

# Comparative Jury Procedures: What a Small Island Nation Teaches the United States About Jury Reform

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# Comparative Jury Procedures: What a Small Island Nation Teaches the United States About Jury Reform

*Kenneth S. Klein*\*

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\* Professor of Law, California Western School of Law. This Article could not have been written without the help and guidance of my professional colleagues in Malta—the Honorable Judge Michael Mallia (Judge of the Criminal Court sitting in Valetta, Malta, ret.), Magistrate Aaron Bugeja (former Senior Criminal Prosecutor and now Criminal Magistrate), Dr. Ugo Mifsud Bonnici (the fifth President of Malta), and Dr. Lorna Mifsud Cachia (Maltese trial lawyer who wrote her doctoral thesis on Maltese jury reform)—each of whom shared their time with me and pointed me in the right direction to find documents integral to understanding Maltese jury practice. This Article was funded by a research grant from California Western School of Law, and benefitted from the suggestions generated by workshoping this Article to the Faculty as a whole. Particular thanks goes to my colleagues Professors Lisa Black, Greg Reilly, Jamie Cooper, and William Aceves, each of whom was instrumental in making this work better. The thoughtfulness and care of the editorial staff of the *Louisiana Law Review* measurably improved this Article. Finally, I thank my mother, Hanne Klein, who graciously endures me when as a quality check on my writing—including this Article—I force her to listen to me read the entire text to her out loud.

## INTRODUCTION

The literature on the American jury<sup>1</sup> too rarely considers the experience of other countries. This Article describes how the now over 200-year debate in the United States over the proper role and form of American jury practice suffers from the usually unstated, but typically unquestioned, premise of American exceptionalism,<sup>2</sup> and suggests that American jury practice could benefit from considering what other systems may have to offer.<sup>3</sup>

Scholars have paid much time and attention in recent years to jury reform in the United States.<sup>4</sup> Two prominent topics in this conversation, both of which form the heart of this Article, have been (1) the appropriateness of allowing jurors to ask written questions of witnesses or otherwise become more informed decision makers,<sup>5</sup> and (2) the proper approach to jury selection.<sup>6</sup> The discussion of these topics, however, has

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1. There are other jury systems in the Americas. This Article uses the terminology of “the American jury” as a reference specifically to juries in the United States of America.

2. See generally Oscar G. Chase, *American “Exceptionalism” and Comparative Procedure*, 50 AM. J. COMP. L. 277 (2002) (discussing the cultural origins of American civil procedure).

3. See generally Valerie P. Hans, *Jury Systems Around the World*, 4 ANN. REV. L. & SOC. SCI. 275, 277 (2008) (“Comparative work on world jury systems and other lay participation systems, although still at an early stage, holds significant promise. Such research can address longstanding questions about the impact of lay legal participation on democracy, legal consciousness, and the unique perspectives and contributions that lay citizens bring to legal decision making. As a scientific matter, many of these questions are difficult to answer when one is limited to studying an existing jury system with long-settled trial practices and stable public and elite attitudes toward jury trial. The cross-country comparisons allow us to take advantage of existing variation in different countries, akin to a natural experiment . . . .” (citation omitted)).

4. See, e.g., GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, *THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT* (2007), available at <http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx>.

5. See, e.g., Shari Seidman Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1 (2003) [hereinafter *Juror Discussions During Civil Trials*] (reporting on and evaluating the Arizona experiment with juror questions and allowing jurors to discuss the case pre-deliberation); Larry Heuer & Steven Penrod, *Increasing Juror Participation in Trials Through Note Taking and Question Asking*, 79 JUDICATURE 256 (1996) [hereinafter *Increasing Juror Participation*] (advocating for allowing jurors to ask questions); Kara Lundy, Note, *Juror Questioning of Witnesses: Questioning the United States Criminal Justice System*, 85 MINN. L. REV. 2007 (2001) (advocating against allowing juror questions in criminal trials).

6. See, e.g., Roger Allan Ford, *Modeling the Effects of Peremptory Challenges on Jury Selection and Jury Verdicts*, 17 GEO. MASON L. REV. 377 (2010); Reid Hastie, *Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries*, 40 AM. U. L. REV. 703 (1991); Hilary Weddell,

primarily taken place on a theoretical plane. The only concrete data comes from the limited instances where judges have allowed experimentation in their courtrooms. This experimentation, unfortunately, has been infrequent and narrow in scope. Regarding jury selection, for example, although practice varies in America about whether judges, advocates, or both question the jury<sup>7</sup> and for how long,<sup>8</sup> all courts allow jury questioning—referred to as *voir dire*—on average for two hours.<sup>9</sup> During trial, however, no American courts allow jurors to directly question witnesses orally, and only 14% of state criminal trials allow juror-written questions to witnesses.<sup>10</sup> Less than 1% of state courts allow jurors to discuss the evidence before deliberations commence in criminal trials.<sup>11</sup> Ultimately, the United States has limited data to evaluate the effectiveness of jury questioning, no examples of trials with active oral questioning by jurors, and very limited data on jury deliberation during trial.

Although such information is lacking in America, other countries have conducted these evaluations of their jury systems.<sup>12</sup> Some of these systems are British-based, meaning they have an adversarial system, common law rules of evidence, and a law/fact division of responsibilities between judge and jury.<sup>13</sup> Within the British-derived systems, American jury reformists should be particularly interested in systems of roughly the same vintage as the United States. The British system itself has evolved and changed over many centuries.<sup>14</sup> Each British-derived system is born out of the version of British justice as it existed at the pertinent moment. Although comparative law cannot control for all differences between nations,<sup>15</sup> nations are of the

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Note, *A Jury of Whose Peers?: Eliminating Racial Discrimination in Jury Selection Procedures*, 33 B.C. J. LAW & SOC. JUST. 453 (2013).

7. MIZE ET AL., *supra* note 4, at 27–28.

8. *See id.* at 77–78.

9. *See id.*

10. *See id.* at 32 tbl.24, 34–35.

11. *See id.* at 32 tbl.24.

12. *See* Hans, *supra* note 3, at 276. For a summary of jury systems in place in Europe see John D. Jackson & Nikolay P. Kovalev, *Lay Adjudication and Human Rights in Europe*, 13 COLUM. J. EUR. L. 83, 93–100 (2007).

13. *See generally* Hans, *supra* note 3, at 278–79 (“Juries are usually embedded within an adversarial common law system in which oral testimony by witnesses is the predominant method of evidence presentation, a sharp contrast with the civil law tradition of document-based litigation. The adversarial approach favors passive decision makers, whereas the inquisitorial approach promotes the active involvement of decision makers in the development of evidence.” (citations omitted)); accord Jackson & Kovalev, *supra* note 12, at 95–96.

14. For a detailed history of the British jury system, see Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 390–420 (1996).

15. Some of the Author’s colleagues are concerned with the contemporary use of the word “nation,” noting that we can no longer equate “nation” with “state”

greatest utility when they are most similar.<sup>16</sup> These nations can serve as useful illustrations of the possible outcomes of American jury reforms.<sup>17</sup>

Within the British-derived court systems, one nation of very similar vintage to the United States is Malta, a member of the European Union and Commonwealth of Nations.<sup>18</sup> Malta is a small island nation in the Mediterranean Sea,<sup>19</sup> which from 1798 to 1964 was part of the British Empire.<sup>20</sup> Perhaps surprisingly, Malta and the United States—at least from the perspective of their jury practices—are essentially twins separated at birth. The American jury system is a direct descendant of the eighteenth century British system,<sup>21</sup> whereas the Maltese system is a direct descendant of the early nineteenth century British system.<sup>22</sup> The first Maltese jury trial occurred about 25 years after the adoption of the United States Constitution.<sup>23</sup>

Although substantial differences exist between Malta and the United States as nations, the similarities of Maltese and American jury trials are patent. If an American trial lawyer were to observe a Maltese jury trial, he would witness a familiar and comfortable scene. The courtroom is set up physically the same as an American court.<sup>24</sup> The Maltese system, like its American counterpart, is adversarial rather than inquisitorial. A jury is selected and empaneled to decide the issues of fact. The overall procedural structures—opening statements, testimony presented through alternating

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or even “country” given that so many countries are now multinational in their makeup. Nonetheless, this Article opts for “nation” for clarity in distinction to a “state” of the United States. No offense nor confusion is intended.

16. See John C. Reitz, *How to Do Comparative Law*, 46 AM. J. COMP. L. 617, 626–27 (1998).

17. See Hans, *supra* note 3, at 277 (“The cross-country comparisons allow us to take advantage of existing variation in different countries, akin to a natural experiment.” (citation omitted)).

18. *The World Factbook: Malta*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/mt.html> (last visited Sept. 30, 2015) (expand “Government” section).

19. *Id.* (expand “Geography” section).

20. *Id.* (expand “Introduction” section).

21. Even today—for purposes of interpreting the civil jury right in United States federal court—the reference point is jury rights in England in 1791. See *Curtis v. Loether*, 415 U.S. 189, 193 (1974) (“[T]he thrust of the [Seventh] Amendment was to preserve the right to jury trial as it existed in 1791 . . . .”); see generally Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005 (1992).

22. See Comment, *The Jury System in Malta*, 13 AM. J. COMP. L. 570, 570 (1964) (transcript of a public lecture delivered by J.J. Cremona in the Royal University of Malta on the December 7, 1960).

23. *Id.* (trial by jury introduced in Malta in 1815).

24. The information regarding the set-up of the Maltese jury system was derived by the Author’s first-hand observation of a Maltese jury trial from June 6, 2011 to June 17, 2011.

examination and cross-examination of witnesses, evidentiary objections and rulings, closing arguments, judge's instructions, verdict, and judgment—appear rather American (or British). Any American trial lawyer would not only recognize a Maltese trial, but the lawyer would also understand it, as Maltese trials are often conducted in English.<sup>25</sup>

For American jury reformists, Malta's greatest utility to the United States may come from focusing on where the two systems diverge. The procedural divergences are most dramatic in the details of jury selection and in the approach to jury participation in trial. Although both peremptory strikes and for cause strikes exist in the Maltese system,<sup>26</sup> *voir dire* is nonexistent. In Malta, when a witness is finished answering cross-examination questions, a microphone is passed around the jury box to facilitate and encourage jurors to directly question the witness.<sup>27</sup> Maltese jurors are expected to actively talk to each other at all stages of the trial.

This small Mediterranean nation presents an opportunity for the United States. Malta offers relevant, concrete data via a "natural experiment"<sup>28</sup> about how reforms in the areas of jury selection and jury participation might develop in America. Malta potentially illustrates for the United States a world with no *voir dire*, with active juror questioning, and with ubiquitous jury deliberation.

