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FOREWORD

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To some, the jury system that evolved from English common law is an institution whose only claim to legitimacy is its archaic roots. It is, they assert, an incredibly poor institution for making important legal decisions in the modern world: A group of untutored and frequently unlearned lay persons are temporarily assembled to hear confusing facts and sometimes complicated expert testimony about the meaning of those facts. Then they are instructed on arcane legal concepts presented to them in professionals' argot and instructed to decide if an accused person is guilty of a criminal act, sometimes if he or she should live or die. Yet jury systems survive, and to a considerable extent thrive, in the United States, Ireland, and many countries in the British Commonwealth.[1] Despite becoming part of China again, Hong Kong retains the jury, and the Caribbean nations of Jamaica, Trinidad, and the Turks and Caicos Islands are some countries where the criminal jury is used. In fact, some sources yield estimates indicating that variations on the common law jury still exist in more than twenty-five countries.[2] To be sure, the civil jury has virtually

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1. This statement needs qualification for Ireland. *See generally* John D. Jackson et al., *The Jury System in Contemporary Ireland: In the Shadow of a Troubled Past*, 62 LAW & CONTEMP. PROBS. 203 (Spring 1999).

2. *See* TRIAL AND COURT PROCEDURES WORLDWIDE 21, 31 (Charles Platto ed., 1991); RAMESH DEOSARAN, TRIAL BY JURY: SOCIAL AND PSYCHOLOGICAL DYNAMICS 18 (1985); Justice Georges, *Is the Jury Trial an Essential Cornerstone of Justice?*, *in* Proceedings and Papers of the 7th Commonwealth Law Conference 30 (Hong Kong, Sept. 18-23, 1983) (on file with author); Ian Kawaley, *The Fair Cross-Section Principle: Trial by Special Jury and the Right to Criminal Jury Trial Under the Bermuda Constitution*, 38 INT'L & COMP. L.Q. 522 (1989).

or actually disappeared in all countries except the United States and Canada,[3] but the jury in criminal cases is seeing a resurgence. The non-common law countries of Spain and Russia have recently reintroduced the jury for some criminal trials,[4] and the Supreme Court of Japan has explored the possibility of reviving its short experiment with the institution from 1929 to 1943.[5]

Although a body of systematic empirical research that has been developed over the last quarter century or so tends to show that the performance of the common law jury is unfairly maligned,[6] the reason for the survival of jury systems may at a core level be simply that experience itself teaches they are good institutions for dispensing justice and helping provide legitimacy to the legal system. Nevertheless, despite a common heritage from English law, jury systems have evolved in different ways in the countries in which they survive. Yet scholars and practitioners do not have easy access to this rich experience and the consequent insights that systematic knowledge of other systems may provide. That lack of access provided the impetus to develop the present volume.

This issue of *Law and Contemporary Problems* provides a comparative perspective on the contemporary criminal jury systems of Australia, Canada, England and Wales, Ireland, New Zealand, Scotland, and the United States, and the civil jury systems of the United States and Canada. It also contains an important article on the criminal jury systems of Spain and Russia, and another article on the prospects for a jury system in Japan. The authors of the articles are outstanding scholars who are either citizens of the countries about which they write or have acquired their expert knowledge through cultural contact and study.

A comparative jury system analysis has much to contribute. The articles are interesting, in and of themselves, for scholars and the intellectually curious, but there are very important lessons to be learned about the importance of histori-

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3. However, the article in this issue on the New Zealand jury system raises the prospect that a minor increase in the use of civil juries is possible in that country. *See* Neil Cameron et al., *The New Zealand Jury*, 62 LAW & CONTEMP. PROBS. 103 (Spring 1999).

4. *See* Stephen C. Thaman, *Europe's New Jury Systems: The Cases of Spain and Russia*, 62 LAW & CONTEMP. PROBS. 233 (Spring 1999).

5. *See* Lester W. Kiss, *Reviving the Criminal Jury in Japan*, 62 LAW & CONTEMP. PROBS. 261 (Spring 1999).

