

## Sessions on Lay Participation during Honolulu Meeting

<i>1126 New Developments in Law and Social Psychology</i>	<i>1</i>
Affective Forecasting Does Not Cause Excessive Damages: The Blame Factor - Jay G. Hook (Harvard University)	1
Give Him a Break; But Only If He's Straight: Moral Outrage Biases Juvenile Sex Offender Punishment Decisions -Mary Murphy (University of Illinois, Chicago)	2
Property Law: Implicit Bias and the Resilience of Spatial Colorlines - Victoria Plaut (University of California, Berkeley), Michelle Wilde Anderson (University of California, Berkeley)	3
Different Voices: The Role Of Gender When Reasoning About The Letter Versus Spirit Of The Law - Victor D. Quintanilla (U.S. Court of Appeals for the Seventh Circuit)	3
Emotion and Jury Deliberation: Does Expressing Emotion Make Stereotyped Holdout Jurors More or Less Persuasive? Jessica Salerno (U of Illinois, Chicago/American Bar Foundation)	4
<i>1130 Empirical Studies on Legal Decision-Makings: Focusing on Civil and Victim Participation in Japanese Criminal Trials</i>	<i>5</i>
Juror Satisfaction with Participation in a Mock Jury Trial - Ayumu Arakawa (Musashino Art University)	5
Influence of Negative Emotions on Mock Lay Judges' Verdict Decisions - Kayo Matsuo (Keio University)	6
The Impact of Victim Participation on Sentencing Decision: Japanese Experience-Masahiko Saeki (Chiba University)	7
The Process of Ordinary Citizens' Determination of Punishment: From the Research on Retributive Motive- Eiichiro Watamura (University of Tokyo), Toshihiro Wakebe (University of Tokyo), Yohtaro Takano (University of Tokyo)	8
<i>1209 - Iconic Jury Trials</i>	<i>9</i>
Trying Rodney King's Case Twice - Sara S Beale (Duke University)	9
Japan's Prominent Lay Adjudication Trials: Appealing Acquittal Verdicts and People's Right to Try "Untouchables" - Hiroshi Fukurai (University of California, Santa Cruz)	9
An Iconic Jury Trial in Spain: The Gürtel Case - Mar Jimeno-Bulnes (University of Burgos)	10
An Iconic Jury Trial in Illinois: The First Criminal Trial of Rod Blagojevich - Nancy Marder (Illinois Institute of Technology)	10
<i>1309 Juries and Mixed Courts in Europe</i>	<i>11</i>
Recent Developments in the French Criminal Jury -Claire M Germain (University of Florida)	11
The Jury in Russia: Research and Reform -Valerie P. Hans (Cornell University)	12
Lay Adjudication in Europe: New Developments - John D Jackson (University College, Dublin), Nikolai Kovalev (Wilfrid Laurier University)	12
Georgian Jury System - Giorgi Meladze (Free University of Tbilisi)	12
Trial by Jury in Russia: Jurata Patriae or Raison D'État - Alexander Smirnov (Russian Academy of Justice), Nikolai Kovalev (Wilfrid Laurier University)	12
<i>2110- New Developments in Lay Participation in Law</i>	<i>13</i>

Testing the Comprehensibility of Canadian Jury Instructions and the Efficacy of 3 Comprehension Aids, -Marie Comiskey (University of Michigan)	13
Lay Participation in the Criminal Trial: First Nations Sentencing Circles and Law Reform in Canada, -Toby S Goldbach (Cornell University)	14
Experts and Deliberative Democracy, Ruth Horowitz (New York University)	14
Is There a Lawyer in the "House"? The Portrayal of Medical Negligence in "House, M.D.", - Natalie Wallace (Cornell University), Valerie P. Hans (Cornell University)	15
<i>2116 - Enhancing Fairness through Lay Participation</i>	<i>16</i>
Legitimacy of the Judicial System and Lay Participation in Judicial Decision-Making Processes in Córdoba, Argentina - Maria Ines Bergoglio (Universidad Nacional de Córdoba)	16
An Appeal to Fairness: The (Non) Representative Jury Selection Process -Andrew V Krebs (DePaul University)	16
The Effect of Race Based Peremptory Challenges on the American Jury System -E. Earl Parson (Albany Law School), Monique McLaughlin (Albany Law School)	17
The People's Jurors in Chinese Judicial System: Mechanisms and Policies -Ming Qi (Jilin University)	18
An Empirical Research on China's Recent Reforms of Its Mixed Tribunal System - Zhuoyu Wang (Southwest University of Finance and Economics of China)	18
<i>3309 New Developments in Japan's Saiban-in System</i>	<i>19</i>
A Gap Before and After Saiban-in Service - Takayuki Ii (Hirosaki University)	19
Intentions and the Reality of the Lay Adjudication in Criminal Trials: Indications from the Introduction of the Japanese Citizen Judge System (Saiban-in Seido) in Terms of a Comparative Criminal Justice Study - Yumiko Kita (University of Sussex)	20
Transparency of Japanese Criminal Justice System after Saiban-in System Was Implemented - Takeshi Nishimura (Shimada & Nishimura Law Office)	20
Japan's Evolving Lay Judge System: Room for Improvement or Even Expansion? - Matthew J. Wilson (University of Wyoming)	20
<i>3409 Roundtable--The Role of Professionals in Lay Tribunals</i>	<i>21</i>
<i>4409 Participation on Juries (Sponsored by IRC09 Lay Participation in Law)</i>	<i>22</i>
Juror Language Accommodation in Theory and Praxis - Jasmine B Gonzales Rose (University of Pittsburgh)	22
Volunteering and Willingness to Serve -Marc Musick (University of Texas, Austin), Sarah Dury (Vrije Universiteit, Brussel), Roger P Rose (University of Minnesota, Morris)	23
Increasing the Incentive to Serve: The Effect of Juror Pay Increase in Texas - Mary R. Rose (University Texas, Austin)	24
Common Narrative and Community Cohesion: Toward a Micro-Level Theory of Deliberative Dynamics -Meredith Rossner (University of Western Sydney)	24
Racial Coding of Railway Stations: Jury Deliberation about the Meaning of Place in a Mock Terrorism Trial -David Tait (University of Western Sydney)	24
<i>IRC09 Business Meeting 4509</i>	<i>25</i>

## 1126 New Developments in Law and Social Psychology

Chair: Victor D. Quintanilla (U.S. Court of Appeals for the Seventh Circuit)  
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Abstract:

Consistent with this year's theme, this panel crosses disciplinary boundaries and features new developments in Law & Social Psychology. The field of social psychology examines the psychological basis of judgment and decision-making and has revealed common biases, pitfalls, and shortcomings in human social judgment. From heuristics and biases, to schemas and implicit theories, to prejudice and stereotyping, the field provides useful theory and methods to examine legal decision-making by judges, jurors, and other actors.

Each of the talks applies social psychological theory to important legal questions. First, Victoria Plaut investigates what implicit bias reveals about property and land use decisions that disparately affect households based on race. Second, Mary Murphy explores biases in juvenile sex offender punishment decisions. Grounded in aversive racism theory, experiments reveal that national-sex-offender-registry laws operate as a context for bias against juvenile offenders who belong to stigmatized groups and that this bias is mediated by feelings of moral outrage. Third, Jessica Salerno investigates the impact of jurors' emotions on deliberations, examining how the expression of emotion by holdouts—particularly holdouts from stereotyped groups—affects their potential to influence other jurors. Fourth, Jay Hook examines whether affective forecasting bias causes excessive damage awards and the mediating role of plaintiffs' self blame. Last, Victor Quintanilla discusses an experiment and explores differences in how women and men resolved legal scenarios that pitted the "letter of the law" against the "spirit of the law."

Bridging disciplines, these presentations reveal that social psychology illuminates ways in which law and society interact.

### **Affective Forecasting Does Not Cause Excessive Damages: The Blame Factor - Jay G. Hook (Harvard University)**

Social psychological research by Gilbert and others shows that people's predictions about the intensity of their emotional responses to certain events are more extreme than actual emotional responses to those events. Gilbert calls this affective forecasting bias (AFB). The average person, for example, will suffer sadness on the death of a favorite pet; but this sadness will be less intense than that person would have predicted, before the pet died. Sunstein and other legal commentators have argued that AFB causes jurors to award excessive damages for pain and suffering in personal injury cases. The juror's guess about the intensity of the injured plaintiff's suffering exaggerates the intensity of the plaintiff's actual suffering in the same way as people's predictions about their own feelings exaggerate their actual feelings. In the present paper, I summarize a series of experiments designed to examine Sunstein's argument. In each, students at Harvard read a vignette about a man (Victim) who was paralyzed in an accident caused by corporate negligence. They then rated the feelings of the Victim and awarded damages in a hypothetical lawsuit. The feelings ratings were compared to self ratings made on the same scales by actually paralyzed young men at the Chicago Rehabilitation Institute in master's thesis research at Northwestern by Ronnie Bulman in 1972. As predicted by the AFB, my subjects guessed that the Victim was very sad indeed, significantly more sad than Bulman's actual victims

claimed to be. Bulman, however, also asked her paralyzed subjects to make blame attributions for their injuries, to themselves and others. She told me that she found significant positive correlations between "other blame" and "sadness". In other words, paralyzed persons who blamed others were more miserable than those who blamed themselves. So, in each of my experiments my subjects guessed the extent to which the Victim blamed himself and others, using the Bulman scales; and in two experiments, I randomly assigned subjects to learn that the Victim either blamed himself or others. In general, my subjects' ratings of the Victim's sadness were not correlated with their ratings of the Victim's "other blame." And, rather than granting higher awards for pain and suffering to Victim's who most blamed others, they gave "other blaming" Victims lower awards than they gave to "self-blaming" Victims. I conclude that, while AFB may be at work in juror deliberations, it does not cause excessive damage awards. This is because of the mediating role of blaming by the Victim. Sunstein is wrong.