Finally, in a less direct way, Malta's experience with jury reform adds another aspect to the American discussion, as the Mediterranean nation allows non-unanimous verdicts.<sup>29</sup> This type of verdict is not unique to Malta, as two American states—Oregon<sup>30</sup> and Louisiana<sup>31</sup>—allow felony

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25. Because of Malta's geographic location—an island nation in the Mediterranean Sea that is south of Sicily, north of Libya, and east of Crete—the country is a gateway to Western Europe. *The World Factbook: Malta*, *supra* note 18 (expand "Geography" section). Its most frequent recurring major crime is drug crime, typically the importation and sale of heroin. Interview with Judge Michael Mallia, Judge of Criminal Court, Malta (June 21, 2013). The accused is often not Maltese. *Id.* Maltese law gives the accused the option of a trial in either Maltese or English. *Id.* The official languages of Malta are Maltese and English. *Language*, VISITMALTA.COM, <http://www.visitmalta.com/en/language> (last visited Oct. 20, 2015). Lawyers and judges are bilingual, and Malta keeps a separate list of possible jurors who speak English. Interview with Judge Michael Mallia, *supra*.

26. See CRIM. CODE art. 611(2) (Malta).

27. See *id.* art. 459 (allowing jury questioning of witnesses).

28. Hans, *supra* note 3, at 277.

29. See CRIM. CODE art. 610(1) (Malta) (stating that a jury shall consist of nine jurors); *id.* art. 468 (requiring a consensus of six jurors in a verdict).

30. See OR. CONST. art. I, § 11; *State v. Sawyer*, 501 P.2d 792, 793 (Or. 1972) (en banc).

31. The Louisiana constitution requires a unanimous decision in capital cases, but not in cases where "the punishment is necessarily confinement at hard labor." LA. CONST. art. I, § 17(A); see also *State v. Bertrand*, 6 So. 3d 738, 743 (La. 2009).

convictions on non-unanimous votes, and the United States Supreme Court has upheld the constitutionality of non-unanimous convictions.<sup>32</sup> But Maltese verdicts may be unique in the self-perceived value of non-unanimous verdicts—insiders to Maltese jury trials believe that although most Maltese nine-person juries actually come to a unanimous verdict, the reported verdict, nonetheless, is seven to two. The reasoning is that every juror can return to their community and claim whatever side of the vote they wish.<sup>33</sup> Thus, the vote provides insulation by preventing anxiety over post-verdict public disapproval from corrupting the integrity of the trial. Minimizing this anxiety is a system concern given little, if any, attention in the United States.

Part I of this Article describes the history of Malta and Maltese jury practice. Part II briefly summarizes the parallel history of American jury practice. Part III compares and contrasts the structural aspects of contemporary Maltese and American jury practice. Part IV draws insights from Malta that add to the understanding of how American jury practice is structured and may be refined. Part V anticipates and responds to potential criticisms of the approach and conclusions of this Article.

#### I. A CONDENSED HISTORY OF MALTA AND A MORE DETAILED HISTORY OF MALTESE JURY PRACTICE<sup>34</sup>

Malta, an archipelago of islands in the Mediterranean Sea, has been controlled at various points in history by the Phoenicians, the Carthaginians, the Romans, the Byzantines, the Arabs, the Normans, the Argonese, the Order of the Knights of St. John, Napoleon's France, and, for most of the past two centuries, the British.<sup>35</sup> Twice in Malta's history, in the sixteenth and twentieth centuries, Malta has been the site of military sieges on which all of western European history arguably turned.<sup>36</sup> Malta has been an

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32. See *Apodaca v. Oregon*, 406 U.S. 404, 410–11 (1972).

33. See Interview with Judge Michael Mallia, *supra* note 25. A comparative law analysis should consider how an insider to the system would view the trial. See Reitz, *supra* note 16, at 628.

34. This section of the Article goes into some detail about the development of jury practices in Malta because Malta does not have in its current literature a manuscript, book, or article that pulls this history together in one place. Malta's lack of extant literature self-describing its procedures and rationales is a limitation of this Article. See Reitz, *supra* note 16, at 630–31.

35. See *History*, VISITMALTA.COM, <http://www.visitmalta.com/en/history> (last visited Oct. 20, 2015).

36. See generally *Knights of St. John*, VISITMALTA.COM, <http://www.visitmalta.com/en/knights-of-stjohn> (last visited Oct. 20, 2015); *British Period*, VISITMALTA.COM, <http://www.visitmalta.com/en/british-period> (last visited Oct. 20, 2015).

independent country since 1964 and is a member state of the European Union and the British Commonwealth.<sup>37</sup>

Demographically, Malta is the rough equivalent of a mid-sized, highly homogeneous, densely populated community in the United States. The 2011 census reported the population of Malta as 417,432 people.<sup>38</sup> Malta's land mass is 122 square miles.<sup>39</sup> Population is evenly divided male and female,<sup>40</sup> and astonishingly evenly spread by age.<sup>41</sup> Over 90% of the country age 10 or older is fluent in Maltese, and over 80% speak English well or average.<sup>42</sup> Slightly over two-thirds of Malta's population has completed at least a secondary level of education.<sup>43</sup> The Vatican estimates that roughly 95% of Malta is Roman Catholic—the highest percentage of anywhere in the world other than Italy.<sup>44</sup>

#### *A. Maltese Juries under the British*

Malta's tradition of trial by jury began immediately following the British-aided Maltese rebellion against Napoleon Bonaparte, which began on September 2, 1798.<sup>45</sup> Charles Cameron, the First British Commissioner of Malta, began the century and a half of British rule of Malta on May 14, 1801.<sup>46</sup> Twenty-five years later, on November 16, 1826, the architect of the current Maltese jury system, Sir John Stoddart, began his tenure as the President of the High Court of Appeal and Senior Member of the Supreme Council of Justice.<sup>47</sup>

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37. See *History*, VISITMALTA.COM, <http://www.visitmalta.com/en/history> (last visited Oct. 20, 2015).

38. See NAT'L STATISTICS OFFICE, MALTA, CENSUS OF POPULATION AND HOUSING 2011: PRELIMINARY REPORT 3–4 tbl.1 (2012), available at [https://nso.gov.mt/en/publicatons/Publications\\_by\\_Unit/Documents/01\\_Methodology\\_and\\_Research/Census2011\\_PreliminaryReport.pdf](https://nso.gov.mt/en/publicatons/Publications_by_Unit/Documents/01_Methodology_and_Research/Census2011_PreliminaryReport.pdf) [hereinafter 2011 CENSUS].

39. See Matt Rosenberg, *The World's Smallest Countries*, ABOUT EDUC. <http://geography.about.com/cs/countries/a/smallcountries.htm> (last visited Sept. 15, 2015).

40. 2011 CENSUS, *supra* note 38, at xviii fig.4.

41. *Id.* at xix fig.5.

42. *Id.* at xxi.

43. See 1 MALTA NAT'L STATISTICS OFFICE, CENSUS OF POPULATION AND HOUSING 2005 tbl.49 (2007).

44. See David M. Cheney, *Statistics by Country*, CH (Nov. 20, 2005), <http://www.catholic-hierarchy.org/country/sc3.html>.

45. See HUGH W. HARDING, MALTESE LEGAL HISTORY UNDER BRITISH RULE (1801-1836), at 2 (1968).

46. See *id.* at 1.

47. See *id.* at 188.

Malta first empaneled juries in 1815, where issues of fact in piracy trials were left to juries to avoid abuse of power by the admiralty.<sup>48</sup> Pursuant to a proposal by Stoddart, through Proclamation VI of 1829, on October 15, 1829, Malta expanded the jury right and adopted a form of trial by jury for all major criminal cases.<sup>49</sup>

Stoddart proposed that trial juries should be composed of three Maltese males and three Englishmen, with a President to be appointed “from the more intelligent classes (such as Police Magistrates, Advocates, Civil Officers of the Higher Ranks, Merchants, etc.).”<sup>50</sup> Verdicts were decided by majority vote, with the President holding the tiebreaking vote, if necessary.<sup>51</sup> Verdicts would find each assertion of the indictment proved or not proved so as to absolve jurors of the pressure of finding guilty or not guilty.<sup>52</sup> Jury trials would occur in the determination of serious felonies, meaning capital cases and crimes punishable by condemnation to the galleys for seven years or more.<sup>53</sup> Stoddart advocated that jury trials “would be considered a benefit by every Englishman and by the best informed of the Maltese.”<sup>54</sup> Following the October 15, 1829 adoption of Stoddart’s proposal, the first five jury trials “succeeded beyond all expectations.”<sup>55</sup>

### B. Juries in Post-British Malta

Malta gained independence from Britain in 1964.<sup>56</sup> The manuscripts of Professor J. J. Cremona<sup>57</sup> and A. J. Mamo<sup>58</sup> recorded the form of jury trials at the time. Professor Cremona was the author of the draft Malta

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48. See *id.* at 148–50. For an island nation strategically located in the center of the Mediterranean trade routes, admiralty and piracy were central issues in Malta for longer than recorded history. The creation of juries in response to distrust of the alternative echoes the concern animating the original jury rights in the United States. See Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence*, 58 CATH. U. L. REV. 153, 163–64 (2008); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (asserting that the jury provides an accused with an “inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge”).

49. See HARDING, *supra* note 45, at 148–150.

50. See *id.* at 191–92.

51. See *id.*

52. See *id.* at 193.

53. See *id.* at 191.

54. See *id.*

55. *Id.* at 258.

56. *The World Factbook: Malta*, *supra* note 18 (expand “Introduction” section).

57. See *The Jury System in Malta*, *supra* note 22.

58. See A. J. Mamo, Notes on Criminal Procedure 132–33 (1942) (on file in the Melitensia Collection of the Library of the University of Malta).

Independence Constitution, and at the time he published his manuscript in 1964, he was completing his tenure as Attorney General of Malta.<sup>59</sup> Mamo was the first President of Malta, and he wrote his “Notes on Criminal Procedure” in 1942—the year he joined the Attorney General’s office as Crown Counsel; for years afterwards law students in Malta would purchase them as a resource.<sup>60</sup> At the time of Maltese independence, jury trials still occurred only in criminal matters.<sup>61</sup> Perhaps unsurprisingly in a small country, much of Maltese procedure is organic rather than codified, and although the Preamble of Proclamation VI of 1829 contemplated the possibility of civil juries, these juries have never been put into practice.<sup>62</sup>

Within criminal law, substantive Maltese law derived from the Napoleonic codes, but procedural law was modeled on the English system.<sup>63</sup> To be eligible for jury service, one had to be a male over 21 residing in Malta, of good character, fluent in Maltese, a property owner, and competent—meaning neither interdicted nor incapacitated, not involved in bankruptcy proceedings, neither currently a criminal defendant nor a convicted criminal, and not unfit to serve due to a notorious physical or mental defect.<sup>64</sup> Postal workers, apothecaries, and doctors were exempt from jury service.<sup>65</sup> Maltese juries were comprised of nine jurors,<sup>66</sup> with the potential of up to three alternates.<sup>67</sup> Lists of potential jurors were compiled annually—one general list and another of jurors who spoke English.<sup>68</sup> From these lists, monthly venires were compiled.<sup>69</sup> Sub-lists were also compiled of jurors with prior experience, and from this list jury foremen were selected.<sup>70</sup>

At time of trial, potential jurors were assembled from the lists, with lawyers for each party having three peremptory challenges, and unlimited challenges for cause.<sup>71</sup> The lawyers had to exercise these challenges immediately upon a juror’s name being randomly drawn at the commencement of a trial, as the juror became part of the jury immediately once he was sworn in.<sup>72</sup> All juries were sequestered during trial, and without leave of court had

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59. See 1 MICHAEL J. SCHIAVONE, *DICTIONARY OF MALTESE BIOGRAPHIES* A-F 612–13 (2009).

