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Commentary on Valerie P. Hans's Presidential Address

Can Juries be Lost in Translation?

Mary R. Rose

Amidst all the excitement that a focus on juries generates in me, and despite the admiration I feel for Professor Hans and other colleagues who have given significant time and energy to cross-national work, Valerie Hans' address also provokes in me a keen awareness of the current limits of the literature on juries. The literature has quite a bit of research on the "branches" associated with juries: the way juries' decisions agree (or not) with others decision makers (Eisenberg et al. 2005; Kalven and Zeisel 1966) or with reason (Vidmar 1995); narrative decision-making strategies that jurors use (Pennington and Hastie 1986), the link between juries and other civic participation (e.g., Gastil et al. 2008; Musick et al. 2015), group decision making dynamics and social influence (e.g., York Cornwell and Hans 2011; Sommers 2006), racial biases in jury processes (Fukurai, Butler, and Krooth 1993; Clair and Winter 2016), and political theory surrounding deliberation effects (e.g., Abramson, 1994; Gastil et al. 2008).

However, Professor Hans's essay reminded me that scholars seem less likely to talk about the tree itself. That is, jury scholars seem strikingly less clear about a basic question: what makes a jury a "jury"? Are some features of a jury necessary in order to call it a "jury," and when has a body been altered or "translated" so much that its core functions and capabilities threaten to be lost in the process? I am no expert in international research, and I

I am honored to write a commentary on Valerie Hans's Presidential Address, I heard the address while seated not far from a table full of cheering Argentinians who are in the midst of advocating for, launching, and supporting a nascent jury system in the several provinces that Professor Hans describes. As she writes, through sometimes-unexpected circumstances and invitations, Professor Hans has engaged with these and other collaborators and has set up lasting institutions that support and encourage the spread of lay participation in legal decision making. Working alongside in-country leaders and scholars, and capitalizing on mechanisms within the Law and Society Association, Valerie Hans is literally changing the world in this area.

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have borrowed liberally from those who have meditated on translating juries or have theorized about them (e.g., Abramson 1994; Burns 1995, 2011; Lempert 1992, 2007; Thaman 2007). I use this essay for thinking about the "juryness" of a decision making body and consider which features of a jury might be associated with which effects. I consider specifically questions of how much power the body enjoys, its independence from legal experts, and its deliberative practices. In doing this, I frequently reference the U.S. jury system but do not intend to imply that it is the "right" type of jury (although I admit my bias). Likely because the United States seems keen on having other countries adopt our institutions rather than the other way around, and likely because we export movies that sometimes feature our legal system, the common law/U.S. form of the jury is familiar globally and therefore serves as a convenient anchor to my discussion.

What is a "Jury"?

Power

Lempert (2007) notes that one can construct a typology of different forms of lay participation (see also Jackson and Kovalev 2007), and his first dimension of stratification across systems concerns power. On this score, the American jury is empowered. Unlike England, the jury has constitutional protection as a potential decision maker in a broad range of cases, both criminal and civil (given the decline in trials that Galanter 2004, documents, my use of the word "potential" is intentional here). Significantly, in criminal cases, the verdict is final if it is an acquittal. This is true even if the acquittal is incorrect as a matter of law. Despite the fact that jury nullification occurs rarely in practice, political theorists (e.g., Abramson 1994) recognize that the jury's power over acquittals is crucial and uniquely signifies its authority: jurors can acquit for no reason or any reason, and as a general rule, they cannot be punished for nullifying the law.[1]

As Professor Hans suggests, there are many ways to tinker with a jury's power. Its powers can be amended through legislative action when the jury does not have constitutional protection. A jury may be relegated to deciding only a society's most serious felony crimes rather than a broader range of cases. Verdicts can be ignored as merely advisory or easily overturned, including through appeals of acquittals. In some systems, through

[1] Some courts have indicated that if a judge discovers while deliberation is ongoing a juror is advocating for nullification, this can be treated as juror misconduct (e.g., *United States v. Thomas* 1997).

