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THE ARRIVAL OF THE CIVIL JURY IN ARGENTINA: THE CASE OF CHACO

SHARI SEIDMAN DIAMOND, VALERIE P. HANS, NATALI CHIZIK &
ANDRÉS HARFUCH*

INTRODUCTION

Jury systems are often ushered in during periods of crisis and change. For example, Russia resurrected its long-dormant jury system in the 1990s during a remarkable period of increased government transparency and political reform.¹ Similarly, Spain's modern jury institution was launched at the end of Franco's dictatorship.² Likewise, new systems of lay participation in East Asian countries have been established in response to vigorous public debates about their legal systems' lack of transparency and concerns about professionally-trained judges' biased, pro-government decision making.³ The attraction of a jury composed of lay members of the public in criminal trials seems obvious: a jury is able to stand between the government and the

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1. Nikolai Kovalev & Sergei Nasanov, *The Russian Jury Trial: An Ongoing Legal and Political Experiment*, in JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE 237, 248–51 (Sanja Kutnjak Ivković, Shari Seidman Diamond, Valerie P. Hans & Nancy Marder, eds., 2021) (describing the reintroduction of jury trial following the collapse of the Soviet Union).

2. CARMEN GLEADOW, HISTORY OF TRIAL BY JURY IN THE SPANISH LEGAL SYSTEM 179–95, 226–35 (2000) (describing situation under Franco's dictatorship and post-Franco debates about the democratizing effects of jury trial); Mar Jimeno-Bulnes, *The Twenty-Fifth Anniversary of the Spanish Jury*, in JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE, *supra* note 1, at 107, 107–08 (explaining that Spain's prior Jury Law (Pacheco Law, dating to 1888) was discontinued during Franco's regime).

3. RIEKO KAGE, WHO JUDGES? DESIGNING JURY SYSTEMS IN JAPAN, EAST ASIA, AND EUROPE 101–03, 144–52, 164–68 (2017) (describing public discontent with Japan's legal system and public views about lay participation in Taiwan and South Korea).

defendant and has the power to insist that the government prove its case.⁴ Thus it is not surprising that the newest jury systems in Argentina and in other countries around the globe (e.g., Georgia, South Korea), as well as the recently instituted mixed tribunal systems that include lay persons (e.g., Japan, Taiwan), have all concentrated on criminal trials.

The exclusive focus on criminal trials has just ended. The province of Chaco in northeastern Argentina recently passed a law providing for jury trials in civil and commercial cases.⁵ It was a bold decision that sets Chaco apart from other Argentine jurisdictions.⁶ And, just as in the historical examples in which political crises led to an embrace of the criminal jury system, the institution of the civil jury in Chaco was a product of lawmakers' serious concerns about a lack of balance and fairness in the civil justice system.⁷

Interestingly, Chaco's introduction of a civil jury is occurring at a time when the United States, which has traditionally been the most frequent site of civil jury trials, has seen a dramatic decrease in civil cases that end in a jury trial.⁸ Other jurisdictions around the world that have relied upon civil juries in the past have also, over time, narrowed the civil jury's scope or eliminated the institution entirely.⁹

To fully appreciate the significance of Chaco's civil jury innovation, we begin by describing the global context of lay participation in legal decision making, showing that multiple countries have long relied upon community members to resolve disputes. We identify some of the values that are served by lay participation in civil litigation and some of the critiques of the institution in other countries. With that global background in mind, we

4. NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 66, 74–75 (2007) (describing the political role of the criminal jury).

5. Law No. 3325-B, Cha., Feb. 3 2021, B.O. Electrónico No. 10.621 (Arg.) (excerpted in Appendix).

6. Vanina Almeida, Denise Bakrokar, Mariana Bilinski, Natali Chizik, Andrés Harfuch, Andrea Ortiz, Sidonie Porterie, Aldana Romano & Shari Seidman Diamond, *The Rise of the Jury in Argentina: Evolution in Real Time*, in *JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE*, *supra* note 1, at 25, 32–33 (documenting the use of juries in criminal but not civil cases in Argentine provinces).

7. As Andrés Harfuch described the significance of the legislative debate and decision, “controversies over tort liability, class action cases, environmental litigation, and cases of freedom of speech, among other issues of great political and economic importance, were historically handled by large interest groups . . . Now the people will decide those cases, in public and oral trials that will forever transform the logic of a justice system so important for democratic coexistence.” Andrés Harfuch, *The Story Behind Argentina's New Civil Jury System: Part 1*, *JURY MATTERS* (N.Y.U. Civ. Jury Project, New York, N.Y.), Mar. 2021, <https://myemail.constantcontact.com/March-Newsletter-of-the-Civil-Jury-Project.html?soid=1127815376566&aid=3BBCpicySFIsaf> [<https://perma.cc/5QVB-CDPB>].

8. Richard Jolly, Valerie P. Hans & Robert S. Peck, *Democratic Renewal and the Civil Jury*, 57 *GA. L. REV.* 79, 112–16 (2022) (documenting decline in civil jury trials in the United States).

9. PAUL SCHIFF BERMAN & MARGARET Y. K. WOO, *GLOBAL ISSUES IN CIVIL PROCEDURE* 217–18 (2d ed. 2021) (quoting Oscar G. Chase, *American “Exceptionalism” and Comparative Procedure*, 50 *AM. J. COMP. L.* 277 (2002)) (discussing limited global use of civil juries).

examine the framework set out in Chaco's civil jury statute. As with some other global jury innovations, Chaco's statute has borrowed from the example of the American civil jury.¹⁰ Chaco's drafters have learned from the American experience and, in a number of instances, as this article documents, they have improved upon it. In this article, we compare the Chaco approach with the American civil jury, focusing in particular on the Chaco statute's structural characteristics and its innovative procedures designed to maximize robust participation and greater access to law.

This article proceeds as follows. Part I offers a historical perspective on lay participation in legal decision making, describing the long practice in multiple countries of relying upon community members to resolve disputes. We chart the course of lay participation around the globe in both criminal and civil cases, observing that while close to two-thirds of the world's countries rely on some form of lay legal decision making in criminal cases, lay participation in civil cases is less common. Our review of the challenges faced by civil juries and their decreasing use in the modern era highlights the distinctive nature of Chaco's new statute providing for a civil jury. Part II provides the background for Chaco's civil jury statute by describing the development of the criminal jury systems introduced in Argentina, including Chaco, in the past twenty years. Part III then turns to an intensive examination of Chaco's new civil jury statute. We identify notable provisions in the statute, finding a combination of similarities to best practices used in civil juries in the United States and several innovative rules and procedures that will bear watching in the new civil jury system. We suggest that Chaco's new civil jury may inspire other jurisdictions to consider whether and how civil jury trials should be implemented. Significantly, a thoughtful look at Chaco's innovations on some dimensions may even provide ideas for jury reform in the United States.

I. GLOBAL CONTEXT OF LAY PARTICIPATION IN LAW

The enlistment of community members to resolve disputes has a long pedigree. In Athens, popular courts composed of jurors drawn from the general society determined guilt and innocence as early as 590 B.C.E.¹¹ Bodies of citizens decided legal disputes in the ancient Roman world.¹²

10. Harfuch, *supra* note 7 (describing similar features of the U.S. and Chaco civil jury); Andrés Harfuch & Sebastián Lloret, *The Dawn of the Civil Jury in Argentina* (June 8, 2020), <https://civiljuryproject.law.nyu.edu/the-dawn-of-the-civil-jury-in-argentina/> [https://perma.cc/3Z4J-5E5V] (describing the introduction of Chaco's civil jury system).