### **Give Him a Break; But Only If He's Straight: Moral Outrage Biases Juvenile Sex Offender Punishment Decisions -Mary Murphy (University of Illinois, Chicago)**

Sex offender registry laws now make consensual sexual activity between juveniles a registration-worthy offense in the United States. We conducted two experiments to examine whether the ambiguity surrounding the application of these laws to juveniles provides a context for prejudice against gay youth to emerge. In the ambiguous context of consensual sex between two juveniles, people supported harsher sex offender registration punishments for gay, compared to straight, offenders. However, this punishment bias did not emerge in the less ambiguous context of an adult having sex with a juvenile. In Study 2, we replicated the effect for a different registration-eligible offense (sexting), and discovered an interesting moderator of this punishment effect: punishment biases emerged against gay male juveniles but did not generalize to lesbian juveniles. Across both studies, participants' bias against gay juveniles was not mediated by the stated legislative purpose of registration—concerns about protecting society—instead, they were mediated by feelings of moral outrage toward the offender. U.S. sex offender registries were designed to protect the public from dangerous sex offenders. In the past, registration laws blatantly discriminated against lesbian, gay, bisexual, and transgender (LGBT) people by making consensual gay sex a registration-worthy sex offense. Although these laws were overturned, many individuals are still forced to remain registered on public websites due to their past convictions. Some States, however, have removed adults from the registry who were convicted under these now-invalid laws. Thus, blatant discriminatory application of registry laws against LGBT individuals may be declining. However, bias against these individuals may persist in ambiguous punishment contexts. This research examines one such context: punitive decision making regarding juveniles who engage in consensual peer sex—an activity that violates U.S. laws originally designed for adults (e.g., laws prohibiting sex with a minor). People discriminate against stigmatized minorities when the basis for judgment is ambiguous (Dovidio & Gaertner, 2004). The application of sex offender registry laws to juveniles engaged in consensual sexual activity with a peer constitutes an ambiguous context in which discrimination against gay youth might emerge. This context is ambiguous because it is unclear how juveniles in these cases should be punished. These juveniles have committed a sex offense (e.g., sex with a minor) and, therefore, are eligible for registration as a sex offender; yet they do not necessarily fit the profile of dangerous repeat offenders for whom registries were created. Grounded in aversive racism theory (Gertner & Dovidio, 1986; Dovidio & Gaertner, 2004), this research examines whether the ambiguity surrounding punishment of juvenile sex offenders might be a context where

discrimination emerges against gay youth. Moreover, this work examines the mechanisms through which these biases exert their effect.

**Property Law: Implicit Bias and the Resilience of Spatial Colorlines - Victoria Plaut (University of California, Berkeley), Michelle Wilde Anderson (University of California, Berkeley)**

Every day, individuals make consequential judgments about property. How much is a home worth? Who wants to live in it? Who can live in it? What kinds of land uses are nearby? What kind of services does the home receive? These individuals occupy many roles: buyer, seller, lender, tax assessor, landlord, tenant, real estate professional, city council member, land use planner, investor, landowner, and more. Under de jure segregation, the relationships of these individuals' decisions to spatial colorlines were obvious: American homes and neighborhoods were ordered according to express racial rules. Since fair housing advocates worked to dismantle de jure segregation in American housing in the 1940s to 1970s, explicit reference to race in maintaining spatial colorlines has been widely erased from law and public discourse. Indeed, scholars have noted a positive shift in explicit racial attitudes. Yet colorlines continue to exist in access to housing, land values, exposure to subprime lending, the siting of amenities and disamenities, and private investment. What explains this persistence? Scholars of many disciplines have searched for answers to these questions for years. Implicit racial bias offers additional insight into this question. Such bias describes the way our minds work even when we lack or fail to exhibit explicit racial animus. This paper discusses what the research on implicit bias, and social psychology more broadly, teaches us on questions relating to property, housing, and land use. To investigate the implications of implicit bias in this setting, first we survey evidence of persistent colorlines in housing, neighborhoods, and mortgage markets. Next we describe our conceptualization of implicit bias and assess current research about the way it operates in spatial contexts. Specifically, experiments testing automatic biases and associations beneath the conscious surface indicate that the American mind is marked by colorlines that associate minorities with criminality, assign lower comfort and value to homes occupied by or near minorities, and depict minorities as less-than-human. Finally, we ask whether law recognizes implicit bias in the housing and land use contexts and then briefly imagine how the law of antidiscrimination in housing and land use might change if it did.

**Different Voices: The Role Of Gender When Reasoning About The Letter Versus Spirit Of The Law - Victor D. Quintanilla (U.S. Court of Appeals for the Seventh Circuit)**

Carol Gilligan famously wrote about the ways that two bright eleven-year olds, Amy and Jake, exercised their moral judgment when facing legal dilemmas. Gilligan expressed the view that, in some situations, women and men speak in different voices and reason differently. The children differed in how they reasoned about conflict and choice, about rights and responsibilities. While Jake exhibited an ethic represented by rule-based and hierarchical thinking, Amy exhibited an ethic based upon care, connectedness, and community, an ethic based upon a network of connection. Since Gilligan's acclaimed work, feminist scholars have elaborated approaches to judging that incorporate these different voices. Scholars have revealed that, in some scenarios, women and men reason differently with women's reasoning being more contextual, more caring, and less legalistic than men's. This presentation explores these legal decision-making styles and reports the results of a recent online experiment conducted on a cross section of the American public. The study asked participants to decide whether rules were violated in three scenarios that pitted the "letter of the law" against the "spirit of the law." In each scenario, a decision finding a

rule violation was aligned with the letter of the law, but inconsistent with the spirit of the law. Consistent with the hypothesis that women and men engage in different moral reasoning styles, the study revealed a statistically significant effect of gender on legal decision-making. On balance, male participants sided with the letter of the law and female participants sided with the spirit of the law across scenarios. A letter-to-spirit scale was fashioned, and women scored much higher on the spirit side of the scale than men. Moreover, women and men exhibited differences in the kinds of additional evidence that they would have liked to draw upon when resolving the legal dilemmas. Women tended to prefer evidence that related to the spirit of the rule, while men tended to prefer evidence that related to the letter of the rule. While women and men tended to differ in their decisions about whether the protagonist in each scenario violated a rule, both women and men agreed that the protagonist committed no harm in each scenario, and neither women nor men imposed other than minimal punishment on the protagonist. In sum, the study sheds light on gender differences in legal decision-making and supports the view that, when solving some legal problems, women and men speak with different voices and with different reasoning styles.

**Emotion and Jury Deliberation: Does Expressing Emotion Make Stereotyped Holdout Jurors More or Less Persuasive? Jessica Salerno (U of Illinois, Chicago/American Bar Foundation)**

Although the quality of group decisions can be improved through diversity of opinion (Nemeth, 1986), being forced to deliberate at length because one group member disagrees creates hostility (Levine, 1989). Discussions get heated; negative emotion results. Real holdout jurors report others reacting to their position with screaming and throwing chairs (Associated Press, 2009). They report experiencing extreme emotion, even vomiting (Renaud, 2010) and locking themselves in bathrooms (Manganis, 2007). Yet, we know little about how an opinion minority's emotion expression might influence his or her ability to exert influence over the group—particularly if he or she belongs to a historically disadvantaged group for whom emotion stereotypes exist (e.g., women as sad, Fabes & Martin, 1991; Black men as angry, Hugenberg & Bodenhausen, 2003). Expressions of negative emotions could detract or enhance credibility, but will likely depend on whether the holdout juror belongs to a stereotyped group (e.g., women, Black jurors). On the one hand, displaying a stereotypical emotion might decrease credibility, and ultimately minority influence, because stereotyped minorities are often penalized for expressing emotions (Lewis, 2000). On the other hand, displaying nonstereotypical emotion might increase credibility and minority influence, because opinion minorities can establish validity by disconfirming an expectation about themselves (Moskowitz & Chaiken, 2001). If opinion minorities act in an unexpected way, majority members believe there must be a reason and are more motivated to process their arguments. A set of mock jury studies was designed to investigate how holdout jurors' emotion expression affects perceptions of their credibility and ultimately their potential to influence the majority—particularly for holdouts from stereotyped groups. This article presents results from an assessment of community members' gender- and race-based emotion stereotypes and the implications of an opinion minority expressing these stereotypical versus non-stereotypical emotions during mock jury deliberation. In a deception paradigm, participants were told that they were engaged in a computer-mediated discussion with five other mock jurors about a murder case, when in reality they were reading a pre-written fictional deliberation script. After mock jurors reported their initial verdict preference, all participants then saw the same false pre-determined feedback in which one holdout juror always argued for the verdict opposite of the participant's original verdict choice (all of the other jurors

always agreed with the participant). We manipulated whether the holdout expressed no emotion, anger, or fear, and the holdout's group membership (e.g., men versus women, White versus Black). This article will present data that demonstrates how the effect of holdout emotion expression depends on whether the holdout belongs to a stereotyped group. These findings increase understanding about the effect that underrepresented groups' emotion expression has on their credibility and potential to exert influence during mock jury deliberation. This article will also increase understanding of how historically underrepresented jurors can decrease or enhance their credibility through expressing emotion on juries and ensure that the many efforts to promote diversity in jury selection are not futile.