6. *See, e.g.*, STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM (1995); NORMAN FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW (1995); VALERIE HANS & NEIL VIDMAR, JUDGING THE JURY (1986); HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY (1966); SAUL KASSIN & LAWRENCE WRIGHTSMAN, THE AMERICAN JURY ON TRIAL (1988); NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS AND OUTRAGEOUS DAMAGE AWARDS (1995); Joe Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727 (1991); T.M. Honess et al., *Juror Competence in Processing Complex Information: Implications from a Simulation of the* Maxwell *Trial*, 1998 CRIM. L. REV. 763; Richard Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 181 (Robert Litan ed., 1993); Robert MacCoun, *Inside the Black Box: What Empirical Research Tells Us About Decision Making by Civil Juries*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra*, at 137; Brian Ostrom et al., *A Step Above Anecdote: A Profile of the Civil Jury in the 1990s*, 79 JUDICATURE 233 (1996); Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849 (1998).

cal, social, and political contexts and about substantive and procedural law. The relative importance of the jury as an institution of democracy varies between these countries, a fact that Alexis de Tocqueville noted in his famous essay that compared the jury systems of the United States and England.[7] In addition, the articles on the Spanish and Russian juries and on Japan's revival effort put in boldest relief the fact, also demonstrated in the other articles, that the jury cannot be disembodied from the procedural system in which it is embedded.

Comparative analysis also can provide some critical insights for judges and legislators. All of the countries surveyed in this volume are, in varying degrees, facing similar problems of societal change. To maintain legitimacy in the eyes of citizens, jury pools have, over the last quarter century or so, been made more representative of the respective populations of the countries. There is an increased concern for the rights of visible minority group members who often make up disproportionate numbers of accused persons whose fates are decided by a jury. Indigenous minorities such as the Maori in New Zealand, Aborigines in Australia, and Inuit and Indian peoples in Canada have posed, and continue to pose, unique problems.[8] As the reader will discover, Australia, New Zealand, Canada, England, and the United States have used different approaches but not resolved the problems. Ireland presents a unique case because of its historical conflict involving England, continuing unresolved conflicts, and unique problems posed in its rural countryside.

Mass media, particularly television, but also fax machines and the internet, have increased the possibility that jurors may be tainted by pretrial or mid-trial publicity. There are also trends indicating that, in many of these countries, the mass media have become more assertive in demanding access to judicial proceedings and continually test the limits imposed by judges on freedom of the press.

Advances in forensic technologies, such as DNA analysis or neutron activation analysis, and other evidence based upon statistically complicated probabilities, have increased the complexity of the evidence the jury hears. In some countries, evidence about psychological profiles that has the potential to infringe improperly upon the jury's role, such as child sexual assault syndrome and battered woman syndrome, not to mention "modus operandi" testimony, has become relatively common. It is also argued that some fraud cases, particularly those involving complex cross-border economic transactions and expert testimony on the issues, are too complicated for a group of lay persons to understand.

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7. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 248-54 (J.P. Mayer & Max Lerner eds., 1966) (1835).

8. *See* Cameron et al., *supra* note 3; Michael Chesterman, *Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy*, 62 LAW & CONTEMP. PROBS. 69 (Spring 1999); W. A. Bogart, *"Guardian of Civil Rights . . . Medieval Relic": The Civil Jury in Canada*, 62 LAW & CONTEMP. PROBS. 305 (Spring 1999); Neil Vidmar, *The Canadian Criminal Jury: Searching for a Middle Ground*, 62 LAW & CONTEMP. PROBS. 141 (Spring 1999).

The articles in this issue offer the opportunity to see how different legal systems have responded to these common problems. Paradoxically, however, at the same time, they provide an opportunity to reflect seriously upon the appropriateness of cross-country comparisons that are made by judges and scholars about jury law and procedures with respect to problems encountered in their own jury systems. The comparisons are often made without regard to other differences between countries.