11. Marvin J. Bertoch, *The Greeks Had a Jury for It*, 57 A.B.A. J. 1012, 1012 (1971) (describing Athenian juries).

12. See, e.g., Anton-Hermann Chroust & John Richard Murphy, *The Lex Acilia and the Rise of Trial by Jury in the Roman World*, 24 NOTRE DAME L. REV. 1, 1–2 (1948) (describing the role that citizens

Historians disagree about whether early forms of the jury were present in England before the time of the Norman Conquest, but what seems certain is that juries routinely made judgments about both criminal and civil wrongs in medieval England.¹³ The Magna Carta's protection from arbitrary criminal punishments is perhaps better known than any prominent marker of protection against civil wrongs: "No freeman shall be taken or imprisoned or exiled or in any way destroyed, nor will we go upon him nor send upon him except by the lawful judgment of his peers or by the law of the land."¹⁴ However, in these early times, juries of local peers were also called upon to decide how civil disputes, such as those involving property rights, should be resolved.¹⁵ Used over the centuries, both criminal and civil juries became embedded in English common law and trial practice, and revered in Blackstone's influential *Commentaries on the Laws of England* as "the glory of the English law."¹⁶

Describing how English colonists imposed English common law along with trial by jury in the countries they conquered, Richard Vogler maintains that "the global development of jury trial is largely due to the spread of British imperialism."¹⁷ At the start of the nineteenth century, many countries that adopted British common law relied on juries to resolve both criminal and civil cases. France, Spain, and other civil law countries, inspired in part by the English example, also used lay juries.¹⁸ During the nineteenth century, however, with increasing professionalism in the legal profession and greater independence of the judiciary, reliance on lay juries in civil cases began to decline.¹⁹ Critics began to voice concerns about juries' competence: "The

played in popular assemblies to decide on charges against their fellow-citizens, as well as in small decision-making groups to determine guilt or innocence in crimes of official misconduct).

13. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND bk. 3, ch. 23 (Oxford 1765–1769) (4 vols.); JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICA LEGAL INSTITUTIONS 125 (2009); Stephan Landsman, *The History and Objectives of the Civil Jury System*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 22–60 (R. E. Litan ed., 1993).

14. MAGNA CARTA art. 39 (1215); see also Nathan Dorn, *Magna Carta: A Charter for the Ages*, LIBR. OF CONG. MAG., Nov.–Dec. 2014, at 13 (quoting the MAGNA CARTA (1215) and describing the historical context).

15. LANGBEIN ET AL., *supra* note 13, at 122–23.

16. BLACKSTONE, *supra* note 13, at 379; see also Mar Jimeno Bulnes, *La Participación en la Administración de Justicia Mediante el Jurado (Art. 125 CE)*, in DOCUMENTOS PENALES Y CRIMINOLÓGICOS, VOL. 2 at 297, 304 (Ernesto Pedraz Penalva, Eugenio Raúl Zaffaroni & Sergio J. Cuarezma Terán, eds., 2004) (describing the importance of the Bill of Rights of February 13, 1689).

17. Richard Vogler, *The International Development of the Jury: The Role of the British Empire*, 72 INT'L REV. PENAL L. 525, 525 (2001). *But see* Bulnes, *supra* note 16 (arguing for the importance of Montesquieu and Rousseau in France and Beccaria in Italy who championed ideas supportive of lay participation in law).

18. Valerie P. Hans, *Trial by Jury: Story of a Legal Transplant*, 51 LAW & SOC'Y REV. 471, 481–82 (2017).

19. See generally Conor Hanly, *The Decline of Civil Jury Trial in Nineteenth-Century England*, 26 J. LEGAL HIST. 253 (2005).

jury is here what the quack doctors are in the medical world—they have not the training for the duty either physically or mentally,” claimed one newspaper editorial.²⁰ Some countries shifted the resolution of both civil and criminal disputes away from juries to judges or to mixed courts of lay and professional judges that decided cases jointly.²¹ Nonetheless, the institution of the jury, especially in criminal cases, has persisted in the modern era. A global survey of lay participation in legal decision making found that close to two-thirds of the world’s countries rely on lay people as decision makers, whether in their roles as jurors, lay judges in mixed courts, lay magistrates, or in lay courts.²² Fifty-six countries use juries in criminal cases.²³

Much less is known about the current use of the jury in civil cases around the world. One recent estimate is that approximately twenty jurisdictions retain a jury for use in civil cases.²⁴ The United States, Canada, Australia, New Zealand, and the United Kingdom all currently hold civil jury trials. In some of these and other jurisdictions, disputants have a right to a civil jury across a broad range of cases, whereas in others, civil juries are permitted in only a limited number of specific types of cases, such as defamation, malicious prosecution, and libel and slander. In Hong Kong, for example, civil juries are limited to defamation cases.²⁵ Most jurisdictions that retain a civil jury were once part of the British Empire, supporting Vogler’s argument about the importance of colonial expansion to the spread of the jury system.²⁶

It is unclear why the civil jury has declined more than the criminal jury. After all, the civil jury is positioned to play an important political role, reflecting community judgments about responsibility and valuation.²⁷ Nonetheless, the criminal jury’s political significance may be more apparent, as it offers a vivid illustration of community representatives assessing the

20. *Id.* at 262 (quoting *Jury Trial in Scotland*, 11 LAW TIMES (Sept. 16, 1848), at 523).

21. Hans, *supra* note 18, at 482, 484 (describing changes over time in reliance on juries).

22. Sanja Kutnjak Ivković & Valerie P. Hans, *A Worldwide Perspective on Lay Participation*, in JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE, *supra* note 1, at 323, 334.

23. *Id.* at 338.

24. Valerie P. Hans, *The Landscape of Lay Participation in Civil Litigation*, COMPARATIVE CIVIL PROCEDURE: POWER, AUTHORITY AND CULTURE IN DISPUTE RESOLUTION (Margaret Woo & Remco van Rhee eds., forthcoming 2024). The jurisdictions thus far identified as having a civil jury system, at least on the books, are: Argentina, Australia, The Bahamas, Barbados, Belize, Bermuda, Canada, Cayman Islands, Dominica, Hong Kong, Isle of Man, Jamaica, New Zealand, St. Kitts & Nevis, St. Vincent & the Grenadines, Sweden, Tonga, Trinidad & Tobago, the United Kingdom, and the United States. *Id.*; see also WORLD JURY SYSTEMS 59, 173, 381, 405, 432, 439–43 (Neil Vidmar ed., 2000).

25. From 1997 to 2022, there were twenty-two civil jury trials in Hong Kong. They were all defamation trials. Email from Peter C.H. Chan, School of Law, City University of Hong Kong to Valerie P. Hans (June 14, 2022, 10:28 AM) (on file with author).

26. Hans, *supra* note 24, at 6.

27. Valerie P. Hans, *What’s It Worth? Jury Damage Awards as Community Judgments*, 55 WM. & MARY L. REV. 935, 937–38 (2014) (describing the importance of the civil jury’s political role).

validity and wisdom of bringing the weight of the government to bear on one of its members. In addition, doubts about the ability of lay factfinders to handle complex civil trials may have motivated legal reformers to limit or remove juries from civil cases.²⁸ Furthermore, in the United States, business and insurance groups engaged in an organized and effective effort to attack the civil jury's fairness and competence, setting the stage for later restrictions on civil juries.²⁹

In addition to the modest number of global jurisdictions that retain the institution of the civil jury, and the limitations on the scope of the civil jury to particular types of cases in some jurisdictions, the COVID-19 pandemic created new pressures that further threaten the institution.³⁰ In the United States, for example, the onset of the pandemic led to the closure of courthouses around the country and the cessation of both criminal and civil trial proceedings. When courthouses reopened, they often, understandably, focused on handling the tremendous backlog of criminal cases, which led to even greater delays for civil litigants who wanted their day in court.³¹ In another example, pandemic-era delays in civil jury trials in Canada led the governments of two provinces—Ontario and British Columbia—to commission studies to explore whether the civil jury was worth preserving.³²

As these and other jurisdictions evaluate the civil jury's future, they invariably consider several challenges facing lay citizens deciding civil disputes. Some civil cases are factually or legally complex, raising concerns about the capability of ordinary citizens to understand the facts and apply the law.³³ Expert testimony may be particularly difficult to comprehend, although that challenge arises not only for jurors but also for judges.³⁴ In addition, business and insurance industries have raised the issue of potential juror bias against business and corporate parties.³⁵

Yet a number of commentators point to the multiple benefits of retaining the jury as an option in civil litigation. Perhaps most important, a

28. Jolly et al., *supra* note 8, at 122–23 (describing tort reform efforts by pro-business interest groups).

29. *Id.* at 107; *see also* SUJA A. THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* (2016).

