

JUSTIFICATION FOR JURIES: A COMPARATIVE PERSPECTIVE ON MODELS OF JURY COMPOSITION

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This Note compares the American jury model, where a group of citizens deliberates, with the European model, where citizens and judges deliberate together. It weighs the benefits and detriments of each model and concludes that the American jury model is superior because it works better in practice. It demonstrates that all-citizen juries are competent—they deliver verdicts with which judges agree, handle complex cases, do not demonstrate bias toward or against certain parties, and determine damages reliably. In addition, serving on a jury of one's peers has been linked to increased civic participation, and juries have the power of nullification. In contrast, the European model seems like a good idea in theory but does not work well in practice because judges tend to dominate deliberations, which renders citizen participation meaningless.

This Note also addresses one of the disadvantages of the American jury model—the widespread negative public perception of juries, which results, in part, from verdicts that appear not to make sense. Examples include the McDonald's coffee spill case, the acquittal of O.J. Simpson, and, most recently, the acquittal of Casey Anthony. To combat this negative public image, this Note recommends borrowing a feature of many European jury systems called "verdict justification," wherein a jury is required to answer a series of questions or provide a brief rationale for its verdict. This Note argues that this modification to the American jury system could improve a jury's accountability to the public as well as help lawyers and parties better understand a jury's decision.

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I. INTRODUCTION

The use of juries is on the decline in the United States.¹ The use of juries is also on the decline in several established European countries.² Many emerging democracies formerly under communist rule, however, have recently implemented or resurrected the jury system.³ And even some long-established countries recently have started to use juries.⁴ What accounts for this discrepancy in the use of citizen participation throughout the world?

A natural starting point for answering this question involves a basic comparison of the primary jury models used in different countries. The essence of a jury is a group of citizens deliberating together, free from outside influences, to determine guilt or liability.⁵ Since its inception, this essence has morphed into countless forms, which legal scholars have since divided into three main categories: (1) the continental jury model, which is made up of citizens only, (2) the collaborative court model, in which citizens and judges deliberate together, and (3) the pure lay judge model, in which citizens are temporarily appointed as judges.⁶ An examination of these models will inform our understanding of the American jury system, which according to some observers is “under concerted attack.”⁷

Part II of this Note provides a brief history of the jury trial right and a comprehensive discussion of the various models of jury composition, with an emphasis on the first two models. Part II also introduces the concept of verdict justification, a feature of some continental juries, and the role it can play in a jury’s accountability. Part III analyzes the benefits and detriments of the continental jury and the collaborative court. Finally, Part IV determines that, while the continental jury is the preferable jury model, the American jury system could benefit from adopting a form of verdict justification.

1. See Honorable William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 73 (2006).

2. See, e.g., Sally Lloyd-Bostock & Cheryl Thomas, *The Continuing Decline of the English Jury*, in *WORLD JURY SYSTEMS* 53, 53 (Neil Vidmar ed., 2000); John D. Jackson & Nikolay P. Kovalev, *Lay Adjudication and Human Rights in Europe*, 13 COLUM. J. EUR. L. 83, 119 (2006).

3. See Jackson & Kovalev, *supra* note 2, at 119–20; Brent T. White, *Putting Aside the Rule of Law Myth: Corruption and the Case for Juries in Emerging Democracies*, 43 CORNELL INT’L L.J. 307, 310 (2010).

4. See Hiroshi Fukurai, *The Rebirth of Japan’s Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT’L L.J. 315, 322 (2007).

5. See Neil Vidmar, *A Historical and Comparative Perspective on the Common Law Jury*, in *WORLD JURY SYSTEMS* 1, 1 (Neil Vidmar ed., 2000).

6. See Valerie P. Hans, *Jury Systems Around the World*, 4 ANN. REV. L. & SOC. SCI. 275, 278–80 (2008); Jackson & Kovalev, *supra* note 2, at 94–95.

7. See NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 16 (2007).

II. BACKGROUND

This Part gives a concise overview of the jury system. Section A provides a relevant historical background about the origins of the English jury and its migration to the United States and other countries. Section B then examines two key features of the jury system: nullification and special verdicts. Lastly, Section C lays out the various models of jury composition found throughout the world.

A. *Juries: A Brief History*

The right to a trial by one's peers originated in England.⁸ Jurors have always represented the community, although their specific role has changed over time. At first, they gathered information about their neighbors and judged cases about which they had knowledge.⁹ Later, they were required not to know about the case or parties involved.¹⁰ In all cases, juries acted as the "sole judge of fact" and possessed the "right to give a verdict according to conscience," whether the presiding judge agreed or not.¹¹ During its early history, the jury in England acted as a check against the government and often decided cases based on its view that a law was unfair rather than specific evidence of guilt.¹²

The American colonists adopted the English jury model, and the Framers eventually made it a part of the U.S. Constitution via the Fifth, Sixth, and Seventh Amendments for both criminal and civil cases.¹³ Similar to the original purpose of the English jury, the American jury was intended to serve as a check against overreaching by the government.¹⁴ State constitutions also guarantee the right to trial by jury.¹⁵ The jury trial right spread to other colonies of the British Empire, and fifty-two countries have jury systems based on the original English model today.¹⁶

8. See *id.* at 23–24; Lloyd-Bostock & Thomas, *supra* note 2, at 53 n.2 (noting that the right to judgment by one's peers appears in the Magna Carta).

9. See Lloyd-Bostock & Thomas, *supra* note 2, at 54–55.

10. See *id.* at 55.

11. *Id.* (discussing *Bushell's Case*, in which jurors who refused to convict were imprisoned but later released).

12. See *id.* at 56; see also *infra* Part II.B (discussing jury nullification).

13. See U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."); U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.").

14. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) ("Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.").

15. VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 31 (1986).

16. See VIDMAR & HANS, *supra* note 7, at 36–37.

B. Key Features of Juries

There are two key features of juries that are particularly relevant to this Note: (1) jury nullification and (2) special verdicts or verdict justification. This Section provides a brief background and context for these features as they relate to modern jury systems.

Jury nullification, which occurs only in criminal cases, is defined as a “jury’s knowing and deliberate rejection of the evidence or refusal to apply the law.”¹⁷ While a jury is legally required to “determine the facts and apply the law,”¹⁸ a jury may deviate from this obligation “because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury’s sense of justice, morality, or fairness.”¹⁹ In order for jury nullification to be effective, a ban on double jeopardy and an absolute right to trial by jury are required—if a defendant can be tried again or a judge can overturn a jury’s acquittal, jury nullification has no force.²⁰ Many legal scholars are highly critical of jury nullification.²¹

A special verdict, which may apply in either criminal or civil cases, involves giving the jury a series of questions to answer in addition to returning a verdict.²² In the United States, such practice is left to the judge’s discretion, while in many European jury systems, such practice is required.²³ Even if jurors are asked to return a special verdict, their deliberations remain confidential.²⁴ U.S. courts rarely use special verdicts, in part because of concerns that juries would lose their independence or feel pressure to convict.²⁵ Some legal scholars believe that increased use of special verdicts could improve the accuracy of verdicts because they

17. BLACK’S LAW DICTIONARY 936 (9th ed. 2009). While there is no jury nullification doctrine in civil law, a civil jury may intentionally disregard the law or the evidence, but both parties have a right to appeal. *See* Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 267 n.45 (1996).

18. *See* RONALD JAY ALLEN ET AL., *CRIMINAL PROCEDURE: ADJUDICATION AND RIGHT TO COUNSEL* 1272 (2011).

19. BLACK’S LAW DICTIONARY 936 (9th ed. 2009).

20. *See* ALLEN ET AL., *supra* note 18, at 1494–98.

21. *See, e.g.*, Leipold, *supra* note 17, at 257 (“[T]he nullification doctrine exerts an enormous influence over the criminal process, especially in cases where a jury does not exercise its power. Whatever the benefits that might arise in the few cases where a jury acquits against the evidence, they pale in comparison to the doctrine’s undesirable collateral effects.”); *see infra* Part III.A.1.d (discussing jury nullification).

22. *See* FED. R. CIV. P. 49(b).

23. *See infra* Part II.C.1 (discussing verdict justification).

24. *See* John D. Jackson, *Making Juries Accountable*, 50 AM. J. COMP. L. 477, 495–96 (2002) (noting that courts take significant measures to guarantee that what happens in the jury deliberation room is protected).

25. *See* Stephan Landsman, *The Civil Jury in America*, in *WORLD JURY SYSTEMS* 381, 399–400 (Neil Vidmar ed., 2000); Leipold, *supra* note 17, at 277. Courts have noted the interplay between special verdicts and jury nullification. *See, e.g.*, *United States v. Desmond*, 670 F.2d 414, 418 (3d Cir. 1982) (“Underlying this aversion is the feeling that denial of a general verdict might deprive the defendant of the right to a jury’s finding based more on external circumstances than the strict letter of the law.”).

could help the jury focus on the relevant elements of the case, especially when there are several parties or counts involved.²⁶

C. *Models of Jury Composition*

The models of jury composition that are used throughout the world can be grouped into three main categories. The first model, known as the continental jury model, is composed exclusively of citizens.²⁷ The second model, known as the collaborative court model, is made up of a combination of citizens and judges.²⁸ The third model, known as the pure lay judge model, is composed of lay judges who do not have formal legal training.²⁹ This Section describes each model in detail, with an emphasis on the first two models.

1. *Continental Jury Model*

The continental jury is comprised entirely of citizens, who are chosen from the general population.³⁰ Based on the English tradition, this model is most frequently found in common-law countries, including the United States.³¹ All-citizen juries have the task of collectively deciding whether a defendant is guilty or liable.³² Notably, in criminal cases, this responsibility generally extends to deciding the verdict but not a defendant's sentence.³³ During deliberation, the jury is "carefully insulated" from the judge.³⁴ Up until that point, however, judges preside over jury trials, rule on whether evidence is admissible, and give the jury legal rules.³⁵

In addition to deliberating and delivering a verdict, some countries with the continental jury model require a form of verdict justification.³⁶ In both Russia and Spain (a civil-law country), juries must answer a "questions list" about the case.³⁷ In Spain, for example, the jury votes separately on the list's factual propositions—each identified as "favora-

26. See Leipold, *supra* note 17, at 276–78. Courts have also weighed in on the issue of what role special verdicts should have in the jury system. See, e.g., *Desmond*, 670 F.2d at 418 (discussing situations in which a special verdict might be necessary as well as potential benefits to a defendant).