60. See 2 MICHAEL J. SCHIAVONE, *DICTIONARY OF MALTESE BIOGRAPHIES* G-Z 1084 (2009).

61. See *The Jury System in Malta*, *supra* note 22, at 573.

62. See *id.*

63. See *id.* at 572.

64. See *id.* at 131–32.

65. See *id.* at 132.

66. *Id.* at 573.

67. See *id.* at 576; Mamo, *supra* note 58, at 133–34.

68. See Mamo, *supra* note 58, at 132–33.

69. See *id.* at 133.

70. See *id.*

71. See *id.* at 134–35.

72. See *id.*

no access to food or water during deliberations.<sup>73</sup> But within these parameters, jurors were robustly empowered during trials, as they could discuss the case among themselves throughout trial, could directly question witnesses, and could put questions to the judge during deliberations.<sup>74</sup> A jury reached a verdict—which required the consensus of at least six jurors—of guilty, not guilty, or not proven.<sup>75</sup>

Today, the Maltese Criminal Code changes jury practice very little from the one Cremona and Mamo described.<sup>76</sup> There are no civil juries.<sup>77</sup> There are two criminal courts in Malta, with one each on the island of Malta and the island of Gozo, and all jury trials are held in the criminal court in Valletta on the island of Malta.<sup>78</sup> Although occasional public criticism of juries in Malta endures,<sup>79</sup> the criminal jury has “merged so completely into the Maltese legal system that is [sic] has long been regarded as an essential and living part of it.”<sup>80</sup>

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73. See *id.* at 193, 198.

74. See *id.* at 193, 195, 198.

75. See *id.* at 198–200.

76. See CRIM. CODE arts. 436–80, 603–19, 611(2) (Malta).

77. See Seán Patrick Donlan, Biagio Andò & David Edward Zammit, “A Happy Union”? *Malta’s Legal Hybridity*, 27 TUL. EUR. & CIV. L.F. 165, 199 (2012).

78. See Email from Judge Michael Mallia, Judge for Criminal Court, Malta, to Author (June 9, 2014) (on file with author). At the time of this email, the judge of this court was Michael Mallia. Judge Michael Mallia served as Judge of the Superior Court of Malta from September 29, 2009 to March 26, 2015. See Curriculum Vitae, Mr. Justice Michael Mallia, available at [www.judiciarymalta.gov.mt/file.aspx?f=545](http://www.judiciarymalta.gov.mt/file.aspx?f=545); *Not Enough Judges and Magistrates on the Bench – Judge Michael Mallia*, MALTA INDEPENDENT (Mar. 26, 2015), <http://www.independent.com.mt/articles/2015-03-26/local-news/Not-enough-Judges-and-Magistrates-on-the-bench-Judge-Michael-Mallia-6736132814>. To the extent there are “unwritten rules” of Maltese jury practice, he is an excellent resource; indeed some of his tenure he was the jurist presiding over every Maltese jury trial. Email from Judge Michael Mallia, Judge for Criminal Court, Malta, to Author, *supra*. Judge Mallia’s descriptions of the actual, but unwritten, aspects of Maltese practice are not only interesting anecdotally, but also are important for a thorough comparative law analysis. See Reitz, *supra* note 16, at 629–30. Judge Mallia reviewed for accuracy this Article’s descriptions of Maltese practice.

79. See, e.g., Miram Dunn, *Acquittals Blamed on Jury System*, MALTA TODAY (July 8, 2001); Editorial, *The Jury System*, MALTA TODAY (Apr. 8, 2001); Matthew Vella, *Still on Jurors List!*, MALTA TODAY (Dec. 17, 2006).

80. Donlan et al., *supra* note 77, at 200 (quoting *The Jury System in Malta*, *supra* note 22, at 572).

## II. A CONDENSED HISTORY OF AMERICAN JURY PRACTICE

The United States Constitution provides for criminal juries in Article III<sup>81</sup> and the Sixth Amendment,<sup>82</sup> and provides for civil juries in the Seventh Amendment.<sup>83</sup> Even when the Founders adopted these provisions, juries were controversial in that the public perceived juries as incompetent and easily manipulated.<sup>84</sup> Still, the Founders protected the right to a jury trial in three separate parts of the Constitution.<sup>85</sup> This protection arose primarily because one catalyst of the American Revolution was a perceived attempt by the British to take away jury rights.<sup>86</sup> Further, American colonists frankly preferred the risk of inept jurors to the risk of corrupt judges.<sup>87</sup>

At the time of the American Revolution, every colony had a jury trial system derived from the British system.<sup>88</sup> Although the text of the Constitution does not explicitly adopt the British form of jury practice, the courts of the United States repeatedly have held that the constitutionally-preserved jury rights are indeed the jury practices of the British.<sup>89</sup> Jury reform pressures have never been far from public consciousness, and the past two centuries have been characterized as a steady trend toward a retraction of the role of the American jury.<sup>90</sup> Even though the frequency of jury trials is currently declining,<sup>91</sup> the core right to trial by jury in America, especially in a criminal trial, remains robust and seemingly inviolate.<sup>92</sup>

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81. U.S. CONST. art. III, § 2.

82. U.S. CONST. amend. VI.

83. U.S. CONST. amend. VII.

84. See Kenneth S. Klein, *Why Federal Rule of Evidence 403 is Unconstitutional, and Why that Matters*, 47 U. RICH. L. REV. 1077, 1095–98 (2013).

85. See U.S. CONST. art. III, § 2; U.S. CONST. amend. VI; U.S. CONST. amend. VII; Klein, *supra* note 84, at 1095–98.

86. Klein, *supra* note 84, at 1095–98.

87. See *id.*

88. See Klein, *supra* note 21, at 1008–12.

89. See, e.g., *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812); *Thompson v. Utah*, 170 U.S. 343, 350 (1898).

90. See generally Kenneth S. Klein, *Unpacking the Jury Box*, 47 HASTINGS L.J. 1325 (1996) (discussing trends in American jury reforms).

91. See Shauna M. Strickland, *Beyond the Vanishing Trial: A Look at the Composition of State Court Dispositions*, NAT'L CENT. STATE CTS., <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/adr/id/41> (last visited Sept. 15, 2015).

92. See MIZE ET AL., *supra* note 4, at 7–8, 4 tbl.2.

III. CONTEMPORARY SIMILARITIES AND DIFFERENCES BETWEEN  
CURRENT MALTESE JURY PRACTICE AND TYPICAL  
JURY PRACTICE IN THE UNITED STATES

Maltese and American jury practices are virtually identical in broad structure, but sometimes divergent in detail. In particular, the countries differ in how jurors are selected, the degree to which jurors are active and interactive during a trial, and how jurors reach a verdict.<sup>93</sup>

Malta has an expansive view of who can be a juror. Although the age of majority in Malta is 18,<sup>94</sup> a juror must be at least 21.<sup>95</sup> In addition, a juror must be a resident of Malta; speak Maltese; be of good character; neither be a felon nor accused of a felony; not currently in bankruptcy, interdicted, incapacitated; and not be “reported unfit by notorious physical or mental defect.”<sup>96</sup> Government officials, soldiers, doctors, pharmacists, teachers, professors, police officers, and persons over the age of 60 are exempt.<sup>97</sup>

The United States has a similarly expansive view of juror qualifications. In the majority of American states, a juror must be a citizen of the state, a resident of the county in which the trial is held, and 18 years of age.<sup>98</sup> A person may be exempted from jury service if that person is not proficient in English, has a felony conviction, or lacks either citizenship or residency.<sup>99</sup> The most common exemptions are prior jury service or age.<sup>100</sup> Many jurisdictions have “designated various occupational or status roles for which citizens could claim an exemption from jury service (e.g., political officeholders, judicial officers, sole caregivers of young children including nursing mothers, or sole caregivers of incompetent adults).”<sup>101</sup> More than one-third of eligible Americans will serve as a juror at least once in their lifetime.<sup>102</sup>

In Malta, the actual selection of jurors is a largely random system. Two lists of possible jurors—one of Maltese speakers and another of English speakers—are generated twice annually, and sub-lists are compiled within

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93. The comparison here is limited to criminal felony trials, as Maltese law has no provision for juries in civil trials.

94. CRIM. CODE art. 188 (Malta).

95. *Id.* art. 603; *see also* Lorna Mifsud Cachia, *The Jury System in Malta: Can It Be Improved?* 146 (2001) (unpublished LL.D. thesis, Univ. of Malta) (on file at the University of Malta, Melintensia collection).

96. CRIM. CODE art. 603 (Malta).

97. *Id.* art. 604.

98. *See* MIZE ET AL., *supra* note 4, at 22.

99. *See id.* at 21.

100. *See id.* at 14–15.

101. *Id.* at 15.

102. *Id.* at 8.

these lists of those with prior jury experience.<sup>103</sup> The lists are generated from a meeting attended by “the Commissioner of Police or his representative, the Senior Magistrate, the Attorney General or his representative, the President of the Chamber of Advocates and the President of the Chamber of Legal Procurators.”<sup>104</sup> Individuals on the list are identified by name, profession, and residence.<sup>105</sup> Venires are formed from these lists monthly.<sup>106</sup> Juries are comprised of eight jurors drawn at random from the venire, a foreperson drawn from the sub-list, and up to six alternates.<sup>107</sup> Because Malta does not have *voir dire*, peremptory strikes are rarely if ever exercised.<sup>108</sup>

In the United States, judges and lawyers are far more proactive in jury selection. For the most part, in the United States juror source lists are generated from voter registration lists, driver’s license lists, or both.<sup>109</sup> The large majority of American courts allow access to at least a juror’s name and address before jury selection begins.<sup>110</sup> Most also collect preliminary *voir dire* information, such as a prospective juror’s marital status, occupation, and number and ages of any of the prospective juror’s children.<sup>111</sup> From there, either the attorneys alone, or with the help of the judge, conduct *voir dire*, although some states mirror the federal approach of predominantly or exclusively judge-conducted *voir dire*.<sup>112</sup> In non-capital felony trials, the median time spent on jury selection in state court is two hours.<sup>113</sup> The vast majority of states require a 12-person jury in felony trials.<sup>114</sup>

In Malta, jurors are active decision-makers throughout trial. During the run of the trial, jurors have the right to question witnesses.<sup>115</sup> After one round of lawyer-conducted direct examination and one round of lawyer-conducted cross-examination, a microphone is handed to the jury box, allowing the jurors to ask any questions they have.<sup>116</sup> Jurors also are free

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103. CRIM. CODE art. 605 (Malta).