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instructions and a long series of questions on verdict forms, legal experts may narrow the choices a jury can make. If the verdict form is essentially a list of questions to answer about the case, this offers what is likely helpful guidance to the jury about where to focus its attention, but it also allows for more micro-managing of a jury's verdict, since a judge may decide that the jury answered the questions incorrectly or illogically, as appears to be the case in Russia (Thaman 2007).

Recognizing empowerment as a key component of a jury permits testable predictions. For instance, I would expect that the more power a jury enjoys, the more likely it is that a jury will return an acquittal, including when a judge favors conviction. This seems reasonable, but I found South Korea's system to be particularly intriguing. The oft-cited agreement rate of 78% in Kalven and Zeisel's (1966) study—and similar figures in follow-up work (Eisenberg et al. 2005)—shows that agreement between juries and judges in the U.S. is far above chance levels (50%), and yet clearly judges and juries do not simply replace one another (100% agreement). Kalven and Zeisel also documented that when juries and judges disagreed, the jury was the body more likely to acquit. How then to interpret the 90% agreement rate Professor Hans reports for South Korean juries? It exceeds the pattern in the U.S., which could generate concerns about redundancy and raise the specter of juries "rubber stamping" a punitive state action. Nonetheless, the original article also reports that the overall conviction rate was similar to published rates from the U.S. at about 80%; thus, the 90% rate of agreement reflects more consensuses on *both* acquittals and convictions compared to the U.S. case (Kim et al. 2013). Just as importantly, when disagreeing with judges, Korean juries—like their U.S. counterpart—were more likely to recommend acquittal than were judges. Note, however that juries in South Korea have more limited power than in U.S. because they provide only advisory verdicts. Thus, perhaps something else—something in addition to the advisory nature of the decision and the concomitant psychological awareness that the jury's verdict is not final—contributes to the jury's leniency toward the defendant, which complicates what I thought would be a simple expectation about power.

The Role of Lay People in Decision Making

The extent to which lay participation is truly "lay" is another dimension on which to consider how the jury has been translated to other contexts. The common law and U.S. model recruits a cross section of the community and allows the perspectives of these community members to dominate fact-finding and the

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application of law. The U.S. routinely fails at securing a truly representative cross section (Fukurai, Butler, and Krooth 1993), but the theory of the jury is that community members bring something different and important to legal decision making, and judges are not permitted to trail the jury into the deliberation room. But as Professor Hans notes, preference for an entirely lay body is not universal. Particularly in countries with strong civil law systems, lay participation can involve combining jurors and judges into a single decision making body, termed a "mixed tribunal."

On this point, it is hard to ignore the many writers who point to problems with mixed tribunals (see, e.g., Kutnjak Ivkovich 2007), including that status differences between judges and jurors can undermine the latter's actual participation in decision making (indeed, jurors may not even have access to the same material as judges). Professor Hans describes another variant that requires or permits a legal expert (a clerk, a judge) to be available for advising, and as I already noted, verdict forms full of specific questions to be answered seem to permit the legal experts access to the jury room without a literal physical presence. At what point, then, does lay participation stop being "lay"? Must laypeople be fully separate for a jury to be a jury?

I have already discussed evidence that laypeople sometimes produce different outcomes (Eisenberg et al. 2005; Kalven and Zeisel 1966; Kim et al. 2013). But would this be true if juries and judges actively deliberated together, and under what circumstances could lay perspectives—if they differ—be preserved and effectual? Research using actual deliberations in U.S. civil cases suggests so-called juror experts (laypeople who have some form of case-specific expertise, including legal training) play a significant but by no means domineering role in deliberations according to various indicators of participation; consistent with many studies, such experts talk more, but it is not clear that their particular views prevail (Diamond, Rose, and Murphy 2014). We do not have similar access to recorded deliberations in other jury systems to better understand how legal experts might shape deliberative content. Professor Hans's address and other writings in this area (Hans 2008) lead me to think that juries need independence from legal elites in order bring out their perspectives, but I have little sense of boundary conditions here.