27. Hans, *supra* note 6, at 278; Jackson & Kovalev, *supra* note 2, at 95–96.

28. Hans, *supra* note 6, at 279–80; Jackson & Kovalev, *supra* note 2, at 96–99.

29. Hans, *supra* note 6, at 280; Jackson & Kovalev, *supra* note 2, at 99.

30. Hans, *supra* note 6, at 278.

31. See Vidmar, *supra* note 5, at 1. Some civil-law countries, such as Spain, employ the continental jury model. Hans, *supra* note 6, at 278; see Stephen C. Thaman, *Spain Returns to Trial by Jury*, 21 HASTINGS INT'L & COMP. L. REV. 241, 246 (1998).

32. See Vidmar, *supra* note 5, at 1.

33. Hans, *supra* note 6, at 278–79.

34. *Id.* at 279; see also Jackson & Kovalev, *supra* note 2, at 96 (“[P]rofessional judges cannot deliberate together with juries while they are deciding on the verdict.”).

35. Hans, *supra* note 6, at 279 (noting that, in addition, some jurisdictions allow judges to comment on evidence); Jackson & Kovalev, *supra* note 2, at 96.

36. Ana M. Martín & Martin F. Kaplan, *Psychological Perspectives on Spanish and Russian Juries*, in UNDERSTANDING WORLD JURY SYSTEMS THROUGH SOCIAL PSYCHOLOGICAL RESEARCH 71, 73 (Martin F. Kaplan & Ana M. Martín eds., 2006).

37. *Id.*

ble” or “unfavorable” to the defendant—and must give a brief explanation of its results.³⁸ The goal of the questions list is to give the trial judge a set of facts that can be used for determining a defendant’s sentence.³⁹

2. Collaborative Court Model

The collaborative court is comprised of both lay citizens and law-trained judges.⁴⁰ This model is typically found in civil-law countries, such as Germany and France.⁴¹ In contrast to a jury made up of only citizens, a mixed jury may decide a defendant’s guilt as well as his sentence in a criminal case.⁴² Moreover, mixed juries may operate at both the trial court level as well as at the appellate court level.⁴³ Within the collaborative court model, there are three variations: (1) the German model, (2) the French model, and (3) the expert assessor model.⁴⁴

First, the German model, also known as *Schöffen*, involves one professional judge and two lay citizens.⁴⁵ The number and composition of the jury could change based on the specifics of the case, such as the nature of the crime or punishment involved.⁴⁶ In this model, citizens are appointed as members of the court, often for a term of several months or even years.⁴⁷ In the courtroom, the citizens sit with the judge at the head of the room.⁴⁸

Second, the French model also involves citizens and judges, however, the ratio of citizens to judges is higher.⁴⁹ A jury composition may include three judges and nine or even twelve citizens, depending on the type of court.⁵⁰ Like the German model, the judges and the citizens deliberate together to determine their verdict.⁵¹ Unlike the German model, the citizens are chosen at random from the population, and in the court-

38. *Id.* at 73–74.

39. *Id.* at 73.

40. Hans, *supra* note 6, at 279; Jackson & Kovalev, *supra* note 2, at 96–97 (recognizing that this model is often referred to as a “mixed tribunal” or a “mixed jury,” but choosing the “collaborative court” terminology to avoid confusion).

41. Hans, *supra* note 6, at 279; Jackson & Kovalev, *supra* note 2, at 97.

42. Martin F. Kaplan et al., *Issues and Prospects in European Juries: An Overview*, in UNDERSTANDING WORLD JURY SYSTEMS THROUGH SOCIAL PSYCHOLOGICAL RESEARCH 111, 112 (Martin F. Kaplan & Ana M. Martín eds., 2006).

43. *Id.*

44. Hans, *supra* note 6, at 279; Jackson & Kovalev, *supra* note 2, at 96–99.

45. “Schöffen” means “jury” in German. See Hans, *supra* note 6, at 279; Jackson & Kovalev, *supra* note 2, at 97.

46. See Hans, *supra* note 6, at 279; Jackson & Kovalev, *supra* note 2, at 97 (noting that the number of citizens generally does not exceed the number of judges by more than one).

47. See Thomas Bliesener, *Lay Judges in the German Criminal Court: Social-Psychological Aspects of the German Criminal Justice System*, in UNDERSTANDING WORLD JURY SYSTEMS THROUGH SOCIAL PSYCHOLOGICAL RESEARCH 179, 182 (Martin F. Kaplan & Ana M. Martín eds., 2006) (noting that a typical term of office for a German lay juror is four years).

48. Hans, *supra* note 6, at 279.

49. *Id.*; Jackson & Kovalev, *supra* note 2, at 98.

50. Hans, *supra* note 6, at 279.

51. See Magali Ginet et al., *Human Justice or Injustice? The Jury System in France*, in UNDERSTANDING WORLD JURY SYSTEMS THROUGH SOCIAL PSYCHOLOGICAL RESEARCH 147, 150 (Martin F. Kaplan & Ana M. Martín eds., 2006).

room, they sit apart from the judge until deliberation.⁵² This model has been described as a “hybrid model which represents a *via media* between the continental jury courts and the *Schöffengerichte* Courts.”⁵³

Third, the expert assessor model involves two or three citizens with particular expertise and one or more judges.⁵⁴ This model has developed in a number of European countries as well as in Thailand.⁵⁵ Analogous to the “special juries” that were historically used in England, this model employs citizens who have particular knowledge and experience that is relevant to a case, such as teaching, medicine, or engineering.⁵⁶ For instance, teachers or professors would serve on a jury if the case involved a juvenile defendant.⁵⁷

3. *Lay Judge Model*

This model involves only lay judges, who do not have formal legal training, and may be known as “lay judges,” “justices of the peace,” or “lay magistrates.”⁵⁸ Such individuals sit alone or in groups to decide cases, which tend to be “minor” and often take place in the lower courts.⁵⁹ Lay judges serve for an extended period of time, sometimes even as their occupation.⁶⁰ This model does not feature prominently in this Note, which focuses primarily on comparisons and contrasts between the continental jury model and the collaborative court model in both criminal and civil contexts.

III. ANALYSIS

Countries throughout the world have adopted various models of jury composition. Most common-law countries employ the continental jury model (juries composed exclusively of citizens), while most civil-law countries have implemented some form of the collaborative court model (juries made up of both citizens and judges).⁶¹ The following analysis weighs the merits and pitfalls of these two models.

A direct comparative analysis of models of jury composition across various countries is a challenging but potentially rewarding endeavor. One prominent jury scholar has noted that “explicitly comparative analyses of the jury and other forms of lay participation are rare.”⁶² Comparisons across countries can provide valuable insight into “societal-level ef-

52. Hans, *supra* note 6, at 279; Jackson & Kovalev, *supra* note 2, at 98.

53. Jackson & Kovalev, *supra* note 2, at 97.

54. Hans, *supra* note 6, at 279; Jackson & Kovalev, *supra* note 2, at 98–99.

55. Hans, *supra* note 6, at 279–80; Jackson & Kovalev, *supra* note 2, at 98.

56. See Vidmar, *supra* note 5, at 22–26.

57. Hans, *supra* note 6, at 279 (noting that this is the case in Croatia).

58. *Id.* at 280; Jackson & Kovalev, *supra* note 2, at 99.

59. Hans, *supra* note 6, at 280; Jackson & Kovalev, *supra* note 2, at 99.

60. Hans, *supra* note 6, at 280.

61. See *supra* Part II.C.

62. Hans, *supra* note 6, at 277.

fects” of jury systems, such as whether participation as a juror affects a citizen and his relationship with the government.⁶³ On the other hand, comparative law scholars caution against transplanting legal institutions from common-law countries to civil-law countries.⁶⁴ With these concerns in mind, the following analysis seeks to compare and contrast the two major models of lay participation worldwide with an aim toward discerning which features of which models work best on a practical level.

Section A discusses the advantages of the continental jury model and addresses some of the common criticisms of that system. Section A then explores the disadvantages of that model, with an emphasis on the negative public perception of juries. Section B lays out the theoretical advantages and the practical disadvantages of the collaborative court model.

A. *Continental Jury Model*

The continental jury model, rooted in the English tradition, has both advantages and disadvantages. This Section relies primarily on the American jury system as the example of the continental jury model.

1. *Advantages*

The continental jury model has several advantages over the collaborative court model. First, despite claims to the contrary, juries comprised exclusively of citizens deliver verdicts with which judges agree, handle complex cases without significant input from a judge, do not demonstrate bias toward or against certain parties, and can determine damages reliably.⁶⁵ Second, after the all-citizen jury delivers its verdict, there are controls in place if the verdict is erroneous.⁶⁶ Third, studies have demonstrated that service on a jury of peers can lead to other forms of civic participation.⁶⁷ Fourth, all-citizen juries have the power, though not necessarily the right, to nullify the law.⁶⁸

a. *Juries Get It Right*

Many individuals, from American citizens to lawyers and academics in other countries,⁶⁹ believe that juries comprised of citizens are unreliable and make mistakes in their verdicts.⁷⁰ Specifically, such individuals

63. *Id.*

64. *Id.* at 278.

65. See Neil Vidmar, *The American Civil Jury for Ausländer (Foreigners)*, 13 DUKE J. COMP. & INT'L L. 95, 122 (2003).

66. *Id.* at 119–20.

67. See, e.g., John Gastil et al., *Civic Awakening in the Jury Room: A Test of the Connection Between Jury Deliberation and Political Participation*, 64 J. POL. 585, 585 (2002).

68. See VIDMAR & HANS, *supra* note 7, at 227.

69. Vidmar, *supra* note 65, at 95.

70. See VIDMAR & HANS, *supra* note 7, at 16.

may believe that (1) judges would make better decisions than juries, (2) juries cannot handle complex cases, (3) juries favor plaintiffs, or (4) juries award excessive damages.⁷¹ The studies discussed below, however, demonstrate that these negative perceptions of juries are, in fact, empirically false.

i. Agreement Between Judges and Juries

First, studies have shown that judges agree with jury verdicts most of the time.⁷² Harry Kalven, Jr. conducted a now famous survey in the 1950s in which he asked judges in approximately 8000 civil jury trials to weigh in on how they would have decided the case.⁷³ By comparing the judge's response with the jury verdict, Kalven found that judges and juries agreed regarding liability in personal injury cases seventy-nine percent of the time.⁷⁴ Where judges disagreed with the juries' verdicts, the cases were almost evenly divided in terms of whether plaintiffs or defendants prevailed.⁷⁵ This is a significant finding because it "contradict[s] the claim that juries tend to favor plaintiffs."⁷⁶ It should be noted, however, that in cases where the plaintiffs won, the jury award tended to be approximately twenty percent higher than what the judge would have awarded.⁷⁷ Overall, the data from this significant study demonstrated that judges generally agreed with jury verdicts.