30. Jolly et al., *supra* note 8, at 137–38 (describing impact of COVID19 pandemic on civil jury trials).

31. *Id.* at 138.

32. Hans, *supra* note 24.

33. *See* BRIAN H. BORNSTEIN & EDIE GREENE, *THE JURY UNDER FIRE: MYTH, CONTROVERSY, AND REFORM* 128–29 (2017); Richard Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 181, 182–83 (Robert E. Litan ed., 1993).

34. Valerie P. Hans & Michael J. Saks, *Improving Judge & Jury Evaluation of Scientific Evidence*, 147 *DAEDALUS* 164, 164 (2018).

35. Jolly et al., *supra* note 8, at 137–38 (describing business and industry claims and efforts to restrict civil jury trials).

civil jury drawn from a representative group from the community has significant strengths as a factfinder in civil litigation.³⁶ Civil juries better represent a community's range of experiences, knowledge, and perspectives, in contrast to judges who are drawn from a smaller and more elite slice of the community. Civil cases often require the factfinder to make normative judgments about responsibility and the significance of an injury and the civil jury is well-placed to incorporate community norms into its verdict. The jury deliberation process also strengthens the evaluation of evidence in the case because it allows pooling of knowledge and testing of arguments during discussion.³⁷ These documented strengths of civil jury factfinding help to allay concerns about the civil jury's competence and fairness.

The positive benefits of the civil jury go beyond the contributions that a jury makes in deciding the case.³⁸ The presence of lay people in the courtroom as decision makers forces the judge and lawyers to speak in a way that will be broadly understood, which makes the entire trial process more transparent—a benefit not only to the jurors but also to the community. Thus, the civil jury is in a position to fill the demand for greater transparency that has fueled introduction of the criminal jury in different historical moments. The presence of lay people also increases the public legitimacy of the trial, as community representatives are the decision makers. Experience as a juror, research has found, also increases jurors' respect for the courts and the government.³⁹ And perhaps most significantly, the civil jury plays a sometimes-unappreciated political role. The criminal jury's political significance is obvious - the jury stands between a criminal defendant and the government. In contrast, the government is not a party in the typical civil

36. A number of scholars have examined the quality of civil jury decision making and reached favorable conclusions. *See, e.g.*, HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 63–65 (1966) (presenting research showing substantial judicial agreement with jury verdicts); Hans, *supra* note 27, at 937 (commenting on the value of civil jury decisions); Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 *CORNELL L. REV.* 1124, 1149–55 (1992) (contrasting stereotypes of civil juries with the realities of their decision making).

37. Jolly et al., *supra* note 8, at 99–107 (showing how judges are less representative than juries, how civil juries incorporate community norms, and the value of deliberation).

38. ALEXANDRA LAHAV, *IN PRAISE OF LITIGATION* 1–2 (2017) (arguing that public litigation including jury trials encourages democracy by, among other benefits, fostering transparency and promoting direct participation in government). *See generally* Jacqueline Horan, *Perceptions of the Civil Jury System*, 31 *MONASH U. L. REV.* 120, 120–21 (2005) (describing the way in which citizen participation promotes the legitimacy of the legal system).

39. *See* JOHN GASTIL, E. PIERRE DEESS, PHIL WEISER & CINDY SIMMONS, *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* 46–47 (2010); John Gastil, E. Pierre Deess, Phil Weiser & Jordan Meade, *Jury Service and Electoral Participation: A Test of the Participation Hypothesis*, 70 *J. POL.* 351, 358–60 (2008); John Gastil, E. Pierre Deess & Phil Weiser, *Civic Awakening in the Jury Room: A Test of the Connection Between Jury Deliberation and Political Participation*, 64 *J. POL.* 585, 586 (2002); Valerie P. Hans, John Gastil & Traci Feller, *Deliberative Democracy and the American Civil Jury*, 11 *J. EMPIRICAL LEGAL STUD.* 697, 710–12 tbls.2 & 3(2014).

case. That may explain in part why the civil jury in the United States has been more vulnerable to attack than the criminal jury.⁴⁰ Yet civil cases often involve claims about the wrongdoing of business and corporate interests or other powerful individuals in a community.⁴¹ A civil jury's verdict and damage award can hold those non-governmental, but powerful, interests accountable, and can express the community's judgment about the responsibility of those whose actions have harmed others.

Weighing the pros and cons, Chaco has chosen to embrace trial by jury in civil and commercial cases. The civil jury builds on the successful experiments with the criminal jury in Chaco and elsewhere in Argentina. Examining the features of Chaco's new civil jury system, we can gain insight into the goals and purposes of this new institution. See the Appendix for excerpts from the Chaco Civil Jury Statute.

II. THE CRIMINAL JURY TRIAL IN ARGENTINA, INCLUDING THE PROVINCE OF CHACO

The Province of Chaco is not a stranger to jury trials; it introduced a criminal jury system several years ago.⁴² But, as in the rest of Argentina, the criminal jury trial is still a new phenomenon.⁴³ Although the Constitution of Argentina in 1853 promised the right to a jury, the first jury trial in the modern era did not take place until 2014, in the Province of Neuquén.⁴⁴ The Province of Buenos Aires, Argentina's largest province, followed with its first jury trial in 2015.⁴⁵ The first jury trial in the Province of Chaco was held in 2019.⁴⁶ At the time of this writing, nine of Argentina's twenty-three provinces plus the autonomous city of Buenos Aires, which together account for nearly two-thirds (64%) of the Argentine population, have passed jury bills providing for jury trials in criminal cases.⁴⁷ These juries generally

40. THOMAS, *supra* note 29, at 4 (discussing the political significance of the criminal jury's role).

41. VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 10–11 (2000) (documenting the numbers of jury trials with business litigants and arguing for their importance).

42. Almeida et al., *supra* note 6, at 32. There was one exception. Between 1856 and 1879, the Welsh immigrants to the Province of Chubut, replicating the legal tradition in their Welsh homeland, conducted both criminal and civil jury trials. Virgilio Zampini, *Chubut Siglo XIX: Una Década del Juicio por Jurados* [Nineteenth Century Chubut: A Decade of Trial by Jury], 8 CUADERNOS DE DOCTRINA Y JURISPRUDENCIA PENAL 1 [NOTEBOOKS OF CRIMINAL DOCTRINE AND JURISPRUDENCE] (2002) (Arg.), https://es.scribd.com/fullscreen/75074555?access_key=key-1t0xawcfe5zgx6ffk5ut.

43. Almeida et al., *supra* note 6, at 37.

44. *Id.* at 30.

45. *Id.*

46. *Id.* at 31.

47. A 10th province, Córdoba, includes laypersons on a mixed tribunal, a system that was implemented in 2004. María Inés Bergoglio, *Twelve Years of Mixed Tribunals in Argentina*, in JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE, *supra* note 1, at 47.

decide cases exclusively involving serious crimes, and all of them consist of twelve members, each with an equal number of male and female jurors. Although the earliest jury bill, passed in Neuquén, did not require a unanimous verdict,⁴⁸ most of the jury bills that followed in the other provinces, including Chaco, require a unanimous verdict.⁴⁹ The provinces have been the leaders in this introduction of jury trials in criminal cases. There has also been movement to introduce criminal jury trials at the national level, supported by Argentinian President Alberto Fernandez, who announced in March 2020 that he supports a federal jury bill.⁵⁰ Until Chaco, none of the provinces had moved to expand the reach of the jury to civil cases.