### **1130 Empirical Studies on Legal Decision-Makings: Focusing on Civil and Victim Participation in Japanese Criminal Trials**

Chair: Masahiko Saeki (Chiba University) mh\_saeki83@yahoo.co.jp

Discussant: Yuji Itoh (Keio University) yitoh@flet.keio.ac.jp

Abstract:

Our session will focus on the process of legal decision-making, and present empirical studies on this topic. Recently, the Japanese criminal system has changed drastically. Two of the factors that have contributed to this change are civil participation and victim participation in criminal trials. So, firstly our session will explain the Japanese civil participation system (Saiban-in Seido) and systems about victim participation. Then, we will present studies that investigate how lay judges decide on legal issues, how victim participation affects legal decision-making, and what experience lay judges will have during deliberation with professional judges.

Our studies are based on mainly psychological experiments but not limited to that methodology. We hope that our session will promote understanding about how people decide on legal issues and how Japanese criminal trials have been administered recently.

#### **Juror Satisfaction with Participation in a Mock Jury Trial - Ayumu Arakawa (Musashino Art University)**

Purpose: To maximize the value of jury deliberations, it is important to recognize how saiban-in, or lay members of the jury panel, respond to communications during such deliberations. This study analyzed jury deliberations during a mock jury trial to examine the situations in which saiban-in experience satisfaction and to investigate those in which saiban-in agree with an opinion. Methods: Six persons participated in a mock saiban-in experiment as jurors, and three judges participated in the experiment as judges. The case in question involved attempted murder with a knife. The defendant denied having had an intention to kill or to hurt the victim. After the evidence was examined in a public trial, the deliberations were videotaped. Six jurors completed pre- and post-trial questionnaires and were interviewed a few weeks later. The questionnaire included questions addressing experiences of satisfaction related to the verdict and deliberations. The experiment was conducted on November 2006. Results and Discussion: Role of judges and

jurors: The analysis of time spent speaking showed that judges were responsible for 67% of the utterances made during all deliberation sessions and that the presiding judge tended to designate the next speaker. Application of the KJ method of analysis to all utterances made by the presiding judge identified three major functions associated with this role: “facilitating deliberations,” “framing opinions,” and “providing expert knowledge.” “Framing opinions” included translating the jurors’ opinions into legal terms or connecting them with the theme of the discussion. Because the presiding judge usually controlled the topic under discussion, most changes in topic were systematic. On the other hand, the major functions of jurors were to “express their opinions” and “inquire about expert knowledge.” The associate judges supported the presiding judge (“supporting the presiding judge” and “providing expert knowledge”) and facilitated the deliberations (“supporting jurors’ participation” and “filling gaps in the discussion”). Do jurors express their opinions adequately?: The analysis of pre- and post-trial questionnaires showed that one of the six jurors felt unsatisfied by the deliberations. This juror did not express an opinion due to the belief that such an opinion needed to be well founded, which felt impossible because she was unable to understand the reasoning that went into the final opinion. This juror was aware of her inability to express her opinion, but another juror, who did not feel unsatisfied soon after the deliberations, believed that the opinions of jurors were not adequate when he watched the video of the deliberations a few weeks later. These findings suggest that communication during deliberations needs to provide validation not only from the perspective of an observer but also from the perspective of jury members. Limitation: This experiment was conducted before the initiation of the saiban-in system. Therefore, the deliberations observed in this study may differ from current deliberations.

### **Influence of Negative Emotions on Mock Lay Judges’ Verdict Decisions - Kayo Matsuo (Keio University)**

It is assumed that laypersons experience negative emotions when they participate in criminal trials as a lay judge. Several studies have indicated that negative emotions such as anger and disgust affect their verdict decisions. Anger is a type of antisocial affects that leads individuals to heuristic decisions, and disgust is associated with moral values that play an important role for making decisions at trials. Therefore, when lay judges experience these types of emotions, they may render a heuristic decision without careful evaluation of evidence. The type of information which may arouse lay judges’ negative emotions is victim impact statements (VIS). In juror trials, because proceedings are separated into a culpability phase and a sentencing phase, VIS is usually presented after a guilty verdict is rendered. However, because lay judge trials do not separate the proceeding phases, VIS is presented along with all other evidence at the same time. Although VIS should not be considered as evidence to determine the defendant’s culpability, it may be taken into account for verdict decisions, especially when they are experiencing negative emotions. The present two experiments examined a relation between negative emotions and verdict decisions as well as effects of extra-legal emotional evidence on verdict decision. Experiment 1 found effect of VIS on verdict decisions, in that mock lay judges who were presented VIS rendered guilty verdicts more often than those who were not presented VIS. Also, when mock lay judges were presented VIS, they experienced anger and disgust. These negative emotions did not mediate between VIS and guilty verdicts, indicating that VIS had a robust effect on the verdict decision. Because VIS should not influence the verdict decision, the following study aimed to investigate factors that moderate VIS effect. Focusing on individual predispositions of the lay judges and procedural laws (i.e., trial instructions), Experiment 2 examined the effect of need for cognition (NC: high/ low) and the trial instructions on verdict



decision. There were three conditions in the trial instructions; general instructions, general instructions with limiting instructions about VIS (full), and no instructions. The results showed effect of NC on verdict decisions, in that mock lay judges low in NC rendered guilty verdicts more often than mock lay judges high in NC, and mock lay judges low in NC experienced anger more than those high in NC. Also, anger partially mediated between NC and guilty verdict. Comparing frequency of using the VIS in decisions, mock lay judges low in NC used the VIS more often than those high in NC, and mock lay judges with the full instructions were the highest in using the VIS, followed by with no instructions and with general instructions, respectively. The results indicated that mock lay judges low in NC experienced anger, referred to the VIS, and rendered guilty verdict more often than mock lay judges high in NC. The role of the negative emotions and the relation between the negative emotions and verdict decisions will be discussed.

### **The Impact of Victim Participation on Sentencing Decision: Japanese Experience- Masahiko Saeki (Chiba University)**

Since 2000, the Japanese Code of Criminal Procedure was revised twice in order to introduce systems of victim participation in criminal trials –the Victim’s Statement of Opinion and the Victim Participation System. Although there are many issues concerning these revisions, I will focus on the issue of the impact of these systems on sentencing outcomes. First, I will focus on the impact of these systems on sentencing outcomes which are decided by lay judges. I conducted two psychological experiments. One of the most important questions to ask is whether the systems or the information are relevant. Even before the introduction of the systems, information about victims’ plights or their emotions could be conveyed to judges. So, if the system is relevant, it is expected that the information concerning the victims which is submitted through a newly introduced system will have a greater impact on sentencing outcomes than the same information which is submitted through a previous system. On the other hand, if information is relevant, it is expected that the impact of the information concerning the victims which is submitted through a newly introduced system is as great as the one of the same information which is submitted through a previous system. I conducted one set of psychological experiments to address the hypotheses mentioned above. According to the results of the experiment, the information concerning the victims has an impact, however, whether the information is submitted through a new system or a previous system is not relevant. Next I tested the impact of victims’ emotion on sentencing outcomes. I will report the findings from another experiment which suggests that victims’ emotion could have an impact on sentencing outcomes. I manipulated the bereaved family member’s emotion (anger/calm) while she was asking questions to the defendant. The differences of this emotion did not have an impact on the sentencing decision directly. However, after watching the mock objective graph which shows recent tendency of sentencing decision in similar cases, the difference between two conditions occurred. The participants who watched the calm bereaved family member changed their previous sentencing decision based on that graph. On the other hand, the participants who watched the angry bereaved family member maintained their previous sentencing decision after seeing that graph. Next I will focus on the impact on sentencing outcomes which are decided by professional judges. Now, I am collecting data from real cases about traffic accidents. So I will give an interim report about that research.