104. *Id.*

105. *Id.* art. 605(2).

106. *Id.* art. 606.

107. *Id.* arts. 605, 610, 611(1).

108. See Interview with Judge Michael Mallia, Judge of Criminal Court, Malta (June 10, 2011).

109. MIZE ET AL., *supra* note 4, at 13–14.

110. See *id.* at 25 tbl.20.

111. See *id.* at 26.

112. See *id.* at 28 tbl.21.

113. See *id.* at 28.

114. See Alisa Smith & Michael J. Saks, *The Case for Overturning Williams v. Florida and the Six-Person Jury: History, Law, and Empirical Evidence*, 60 FLA. L. REV. 441, 443 (2008).

115. CRIM. CODE art. 459 (Malta).

116. See Interview with Judge Michael Mallia, *supra* note 108.

to discuss the case with each other during trial.<sup>117</sup> Additionally, the judge sums up the evidence for the jury and explains the law to them,<sup>118</sup> and the jury can ask the judge questions.<sup>119</sup>

Maltese law provides that as to each charge in the indictment, the verdict can be guilty, not guilty, or not proven.<sup>120</sup> In practice, however, a verdict that includes the latter option is not provided.<sup>121</sup> Rather, “[j]urors may be instructed, if the case so warrants, to find guilt in a lesser charge even though not specifically mentioned in the Bill of Indictment provided the lesser charge is incorporated in the main charge.”<sup>122</sup> Six votes are needed to convict.<sup>123</sup>

Maltese law forbids lawyers from speaking to jurors, even informally, after the conclusion of a trial.<sup>124</sup> Although juries are no longer required to be sequestered during trial,<sup>125</sup> in practice they usually are.<sup>126</sup> Juries are limited in their authority to deciding issues of fact and applying those findings of fact to the law.<sup>127</sup>

In the United States, of course, there is no mimicking of the Maltese “pass around the microphone” practice and there is, at most, limited juror interaction with the trial in general. More than two-thirds of courts now allow jurors to take notes and to have at least one copy of the written instructions, and over half give jurors guidance on deliberations.<sup>128</sup> Or, put another way, one-third of states still do not allow juror note-taking, one-half give no guidance to jurors on how to deliberate, and one third do not even provide jurors with one written copy of the jury instructions.<sup>129</sup> Only 14% of state criminal trials allow juror-written questions to witnesses, and

117. CRIM. CODE art. 471(1) (Malta).

118. *Id.* art. 465.

119. *Id.* art. 470(1).

120. *Id.* arts. 436(2), 467, 480(3).

121. See Email from Judge Michael Mallia, Judge of Criminal Court, Malta, to Author (August 9, 2014) (on file with author).

122. See *id.* Judge Mallia explains, in practice:

[J]urors can not, out of their own volition return a “Not Proven” verdict but must be specifically asked to do so by the Court and then only when a doubt arises on any question of law upon the determination of which might depend the finding of the jury as to whether the accused is guilty of the offence. . . . As far as I am aware, this procedure has never been resorted to, at least for the past ten years.

Email from Judge Michael Mallia, Judge of Criminal Court, Malta, to Author (August 11, 2014) (on file with author).

123. CRIM. CODE art. 468 (Malta).

124. See Interview with Judge Michael Mallia, *supra* note 25.

125. CRIM. CODE art. 471(2) (Malta).

126. See Interview with Judge Michael Mallia, *supra* note 25.

127. See *id.*

128. MIZE ET AL., *supra* note 4, at 32.

129. *Id.*

less than 1% allow jurors to discuss the evidence before deliberations commence.<sup>130</sup> All but two states require a unanimous verdict in criminal cases.<sup>131</sup> Therefore, in the United States, modification and reflection on jury practices is always a work in progress.<sup>132</sup>

#### IV. MALTA CAN FILL GAPS IN THE AMERICAN CONSIDERATION OF JURY REFORM

In both Malta and the United States, felony jury trials look fundamentally the same and have broadly identical procedures. Even at the granular level, remarkable similarity exists within some aspects, such as who is qualified for jury service or what information is known about the potential jurors before they appear for jury duty. Because of the broad similarities, Malta can be a useful resource to the United States in the areas where there are differences, filling in informational gaps. Those procedural differences primarily arise in how the jury is selected and how the jurors interact with each other and with witnesses during the trial.

##### *A. Jury Selection*

Robust debate exists in the American literature about many aspects of jury selection.<sup>133</sup> Within this literature, many scholars put significant focus

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130. *Id.* at 32 tbl.24. At least one researcher questions whether these numbers are low. See Mitchell J. Frank, *The Jury Wants To Take the Podium—But Even with the Authority to Do So, Can It? An Interdisciplinary Examination of Jurors’ Questioning of Witnesses at Trial*, 38 AM. J. TRIAL ADVOC. 1, 8 (2014).

131. Shari Seidman Diamond, Mary R. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201, 203 (2006) [hereinafter *Revisiting the Unanimity Requirement*].

132. See generally MIZE ET AL., *supra* note 4 (documenting “local practices [of American states] and jury operations in the context of their respective state infrastructures and . . . provid[ing] a baseline against which state court policymakers could assess their own systems vis-à-vis their peers and nationally recognized standards of effective practices”).

133. See, e.g., Raymond J. Broderick, *Why the Peremptory Challenge Should be Abolished*, 65 TEMP. L. REV. 369 (1992); Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection*, 64 HASTINGS L.J. 141 (2012); Joseph A. Colquitt, *Using Jury Questionnaires: (Ab)using Jurors*, 40 CONN. L. REV. 1 (2007); Shari Seidman Diamond & Mary R. Rose, *Real Juries*, 1 ANN. REV. LAW & SOC. SCI. 255, 259–62 (2005); Ford, *supra* note 6; Deborah L. Forman, *What Difference Does It Make? Gender and Jury Selection*, 2 UCLA WOMEN’S L.J. 35 (1992); Hastie, *supra* note 6; Scott W. Howe, *Juror Neutrality or an Impartiality Array? A Structural Theory of the Impartial Jury Mandate*, 70 NOTRE DAME L. REV. 1173 (1995); Nancy J. King, *Racial Gerrymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707 (1993); Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal*

on the utility of peremptory strikes.<sup>134</sup> Occasionally, an argument appears for the elimination of peremptory strikes altogether.<sup>135</sup>

Peremptory strikes, the right to which lies at the heart of the rationale for robust jury questioning in the United States, pre-date the country itself.<sup>136</sup> The United States Supreme Court has explained that the purpose of peremptory challenges is to “eliminate the extremes of partiality on both sides” and to assure that jurors “will decide on the basis of the evidence.”<sup>137</sup> Yet defending the American approach on the reason proffered by the Court is difficult. An underlying assumption of both judges and lawyers in the American system is that counsel are selecting the most biased jury possible.<sup>138</sup> In an adversarial system, the assumption argues, this competition will balance out the jury.<sup>139</sup> The underlying premise is that the background of a particular juror is a valid place marker for a point of view.<sup>140</sup> That premise is debatable.<sup>141</sup> If the premise is wrong, then the assumption fails, and so the rationale for *voir dire* weakens. But even accepting the premise, broadly speaking, little reason exists to believe that peremptory challenges work, or at least work as intended.<sup>142</sup> Therefore, one then returns to the question of the value of *voir dire*.

*Cases: A Critical Evaluation*, 86 GEO. L.J. 945 (1998); Hillel Y. Levin & John W. Emerson, *Is There a Bias Against Education in the Jury Selection Process?*, 38 CONN. L. REV. 325 (2006); MIZE ET AL., *supra* note 4; Amy R. Motomura, *The American Jury: Can Noncitizens Still Be Excluded?*, 64 STAN. L. REV. 1503 (2012); Mary R. Rose, *A Dutiful Voice: Justice in the Distribution of Jury Service*, 39 LAW & SOC’Y REV. 601 (2005); Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597 (2006); Weddell, *supra* note 6.

134. See, e.g., Diamond & Rose, *supra* note 133, at 259–62; King, *supra* note 133; Motomura, *supra* note 133; Ford, *supra* note 6.

135. See, e.g., Felice Banker, Note, *Eliminating a Safe Haven for Discrimination: Why New York Must Ban Peremptory Challenges From Jury Selection*, 3 J.L. & POL’Y 605 (1994); Broderick, *supra* note 133; Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809 (1997); Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1182–83 (1995).

136. See *Swain v. Alabama*, 380 U.S. 202, 212–13 (1965).

137. *Id.* at 219.

138. See Reid Hastie, *Is Attorney-Conducted Voir Dire An Effective Procedure For The Selection Of Impartial Juries?*, 40 AM. U. L. REV. 703, 706 (1991).

139. See Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 491–92 (1977).

140. See Kenneth S. Klein & Theodore D. Klastorin, *Do Diverse Juries Aid or Impede Justice?*, 1999 WIS. L. REV. 553, 553–59.

141. *Id.*

142. See Amar, *supra* note 135, at 1182–84; accord Jacqueline Horan & Jane Goodman-Delahunty, *Challenging the Peremptory Challenge System in Australia*, 34 CRIM. L.J. 167, 185–86 (2010).

Great Britain, the ancestral system of both the United States and Malta, has largely abandoned *voir dire*.<sup>143</sup> The United States Supreme Court, commenting on the British disuse of *voir dire*, concluded that in Great Britain jury selection was unnecessary.<sup>144</sup> Rather, the Court noted, due in part to Britain's superior control of pre-trial publicity, "court and counsel have confidence in the impartiality and integrity of trial jurors . . ."<sup>145</sup>

The only empirically demonstrated benefit of attorney-conducted *voir dire* is that it generates more candid responses than judge-conducted *voir dire*.<sup>146</sup> But that benefit only points to who should question potential jurors, not whether there is a general benefit from questioning potential jurors at all. Any layperson observing American jury selection quickly questions whether *voir dire* enhances the likelihood of justice, as opposed to simply favoring the side with the more clever lawyer.<sup>147</sup> That skepticism itself undermines the rationale for *voir dire*, as it goes to the heart of the rationale of jury questioning as a means to achieve confidence in jury impartiality and integrity.

Although the gain from *voir dire* is questionable, the cost is undisputed. *Voir dire* and peremptory strikes take time, expend lawyer and court resources, and are quite possibly ineffective.<sup>148</sup> Yet in the American literature, the closest anyone comes to contemplating the complete elimination of *voir dire* is Professor Akhil Amar's suggestion that, "[b]y and large, the first twelve persons picked by lottery should form the jury."<sup>149</sup> As is suggested by the phrase "by and large," even Professor Amar, who also largely advocates for the elimination of most strikes for cause, cannot truly envision and evaluate the possibility of no *voir dire* whatsoever.<sup>150</sup> Unsurprisingly, given this state of the literature, no American studies have tested a scenario without *voir dire*.

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143. *Swain v. Alabama*, 380 U.S. 202, 218 (1965).

144. *See id.* (explaining that the difference arises "perhaps because juries [in the United States] are drawn from a greater cross-section of a heterogeneous society").

