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A Jury for Israel: Determining When a Lay Jury System Is Ideal in a Heterogeneous Country

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A Jury for Israel?: Determining When a Lay Jury System is Ideal in a Heterogeneous Country

Steven J. Colby[†]

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Introduction

Is a jury system necessary or even ideal in a country? From an American perspective, the answer would appear to be “yes.” For example, in American jurisprudence, the right to a trial by a lay jury in serious criminal cases and many civil cases is a fundamental constitutional right.¹ A lay jury is also common in many Western countries, particularly those countries with Anglo-Saxon roots.² However, a jury system may not be ideal in many countries, particularly those with heterogeneous populations, due in part to both discrimination and to difficulties in reaching a consensus on a common set of applicable laws.³ With numerous countries having already instituted a lay jury system,⁴ it is important to determine when a lay jury system is preferable.

Israel is a heterogeneous democracy that does not have a lay jury system.⁵ In this Note, Israel is used as a case study to determine the appropriate framework for deciding when a heterogeneous country should institute a lay jury system.

This Note argues that there are two important prerequisites to the use of a lay jury system in a heterogeneous country. First, the vast majority of citizens should have a common national identity. Second, the society must agree on a common set of laws to be employed. In Part I, this Note gives background information on jury systems both in the United States and around the world in order to provide a foundation to compare Israel to the countries that use a jury system. In Part II, this Note discusses both the Israeli legal system and the currently-existing internal social cleavages within Israel. In Part III, this Note argues that Israel should not move toward a lay jury system because such a system would not be fair, particularly to minority groups. In Part IV, this Note develops a concise test for whether and when a heterogeneous country should institute a lay jury system.

I. Background on the Spread of the Anglo-Saxon Jury System Around the World

A. Principles of the American Jury System

In the United States, the right to a trial by jury is synonymous with American democracy.⁶ In fact, three of the Amendments in the Bill of Rights pertain specifically to the trial by jury right.⁷ In criminal cases, the Fifth Amendment protects criminal defendants by requiring that they be

1. See *infra* notes 6-20 and accompanying text.

2. See *infra* notes 24-25 and accompanying text.

3. See *infra* notes 32-37 and accompanying text.

4. See *infra* notes 24-25 and accompanying text.

5. See *infra* notes 47, 87, 92-93 and accompanying text.

6. See VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 31 (1986) (“The right to a trial by jury is deeply embedded in the American democratic ethos.”).

7. See *id.*

indicted by a Grand Jury for any “capital, or otherwise infamous crime.”⁸ The Sixth Amendment specifies that criminal defendants are entitled to a “public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”⁹ The Seventh Amendment extends the trial by jury right to civil cases.¹⁰

The United States, along with many other Western countries, adopted the British common law jury system.¹¹ However, the American legal system utilizes juries more than the legal systems of Great Britain and Canada.¹² While the right to a jury in the United States is a constitutional right, William Blackstone, a leading eighteenth century scholar of law, argued that a trial by jury is a privilege, and is not a right within English law.¹³

Currently, one basic feature of the American jury system is the right to a jury venire¹⁴ that represents a fair cross-section of the community. Initially, the American jury system included some discriminatory features inherited from the British jury system.¹⁵ Women¹⁶ and African-Americans¹⁷ were excluded from American juries for much of American history. Those discriminatory practices, however, are now unconstitutional in the United States.¹⁸ Currently, parties are entitled to a jury embodying a “fair

8. U.S. CONST. amend. V.

9. *Id.* amend. VI.

10. *Id.* amend. VII.

11. See Neil Vidmar, *A Historical and Comparative Perspective on the Common Law Jury*, in *WORLD JURY SYSTEMS* 1, 1-2 (Neil Vidmar ed., 2000).

12. See HANS & VIDMAR, *supra* note 6, at 31 (“In contrast, England, Scotland, Wales, and Canada do not have as liberal a standard concerning trial by jury. In those countries, persons accused of nonindictable crimes—less serious crimes for which the prescribed punishment is less than two years in prison—do not have the right to trial by jury.”).

13. *Id.*

14. A “venire” is the pool of prospective jurors from which the final jury is selected. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975).

15. HANS & VIDMAR, *supra* note 6, at 51 (“The outright exclusion of women from juries in the United States was an inheritance of the English common law system. In England, women were excluded from juries until 1919. Indeed, the famous legal scholar Blackstone wrote in the 18th century that women were rightfully prohibited from jury service because of what he labeled the *defect of sex*, which made them incapable of the intelligent decision-making required for jury duty.”) (emphasis in original).

16. See, e.g., Lucy Fowler, *Gender and Jury Deliberations: The Contributions of Social Science*, 12 WM. & MARY J. WOMEN & L. 1, 1 (2005) (“Women were not permitted to serve on juries for most of United States history. As recently as 1961, the United States Supreme Court upheld a state jury selection scheme that permitted women to serve on juries *only* if they filed a written declaration expressing their desire to be eligible for service.”) (emphasis in original) (citations omitted).

17. See, e.g., Sanjay K. Chhablani, *Re-Framing the ‘Fair Cross-Section’ Requirement*, 13 U. PA. J. CONST. L. 931, 935 (2011) (“[D]uring the antebellum period, blacks were excluded from jury service in all southern and most northern states. . . . While some African Americans apparently were permitted to serve on juries just prior to the Civil War, for the most part the systematic exclusion of African Americans continued through the years immediately following the Civil War.”) (citations omitted) (internal quotation marks omitted).

18. See, e.g., *Taylor*, 419 U.S. at 527, 533-34 (holding that defendants are entitled to a “jury drawn from a fair cross section of the community” and holding that women

cross section of the community.”¹⁹ However, likely due in part to jury pool selection procedures, minorities continue to be underrepresented in many American jury pools.²⁰

The American judicial system values ensuring fair and diverse community representation at the jury selection stages beyond simply the venire stage. Because of the Supreme Court’s decision in *Batson v. Kentucky*,²¹ attorneys are constitutionally forbidden from using peremptory challenges based on race or gender.²² Despite the general consensus that challenges to jurors should be race-neutral and gender-neutral, many scholars argue that *Batson* and its progeny are ineffective in combating the discriminatory use of peremptory challenges.²³

B. Lay Juries Around the World

Various countries around the world use some form of a lay jury system.²⁴ This includes numerous non-Anglo-Saxon countries, which have instituted lay jury systems more recently.²⁵ Notably, in most countries, the use of lay juries to decide guilt and innocence in criminal cases is much more frequent than the use of lay juries to determine fault and damages in

cannot be systematically excluded from a venire); *Holland v. Illinois*, 493 U.S. 474, 477-78 (1990) (noting that defendants, irrespective of their racial group, are entitled to a fair cross section jury venire without any racial group being excluded, but are not necessarily entitled to a correspondingly proportional final jury).

19. See, e.g., *Holland*, 493 U.S. at 477.

20. See, e.g., Heather Davenport, Comment, *Blinking Reality: Race and Criminal Jury Selection in Light of Ovalle, Miller-El, and Johnson*, 58 BAYLOR L. REV. 949, 955-56 (2006) (noting that facially-neutral methods of selecting a venire, such as using voter registration or drivers’ license lists, often result in limiting minority representation in American jury pools); Mark McGillis, *Jury Venires: Eliminating the Discrimination Factor by Using a Statistical Approach*, 3 HOW. SCROLL: SOC. JUST. L. REV. 17, 21-30 (1995) (discussing examples of the discriminatory impact of certain venire selection procedures).

21. 476 U.S. 79 (1986).

22. See, e.g., *id.* at 79-80 (“Although a prosecutor ordinarily is entitled to exercise peremptory challenges for any reason, as long as that reason is related to his view concerning the outcome of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State’s case”); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (holding that “gender, like race, is an unconstitutional proxy for juror competence and impartiality.”); *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (holding that “the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges.”).

23. See, e.g., Catherine M. Grosso & Barbara O’Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1557 (2012) (arguing that “North Carolina trial courts have not been especially willing to sustain *Batson* objections, and reviewing courts have shown almost complete deference to those rulings.”); Nancy S. Marder, *Batson Revisited*, 97 IOWA L. REV. 1585, 1588, 1607-10 (2012) (arguing that peremptory strikes limit the effectiveness of *Batson* and should be eliminated).