Subsequent studies have found similar results to Kalven's. First, one study asked judges from thirty-three states to evaluate jury verdicts and found a comparable rate of agreement between judges and juries.⁷⁸ Significantly, in cases where there was disagreement between the judge and the jury, the study did not discover a correlation with how complex the judge thought the evidence was.⁷⁹ This finding is important because it negates one of the reasons commonly given for why jury verdicts are unreliable—that regular citizens are not equipped to evaluate complex cases.⁸⁰ Second, another study examined 153 civil cases in Arizona.⁸¹ Like the other studies, this study also found a high rate of agreement between judges and juries and no correlation to the complexity of the trial or the number of experts.⁸²

71. See *id.* at 170; VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 215 (2000).

72. Vidmar, *supra* note 65, at 98–99 (summarizing the results of various surveys).

73. Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1063 (1964).

74. *Id.* at 1065.

75. *Id.*

76. Vidmar, *supra* note 65, at 98.

77. Kalven, *supra* note 73, at 1065.

78. Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 LAW & HUM. BEHAV. 29, 32, 46 (1994).

79. *Id.* at 48–49.

80. See VIDMAR & HANS, *supra* note 7, at 169–70.

81. Paula L. Hannaford et al., *Permitting Jury Discussions During Trial: Impact of the Arizona Reform*, 24 LAW & HUM. BEHAV. 359, 373 (2000).

82. *Id.* at 373–75.

The findings of these studies are noteworthy because they can help rebut common negative perceptions of juries, in particular that a legal professional such as a judge would make better decisions than a group of untrained lay citizens. The issue that remains is how to actually change public perceptions of juries, given this important information.

ii. Complex Cases

Studies have shown that all-citizen juries are capable of handling seemingly complex cases. A complex case may refer to: (1) the type of case, e.g., medical malpractice or products liability, (2) a large number of plaintiffs or defendants involved, or (3) several weeks of trial.⁸³ Factors such as complex evidence (especially involving the use of experts), a large amount of evidence, or complex law could contribute to the complexity of the case.⁸⁴

The use of expert evidence at a trial may contribute to the perception that the case is complex.⁸⁵ Relatively recent scientific advancements, such as in the area of DNA, tend to figure prominently into this perception.⁸⁶ Studies of juries handling such cases, however, disprove this myth. One study of twelve trials thought to be complex found that in only two of the cases was the expert evidence so complicated that only another expert could comprehend it.⁸⁷ This finding would put juries in the same position as judges—in other words, no amount of legal training would affect an individual's ability to understand the expert evidence.⁸⁸ The study “concluded that there was no clear evidence of the juries being befuddled”⁸⁹ In addition, Neil Vidmar conducted interviews with individuals who had just served on juries that had reached verdicts in supposedly complex cases involving medical issues and battling experts.⁹⁰ In one case, which involved surgery for urinary incontinence, he found that “the jurors had a basic intellectual grasp of the case.”⁹¹ Acknowledging that it is perhaps not possible to know whether any of the juries in his study reached the “correct” result, he determined that “the jurors were not passive in evaluating the experts or their testimony.”⁹² He based this conclusion on the fact that the jurors could identify the underlying disagreements between the experts, often showed skepticism of the experts

83. See Vidmar, *supra* note 65, at 99 n.31 (“Judges and legal schools do not always agree on what constitutes a complex case.”).

84. *Id.* at 99.

85. See *id.* at 102–05.

86. See *id.*

87. See Richard Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 181, 185–90 (Robert E. Litan ed., 1993).

88. See Vidmar, *supra* note 65, at 99–100.

89. See *id.* at 100.

90. See NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEPS POCKETS, AND OUTRAGEOUS DAMAGE AWARDS 9 (1995).

91. Vidmar, *supra* note 65, at 103–04; see also VIDMAR, *supra* note 90, at 131–32.

92. See Vidmar, *supra* note 65, at 104.

for various reasons, took into account if expert testimony was lacking in some way, and judged expert testimony against the other evidence of the trial.⁹³ Other comparable studies have also found that jurors do not accept expert testimony at face value but rather judge it as they would other evidence.⁹⁴

The type of case—such as medical malpractice or products liability—may also contribute to the perception that the case is complex. In medical malpractice cases, for instance, the jury is asked to judge negligence by a “standard of medical care,” namely what a reasonable doctor or hospital in a certain field and community would have done.⁹⁵ For this reason, doctors, hospitals, and insurance companies often contend that only doctors are capable of assessing this standard of care.⁹⁶ Again, studies disprove these claims quite conclusively. For example, one study compared 988 jury verdicts with independent assessments made by doctors and found that the jury verdicts correlated with instances where the doctors had or had not found negligence on their own.⁹⁷ Like the agreement between judges and juries discussed above, the general agreement between doctors and juries proves that medical cases are not, in fact, beyond the understanding of a jury.⁹⁸

In conclusion, actual studies and research disprove the common criticism that juries cannot handle complex matters. Rather, these studies show that “civil juries approach the issue of liability with diligence and intelligence.”⁹⁹ Whether juries deliver accurate verdicts, at least we know that they can take on cases that have the potential to confuse an ordinary citizen or even a judge.

iii. Jury Bias in Favor of Plaintiffs

Juries are not necessarily biased toward plaintiffs and against big businesses. To investigate these common bias claims, Valerie Hans conducted the “Business Jury Project,” in which she interviewed 269 jurors from 36 different civil cases during a one-year period at a state trial court of general jurisdiction.¹⁰⁰ Almost all of the cases involved an individual plaintiff suing a corporate defendant, for either tort- or contract-related issues.¹⁰¹

93. *Id.*

94. See Sanja Kutnjak Ivkovich & Valerie P. Hans, *Jurors and Experts*, 16 *ADVOCATE: THE MAGAZINE FOR DELAWARE TRIAL LAWYERS* 17, 19–20 (1994).

95. Vidmar, *supra* note 65, at 100.

96. *Id.*

97. See Mark I. Taragin et al., *The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims*, 117 *ANNALS INTERNAL MED.* 780, 780–81 (1992) (explaining that of the 8231 cases studied, only twelve percent resulted in a jury verdict).

98. See VIDMAR, *supra* note 90, at 265.

99. Vidmar, *supra* note 65, at 107.

100. HANS, *supra* note 71, at 17–21.

101. *Id.* at 18. The study involved twenty-eight tort cases and eight contract cases, which is generally representative of the types of civil cases decided by juries in other states. *Id.*

Following her study, Hans refuted the “myth of the pro-plaintiff jury.”¹⁰² She found that jurors were both hostile toward and critical of plaintiffs in that they “prob[ed] for ways in which plaintiffs were responsible for their own injuries and assess[ed] the degree to which they could be overstating their injuries.”¹⁰³ Importantly, jurors viewed their mission as being “vigilant about spotting frivolous lawsuits.”¹⁰⁴ Such “mistrustful attitudes,” Hans found, were not unique to the jurisdiction in which she conducted her study but are prevalent throughout the United States.¹⁰⁵ Given her research and the research of others, Hans concluded:

A more accurate characterization is that jurors are often suspicious and ambivalent toward people who bring lawsuits against business corporations. Jurors and the public are deeply committed to an ethic of individual responsibility, and they worry that tort litigation could be fraying the social fabric that depends on a personally responsible citizenry.¹⁰⁶

Hans also refuted the “myth of the anti-business jury.”¹⁰⁷ First, Hans found, in direct contrast with the hostility jurors showed toward individual plaintiffs, that jurors were not generally hostile toward business defendants.¹⁰⁸ Rather, jurors were concerned about the effects of “excessive litigation” on the business community, such as whether an award of damages against a particular defendant could cause a loss of jobs.¹⁰⁹ Second, Hans found that jurors evaluated the actions of a corporation much the same way they evaluated the actions of an individual: in determining liability, they would consider whether an individual in the corporation’s shoes would be responsible.¹¹⁰ Notably, jurors actually held corporations to a higher standard than that of a regular individual.¹¹¹ Hans observed that jurors viewed a corporation as a “professional individual” who presumably would have a significant amount of knowledge and resources, meaning that, in some situations, jurors might find a corporation negligent, but not an individual.¹¹² In this way, jurors’ scrutiny of corporations aligns with the approach Congress has taken in delineating standards for business responsibility in asbestos and products liability cases.¹¹³

102. *Id.* at 216.

103. *Id.*

104. *Id.*

105. *Id.* at 217 (acknowledging that despite this overall trend, some states, like Texas, are generally considered “pro-plaintiff”).

106. *Id.* at 216.

107. *Id.* at 217.

108. *Id.* (noting that jurors interviewed described business litigants in a “neutral or positive light”).

109. *Id.*

110. *Id.* at 218.

111. *Id.* at 218. Hans’s finding is consistent with the results of other independent studies carried out in California, North Carolina, and Japan. *Id.*

112. *Id.* (“What might be viewed as accidental and excusable for an individual is seen as negligent for a corporation.”). Hans attributed this higher standard to “specific expectations about what is necessary and desirable for business actors” and not “negative (or positive) views of the business community.” *Id.*

113. *Id.*

In sum, Hans has put forth significant scholarship disproving that juries tend to be anti-plaintiff and pro-business. Notwithstanding the outcome of the case—that is, whether juries tend to decide cases in favor of plaintiffs or defendants—ample research demonstrates that juries are thoughtful, even critical, of both sides and do not determine liability based solely on the identity of the parties.

iv. Damages

Studies have demonstrated that juries are just as competent as judges when it comes to estimating damages. Neil Vidmar conducted a series of two experiments in which he compared damages awarded by lay persons with damages awarded by senior lawyers, some of whom had served as judges.¹¹⁴ In the first experiment, the jurors and lawyers were asked individually to estimate an award for pain and suffering in an actual medical negligence case.¹¹⁵

In terms of the amount of damages awarded, Vidmar found that there was “no support for the hypothesis that jurors are more generous in awarding noneconomic damages.”¹¹⁶ For example, the mean award for the jurors was \$51,852, and the mean award for the lawyers was \$50,433.¹¹⁷ Furthermore, in terms of the variation of awards, Vidmar found that both jurors and lawyers, as individuals, awarded amounts that varied considerably from their peers.¹¹⁸ For instance, jurors awarded amounts between \$11,000 and \$197,000, while lawyers awarded amounts between \$22,000 and \$82,000.¹¹⁹

Vidmar further compared individual lawyers’ awards with awards made by artificially constructed juries.¹²⁰ To accomplish this task, Vidmar randomly selected jurors, put them in groups of six or twelve, and calculated an average damage award based on the median award given by each member.¹²¹ The average award for twelve-person juries was \$48,900, and the average award for six-person juries was \$51,390.¹²² These figures were similar to the mean award given by legal professionals (\$50,433).¹²³ Even more significantly, the standard deviation (which signals variability) was \$10,970 for the twelve-person juries and was \$12,290 for the six-person juries, whereas the standard deviation was \$16,730 for individual lawyers.¹²⁴ Thus, Vidmar concluded that “juries

114. Vidmar, *supra* note 65, at 114 (briefly summarizing the results). For a more in-depth description of the experiments, see VIDMAR, *supra* note 90, at 221–35.