III. THE CIVIL JURY TRIAL IN CHACO

On September 16, 2020, Chaco Governor Jorge Capitanich sent the unprecedented bill to Chaco's legislature providing the right to trial by jury for civil, including commercial, injuries. The legislature approved the bill, and it is now law.⁵¹ Trial by jury in civil and commercial cases will be introduced progressively, with the first civil jury trial anticipated in 2023.⁵² The statute explicitly specifies that the purpose of the law is to guarantee citizen participation in the administration of civil and commercial justice.⁵³ But the purposes of the law have a greater reach, reflecting the words of an old Argentine saying: "Matar dos pájaros de un tiro" ("To kill two birds with one stone").⁵⁴ In particular, the statute points to other purposes of the legislation, recognizing the important benefits that an adversarial civil jury

48. Law No. 2784 Art. 207, Nqn., May 2017 (Arg.) (eight of twelve jurors must vote to convict the defendant); see also Almeida et al., *supra* note 6, at 32 tbl.2.1.

49. Almeida et al., *supra* note 6, at 32–33 tbl.2.1.

50. *Argentina's President Alberto Fernández Announced That the Federal Jury Bill Will Be Sent to the Congress for Its Approval*, ASOCIACIÓN ARGENTINA DE JUICIO POR JURADOS (Mar. 1, 2020), <http://www.juicioporjurados.org/2020/03/argentinas-president-alberto-fernandez.html> [https://perma.cc/ZU5X-CH69].

51. See generally Law No. 3325-B, Cha., Feb. 3, 2021, B.O. Electrónico No. 10.621 (Arg.) (excerpted in Appendix).

52. *Id.* art. 64. ("During the first two years of validity of this law, only a certain number of cases will be held before a jury, which may not be less than twelve nor more than twenty per calendar year."). See generally Harfuch, *supra* note 7 (background on bill's passage and content); Andrés Harfuch & Juan Sebastián Lloret, *The Story Behind Argentina's New Civil Jury System: Part 2*, JURY MATTERS (N.Y.U. Civ. Jury Project, New York, N.Y.), Apr. 2021, https://myemail.constantcontact.com/April-Newsletter-of-the-Civil-Jury-Project.html?soid=1127815376566&aid=NM_Wb1r0YAA. [https://perma.cc/NE5J-Z6QD] (same).

53. Law. No. 3325-B art. 1.

54. Julieta Escat, *SabésCuál es el de la Expresión "Matar dos Pájaros de un Tiro,"* BILLIKEN, Nov. 26, 2022, <https://billiken.lat/interesante/sabes-cual-es-el-origen-de-la-expresion-matar-dos-pajaros-de-un-tiro/>. [https://perma.cc/PVY7-2X4C].

trial promises to bring to Chaco and its civil justice system: transparency⁵⁵ and a reduction in delay⁵⁶ in addressing serious grievances. Transparency was not a feature of criminal or civil litigation under the inquisitorial civil law tradition of Argentina.⁵⁷ The introduction of jury trials in criminal cases brought the public into the jury box and the trial into the public view. It will do the same for civil trials in Chaco. The Chaco statute identifies the shift from the private paper processing of the fifteenth century Spanish tradition to a transparent public oral proceeding as a prominent value of the civil jury trial.

Civil jury trials in Chaco also offer the promise of bringing a swift resolution to the dispute once the proceedings begin. In the past, civil dispute procedures were marked by long delays and interrupted case activity. An extreme example of this occurred in an Argentine civil proceeding involving a teenager who was severely and permanently injured by a hazard on an open field owned by the Argentine government and frequently used as a playground.⁵⁸ The case began in 1990 and was completed more than twelve years later. In evaluating the proceedings and the twelve-year duration of the case, the Inter-American Court of Human Rights (IACHR) found the court authorities responsible for unreasonable delay. The IACHR said,

Having analyzed the four elements of the test of a reasonable time [], the Inter-American Court concludes that the judicial authorities hearing the civil suit for damages and the claim for compensation did not act with the due diligence or promptness required by the vulnerable situation of [the injured teenager], and therefore exceeded the reasonable time, in violation of the right to a fair trial.⁵⁹

Significantly, the IACHR evaluated the complexity of the case and determined that

the case did not involve legal or evidentiary aspects or debates that would involve a degree of complexity requiring almost [twelve] years to respond to. Therefore, the delay in the development and execution of the civil suit for damages in the instant case cannot be justified based on the complexity of the matter.⁶⁰

55. See Law No. 3325-B art. 2 (granting the right to a public hearing).

56. See *id.* (describing simplicity and promptness as goals of the statute).

57. Edmundo Hendler, *Lay Participation in Argentina: Old History, Recent Experience*, 15 SW. J. INT'L L. 1, 11–12 (2008); see also Almeida et al., *supra* note 6, at 27–29.

58. *Furlan v. Argentina, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 246, ¶ 72* (Aug. 31, 2012).

59. *Id.* ¶ 204.

60. *Id.* ¶ 159.

Chaco's jury statute is designed to avoid delay, by emphasizing "procedural efficiency," "immediacy," and "promptness" as key goals.⁶¹ The nature of a jury trial positions it to achieve these goals. Because the juror citizens are extracted from their ordinary lives to serve as jurors, the hearing must be more efficient than the earlier procedures, which suffered from long delays as the parties submitted documents and could not put any pressure on judges to make immediate rulings. Once a jury trial begins, in contrast, it is a concentrated proceeding. The evidence is presented at trial in one uninterrupted set of proceedings and the jury delivers a verdict after deliberations at the close of the trial.

In designing its Civil Jury Statute, Chaco took a close look at civil jury trials in the United States, but arrived at its own unique approach: adopting some of the U.S. best practices,⁶² modifying others, and inventing new features tailored to Chaco's distinctive needs. We are impressed by (and, the American authors confess, are envious of) some of the choices reflected in the Chaco statute. We turn now to an examination of the statute's provisions, comparing the choices made with the features of civil juries in the United States.

A. Adopting and Extending Best Practices

1. Composition of the Jury

The civil jury in Chaco is composed of twelve members.⁶³ Although two-thirds of states in the United States also use twelve-person juries in civil cases, a third have between six- and eight-member juries.⁶⁴ Chaco has adopted the better practice. The jury of twelve brings benefits that the smaller juries lack: increased diversity,⁶⁵ greater representativeness of the community,⁶⁶ and greater predictability, with a reduced likelihood that the jury will be influenced by a few jurors with extreme views.⁶⁷

61. See Law No. 3325-B art. 2.

62. See generally A.B.A., PRINCIPLES FOR JURIES AND JURY TRIALS (rev. ed. 2016) (recommending best practices for U.S. jury trials); Harfuch, *supra* note 7 (describing the development and passage of Chaco's civil jury law); Harfuch & Lloret, *supra* note 10 (describing the success of the criminal jury laws in Argentina, which have opened the door to consideration of a civil jury).

63. Law No. 3325-B art. 6.

64. See *Comparative Data: Peremptory Challenges*, NAT'L CTR. FOR STATE CTS., <https://www.ncsc-jurystudies.org/state-of-the-states/jury-data-viz> [<https://perma.cc/83GC-FPJ9>].

65. Shari Seidman Diamond, Destiny Peery, Francis J. Dolan & Emily Dolan, *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. EMPIRICAL LEGAL STUD. 425, 425 (2009).

66. See *id.*

67. See Patrick E. Higginbotham, Lee H. Rosenthal & Steven S. Gensler, *Better by the Dozen: Bringing Back the Twelve-Person Civil Jury*, 104 JUDICATURE 47, 47-48 (2020) (providing a review of the benefits of a twelve-member jury).

Chaco, however, has gone beyond adopting the best practice of the twelve-member jury. As in all of the Argentine provinces that have introduced juries in criminal trials, the new Chaco civil jury requires equal numbers of male and female jurors, ensuring that each jury has equal gender representation.⁶⁸ Although the United States requires that all eligible individuals have an equal opportunity to be potential members of a jury, the jury itself can end up being unrepresentative.⁶⁹ Moreover, Chaco has gone further than simply guaranteeing equal gender composition. Recognizing the importance of representation on the jury of its indigenous peoples, Chaco's civil jury statute includes a unique provision that applies when one of the parties belongs to the Qom, Wichí or Mocoví community.⁷⁰ If one of the parties is an indigenous person, half the jury must be selected from that community. If both parties belong to the same indigenous community, the jury will be composed entirely of members of that community.⁷¹ Although this approach to the representative jury may be perceived as inconsistent with a norm of larger community representation, it increases the likelihood that members of minority communities will feel that their grievances will receive a fair hearing in the new civil jury system.