**The Process of Ordinary Citizens' Determination of Punishment: From the Research on Retributive Motive- Eiichiro Watamura (University of Tokyo), Toshihiro Wakebe (University of Tokyo), Yohtarō Takano (University of Tokyo)**

In this study, we investigated the retributive motive which works when ordinary citizens decide the appropriate punishment for the criminal offender. People determine the criminal punishment based on their retributive motive (Carlsmith, 2006). Retributive motive is the psychological tendency to decide punishment in proportion to the seriousness of the crime. In other words, people decide on heavier punishments when the result of the crime (e.g., the physical damage brought about to the victim) is more serious or when the intent of the offender is more vicious. Some researchers have assumed that the retributive motive works automatically or implicitly (e.g., Carlsmith & Darley, 2008; Tetlock et al., 2007). It is supposed to activate without their awareness, when ordinary citizens see the information about the crime, and then influence their decision. It follows that it is possible that people decide heavier punishment when the retributive motive is activated than when not. Although it is very likely that the retributive motive is implicit, there are not many studies that investigate it. So, we will report some psychological experiments in which we verified the activation of retributive motive on the implicit level and its influence on the determination of punishment. Implicit Association Test, one of the most reliable implicit measures, was used in the experiments. Study 1 showed the activation of implicit retributive motive, by comparing before and after participants saw the brutal murder image. Interestingly, the retributive motive was not activated when they were given the information that the offender in the image of the crime had been punished severely (Study 2). In Study 3, we investigated the influence of retributive motive on the determination of punishment. The result showed that activation of retributive motive by itself had little influence on participants' decision, but that it encouraged them to decide retributively, only given "the excuses" such as the prior record or the prosecutor's opinion. Notably, in Study 3, the image of the crime which activated participants' retributive motive was not the same with the crime for which they decided the punishment. In other words, retributive motive influenced the punishment on the offender unrelated to its activation. These psychological findings highlight some important problems about ordinary citizens' determination of punishment. Previous studies have shown that some information (e.g., offender's race) can distort people's fair decision-making with bias. Retributive motive, on the other hand, influences their decision generally, because retribution is the fundamental strategy of ordinary citizens' determination of punishment. Moreover, it is hardly possible to prevent retributive motive from influencing their decision, since it activates implicitly, or subconsciously. Finally, the implicit retributive motive can be "carried over". In our study, retributive motive which was activated by the image of the crime made participants decide severe punishment on the other offender of unrelated crimes. We will try to approach these problems both from a psychological and practical perspective.

## 1209 - Iconic Jury Trials

(Sponsored by IRC09 Lay Participation in Legal Decision Making)

Chair: Neil Vidmar (Duke University) vidmar@law.duke.edu

Discussant: Richard O. Lempert (University of Michigan) rlempert@umich.edu

Abstract:

What do the jury trials of O.J. Simpson for the murders of Nicole Brown Simpson and Ron Goldman, of Rod Blagojevich for the selling of President Obama's U.S. Senate seat, and of Laurence Powell and Stacey Koon for the beating of Rodney King have in common? They have all achieved the status of "iconic" jury trials in the United States. This panel session will examine iconic jury trials across cultures, including Japan, Spain, and the United States. Presenters will focus on iconic jury trials and identify some of the key lessons that those trials teach about juries and how they function in that society. Presenters also will consider what is required for a trial to attain "iconic" status in a culture and what implications iconic trials have for jury research across cultures.

### **Trying Rodney King's Case Twice - Sara S Beale (Duke University)**

A bystander videotaped four Los Angeles police officers beating motorists Rodney King after a high speed chase. The shocking images of police brutality were shown on television news around the world. These events led to two highly publicized trials, as well as deadly riots. State charges of the use of excessive force were tried first. To mitigate the effects of pretrial publicity, the trial was moved from Los Angeles to neighboring Simi Valley, with a new jury pool. The jury, made up of ten whites, one Latino, and one Asian, acquitted three of the officers and failed to reach a verdict on the other officer. Many people who had seen the video were shocked by the verdict, and Los Angeles erupted in rioting that left more than 50 dead caused losses of nearly \$1 billion. In the second trial, held in Los Angeles federal court, the officers were charged with violating King's civil rights. Two of the four officers were convicted. Twenty years after the first trial and the riots that followed, it is increasingly likely that widely publicized video evidence will later be introduced in criminal trials. What lessons can we learn from these cases?

### **Japan's Prominent Lay Adjudication Trials: Appealing Acquittal Verdicts and People's Right to Try "Untouchables" - Hiroshi Fukurai (University of California, Santa Cruz)**

My presentation examines two of the most watched and discussed lay trials in Japan: (1) Japan's first complete acquittal case, in which a victim of domestic violence was exonerated by lay judges for killing her partner and Japanese prosecutors decided not to appeal the acquittal verdict, and (2) a trial of ruling Democratic Party of Japan (DPJ) Chairman Ichiro Ozawa who became the first politician to be indicted by Japan's grand jury panel (a.k.a. Kensatsu Shinsakai or a Prosecution Review Commission) for the violation of election laws. As of today, nearly 5000 defendants had been tried in the lay court, but only 10 of them were acquitted by the jury (i.e., 99.9% conviction rate), and Japanese prosecutors appealed 9 of the acquittals. However, the same prosecutors acted very differently on the matter of crimes committed by powerful politicians. They long protected political powerbrokers for the violation of election laws and related bribery matters by their refusal to issue the indictment. Nonetheless, for the first time in Japan's history, Ozawa became the first prominent politician to be indicted by the grand jury panel, and his trial is

currently being held in Tokyo. These two cases examine the following two legal issues: (1) socio-political ramifications of prosecutorial decisions on whether or not to appeal acquittal verdicts rendered by the jury; and conversely (2) exposition of legal mechanisms necessary to indict political “untouchables” who had long been protected by Japanese prosecutors. While my 2010 recent nation-wide survey on lay participation provides the analysis to the first question, the analysis of the recent re-indictment of an American soldier provides the basis for the examination of the second issue. In that case, the Japanese prosecution previously decided not to prosecute the same soldier whose vehicle killed an Okinawan youth on his way from an official party at the base, while the non-indictment decision was later reversed by Okinawa’s grand jury, prompting the re-indictment and prosecution of the American soldier. The prosecutors’ persistent effort to seek conviction of acquitted defendants is contrasted to their tireless effort to protect prominent politicians, as well as the members of U.S. Armed Forces stationed in Japan from prosecution.

### **An Iconic Jury Trial in Spain: The Gürtel Case - Mar Jimeno-Bulnes (University of Burgos)**

This paper will focus on the iconic Gürtel case in Spain. This case will be heard by a Jury Court in Valencia Supreme Regional Court (Tribunal Superior de Justicia) in December 2012, in accordance with Spanish Jury Law rules enacted in 1995. This case has enormous social importance and will raise questions about juror competence in complex cases and the risk of juror bias in high-profile cases. The case is a high-profile case in Spain. All four defendants are politicians, and one of the defendants, Francisco Camps, is a member of the conservative party (Partido Popular) and had been president of one of the Spanish regional governments (Regional Autonomous Community of Valencia, Generalitat valenciana) until July 2011. All four defendants, as politicians, have a special privilege (aforamiento) in Spain, which allows them to be tried by a superior court in lieu of an ordinary court, where the jury court is located. In this case, a jury panel has been already called in Valencia. Francisco Camps has tried to avoid a jury trial in Valencia, but his attempts have been unsuccessful thus far. Francisco Camps and the other defendants were charged with bribery. This crime is regarded as a crime against Public Administration in Spain (insofar as it can only be committed by civil servants). In the past, there has been debate about whether jurors, as laypeople, are able to handle the complex facts and evidence associated with this crime. Some scholars have argued that this crime should not be tried by a jury. This case has received much media coverage in Spain, especially in newspapers and on television. Such extensive pretrial publicity raises a question about juror impartiality and whether the defendants can receive due process and a fair trial, as guaranteed by the Spanish Constitution. This paper will focus on the Gürtel case as an iconic jury trial in Spain. This paper will also consider what this iconic case can teach us about the jury system in Spain, and in particular about juror competence in complex cases and juror bias in the face of extensive pretrial publicity.

### **An Iconic Jury Trial in Illinois: The First Criminal Trial of Rod Blagojevich - Nancy Marder (Illinois Institute of Technology)**

Former Illinois Governor Rod Blagojevich was tried in federal district court in Illinois for the selling of President Barack Obama's former U.S. Senate seat, among other charges. The first jury trial resulted in a hung jury on all but one charge. I will argue that this first trial achieved iconic status in Illinois and the U.S. One question this paper will examine is what is required for a jury trial to achieve "iconic" status? This paper will suggest several indicia, including the renown of the central figure, the extent of the media coverage, whether the trial has become part of everyday

conversations, whether the trial has become fodder for late-night talk show hosts, and nowadays, whether the trial has become a topic in the blogosphere. This paper will make the case that the first criminal trial of Rod Blagojevich achieved iconic status in Illinois and the U.S. The former governor was certainly well known in Illinois and his media campaign prior to trial made him well known nationwide. He appeared on talk shows and advertisements and gave interviews and speeches. His lawyers also carried on his defense in the media. The trial received extensive media coverage. Not every high-profile case achieves iconic status. For iconic status, the case needs to become part of popular culture and a short-hand for hot-button issues in that society. The trial of Rod Blagojevich, for example, became a story about corruption, greed, and self-promotion. Iconic jury trials also teach lessons about the jury, and the first trial of Blagojevich is no exception. The case taught important lessons about the role of the hold-out juror and the role of post-verdict interviews by the media. The hold-out in this case voted according to her sincerely-held views; yet, she was castigated in the media. What can courts do to aid the hold-out juror, and how can the hold-out juror and a hung jury be explained in the media so that the public understands that this is the right outcome in a trial in which a juror has reasonable doubt? This case also raises questions about the role the media should play after a verdict. In this case, the media "hounded" the jurors; yet, the court offered jurors few protections. At the very least, courts should inform jurors that they do not have to talk to the media. Preferably, courts should provide jurors with a brief respite between the end of a grueling trial and the start of the media inquiries by withholding jurors' names for several hours, if not days. Iconic jury trials reveal important lessons about juries in a particular culture and juries across cultures. For example, two jury issues raised by this trial--the role of the hold-out and the role of post-verdict interviews--could not arise in England, where the jury can render a majority verdict and a statute prevents anyone from questioning jurors about the verdict. Yet, the central lessons of corruption and greed cut across cultures and across "the seas of law and society."