145. *Id.* at 218 n.24 (quoting PENDLETON HOWARD, *CRIMINAL JUSTICE IN ENGLAND* 363 (1931)). There is some empirical support for the notion that pre-trial publicity is problematic in the American system. *See* Dennis J. Devine et al., *Jury Decision Making*, 7 *PSYCHOL. PUB. POL'Y & L.* 622, 687–88 (2001).

146. MIZE ET AL., *supra* note 4, at 28.

147. *See* Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 *TEX. L. REV.* 1041, 1084 (1995).

148. *See* Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 *STAN. L. REV.* 545, 545–46 (1975).

149. Amar, *supra* note 135, at 1182.

150. *See id.* at 1183 ("I propose getting rid of almost all 'for cause' dismissals and thus most *voir dire*. . .").

And, of course, no example from the American courts exists. Today, all American states and the federal courts have *voir dire*.<sup>151</sup> Roughly 45% of states have attorney-dominated *voir dire*, approximately 20% of states have judge-dominated *voir dire*, and about 35% of states have equally shared judge- and counsel-conducted *voir dire*.<sup>152</sup> Apparently in the United States, eliminating *voir dire* is beyond imaginable. Ironically, from the perspective of a Maltese lawyer, almost the exact opposite view emerges. In her doctoral thesis, Dr. Cachia captured this sentiment, explaining that “the American system[’s] . . . obsession with the identity of the jurors is totally erroneous for the whole emphasis of the system is not on the trial itself, but on the jury. Indeed, it is submitted that each trial by jury is becoming a trial of jurors.”<sup>153</sup>

In this regard, Americans advocating for the elimination of peremptory strikes should be interested in Malta. This small, Mediterranean nation shows that a court system can function smoothly without *voir dire*, without the exercise of peremptory strikes, and with only rare strikes for cause. Although the Maltese jury essentially is comprised of the first nine names randomly drawn from the list, no chaos results. Malta suffers no pervasive protest from the public, from lawyers, or from judges about the composition of juries.

Of course, one may validly respond that not much can be gleaned from a lack of protests on jury composition. Malta’s lack of reports of anecdotal displeasure does not equate to public confidence in jury impartiality and integrity, or even to actual jury impartiality and integrity. Unsurprisingly, the literature of this young nation has yet to include even a compilation of its jury procedures, let alone a study of the consequences of current jury procedures. Malta’s experience can only go so far in establishing, rather than merely suggesting, that eliminating *voir dire* would not impair either actual or perceived jury impartiality or integrity.

But, in this regard, additional confidence comes from a third nation—the Republic of Ireland. Ireland, like Malta, has both peremptory strikes and strikes for cause, and has no *voir dire*.<sup>154</sup> In 2010, the Law Reform Commission of the Republic of Ireland published a 240-page report on jury service.<sup>155</sup> In its work on jury reform, the Commission looked

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151. See MIZE ET AL., *supra* note 4, at 27–28 (classifying *voir dire* practices for each state and acknowledging that federal courts perform *voir dire* as well).

152. See *id.* at 27–28.

153. Cachia, *supra* note 95, at 112.

154. See LAW REFORM COMM’N, JURY SERVICE (2010), available at [http://www.lawreform.ie/\\_fileupload/consultation%20papers/LRC%20JuriesCP%20full.pdf](http://www.lawreform.ie/_fileupload/consultation%20papers/LRC%20JuriesCP%20full.pdf).

155. See *id.* The Commission “is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission’s principal role is to keep the law under review and to make proposals for reform, in particular by

extensively at jury selection, particularly considering the history of Irish law and procedure, the approaches of other nations, the academic literature on the topic, and the merits of the arguments both for and against peremptory strikes.<sup>156</sup> The Commission concluded that retaining the right to peremptory strikes and strikes for cause was important but that questioning of jurors, whether oral or written, was more harmful than helpful.<sup>157</sup>

Thus, Ireland and Malta go further than the most imaginative of American scholars. Although some commentators in the American literature advocate for the elimination of peremptory strikes, virtually none advocate for the elimination of *voir dire* entirely because strikes for cause remain. For example, even Professor Amar, who advocates for eliminating most strikes for cause, writes, “I propose getting rid of . . . most *voir dire*.”<sup>158</sup> The obvious reason that the American literature does not contemplate eliminating *voir dire* is that if any strikes for cause exist, a lawyer would want to retain the ability to evaluate a possible strike.

When Dr. Cachia reflected on the Maltese experience with jury selection, she did not advocate for allowing juror questioning, but she did advocate for disseminating an American-like written juror questionnaire.<sup>159</sup> In this regard, the Irish and Dr. Cachia diverge, as the Irish Commission’s report explicitly considers and rejects the utility of even written questions.<sup>160</sup>

One should note that, in the absence of even written questionnaires, Maltese and Irish lawyers work off of the same basic informational pallet as an American lawyer would in the absence of *voir dire*, meaning the

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recommending the enactment of legislation to clarify and modernise the law.” *Id.* at ii.

156. *See id.*

157. *Id.*

158. Amar, *supra* note 135, at 1183.

159. *See* Cachia, *supra* note 95. In particular, Dr. Cachia proposed:

- Raising the minimum juror age to 25
- Raising the exemption age to 70
- Introducing a literacy requirement
- Making the definition of good character more complete (such as by specifying no drug addicts, gamblers, or vagrants)
- For societal necessity exempting all medical professionals and teachers, and for reasons of eliminating bias exempting all legal professionals
- Generating the lists of potential jurors with local councils working off of databases and doing “key man” cross-checks
- Having jurors complete simple questionnaires in advance of selection, probing bias based on “familiarity with the crime or the lawyers, press coverage, personal history, and the like”

*Id.* In the ensuing years since Dr. Cachia wrote, Maltese practice has (thus far) not changed.

160. LAW REFORM COMM’N, *supra* note 154, at 167 (“[P]ermitting the questioning of candidate jurors by means of a written questionnaire would not be a desirable or necessary law reform . . .”).

potential juror's physical appearance, name, address, age, and occupation.<sup>161</sup> An American lawyer would recoil at this lack of information on the jurors, as would Dr. Cachia, who works as a barrister in an adversarial system in the Maltese courts.<sup>162</sup> But when the Irish Commission, which in contrast to Dr. Cachia has no client interest to consider, looked at jury service from a societal perspective, the Commission concluded that justice was best served by not allowing attorneys or judges to conduct any inquiry of jurors beyond basic information.<sup>163</sup>

One might postulate that Malta's system works well for a very small and insular place, and that Ireland's system works well for a similarly small and insular place—outside of Dublin—but that extended *voir dire* is necessary in America to prevent the attorneys from knowing nothing about a potential juror. This is a testable postulation. Neither Malta nor extra-Dublin, Ireland are less populous or less densely populated than parts of the United States—arguably, measured by population per square mile, Malta is densely populated. Thus, if the relevant variable was population size or density—both highly variable in the United States—one would expect to see the length of *voir dire* in the United States roughly correlate to the population of the state, and diverge between dense low population states such as Rhode Island and disperse low population states such as Montana. The National Center for State Courts compiled a list of the average length of *voir dire* in all 50 states and the District of Columbia.<sup>164</sup> No such pattern is present.<sup>165</sup>

So what can be concluded from all of this? The Maltese and Irish approaches of eliminating questioning of jurors while retaining the right to both peremptory and for cause strikes perhaps should be characterized as provocative but not definitive. The Maltese and Irish experiences should undermine, at least to some degree, any confidence we have in the conclusion that *voir dire* is a necessary evil to having a meaningful right to a peremptory or for cause strike and therefore, the Maltese and Irish

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161. See *supra* Part III.

162. For information on Dr. Chachia, see *Dr. Lorna Mifsud Cachia B.A., Mag. Juris (Eur & Comp. Law), LL.D, Adv.Trib.Eccles.Melit*, DINGLI & DINGLI LAW FIRM, <http://www.dingli.com.mt/page.asp?p=7143> (last visited Sept. 15, 2015).

163. See LAW REFORM COMM'N, *supra* note 154, at 165–67.

164. See MIZE ET AL., *supra* note 4, at 77.

165. Medium population states, such as South Carolina, Alabama and Virginia, top the list for shortest average *voir dire*, ranging from 30 to 60 minutes. *Id.* Although some large population states like New York and California are near the bottom, so too is sparsely populated Alaska, and these three range from four to five hours of average *voir dire*. *Id.* And sparsely populated Montana, Rhode Island, and Wyoming find themselves squarely within the middle with much larger states, such as Texas and Florida, with all of these states spending an average of two hours on *voir dire*. *Id.*

experiences should be thought of as natural experiments that provide data that theoreticians in the United States should consider.

### *B. Jury Interaction*

From the perspective of an American lawyer, another deeply incongruous aspect of a Maltese jury trial is how the jury behaves during trial. Malta actually encourages juror questions, as a microphone literally is passed through the jury box immediately following one round each of direct and cross-examination.<sup>166</sup> And throughout trial, jurors are expected to discuss the case and their evolving views of it.<sup>167</sup>

Malta's view of the way a jury should act and interact during trial is, quite literally, foreign to the form of most American trials. In all but a handful of civil trials in the United States, American juries are instructed to not discuss the trial at all until deliberations begin.<sup>168</sup> Typical is Kansas, where by statute:

If the jury is permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that: (1) It is their duty not to converse with, or allow themselves to be addressed by any other person on any subject of the trial, and that any attempt to do so should be immediately reported by them to the court; (2) it is their duty not to make any final determinations or express any opinion on any subject of the trial until the case is finally submitted to them; and (3) such admonition shall apply to every subsequent separation of the jury.<sup>169</sup>

In recent years, a robust discussion has taken place in American literature on the desirability of an interactive jury.<sup>170</sup> And though the courtroom

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166. See CRIM. CODE art. 459 (Malta); Email from Judge Michael Mallia, *supra* note 122.

167. See Interview of Criminal Court Judge Michael Mallia (June 3, 2011).

168. See MIZE ET AL., *supra* note 4, at 32 tbl.24.

169. KAN. STAT. ANN. §22-3420(b) (West, Westlaw through 2015 Regular Session). It will be detailed further below why Kansas in particular is an apt point of comparison.