24. See, e.g., Valerie P. Hans, *Jury Systems Around the World*, 4 ANN. REV. L. & SOC. SCI. 275, 276 (2008).

25. *Id.* These countries include Argentina, Korea, Russia, and Spain. See *id.*

civil cases.²⁶

Countries differ both on questions of whether to have a lay jury system and, if so, how to implement one. Examples of countries without a lay jury system include Chile, the Czech Republic, Hungary, India, Israel, Mexico, the Netherlands, and South Africa.²⁷ Both Poland and Germany have a mixed system where professional judges and lay assessors serve together.²⁸ Australia, Brazil, Canada, England, Ireland, Scotland, and Spain, are countries where jurors deliberate and issue verdicts apart from the judgment of professional judges.²⁹ In Austria, Denmark, France, Greece, Italy, and Portugal, laypersons and professional judges deliberate together.³⁰ As British colonialism spread, elements of the British jury system reached Africa, the Mediterranean, Asia, the Caribbean, South America, and the South Pacific.³¹

Given the fact that countries differ on whether or not to utilize lay jury system, what are the advantages to adopting such a system in some countries but not in others? Neil Vidmar noted in his survey of various jury systems that “experience seems to indicate that jury systems often do not operate well in multi-racial societies, particularly when the racial cleavages are deep.”³² In his study of African jury systems published in the early 1960s, J.H. Jearey argued that implementation of a jury system may not be fair to all citizens.³³ Jearey found that the “system of trial by jury as developed in England can only work properly if three conditions are satisfied.”³⁴ First, the society must be mostly homogeneous with respect to race, culture, language, and religion.³⁵ Second, members of society must be sufficiently educated to set aside private prejudices in issuing a judgment.³⁶ Third, members of society must generally agree on what the law is that they are enforcing.³⁷ A fourth factor to consider is societal support for citizen participation in the legal system and any historical use of a jury

26. See Ethan J. Leib, *A Comparison of Criminal Jury Decision Rules in Democratic Countries*, 5 OHIO ST. J. CRIM. L. 629, 629 (2007).

27. *Id.* at 631-32. The Czech and South African legal systems include some lay participation, but not lay juries. See *id.* at 631 n.8, 632 n.14.

28. *Id.* at 633. Additionally, Japan and Venezuela both have mixed systems where professional judges serve alongside lay assessors. See Hiroshi Fukurai & Valerie P. Hans, *The Future of Lay Adjudication in Korea and Japan*, 3 YONSEI L.J. 1, 3, 8 (2012).

29. Leib, *supra* note 26, at 635-37.

30. *Id.* at 638-41.

31. Neil Vidmar, *Juries and Lay Assessors in the Commonwealth: A Contemporary Survey*, 13 CRIM. L.F. 385, 385 (2002).

32. *Id.* at 404.

33. See J.H. Jearey, *Trial by Jury and Trial with the Aid of Assessors in the Superior Courts of British African Territories: I*, 4 J. AFR. L. 133, 133 (1960) (“The existence of trial by jury in [Africa] can be ascribed to one or other of two reasons. It is either a relic of the enthusiasm for the jury which prevailed during the nineteenth century, or it is the result of demands by European minorities in those territories where these minorities are politically important.”).

34. J.H. Jearey, *Trial by Jury and Trial with the Aid of Assessors in the Superior Courts of British African Territories: II*, 5 J. AFR. L. 36, 46 (1961).

35. *Id.*

36. *Id.*

37. *Id.*

within that society.³⁸

Issues of internal conflict are not typically present in homogeneous societies, and therefore, a good argument can be made that a jury is ideal in most homogeneous societies.³⁹ Richard Lempert cautions, however, that because diversity of viewpoints in homogeneous societies is limited, an American-style jury system may not be ideal in a homogeneous country such as Japan.⁴⁰ Therefore, any test looking at the necessity of a lay jury in a heterogeneous society should probably be limited in application to only heterogeneous societies.

II. Israeli Legal System and its Social Cleavages

A. Formation of the Israeli Court System

Similar to the American legal system, the Israeli legal system is based on the British legal system. Between World War I and the establishment of the State of Israel in 1948, Great Britain controlled the British Mandate of Palestine.⁴¹ As Justice Aharon Barak, former President of the Israeli Supreme Court noted, “[t]he system of public law in Israel is based on the foundations of English law, incorporated into the law of [Israel] during the thirty years of the British mandate.”⁴² Israel has maintained the three-tiered legal system established by Great Britain.⁴³ The Magistrate Court is the lowest court, the District Court is the intermediate court, and the Supreme Court is the court of last resort.⁴⁴ In Israel, there are currently twenty-nine Magistrate Courts, five District Courts, and one Supreme Court.⁴⁵

The Israeli legal system departs from the legal systems in many other democratic countries in a few respects. First, Israel does not have a written constitution to serve as a basis for its legal system.⁴⁶ Second, the Israeli

38. See Lester W. Kiss, *Reviving the Criminal Jury in Japan*, 62 LAW & CONTEMP. PROBS. 261, 280 (Spring 1999) (“A fourth factor that Jearey does not mention that could affect the success of a jury system is the degree to which a society has allowed or is willing to allow citizen participation in the system.”).

39. See, e.g., *id.* at 283 (arguing that from a societal point of view, Japan, a homogeneous country, “is ripe for the reintroduction of the jury system.”).

40. See Richard Lempert, *A Jury for Japan?*, 40 AM. J. COMP. L. 37, 42 (1992) (noting that Japan is much more ethnically homogenous than the United States, and arguing that “in order to achieve the strengths which the jury system brings to the system of justice in the United States, Japan may have to deviate somewhat from the structural features of the United States’ jury system.”).

41. See, e.g., Shmuel Orenshtein & Michal Cohen, *The Israeli Legal System and Current Innovations in its Administration*, EUR. INST. PUB. ADMIN., 1 (Apr. 2007), http://www.eipa.eu/modules/EuroMedJustice/Conferences/Istanbul_16_19Apr07/reports/10_Israel.pdf; MENACHEM MAUTNER, *LAW AND THE CULTURE OF ISRAEL* 35 (2011).

42. Aharon Barak, *Foreword* to PUBLIC LAW IN ISRAEL, at vii (Itzhak Zamir & Allen Zysblat eds., 1996).

43. See Orenshtein & Cohen, *supra* note 41, at 1.

44. *Id.*

45. *Id.*

46. *The Judiciary: The Court System*, ISR. MINISTRY OF FOREIGN AFF., <http://www.mfa.gov.il/MFA/Government/Branches%20of%20Government/Judicial/The%20Judiciary-%20The%20Court%20System> (last visited Mar. 24, 2013).

legal system lacks a lay jury.⁴⁷ Instead, professional judges, appointed by a judicial appointments committee, make determinations of both law and fact.⁴⁸ While one judge tries most cases, three-judge panels try serious criminal cases.⁴⁹ Additionally, three-judge panels preside over both criminal and civil appeals.⁵⁰

B. Israeli Religious Courts

A unique aspect of the Israeli legal system is the presence of religious courts.⁵¹ In fact, religious law plays a major role in the legal system. In Israel and in several other Middle Eastern countries emerging from Ottoman rule, religious courts have exclusive jurisdiction over family law.⁵² The Israeli religious courts emerged in the nineteenth century under Ottoman rule and gained official recognition during the British Mandate.⁵³ The Israeli government recognizes many religious communities: Jewish, Muslim, Baha'i, and ten Christian denominations.⁵⁴ The Knesset, the Israeli national legislative body, has also recognized the Druze religious community and has passed legislation to create Druze religious courts.⁵⁵

After the establishment of Israel, religious courts continued to maintain complete authority over family law.⁵⁶ Muslim religious courts maintain jurisdiction over marriage, divorce, inheritance, custody, and religious identity.⁵⁷ The Muslim courts follow Sharia law and have broader jurisdiction over Israeli Muslims' personal status issues than the Rabbinical courts

47. See, e.g., Amnon Straschnov, *The Judicial System in Israel*, 34 TULSA L.J. 527, 528 (1999).

48. *Id.* Straschnov offers two reasons to explain why Israel does not have a lay jury. *Id.* ("Initially it is believed impossible to find twelve people who do not know each other, or the grandmother of the prosecutor, or the son-in-law of one of the witnesses. Such familiarity among potential jurors makes the creation of an unbiased jury equally impossible. Additionally, and most importantly, one would be hard pressed to find twelve Israelis who agree unanimously on a certain fact or point, let alone an entire case.").

49. *Id.*

50. Orenshtein & Cohen, *supra* note 41, at 2.

51. *The Judiciary*, *supra* note 46.

52. PATRICIA J. WOODS, JUDICIAL POWER AND NATIONAL POLITICS: COURTS AND GENDER IN THE RELIGIOUS-SECULAR CONFLICT IN ISRAEL 33 (Russell Stone ed., 2008).

53. *Id.* "The basic source for the application of the personal status law and the jurisdiction of the various religious courts is found in the Palestine Order in Council (1922)." *The Judiciary*, *supra* note 46.

54. See *The Judiciary*, *supra* note 46. The Baha'i faith was founded in Iran in 1863. *Baha'i at a Glance*, BBC, <http://www.bbc.co.uk/religion/religions/bahai/ataglance/glance.shtml> (last updated Sept. 22, 2009). The central concept of the faith is that people should work together for the betterment of humanity. *Id.*

55. See *The Judiciary*, *supra* note 46. The Druze community is an Arabic-speaking sect that recognizes all three monotheistic religions (Christianity, Islam, and Judaism), but it is secretive and closed to converts. Naim Aridi, *The Druze*, JEWISH VIRTUAL LIBR., http://www.jewishvirtuallibrary.org/jsource/Society_&_Culture/druze.html (last visited Sept. 1, 2013).