In 2010, Chaco recognized the Qom, Wichí, and Mocoví languages of its three major groups of indigenous peoples as official languages, along with Spanish.⁷² Thus, it is not surprising that the Chaco civil jury statute explicitly provides that when one of the parties or a member of the jury belongs to the Qom, Wichí, or Mocoví community, translators or interpreters will be provided if needed. The state of New Mexico in the United States, where over a quarter of the population speaks Spanish,⁷³ has a similar provision: The state constitution explicitly prohibits the exclusion of citizens who are unable to speak, read, or write English.⁷⁴ This provision has been interpreted to call for reasonable efforts to accommodate the non-English speaking juror by requiring the court to provide an interpreter.⁷⁵ Similarly, the American

68. Law No. 3325-B art. 6.

69. Shari Seidman Diamond & Valerie P. Hans, *Fair Juries*, U. ILL. L. REV. (forthcoming) (manuscript at 58) (on file with authors).

70. Law No. 3325-B art. 7.

71. *Id.*

72. Law No. 6604, Cha., July 28, 2010, B.O. 9092 (Arg.).

73. *New Mexico Population 2022*, WORLD POPULATION REV., <https://worldpopulationreview.com/states/new-mexico-population> [<https://perma.cc/A5RT-MNB9>] (citing U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY, tbl.S1601 (2020), <https://data.census.gov/table?tid=ACSSST5Y2020.S1601&g=0400000US35>) (“About 28% of the population over the age of 5 speaks Spanish at home”).

74. N.M. CONST. art. VII, § 3.

75. *State v. Rico*, 52 P.3d 942, 943 (N.M. 2002). See generally Edward L. Chávez, *New Mexico's Success with Non-English Speaking Jurors*, 1 J. CT. INNOVATION 303 (2008) (discussing New Mexico's

Bar Association's *Principles for Juries and Jury Trials* endorses eligibility of non-English speaking jurors "unless the court is unable to provide a satisfactory interpreter."⁷⁶ Nonetheless, no other U.S. state has followed the New Mexico model. Chaco has recognized that providing interpreters for jurors is necessary in order to ensure the substantial representation from the indigenous communities it has promised.

2. Jury Decision Rule

The civil jury in Chaco,⁷⁷ like its criminal jury,⁷⁸ is required to reach a unanimous verdict. Requiring unanimity is consistent with the evidence that the unanimity requirement produces more robust deliberations.⁷⁹ Research shows that when jury verdicts must be unanimous, juries discuss more key facts and legal issues, are more likely to correct mistaken assertions, elicit greater participation from minority-view jurors, and are more likely to be "evidence-driven," that is, delaying their first vote longer while discussing the evidence more thoroughly.⁸⁰ In short, requiring unanimity strengthens deliberation.

Jurors themselves recognize the value of unanimity. Jurors in civil cases who deliberated under a non-unanimous decision rule and reached a non-unanimous verdict reported on their post-trial questionnaires that their deliberations were less thorough, and their fellow jurors were less open-minded than did members of juries that reached unanimous verdicts.⁸¹ A key finding was that both those in the majority and those who dissented rated their deliberations less favorably. Thus, even though their verdict preference had prevailed, those in the majority were less satisfied than those on unanimous juries.⁸²

The public has a similar view of the benefits of unanimous juries. When asked to rate twelve-person unanimous juries compared with twelve-person

approach); Kyle Duffy, *Lost in Translation: New Mexico's Non-English Speaking Jurors and the Right to Translated Jury Instructions*, 47 N.M. L. REV. 376, 379 (2017) (same).

76. A.B.A., *supra* note 62, at 11.

77. Law No. 3325-B art. 55, H, Feb. 3, 2021, B.O. Electrónico No. 10.621 (Arg.) (excerpted in Appendix).

78. Law No. 7.661 art. 86, Cha., Sept. 16, 2015, B.O. (Arg.).

79. Dennis J. Devine, Laura D. Clayton, Benjamin B. Dunford, Rasmy Seying & Jennifer Pryce, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 669 (2001) (examining eleven empirical studies).

80. Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 DEL. L. REV. 1, 24–25 (2001); *see also* REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* 163–65 (Harvard Univ. Press 1983).

81. 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, 204, 225 tbl.2 (2006).

82. *See id.* at 226.

majority, six-person unanimous and six-person majority juries, survey respondents rated the twelve-person unanimous juries as “most accurate (63%), most thorough (62%), most likely to represent minorities (67%), most likely to listen to holdouts (36%), most likely to minimize bias (41%), and fairest (59%).”⁸³

It is not surprising that the American Bar Association’s *Principles for Juries and Jury Trials* has endorsed unanimity as an optimal decision rule for both criminal and civil jury trials.⁸⁴ In the U.S, juries in criminal cases must reach a unanimous verdict in all federal and state jury trials.⁸⁵ In civil jury trials, although federal courts also require unanimous verdicts,⁸⁶ half of the states have permitted non-unanimous verdicts with two or more holdouts.⁸⁷ Chaco’s civil jury statute is consistent with the ABA’s standard and with U.S. federal courts.

But Chaco has done more than adopt the ideal practice of requiring unanimity. It has also set out two ways to efficiently and fairly respond when the jury is unable to reach agreement. A concern sometimes raised about the unanimity requirement is that the jury will fail to reach unanimity, delaying the resolution of the case. Although hung juries occur infrequently, particularly in civil cases,⁸⁸ when they do, they may act as a valuable “pause button,”⁸⁹ as a hung jury does not produce an immediate resolution to the case. The Chaco Civil Jury Statute institutes two approaches, one that reduces the likelihood of a hung jury and the other that minimizes the costs associated with the lack of resolution when a hung jury occurs.⁹⁰ When a jury reports that it is deadlocked after a reasonable period of deliberation, the judge and the parties are directed to “try to agree on all necessary measures

83. Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens’ Perception of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 LAW & HUM. BEHAV. 333, 337 (1988).

84. A.B.A., *supra* note 62, at 22.

85. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020) (“[T]he Sixth Amendment’s unanimity requirement applies to state and federal criminal trials equally.”).

86. FED. R. CIV. P. 48(b) (“Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members.”).

87. *Diamond et al.*, *supra* note 81, at 230.

88. *Id.* at 207, 228.

89. The use of the hung jury as a “pause button” enables the parties to reconsider their positions in a civil case and in a criminal case to consider whether a conviction is warranted, whether some charges should be dropped, and whether more persuasive evidence is available. See Shari Seidman Diamond, *El Jurado Estancado: Una Pausa Valiosa [The Hung Jury: A Valuable Pause Button]*, in LA UNANIMIDAD DE LOS VEREDICTOS DEL JURADO 113–18 (Alberto M. Binder & Andrés Harfuch eds., 2021) (describing the path leading the United States to require unanimous criminal verdicts, the evidence showing that retrials in cases of hung juries produce both convictions and acquittals when cases are re-tried, and the finding that non-unanimous juries had convicted at least fifteen of the thirty-three defendants who were wrongfully convicted in Louisiana before nonunanimous verdicts were ruled unconstitutional in *Ramos*, 140 S. Ct. 1390).

90. See Law No. 3325-B art. 55, H, Feb. 3 2021, B.O. Electrónico No. 10.621 (Arg.) (excerpted in Appendix).

that may allow the jury to overcome the deadlock,⁹¹ including inviting the jury to submit a brief written note indicating the point(s) that are in contention (but not anything about the vote distribution or the deliberations), reopening evidence on an issue, allowing the parties to make new statements, or providing a new instruction from the judge.⁹²

In the end, if a hung jury does occur, Chaco permits only one new trial. The United States has no limitation on retrial after a verdict is not reached or is overturned on appeal.⁹³ In Chaco, if there is a retrial after a hung jury and a second deadlock, the claim will be rejected by the judge. Chaco's civil statute follows the same response to a second hung jury in criminal cases: the defendant will be acquitted. This response to a second failure of the plaintiff or state to meet its burden of proof is a sensible and fair way to produce closure.