115. VIDMAR, *supra* note 90, at 222–24.

116. *Id.* at 225.

117. *Id.*

118. *See id.*

119. *Id.* Vidmar noted that awarding noneconomic damages is a “pretty subjective process even for trained, experienced legal professionals.” *Id.* at 226.

120. *Id.* at 226–29.

121. *Id.* at 227.

122. *Id.* at 227–28.

123. *Id.*

124. *Id.*

yielded more reliable estimates of noneconomic damages than the legal professionals”¹²⁵

In conclusion, juries may, in fact, be more reliable than individual judges in determining certain types of damages. Vidmar based this conclusion on both the amount and the variability of the awards in his experiment.¹²⁶ Such a conclusion speaks to the inherent advantages of a continental jury. Jurors, by combining their unique, individual perspectives, can overcome the fact that they have little or no experience in the law and actually make decisions that match and even exceed those of individual judges, who have experience and knowledge but deliberate alone.¹²⁷

b. Controls

The second significant advantage to the continental jury model is the various controls that may be triggered if, in fact, a jury makes a mistake in determining liability or awarding damages.¹²⁸ First, there are formal controls, such as remittitur and appeal.¹²⁹ Second, there are informal controls, such as post-verdict negotiations.¹³⁰ These controls, in conjunction with the oversight of the trial judge, provide a valuable check on the jury’s power.

i. Formal Controls

There are several formal controls in place to address possible errors in jury verdicts. First, the trial judge in a civil case must agree with a jury’s verdict and enter formal judgment in order for the verdict to be considered valid.¹³¹ If the judge determines that the evidence presented did not justify the verdict, the judge has the power to: (1) set aside part of the verdict or damages, or (2) set aside the entire verdict and damages, and order a new trial.¹³² The civil defendant may move for a new trial or remittitur, which is a reduction in the verdict.¹³³ The standard for a court to find excessive damages is that the jury verdict shocks the judicial conscience or, in the alternative, the verdict is beyond the maximum a reasonable jury would award.¹³⁴ Third, the losing party may appeal the ver-

125. *Id.* at 227.

126. *Id.* at 227–28.

127. *See* Vidmar, *supra* note 65, at 114.

128. *See id.* at 118–19 (discussing possible causes for outlier verdicts, including jury instructions and evidence presented at trial).

129. *See id.* at 119–20.

130. *See id.* at 120–22.

131. *Id.* at 119. In making this determination, a judge must consider the “overwhelming weight of all proof taken together;” the judge cannot merely disagree with the jury’s assessment of witness credibility or weight of the evidence. Landsman, *supra* note 25, at 403.

132. Vidmar, *supra* note 65, at 119–20. In a criminal case, on the other hand, a jury verdict of acquittal is basically unreviewable. *See supra* note 20 and accompanying text.

133. FED. R. CIV. P. 59; Vidmar, *supra* note 65, at 119.

134. *See, e.g., O’Neill v. Krzeminski*, 839 F.2d 9, 13 (2d Cir. 1988).

dict to a higher court.¹³⁵ These procedural controls ensure that if a jury makes a mistake, the losing party has options to challenge the decision.

ii. Informal Controls

There are also various informal controls that have the ability to correct erroneous jury verdicts. First, post-verdict negotiations provide a platform for the individual parties to address large jury verdicts.¹³⁶ For instance, a successful plaintiff may agree to accept a lesser award in exchange for the defendant agreeing not to pursue an appeal, which tend to be expensive and drawn out.¹³⁷ Second, “high-low” agreements also serve to mitigate large jury verdicts.¹³⁸ Typically, the parties will specify the minimum amount to which the plaintiff is entitled as well as the maximum amount the defendant is willing to pay.¹³⁹ Then, if the jury awards an amount below the low figure (or even decides in favor of the defendant) or awards an amount above the high figure, the defendant will pay only the amount previously agreed upon depending on which threshold is crossed.¹⁴⁰ High-low agreements, which can be made before or during trial, protect both parties from a jury verdict perceived to be wrong in some regard.¹⁴¹ Moreover, Neil Vidmar has conducted research demonstrating that the largest verdict awards tend to be reduced the most by high-low agreements, thereby underscoring the effect that informal controls can have on incorrect jury verdicts.¹⁴²

In sum, both formal and informal controls play an important role in making adjustments to erroneous jury verdicts. In this way, the continental jury model allows for a check on the jury’s power.

c. Civic Participation

The third advantage to the continental jury model is that jury service may encourage other forms of civic participation, such as voting.¹⁴³ This phenomenon has been studied principally in the United States;

135. Vidmar, *supra* note 65, at 120. While the criminal defendant may appeal his conviction, the prosecution may not appeal an acquittal. Leipold, *supra* note 17, at 267.

136. Vidmar, *supra* note 65, at 120.

137. *Id.*

138. See JJ Prescott et al., *Trial and Settlement: A Study of High-Low Agreements* 1 (Harvard John M. Olin Center for Law, Econ., and Bus., Discussion Paper No. 678, 2010) (“High-low agreements allow both sides to hedge their bets and, perhaps as a result, these agreements appear to have become increasingly popular over the last 30 years.”).

139. This agreement is binding “regardless of the outcome of the trial.” BLACK’S LAW DICTIONARY 797 (9th ed. 2009).

140. Vidmar, *supra* note 65, at 120.

141. *See id.*

142. *Id.* at 120–22 (detailing the results of various studies, but noting that they cannot be comprehensive due to the confidential nature of high-low agreements). See Prescott et al., *supra* note 138, at 2–3 (presenting an empirical study of high-low agreements that uses actual data from a large, national insurance company).

143. Hans, *supra* note 6, at 284–85.

however, it is also worth considering in other countries, particularly those with emerging democracies.¹⁴⁴

i. United States

Studies of American juries have demonstrated an explicit link between jury service and other forms of civic participation. One study found that citizens who served on a criminal jury where a verdict was reached were more likely to vote in future elections than jurors who could not reach a verdict, were dismissed, or served as alternates.¹⁴⁵ This result underscores the theory of deliberative democracy, namely that “citizen deliberation . . . bolsters civic activity by increasing participants’ levels of political efficacy.”¹⁴⁶ A second study confirmed the link between jury service and subsequent voting by surveying court and voting records of more than 13,000 jurors in both criminal and civil cases.¹⁴⁷ Specifically, the study found that jurors who had not voted with regularity in the past and served on a criminal jury that deliberated in some capacity, regardless of whether a verdict was reached, were more likely to cast a ballot following their experience on the jury.¹⁴⁸

It is worth noting that this connection between jury service and other forms of civic participation was found only in criminal trials and not in civil trials.¹⁴⁹ Valerie Hans has suggested several possible explanations for this discrepancy, including that the experience of serving on a criminal jury may seem more like a “meaningful community activity” in which jurors act together to “reinforce their community values.”¹⁵⁰ Even though increased civic participation has been proven only in the context of criminal juries, the existence of such participation in that context remains a significant advantage of the continental jury system because it extends the value of the jury outside of the courtroom and into citizens’ everyday lives.

ii. Emerging Democracies

Against the backdrop of the studies demonstrating a link between jury service and civic participation in the United States, recent scholarship has emphasized the potentially significant effects of juries comprised exclusively of citizens in emerging democracies.¹⁵¹ Brent White, using

144. *Id.* at 285; see White, *supra* note 3, at 360.

145. Gastil et al., *supra* note 67, at 585 (taking into consideration individual jurors’ voting history).

146. See *id.* at 586 (citations omitted).

147. John Gastil et al., *Jury Service and Electoral Participation: A Test of the Participation Hypothesis*, 70 J. POL. 351, 352, 359 (2008).

148. *Id.* at 359.

149. *Id.* at 356, 359.

150. Hans, *supra* note 6, at 285.

151. White, *supra* note 3, at 360.

Mongolia as a case study, makes the case for juries as a viable alternative to rule-of-law reform.¹⁵²

White emphasizes the role deliberation can have in articulating community values in an emerging democracy like Mongolia.¹⁵³ White posits that jury deliberation could “play a critical role in encouraging more active civic engagement on important public issues,” such as striking a balance between traditional ideas about public land and the increasing privatization of land for economic development purposes.¹⁵⁴ Thus, White suggests that juries in Mongolia could “help define and set legal norms” in this context.¹⁵⁵

In addition to the effects of deliberation, White argues that “[j]uries can . . . check judicial corruption and create a public space for the fair and just resolution of conflict”¹⁵⁶ The role of the jury in this regard, which aligns with the original role of the jury in England and the United States, is crucial in a country where judges are seen as corrupt and citizens are often mistrustful of the government.¹⁵⁷ White suggests that juries can check judicial corruption by “dispensing decision-making power” and “providing a public audience for the exposure of official corruption.”¹⁵⁸ Although the link between jury service and other forms of civic participation has not been studied extensively outside of the United States, there is reason to believe that jury service can have a profound impact on citizens’ views on and roles in the government in emerging democracies.

d. Jury Nullification

The fourth advantage to the continental jury model is the phenomenon of jury nullification.¹⁵⁹ Jury nullification is controversial and is not endorsed by the U.S. Supreme Court because it means that juries are ignoring or deviating from the law.¹⁶⁰ Still, it remains a powerful feature of the continental jury.

152. *Id.* at 309–10 (arguing that “in emerging democracies, certainty is less important than contextualized justice that reflects community values”).

153. *Id.* at 360.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 360–61; *see supra* Part II.A (discussing the origins of the jury as a check against the government).