56. See WOODS, *supra* note 52, at 36.

57. *Id.* at 33.

have over the personal status issues of Jews.⁵⁸ Israeli Muslims can appeal their cases to the Sharia Court of Appeals in Jerusalem, where a three-judge panel hears the appeals.⁵⁹ Rabbinical courts maintain control over marriage and divorce.⁶⁰ The Chief Rabbinical Council selects rabbis, called dayyanim, to serve as judges in the Rabbinical courts.⁶¹ Despite a large Jewish secular population, all Jewish citizens of Israel are subject to Hala-cha, meaning Jewish law, regarding issues of marriage and divorce.⁶²

C. Israeli Labour Courts

The major exception to the absence of lay participation in Israeli courts is found in Israeli labour courts.⁶³ In Israeli labour courts, lay persons act as public representatives by serving on panels alongside professional judges.⁶⁴ Regional Labour Court panels are composed of one professional judge, one lay judge with experience in the labour sector, and one lay judge with management experience.⁶⁵ Generally, appeals are heard by a panel of assessors at the National Labour Court in Jerusalem, with panels composed of three professional judges, one lay judge from the labour side, and one from the management side.⁶⁶ Lay judges are appointed by the Minister of Justice and Minister of Labour for three-year terms, and the appointed lay judges have equal voting rights on the panel to those of the professional assessors.⁶⁷

D. Israeli Military Courts

In addition to Israeli religious courts and labour courts, Israel also has separate military courts, which have been maintained in the West Bank since 1967 and existed in the Gaza Strip from 1967 until 2005.⁶⁸ As part

58. MARTIN EDELMAN, COURTS, POLITICS, AND CULTURE IN ISRAEL 77 (Kermit Hall & David O'Brien eds., 1994).

59. *Id.* at 78.

60. *Id.* at 53. Orthodox Judaism is the only State-recognized Jewish community in Israel. *Id.* at 51. By agreement with the state, Orthodox leadership has control over kosher dietary laws, Sabbath observance, and the possibility for Jewish religious schools. *Id.*

61. *Id.* at 53.

62. *Id.*

63. Peter Clark & Stephen Adler, *Tenth Meeting of European Labour Court Judges: Lay Judges Questionnaire*, INT'L LAB. ORG., 1 (Sept. 2, 2002), http://www.ilo.org/wcmsp5/groups/public/@ed_dialogue/@dialogue/documents/meetingdocument/wcms_160097.pdf. Labour courts have jurisdiction over worker-employer relations and disputes. See SUZIE NAVOT, THE CONSTITUTIONAL LAW OF ISRAEL 145 (2007).

64. RUTH HALPERIN-KADDARI, WOMEN IN ISRAEL: A STATE OF THEIR OWN 151 (Bert B. Lockwood, Jr. ed., 2004).

65. Clark & Adler, *supra* note 63, at 2.

66. *Id.* at 1.

67. *Id.* at 2-3.

68. EDELMAN, *supra* note 58, at 101. During the Six Day War in 1967, Israel captured the West Bank and East Jerusalem from Jordan and the Gaza Strip from Egypt. See 1967: *Israel Launches Attack on Egypt*, BBC NEWS, http://news.bbc.co.uk/onthisday/hi/dates/stories/june/5/newsid_2654000/2654251.stm (last visited Mar. 29, 2013). Nearly 500,000 Israeli citizens live in settlements located beyond Israel's pre-1967 borders. See Max Fisher, *9 Questions about Israel-Gaza You Were Too Embarrassed to Ask*, WASH. POST

of an interim peace agreement between Israel and the Palestine Liberation Organization (PLO), signed in September 1995, Israel transferred certain governmental and legal powers over the West Bank to the Palestinian Authority (PA), the organization that today governs much of the West Bank.⁶⁹ In Area A of the West Bank, the PA has control over civil governance and security matters; in Area B of the West Bank, the PA maintains civil governance while the Israeli army is responsible for security matters; and in Area C of the West Bank, which consists of Israeli civilian settlements and Israeli military bases, the Israeli army maintains complete authority.⁷⁰

While Palestinian courts have jurisdiction over Palestinian civil and criminal matters in the West Bank, Palestinians in the West Bank⁷¹ are subject to Israeli military courts for security-related matters.⁷² However, West Bank Israeli settlers charged in security-related matters are typically tried in Israeli civil courts.⁷³ Israeli law enables authorities to deny detained individuals access to counsel for up to fifteen days, although detainees must be permitted to meet an attorney “once [an] interrogation is over.”⁷⁴ Criminal defendants are entitled to defense counsel and may petition the Israeli Supreme Court for appellate review.⁷⁵

(Nov. 21, 2012, 7:00 AM), <http://www.washingtonpost.com/blogs/worldviews/wp/2012/11/21/9-questions-about-israel-gaza-you-were-too-embarrassed-to-ask/>.

The United States supports an Israeli withdrawal to Israel’s pre-1967 borders, assuming that land swaps take into consideration the blocs of settlements near Israel’s pre-1967 borders that contain most of the Israeli settlers. See, e.g., Mark Landler & Steven Lee Myers, *Obama Sees ‘67 Borders as Starting Point for Peace Deal*, N.Y. TIMES, May 19, 2011, http://www.nytimes.com/2011/05/20/world/middleeast/20speech.html?pagewanted=all&_r=0; DAVID MAKOVSKY ET AL., IMAGINING THE BORDER: OPTIONS FOR RESOLVING THE ISRAELI-PALESTINIAN TERRITORIAL ISSUE 1 (2011), available at <http://www.washingtoninstitute.org/uploads/Documents/pubs/StrategicReport06.pdf>. Israel withdrew its military and its settlements from Gaza in 2005. See Fisher, *supra*. Hamas, an internationally recognized terrorist organization, now manages the Gaza Strip. *Id.*

69. See Sharon Weill, *The Judicial Arm of the Occupation: The Israeli Military Courts in the Occupied Territories*, 89 INT’L REV. RED CROSS 395, 401-02 (2007), available at http://www.icrc.org/eng/assets/files/other/irrc_866_weill.pdf.

70. *Id.* at 402.

71. This includes those Palestinians who live in Area A. See *id.*

72. EDELMAN, *supra* note 58, at 102. Israeli military courts also have what amounts to de facto concurrent jurisdiction over all criminal matters in the West Bank. See *id.*

73. *Id.* “Israeli citizens in the Administered Areas, like those residing in the State, are also subject to the military courts for certain offenses, but in practice Israeli citizens not on active military duty are rarely tried by the military courts.” *Id.* After extremist West Bank Israeli settlers attacked an Israeli military base, the Israeli Prime Minister announced that Israeli extremists would be subject to military courts. See Ethan Bronner, *Israel Leader Sets Curbs on Settlers for Violence*, N.Y. TIMES, Dec. 14, 2011, <http://www.nytimes.com/2011/12/15/world/middleeast/netanyahu-sets-new-curbs-on-violent-settlers-in-israel.html>. However, despite the Prime Minister’s announcement, the alleged attackers were not indicted in a military court, but rather were indicted in an Israeli civil court in Jerusalem. See Isabel Kershner, *Israel Charges 5 Settlers in West Bank Army Base Clash*, N.Y. TIMES, Jan. 8, 2012, <http://www.nytimes.com/2012/01/09/world/middleeast/israel-charges-5-settlers-in-clash-at-army-base.html>.

74. EDELMAN, *supra* note 58, at 106.

75. See *id.* at 103, 108.

E. Liberal Tendencies of the Israeli Judiciary

The Israeli judiciary better protects the civil rights and liberties of minorities than a lay jury would. The Israeli Supreme Court has the authority to review the actions of other Israeli courts, including the military courts,⁷⁶ and has garnered significant international prestige for its active form of judicial review.⁷⁷ During the term of Supreme Court President Justice Aharon Barak, the Israeli Supreme Court drew praise for protecting the civil rights and liberties of the disadvantaged in the areas of torture and religious freedom, and for protecting the rights of Israeli-Arabs to live in Jewish towns.⁷⁸ For example, Justice Barak ordered that the Israeli government hand out gas masks to Palestinians in the West Bank and Gaza during the Persian Gulf War in 1991.⁷⁹ The Israeli Supreme Court's liberal use of its powers, despite Israel's numerous security chal-

76. *Id.* at 102-03.

77. See, e.g., DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 1-2* (Russell Stone ed., 2002); but see Jonathan Cook, *The Myth of Israel's Liberal Supreme Court Exposed*, MIDDLE EAST RES. AND INFO. PROJECT (Feb. 23, 2012), http://www.merip.org/mero/mero022312?ip_login_no_cache=7a3540719c05834bcc77a0c9b6585458 (arguing that the Israeli Supreme Court, particularly recently, has not taken liberal positions with regards to the Israeli-Palestinian conflict).

Additional empirical research would be helpful in determining how successful the Israeli judiciary is at protecting the civil rights and liberties of minority defendants, particularly at the trial court level. There are older studies suggesting some sentencing discrepancies between minority and non-minority defendants, but these studies are a few decades old and do not indicate the degree to which sentencing disparities are based on judicial decision-making. See ARYE RATTNER & GIDEON FISHMAN, *JUSTICE FOR ALL? JEWS AND ARABS IN THE ISRAELI CRIMINAL JUSTICE SYSTEM 9, 14-21* (Simon Hakim ed., 1998). Additionally, non-discriminatory sentencing could reflect that judges are more concerned with civil rights and liberties than is the Israeli public at-large. See *infra* note 84 and accompanying text.