170. See, e.g., B. Michael Dann, "Learning Lessons" and "Speaking Rights": *Creating Educated and Democratic Juries*, 68 IND. L.J. 1229 (1993) (advocating for letting jurors discuss the evidence throughout trial); *Increasing Juror Participation*, *supra* note 5 (advocating for allowing juror questions); Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190 (1990) (advocating for allowing juror questions); Nicole L. Mott, *The Current Debate on Juror Questions: "To Ask or Not To Ask, That is the Question"*, 78 CHI.-KENT L. REV. 1099 (2003) (arguing that data demonstrates

empirical work on juror questions in particular has been a slightly bumpy road, this road has pointed in a clear direction. The social science literature would predict that juror questions are of value to the fact-finding function of the jury.<sup>171</sup> The debate in the American legal literature largely is not about whether juror questions have fact-finding benefits. Rather, the debate about juror questions devolves into arguments about balancing informed advocacy and decision making against concerns about distraction, disruption, loss of objectivity, wasting time, or distorting the proper role of the jury.<sup>172</sup> Notably, even those opposing juror questions do not assert that jurors should ideally be passive receptacles of information.<sup>173</sup>

In an effort to bring empirical evidence to the debate over various methods to increase juror interaction with witnesses and each other, social scientists Larry Heuer and Steven Penrod conducted two courtroom studies in which they attained “the data for the first experiment . . . from the judges, lawyers, and jurors for 67 Wisconsin state court trials; the data for the second from the judges, lawyers, and jurors for 160 state and federal court trials conducted in 33 states.”<sup>174</sup> Within this set, Heuer and Penrod studied juror questions in 33 Wisconsin criminal trials and 71 federal trials.<sup>175</sup> The results of the work of Heuer and Penrod largely affirmed the expectations of advocates of juror questions. As one frequently raised concern with juror questions is the possibility of jurors asking objectionable questions,<sup>176</sup> the

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that juror questions enhance jurors as fact finders); Michael Wolff, Comment, *Juror Questions: A Survey of Theory and Use*, 55 MO. L. REV. 817 (1990) (advocating for juror questions); Shari Seidman Diamond et al., *Juror Questions During Trial: A Window into Juror Thinking*, 59 VAND. L. REV. 1925 (2006) [hereinafter *Juror Questions*] (advocating allowing juror questions); *Juror Discussions During Civil Trials*, *supra* note 5 (reporting on and evaluating the Arizona experiment with juror questions and allowing jurors to discuss the case pre-deliberation); Larry Heuer & Steven D. Penrod, *Some Suggestions for the Critical Appraisal of a More Active Jury*, 85 NW. U. L. REV. 226 (1990) (advocating for a more critical evaluation of the possibility of juror questions). *But see* Lundy, *supra* note 5 (advocating against allowing juror questions in criminal trials); N. Randy Smith, *Why I Do Not Let Jurors Ask Questions in Trials*, 40 IDAHO L. REV. 553 (2004) (arguing against juror questions).

171. See Dann, *supra* note 170, at 1238–47.

172. See *Juror Questions*, *supra* note 170, at 1931–34; Mott, *supra* note 170; Lundy, *supra* note 5.

173. See, e.g., Lundy, *supra* note 5, at 2032–34 (arguing that juror questions should be disallowed because the goal of truth should be subordinate to other system goals).

174. *Increasing Juror Participation*, *supra* note 5, at 256–57.

175. *Id.* at 259 (“In the national study, juror questions were allowed in 71 trials . . .”).

176. See, e.g., Wolff, *supra* note 170, at 826–27; Frank, *supra* note 130, at 10.

studies assuage these concerns by suggesting that “[j]urors do not ask inappropriate questions.”<sup>177</sup>

Another closely related concern with juror questions is that counsel will be reluctant to object to juror questions.<sup>178</sup> Again, the studies of 104 trials indicate that this is not a problem.<sup>179</sup> The concern is raised that allowing jurors to be active questioners will alter the neutrality of the jurors as decision makers.<sup>180</sup> The Wisconsin and federal studies found, “[j]urors allowed to ask questions do not become advocates rather than neutrals.”<sup>181</sup> But in one respect, the results were surprising. Though the studies found that juror questions advanced juror understanding, juror questions did not advance reaching the truth nor assist the lawyers.<sup>182</sup>

The Wisconsin and federal studies did little to quell any debate over the desirability of juror questions. Despite the results of these two studies, the concerns of bias, inappropriate questions, or pressures on advocates regarding objections all persisted.<sup>183</sup> The National Center for State Courts, citing the work of Heuer and Penrod, among others, reported in its 2007

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177. *Increasing Juror Participation*, *supra* note 5, at 260.

178. *See, e.g.*, Wolff, *supra* note 170, at 826–27.

179. *See Increasing Juror Participation*, *supra* note 5, at 260 (“If the lawyers do object, the jurors are not embarrassed or angry. . . . If counsel objects and the objection is sustained, the jury does not draw inappropriate inferences from the unanswered question.”).

180. *See, e.g.*, Wolff, *supra* note 170, at 829–33.

181. *Increasing Juror Participation*, *supra* note 5, at 260. Heuer and Penrod state:

This article summarizes the results of two courtroom experiments investigating the consequences of allowing jurors to take notes and to direct questions to witnesses during trials. The data for the first experiment were obtained from the judges, lawyers, and jurors for 67 Wisconsin state court trials; the data for the second from the judges, lawyers, and jurors for 160 state and federal court trials conducted in 33 states.

*Id.* at 256–57. Heuer and Penrod further stated:

Twenty four percent of the jurors’ questions were objected to . . . [and] the attorneys were in considerable agreement about which questions were objectionable. . . . [T]wo-thirds of the lawyers’ objections were sustained. . . . Jurors do not ask inappropriate questions. . . . Counsel are not reluctant to object to inappropriate juror questions. . . . If the lawyers do object, the jurors are not embarrassed or angry. . . . If counsel objects and the objection is sustained, the jury does not draw inappropriate inferences from the unanswered question. . . . Jurors allowed to ask questions do not become advocates rather than neutrals. . . . Jurors do not overemphasize answers to their own questions at the expense of other trial evidence.

*Id.* at 260.

182. *See id.* at 260.

183. *See* Lundy, *supra* note 5, at 2024–32; *Juror Questions*, *supra* note 170, at 1929–30, 1932–34.

comprehensive study of jury practices in the state courts, “[a] substantial and growing body of empirical research has found that [permitting written juror questions], if properly controlled by the trial judge, improves juror comprehension without prejudicing litigants’ rights to a fair trial.”<sup>184</sup> Furthermore, even more recent studies, such as the Arizona Videotaping Project, indicated the need to limit juror questions to written questions in a controlled environment that provided tools for a judge to discourage too many questions.<sup>185</sup>

Therefore, confining the focus only to juror questions, what can Malta, a country with so few jury trials that for several years all were conducted in a single courtroom,<sup>186</sup> add to the discussion? In this regard, because Malta allows oral questions by jurors, Malta contributes in two ways. First, the country is a natural experiment that can provide further clarity on the desirability of written juror questions. Second, the Maltese experience suggests that if America decides that written juror questions should be allowed, then America will not have gone far enough; Malta illustrates that oral juror questions should also be allowed.

The Maltese experience is a natural experiment that can further clarify whether written juror questions are desirable. The empirical compilation and interpretation of both the National Center for State Courts<sup>187</sup> and the Arizona Videotaping Project<sup>188</sup> suggest that juror questions under controlled conditions—to minimize jurors asking too many questions or the wrong questions—can improve trials. The question is whether controlled conditions are necessary. Malta provides the data to answer this question. Whatever concerns exist about an unchecked jury when juror questions are allowed, those concerns should be magnified when oral questions are allowed. Whatever pressure exists on judges and lawyers to not interfere with juror questions, those pressures magnify in the context of a question that is already asked, rather than just submitted in writing. Just imagine objecting to a juror question to that juror’s face. If the concerns are real about jurors asking too many questions or the wrong questions, those concerns should be magnified and inescapable in Malta. But in Malta, those concerns are not apparent.

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184. MIZE ET AL., *supra* note 4, at 34–35; *see also* Dann, *supra* note 170, at 1239–46, 1253–55.

185. *See Juror Questions*, *supra* note 170, at 1965–72. Pilot programs also have been undertaken in New Jersey and Minnesota. *See* Mott, *supra* note 170, at 1104–06; *see* Frank, *supra* note 130 (describing and analyzing a recent survey of Florida Ninth Judicial Circuit judges on jury questioning).

186. *See supra* note 78.

187. *See* MIZE ET AL., *supra* note 4, at 34–35.

188. *See Juror Questions*, *supra* note 170, at 1965–71.

Malta's experience also suggests that if the United States decides to allow that written juror questions, then it also has reason to allow oral juror questions. The primary benefit of having an interactive jury as decision-maker is the pedagogical and psychological advancement of an informed verdict.<sup>189</sup> The inevitable result of requiring the jury to submit questions in writing is twofold. First, the immediacy of the "question and answer" interchange is undermined. Second, some submitted questions will not be asked. Both of these work to the detriment of actively engaging individual jurors in their task. The benefit of oral juror questions is particularly compelling if people disregard the concerns animating the proposed restrictions on written juror questions. And the Maltese experience suggests those concerns should be ignored in America.

Malta's experience with an interactive jury, of course, takes this natural experiment one step further. Malta expects the jury to confer and deliberate throughout the entire course of the trial.<sup>190</sup>

United States courtrooms recognize the interrelationship between juror questions and pre-deliberation jury discussion of the case. Occasionally, state courts in the United States have allowed jurors to discuss the evidence among themselves before final deliberations, albeit almost entirely in civil cases.<sup>191</sup> In particular, Devine states:

In 1995, the Arizona Supreme Court allowed this practice and permitted trial court judges the discretion to prevent some juries from discussing cases prior to deliberation, allowing its impact to be assessed through a field experiment. Although data were still being collected and analyzed at the end of [the] review period, an initial report based on the questionnaire responses of trial participants suggests a mixed but generally positive reaction. Most jurors who were allowed to converse prior to deliberation reported doing so, and jurors as well as judges generally felt that predeliberation discussion produced beneficial results. At the same time, attorneys and litigants were somewhat less enthusiastic about the reform, and its impact on jury verdicts is still unclear.<sup>192</sup>

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189. See generally Dann, *supra* note 170, at 1241–44 (discussing the "reality-based" behavioral model of the juror).

190. See Interview with Judge Michael Mallia, *supra* note 108. Judge Mallia was shocked that this is not the norm in the United States and wondered what we expect the juries are talking about during trial. *Id.*

191. MIZE ET AL., *supra* note 4, at 34–35.

192. Devine et al., *supra* note 145, at 668–669 (citations omitted). One can find a more detailed description of the Arizona study in an excellent article in the Arizona Law Review. See *Juror Discussions During Civil Trials*, *supra* note 5.

Interestingly, even though allowing in-trial deliberation was an Arizona experiment that was part of the same project that allowed juror questions, the reporters on the project did not analyze the two procedural reforms as an integrated possibility.<sup>193</sup>

Although the American literature is largely silent on the effects of deliberation during trial, one presumes the rationale of the ubiquitous “don’t discuss the case among yourselves until deliberations” instruction is the concern that jurors will not decide the case in the manner intended. Reasons for skepticism of the instruction as a bandage for that concern are well-founded, as “jurors often do not make decisions in the manner intended by the courts, regardless of how they are instructed.”<sup>194</sup> Further, many jurors talk about the trial before deliberations begin, despite instructions to the contrary.<sup>195</sup> In 1993, Judge Michael Dann of the Maricopa County Superior Court in Phoenix, Arizona—having considered and rebuked the assumptions about how jurors behave—wrote, “future research should be conducted to demonstrate the effects of an ‘affirmative’ instruction permitting jurors, under certain restrictions, to discuss evidence during the trial.”<sup>196</sup> In this regard, Malta can again serve as that research.