158. *See* White, *supra* note 3, at 361.

159. *See* VIDMAR & HANS, *supra* note 7, at 221–40; *supra* Part II.B.

160. *See* John C. Brigham, *The Jury System in the United States of America*, in UNDERSTANDING WORLD JURY SYSTEMS THROUGH SOCIAL PSYCHOLOGICAL RESEARCH 11, 12–13 (Martin F. Kaplan & Ana M. Martin eds., 2006); *see also* United States v. Thomas, 116 F.3d 606, 608 (2d Cir. 1997) (holding that a juror could be dismissed for refusing to apply the law as instructed by the court because such action was “an obvious violation of a juror’s oath and duty”).

i. United States

Jury nullification demonstrates the jury's role as the conscience of the community.¹⁶¹ In situations where jury nullification occurs, jurors frequently substitute their own political or moral judgments for the law as it is written.¹⁶² A classic example of jury nullification occurred in the United States in the mid-1800s when juries acquitted defendants accused of helping slaves escape from the South.¹⁶³ Although the defendants' actions violated the Fugitive Slave Act, many juries, reflecting popular sentiment at the time, disagreed with the law and chose not to enforce it by acquitting such defendants.¹⁶⁴ More recently, in the 1960s and 1970s, juries disregarded the law in the context of the civil rights movement and protests against the Vietnam War.¹⁶⁵ Thus, juries can provide valuable insight into popular sentiment about unpopular laws.

One reason that American juries have the power of nullification is because they do not have to explain their verdict.¹⁶⁶ In other words, this ability to "render general verdicts after secret deliberations without having to give reasons for their decision" gives juries the power, but not necessarily the right, to disregard the law.¹⁶⁷ It is precisely the lack of knowledge about what happens in the jury room has led scholars to distinguish among types of nullification.¹⁶⁸ Darryl Brown has delineated four situations in which jury nullification occurs: (1) the defendant violates a law perceived to be unjust, (2) a just law is applied in an unjust way, e.g., rendering disproportionate punishment, (3) the jury feels that the state has acted wrongly, and (4) the jury has bias or prejudice against one of the parties.¹⁶⁹ The first three situations fall "within the scope of the law and the historic role of the jury," whereas the fourth situation does not.¹⁷⁰ Because of a lack of information about jurors' thought processes, however, it is next to impossible to determine which type of nullification has occurred when a jury renders a verdict that appears to disregard the law.¹⁷¹

161. See Brigham, *supra* note 160, at 12.

162. See *id.*

163. *Id.*

164. *Id.*

165. *Id.* at 13; see Leipold, *supra* note 17, at 254–55 (listing present-day examples of suspected jury nullification, including the acquittals of Washington, D.C. Mayor Marion Barry, Dr. Jack Kevorkian, and Oliver North).

166. Brigham, *supra* note 160, at 12; see Jackson, *supra* note 24, at 516 ("If we allow a role for nullification in these instances, however, it makes no sense to say that the jury should always be made publicly accountable to the legal system because by their very nature these acts of nullification are challenges to the legal system.").

167. VIDMAR & HANS, *supra* note 7, at 227.

168. See *id.*; Jackson, *supra* note 24, at 515–16 (summarizing the difference between "intrasystemic" nullification, where the jury bases its decision on principles of justice in the law and "extrasystemic" nullification, where the jury bases its decision on a moral standard not recognized by the law).

169. VIDMAR & HANS, *supra* note 7, at 227.

170. *Id.*

171. See *id.* at 228; see Jackson, *supra* note 24, at 495 (discussing the role of secrecy in jury deliberations).

Despite the historical role of the American jury, studies have shown that jury nullification today is not that common.¹⁷² Jurors tend to agree with judges on verdicts and are often unaware of their power to nullify.¹⁷³ Even so, jurors retain the ability to “stand between the accused and an out-of-touch state.”¹⁷⁴

ii. Emerging Democracies

Jury nullification could have a profound impact in emerging democracies.¹⁷⁵ In such countries, the law may fail to reflect community ideas about fairness and social justice or may have been put in place anti-democratically.¹⁷⁶ In his case study of Mongolia, Brent White points to a bribery law as a potential candidate to demonstrate the power of jury nullification.¹⁷⁷ The law at issue holds an individual who makes a bribe to secure government services just as guilty as the public official who solicits the bribe.¹⁷⁸ White explains that such a law provides no incentive for individuals to expose public corruption because of fear of punishment themselves.¹⁷⁹ A jury, however, might refuse to convict such individuals, which has the potential to nullify the law by opening the door for individuals to expose government corruption.¹⁸⁰ Like the juries of the early United States, juries in emerging democracies possess the ability to shape the contours of their laws through the power of nullification.¹⁸¹

In summary, the continental jury model has numerous advantages. Juries made up of only citizens deliver verdicts with which judges agree, successfully process complex cases, do not demonstrate bias toward or against certain parties, and determine damages reliably. In the event that a jury delivers an erroneous verdict, procedural controls can rectify the situation. In addition, jury service can lead to other forms of civic participation. Finally, all-citizen juries have the important power of nullification.

172. VIDMAR & HANS, *supra* note 7, at 240. *But see* Leipold, *supra* note 17, at 254–55 (noting a few examples of recent suspected jury nullification).

173. VIDMAR & HANS, *supra* note 7, at 240. This lack of awareness of the power to nullify stems, in part, from the fact that current practice dictates that judges do not instruct jurors regarding this power; *see* Leipold, *supra* note 17, at 257.

174. VIDMAR & HANS, *supra* note 7, at 240.

175. *See* White, *supra* note 3, at 359.

176. *Id.*

177. *Id.*

178. *Id.* (noting that individuals pay bribes out of necessity because “systemic corruption thrives” in Mongolia).

179. *Id.*

180. *Id.*

181. *See id.* (arguing that “jury nullification itself is part of the law-making project”); *supra* notes 11–12, 14 (discussing the original purpose of the early English and American juries).

2. *Disadvantages*

The continental jury model does have some disadvantages in comparison with the collaborative court model. First, negative public perception of juries is prevalent, both in the United States and abroad.¹⁸² Second, many people believe that juries make mistakes by convicting the innocent or acquitting the guilty.¹⁸³ Third, there are some consistent points of disagreement between judges and juries regarding case outcomes.¹⁸⁴ These Subsections address each of these elements in turn.

a. Negative Public Perception

One disadvantage to the continental jury model is the widespread negative public perception of juries.¹⁸⁵ In the United States, this attitude has resulted from certain highly publicized cases in which the news media has portrayed a jury's decision in an unfavorable light.¹⁸⁶ In Europe, a distrustful attitude has developed in countries where the continental jury has been newly introduced or reinstated.¹⁸⁷ In both situations, these negative public perceptions threaten the credibility of the jury system as a whole.¹⁸⁸

i. United States

The negative public perception of juries in the United States results largely from seemingly unjustified verdicts in a few highly publicized cases. On the civil side, the most symbolic example is the McDonald's coffee spill case.¹⁸⁹ On the criminal side, infamous cases include the acquittal of O.J. Simpson, and, most recently, the acquittal of Casey Anthony.¹⁹⁰

182. See, e.g., Martin F. Kaplan & Ana M. Martín, *Introduction and Overview*, in UNDERSTANDING WORLD JURY SYSTEMS THROUGH SOCIAL PSYCHOLOGICAL RESEARCH 1, 4 (Martin F. Kaplan & Ana M. Martín eds., 2006) (describing a "lingering distrust" of continental juries in countries where the jury system has recently been reinstated); Vidmar, *supra* note 65, at 95 (stating that international practitioners and legal scholars ask the author "to explain the 'crazy,' 'outrageous' system by which we allow groups of untutored lay persons to decide civil disputes").

183. See VIDMAR & HANS, *supra* note 7, at 191.

184. See *id.* at 148–52.

185. See *id.* at 16. But see Hans, *supra* note 6, at 281 (citing public opinion polls in favor of the jury); AM. BAR ASSOC., JURY SERVICE: IS FULFILLING YOUR CIVIC DUTY A TRIAL? 5 (July 2004), available at http://www.abanow.org/wordpress/wp-content/files_flutter/1272052715_20_1_1_7_Load_File.pdf (reporting that seventy-five percent of 1029 American adults polled said they would want their criminal case decided by a jury).

186. See VIDMAR & HANS, *supra* note 7, at 16–17.

187. See Kaplan & Martín, *supra* note 182, at 4.

188. See VIDMAR & HANS, *supra* note 7, at 16.

189. See *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309 (N.M. Dist. Aug. 18, 1994).

190. Lizette Alvarez, *Florida Mother Is Found Not Guilty of Murder*, N.Y. TIMES, July 6, 2011, at A1.

Many Americans believe that “legal judgments are out of line.”¹⁹¹ The McDonald’s coffee spill case is a classic illustration of this belief—a jury awards an elderly woman nearly \$3 million for spilling hot coffee on herself.¹⁹² Of course, the story did not end there, even if most of the media reporting did.¹⁹³ Notably, the trial judge later reduced the award by seventy-five percent, and the parties settled for an undisclosed amount.¹⁹⁴ Beyond that, the *Wall Street Journal* interviewed the jurors, who explained their rationale for returning a verdict in favor of the plaintiff (the defendant demonstrated “callous disregard for the safety of people”) and for calculating the punitive damages (the amount was based on estimated figures for two days’ worth of coffee sales at McDonald’s).¹⁹⁵ Placed in context, the jury’s actions do not seem outrageous. Given the media’s attention primarily on the verdict alone, however, the McDonald’s coffee spill case has become a symbol of what is wrong with the American judicial system.¹⁹⁶

Many Americans also believe that juries make mistakes because they acquit “obviously guilty criminals.”¹⁹⁷ The Casey Anthony trial is a recent example of this belief—the general public was outraged when jurors acquitted the young mother of killing her daughter.¹⁹⁸ People stood outside the courthouse with signs reading “Arrest the Jury” and “Somewhere a Village is Missing 12 Idiots.”¹⁹⁹ Because of the intense backlash, the jurors’ names were withheld from the public for three months following the trial.²⁰⁰ When one juror spoke with the media, she explained the jury’s decision by saying there simply was not enough evidence to convict.²⁰¹ Like the McDonald’s case, the jurors do not appear to have been reckless or illogical in their decision, despite the public’s perception.²⁰² In

191. HANS, *supra* note 71, at 50.

192. See Andrea Gerlin, *A Matter of Degree: How a Jury Decided That a Coffee Spill Is Worth \$2.9 Million*, WALL ST. J., Sept. 1, 1994, at A1.