Empirical evidence in American criminal cases suggests that trial court judges are more likely to acquit than juries. See Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone?*, 83 WASH. U. L.Q. 151, 152 (2005) ("Between 1989 and 2002, the average conviction rate for federal criminal defendants was 84% in jury trials, but a mere 55% in bench trials.").

78. Emily Bazelon, *Let There Be Law*, LEGAL AFF., May-June 2002, http://www.legalaffairs.org/issues/May-June-2002/feature_bazelon_mayjun2002.html ("By taking the side of suspected terrorists and defending the individual rights of Arabs and women, the court has performed the classic judicial function of standing up for the disadvantaged."). Justice Barak revolutionized Israeli jurisprudence by using Basic Laws to protect the rights of minorities and by finding that the Israeli Knesset could not repeal Basic Laws. See Richard A. Posner, *Enlightened Despot*, NEW REPUBLIC (Apr. 23, 2007), <http://www.newrepublic.com/article/enlightened-despot>. Justice Barak has, in essence, used these Basic Laws as a constitution. *Id.* Prior to Elena Kagan's Senate confirmation hearings, conservatives called attention to Kagan's claim that Justice Barak was Kagan's "judicial hero," a statement Kagan made while introducing Justice Barak at Harvard Law School. See Stuart Taylor Jr., *Kagan Blasted for Praising Liberal Israeli Judge*, NEWSWEEK (May 24, 2010, 8:00 PM), <http://www.thedailybeast.com/newsweek/2010/05/25/elena-kagan-s-judicial-hero.html>.

79. Sheryl Gay Stolberg, *Praise for an Israeli Judge Drives Criticism of Kagan*, N.Y. TIMES, June 24, 2010, <http://www.nytimes.com/2010/06/25/us/politics/25kagan.html>; but see Nimer Sultany, Note, *The Legacy of Justice Aharon Barak: A Critical Review*, 48 HARV. INT'L L.J. ONLINE 83, 83-92 (2007) (arguing that Justice Barak did not sufficiently protect the interests of Palestinians in the Occupied Palestinian Territories).

lenges, has led Israeli right-wing politicians and many within the Israeli military establishment to deride the Israeli Supreme Court.⁸⁰

An independent and liberal Israeli judicial system is necessary for several reasons. First, unlike the United States and many other Western democracies, Israel does not have a written constitution to ensure all of the protections and liberties that constitutions provide.⁸¹ Second, Israel is governed by a unicameral legislature, the Knesset, and Israel's government lacks the checks and balances present in the United States.⁸² Third, Israel's executive branch is embedded in the Knesset; typically, the leader of the largest party in the Knesset forms a governing coalition and serves as Prime Minister.⁸³ Given the structure of Israel's government, the Israeli judiciary serves as the only independent check on the Israeli governing coalition.

There are several reasons why the Israeli Supreme Court has maintained its judicial independence and has been able to champion civil rights and civil liberties. First, the Israeli Bar Association and the Israeli judiciary are disproportionately left-leaning.⁸⁴ Second, the Judicial Selection Committee, responsible for appointing judges, is somewhat insulated from the Knesset.⁸⁵ Even when the Knesset is majority conservative, representation from the Israel Bar Association and the Israeli Supreme Court on the

80. KRETZMER, *supra* note 77, at 2. In fact, in recent years, right-wing Israeli politicians have attempted to pass several pieces of legislation aimed at undermining the independence of the Israeli Supreme Court. Oren Majar, *Peres: Israeli Right-Wing Bills are 'Digression from Democracy'*, HAARETZ (Nov. 15, 2011, 6:16 PM), <http://www.haaretz.com/news/national/peres-israeli-right-wing-bills-are-digression-from-democracy-1.395774>.

81. See *supra* note 46 and accompanying text.

82. See Elise Garofalo, *Israeli Election Primer – What You Should Know*, PBS (Jan. 21, 2013, 5:50 PM), <http://www.pbs.org/newshour/rundown/2013/01/israel-election-primer.html>. The United States has more checks and balances in its national government than does Israel in its national government because the United States has a President who is elected separately from the legislature, as well as a bicameral legislature. See U.S. CONST. art. I, §§ 2–3; U.S. CONST. art. II, § 1.

83. See Garofalo, *supra* note 82. In 2009, Tzipi Livni, the leader of the largest party, was unable to form a governing coalition. See *id.*

84. See, e.g., Anshel Pfeffer, *Netanyahu Against Vetting of Supreme Court Judges*, JEWISH CHRON. (Nov. 17, 2011), <http://www.thejc.com/news/israel-news/58423/netanyahu-against-vetting-supreme-court-judges> (noting that a “left-wing faction” currently controls the Israeli Bar Association); Gil Ronen, *Supreme Court “Gang” Heading Out, Says Leading Journalist*, ARUTZ SHEVA (June 11, 2011, 10:34 PM), <http://www.israelnationalnews.com/News/News.aspx/144857#UViSojn3A1g> (noting that many of the Israeli Supreme Court Justices are known as the “Rehavia Gang,” because they are left-leaning and live in the upscale Jerusalem neighborhood of Rehavia); see also Bazelon, *supra* note 78 (“In contrast to politics, the institutions of the law—the courts, the major law schools, the Israel Bar Association—remain in the hands of the Ashkenazi elite, descended from the group that founded Israel. The most powerful group is identified with the secular, upper-middle-class neighborhood of Rehavia in West Jerusalem . . .”).

85. See David Nachmias, *National Government Institutions*, JEWISH VIRTUAL LIBR. (Apr. 2009), <http://www.jewishvirtuallibrary.org/jsource/isdf/text/nachmias.html> (noting that the Judicial Selection Committee is composed of nine members: the Minister of Justice, an additional government minister, the president of the Supreme Court, two other justices of the Supreme Court, two Knesset members, and two representatives of the Israel Bar Association).

Judicial Selection Committee has given left-leaning figures significant control over the selection of judges.⁸⁶ This results in a Supreme Court protected from the political pressure of the Knesset.

F. Israel: A Deeply Divided Society

Different religious identities divide Israel's population, and it is unlikely that jury service would mitigate these cleavages. While Israel identifies as a Jewish State, Israeli-Arab citizens enjoy the same political rights, including the right to vote, and the same social welfare benefits granted to Israel's Jewish citizens.⁸⁷ Although jury service has been shown to increase civic engagement among minorities in the United States,⁸⁸ it may not have as positive an impact among Israeli-Arabs.⁸⁹ While overall voter turnout dropped from 78.7% in the 1999 Knesset elections to 64.7% in the 2009 Knesset elections,⁹⁰ Israeli-Arab voter turnout has shown a sharper decline, from 75% to 53.4%, over the same period.⁹¹ In addition to voter turnout, Arab enlistment in the Israeli army is low and is evidence of competing national identities.⁹² Druze and Jewish Israeli citizens face compulsory service in the Israeli army or national service, but Israeli-Arabs participate voluntarily and at a much lower rate.⁹³

Although Israel's Declaration of Independence grants Israeli-Arabs equal rights,⁹⁴ Israeli-Arabs face discrimination within Israeli society. A majority of Jewish Israeli citizens—68%—view democracy to be at least as important as the Jewishness of Israel.⁹⁵ However, only 29% of Israeli Jews and 20% of Israeli-Arabs believe there is full equality between Arab and

86. See, e.g., Pfeffer, *supra* note 84.

87. See, e.g., Samuel Thrope, *How Israel's Arab Citizens Vote*, DAILY BEAST (Dec. 27, 2012, 12:00 PM), <http://www.thedailybeast.com/articles/2012/12/27/how-israel-arab-citizens-vote.html> (noting that Israeli-Arabs account for approximately 20% of Israel's population and discussing voting trends among Israeli-Arab citizens in local and national Israeli elections); *Legal Status of East Jerusalem and its Residents*, B'TSELEM (Jan. 1, 2013), http://www.btselem.org/jerusalem/legal_status (noting that Palestinians living in Israel are considered "permanent residents" who are granted social benefits and may vote in local elections but may not vote in Knesset elections).

88. See *infra* note 111 and accompanying text.

89. See *infra* notes 112–118 and accompanying text.

90. *Israeli Elections: Voter Turnout*, JEWISH VIRTUAL LIBR., <http://www.jewishvirtuallibrary.org/jsource/Politics/voting.html> (last visited Apr. 2, 2013).

91. Thrope, *supra* note 87.

92. See Amy Teibel, *National Service Proposal Riles Israeli Arabs*, ASSOCIATED PRESS (June 29, 2012, 5:21 AM), <http://bigstory.ap.org/article/national-service-proposal-riles-israeli-arabs>.