## **1309 Juries and Mixed Courts in Europe**

(Sponsored by IRC09 Lay Participation in Legal Decision Making)

Chair: Valerie P. Hans (Cornell University) [valerie.hans@cornell.edu](mailto:valerie.hans@cornell.edu)

Chair: Nikolai Kovalev (Wilfrid Laurier University) [nkovalev@wlu.ca](mailto:nkovalev@wlu.ca)

### **Recent Developments in the French Criminal Jury -Claire M Germain (University of Florida)**

Update on the contemporary landscape of the French jury in its legal and political aspects, from a comparative perspective. The paper will discuss recent developments affecting the criminal jury system in France, and some current issues and debates. The scope of lay participation in the French legal system has become a major political issue. 1. The high-profile Rapport Léger,

commissioned by French President Nicolas Sarkozy, undertook a major re-examination of the French legal system. Among the most significant problems it identified were lengthy delays for hearings at the Cour d'assises, which result in long periods of detention for defendants awaiting trial. As a remedy, the Rapport Léger proposed that the Cour d'assises be replaced with a new criminal court composed of professional judges and fewer lay jurors, and a more flexible and less formalist procedure than the current one. 2. French parliament recently enacted a reform to extend the participation of citizens in criminal courts beyond the Cour d'assises.

### **The Jury in Russia: Research and Reform -Valerie P. Hans (Cornell University)**

The jury was introduced in Russia in the 1990s as one of a number of initiatives designed to promote democracy. Although there was initial enthusiasm among some policymakers and scholars, the tone of commentary has shifted to one that is decidedly negative. It's time to take stock. What does research indicate about the strengths and limitations of the contemporary Russian jury?

### **Lay Adjudication in Europe: New Developments - John D Jackson (University College, Dublin), Nikolai Kovalev (Wilfrid Laurier University)**

This paper updates the survey of lay adjudication systems in 47 Council of Europe member states conducted by the authors in 2004 with reference to the most recent jury and other lay adjudication reforms in European states and to the most recent case law of the European Court of Human Rights. Conclusions will be drawn on whether lay adjudication is more evident today than at the time of the last survey and about the implication of the recent European decisions for the future direction of lay adjudication.

### **Georgian Jury System - Giorgi Meladze (Free University of Tbilisi)**

First jury trial of the second Georgian republic has taken place in November 2011. The most significant event of the reform of judiciary can be seen as a continuation of the tradition which was laid down during the first republic in 1919 by adopting a law on jury trial and later affirming its status by the first Georgian Constitution in 1921. However juries have deep roots in Georgian customary law. Courts of layman have long prevailed in several parts of Georgia and have survived in various forms up to modern days. Jury trial has been seen as a major development for creating public trust towards the judicial branch and bridging the gap between society and courts. The gap has been evolving over the years of Tsarist and later communist occupation when justice system served the interest of occupant force and was largely distrusted by general society. The move towards independence accompanied by two territorial conflicts and the civil war as well as total disintegration of state institutions left courts without any major reforms and the heavy Soviet heritage continued ten more years. First round of reforms created some landmarks but reform was narrowly focused on courts and did not yield the expected fruit. Reforms after 2003 had more complex approach targeting whole justice system where Jury trial is introduced as a golden crown finalizing the major transition towards new system of criminal justice. The challenges remain and now it is the matter of time to observe and measure results.

### **Trial by Jury in Russia: Jurata Patriae or Raison D'État - Alexander Smirnov (Russian Academy of Justice), Nikolai Kovalev (Wilfrid Laurier University)**

The paper explores legal and political role of the trial by jury in contemporary Russia. The paper aims to examine a question whether trial by jury is an essential right of the Russian citizen (jurata patriae) or it is rather a prerogative of the state (raison d'état). The main focus of the paper is the

analysis of the Russian Constitution and the jurisprudence of the Constitutional Court of the Russian Federation. In particular, authors consider the majority decision of the Constitutional Court, which found constitutional the law that abolished jury trials for terrorist, espionage and other crimes against the state.

## **2110- New Developments in Lay Participation in Law**

(Sponsored by IRC09 Lay Participation in Legal Decision Making)

Chair: Valerie P. Hans (Cornell University) [valerie.hans@cornell.edu](mailto:valerie.hans@cornell.edu)

This paper session showcases innovative approaches to including lay citizens in legal decision making, from medical boards to sentencing councils to mixed courts.

### **Testing the Comprehensibility of Canadian Jury Instructions and the Efficacy of 3 Comprehension Aids, -Marie Comiskey (University of Michigan)**

This paper will discuss the results of a pilot project on the comprehensibility of jury instructions. The pilot study was conducted in Toronto, Canada using 131 undergraduate students in an introductory criminology class. The jury instructions tested are those of Justice David Watt, who is currently an appellate court judge in the Ontario Court of Appeal but who sat as a trial judge for over 20 years. The study also tested the efficacy of three aids: 1) note-taking; 2) decision trees (or flow charts); and 3) written instructions. The fact pattern presented to the students was based on a classic murder case, *R. v. Thibert*, in which the provocation defence is relied on. After a 2 page fact scenario was read aloud to the students, the standard Watt jury instructions on first degree murder, second degree murder and manslaughter were read aloud to the students. The students were then asked to answer a questionnaire which tested their comprehension of the jury instructions through 24 true/false questions and one short answer question on provocation marked out of 4. The highest possible score was 28. The mean score was 17.61 with a standard deviation of 2.98. The lowest score received was 9 and the highest score achieved was 24. The statistical analysis done to date has shown that being provided with written instructions correlated moderately with getting a higher score on the short answer question regarding the elements of the defence of provocation. Secondly, being provided with written instructions correlated positively, although weakly, with a higher overall score, one-tailed  $p = .0171$ . Those who received written instructions averaged about 4% higher on the test than those without written instructions. Those who received written instructions were also more likely to score above average on the subject of first degree murder. None of the other aids, note-taking or being provided with the decision tree correlated with achieving higher scores on any of the individual questions or on the overall score. While this study used a relatively homogenous population (an undergraduate student population with a mean age of 20.55), the findings suggest that the provision of written instructions may be a tool that may be effective in assisting jurors acquire knowledge of at least one criminal law concept, the defence of provocation. The author will discuss how this study has laid the

foundation for a multi-site study in Ontario using jury eligible citizens to conduct further testing on the comprehensibility of Watt's standard instructions, and the efficacy of the three jury aids.

### **Lay Participation in the Criminal Trial: First Nations Sentencing Circles and Law Reform in Canada, -Toby S Goldbach (Cornell University)**

This paper examines reforms to the Canadian criminal justice system, in particular, the establishment of the Aboriginal Justice Strategy (the "AJS") and the use of lay participants in the sentencing phase of a criminal trial. Canadian criminal justice reforms in the 1990s included efforts to accommodate an aboriginal justice movement within the framework of a criminal trial. Most of the history of Canada's confrontation with its indigenous community is marked by paternalism and overt efforts to suppress aboriginal culture. Following the enactment of the Charter, politics and discourse in Canada shifted to being about encouraging aboriginal rights and practices. At the same time, researchers troubled by the disparate treatment aboriginal offenders faced in the justice system identified over-incarceration as one area in need of reform. Sentencing circles thus became a focal point for both culture and equality concerns. At first, Judges adapted aboriginal healing circles for use in the criminal trial. By the mid-1990s, "Sentencing Circles" became institutionalized in two ways. First, Sentencing Circles were supported through financing from the AJS, an initiative of the Federal Department of Justice. Second, in its decision in *R v Gladue*, the Supreme Court of Canada confirmed that the legal authority to conduct a Sentencing Circle was found in section 718.2 of the Criminal Code. This paper presents data compiled from a review of 101 published decisions from 1993 to 2010. The research analyzes requests for Sentencing Circles and tracks decisions once a Sentencing Circle was held. The data show that while there was initial enthusiasm following the reforms, more recently the response has been mixed. Most troubling was how judges approached sentencing circle recommendations. While judges employed tests or factors to consider when approached with a request to hold a sentencing circle, there were no parallel methods or techniques applied to sentencing recommendations. Because governmental and non-governmental actors supported community involvement in sentencing as a solution to Aboriginal confrontation with the justice system, a review of Sentencing Circles is a place to ask general questions about lay participation and law reform. In addition to highlighting the conflict between democratic values and lay participation in sentencing offenders, the reforms to institutionalize Sentencing Circles is also a story about the complicated process of law reform and legal change. Express doctrinal change is specific, measurable and attainable. Legal actors work in concert to promote reform - through reports, commissions, and legal scholarship. However, once new measures are adopted the landscape often changes. Operational change may be diffuse or varied and implementation may be left to multiple disparate actors. In looking at the details of how this reform unfolded in the criminal trial, this paper hopes to further stimulate conversation about what constitutes legal change.

