Silent Lay Judges - Why Their Influence in the Community Falls Short of Expectations

Stefan Machura

Recommended Citation
Stefan Machura, Silent Lay Judges - Why Their Influence in the Community Falls Short of Expectations, 86 Chi.-Kent L. Rev. 769 (2011). Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol86/iss2/11

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.
SILENT LAY JUDGES—WHY THEIR INFLUENCE IN THE COMMUNITY FALLS SHORT OF EXPECTATIONS

STEFAN MACHURA*

INTRODUCTION

Are lay judges active educators of the public? This question will be addressed using data about self-reported behaviour of German lay judges. Germany has a mixed court system: lay assessors and professional judges form part of the panel of judges.\(^1\) They hear the cases and together they decide on all procedural matters that arise during the main hearing. In the end, they deliberate and rule as one body.\(^2\) Tellingly, lay judges at criminal court are called “Schöffen,” which derives from the German verb for “to make something.” They “make law,” recognising that a peoples’ law is not only formulated by parliaments, but also specified in daily court rulings. At other branches of the courts, lay judges are called “honorary judges” which emphasizes the significance of the office and the absence of material interests. There are a number of reasons that are commonly given for the participation of lay judges. Lay judges provide special knowledge in some

---

1. Systems of lay participation have to be seen in the context of the law, the legal institutions and the legal culture of a country. For readers unfamiliar with the German legal system, especially Americans, the following sketch might be helpful. The German legal system is different in a number of ways from the US system which impact on lay participation. To begin with, German legal-political culture traditionally keeps politics and legal proceedings separate. As a consequence, offices in the area of law are seen as apolitical. Judges and public prosecutors are civil servants, starting a life-long career after rigorous state exams. This takes away any suspicion of political interference in all but a limited number of constellations. The courts eagerly uphold the idea of judicial independence, taking it to its logical extreme. Professional judges are the key figures. The judge has to investigate the case, questions the parties and witnesses and takes other evidence. All evidence must be introduced in open court. “Deals” with the parties have spread but it is the presiding judges who are expected to be in control and they have to involve any lay judges if an agreement is to be reached during the main hearing. Following the principles of the “social state of law” and of “fairness,” the presiding judge has to make sure that the socially weaker party in a trial is not unduly disadvantaged. The highest ideal of a court procedure would be the “Rechtsgespräch,” a “discourse about the law,” with the parties. It has to be mentioned that this brief sketch is highly abstract and that, of course, there may be a vast difference between good practice and daily practice.

more specialised branches of the courts, like the juvenile courts. Or they represent the public in courts with general jurisdiction—administrative courts and criminal courts. Through their participation, lay judges should secure a careful deliberation of cases. Lay judges should also contribute to the “education of the public” on the law and the legal system. Broadly conceived, lay judges could provide others with information about the law and its application, about professionals working in the area of law, and about the inner workings of the courts. Ultimately, such knowledge could enable citizens to make a more competent use of the law, which might also have repercussions on legal policy. Armed with this knowledge, citizens may be better suited to influence political decisions as voters or as members of political associations.

In a narrower sense, lay participation is seen as a source of legitimacy for the courts and the legal system; it can enhance the trust of the parties and of the broader public. According to Max Weber’s famous definitions, the “legitimacy” of a social order means a belief in its exemplariness and validity; a “legitimate rule” means that orders of an authority have to be obeyed even if their content is resented. The eminent politician and judge Rudolf Wassermann viewed the legitimating function as supported even by those jurists who otherwise disregard lay judges. In the past, empirical studies showed that citizens wanted courts to involve a lay element. It


4. The leading German commentary on court procedure seems sceptical and assumes that “no reliable evidence” exists for a strengthening of the legitimacy of the courts through the existence of lay judges. EBERHARD SCHILKEN, GERICHTSVERFASSUNGSGESCHICHTE [JUDICATURE LAW] 350 (2007).


6. Rudolf Wassermann, Bürgermitwirkung an der Rechtsprechung [Citizen Involvement in the Administration of Justice], in EHERNAMTLICHEN RICHTER—DEMOKRATIE ODER DEKORATION AM RICHTERTISCH? [HONORARY JUDGE—DEMOCRACY OR DECORATIONS ON JUDGES’ DESKS?] 45 (Hasso Lieber & Ursula Sens eds., 1999).

seems that the idea of lay participation in the administration of justice is attractive for Germans. Lay judges reporting favourably about their work to their family, neighbours, and colleagues and telling them that the legal system is functioning well should therefore contribute to widespread trust. In turn, this trust might translate into a general inclination to respect the law and to obey the decisions of legal authorities.