193. HANS, *supra* note 71, at 72; see HOT COFFEE (Group Entertainment 2011) (documentary film refuting some of the commonly held misconceptions about the McDonald’s coffee spill case).

194. *McDonald’s Coffee Award Reduced 75% by Judge*, WALL ST. J., Sept. 15, 1994, at A4; *McDonald’s Settles Lawsuit Over Burn from Coffee*, WALL ST. J., Dec. 2, 1994, at B6.

195. Gerlin, *supra* note 192, at A1.

196. See HANS, *supra* note 71, at 50–51. Hans has noted that advertising campaigns sponsored by the business and insurance industries also contribute to the development of many Americans’ negative perceptions of the litigation system. *Id.* at 73; see HOT COFFEE, *supra* note 193 (documentary film detailing the tort reform advertising campaigns).

197. See VIDMAR & HANS, *supra* note 7, at 16.

198. Alvarez, *supra* note 190, at A1.

199. See *Casey Anthony Trial: Judge Could Reveal Jury Members’ Names on Tuesday*, HUFFINGTON POST (Oct. 24, 2011, 4:53 PM), http://www.huffingtonpost.com/2011/10/24/casey-anthony-trial-jury-names_n_1028699.html?ncid=edlinkusaolp00000003#s303160&title=Casey_Anthony_Trial; Amy Pavuk & Anthony Colarossi, *Casey Anthony Trial: Names of Jurors Revealed*, ORLANDO SENTINEL (Oct. 25, 2011), http://articles.orlandosentinel.com/2011-10-25/news/os-casey-anthony-juror-names-released-20111025_1_juror-names-alternate-jurors-casey-anthony-trial.

200. Pavuk & Colarossi, *supra* note 199.

201. See Mary Kate Burke et al., *Casey Anthony Juror: ‘Sick to Our Stomachs’ Over Not Guilty Verdict*, ABC NEWS (July 6, 2011), http://abcnews.go.com/US/casey_anthony_trial/casey-anthony-juror-sick-stomach-guilty-verdict/story?id=14005609.

202. See *id.*

spite of the jurors' explanation and perhaps because of the public's fascination with the case, it is likely that the Casey Anthony acquittal will, in time, become another symbol of the commonly held belief that juries let guilty people go free.²⁰³

ii. Europe

In Europe, the public has developed a distrustful attitude toward juries in countries where the continental jury has been newly introduced or reinstated.²⁰⁴ Two such countries suffering from a jury image problem are Russia and Spain, which re-established juries composed exclusively of laypersons in 1993 and 1995, respectively.²⁰⁵

Russia had versions of both the continental jury and the collaborative court during various times in the country's history.²⁰⁶ Before the jury reform enacted in 1993, Russia's collaborative court included one judge and two "people's assessors," who were laypeople but were known as "nodders" for generally deferring to the judge.²⁰⁷ In the early stages of the continental jury's resurrection in Russia, juries tended to deliver lenient verdicts, which one scholar reasoned was partly the result of a "profound mistrust among the population of criminal investigators and police"²⁰⁸ Just over ten years later, more recent polls of the Russian public demonstrate that their trust in the judicial system is "abysmally low," primarily because the jury reforms have been unsuccessful in eradicating corruption among judges.²⁰⁹

Spain, on the other hand, had only the continental jury for intermittent periods of time, depending on the ruling party.²¹⁰ Despite never having had the collaborative court, one poll demonstrated that the Spanish public preferred judges to decide cases over juries, in part because they believed judges' decisions would be more fair as a result of their legal training and experience.²¹¹ One explanation for the public's wariness toward juries might stem from the fact that Spain does not have a long his-

203. See VIDMAR & HANS, *supra* note 7, at 195–96 (noting that failure to meet the high standard for proof in criminal law—proof beyond a reasonable doubt—is often the reason why a jury acquits even if it appears that the defendant committed the crime).

204. Kaplan & Martín, *supra* note 182, at 4.

205. Martín & Kaplan, *supra* note 36, at 71; Stephen C. Thaman, *The Resurrection of Trial by Jury in Russia*, 31 STAN. J. INT'L L. 61, 63 (1995).

206. Thaman, *supra* note 205, at 64–68.

207. *Id.* at 67.

208. Stephen C. Thaman, *Europe's New Jury Systems: The Cases of Spain and Russia*, in WORLD JURY SYSTEMS 319, 348 (Neil Vidmar ed., 2000).

209. Stephen C. Thaman, *The Nullification of the Russian Jury: Lessons for Jury-Inspired Reform in Eurasia and Beyond*, 40 CORNELL INT'L L.J. 355, 366 & n.63 (2007); see also Stephen C. Thaman, *The Good, the Bad, or the Indifferent: 12 Angry Men in Russia*, 82 CHI.-KENT L. REV. 791, 808 (2007) (reporting that fifty-one percent of Russians polled in 2006 thought it was "easy to buy or scare" jurors).

210. Martín & Kaplan, *supra* note 36, at 71.

211. *Id.* at 75.

tory of democracy and that many citizens still remember “popular tribunals,” quasi-juries subject to political control.²¹²

Therefore, in countries like Russia and Spain, juries may have a negative connotation in the public eye, due to a general distrust of the legal system. This perception is a significant hurdle for the continental jury model to overcome.

b. Mistaken Convictions and Acquittals

In addition to viewing juries in a negative light, many Americans believe—based on actual results of trials—that juries convict the innocent and acquit the guilty.²¹³ The occasional fallibility of the jury becomes apparent through two significant examples: the Innocence Project and the *CSI* effect.

The Innocence Project, which uses DNA testing to exonerate individuals who have been convicted of crimes which they did not commit, demonstrates that juries sometimes convict innocent citizens.²¹⁴ Such wrongful convictions can occur because the jury relies on unsound trial evidence, including unreliable eyewitness identifications, improper forensic science, false confessions by defendants, or informant testimony.²¹⁵ Because the jury and even the judge may be unaware that such evidence is flawed, the jury may, in fact, return erroneous convictions.²¹⁶ The Innocence Project, therefore, has exposed a potential flaw in the role of the jury as well as the legal system as a whole.

On the other end of the spectrum, juries may acquit the guilty, in part because of the *CSI* effect. The *CSI* effect refers to the phenomenon that “[j]urors who consume a steady diet of *CSI* television are reportedly reluctant to convict when the messy world of real criminal trials does not measure up to what they have come to expect from prosecutors trying to prove their cases.”²¹⁷ One study found that thirty-eight percent of prosecutors in a populous county in Arizona believed they had at least one trial in which the jury acquitted or was hung because there was no forensic evidence “to corroborate testimony that should have been sufficient by itself to sustain a conviction.”²¹⁸ Although the *CSI* effect has its critics

212. *Id.* at 82.

213. *See* VIDMAR & HANS, *supra* note 7, at 191.

214. THE INNOCENCE PROJECT, <http://www.innocenceproject.org> (last visited Apr. 11, 2013).

215. *The Causes of Wrongful Convictions*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/> (last visited Apr. 11, 2013). For an in-depth discussion of the common causes of wrongful convictions, see BARRY SCHECK ET AL., *ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* (3d ed. 2003).

216. *See* VIDMAR & HANS, *supra* note 7, at 193.

217. *Id.* at 191.

218. MARICOPA CNTY. ATTORNEY'S OFFICE, *CSI: MARICOPA COUNTY: THE CSI EFFECT AND ITS REAL-LIFE IMPACT ON JUSTICE 5* (June 30, 2005), available at http://www.ce9.uscourts.gov/jc2008/references/csi/CSI_Effect_report.pdf.

and doubters,²¹⁹ it is a very real possibility that jurors may subject evidence to a higher standard because of the knowledge they have gained (or think they have gained) from watching *CSI* and other shows like it. Thus, the *CSI* effect shows that juries sometimes acquit guilty individuals.

c. Disagreement Between Judges and Juries

Finally, there are some consistent points of disagreement between judges and juries when it comes to case outcomes.²²⁰ Harry Kalven, Jr. & Hans Zeisel's landmark study of judge-jury agreement demonstrated that, in criminal cases, judges and juries agree approximately seventy-five percent of the time, which leaves an unsettling twenty-five percent for disagreement.²²¹ Kalven and Zeisel identified the following factors that frequently appeared in instances of disagreements between judges and juries: (1) evidence issues, (2) facts that only the judge knew, (3) disparity of counsel, (4) jury sentiments about the individual defendant, and (5) jury sentiments about the law.²²² They found that the first, fourth, and fifth categories were the primary reasons for disagreement, which presented the following issue: "[T]he jury in disagreeing with the judge is neither simply deciding a question of fact nor simply yielding to a sentiment or value; it is doing both. It is giving expression to values and sentiments under the guise of answering questions of fact."²²³ Subsequent studies by different scholars have come to similar conclusions about both criminal and civil juries.²²⁴ While it is impossible to accurately predict when judges and juries will see eye to eye and when they will diverge, some consistent disagreement is one of the inevitable flaws of the continental jury model.

In summary, the continental jury model has disadvantages. The most significant disadvantage is the widespread negative public perception of juries, both in the United States and in Europe. Relatedly, many people think that juries mistakenly convict the innocent and acquit the guilty. Finally, studies demonstrate some consistent points of disagreement between judges and juries regarding case outcomes.

219. See VIDMAR & HANS, *supra* note 7, at 197 ("There is no direct evidence—yet—of a *CSI* effect."); see also Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 *YALE L.J.* 1050 (2006).

220. See VIDMAR & HANS, *supra* note 7, at 148–52.

221. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 56–57 (1966).

222. *Id.* at 106–08.

223. *Id.* at 115, 116.

224. See Valerie P. Hans, *The Illusion and Realities of Jurors' Treatment of Corporate Defendants*, 48 *DEPAUL L. REV.* 327, 342 tbl.1 (1998); Bruce D. Spencer, *Estimating the Accuracy of Jury Verdicts* 25–26 (Northwestern University Institute for Policy Research, Working Paper No. 06-05, 2007); *supra* Part III.A.1.a.i.

B. Collaborative Court Model

This Section turns to the collaborative court model, which is found in civil-law countries like France and Germany.²²⁵ Like the continental jury, the collaborative court has both advantages and disadvantages. This Section delineates those advantages and disadvantages by using various European jury systems as illustrative examples.