### **Experts and Deliberative Democracy, Ruth Horowitz (New York University)**

Ruth Horowitz [Ruth.horowitz@nyu.edu](mailto:Ruth.horowitz@nyu.edu) There are always complex issues surrounding expertise in modern democracies. Societies are too complex for everyone to know everything about many specific societal concerns. Not only do most people not get to "the public square" to debate but often do not have the knowledge to debate the issues. Nevertheless there are instances, sometimes partially within the state sphere where experts and nonexperts are brought together to debate issues and in some cases, make decisions. Can experts and non experts deliberate together and all make reasonable contributions to the decision making process when they have little experience of each other, different knowledge bases and often different statuses? Both jury and regulatory



group decision-making raise issues about inequalities in deliberations with direct consequences. How do models of deliberative democracy propose that such groups deliberate? How do such deliberations in practice pose problems for the achievement of ideal models of deliberative democracies? This paper will examine the contributions of such models for understanding the deliberative processes when not everyone has the same expertise and how empirical studies of such deliberations require a dose of reality for such deliberative models. Deliberative democracy models assume equality, rational (non-emotional) discourses, reason-giving, non-self-interested discourse, and taking the role of the other. But in everyday practice when you bring a group together, they are rarely equal, often are self interested and emotions do play a role. Moreover, many do not have much experience taking the role of the other when “others” are very different from them. I will suggest that there are several barriers to taking independent stances when nonexperts deliberate with experts – professional status, professional discursive domains, and technical knowledge. This makes deliberative democracy difficult to achieve and points to difficulties in achieving such models. Nevertheless, there are ways to make such unequal groups more equal. Based on research with doctors and non physicians on medical licensing and disciplinary boards, I will show some of the ways it is possible for all to engage in reasonable discussions. On the other side, theorists of deliberative democracy need to take into account the sometimes positive role of emotions in discourse, acknowledge that people bring discursive frameworks to the table without necessarily being self-interested, that reason-giving works better in some situations than others, and that taking the role of the other is often essential to reasonable discourse. This research specifically explores medical licensing and disciplinary boards where doctors and non physicians deliberate together.

**Is There a Lawyer in the "House"? The Portrayal of Medical Negligence in "House, M.D.",-Natalie Wallace (Cornell University), Valerie P. Hans (Cornell University)**

Through a combination of empirical data analysis and episodic content critiques, this paper assesses the portrayal of medical negligence in the T.V. show “House, M.D.” Millions of potential jurors watch the brilliant, roguish, fictional doctor House mistreat, misinform, and misdiagnose patients every week. But, does the fact that he (almost always) gets it right in the end justify these means? Legally speaking the answer would often be no. This paper, however, focuses on the consequences in the conjured setting of Princeton Plainsboro Hospital. In House’s world, negligent, even criminal, acts are rarely punished and often seem essential to the patients’ eventual salvations. While the show devotes attention to the possible criminal repercussions of House’s erratic behavior and addictive personality, almost no censure from within the medical community or through malpractice claims is apparent. By drawing an analogy to prior research on the effects of media on jurors in general and the criminal justice system in particular, this paper hypothesizes about the possible impact of “House” and its treatment of medical ethics and standards. Does watching this compelling protagonist ignore protocol and brush aside regulations in his no-holds-barred battle against illness make viewers more inclined to forgive real life medical indiscretions? Or does the tidy closure of each episode and the usual success of House's team make them more critical of doctors' failures? Given the perpetually poor outcomes for plaintiffs in medical negligence claims and the body of literature on media effects in the jury box, perhaps it is time for a closer look at how the law is depicted in medical dramas such as “House.”

## 2116 - Enhancing Fairness through Lay Participation

(Sponsored by IRC09 Lay Participation in Legal Decision Making)

Chair/Discussant: David Tait (University of Western Sydney) [d.tait@uws.edu.au](mailto:d.tait@uws.edu.au)

This session deals with different forms of lay participation and various issues related to fairness measures adopted in two jurisdictions, e.g., U.S. and China.

### **Legitimacy of the Judicial System and Lay Participation in Judicial Decision-Making Processes in Córdoba, Argentina - Maria Ines Bergoglio (Universidad Nacional de Córdoba)**

As Tocqueville pointed out, countries in which juries have existed for many years show a strong public trust in the judiciary. It is interesting to ask whether these positive effects on legitimacy are also found in countries that have recently introduced lay participation in judicial decision-making processes. The question is particularly relevant where trust in justice is low, as is the case in Argentina. This paper explores the relationship between lay participation in judicial decision-making processes and trust in the judicial system in the Argentine province of Córdoba, where mixed tribunals were introduced in 2005 to deal with some aberrant crimes and cases of corruption.

Data obtained in two public opinion studies, conducted in 1993 and 2011 are used to discuss this issue. This paper also compares other survey data (Latinobarometer series 1995-2011) in order to review trends in trust in the judiciary in Argentina. The evidence shows that people who have performed jury service have a better opinion about courts. However, there has been little effect on the perceived legitimacy of the judicial system among common citizens, which is likely due to the limited scope of lay participation in Córdoba to date.

### **An Appeal to Fairness: The (Non) Representative Jury Selection Process -Andrew V Krebs (DePaul University)**

What are the effects of the jury selection process in the Civil Circuit Courts of Cook County, Illinois on the demographic composition of the venire and the jury panels? In order to answer this question, the study examines the drawing of the venire and the challenges and removals related to voir dire as two separate aspects of the jury selection process.

The study analyzes two datasets, one for each aspect of the jury selection under examination. The first dataset compares venire-level variables collected through non-participant observation with county-level variables taken from the 2010 Census. Here, the study uses t-test to reveal whether the differences in mean age, percent male, and percent white between the venire and Cook County residents are statistically significant. Results indicate significant differences in both the 'mean age' and 'percent white' descriptive statistics.

Next, the study analyzes a second dataset that contains individual-level variables collected through non-participant observation using a series of logistic models. These models examine whether the extra-legal characteristics of potential jurors are associated with (1) whether or not the potential jurors are challenged after having been the subject of voir dire, (2) whether the

challenge was a causal challenge or a peremptory challenge, or (3) whether the plaintiff's attorney or the defense attorney was responsible for peremptorily striking the potential juror.

With respect, significant results indicate potential jurors who speak limited or no English are more likely to be removed, Asian potential jurors are more likely to be challenged for cause, and black potential jurors are more likely to be peremptorily challenged by a defendant's attorney.

In conclusion, the study finds the heterogeneity of the jury panel is limited by the jury summons process and the discretionary removals during voir dire.

### **The Effect of Race Based Peremptory Challenges on the American Jury System -E. Earl Parson (Albany Law School), Monique McLaughlin (Albany Law School)**

The persistence of racial bias in our legal system is a profound impediment to the administration of justice because it denies equal justice. Denying particular types of citizens the duty and privilege of participating in our judicial process through jury service on the basis of race has been one of the most visible manifestations of this bias. Discrimination in the selection of jurors for civil and criminal cases has consistently been addressed by the United States Supreme Court since 1880 when the Supreme Court held that it is unconstitutional to deny a citizen the right to serve on a jury based on race. Despite this early awareness of the insidious problem of racial prejudice in the judicial system, the problem has persisted through the use of pretextual peremptory challenges.

The Supreme Court aptly expressed the detrimental effects of racial discrimination in jury selection as follows: "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude African-Americans from juries undermine public confidence in the fairness of our system of justice." This paper makes a comparative study between the old jury exclusion system and the modern jury exclusion tactics of peremptory striking and how those challenges have affected minority participation in the jury process today. This paper examines first, from a historical perspective, how Jim Crow statutes and then race neutral jury practices were used as pretextual mechanisms to suppress and deny minority participation in the American jury process. For almost two hundred years, these laws, statutes, and practices systematically denied people of color the right to participate in the judicial system. This focus of controversy relating to the exercise of full citizenship rights through jury participation has been a subject of concern since the writing of the United States Constitution. Secondly, through comparative data, this paper purports to show how modern jury exclusion tactics of black striking are only pretextual race-based challenges designed again to deny people of color full participation in the jury process.

More specifically, the authors of this paper will put forth the debate that the ruling in Batson v. Kentucky has failed to eliminate the abuse and misuse of discriminatory peremptory challenges, thereby, circumventing the intent of Batson to the detriment of the administration of justice. Because Batson has not properly rooted out the illegitimate use of peremptory challenges, the better remedy would be to exclude all challenges, absent a very narrow interpretation for "cause" by the court.

It's difficult to fight the discrimination in peremptory challenges, since prosecutors and judges are overwhelmingly whites (90-95%).

## **The People's Jurors in Chinese Judicial System: Mechanisms and Policies -Ming Qi (Jilin University)**

China has adopted the People's Juror mechanism in the judicial system in the first trials of all levels of cases at courthouses. In 2005, the Peoples' Congress of P.R. China passed the Decision of Improving the Mechanism of People's Juror, which initiated the modern trial reform of courthouses in China with people's jurors, though the history of employing jurors in court can be traced to 1927. My presentation is divided into four parts. Firstly, I will make brief introduction of the People's Juror system of China. Although it is called people's juror, the mechanism is not a juror system, but a judge acting mechanism. In Chinese judicial system, People's jurors are selected from the data base of grass-root courthouses, recommended by the basic unites of Chinese society and working with the power of judge, which is totally different from western system on aspects of selection, power, decision making, and even the solvencies when they disagree against the collegiate bench on certain case. So the detailed functioning mechanisms of it will be introduced in my presentation. Secondly, I will talk about the merits and drawbacks of people's jurors' performance in real cases with my real trial experiences, and make comparison with American style of jury system. The involvement of people's jurors into trial practices gives common people opportunity to act as judge at court, and to know more about the working mechanism of judicial system, while it also makes people concern about their performance at court without professional legal knowledge and training. It is risky that it takes at least four years of legal education and one harshest examination to be a formal judge, while the system enables ordinary people without all these requirements. Thirdly, I will further explore the necessity, policy making of the People's Juror mechanism of China under the situations of current Chinese society, Rule-of-Law construction, current legal reform, and democracy. Considering the cost and gains of the system, people ask the questions of why we should have such kind of trial mechanism, what kind of problems it aims at solving, and where it leads to in the future. Current Chinese social problems are analyzed in this part, and the people's juror mechanism offers a way to contribute to constructing Harmonized Society in modern China. At last, the adoption or creation of the people's juror mechanism in has other implications outside the judicial system. It makes people think if law still is a science in China if people's jurors can act judge at court. It is worth exploring what on earth is absent from the Rule-of-Law construction of modern China so bad that such kind of mechanism has to be introduced.