93. See *id.*

94. See Michael Mertes & Christiane Reves, *Israel As A Jewish And Democratic State: An Old Issue becomes a New Challenge*, KAS INT'L REPS., 21, 21 (March 2012), http://www.kas.de/wf/doc/kas_30496-1522-2-30.pdf?120326140543 ("[Israel's] charter specifies that Israel will ensure 'complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex.' It also appeals to the 'Arab inhabitants of the State of Israel to participate in the upbuilding of the State on the basis of full and equal citizenship and due representation in all its provisional and permanent institutions.'").

95. See Shibley Telhami & Steven Kull, *Israeli Public Opinion after the November 2012 Gaza War*, BROOKINGS INST. (Nov. 30, 2012), <http://www.brookings.edu/-/media/>

Jewish citizens.⁹⁶ Additionally, 56% of Israeli Jews and 43% of Israeli-Arabs believe that while there is legal equality, institutional and societal discrimination remains against Israeli-Arabs.⁹⁷ In fact, a survey, conducted by the Israel Democracy Institute in 2010, found that 46% of Israeli Jews would not want to have Arabs as neighbors.⁹⁸ In terms of identification, many more Israeli-Arabs identify as Arab or Palestinian than identify as Israeli.⁹⁹

G. The Conflict Between Secular & Religious Jews

Even Israeli Jews are bitterly divided in terms of identity. Disagreements over the governing law are particularly strong between groups within the Israeli Jewish population, and these disagreements undermine attempts at uniform acceptance of the law. In the late 1940s, Prime Minister David Ben-Gurion agreed to allow the small Ultra-Orthodox (“Haredi”) Jewish population to be exempt from compulsory army service in order to study traditional Jewish texts, but this decision has enflamed legal, policy, and religious debates in recent years.¹⁰⁰ The Haredim, once a small population, now compose about 10% of Israel’s population.¹⁰¹ Haredi political parties have historically used their political power as coalition partners to prevent their constituents from being drafted.¹⁰² Many Israelis look down upon the Haredim for not “sharing the burden” of national defense and for

research/files/presentations/2012/11/30%20israel%20public%20opinion%20telhami/30%20israel%20poll%20full%20report.pdf.

96. *Id.*

97. *Id.*

98. Aviad Glickman, *Survey: Half of Israeli Jews Oppose Having Arab Neighbors*, YNETNEWS (Nov. 30, 2010, 2:44 PM), <http://www.ynetnews.com/articles/0,7340,L-3992058,00.html>.

99. Shibley Telhami, *Israeli Arab/Palestinian Public Opinion Survey*, BROOKINGS INST. (2010), http://www.brookings.edu/-/media/research/files/reports/2010/12/09%20israel%20public%20opinion%20telhami/israeli_arab_powerpoint.pdf (noting that of 600 surveyed Israeli Arabs and Palestinians, 36% identify as Arab, 22% identify as Palestinian, 19% identify as Muslim, and only 12% identify as Israelis).

100. Jon Frosch, *Israel’s Draft Expansion Reveals Deep Rifts*, FR. 24 (July 13, 2012), <http://www.france24.com/en/20120712-israel-tshah-knesset-ultra-orthodox-arab-israeli-military-benjamin-netanyahu-army>.

In 2012, the Israeli Supreme Court struck down the Tal Law, which exempted yeshiva students from military service, as unconstitutional. *See, e.g.,* Aviad Glickman, *High Court Rules Against Extending Tal Law*, YNETNEWS (Feb. 22, 2012, 12:53 AM), <http://www.ynetnews.com/articles/0,7340,L-4193034,00.html>.

The Israeli government has yet to implement a procedure to achieve integration of the Haredi community into the Israeli military and national service, although it has recently created the Peri Committee to devise legislation on the matter. *See, e.g.,* Yehuda Shlezinger, *Haredi Leaders Claim Army, National Service is a ‘Calamity’*, ISR. HAYOM (Apr. 24, 2013), http://www.israelhayom.com/site/newsletter_article.php?id=8835.

Prominent Haredi leaders have called on Haredim to resist any laws requiring military enlistment. *See* Itzhak Tessler, *Rabbi Says Call-Up Notices Must be Ignored*, YNETNEWS (Apr. 25, 2013, 1:55 PM), <http://www.ynetnews.com/articles/0,7340,L-4372235,00.html>.

101. Frosch, *supra* note 100.

102. *See* Josef Federman, *Israeli Coalition Formed, First In Decades to Exclude Ultra-Orthodox Parties*, HUFFINGTON POST (Mar. 15, 2013, 3:46 PM), http://www.huffingtonpost.com/2013/03/15/israel-coalition_n_2883830.html.

prioritizing Torah study over the country's security.¹⁰³ In fact, 23% of Jewish Israelis believe that a member of the Haredi community would make the worst neighbor.¹⁰⁴

Many within the Haredi community believe that Jewish religious law, or Halacha, should govern Israel.¹⁰⁵ While 83.6% of young traditional, secular Israeli Jews believe that Halacha should not prevail over democratic principles, 85.4% of young Haredi and Orthodox Israelis believe that Halacha *should* prevail over democratic principles.¹⁰⁶ Haredi Israelis are not alone in their willingness to follow messianic dogma at the expense of democratic decision-making. Many non-Haredi, Orthodox Jews support disobeying government orders to evacuate settlements.¹⁰⁷ More significantly, many Haredim despise the Israeli secular courts and wish to have them replaced with Halacha courts with jurisdiction over all matters.¹⁰⁸

III. Why Israel Should Not Move Toward a Lay Jury System

A. Israeli Minorities' Resistance to Civic Engagement

Israel is not suited to implement a lay jury system in part because Israel's minorities would likely be resistant to jury service. A fundamental aspect of the American jury system is the fair cross-section requirement, which is aimed at achieving a diverse jury.¹⁰⁹ In the United States, some major reasons for empaneling a large and diverse jury are "to ensure a diversity of viewpoints, to increase the likelihood that the jury will represent all elements of the community, to promote group deliberation, and to enhance the public's acceptance of grand jury rulings."¹¹⁰ There are also civic benefits to jury service: studies of jurors in the United States have found that jurors who reached a verdict in criminal trials were more likely to participate in future United States elections.¹¹¹

However, the deep divides among Israeli ethnic and religious groups have made Israeli minorities resistant to civic engagement. Theoretically,

103. See *id.*

104. See Glickman, *supra* note 98.

105. Ruth Gavison, *Jewish and Democratic? A Rejoinder to the "Ethnic Democracy" Debate*, 4 *ISR. STUD.* 44, 54 (1999).

106. Mertes & Reves, *supra* note 94, at 30.

107. See, e.g., Amiram Barkat et al., *Peace Now: Probe Rabbi's Call to Disobey Evacuation Orders*, HAARETZ (Oct. 14, 2004, 12:00 AM), <http://www.haaretz.com/news/peace-now-probe-rabbi-s-call-to-disobey-evacuation-orders-1.137362>.

108. See NACHMAN BEN-YEHUDA, *THEOCRATIC DEMOCRACY: THE SOCIAL CONSTRUCTION OF RELIGIOUS AND SECULAR EXTREMISM* 109 (2010) ("Much of the *Haredi* rage has been directed at the Israeli legal system, especially—but not only—during the investigation, trial, and punishment of Aryeh Deri from Shas. Many *Haredim* view with scorn the Israeli legal system because it is based on non-Jewish law principles. Many law professionals have thus been exposed to animosity, threats, and attacks. *Haredim* have been called upon repeatedly not to resort to the secular courts. If the *Haredim* had their way, Israel's secular court system would have probably been replaced with a rabbinical one.")

109. See *supra* notes 19, 21–23 and accompanying text.

110. Albert W. Alschuler, *Racial Quotas and the Jury*, 44 *DUKE L.J.* 704, 721 (1995).

111. See, e.g., John Gastil et al., *Jury Service and Electoral Participation: A Test of the Participation Hypothesis*, 70 *J. POL.* 351, 358–60 (2008).

minority groups in Israel might become more civically engaged after participating in jury service. A jury requirement, however, is unlikely to be successful in any effort to increase civic engagement among Israeli-Arabs or the Haredim because both groups have not taken advantage of alternative opportunities for civic engagement through voluntary army service or national civilian service, and because Israeli minority groups do not identify strongly with their country.¹¹² Despite the fact that army or national service is mandatory for most Israelis, Israeli-Arabs and Haredi Israelis have not agreed to compulsory army or national service.¹¹³ Such service would be an opportunity for Israeli-Arabs and Ultra-Orthodox Jews to more fully participate in Israeli society. Additionally, the rate of Israeli-Arab participation in national elections is decreasing. Roughly 22% fewer Israeli-Arabs voted in the 2009 Knesset elections than voted in the 1999 Knesset elections.¹¹⁴

The problems causing a lack of Israeli-Arab participation in Israeli civic life run much deeper than a lack of opportunity for participation. Much of the decrease in Israeli-Arab voting follows the Second Intifada, the 2000 uprising of Palestinians against Israel.¹¹⁵ Discrimination and a lack of identification with the Jewish state negatively impact Israeli-Arab enthusiasm for Israel.¹¹⁶ The lack of identification with Israel among Israeli-Arabs¹¹⁷ contrasts with the relatively stronger sense of American identity felt amongst minority and immigrant groups in America.¹¹⁸ Therefore,

112. See *supra* notes 92–93, 99 and accompanying text.

113. See *supra* notes 92–93, 100, 103 and accompanying text.

114. See *supra* notes 90–91 and accompanying text.

115. See Seth Freedman, *The Second Intifada, 10 Years on*, *GUARDIAN* (Oct. 1, 2010, 4:30 AM), <http://www.guardian.co.uk/commentisfree/2010/oct/01/israel-palestine-intifada-10-years-on>; see also Nadim Rouhana et al., *Voting without Voice: About the Vote of the Palestinian Minority in the 16th Knesset Elections*, in *THE ELECTIONS IN ISRAEL—2003* 217, 236 (Asher Arian & Michal Shamir eds., 2005) (noting that an Israeli-Arab shift from voting for Zionist parties in the early 1990s to voting for non-Zionist parties in the early 2000s may be evidence of Israeli-Arabs' lack of identification with Israel).