B. Chaco's Innovative Jurisdictional and Procedural Features

In addition to its adoption and extension of several best practices involving the structure of the jury and its decisions, the Chaco Civil Jury Statute also lays out several innovative procedures. These procedures—including class actions, waivers of a minimum amount in controversy in selected cases, and insistence on accessible judicial instructions—underscore the ways in which the new civil jury system is designed with the public's interest in mind.

1. Class Actions: Jury Trials for Collective Rights

The Chaco Civil Jury Statute explicitly recognizes the right to a jury trial in cases involving collective rights.⁹⁴ These include joint injury to a community (e.g., pollution) as well as consumer injuries (e.g., fraud, damage or injuries from products made by the defendants) that are aggregated among the plaintiffs in order to bring one suit for relief. This important provision of the statute heralds a dramatic shift from the traditional approach to class actions in Chaco, from giving professional judges using written procedures the exclusive jurisdiction over class action cases to a new era in which a jury of citizens will decide cases involving class actions after a fully public trial.

91. *Id.*

92. *Id.* A similar approach was instituted in Arizona. See B. Michael Dann & George Logan III, *Jury Reform: the Arizona Experience*, 79 JUDICATURE 280, 282–83 (1995-1996) (“Offer the Assistance of the Judge and Counsel to Deliberating Jurors who Report an Impasse”).

93. See, e.g., *Flowers v. Mississippi*, 139 S. Ct. 2228, 2234–35 (2019) (overturning the conviction of a criminal defendant who had been tried six times for the same crime; convictions in the first three trials had been overturned for prosecutorial misconduct, and the fourth and fifth trials had ended in hung juries).

94. Law No. 3325-B art. 3.

Class action litigation in the United States has been important in a number of areas (e.g., tobacco and asbestos litigation), but has also received criticism. One complaint is a perception that plaintiff attorneys have received disproportionate compensation relative to their clients.⁹⁵ Another is poor treatment of individual plaintiffs in class action and multidistrict litigation.⁹⁶ In the United States, judges are charged with ensuring the adequacy of attorney representation, and monitoring and approving reasonable fees when an award is made, or if the case is settled before trial.⁹⁷ In Chaco, the judges are similarly responsible for supervising settlements.⁹⁸ Moreover, the statute requires that the parties be kept abreast of developments throughout the litigation.⁹⁹ We will watch eagerly to see how class action litigation unfolds in Chaco under the new jury trial statute, hoping that Chaco is more successful than the United States has been.

2. A Jurisdictional Innovation: Waiver of Minimum Damages Amount

A striking innovation in the Chaco Civil Jury Statute is that while it imposes a general requirement (applicable to both individual claims and class actions) that the claimed damages in tort cases must be greater than a specific minimum amount (150 times the nation's monthly minimum wage), it describes a potentially important set of exceptions. If the plaintiff claims discrimination or a violation of freedom of expression, thought, religion, or conscience, the monetary minimum does not apply.¹⁰⁰ Further, a party, regardless of the type of right at stake and even if the amount claimed would ordinarily be insufficient, can request a trial by jury if the case involves "a public or institutional interest or is relevant for its political, social, or judicial impact."¹⁰¹ Thus, the Chaco statute explicitly recognizes the symbolic importance of the civil jury and its verdict. Depending on how these provisions are interpreted, it should give the citizens of Chaco broader access to the civil jury when issues of dignity, equality, or other public interests are involved.

95. Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2043–44 (2010) (describing and rebutting the common perception that class action lawyers benefit excessively from settlements).

96. Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 CORNELL L. REV. 1835, 1873 tbl. 8 (2023) (reporting that two-thirds of multi-district litigation plaintiffs were dissatisfied with their attorneys and a comparable proportion did not understand what was occurring with their lawsuit).

97. See, e.g., Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 FORDHAM L. REV. 1151, 1151 (2021) (describing the responsibilities of federal judges in class action litigation).

98. Law No. 3325-B art. 5.

99. *Id.* art. 15.

100. *Id.* art. 4.

101. *Id.*

3. Limitations on Jury Trial Waiver

The parties in Chaco civil litigation, other than in class actions, can by mutual agreement waive their right to a jury trial. This provision is similar to the procedural rules in the United States.¹⁰² What is different in Chaco, however, is that once the trial date is set, the parties may not exercise the right to waive the jury or use an alternative means of conflict resolution.¹⁰³ In the United States, settlement sometimes occurs only on the eve of trial when the parties are on the verge of putting their claims to the test in front of the jury, or even during trial as they watch the evidence unfold and reevaluate the strength of their case. This situation wastes court (and juror) time. The Chaco approach may cause litigants to be more realistic earlier, and may increase efficiency in the trial process.

4. Instruction Transparency: Judges Must Give Easily Understandable Jury Instructions

A key feature of the Chaco Civil Jury Statute that reflects the goal of transparency in jury trials is the provision that describes the role of the judge's instructions. It states: "The instructions given by the judge must be drafted in such a way as to allow the general public, and especially the parties, to understand the grounds of the jury's verdict."¹⁰⁴ This explicit directive in the statute calls on the judge and the parties to pay more attention than they often do in the United States to making sure that jury instructions are not only legally accurate, but also clearly communicate to the jury, to the parties, and to the public.¹⁰⁵ And not surprisingly, the Chaco statute directs that the jury receive a written copy of the instructions, again a best practice not always followed in the United States¹⁰⁶

CONCLUSION

As scholars of jury systems around the world, we applaud the extraordinary efforts and considerable insights that have led to the development of Chaco's impressive new civil jury law. There is much to admire. Faced with the challenge of creating an entirely new institution in Argentina, Chaco's legislators have drawn important lessons from their analysis of both the strengths and the limitations of the civil jury's

102. FED. R. CIV. P. 39.

103. Law No. 3325-B art. 30.

104. *Id.* art. 11.

105. See Shari Seidman Diamond, Beth Murphy & Mary R. Rose, *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537, 1543-44 (2012).

106. A.B.A., *supra* note 62, at 110 (discussing how information is better processed and retained when presented both orally and in written form).

performance in other countries. As we described, research has documented that representativeness, larger jury size, and jury unanimity are all associated with stronger and more robust jury decision making. Thus, from the start, Chaco's civil jury trials will benefit from the twelve-person representative juries that are required to reach unanimous decisions. Innovative procedures such as time limits on jury trial waiver and the obligation to provide not just legally accurate but also generally understandable jury instructions are likely to promote greater efficiency and transparency in jury trials. And the provision for pursuing collective rights will improve access to justice for the citizenry. More generally, the civil jury may function something like a Trojan Horse; since the jury system envisions a public, accessible, and oral hearing, it "puts an end to the centrality of the written file and places the trial at the center of the process."¹⁰⁷ In sum, the Chaco Civil Jury Statute offers great promise for democratizing the civil justice system in Chaco and providing leadership throughout Argentina and beyond. Perhaps even the United States can be re-inspired to appreciate and support its civil jury.

107. Almeida et al., *supra* note 6, at 30.

APPENDIX—EXCERPTS FROM THE CHACO CIVIL JURY STATUTE (2022)

Article 1: Purpose. The purpose of this law is to guarantee citizen participation in the administration of civil and commercial justice in the Province of Chaco in accordance with . . . the National Constitution and within the framework of current Covenants that are binding for the country.

Article 2: Right to an Oral and Public Hearing. Principles of the Adversarial Process.

Every person has the right to have their civil and commercial case tried in an oral and public hearing before a jury and an independent and impartial judge.

Throughout the process before juries, the principles of equality between the parties, proportionality and instrumentality,¹⁰⁸ good faith, procedural fairness, orality,¹⁰⁹ publicity,¹¹⁰ procedural efficiency, immediacy, simplicity, promptness, citizen participation and adversarial litigation must be observed. . . .