## **An Empirical Research on China's Recent Reforms of Its Mixed Tribunal System - Zhuoyu Wang (Southwest University of Finance and Economics of China)**

“Despite the actual widespread use across...countries, existing empirical studies on mixed tribunals are relatively rare” , a picture that holds true in China as well. Since 1st May 2005, when the much-anticipated Lay Assessor Act of China (2004) came into force, neither the Chinese authorities nor the academic community has published any systematic study to empirically evaluate the practical situation of the mixed tribunal system since the reforms. Meanwhile, it is striking that Chinese official propaganda material has been recently released to commend Lay Assessor Act of China (2004) for the changes it has brought to China, claiming (1) lay assessors have worked effectively since this Act, and (2) lay assessors have been carefully selected and represent the community from which they come. These positive official conclusions give rise to my scepticism as they are not premised on relevant empirical evidence. For example, the claim for the alleged representativeness of lay assessors does not quote any actual statistics, such as the gender distribution, education levels, occupations, or political beliefs of those within

the lay assessor pool. An empirical study would therefore seem to be both desirable and necessary. In this context, between December 2006 and June 2007 I conducted fieldwork in China, in order to survey how the mixed tribunal system has been operating in practice since the Lay Assessor Act of China (2004) came into force, drawing particular attention to the following issues: (1) whether the courts have embraced the new Act and have abandoned previous practices, those now viewed as inappropriate, particularly given that their discretionary jurisdiction has been largely preserved by the Act, (2) whether the selection of lay assessors with a higher educational level, together with some limited training has, as envisaged in the new Act, produced lay assessors competent to perform their dual role of both fact-finding and applying the law, (3) whether lay assessors recruited since 2004 have escaped the role of “puppet”, one that trapped their predecessors, and thus have been able to effectively participate in judicial decision-making, and (4) whether the various legal actors involved in mixed tribunals, that is, judges and lay assessors, in practice uphold the reformed system. The article I plan to present will report on my fieldwork, with three sections incorporated. Section 1 interprets the methodologies applied during the fieldwork, Section 2 illustrates the major findings of the field project and covers the critical analysis, and Section 3 presents a conclusion.

### **3309 New Developments in Japan's Saiban-in System**

(Sponsored by IRC09 Lay Participation in Legal Decision Making and CRN33 East Asian Law and Society)

Chair: Valerie P. Hans (Cornell University) [valerie.hans@cornell.edu](mailto:valerie.hans@cornell.edu)

Discussant: Christoph Rennig (Frankfurt High Court of Appeals) [christoph.rennig@gmail.com](mailto:christoph.rennig@gmail.com)

Abstract:

In this session, scholars and researchers will examine new developments in Japan's saiban-in system, a mixed court of 3 professional and 6 lay judges.

#### **A Gap Before and After Saiban-in Service - Takayuki Ii (Hirosaki University)**

According to a public opinion poll, almost half of Japanese answer that they became more interested in trial and judiciary after the introduction of saiban-in system, while most of them are reluctant to serve themselves as saiban-ins. Most former saiban-ins, however, say that their experience as saiban-ins was “good”. This paper tries to consider a background of the gap based on interviews to former saiban-ins and measures to fill the gap, which include education to nurture qualities for saiban-in and networking former saiban-ins.

### **Intentions and the Reality of the Lay Adjudication in Criminal Trials: Indications from the Introduction of the Japanese Citizen Judge System (Saiban-in Seido) in Terms of a Comparative Criminal Justice Study - Yumiko Kita (University of Sussex)**

The lay adjudication system appears to be gaining ground globally. Considerable research has been conducted in this area, identifying the idea of international tendency of both divergence and convergence in existing lay adjudication systems. In this paper, I will consider a gap between intentions and the reality of the Japanese citizen judge system (Saiban-in Seido) in the light of the contribution/satisfaction of citizen judges (saiban-in), as a part of the institution of democracy. I conducted semi-structured interviews in 2011 in Japan with professional judges, public prosecutors, attorneys, citizen judges who experienced citizen judge trials, as well as lawmakers. Through an in-depth analysis of the interviews and a comparative study especially on European countries, I will a) identify the factors affecting the contribution of lay members, b) examine the impact of the new system on criminal procedure.

### **Transparency of Japanese Criminal Justice System after Saiban-in System Was Implemented - Takeshi Nishimura (Shimada & Nishimura Law Office)**

Saiban-in system produced several changes of Japanese criminal justice system. These changes are related to transparency. Needless to say, participation of lay people in trial itself is to open tribunals for people. At the same time or just before Saiban-in system was implemented, Japanese criminal justice system was improved for more transparency. Implementation of Saiban-in system is directly or indirectly related to these changes.

### **Japan's Evolving Lay Judge System: Room for Improvement or Even Expansion? - Matthew J. Wilson (University of Wyoming)**

For over sixty years, meaningful public participation in criminal or civil trials has been a foreign concept in Japan. In August 2009, this drastically changed as Japan conducted its first trial involving lay judges. As part of its new "saiban-in seido" or quasi-jury trial system, Japan now conscripts registered voters to serve on mixed tribunals, comprised of professional and lay judges, which hear serious criminal cases. Citizen participation in criminal trials is one of many revolutionary legal reforms intended to transform Japan from a society with excessive regulatory control to a global model based on transparent, after-the fact review. Based on these changes, it is expected that Japanese citizens will be converted from governed objects to governing subjects. The introduction of greater citizen participation in the Japanese trial process was intended increase common understanding of the judicial process, promote civic responsibility, and enhance the tools of democracy available to society. Reformists hoped that citizen participation would infuse sound common sense into the judicial process as well as ensure justice, due process of law, and prosecutorial accountability. However, many have argued that the new quasi-jury system is an expensive exercise in futility. Without significant public debate, Japan spent hundreds of millions of dollars implementing a ground-breaking system that runs counter to Japanese legal traditions and still faces considerable doubt and opposition among members of society and the legal community. There are certainly many weaknesses and challenges associated with citizen participation in the judicial process in Japan. Notwithstanding, the new system has generated many benefits and has much potential. With Japan approaching the three year anniversary of the saiban-in seido, it is an ideal time to assess the strengths and weaknesses of the current system and examine the system's effect on Japanese society. As part of this process, my presentation will focus on potential areas of improvement for the saiban-in seido and ideas for making such

improvements. It will also explore the potential benefits and advisability associated with expanding use of citizen judges in Japan beyond serious criminal cases and using citizen judges in less-serious criminal and certain civil cases. Going forward, Japan's new quasi-jury system should not only be closely scrutinized on a domestic scale, but it may also offer valuable lessons on an international scale to established and emerging democracies.

### **3409 Roundtable--The Role of Professionals in Lay Tribunals**

(Sponsored by IRC09 Lay Participation in Legal Decision Making)

Session Participants:

Chair: Shari S. Diamond (Northwestern U/American Bar Foundation) s-diamond@law.northwestern.edu

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Participant: Edmundo S. Hendler (University of Buenos Aires) ehendler@catedrahendler.org

Participant: Jae-Hyup Lee (Seoul National University) jhyup@snu.ac.kr

Participant: Richard O. Lempert (University of Michigan) rlempert@umich.edu

Participant: Kwangbai Park (Chungbuk National University) kwangbai@chungbuk.ac.kr

Participant: Christoph Rennig (Frankfurt High Court of Appeals) christoph.rennig@gmail.com

Abstract:

U.S. myopia tends to view lay participation according to one model: the lay jury (although others ---Germany's mixed tribunals and England's lay magistrate system – have a long tradition). In the last decade, a variety of tribunals including lay participation have joined the mix, taking a myriad of forms.

A continuing question that persists as each legal system designs its own version of lay participation is, What Role Do (Should) Professionals Play? At one extreme is the American jury trial in which the professional judge presides, but does not participate in deliberations. Other systems give larger roles to professionals. For example, in Germany and in Japan's Saiban-in system, the professional judges deliberate and vote with the laypersons. In the new Korean system, the jury first deliberates alone on the issue of guilt, but if the jurors cannot reach a unanimous verdict, the jurors must hear the judge's opinion; the jurors then deliberate again outside the presence of the judge and can reach a verdict by a simple majority. In the lower criminal courts in England, lay magistrates sit in panels of three; a legally-qualified clerk is available to advise them, but not to deliberate or vote with them.