116. See Rouhana et al., *supra* note 115; see also *supra* notes 96–99 and accompanying text.

117. See *supra* note 99 and accompanying text.

118. See, e.g., David Seminara, *New Poll: Latino Voters Identify as Americans First and Don't Vote on the Immigration Issue*, *CENTER FOR IMMIGR. STUD.* (Sept. 27, 2012), <http://www.cis.org/seminara/new-poll-latino-voters-identify-americans-first-and-dont-vote-immigration-issue> (“74 percent of Latinos told pollsters that they identified as being American, with only 19 percent stating that they identified themselves as both American and Latino, and 4 percent claiming that they identified more with their country of origin than the United States.”); *Second-Generation Americans: A Portrait of the Adult Children of Immigrants*, *PEW RES. CENTER* (Feb. 7, 2013), <http://www.pewsocialtrends.org/2013/02/07/second-generation-americans> (“[R]oughly six-in-ten adults in the second generation consider themselves to be ‘typical American,’ about double the share of immigrants who say the same. . . . About half of second-generation Latinos (52%) and about two-thirds of Asian Americans (64%) say their group gets along well with all other major racial and ethnic groups in America; smaller shares of Latino (26%) and Asian-American (49%) immigrants say the same.”); *Proud Patriots – and Harsh Critics of Government*, *PEW RES. CENTER* (July 1, 2010), <http://www.pewresearch.org/2010/07/01/proud-patriots-and-harsh-critics-of-government> (noting that 36% of African-Americans are “extremely proud” to be Americans and 45% are “very proud”).

while both the United States and Israel are heterogeneous countries, minorities in the United States identify much more strongly with the United States than Israeli-Arabs identify with Israel. Given Israeli-Arabs' lack of identity with Israel, Israeli-Arabs would likely resist a jury service requirement.

There are also concerns regarding the practicability of a jury service requirement among Haredi Israelis. For many Haredim, Torah study and adherence to Halacha law are more important than service to the State of Israel.¹¹⁹ Haredim believe in separation between women and men and hold many misogynistic views.¹²⁰ Given their use of religion to avoid military service and disdain for the Israeli secular courts, it is unlikely that Haredim would be willing to serve on a jury.¹²¹ And given their views on women,¹²² it is even less likely that a court could obtain unbiased Haredi jurors. Additionally, even if selected, Haredi jurors might be unwilling to agree to adhere to Israeli law over religious law.¹²³

B. Israeli Bias Against Minorities Would Cause Unfairness

Discrimination against minorities makes selecting an unbiased jury in Israel almost unfeasible. Engagement in armed conflict has caused bias in many democracies, including the United States. Examples include the political repression of those associated with Communism during the Red Scare and McCarthyism¹²⁴ and the internment of Japanese Americans dur-

119. See *supra* note 103 and accompanying text.

120. See Catrina Stewart, *Sexism and the State of Israel*, INDEPENDENT (Jan. 10, 2012), <http://www.independent.co.uk/news/world/middle-east/sexism-and-the-state-of-israel-6287448.html>.

121. See *supra* notes 103, 108 and accompanying text.

While it may be difficult to obtain a complete cross-section of the Haredi population, having Haredi jurors in criminal cases involving Haredi defendants could add some legitimacy to the legal system. During the twelfth century, England created mixed juries in cases involving a party from the minority community. See Deborah A. Ramirez, *A Brief Historical Overview of the Use of the Mixed Jury*, 31 AM. CRIM. L. REV. 1213, 1214 (1994); see also Peter J. Richards, Note, *The Discreet Charm of the Mixed Jury: The Epistemology of Jury Selection and the Perils of Post-Modernism*, 26 SEATTLE U. L. REV. 445, 461 (2003) ("These mixed juries, or juries 'of half-tongue,' seem to promise a historically-informed alternative perspective on the problems posed by the potentially explosive combination of minority over-representation in the class of criminal defendants, and under-representation on jury panels.").

122. It is possible that some Haredi men would outright refuse to sit on a jury with women, particularly if forced to sit adjacent to a female juror. See, e.g., Mordechai I. Twersky, *Ultra-Orthodox Jews Increasingly Refuse to Sit Near women on El Al flights*, HAARETZ (Mar. 23, 2012, 1:07 AM), <http://www.haaretz.com/weekend/anglo-file/ultra-orthodox-jews-increasingly-refuse-to-sit-near-women-on-el-al-flights-1.420298> (discussing trend of Haredi male airplane passengers asking female passengers to switch seats so that men can sit near men, and women near women).

123. See *supra* notes 106, 108 and accompanying text.

124. See, e.g., REGIN SCHMIDT, *RED SCARE: FBI AND THE ORIGINS OF ANTICOMMUNISM IN THE UNITED STATES, 1919-1943* 30 (2000) (noting that works written about the Red Scare during the era of McCarthyism were colored by views held during the era of McCarthyism).

ing World War II.¹²⁵ Israel has been at war with many of its Arab neighbors since Israel's founding, and as a result, there is bias among Israel's Jewish population against Arabs.¹²⁶

Israel's Jewish population is also biased against the Haredim.¹²⁷ In fact, the battle over the future of Israel between the secular Jewish population and the Haredi population has been likened to a "civil war."¹²⁸ Given these realities, members of the secular Jewish population selected for jury service are likely to be biased against the Israeli-Arab and Haredi populations.

C. Adherence to What Law?

It is unclear whether all Israelis would adhere to one set of laws. Israel does not have a written constitution, though the Israeli Supreme Court applies the Basic Laws¹²⁹ to provide some protection of civil liberties.¹³⁰ More importantly, it is unclear what law Israeli jurors would follow. Although Israel has a written Criminal Code,¹³¹ would jurors follow Halacha, common law, or some combination? This question would need to be answered before instituting a jury system.

There is also a risk of juries discriminatorily nullifying criminal activity. According to Professor Doug Linder, "[j]ury nullification occurs when a jury returns a verdict of 'Not Guilty' despite its belief that the defendant is guilty of the violation charged. The jury in effect *nullifies* a law that it believes is either immoral or wrongly applied"¹³² Nullifications may be particularly concerning if caused by discrimination, especially against minority groups.¹³³ Given the negative views many Israelis have of Israeli-

125. See, e.g., *Children of the Camps: Internment History*, PBS (1999), <http://www.pbs.org/childofcamp/history/>.

126. See Glickman *supra* note 98 and accompanying text.

127. See *supra* notes 103, 104 and accompanying text.

128. See, e.g., Erica Brown, *Fight with Haredi a Civil War No One Wants*, JEWISH CHRON. (Jan. 15, 2012, 11:43 AM), http://thejewishchronicle.net/view/full_story/17162023/article-Fight-with-Haredi-a-civil-war-no-one-wants?-instance=news_special_coverage_right_column.

129. Instead of a constitution, the Israeli Knesset has passed so-called "Basic Laws" that set the political and legal framework for Israel and are arguably constitutionally superior to most legislation that is passed by the Knesset. *Basic Laws - Introduction*, KNESSET, http://www.knesset.gov.il/description/eng/eng_mimshal_yesod.htm (last visited Sept. 1, 2013). The Knesset has passed fourteen such Basic Laws. *The Existing Basic Laws: Full Texts*, KNESSET, http://www.knesset.gov.il/description/eng/eng_mimshal_yesod1.htm (last visited Sept. 1, 2013).

130. See *supra* note 78 and accompanying text.

131. See Emily Silverman, *Section Israel*, MAX PLANCK INST. FOR FOREIGN AND INT'L CRIM. L., http://www.mpicc.de/ww/en/pub/organisation/wissenschaft/referat/laender-referat/naher_osten/israel.htm (last updated Dec. 12, 2013).

132. Doug Linder, *Jury Nullification*, U. MO. KAN. CITY (2001), <http://law2.umkc.edu/faculty/projects/ftrials/zenger/nullification.html>.

133. Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 304 (1996) ("The second erroneous assumption, and by far the most troubling, is that when juries nullify they do so out of compassion or a desire to be lenient, rather than for illegitimate reasons. For every case where the jury extends mercy to a deserving defendant, there may well be another (or two, or five others) where the verdict is based on improper

Arabs and Haredim, it is quite possible that discriminatory nullification would take place in cases where there is an Israeli-Arab or Haredi party involved. For example, an Israeli jury hearing a case regarding a “price tag” vandalism attack against an Israeli-Arab or a Haredi Israeli could be biased, and could use such bias to nullify what would otherwise be a guilty verdict against the perpetrator.¹³⁴ Such a result would be contrary to the goal of a legal system that protects minorities and other vulnerable populations.¹³⁵

Nullification based on religious belief is an additional concern. Materials published by religious groups in the United States reveal reason to suspect that religious beliefs could factor into verdicts arrived at by religiously ardent jurors.¹³⁶ The same danger could be present in Israel, where jurors could nullify a verdict for violation of a law where the law conflicts with a religious belief.¹³⁷

D. The Current System is Preferable

Israel’s minorities are currently protected in Israel’s judicial system, even though Israel does not have a lay jury system. The Israeli judiciary has a reputation for protecting civil liberties, despite the Israeli-Arab conflict, and despite the discriminatory views held by many Israelis.¹³⁸ The Israeli judiciary has been able to maintain this reputation, even though

considerations. The archetypical case occurs when the acquittal is based on race or ethnicity: either the jury is prejudiced against a victim (e.g., the victim was African American, and jurors considered the harm done by the crime less than if the victim were white) or biased in favor of a defendant because of race.”).

134. A “price tag” attack is a retaliatory act carried out by right-wing Israeli Jewish activists against Israeli-Arabs or Haredim. See, e.g., Michael Omer-Man, ‘88% of Jewish Israelis Oppose Price Tag Attacks’, JERUSALEM POST, <http://www.jpost.com/National-News/88-percent-of-Jewish-Israelis-oppose-price-tag-attacks> (last updated Nov. 10, 2011, 7:45 PM) Polls on what percentage of Jewish Israelis support “price tag” attacks are mixed. See *id.* (finding that 88% of Jewish Israelis oppose “price tag” attacks); Poll: 46% in Favor of ‘Price Tag’, YNETNEWS (Mar. 28, 2011, 2:19 PM), <http://www.ynetnews.com/articles/0,7340,L-4048459,00.html> (finding that 46% of Jewish Israelis believed “price tag” attacks were somewhat justified following the murder of a family in the Israeli settlement of Itamar).

135. See *supra* notes 129–130 and accompanying text.

136. See, e.g., Don Boys, *Should Christian Jurors Disregard Judges’ Instructions?*, CSTNEWS (June 19, 2006), <http://www.cstnews.com/bm/social-issues-facing-christians-common-sense-for-today/criminal-justice-and-common-sense/should-christian-jurors-disregard-judges-instructi.shtml> (arguing that jury nullification by Christians “is the very last blow the average citizen can strike at tyranny.”); *Should a Christian Serve on a Jury (Matthew 7:1)?*, CHURCH OF THE GREAT GOD, <http://www.cgg.org/index.cfm/fuseaction/Library.sr/CT/BQA/k/152/Should-Christian-Serve-on-Jury-Matthew-71.htm> (last visited Mar. 6, 2013) (arguing that Christians should not serve on juries because the Bible “teaches that Christians should not involve themselves in judging others.”); *The Citizen’s Rule Book*, AM. PATRIOT FRIENDS NETWORK, <http://www.apfn.org/pdf/citizen.pdf> (last visited Apr. 7, 2013) (promoting a right to jury nullification founded in the bible).

137. See, e.g., Jeremy Sharon, *Police Arrest Women of the Wall Leader for Singing*, JERUSALEM POST (Oct. 17, 2012), <http://www.jpost.com/Jewish-World/Jewish-Features/Police-arrest-Women-of-the-Wall-leader-for-singing> (noting that the leader of the Women of the Wall activist group was arrested for violating a law prohibiting singing aloud at the Western Wall).

138. See *supra* notes 78–80, 84–86 and accompanying text.

minorities are relatively under-represented in the Israeli bar and in the Israeli judiciary.¹³⁹ At the end of 2008, 15.5% of Israeli lawyers, and 7% of Israeli judges were Arab.¹⁴⁰ In 2004, Salim Joubran became the first Israeli-Arab to be appointed to the Israeli Supreme Court.¹⁴¹ There is little data available on Haredi-Israeli membership of the Israeli bar and the Israeli judiciary, but given the general disdain for the secular courts held by the Haredim, Haredi-Israelis are likely under-represented in both the Israeli bar and among the Israeli judiciary.¹⁴²

While minorities are underrepresented within the Israeli judicial system, the liberal-leaning nature of the Israeli Bar Association provides better protection against discrimination for Israel's minority populations in criminal matters than would instituting a lay jury system. This is particularly true given the difficulties faced in assembling an unbiased jury that fairly represents Israel's diverse population and that agrees as to the content of the law that should be applied.¹⁴³ Additionally, Israel's minorities are protected from discrimination in personal and family matters through the vast jurisdiction of the religious courts.¹⁴⁴

Additionally, though a jury system is beneficial for many countries, a jury system is not likely to be beneficial for Israel. A jury system is beneficial because it can add to the perceived legitimacy of a legal framework.¹⁴⁵ Additionally, a jury system can promote civic engagement and political participation.¹⁴⁶ Further, a jury system is likely to promote the perception that the legal framework is fair.¹⁴⁷ At present, a jury in Israel is unlikely to promote civic engagement and political participation,¹⁴⁸ and is unlikely to promote fairness.¹⁴⁹ However, a jury system could ultimately help legitimate the legal framework by increasing the inclusion of minority groups in the deliberation process.

139. See Ali Haider, *Appoint Arab judges*, HAARETZ (Sept. 7, 2009), http://www.sikkuy.org.il/english/docs/haaretz_haider_14_9_09.pdf.

140. *Id.* The number of Israeli-Arab lawyers and judges in the Israeli judiciary is not proportionate to the number of Israeli-Arabs in the Israeli population. *Id.*

141. See Greg Myre, *World Briefing: Middle East: Israel: Supreme Court Gains First Arab*, N.Y. TIMES (May 7, 2004), <http://www.nytimes.com/2004/05/07/world/world-briefing-middle-east-israel-supreme-court-gains-first-arab.html>.

142. See BEN-YEHUDA *supra* note 108.

143. See *supra* Part III.A-C.

144. See *supra* notes 56-62 and accompanying text.

145. See, e.g., John Gastil et al., *Deliberation and Global Criminal Justice: Juries in the International Criminal Court*, 24 ETHICS & INT'L AFF. 69, 70 (2010) (arguing that under certain circumstances, a jury in the International Criminal Court's cases "could contribute significantly to the perceived legitimacy of the Court's decisions and to its function as a legal institution").

146. See, e.g., JOHN GASTIL ET AL., *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* 9-11 (2010) (arguing that lay juries promote civic engagement and political participation).

147. See, e.g., Dru Stevenson, *The Function of Uncertainty Within Jury Systems*, 19 GEO. MASON L. REV. 513, 513 (2012) ("Many characterize the American jury system as maximizing fairness, urging that it allows a group of representative citizens to adjudicate disputes rather than allowing the state to run rampant.").

148. See *supra* Part III.A.

149. See *supra* Part III.B.

IV. Juries in Heterogeneous Societies

A. A Test to Determine the Feasibility of a Jury System in Israel

In Section I, this Note discussed a four-factor test for determining whether a lay jury is desirable in a particular society.¹⁵⁰ Israel likely fails the first factor: having a population that is mostly racially, culturally, linguistically, and religiously homogeneous.¹⁵¹ Most Israelis are Jewish¹⁵² and speak Hebrew.¹⁵³ However, there is a significant Arab population that speaks Arabic and is mostly either religiously Muslim or Christian.¹⁵⁴ Israel likely fails the second factor as well, which requires having a population sufficiently educated to set aside prejudices prior to reaching a judgment.¹⁵⁵ While Israelis are relatively highly educated,¹⁵⁶ a substantial number of Israelis still maintain discriminatory views.¹⁵⁷ For the third factor—juror agreement on the type of law that society ought to enforce¹⁵⁸—Israelis do not have a constitution, have not agreed on what type of law the country should be enforcing, and it is unclear how much impact religion would have on juror decision-making.¹⁵⁹ With regard to the fourth factor of societal support for a lay jury and the historical use of a lay jury,¹⁶⁰ there is no history in Israel of a jury system, and there is no evidence to suggest societal support for a shift toward a lay jury system.¹⁶¹ Israel, therefore, fails all four factors of the test proposed in Section I.

While the previously discussed four-factor test may be a useful starting point for judging the feasibility of a jury system in homogenous countries¹⁶² a condensed and simplified version of the test is more appropriate for application in heterogeneous countries. It is argued that before a heterogeneous country institutes a lay jury system, two factors must be present: (1) The vast majority of citizens must have a common national identity; and (2) the society must agree on a common set of laws to be employed. This new test combines many of the aspects of the previously discussed four-factor test, but with some significant modifications.