German courts enjoy moderate to high levels of trust according to repeated surveys, at least in the western part. This support may be resulting from a positive portrayal by news, especially of the authoritative constitutional court, although the criminal courts get their fair share of criticism. Film and TV shows also tend to legitimize the legal system as such, even if they often deal with negative aspects for dramaturgical reasons. Personal experiences at the courts also form opinion as

(Youth) Criminal Justice System—Law Between Professional and Citizen], in INTEGRATION VON STRAFRECHTS- UND SOZIALWISSENSCHAFTEN [INTEGRATION OF CRIMINAL LAW AND SOCIAL SCIENCE] 306, 344–59 (Heribert Ostendorf ed., 1986). In Norway, which like Germany has a mixed court system, Leif Petter Olausssen has found robust evidence for support of the idea of lay participation. Leif Olausssen Petter, Confidence in the Courts Among Norwegians, in THIRD ANNUAL CONFERENCE OF THE EUROPEAN SOCIETY OF CRIMINOLOGY: CRIME AND CONTROL IN AN INTEGRATED EUROPE 214, 217–18 (2003). He also showed that Norwegians have an instrumental reason for standing behind lay judges: they assume that they share their penal preferences, be they on the lenient or on the harsh side. Id. 8

8. Though, they are not necessarily themselves eager to be a lay judge if an opinion survey reported by Remmers in the Province of Saxony-Anhalt can be generalized. Only 24% of the respondents were ready to serve, while 69% rejected the idea. Werner Remmers, Aufbau der Justiz in Sachsen-Anhalt [Building the Judiciary in Saxony-Anhalt], 47 NEUE JUSTIZ [NEW JUSTICE] 99 (1993).

9. Hans-Ulrich Derlien & Stefan Löwenhaupt, Verwaltungskontakte und Institutionenvertrauen [Managing Contacts and Trust in Institutions], in TRANSFORMATION DER POLITISCH-ADMINISTRATIVEN STRUKTUREN IN OSTDEUTSCHLAND [TRANSFORMATION OF POLITICAL-ADMINISTRATIVE STRUCTURES IN EAST GERMANY] 455, 457–60 (Hellmut Wollmann et al. eds., 1997); Elisabeth Noelle, Vertrauen ist besser [Trust is Better], FRANKFURTER ALLGEMEINE ZEITUNG, Jul. 20, 2005, at 5. A more recent survey depicts the different climate in both parts of Germany. Of the West Germans, 7.2% declared having "full trust” in the courts and the legal system and 3.2% of the East Germans; “much trust” indicated by 42.3% and 24.3%, respectively; “some trust” 33.7% and 44.1; “very little trust” 13.2% and 18.2%; and “no trust at all” 3.7% and 10.3%. GESIS: LEIBNIZ-INSTITUT FÜR SOZIALWISSENSCHAFTEN [GESIS: LEIBNIZ INSTITUTE FOR SOCIAL SCIENCES], ALLGEMEINE BEVOLKERSUMFRAGEN DER SOZIALWISSENSCHAFTEN (ALLBUS): DATENHANDBUCH 2008 [GENERAL POPULATION SURVEY OF THE SOCIAL SCIENCES (ALLBUS): DATA MANUAL 2008] 427 (2009) [hereinafter ALLBUS]. As part of a battery of questions related to trust in public institutions, more than half of West Germans indicated some degree of trust in the Federal Constitutional Court while East Germans were a bit more sceptical. Id. at 40. Trust for the courts generally ("Justiz") was a bit lower in the West compared to trust in the highest German court. Id. at 40, 43. In the eastern part, answers converged to a middle position between trust and distrust. Id. at 43. This pattern is related to a sizeable portion of the East German population being disappointed with the process of reunification after 1990 for reasons of allegiance with the former communist regime and radical socialist ideas, or of having suffered a socio-economic downfall in the transition of a planned to a market economy.

evidenced by studies with defendants,11 prisoners,12 and lay judges.13 Courts gain trust if the procedures are run fairly. Of special importance here is the fairness of the presiding judges and if awards, verdicts, and sentences are regarded as just. Furthermore, the courts need to keep their proper distance from party politics, government, and parliament.14