1. Advantages

The collaborative court model has some advantages over the continental jury model. First, juries have the potential to be more accountable for their decisions if they deliberate in the presence of a judge.²²⁶ Second, citizens and judges can exchange their differing views to better inform their combined decision about the case.²²⁷ These Subsections discuss each of these elements.

a. Improved Accountability

First, juries might be more accountable for their decisions if they deliberate with a judge.²²⁸ Proponents of the collaborative court model believe that the “restraint imposed by professional judges” will prevent a jury from acquitting a defendant too quickly or deciding the case based on emotions instead of facts.²²⁹ Moreover, proponents argue that a collaborative court could function as a “safeguard against the potential incompetence, bias, and capriciousness” of citizen jurors, although it should be noted that there is scant direct evidence proving that having a judge sit with citizen jurors actually improves the quality of their decision making.²³⁰ In Germany, one survey indicated that the public perceived lay jurors to be less competent than professional judges in terms of rendering a fair judgment.²³¹ Whether such a perception is true, the presence of a professional judge on a jury can at least assure the public that justice is being served. Therefore, it is possible that having judges and citizens deliberate together increases the accountability of the jury itself.

b. Exchanging Views

Second, citizens and judges on a collaborative court can exchange views to reach a decision that reflects both community and legal values.²³² Citizens can relay community norms and values to judges, while judges

225. See *supra* Part II.C.2.

226. See Jackson & Kovalev, *supra* note 2, at 121.

227. Hans, *supra* note 6, at 288.

228. See Jackson & Kovalev, *supra* note 2, at 121.

229. See *id.* at 121 & n.172.

230. See Kaplan et al., *supra* note 42, at 121.

231. See Bliesener, *supra* note 47, at 187.

232. Hans, *supra* note 6, at 288.

can help citizens better understand unfamiliar law.²³³ This exchange comports with the original purpose of juries to “inject community values into the formal legal process, and thus they can bring a sense of equity and fairness against the cold and mechanistic application of legal rules.”²³⁴ In Germany, for instance, deliberation often begins with the professional judge summarizing the case and explaining possible outcomes, which can force judges to reconsider the issues in a way they would not have previously.²³⁵ Furthermore, the prescribed voting order during deliberation in all collaborative court models mandates that lay jurors vote before the judge(s) presiding, with the goal of equalizing views and avoiding undue influence.²³⁶ Thus, the collaborative court has the potential to foster meaningful discussion between citizens and judges.

To summarize, the collaborative court model has some theoretical advantages over the continental jury model. Juries may have increased accountability for their decisions if they deliberate with a judge. In addition, citizens and judges bring their different backgrounds to deliberation, which can lead to a better informed ultimate decision.

2. *Disadvantages*

The collaborative court model has some significant drawbacks on a practical level. First, judges could potentially dominate deliberations, rendering the lay jurors powerless.²³⁷ Second, many judges and other members of the legal community have negative perceptions of lay jurors.²³⁸ Third, there is no evidence that participation as a lay juror in the collaborative court model encourages civic participation.²³⁹ These Subsections examine each of these concerns.

a. *Judges May Dominate Hearings and Deliberations*

First, judges have the potential to overpower deliberations with lay jurors.²⁴⁰ While lay jurors might outnumber judges on a typical collaborative court, lay jurors are still considered a minority because they have less influence and the judges often consider them “less relevant and effi-

233. *Id.*

234. *See* Vidmar, *supra* note 5, at 1.

235. *See* Bliesener, *supra* note 47, at 186.

236. Kaplan et al., *supra* note 42, at 112–13.

237. *See* Jackson & Kovalev, *supra* note 2, at 100.

238. *See, e.g.*, Bliesener, *supra* note 47, at 180–81 (citing several surveys in which German professional judges expressed their dissatisfaction with citizens who serve as lay jurors).

239. *But see* Jackson & Kovalev, *supra* note 2, at 100 (“All of the models may be said to enhance political participation in government by encouraging lay persons to participate in the judicial branch of government.”).

240. *Id.*; *see* Danuta Parlak, *Social-Psychological Implications of the Mixed Jury in Poland*, in UNDERSTANDING WORLD JURY SYSTEMS THROUGH SOCIAL PSYCHOLOGICAL RESEARCH 165, 175 (Martin F. Kaplan & Ana M. Martín eds., 2006) (“In practice, professional judges exercise their superior status in dominance over both the process and outcome of decision-making. Domination may stem from their superiority in one or more bases of power: expertise, legitimacy, and social/normative status.”).

acious.”²⁴¹ In an Italian mixed jury system, for instance, the professional judge is supposed to avoid using technical language and moderate discussions in the deliberation room, thereby paving the way for the legally trained judge to frame the issues and unduly influence the lay jurors.²⁴² Moreover, legal professionals and laypeople reason differently, and if some of those individuals are viewed as “experts,” it is easy to see whose ideas could dominate the discussion.²⁴³ In countries where lay jurors are permitted to ask questions during the trial, such as in Germany, they often remain passive or make inquiries that professional judges perceive as “unimportant or redundant.”²⁴⁴ Sometimes jurors do not even have access to the same case files as the judge, which could put them at a disadvantage.²⁴⁵ Overall, despite having the same task, it seems as though lay jurors who lack legal training may defer to or be influenced by judges who possess legal training, thereby destroying the whole point of a jury premised on collaboration.

b. Negative Perceptions of Lay Jurors

Second, in countries with the collaborative court, many judges and other members of the legal community have negative perceptions of lay jurors.²⁴⁶ For example, in Germany, professional judges complain about lay jurors’ lack of legal knowledge, contributions, and emotional objectivity.²⁴⁷ One survey even found that forty percent of German professional judges would support eliminating the participation of lay jurors entirely.²⁴⁸ Surveys of the German public regarding lay jurors’ competence are mixed at best—some doubt the ability of lay jurors to make sound judgments, while others believe that collaborative courts deliver superior judgments than professional judges would acting alone.²⁴⁹ Similar sentiments exist in Poland, where a common stereotype of lay jurors is that they are motivated to serve by personal, and not public interest, reasons.²⁵⁰ Unlike in the United States, where the judiciary tends to have a favorable opinion of juries even if the public does not,²⁵¹ judges and other

241. Kaplan et al., *supra* note 42, at 116–17.

242. See Patrizia Catellani & Patrizia Milesi, *Juries in Italy: Legal and Extra-Legal Norms in Sentencing*, in UNDERSTANDING WORLD JURY SYSTEMS THROUGH SOCIAL PSYCHOLOGICAL RESEARCH 125, 129 (Martin F. Kaplan & Ana M. Martín eds., 2006). Italian criminal juries consist of six lay jurors and two professional judges, one of whom is considered the “president” of the trial. *Id.* at 127. The lay jurors and the professional judges wear different attire. *Id.* at 128.

243. *See id.* at 139.

244. *See* Bliesener, *supra* note 47, at 185.

245. *See id.* at 184 (noting that German law is unsettled in this area).

246. *See, e.g., id.* at 180–81.

247. *See id.* at 180.

248. *See id.* at 181.

249. *See id.* at 187.

250. *See* Parlak, *supra* note 240, at 168–69. One stereotype, for example, is that many Polish citizens want to serve on a jury simply to make money. *See id.* at 169.

251. *See supra* Parts III.A.1.a.i (agreement between judges and juries), III.A.2.a.i (negative perception of juries in the United States).

legal professionals in countries that employ the collaborative court tend to have an overwhelmingly negative perception of lay jurors.

c. No Motivation for Civic Engagement

Third, it is not clear that participation as a lay juror in the collaborative court model encourages other forms of civic participation.²⁵² This disadvantage is different in character than the other disadvantages previously discussed in that it is based on an explicit comparison with the continental jury model. Deliberative democracy is premised on citizens deliberating as equals, but much of the scholarship on the collaborative court model in European countries demonstrates that professional judges and lay jurors do not, in fact, act as equals in this setting.²⁵³ Furthermore, studies of German citizens who have served as lay jurors reveal that they did not talk openly about their experiences with friends and family, although this reluctance may be attributed to certain confidentiality requirements.²⁵⁴ Germans are typically recruited to serve as lay jurors; it is rare for citizens to volunteer.²⁵⁵ Although juries are often instituted with the goal of encouraging civic participation, it is unclear if that goal has been achieved in countries with the collaborative court model.

Thus, the collaborative court model has some practical disadvantages. In deliberations, judges may control the conversation, which takes away the power of the lay jurors. Moreover, many members of the legal community possess negative images of lay jurors. In comparison with the continental jury model, there is no evidence that participation as a lay juror in the collaborative court model encourages civic participation.

IV. RECOMMENDATION

Having evaluated the continental jury model and the collaborative court model side-by-side, the continental jury emerges as the model that is most likely to guarantee active and meaningful citizen participation in legal decision making. Despite the robust research demonstrating the competency of the all-citizen jury, it continues to suffer from a serious image problem in the eyes of the public. To combat this image, this Note recommends that the United States legal system adopt some form of a verdict justification requirement.

252. *But see* Jackson & Kovalev, *supra* note 2, at 100 (arguing that jury service encourages individuals to participate in the judicial branch of government).

253. Hans, *supra* note 6, at 288.

254. *See* Bliesener, *supra* note 47, at 190.

255. *See id.* at 182.

A. Why the Continental Jury Model Is Superior

In weighing the pros and cons of the continental jury and collaborative court models, the continental jury proves to be superior because of how effectively it works in practice.

The practical advantages of the continental jury model outnumber the theoretical advantages of the collaborative court model. As studies have demonstrated, all-citizen juries are extremely competent—they deliver verdicts with which judges (mostly) agree, handle complex cases, do not demonstrate bias toward or against certain parties, and determine damages reliably.²⁵⁶ Beyond their basic capabilities, citizens serving on such juries have the power to nullify the law and may be more likely to vote; both history and research have demonstrated these claims to be true.²⁵⁷ The collaborative court model, on the other hand, possesses theoretical advantages that do not play out in reality. Juries have the potential to be more accountable for their decisions by deliberating with judges, and the resulting verdict might be better informed because it is the product of differing perspectives.²⁵⁸ But because judges tend to dominate deliberations in practice,²⁵⁹ these theoretical advantages are rendered worthless and citizen jurors in this system are rendered powerless.