These varying institutional arrangements reflect concerns about lay competence, legal expertise and democratic representation, cultural influences, and the appearance of justice. They also raise

normative and empirical questions about the optimal and actual nature of professional influence on these tribunals. This roundtable will explore all of these issues.

#### **4409 Participation on Juries (Sponsored by IRC09 Lay Participation in Law)**

(Sponsored by IRC09 Lay Participation in Legal Decision Making)

Chair: Mary R. Rose (University Texas, Austin) [mrose@austin.utexas.edu](mailto:mrose@austin.utexas.edu)

Abstract:

To be robust, the jury system depends upon active participation. First, citizens must be willing to serve, in that they agree to and are able to take time away from their lives to participate. Once selected, the law presumes that the jury discussion will include all voices – that is, that each member will actively participate. This session will explore the many meanings of jury participation. We consider the make-up of the jury pool by investigating attitudes toward jury service, as well as the effects of incentives from the state to increase jury participation. Next we will consider various types of participation between jurors by exploring language diversity among jurors, as well as detailed examinations of how jurors speak to one another. Data comes from a variety jurisdictions, including those in both the United States and Australia.

#### **Juror Language Accommodation in Theory and Praxis - Jasmine B Gonzales Rose (University of Pittsburgh)**

This paper explores the exclusion of limited English proficient (LEP) speakers from jury service in both state and federal courts in the United States and the challenges and possibilities presented by juror language accommodation. In the United States, approximately 24 million people are LEP. That is approximately 9% of the population. There is a tremendous correlation between race and English speaking ability. Approximately 50% of Latinos are LEP. And 40% of people of Asian descent residing in the U.S. are LEP. In total, about 86% of LEP individuals are people of color. That is 20.6 million people of color. Thus, when our legal system excludes LEP persons from the jury box, we are excluding people of color. This is particularly concerning in the context of criminal juries where criminal defendants are guaranteed a fundamental right to a jury selected from a fair cross-section of the community under the Sixth Amendment. In the federal context, the Jury Selection and Service Act (JSSA) of 1968 provides that a person is not qualified for jury service if he does not speak, read, write, and understand English. The JSSA was enacted to establish uniform jury selection procedures to ensure jury pools are drawn from a fair cross-section of the community and to prevent exclusion on account of race, color, national origin, and economic status. However despite the JSSA's purported anti-discrimination purpose, application of the JSSA language requirement in certain communities actually systematically discriminates against many of the same populations it is designed to protect and ensures juries are not selected from a fair cross-section of the community. Most states have similar language prerequisites; however the requirements vary in stringency. Some jurisdictions require only that a potential



juror understand English, while others require jurors to read and write in English. Such literacy qualifications disproportionately exclude persons of color. Approximately 11 million people in the U.S. are illiterate, with an overrepresentation of Latinos, in particular, as well as African Americans. My constitutional analysis centers on the fair cross-section requirement of the Sixth Amendment, as well as equal protection and due process under the Fourteenth and Fifth Amendments, and First Amendment concerns. Central to my discussion is an investigation into how juror language exclusion interacts with multidimensional notions of citizenship. I examine how jury participation is a benchmark of full citizenship and how language restrictions relegate certain racial and national origin groups to second-class citizenship status. I juxtapose and examine the legal framework and accompanying policy rationales which allow for the highly divergent levels of protection for language minorities in the U.S.'s two main opportunities for democratic self-government: voting and jury participation. Literacy bars to voting have consistently been recognized as products of racial discrimination. How are language literacy bars in the juror context similar or dissimilar? Finally, I pragmatically evaluate the prospect of instituting juror interpretation programs modeled after the New Mexico state courts and other prototypes in the Americas and abroad.

**Volunteering and Willingness to Serve -Marc Musick (University of Texas, Austin), Sarah Dury (Vrije Universiteit, Brussel), Roger P Rose (University of Minnesota, Morris)**

The cornerstone of the American judicial system is the jury. Although jury service across many jurisdictions is compulsory in statute, in practice it is actually a voluntary endeavor. In many areas, for citizens to serve they must first be chosen, and to be chosen they must appear on rolls that would open the opportunity to serve. Once summoned for service, citizens can simply opt not to appear, and in many areas, ignoring such a request carries few consequences. Even after appearing for jury selection, many will try to find ways to avoid being selected out of a desire to not serve but also not be punished for not appearing for selection. Equally important is the idea that jurors take their service seriously. Too often unwilling jurors will be placed on juries and will simply go through the motions of the trial. Other jurors may ignore the proceedings altogether and stand silent during deliberations. For a judicial system that depends on the fairness, impartiality and thoughtfulness of a jury, it is not in the best interests of our society to enlist these unmotivated jurors. The solution to both of these issues is to create a citizenry who are both willing and able to serve effectively in the juror role. The purpose of this study is to examine the willingness of adults to serve as jurors and how that willingness is predicted across multiple factors. Primary among the potential causes examined in this paper is volunteering, an activity engaged in across the US by adults from many different backgrounds. The paper argues that volunteering, as a form of civic engagement, increases attachment to civic engagement and thus makes people more willing to serve. Volunteering also provides individuals insight into governmental and non-profit agencies that may enhance attitudes towards those organizations. In sum, it should be the case that people who volunteer are more likely to believe in civic institutions, and thus be more willing to serve on juries. Data for the study come from the Survey of Texas Adults (SoTA) conducted from November, 2003 to January, 2004. Potential respondents were community-dwelling adults residing in Texas and aged 18 and over. The data collection process yielded 1,504 completed telephone interviews (Household-level cooperation rate: 37%; Respondent-level cooperation rate: 89% [The American Association for Public Opinion Research 2004]). Data were weighted on known population characteristics to match the sample to the population from which it was drawn. Initial findings indicate that volunteering is a positive predictor of willingness to serve in two ways. First, adults who volunteer for certain

types of groups engaged in political advocacy are more willing to serve. Second, those who volunteer for a broader range of organizations in general are also more likely to serve.

**Increasing the Incentive to Serve: The Effect of Juror Pay Increase in Texas - Mary R. Rose (University Texas, Austin)**

The yield from juror summonses in the United States is frequently abysmal, with high proportions of people failing to respond to a summons. There are many explanations for this, but a common refrain is that juror pay is too low. Without an adequate stipend, people cannot afford to take time away from work to serve on juries. Until a few years ago in Texas juror pay was only \$6 to \$12 per day. In 2005 the state legislature agreed to increase pay to as much as \$40 per day, effective 2006. This change creates a before/after design, allowing examination of whether increasing pay affects summons response. Greater pay may increase overall summons yield (the number of jurors who remain eligible for service among all those summoned) by generating more total responses, and/or it may reduce the number of people who seek hardship exemptions from service. To examine the effect of the pay increase, this project take a before and after look at summons response in the most populous counties in Texas. I contacted jury administrators in the ten most populous counties to request summons information for the years 2002 through 2010, approximately 3 -4 years before and after the change. I examine the number of summons sent, less those returned as undeliverable, and the numbers that yielded a response at all, as well as whether pay reduced the numbers of people seeking exemptions and excuses. An advantage of studying this issue in Texas stems from the fact that one its counties, El Paso, increased pay for their jurors a few years ahead of the rest of the state. Thus El Paso serves as control county of sorts, helping assess if any time trends explain any changes. Data are still being collected, but my hypothesis is that juror yield will increase following the pay increase.

**Common Narrative and Community Cohesion: Toward a Micro-Level Theory of Deliberative Dynamics -Meredith Rossner (University of Western Sydney)**

This paper explores a theoretical framework and proposes a set of methodologies for a micro-level analysis of jury deliberations. Drawing from ethnomethodology and microsociological theories of interaction, we propose that the trajectories and turning points of ‘talk-in-interaction’ can reveal how a narrative comes to be co-produced and shared, and also how a sense of community is formed or challenged among participants. Data from video recordings of jury deliberation from a mock-jury study in New South Wales are used to explore these themes.

**Racial Coding of Railway Stations: Jury Deliberation about the Meaning of Place in a Mock Terrorism Trial -David Tait (University of Western Sydney)**

A mock trial was held in a heritage courtroom of the NSW Supreme Court, in which the accused was charged with placing a bomb on a train, getting off at one station before the bomb went off at a later station. Jurors in the twelve juries debated the strength of the forensic evidence, as well as the evidence tying the accused to a white power extremist group. They also tried to make sense of the railway stations involved in the story as a clue to understanding motive and culpability. This paper explores their debates about the meaning of place, and the racial and class significance of the stations involved. A detailed reading is provided of the way a shared narrative was developed as the jury developed social cohesion.

## **IRC09 Business Meeting 4509**

(Sponsored by IRC09 Lay Participation in Legal Decision Making)

Session Participants:

Chair: Valerie P. Hans (Cornell University) [valerie.hans@cornell.edu](mailto:valerie.hans@cornell.edu)

Chair: Sanja Kutnjak Ivkovich (Michigan State University) [kutnjak@msu.edu](mailto:kutnjak@msu.edu)

Chair: Nikolai Kovalev (Wilfrid Laurier University) [nkovalev@wlu.ca](mailto:nkovalev@wlu.ca)

Chair: Takeshi Nishimura (Shimada & Nishimura Law Office) [law-s-n@mva.biglobe.ne.jp](mailto:law-s-n@mva.biglobe.ne.jp)

Abstract:

Business meeting, discussion of IRC projects