All hearings, except for the deliberation of the jury and the preliminary hearing, will be recorded on audio and video.

Article 3: Jurisdiction. Civil and commercial trials will be held by juries, exclusively in the following cases:

a) When it comes to determining individual non-contractual civil liability.¹¹¹

b) When collective rights have been affected, whether these rights involve collective assets or homogeneous individual interests.

Article 4: Amount. Exemptions Appeal. The jury trial will only be held if the lawsuit claims an amount of damages greater than the equivalent of one hundred fifty (150) times the monthly Minimum Wages, unless the right to freedom of speech, thought, religion, conscience or non-discrimination is at stake. In these cases, the case must be submitted to juries regardless of the monetary sum that is claimed.

108. Authors' note. The Spanish word is "instrumentalidad." In civil cases in civil law countries, the principle of instrumentality refers to a principle of international human rights developed in the 1970s to protect vulnerable groups of consumers and peoples from the strictness of the procedural law. The idea is that if any section of a bill results in the denial of a substantive right in the Civil Code, the Constitution, or the International Covenants of Human Rights, the latter must prevail. MAURO CAPPELLETTI, *ASPECTOS SOCIALES Y POLÍTICOS DEL PROCEDIMIENTO CIVIL* (Santiago Sentís Melendo trans., 1974) (Arg.); MAURO CAPPELLETTI & BRYANT GARTH, *EL ACCESO A LA JUSTICIA* (1978) (Mex.).

109. Authors' note. "Orality" refers to the oral nature of the trial, in contrast to the written communications that mark proceedings in non-jury trials. LOUISE ELLISON, *THE ADVERSARIAL PROCESS AND THE VULNERABLE WITNESS* 65 (2002).

110. Authors' note. "Publicity" refers to the public nature of the trial. See, e.g., Anatoly Shevchuk, *Publicity during the Trial: Key Features and Trends* (Aug. 15, 2022) (unpublished manuscript) <https://ssrn.com/abstract=4244820>.

111. Authors' note. Typically, this would involve tort liability.

Regardless of the type of right at stake, even cases that do not meet the above amount may also be tried before a jury when the subject-matter of the claim is of importance, such as those who pursue a public interest that is relevant for its political, social or judicial impact. . . .

The parties may appeal the decision of the judge who refuses to grant a jury trial.

Article 5: Waiver of Jury Trial. Mediation. Class Actions. Transaction. [T]he parties may exercise their waiver by mutual agreement or go to mediation to settle the matter. They have time until the procedural stage established in Article 30 of this law to exercise that prerogative, and time to reach an agreement until the time established on Article 52 of this law.

One cannot waive a jury trial in class action cases. However, they can still be settled within the judicial process and under the supervision of the judge or a mediator that is registered in the registry of mediators for this purpose. . . .

Article 6: Composition of the Jury. The jury will be composed in all cases by twelve (12) seated jurors and at least two (2) alternates. The trial will be held before one civil and commercial judge. The trial judge may order that there be more alternates according to the seriousness and/or complexity of the case.

There is a mandatory equal gender composition. The gender of the jurors will be determined by their national identity document.

Article 7: Composition of the Jury with Indigenous Peoples. When one of the parties belongs to the Qom, Wichi, or Mocoví indigenous community, half of the panel of twelve seated and alternate jurors will be mandatorily comprised of equal numbers of men and women from the same community. In cases where both parties belong to the same Qom, Wichi, or Mocoví community, the panel (seated and alternate jurors) will be mandatorily comprised of men and women from the same community.

Article 8: Interpreters. When one of the parties or a member of the jury belongs to the Qom, Wichi, or Mocoví community or there is a person with a disability, the presence of translators or interpreters should be ordered.

Article 9: Change of Venue. Trials by jury will be held in the jurisdiction in which the event happened. When these events impacted a community in such a way that an impartial jury could not reasonably be summoned, the judge may order a change of venue, only at the request of the respondent and by providing adequate reasons for his/her decision order

Article 10: Role of the Jury and the Judge. The jury deliberates on the evidence presented at trial and decides the responsibility of the defendant by assessing the conduct, the element of causation, and the harmful

consequences of the defendant's conduct that led to their obligation to provide reparation to the opposing party. For the jury to perform this function, the members of the jury must be instructed by the judge on the law applicable to the case, as well as about the substantive legal issues raised by the parties and the legal alternatives relevant to the specifics of the case, in accordance with the evidence presented at trial.

Article 11: Verdict and Role of the Judge's Instructions. The jury renders its verdict in accordance with their best knowledge and belief, with the evidence of damages, causation, and defenses produced at trial and without stating the reasons for their decision. The judicial instructions to the jury, the plaintiff's complaint, the defendant's answer, any written counterclaim made by the parties, and the mandatory audiovisual record of the trial will constitute a full and sufficient basis for the broad assessment of the decision.

The instructions given by the judge must be drafted in such a way as to allow the general public, and the parties, to understand the grounds of the jury's verdict.

Article 12: Freedom of Conscience of the Jury. Prohibition of Retaliation. The jury is independent, sovereign, and indisputably responsible for its verdict, free from any threat from the judge, the Government, or the parties. . . .

Article 16: Application of Law 2364-B¹¹² on Trial by Juries for Criminal Cases. All the rules provided for the operation of the Jury of Law 2364-B will be applied here, with special adjustments in view of the nature of these types of civil procedures. . . .

Article 17: Plain Language Requirement. Plain language is an essential requirement for the parties, for the jury and for society . . . All parties involved must use plain, simple, and brief language. The use of technical legal language is the last resort. The use of archaisms, words or phrases in Latin and any type of expression that makes understanding the decision more difficult is unjustified and it is prohibited, except in cases when it is impossible to replace it.

Article 18: Payment. Juries will be paid for their service. . . .

Article 27: Discovery Hearing. In order to guarantee a full adversarial cross-examination in a trial by jury, it will be mandatory for the parties to anticipate the exchange and production of any type of evidence that is intended to be used in court. . . .

112. Law No. 2364-B, Cha., Sept. 16, 2015, B.O. Electrónico No. 9839 (Arg.).

Article 28: Hearing on the Admissibility of Evidence. After discovery is completed, a mandatory videotaped public hearing will be convened with all parties to decide the admissibility or exclusion of the evidence. . . .

Article 30: Day and Time of the Jury Selection Hearing. Voir dire. Once the preliminary hearing and/or the hearing on admissibility of evidence have concluded and it is not necessary to hold a discovery hearing, the judge will set the date for the trial by jury. Once established, the parties may not exercise any right to waive the jury trial or to use an alternative means of conflict resolution. . . .

Article 31: General Principles. The jury trial will be governed entirely by the provisions of the Act “2364-B”¹¹³ with the corresponding adjustments to the nature of the litigation provided for in this law and in the Civil and Commercial Procedural Code.

Article 32: Assessment of the Evidence. Juries assess the evidence as a whole according to their “*intime conviction*”¹¹⁴ and without expressing the reasons for their decision, observing the principles of freedom in the assessment of the evidence, logic, knowledge, common sense, and scientifically established knowledge.

Article 33: Standard of Proof. Preponderance of Evidence Standard. Other Standards. The judge will generally instruct the jury to apply the evidentiary standard of preponderance of the evidence unless another evidentiary standard is applicable.¹¹⁵

113. *Id.*

114. Authors’ note. The concept of “intime conviction,” initially used in French criminal trials, has been further developed by the Inter-American Court of Human Rights in *V.R.P. v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 350, 23, 38 (Mar. 8, 2018)*. See also *The Inter-American Court of Human Rights Ratified the Conventional Validity of the Classic Jury*, ASOCIACIÓN ARGENTINA DE JUICIO POR JURADOS (May 31, 2018), <http://www.juicioporjurados.org/2018/05/the-inter-american-court-of-human.html> (discussing the impact of the decision); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 2/5/2019, “Canales, Mariano Eduardo y otro s/ homicidio agravado,” Fallos (2019-342-697) (Arg.). It is sometimes misunderstood as a purely subjective state of mind, driven by emotion. However, as these cases make clear, it refers to the way in which a jury, without providing reasons publicly, evaluates the evidence in the case and reaches a firm conclusion. In other words, “the decision based on intime conviction is not best viewed as the expression of a feeling, but rather as a considered opinion based on the charges, evidence, and defenses presented by the parties.” Valerie P. Hans & Claire M. Germain, *The French Jury at a Crossroads*, 86 CHI.-KENT L. REV. 737, 755 (2011) (citing WILLIAM ROUMIER, *L’AVENIR DU JURY CRIMINEL* 232–33 (2003)). See generally Giovanni Tuzet, *Evidence Assessment and Standards of Proof: A Messy Issue*, 2 QUAESTIO FACTI. INT’L J. ON EVIDENTIAL LEGAL REASONING 87 (2021) (Spain) (discussing the concept of intime conviction).