The Maltese system consists of criminal trials where jurors routinely discuss the case throughout the trial.<sup>197</sup> As a positive consequence of this, juror questions not only give advocates insight into an individual juror’s thinking, but also into the collective thinking of the jury. Obviously, when jurors are allowed to ask witnesses questions, the jurors implicitly share their individual views with each other and the advocates through their questions. Even if concerns with juries forming pre-deliberation conclusions are valid, that concern is essentially moot once juror questioning is allowed.

Malta offers the United States a natural experiment on whether juror interaction during trial distorts trial accuracy or fairness. Notably, Malta has not articulated any concerns with its process. Rather, Judge Mallia would ask the following questions: “What do you expect the jurors to talk about? How do you expect them to reach their decision?”<sup>198</sup>

### *C. An Additional Contribution of Malta to the American Discussion of Jury Reform: Non-Unanimous Verdicts*

The third way in which Malta diverges from the overwhelming majority of American states is that the former allows convictions with non-

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193. See *Juror Questions*, *supra* note 170.

194. Devine et al., *supra* note 145, at 699.

195. See Dann, *supra* note 170, at 1263.

196. *Id.* at 1264.

197. See Interview with Judge Michael Mallia, *supra* note 108.

198. Interview with Judge Michael Mallia, *supra* note 25.

unanimous verdicts.<sup>199</sup> That alone is not informative on the American experience. In *Apodaca v. Oregon*,<sup>200</sup> the United States Supreme Court held that constitutionally, a state criminal court could convict by a 10-2 or an 11-1 vote,<sup>201</sup> and indeed Oregon<sup>202</sup> and Louisiana<sup>203</sup> do not require unanimity in criminal felony trials.<sup>204</sup> These two states provide the data set one needs to evaluate the typical terms of the debate on the unanimity requirement—balancing efficiency and justice, primarily in the context of a concern over hung jury rates.<sup>205</sup> However, there is an apparent quirk of Maltese practice—albeit one that is known purely through anecdotal evidence—that adds to the American literature by raising a concern not previously directly considered, and thus merits at least brief exploration.

For a period of time, a single Maltese judge, Michael Mallia, presided over every jury trial in Malta. He reported that it was his belief that although every trial he observed *reported* a seven to two verdict, the decisions were actually unanimous.<sup>206</sup> His belief was that that jurors wanted the ability to return to their communities and if necessary claim that they—as an individual juror—did not vote to convict or to acquit.<sup>207</sup> In other words, by reporting a non-unanimous verdict, each juror is insulated from after-the-fact disapproval of the community and friends of the defendant or the juror.<sup>208</sup>

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199. See CRIM. CODE art. 468 (Malta).

200. 406 U.S. 404 (1972).

201. *Id.* at 410–11.

202. OR. CONST. art. I, § 11; *State v. Sawyer*, 501 P.2d 792, 793 (Or. 1972) (en banc) (citing *Apodaca* to uphold the constitutionality of non-unanimous verdicts).

203. The Louisiana constitution requires a unanimous decision in capital cases but not in cases where “the punishment is necessarily confinement at hard labor.” LA. CONST. art. I, § 17(A); see also *State v. Bertrand*, 6 So. 3d 738, 743 (La. 2009) (citing *Apodaca* to uphold the constitutionality of non-unanimous verdicts).

204. See Kate Riordan, *Ten Angry Men: Unanimous Jury Verdicts in Criminal Trials and Incorporation After McDonald*, 101 J. CRIM. L. & CRIMINOLOGY 1403, 1404 (2011).

205. See, e.g., *Revisiting the Unanimity Requirement*, *supra* note 131, at 204; George C. Thomas III & Mark Greenbaum, *Justice Story Cuts the Gordian Knot of Hung Jury Instructions*, 15 WM. & MARY BILL RTS. J. 893, 918–19 (2007); Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 U. MICH. J.L. REFORM 569, 582–83 (2007) (roughly 2% of federal trials and 5% to 6% of state trials end in hung juries).

206. Interview with Judge Michael Mallia, *supra* note 25.

207. *Id.* Judge Mallia speculated that the way juries serially reached this strategy of self-constructing a plausible deniability of position was by having the fore of the jury—who was drawn from a list of persons who had served on a jury before—orally passing on this strategy of positional insulation.

208. *Id.*

Assuming the accuracy of Judge Mallia's anecdotal observations and conclusions, then does the Malta approach work? There is some reason to believe that it does.

By code, Malta provides for three types of verdict: guilty, not guilty, and not proven.<sup>209</sup> Scotland has utilized the not proven option for nearly 300 years,<sup>210</sup> and occasionally other nations, including the United States, consider the verdict.<sup>211</sup>

The verdict choice of not proven accounts for between one-fifth and one-third of all Scottish acquittals.<sup>212</sup> This latter statistic suggests, and initial empirical work confirms, that the verdict option of not proven "clearly impacts the decision making processes of jurors."<sup>213</sup> One explanation of this "impact" is that in between one-fifth and one-third of all Scottish acquittals, the jury is communicating that the prosecutor failed in meeting his or her burden, but the defendant may well actually be guilty.<sup>214</sup> But theoretically, an alternative explanation is that in some instances, juries are choosing the not proven option as a means of lessening post-verdict stigma.

Malta's experience at least is suggestive in sorting through these two explanations because apparently Malta does not have hung juries.<sup>215</sup> Although Malta does not require unanimity, the empirical work in the United States demonstrates that eliminating the unanimity requirements does *not* eliminate hung juries.<sup>216</sup> Add to this equation that although Malta by code allows a verdict of not proven, Malta does not actually make that option available to juries. Judge Mallia observes:

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209. See CRIM. CODE arts. 436(2), 467, 480(3) (Malta).

210. See Lorraine Hope et al., *A Third Verdict Option: Exploring the Impact of the Not Proven Verdict on Mock Juror Decision Making*, 32 LAW & HUM. BEHAV. 241, 241–42 (2008). For more information on the "not proven" verdict in Scotland, see Samuel Bray, *Not Proven: Introducing a Third Verdict*, 72 U. CHI. L. REV. 1299, 1301–03 (2005).

211. See Hope et al., *supra* note 210, at 242.

212. *Id.*

213. *Id.* at 251.

214. See *id.* at 241–42.

215. Email from Judge Michael Mallia, *supra* note 78 ("There is no data but I know that all juries reach a verdict. . . . As regards percentages of guilty verdicts, again, there is no data but I know that drugs and pedophile cases nearly always return a guilty verdict, other cases like for example murder, attempted murder, grievous bodily harm etc. not so sure . . . Also, a lawyer may be successful invoking a justifiable or excusable reason for the crime which could affect a guilty verdict.").

216. Roughly 60% of hung juries in the United States have more than two hold out jurors. See *Revisiting the Unanimity Requirement*, *supra* note 131, at 207–08; see also William S. Neilson & Harold Winter, *The Elimination of Hung Juries: Retrials and Nonunanimous Juries*, 25 INT'L REV. L. & ECON. 1, 1–2 (2005).

[J]urors cannot, out of their own volition return a “Not Proven” verdict but must be specifically asked to do so by the Court and then only when a doubt arises on any question of law upon the determination of which might depend the finding of the jury as to whether the accused is guilty of the offence. . . . As far as I am aware, this procedure has never been resorted to, at least for the past ten years.<sup>217</sup>

This information helps to sort through the two explanations of the Scottish experience. If an advantage of the three verdict choices is positional insulation and the primary disadvantage of the unanimity requirement is the increase in hung juries, then in a jurisdiction that has another mechanism for positional insulation and does not require unanimity, there should be no hung juries, with or without the actual deployment of the three verdict choices. That is what is seen in Malta.<sup>218</sup>

How does this inform on jury practice in the United States? A great deal of United States literature addresses controlling the influence on verdicts of either pretrial publicity or anxiety of jurors about pressure from others, such as media, lawyers, or casual acquaintances to decide a case a

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217. Email from Judge Michael Mallia, *supra* note 122.

218. This comes with a caveat common to any conclusion of causality from correlation—there may be an alternative explanation. Judge Mallia’s understanding of why Malta has no hung juries derives from another aspect of Malta’s uncodified but recurrent form of trials:

At the end of the Judges submissions to the Jury a sample verdict is given to them which would have been worked out and approved by the Judge, defence and the prosecution whereby all possible defences would be included without prejudice to the guilty claim by the prosecution. That way we avoid the possibility of ever having a hung jury or else more seriously, having an illegal verdict that may not exist at law. You can never be surprised what lay jurors can come up with and to avoid that possibility we give them the multiple legal choices they may consider, at least we know for sure that even though we may not agree with the jurors’ choice it would never the less be a legal one and perfectly enforceable. . . . The important thing is that when they go into the deliberating room they would know exactly what to consider and its legal implications. The choice would be up to them but we will not have any problems with whatever they decide and that verdict would be a legal one and duly registered. This practice is not covered by any legal provision but is something developed by our judges to make sure that we do not get any anomalies at the end of the trial. The system has worked well, we never have a hung jury and always get a legal verdict.

Email from Criminal Court Judge Michael Mallia (Oct. 13, 2015) (on file with author). If Judge Mallia is correct, American theorists still should consider means of protecting jurors from post-verdict opprobrium, but may wish to be more nuanced in considering the Maltese experience.

certain way.<sup>219</sup> In response to at least to the latter of these concerns, the United States puts in place protections of juror privacy.<sup>220</sup> The reasoning of jurors during deliberations also has protection.<sup>221</sup> By doing so, the United States seems to recognize that the accuracy of jury fact-finding should not be distorted by juror concern about public reactions to the verdict. But apparently no consideration exists in either the American literature or jury procedures of the possibility of anxiety over the reproach a juror may face from his or her own friends and family, who have access to the juror despite any structural protection of juror privacy.

It does not matter whether Judge Mallia's observations and interpretations of Maltese jurors are idiosyncratic or typical. What matters is that his observations and interpretations bring to our attention a concern that has gotten little attention in the extant American literature—prophylactically insulating jurors from anxiety over opprobrium from friends and family post-verdict. Focusing on the Malta experience in conjunction with the Scottish experience identifies two mechanisms for achieving post-verdict positional insulation—verdict options of not proven and eliminating unanimity.