Apart from shaping outcomes, a critical variable involves perceptions about what it means to have laypeople participate. A theory of the jury, particularly one that begins with U.S. practices, would suggest that verdicts enjoy greater legitimacy when they stem from the will of the people instead of from judges viewed (at best) as out-of-touch elites and (at worst) as beholden solely to

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state interests. This desire for legitimacy appears time and again in the literature on the spread of worldwide lay participation schemes and in Professor Hans's remarks. The urge to involve "the people" in legal decision making is linked with a desire to demarcate the end of authoritarian rule and to convey the trustworthiness of legal outcomes. Yet as a research question, we are just beginning to be able to use cross-cultural research to answer questions about how much legitimacy attaches to lay participation and under what circumstances (see Hans 2008), particularly given a ripe history of criticizing jury verdicts as irrational and flawed (e.g., Vidmar and Hans 2007).

In understanding what results lay participation generate, researchers must be highly knowledgeable about what "lay" or "elite" means in a particular country (e.g., Munger 2007), and what types of lay people participate. In the U.S., the jury's level of racial diversity has been a long-standing fault line for trustworthiness of verdicts (e.g., Abramson 1994). Salient historical cases, such as an all-white jury's acquittal of Emmet Till's murderers, as well as an unrepresentative, six-person jury's more recent acquittal in the Trayvon Martin murder (Bell and Lynch 2016) threaten the jury's legitimacy (see Ellis and Diamond 2003), particularly among minority populations. Survey evidence indicates that racial minorities are somewhat more tepid in their support for juries than are whites (Rose, Ellison and Diamond 2008).

Still, to date, a toxic history of race relations in the United States, chronic minority underrepresentation, and a roster of problematic verdict outcomes have not led people to reject the jury. Regardless of race, a clear majority of U.S. citizens prefer a jury to a judge in criminal cases (Rose, et al. 2008). Thus, I read with interest one author's view that a jury is probably impossible in Israel—a country that notably has both democratic and some common law traditions, which should make it a ripe candidate for lay participation (Colby 2014). One reason, Colby argues, is that there is no way to guarantee the meaningful participation of either Israel-Arabs or some ultra-orthodox Jewish groups. The author supports this argument with cites to others who have argued that a jury system is not feasible when a country is not homogenous on race, culture, language or religion. As Professor Hans notes, the Argentinians have addressed the problem of representativeness by requiring specific types of diversity in some cases. Yet authors like Colby, who are concerned both about the exclusion of minorities and juries' potential prejudices against parties from these minority groups, suggest that a fair and legitimate jury made up of laypeople from disparate walks of life is largely incompatible with Israel's reality. Anecdotally, whenever I have spoken to Israeli colleagues about juries in Israel, they have

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literally shuddered at the thought. I have therefore marveled that a reality television show has emerged there that depicts jury deliberations in low-level legal disputes—a sort of "People's Court" with a jury (see: http://www.23tv.co.il/704-he/Tachi.aspx). Whether or not Israel has the purportedly "right" cultural conditions to use a jury—something that merits study there and elsewhere—segments of this population are clearly intrigued about an empowered, deliberative lay voice in legal proceedings.

Deliberation

Deliberation is of interest to multiple disciplines—sociology, social and cognitive psychology, political science, communication studies—and it therefore tends to receive a good deal of theorizing and research attention. For my purposes, I see deliberation as bound up in the other facets I have considered: I would expect that jurors who feel little power likely deliberate less seriously (but this needs to be more clearly demonstrated), and deliberation dynamics and content will depend, to some extent, on the distribution of lay versus expert membership on the jury and the diversity of the body (e.g., Sommers 2006). A more relevant question here is whether a jury can be a jury and not deliberate? Is deliberation a necessary feature of the jury?

Brazilians have determined that it is not necessary. In their system, the jury enjoys power, including constitutional protection, over particular kinds of cases (involving "intentional crimes against life," e.g., attempted or completed homicides); in addition, their verdicts are generally binding, particularly in a retrial (Gomes and Zomer 2001–2002). The system also relies on an independent body of lay people chosen for compulsory service. Yet to avoid social influence on individuals' verdicts, the jurors do not deliberate. They retire to a private room and each answers a series of question; the views of a majority of the seven jurors assigned to a case determine guilt or acquittal. They may not reveal their votes to others.

