F.3d 606 (2d Cir. 1997)
State v. Cheek, 936 P.2d 749 (Kan. 1997)
Saric v. Denmark ECHR 1999.