But empirical work in the United States suggests a downside to the Malta approach. Recall that the mechanism of the Malta approach is the recurring experienced juror. Professors Dennis J. Devine, Laura D. Clayton, Benjamin B. Dunford, Rasmy Seying, and Jennifer Pryce comprehensively reviewed 44 years of empirical studies of American juries, and among their results found that “research on forepersons suggests they may be more influential than other jurors . . . [and] experienced jurors tend to be somewhat more pro-conviction and influential than inexperienced jurors, but they also appear to evaluate evidence in light of their experience in previous trials.”<sup>222</sup> Thus, having an

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219. See, e.g., Devine et al., *supra* note 145; Norbert L. Kerr, *The Effects of Pretrial Publicity on Jurors*, 78 JUDICATURE 120 (1994); Hillary Cohn Aizenman, *Pretrial Publicity in a Post-Trayvon Martin World*, 27 CRIM. JUST. 12 (2012); Scott M. Matheson Jr. & Randy L. Dryer, *Jury Surveys and Pretrial Publicity: Two Case Studies*, 3 UTAH B.J. 2d 8 (1990); Norbert L. Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM U. L. REV. 665 (1991); Sally R. Weaver, Comment, *Judicial Restrictions on Attorneys' Speech Concerning Pending Litigation: Reconciling the Rights to Fair Trial and Freedom of Speech*, 33 VAND. L. REV. 499 (1980); Melanie D. Wilson, *Juror Privacy in the Sixth Amendment Balance*, 2012 UTAH L. REV. 2023; David Weinstein, *Protecting a Juror's Right to Privacy: Constitutional Constraints and Policy Options*, 70 TEMP. L. REV. 1 (1997); Paula L. Hannaford, *Safeguarding Juror Privacy: A New Framework for Court Policies and Procedures*, 85 JUDICATURE 18 (2001).

220. See MIZE ET AL., *supra* note 4, at 25–26.

221. See, e.g., FED. R. EVID. 606(b).

222. Devine et al., *supra* note 145, at 677, 696.

experienced foreperson builds a bias, not based on evidence, in favor of conviction, which may be discordant with the presumption of innocence and the “beyond a reasonable doubt” conviction standard.

That is not to say that adding the verdict option of not proven is a solution without concerns. For example, “for an innocent defendant, a Not Proven verdict is at best morally unsatisfactory and, at worst, may incur social sanctions by virtue the of associated stigma.”<sup>223</sup>

The point of this discussion is not to argue for any particular solution, but rather to highlight that the Maltese experience raises a system concern that the United States should explore but apparently has yet to adequately consider.

#### V. DEFENDING THE APPROACH OF THIS ARTICLE

A fundamental challenge in any comparative law analysis is to control for differences, such as cultural differences and norms, that might minimize the utility of the comparison and to acknowledge differences that cannot be controlled.<sup>224</sup> One may be tempted to explain all Maltese jury practices as responsive to the size, homogeneity, and geographic isolation of Malta. But the importance of those features to differentiating Malta from the United States may be far less than one might imagine. One can identify an American community of similar size, remoteness, and homogeneity to Malta, and examine whether the practices in that community still resemble typical American practices.

Wichita, Kansas, for example, is broadly Malta-like in terms of population size, remoteness, and homogeneity. Wichita, which is located in almost the exact middle of the continental United States, in 2014 reported a population of just over 388,413, about 30,000 people smaller than Malta. Also like Malta, Wichita has an age-diverse population.<sup>225</sup> A glance at any map of the United States illustrates how Wichita, like Malta, is a geographically isolated major population center.<sup>226</sup> One of Malta’s interesting characteristics is its relative heterogeneity,<sup>227</sup> close to 90% of

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223. Hope et al., *supra* note 210, at 251.

224. See Hans, *supra* note 3, at 277–78.

225. *State and County Quick Facts: Wichita (city), Kansas*, U. S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/20/2079000.html> (last updated Oct. 14, 2015) (26.6% of Wichita’s population is under 18 and 11.5% is over 65 years old).

226. See, e.g., Map of United States Population Density by County in 1990, CTR. FOR SPATIAL TECHS., <http://cast.uark.edu/local/catalog/national/images/maps/Population.dir/USpop1990.gif> (last visited Nov. 1, 2015).

227. *Id.* (Wichita is about 72% white—64.5% White and not Hispanic nor Latino).

Wichita's adult population is at least high school educated,<sup>228</sup> and a majority of Wichita self-identifies as religious.<sup>229</sup>

Wichita jury practices do not conform or adapt to Wichita's size, isolation, and homogeneity. In Kansas, jury selection on average consists of two hours of attorney questioning of prospective jurors,<sup>230</sup> which concludes in the exercise of both peremptory strikes<sup>231</sup> and strikes for cause.<sup>232</sup>

Kansas juries are not interactive. In Kansas, throughout the trial, the judge "may instruct the jury on such matters as in the judge's opinion will assist the jury in considering the evidence as it is presented."<sup>233</sup> Kansas jurors were permitted to submit questions in writing to witnesses in less than 3% of trials.<sup>234</sup> Juries are admonished throughout trial "not to [form] or express any opinion . . . until the case is finally submitted to them."<sup>235</sup> Although no explicit Kansas constitutional or statutory provision requires a unanimous verdict, a unanimity requirement can be inferred from the statutes,<sup>236</sup> is assumed by the Kansas Supreme Court,<sup>237</sup> and is recognized by the Kansas appellate courts.<sup>238</sup>

Wichita has no rules deviating from the practice across Kansas. Kansas felony trial jury practice is squarely within the norm of American practice. In particular, within the aspects of practice that this Article focuses upon—*voir dire*, jury interaction, and decisional rules—the practice in Kansas is quintessentially American.

Therefore, Kansas in general, and Wichita in particular, serve as a useful control for this Article in two ways. First, Wichita rebuts the notion that due to size, homogeneity, and isolation, no useful point of comparison

228. *Id.* (Malta's population is roughly 70% high school educated).

229. *Wichita, Kansas*, SPERLING'S BEST PLACES, <http://www.bestplaces.net/religion/city/kansas/wichita> (last visited Oct. 20, 2015) (only roughly 1% of which identifies as other than Christian, with the largest Christian denomination being Roman Catholic).

230. MIZE ET AL., *supra* note 4, at 77–78.

231. *See* KAN. STAT. ANN. § 22-3412 (West, Westlaw through 2015 Regular Session).

232. *See Id.* §22-3410.

233. *Id.* § 22-3414(3).

234. MIZE ET AL., *supra* note 4, at 85.

235. KAN. STAT. ANN. § 22-3420(b)(2); *see also* *Jury Information*, 18TH JUD. D. CT. SEDWICK CNTY. KAN., <http://www.dc18.org/dept/jury.shtml> (last visited Sept. 15, 2015).

236. *See* KAN. STAT. ANN. §§ 22-3421, 22-3423(1)(d) (providing jurors must agree to a verdict and for mistrial in the absence of agreement).

237. *See* *State v. Kesselring*, 112 P.3d 175, 183–84 (Kan. 2005) (reviewing whether a verdict was unanimous).

238. *See, e.g., State v. Buckner*, 154 P.3d 42, 44–45 (Kan. Ct. App. 2007); *see also* Carol A. Beier, *Lurching Toward the Light: Alternative Means and Multiple Acts Law in Kansas*, 44 WASHBURN L.J. 275, 277–79 (2005).

exists between Malta and the United States. Wichita is a rough American equivalent to Malta on these metrics, and yet still has American jury practices. Second, Wichita rebuts the related concern that America's size is an impediment to adopting a Maltese approach. America is comprised of many small places like Wichita, and those places do not, but certainly could, bend their procedures towards a more regionally-tailored jury practice.

A stark substantive difference between jury practice in Malta and jury practice in the United States is that Malta has no civil juries,<sup>239</sup> but several rebuttals can be made in response to those who believe that this difference in jury practice makes Malta an impractical comparison for American jury reforms. First, most of the courtroom experimental data in the United States comes from civil trials, so in this regard perhaps Malta is even more important in filling data gaps in the American experience because Malta provides a data set from criminal trials. Second, virtually none of the world other than the United States has civil juries,<sup>240</sup> so this difference would discount any foreign nation's experience for comparative law purposes. Third, the premise of this Article, as well as essentially all American jury reform literature, is that juries are important. If so, then it may be of limited concern that Malta opts to not empanel juries in a less consequential set of cases than criminal trials. Finally, the suggestion of this Article is not that America should bow to Maltese practice, but rather that America should acknowledge and take account of Maltese practice. Thus, unless the absence of civil juries in Malta rises to the level of justifying totally discounting the Maltese experience, the lack of civil jury trials is not a fatal flaw to the comparison.

One might posit that, although Maltese procedures are relevant to small American jurisdictions, Maltese jury practices are inapplicable to large American jurisdictions. Much larger justice systems than Malta, notably Great Britain<sup>241</sup> and Canada,<sup>242</sup> have no jury selection. These systems are not dependent upon the premise of "in this community everyone already knows everyone," and yet they have no pervasive concern about the composition of jury panels. Notably, none of the empirical work cited in this Article on the utility, or lack thereof, of *voir*

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239. See Donlan et al., *supra* note 77, at 199.

240. Scott Brister, *The Decline in Jury Trials: What Would Wal-Mart Do?*, 47 S. TEX. L. REV. 191, 193 (2005) ("The United States is the only country in the world that routinely employs juries in civil trials.")

241. In 1988, Great Britain eliminated peremptory strikes. See Criminal Justice Act of 1988 (UK), §118.

242. See Neil Vidmar, *Pretrial Prejudice in Canada: A Comparative Perspective on the Criminal Jury*, 79 JUDICATURE 249, 250 (1996).

*dire* is focused on the size of the community or on any other demographic aspect of the community.<sup>243</sup>

The same is true of the work analyzing the desirability of a more active and interactive jury. None of the work is grounded in the assumption of a small, isolated, homogeneous trial venue.<sup>244</sup> For example, the current experiment on allowing jury questions in American courts is occurring in populous major urban areas such as Phoenix, Arizona.<sup>245</sup>

Finally, including the verdict option of “not proven” to deal with potential family and friend disapproval of jury verdicts mimics the Scottish approach.<sup>246</sup> And through that or any other method, the concern is not limited to small, insular places because everyone, from a resident of Manhattan to a family farmer, has people they return home to after jury service, and about whose reactions they may care.

#### CONCLUSION

Perfection is a noble goal but never a realistic achievement. The American experience with juries will always be a work in progress. The research and reflection and reform of that experience has been extensive. Jury reform is not a purely academic inquiry. As of 2007, at least 38 states had formal and recent commissions or task forces to examine jury operations and trial procedures.<sup>247</sup>

Yet Malta serves as a useful exposure of aspects of American practice that still need consideration and reconsideration. Malta’s experience suggests that the United States should reconsider the value of peremptory strikes, and independently consider the value of *voir dire*. It also suggests that allowing jurors to ask questions of witnesses carries little risk, and indeed these should be oral questions by jurors directly to witnesses. Finally, Malta’s experience shows that the United States should not fear active juror deliberation during all stages of the trial, and highlights a concern little considered in the American literature—juror anxiety over the reaction of a juror’s family and friends to a verdict. Even if Malta serves no more function than as a nudge to the United States to think differently, comparison of the Maltese experience to the American experience is useful.

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243. See *supra* Part IV.A.

244. See *supra* Part IV.B.

245. See B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280 (1996).

246. See Bray, *supra* note 210.

247. MIZE ET AL., *supra* note 4, at 9.