Consider, for example, the issue of peremptory challenges that has arisen in the United States. In response to a concern that peremptory challenges are being used by both prosecution and defense in an attempt to thwart Supreme Court rulings that race and gender are impermissible grounds upon which to exclude persons from the petit jury,[9] a number of commentators, including high-profile judges, have alluded to the fact that England has abolished all peremptory challenges, presumably with no ill effects, and implied inferentially that the English experience can be applied to U.S. juries.[10] Notwithstanding the fact that the abolition of peremptory challenges remains controversial within England, there are a number of major differences between the two countries' jury systems.[11] Among them is the fact that England effectively has no challenges for cause either; that is, the first twelve jurors called constitute the jury! England has more or less abolished the unanimity rule even for serious cases. In addition, all of these and other differences take place in a legal context in which, as soon as charges are laid, mass media are forbidden from publishing anything substantive about the preliminary hearing or the trial itself and can be prosecuted during or after a trial for publishing material that is judged as having the potential to interfere with the administration of justice. Furthermore, jurors are forbidden from ever disclosing anything about the deliberations, and the trial judge has a duty to summarize the theories of the opposing sides and the ability to comment on the testimony of witnesses. Contrast these differences with the U.S. setting, which often allows televising of the preliminary hearing and the trial itself, and tolerates jurors who are suspected of planning to sell the "inside story" to a tabloid even before they have heard any evidence at trial. Add the relatively lesser influence of the trial judge, and it is apparent that the jury systems of England and the United States are very different. Consider also the fact that the legal systems of Australia, Canada, Ireland, Scot-

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9. *See* Nancy Jean King, *The American Criminal Jury*, 62 LAW & CONTEMP. PROBS. 41, 55-57 (Spring 1999); Stephan Landsman, *The Civil Jury in America*, 62 LAW & CONTEMP. PROBS. 285, 293-94 (Spring 1999).

10. *See, e.g.*, WILLIAM PIZZI, TRIALS WITHOUT TRUTH 18 (1999); HAROLD ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE 191-97 (1996); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 815-22 (1997); Eugene R. Sullivan & Akhil R. Amar, *Jury Reform in America—A Return to the Old Country*, 33 AM. CRIM. L. REV. 1141, 1144-45 (1996). For a contrary view, see Barbara Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1174-80 (1993).

11. *See* Sally Lloyd-Bostock & Cheryl Thomas, *Decline of the "Little Parliament": Juries and Jury Reform in England and Wales*, 62 LAW & CONTEMP. PROBS. 7 (Spring 1999); *see also* JAMES GOBERT, JUSTICE, DEMOCRACY AND THE JURY (1997); David Corker & Michael Levi, *Pre-trial Publicity and Its Treatment in the English Courts*, 1996 CRIM. L. REV. 622.

land, and New Zealand have characteristics that make their jury systems more similar to England's system than to the United States's (though they differ on a number of characteristics and sometimes within regions in a country). Yet these countries, with the exception of Ireland, all have retained peremptory challenges.

In like fashion, commentators from outside the United States are often critical of the U.S. jury system,[12] characterizing it as involving the extensive and personally intrusive questioning of jurors in every trial, unaware that in many trials the jury selection process is brief, and unmindful of the unique First Amendment rights that permit the press and individual jurors far more freedom than in their own country, with the consequent potential to taint the jury process. These differences produce the need for the remedial steps that occur in U.S. trials.

The articles on the Scottish and Irish juries add additional cultural perspective.[13] As the article in this issue illustrates, stereotypes about the American civil jury also fail to consider the political context of the civil jury and the constraints under which it operates.[14] The article on the Canadian civil jury raises additional issues about political and social context, including the significant role that academic scholars may have played in restricting its use in Canada.[15] It should be noted that the civil jury in New Zealand is rare but that recent legal developments regarding personal injury claims raise the possibility of a minor increase in its use in that country.

In summary, the collection of articles contained here clearly points to the need to view each jury system and its particular procedural and substantive characteristics in their totality and in relation to the broader legal and political context in which they exist. At the same time, the articles provide a rich source of information that may assist legal scholars and practitioners in thinking about the functions and performance of the jury system in a world of fluid social and technological changes.

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12. In Canada, see R. v. Hubbert [1975] 11 O.R.2d 464; in England, see R. v. Kray et al. [1969] 53 Crim. App. 412, 416.

13. *See* Peter Duff, *The Scottish Criminal Jury: A Very Peculiar Institution*, 62 LAW & CONTEMP. PROBS. 173 (Spring 1999); Jackson et al., *supra* note 1.

14. *See* King, *supra* note 9.

15. *See* Bogart, *supra* note 8.