115. The preponderance of evidence standard is a more definite standard of proof. In contrast, Section 1735 of the Federal Civil and Commercial Code of Argentina (2016) provides for “dynamic burdens of proof,” to be determined by the trial judge after initial hearings in the case if so warranted by fairness concerns. Leandro J. Giannini, *New Insights on the ‘Dynamic Burden of Proof’ Doctrine*, 5 REVISTA IBEROAMERICANA DE DERECHO PROCESAL 255 (2019), <https://ssrn.com/abstract=3285974> or <http://dx.doi.org/10.2139/ssrn.3285974>.

Article 35: Orality. Exceptions. The evidence must be entirely produced at the oral hearing. The expert evidence must be presented in such a way that it can be clearly reviewed, in plain language.

Only in exceptional circumstances can certain evidence be put before the jury by reading it to them. . . .

Article 36: Prohibition of the Use of the Dossier. Under no circumstances may the jury have access to the dossier. Anyone who brings it to the attention of the jury would be committing a serious offense. . . .

Article 43: Instructions and Verdict Form. The parties will provide their proposals for jury instructions to the judge before or during the trial. Once the trial has ended after the closing arguments of the parties, the judge will hold a private hearing with the parties in order to determine the legal instructions to be given to the jury. After listening to the parties, the judge will establish the law applicable to the facts of the case and will come up with the appropriate verdict form that will be delivered to the jury, but only after hearing arguments by the parties. The parties' objections will be properly recorded to allow this to be later used in the event of an appeal. . . .

Article 44: Content of the Instructions to Deliberate. The judge will present these instructions to the jury. Before reading the instructions, the judge will give each of the jurors a written copy, so that they can follow them more easily and also to assist them during deliberations.

First, the judge will explain to the jury the rules that govern deliberation. The judge will give them a written copy of these rules together with the instructions: The judge will explain how the form(s) with the proposed verdict should be completed and will inform the jury of their duty to try to arrive at a unanimous verdict in a secret and continuous deliberation. The judge will also tell them that at some point in their deliberations they must elect a Foreperson.

The judge will explain to the jury that they must first decide on the responsibility issue, then assess the conduct, then the issue of causation and, finally, the damage award. The judge will also let them know that they can award damages [jointly/severable] if applicable.

The judge will instruct the jury that they should decide the verdict according to its *intime conviction* on the evidence produced during trial, in light of the relevant evidentiary standard.

The judge will also explain to the jury which of the parties has the burden of proof in each matter and will instruct them about the extent of the award of damages that the law establishes or allows to be taken into account to determine the amount of damages. . . .

Article 46: Prohibition. During instructions, the judge must not provide his or her opinion of the facts, nor make assessments about the facts,

the evidence or the credibility of witnesses. This can make these instructions null and void. . . .

Article 49: Deliberations. Use of Jury Evidence. Interpreters. During deliberations, the jury must have with them all documents admitted as evidence, except witness statements.

No one may enter the jury room, except in the case of a jury that requires an interpreter to assist them during deliberations, which will be limited exclusively to fulfilling that function and keeping absolute secrecy.

The infringement of this prohibition will result in a mistrial.

Article 50: Dissolution of the Jury. Reasons. The judge may order the dissolution of the jury before the verdict if during deliberations it becomes impossible to continue with them as a result of the serious illness or death of up to two of the members of the jury or any other circumstance that prevents jurors from staying together in the room to deliberate.

However, the jury may continue with deliberations with the remaining members until reaching a unanimous verdict, provided that the parties so consent to it.

In this latter case, and only after discussing this option with the parties, the judge may order that the alternate jurors be incorporated on condition that the jury restart the deliberation from the beginning if it has not been extended too long.

If the jury is dissolved for these reasons, a new trial will be ordered.

Article 51: Arriving at a Verdict. The jury will agree on the best way to proceed with their deliberations and carry out the voting. If they decide to vote with individual ballots, the ballots will be destroyed immediately once the verdict has been rendered, ensuring that people outside the jury will not have access to them. Once the jury has arrived at a verdict, the form(s) delivered by the judge will be completed, signed and dated by the foreperson in the presence of the entire jury. The full jury will then return to the courtroom under the custody of the sheriff for the announcement of the verdict in open court.

Article 52: Delivery of Verdict. To pronounce the verdict, the following procedure will be strictly observed: once all the parties and the entire jury are present in the courtroom, the judge will ask the foreperson if the jury has reached a verdict.

If so, the judge will order the foreperson to read it aloud

Article 53: General Verdict. The verdict will solely establish who the winning party is without other additions and, if there is an award, the amount of the award

The jury may divide the allocation of damages between parties and grant each one the corresponding percentage of the award. . . .

Article 54: Special Verdict. In the hearing for the preparation of the instructions, the parties may in exceptional cases request the judge to order the jury, together with the general verdict, to provide in writing answers to certain questions of fact that the court will formulate and which will appear in the verdict form. The answers may be categorical or brief and the judge will provide the necessary instructions and explanations to allow the jury to render its general verdict and answer the special verdict questions in writing. . . .

Article 55: Unanimity and New Trial. The verdict of the jury will be unanimous. If the jury encounters a deadlock after a reasonable period of deliberations, the judge and the parties will try to agree on all the necessary measures that may allow the jury to overcome the deadlock, such as the reopening of a certain evidentiary issue, new statements from the parties, or a new instruction from the judge. To this end, the judge may ask the jury if they wish to inform them by means of a brief written note of the point(s) that are in contention, without revealing any aspect or detail of the deliberations or the number of votes favoring one party or the other. Once the parties and the jury are present in the courtroom, the judge will determine the course to follow, as previously discussed with the parties, to assist the jury to reach a unanimous verdict.

If applicable, the judge will give a new instruction to the jury so that they can go back to deliberate and deal with the points in contention. If the deadlock persists, the jury will be declared hung and the judge will ask the plaintiff if they wish to continue with their claim.

If the plaintiff wishes not to proceed, the judge will declare the trial to be over.

If the plaintiff wishes to proceed, the judge will dissolve the jury and a new trial will be ordered before a new jury.

In case of a second deadlock, the claim will be rejected by the judge.

Article 56: Polling of the Jury. After the verdict, at the request of any party or at the request of the judge themselves, such verdict may be polled with respect to each member of the jury. . . .

Article 57: Rule of Secrecy. The members of the jury are obliged to keep their opinion and the way in which they voted absolutely confidential at all times.

The statements made, the opinions expressed, the arguments advanced, and/or the votes cast by the members in the course of their deliberations are inadmissible in any legal proceeding.

In particular, jurors cannot be compelled to express or testify about the effect of anything that has influenced their mind or that of the other jurors, their emotions, or their final decisions.

However, a member of the jury may reveal that the jury was offered non-admissible elements beyond the elements they ought to consider during their deliberations, or if there was any external influence or pressure to try to influence their decision, or if there was an error when filling the verdict form.

Failure to comply with said obligation will make them liable for a fine

Article 64: Progressive Implementation. Determination of Cases. Standards. Selection Process. The implementation of the jury trial will be progressive, in order to guarantee its proper implementation. During the first two years of validity of this law, only a certain number of cases will be held before a jury, which may not be less than twelve and nor more than twenty per calendar year. . . .