In examining the disadvantages, there is an overarching theme that appears in both jury system models: negative public perception. In the continental jury model, many people, both in the United States and abroad, believe that juries make mistakes by convicting the innocent, acquitting the guilty, or awarding outrageous sums of damages.²⁶⁰ Similarly, in the collaborative court model, judges and other members of the legal community look unfavorably on lay jurors.²⁶¹ Considering the disadvantages to be equal—which is generous given the other major disadvantage of the collaborative court model (that judges tend to control the deliberations with jurors)—the continental jury model emerges as the superior model based on a simple weighing of pros and cons.

B. Benefits of Verdict Justification

This Note recommends that the United States consider instituting a verdict justification requirement. On a practical level, this requirement would mean that verdict justification would apply to all types of decisions, but jury deliberations would remain protected. On a more theoretical level, this plausible tweak to the jury system has the potential to accomplish three related goals. Verdict justification can improve the

256. See *supra* Part III.A.1.a.

257. See *supra* Part III.A.1.c–d.

258. See *supra* Part III.B.1.

259. See *supra* Part III.B.2.a.

260. See *supra* Part III.A.2.a–b. But see *supra* note 185 (detailing two polls demonstrating that some Americans hold relatively favorable opinions of the jury system).

261. See *supra* Part III.B.2.b.

negative public perception of juries; assist judges, attorneys, and parties in better understanding a jury's decision; and help jurors feel more confident about their verdicts.

As an initial matter, verdict justification should apply to all types of jury decisions, whether convictions or acquittals in criminal cases or finding in favor of the plaintiff or defendant in civil cases. As previously discussed in Part II.B., the Federal Rules of Civil Procedure explicitly authorize the discretionary use of special verdicts. In criminal cases, the issue is more contentious. Some scholars support the concept of verdict justification for convictions because a conviction must be based on legal standards.²⁶² Also, a conviction deprives a defendant of liberties and subjects that individual to a possibly lengthy sentence in prison.²⁶³ Those scholars do not think juries should have to justify their verdicts for acquittals, however, because such justification would be inconsistent with the power of nullification and the presumption of innocence.²⁶⁴ While this distinction makes sense, it does not go far enough. First, while there is tension between jury nullification and verdict justification (because a jury that intends to nullify would have to explicitly state that it is rejecting the law),²⁶⁵ the U.S. jury system can support both features because of the rarity of jury nullification.²⁶⁶ Second, notwithstanding the presumption of innocence, some of the most notorious jury verdicts—those that have caused confusion and anger among the American public—were, in fact, acquittals.²⁶⁷ Therefore, in the interest of public accountability, it makes sense to extend the verdict justification to all types of verdicts, not just convictions.

Verdict justification would not necessarily mean that the jury's deliberations themselves would become public information. Making jury deliberations public could have serious ramifications. Jurors might not be as candid in discussions and they might be less willing to serve if their views were made known to everyone.²⁶⁸ In addition, finality and public confidence in the verdict and even the institution of the jury could be undermined.²⁶⁹ Rather, verdict justification would mean that juries would be required to answer a series of questions that could shed light on their reasoning and thought process without actually revealing everything.

Most importantly, a verdict justification requirement will help improve the negative public perception of juries. A verdict justification requirement could change the "jury's relative lack of accountability to the

262. See Jackson, *supra* note 24, at 527.

263. See Stephen C. Thaman, *Should Criminal Juries Give Reasons for Their Verdicts?: The Spanish Experience and the Implications of the European Court of Human Rights Decision in Taxquet v. Belgium*, 86 CHI.-KENT L. REV. 613, 620–21 (2011).

264. See Jackson, *supra* note 24, at 517; Thaman, *supra* note 263, at 662.

265. See Jackson, *supra* note 24, at 516; Leipold, *supra* note 17, at 277–78.

266. See *supra* notes 172–73 and accompanying text.

267. See *supra* Part III.A.2.a.i.

268. See Jackson, *supra* note 24, at 494–95.

269. See *id.*

legal system, the public and the parties in the case.”²⁷⁰ Because of the secretive nature of jury deliberations and the subsequent one- or two-word answer (“guilty” or “not guilty”), it is not uncommon for the public to feel mystified by a jury verdict.²⁷¹ A jury’s answers to a verdict justification questionnaire would be publicly available, similar to how courts treat case filings. The media would have access to the questionnaire and could fill in missing pieces to the public when a jury delivers what seems like a puzzling verdict. Therefore, a verdict justification requirement could improve the negative public perception of juries in the United States.

Next, a verdict justification requirement could help both parties and practitioners better understand how juries make decisions. Judges are accountable for their decisions in the sense that they must explain their reasoning and can be overturned on appeal, so it seems logical that juries, who perform essentially the same task as judges in many instances, should also explain their decisions, at least to a certain degree.²⁷² Especially in situations where jurors’ names are kept secret,²⁷³ answers to a verdict justification questionnaire could provide insight into the jury’s understanding of the facts of the case, which could help practitioners better prepare for future cases.

Finally, a verdict justification requirement might help jurors themselves feel more confident about their verdicts. Verdict justification essentially guides jurors by “forc[ing] them to concentrate on their basic legal duty to convict only if satisfied that the specific elements of the offence have been proved.”²⁷⁴ While we have already seen that juries consistently deliver verdicts with which judges agree, verdict justification could also help the jurors themselves feel more confident in their decision.²⁷⁵

C. Form of Verdict Justification

This Note makes two specific recommendations as to the form and process of verdict justification. First, courts should place limits on the number of questions contained in a verdict justification questionnaire. Second, judges should be flexible in allowing jurors to deliberate on their own and receive the questions list when they have reached a decision. Both of these recommendations will allow the jury to continue to function in much the same way that it does today, with a more developed outcome.

270. *Id.* at 477.

271. *See id.* at 488 (describing a jury verdict as “sphinx-like”).

272. *See id.* at 510, 515.

273. Jurors’ names are often kept confidential in high-profile cases for safety concerns, among other reasons. *See* Part III.A.2.a.i (discussing the Casey Anthony trial).

274. *See* Jackson, *supra* note 24, at 519; *see also supra* note 26 and accompanying text (suggesting that special verdicts could increase accuracy).

275. *See* Heuer & Penrod, *supra* note 78, at 50.

First, judges, who would be responsible for drafting the verdict justification questionnaire, should place limits on the number of questions contained therein. Requiring verdict justification has the potential to unduly influence jurors' reasoning and subsequent verdict. In Spain and Russia, where the questions list is frequently used, it is normal for the jury to answer more than one hundred questions.²⁷⁶ While a series of detailed questions might encourage jurors to think more critically or deeply about the evidence, there is also potential for confusion, fatigue, and lack of independent thought. The questions list and accompanying verdict rationales have been described as a "two-edged sword, enhancing systematic reasoning but also unintentionally confusing juries and leading to the use of simplifying strategies."²⁷⁷ While answers to a list of hundreds of questions might be helpful to judges and other legal professionals, it would not further one of the primary goals with which this Note is concerned—increasing the jury's accountability to the public. Thus, this Note recommends that limits be placed on the number of questions that could be contained in a verdict justification. Alternatively, instead of using a questions list, courts could just ask for a concise statement summarizing the jury's rationale for its decision.²⁷⁸ These considerations are of paramount importance when deciding what type of verdict justification fits with the American jury system.

Second, judges should allow jurors to deliberate on their own and receive the questions list when they feel they have reached a decision. Courts and legal scholars have expressed concern that having juries answer questions related to the verdict runs the risk of taking away some of their primary functions and purposes. In considering whether to have a jury answer questions based on a verdict, the Court of Appeals for the First Circuit pointed out that "the jury, as the conscience of the community, must be permitted to look at more than logic."²⁷⁹ Also, individual jurors are supposed to bring their diverse, collective experiences to the courtroom, which means it is possible that although jurors agree on an outcome, their reasoning could (and maybe should) differ.²⁸⁰ To this end, the Note recommends a few possible solutions. Judges could allow jurors to deliberate on their own and then receive the questions list when they feel they have reached a decision. Alternatively, judges could instruct juries to discuss the questions first and vote at the end, thus endorsing an evidence-driven approach.²⁸¹ By carefully placing some limits on the process of verdict justification, courts can ensure that juries do not lose their inherent purpose of representing the community.

In sum, instituting a verdict justification requirement could bring clarity and understanding to the continental jury model in the United

276. Martín & Kaplan, *supra* note 36, at 80.

277. *Id.* at 83.

278. See Thaman, *supra* note 208, at 344–45.

279. United States v. Spock, 416 F.2d 165, 182 (1st Cir. 1969).

280. See Jackson, *supra* note 24, at 522.

281. See *id.* at 520–21.

States. Asking the jury to provide answers to questions or a short statement of its reasoning will improve the negative public image of juries and help people understand the underlying rationale beyond a one- or two-word answer. Verdict justification should apply to both acquittals and convictions because some of the most notorious jury verdicts have been acquittals. At the same time, it is important to continue to keep jury deliberations secret, limit the number of questions juries might have to answer, and give juries flexibility in making their decision independently of the questionnaire. This recommendation will maintain the integrity of the jury system while providing for a more meaningful verdict.

V. CONCLUSION

Jury systems throughout the world are constantly changing. Some countries, like the United States, have a long tradition of using an independent body of twelve citizens to decide civil and criminal cases. Other countries, like Spain, have recently reintroduced the jury in a modified form—jurors are required to answer a series of questions to justify their verdict. Still other countries, like Japan, have instituted a system where jurors and judges deliberate together. These developments show that the jury is a highly valued institution that can be adapted to different legal systems.

A comparison of the primary models of jury composition demonstrates that the continental jury model, composed exclusively of citizens, is preferable to the collaborative court model, composed of both citizens and judges, because it is more likely to guarantee active and meaningful citizen participation in legal decision making. All-citizen juries capably perform their legal duty by delivering verdicts with which judges agree, handling complex cases, viewing the parties without bias, and determining damages reliably. They also have the power to nullify the law and may be more likely to vote after jury service. While the collaborative court model has some theoretical advantages over the continental jury model, in practice judges tend to dominate deliberations, making citizen participation meaningless. Of course, the continental jury model has some disadvantages. Many members of the public have negative perceptions of juries and believe that they make mistakes in their verdicts.

A possible solution to the negative public image of juries comes from examining other world jury systems: verdict justification. Requiring American juries to justify their verdict by answering a series of questions about the case or submitting a brief statement of the rationale for the verdict could greatly enhance the jury's accountability to the parties, the lawyers, and most importantly, the public. At the same time, this requirement would not substantially alter the original purpose of the American jury as an independent body that represents the community. Perhaps it is time for the American jury system to change, ever so slightly, so that more Americans can appreciate the power of the jury.