To me, an American, this "translation" (if that is what has occurred in Brazil) has produced a body that deeply challenges my understanding of what juries do. But of course any firm conclusion requires more empirical support. Perhaps even nondeliberating juries play a significant role in the legal system so long as their input enjoys power and protection and as long as that input comes from laypeople rather than legal experts. This deeper understanding of what that role is, what constitutes a jury (versus something else) and what factors allow it to shape legal systems in meaningful ways would allow us to give shape to the many details surrounding the expansion of lay participation that

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Professor Hans provides in her address, filling in a better understanding of the history of the jury and its "transplantation." For example, it is hard to ignore the fact that the former British colonies that maintained a jury upon independence—Australia, Canada, New Zealand, the United States—share a history of dominating non-white indigenous or captive/enslaved persons. Perhaps it was easy to enshrine protections for juries when those in power assumed dominated groups would never be included in deliberations. But then the question becomes why and how the jury has been sustained—if it has—as those areas have moved to have a more inclusive society.

Losing the Jury

One cannot talk about the rise of lay participation globally without acknowledging the vanishing of the American trial, including jury trials (Galanter 2004). Some see more than coincidence in the fact that greater inclusiveness on U.S. juries coincides with its dismantling. For example, Burns (2011) suggests that as the jury has become more representative and more democratic in recent decades, tensions naturally increase between how juries achieve justice versus what other (more elite) "social systems"—corporations, courts striving for efficiencies, and other powerful political institutions-expect juries to do. This tension "may become close to intolerable, leading to various forms of pressure to reduce its [the jury's] significance in the legal order" (2011, p. 586).

This dynamic seems particularly apparent in the civil jury system. Viewing juries as both unpredictable and likely biased against them, repeat-players (like corporations) complain about expected outcomes and liabilities, and this uncertainty remains so long as juries stay empowered. As Haltom and McCann (2004) show, since the 1980's, insurance companies and the business community have lobbied extensively to limit a jury's power. These efforts include tort reform measures, limits on punitive damages, and unconscionable binding arbitration agreements that simply command that people not use juries. The jury in the U.S. may enjoy constitutional protection, seemingly a signal of its empowered status, but routinized practices—including agreeing to terms of service when enrolling in, say, Netflix or, in my own recent case, signing a contract to place a parent in an assisted care facility—explicitly waive Seventh Amendment rights to a jury trial. Other taken-for-granted assumptions undermine the jury. Some judges have come to see trials as failures in their ongoing efforts to manage their dockets (Burns 2011), and the

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system is self-reinforcing: as younger litigators fail to gain experience in trying cases before juries, they are more likely to avoid pushing for trial in cases to come (Burns 2011)

The response of the public to all of these movements? If the United States is in the midst of a populist uprising, there seems to be a remarkable shrugging at the systematic stripping of a jury's power. The jury is not dead in the U.S., but it is greatly endangered. The jury needs a social movement, one that sensitizes people to the unique benefits and strengths of having an empowered set of laypeople deliberate to a verdict. One direction to avoid is the possibility that jury decision making becomes a privilege of only the very elite. Former federal judge Vaughn Walker wrote recently about how frustrated parties to a business dispute—fed up with delays in court but still wanting their day before a jury—agreed to a "private jury trial," rather than a straightforward arbitration procedure dominated by legal elites (Walker, Wheeler, and Jimenez, 2015). They recruited—and paid—laypeople and held a trial with many of the traditional procedural trappings, and the jury deliberated to a verdict (one, of course, that cannot be discussed publicly, which for the powerful is another "perk" of private arrangements).

This anecdote raises the possibility that the U.S. is in the process of "translating" a jury to solve disputes in the modern era. Private juries would be an unwelcome step, but we must reckon with the current barriers to trial and find ways to translate juries—and trials more generally—into faster, more useful vehicles, but to do so without sacrificing the features that make juries what they are. Understanding where and when juries work best, as well as what features must be preserved at all costs, may help us along this path.

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