150. See *supra* notes 34–38 and accompanying text.

151. See *supra* note 35 and accompanying text.

152. *65th Independence Day - More than 8 Million Residents in the State of Israel*, CENT. BUREAU OF STAT. (Apr. 14, 2013), http://www1.cbs.gov.il/www/hodaot2013n/11_13_097e.pdf.

153. *PEOPLE: Minority Communities*, ISR. MINISTRY OF FOREIGN AFF., <http://mfa.gov.il/MFA/AboutIsrael/People/Pages/SOCIETY-%20Minority%20Communities.aspx> (last visited Jan 10, 2014).

154. *Id.*

155. See *supra* note 36 and accompanying text.

156. See, e.g., *OECD: Israel Among World's Most Highly Educated Countries*, JERUSALEM POST, <http://www.jpost.com/Breaking-News/OECD-Israel-among-worlds-most-highly-educated-countries> (last updated Feb. 1, 2012, 7:16 PM) (noting that the Organization for Economic Cooperation and Development found Israel to be among the most highly educated countries in the world, particularly at the post-secondary education level).

157. See *supra* notes 94–98, 103–104, 126–128 and accompanying text.

158. See *supra* note 37 and accompanying text.

159. See *supra* Part III.C.

160. See *supra* note 38 and accompanying text.

161. See Straschnov, *supra* note 47 and accompanying text.

162. See *supra* notes 35, 38–39 and accompanying text.

In terms of the first factor in the new test, having a common national identity is far more important than the other sorts of cleavages that can divide a society. There are countries, such as the United States, that maintain respected jury systems despite not being racially, culturally, linguistically, and religiously homogeneous.¹⁶³ However, differing national identities in other heterogeneous countries, such as Israel, prevent a lay jury system from being viable. Currently, Israel is divided not only by differences in national identity between the Jewish majority and Arab minority, but also by differences within the Jewish majority between secular Jews and the Haredim.¹⁶⁴

With regard to the second factor in the test, having an agreed upon source of law solves many of the concerns addressed in the previously discussed four-factor test. Having an agreed upon a source of law would encourage education about legal rights and liberties. Additionally, having a societal consensus on the source of law could boost societal support for lay participation in the legal system.¹⁶⁵

The United States passes this new test because even despite some racial and cultural differences, United States citizens have a common national identity,¹⁶⁶ and because the United States has a written constitution granting all citizens equal rights.¹⁶⁷ In the United States, the Constitution is the law of the land,¹⁶⁸ and in fact, new American citizens must take an oath of allegiance to the United States of America and to the United States Constitution.¹⁶⁹

Israel, however, would fail both factors of this test. There is a significant minority of Israelis who do not identify as Israelis,¹⁷⁰ and many Haredim want Israel to become a Halachic state.¹⁷¹ Furthermore, Israel does not have a universally recognized constitution to serve as the central source of law and protection for all Israelis.¹⁷²

B. Further Complications to the Potential for a Jury in Israel

Before Israel can add a jury, Israelis must agree on what law should be employed.¹⁷³ It is impractical for Israel to have secular criminal law if much of the population will ignore it based on religious beliefs.¹⁷⁴ A writ-

163. See *supra* note 118 and accompanying text.

164. See *supra* notes 94-99, 105-108 and accompanying text.

165. See *supra* note 111 and accompanying text.

166. See *supra* note 118 and accompanying text.

167. U.S. CONST. amend. XIV, § 1.

168. *Id.* art. VI.

169. See *Naturalization Oath of Allegiance to the United States of America*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=facd6db8d7e37210VgnVCM100000082ca60aRCRD&vgnnextchannel=dd7ffe9dd4aa3210VgnVCM100000b92ca60aRCRD> (last visited Apr. 8, 2013).

170. See Telhami, *supra* note 99 and accompanying text.

171. See *supra* notes 105-108 and accompanying text.

172. See *supra* note 46 and accompanying text.

173. See *supra* Part III.C.

174. See *supra* notes 136-137 and accompanying text.

ten constitution defining what it means to be a Jewish state could go a long way toward solving this problem. Would such a state simply be a secular state with a Jewish majority, or would Judaism play a substantial role in Israeli jurisprudence? Such a decision should be specified in Israel's constitution. It is also important for any Israeli constitution to address how Israel can define itself as a state with a Jewish majority, but still protect the rights of minority groups. Addressing this concern could help Israeli minorities identify more with Israel.

The Israel-Arab conflict likely undermines Israel's ability to have a jury system by making it especially difficult to create a common national identity. Israel's inability to determine its borders threatens its future as a Jewish, democratic state. While Palestinians in the West Bank are governed by and vote in Palestinian Authority elections,¹⁷⁵ Israeli settlers who live in the West Bank are governed by and vote in Israeli elections.¹⁷⁶ If Palestinians were to abandon calls for the creation of a Palestinian state encompassing the West Bank (and Gaza), and were instead to demand the right to vote in Israel, Israel would soon cease to be a majority-Jewish state.¹⁷⁷ Such a situation would further complicate any attempt at achieving a common national identity among Israelis.

Currently, the existence of a Palestinian state would be beneficial for Israel. In addition to any security and demographic benefits that a Palestinian state would bring, it could also provide Israeli-Arabs who do not identify with Israel a homeland with which to identify.¹⁷⁸ If the people who are currently considered Israeli-Arabs had two homelands to choose from, it is quite possible that tensions between Israelis and Israeli-Arabs would be mitigated and a unifying Israeli identity could be formed that includes Israeli minority groups.

C. A Jury in the Future?

Israel's lack of a jury is not ideal. Without a jury system, Israel is prone to criticisms that its judicial system lacks legitimacy.¹⁷⁹ However, without major changes, the current absence of a lay jury is preferable to the addition of a lay jury.¹⁸⁰

175. See, e.g., Noah Browning, *West Bank Vote Held to Help Plug Palestinian Democracy Gap*, REUTERS (Oct. 20, 2012, 9:51 AM), <http://www.reuters.com/article/2012/10/20/us-palestinians-elections-idUSBRE89J07T20121020>.

176. See, e.g., Ori Nir, *Who Did the Jewish Settlers Vote For*, FORWARD (Feb. 7, 2013), <http://forward.com/articles/170754/who-did-the-jewish-settlers-vote-for/?p=all>.

177. See, e.g., Jeffrey Goldberg, *How Palestinians Can Finally Achieve Independence*, BLOOMBERG (Nov. 26, 2012), <http://www.bloomberg.com/news/2012-11-26/how-palestinians-can-finally-achieve-independence.html?alcmpid=view> (arguing that if Palestinians voted in Israeli elections, as opposed to in Palestinian elections, Israel would quickly become an Arab-majority state).

178. See Livni: *National aspirations of Israel's Arabs Can be Met by Palestinian Homeland*, HAARETZ (Dec. 11, 2008, 2:06 PM), <http://www.haaretz.com/news/livni-national-aspirations-of-israel-s-arabs-can-be-met-by-palestinian-homeland-1.259321>.

179. See *supra* note 145 and accompanying text.

180. See *supra* Part III.D.

Under the right circumstances, however, a jury system would be preferable to the status quo. If Israelis were able to unite around a common national identity and a common source of law, a lay jury system would add legitimacy to Israel's legal system and could increase civic engagement. Such a system would have to involve a fair cross-section of the population, including Israel's Arab and Haredi populations. If Israel can integrate minority groups sufficiently to create a common national identity, Israel would pass the first part of the two-part test suggested in Section A of Part IV of this Note.¹⁸¹ If Israel can reach a consensus among all Israelis on the source of law, Israel could accomplish better protection of minorities' rights, and could also pass the second prong of the test.¹⁸² If Israel is able to pass both parts of the test, lay participation in jury service could also add to the legitimacy of the Israeli legal system, as well as increase civic engagement.¹⁸³

Conclusion

In the United States, the right to a trial by jury in serious criminal cases and in many civil cases is a fundamental right. The trial by jury is also common in many Western countries, particularly those with Anglo-Saxon roots. More and more countries have added lay juries in recent years. However, Israel, a country with Anglo and Ottoman roots, has not yet added a jury system. An important question is whether and under what circumstances a heterogeneous society such as Israel should have a lay jury.

This Note argued that Israel should not presently institute a lay jury system. This Note analyzed an existing four-factor test for determining whether a society should have a lay jury. This pre-existing test is useful, but should be modified and condensed into a two-part test for application to heterogeneous societies: First, in order to institute a jury, the vast majority of citizens must have a common national identity. Second, there must be an agreed upon source of law.

At present, Israel fails both parts of this new test. First, Israeli society is sharply divided between the majority who identify with Israel, and a significant minority who either identify as Palestinian Arabs, or identify as followers of Halachic Judaism. Second, not all Israelis have agreed upon a common source of law. However, a lay jury system may be ideal once Israel meets these two conditions. In addition to its application to Israel, the two-part test can be applied to other heterogeneous countries to determine the feasibility of a lay jury system.

181. The first part of the test is that the vast majority of citizens must have a common national identity.

182. The second part of the test is that society must agree on a common set of laws to be employed.

183. See *supra* notes 145-146 and accompanying text.