Talking to others about their experiences forms part of the contribution lay judges make to legitimizing the legal system and to their "education function" to the broader public. The number of lay judges currently serving at German mixed courts of all varieties is estimated by the Federal Association of Lay Judges at well over 100,000.15 The majority are at criminal courts.16 Most serve for one or two periods of five years over their lifetime.17 So the actual number of people with judging experience will be much higher. In theory, they could be quite successful in influencing the German public. Yet, studies showed that lay assessors rarely reported about their experience.18 However, it seems easier for lay
judges to talk with family about their work than to people less close. In a small study, Jutta Gerken found that talking to family and friends, for some of her interview participants, had the function of unloading worrying experiences. Yet, only 44% (n = 20) communicated about their work as lay assessors at juvenile court. Gerken suggested that friends and family were likely to think similarly as the lay judges anyhow. Therefore, the influence of lay judges on the public would be limited, and listeners would also be mainly interested in “stories.” In a larger study by Christoph Rennig, a minority of respondents reported about their experience at court to their surroundings, and especially, when they found the law insufficient. The present article reports the results of two more recent studies concerning lay judges at German administrative courts and German criminal courts.

I. LAY ASSESSORS AT ADMINISTRATIVE COURT

Cases that go to administrative courts are usually less emotionally and less morally charged than criminal cases. Administrative courts deal with conflicts under public law related to disputes between citizens and the state and for which there is no special court (like the social courts). Some cases at administrative courts derive from conflicts between branches of the state. An increasing number of cases at administrative court are channelled to single professional judges to save money. Yet, where a full chamber is employed, the panel consists of three professional judges and two lay judges. The voting rule requires a simple majority, so that the professional judges do not need the lay members for a decision when they are united. The political parties often exert their influence over the selection of administrative court lay judges because the local councils draw up proposal lists. The lay judges only serve for a limited number of days per year.


19. GERKEN, supra note 18, at 165.
20. Id.
21. Id.
22. Id.
23. Id. at 176.
24. RENNIG, supra note 18, at 516-17.
25. See MACHURA, FAIRNEB, supra note 3 (criminal court and juvenile court lay judges) and MACHURA, EHRENAMTLICHE, supra note 16 (administrative court lay judges).
In 2000, 301 ehrenamtliche Verwaltungsrichter (voluntary administrative judges) took part in a questionnaire study, of which 147 were from Saxony-Anhalt Province in East Germany and the remaining from Hesse Province in the West. To find out whether the respondents reported their experiences to others, the following question was posed:

Do you report—keeping the secrecy of deliberations—in the circle of your family or to acquaintances or colleagues about your experiences and feelings regarding your work as an honorary administrative judge?

This empathic formulation aimed to avoid possible concerns about the secrecy of judicial deliberations. It makes clear that lay judges would not incriminate themselves when answering. According to German law, the secrecy of deliberation does not compromise the right of free speech; it is mainly intended to shelter judicial independence from illicit interference. However, it may well be that during lay judge introductions some judges put too much emphasis on the secrecy of deliberations. Certainly, everyone has a duty to protect the specifics of cases and people involved. But it is one of the objectives of lay participation that they communicate their general impressions to the general public. Possibly, the difference is not made clear enough in induction seminars.

Table 1: Age and Reporting, Administrative Court

<table>
<thead>
<tr>
<th>Age</th>
<th>Regularly</th>
<th>Often</th>
<th>Sometimes</th>
<th>Not at all</th>
</tr>
</thead>
<tbody>
<tr>
<td>under 40</td>
<td>21.6%</td>
<td>18.9%</td>
<td>37.8%</td>
<td>21.6%</td>
</tr>
<tr>
<td>under 50</td>
<td>17.0%</td>
<td>12.8%</td>
<td>48.9%</td>
<td>21.3%</td>
</tr>
<tr>
<td>under 60</td>
<td>13.1%</td>
<td>09.1%</td>
<td>54.5%</td>
<td>23.2%</td>
</tr>
<tr>
<td>over 60</td>
<td>10.8%</td>
<td>08.1%</td>
<td>52.3%</td>
<td>28.8%</td>
</tr>
<tr>
<td>Overall</td>
<td>13.9%</td>
<td>10.5%</td>
<td>50.7%</td>
<td>24.8%</td>
</tr>
</tbody>
</table>

26. MACHURA, EHRENAmtLcHE, supra note 17, at 24.  
27. Id., at 91.  
28. The question is taken from Rennig’s study of lay judges at criminal court. RENNIG, supra note 18, at 639. Earlier, Großmann had interviewed lay judges at social courts in Bremen city with a similar question. GroSßmann, supra note 18, at 536. At the Bremen social courts, one in two respondents answered “sometimes” and about a third “never” while only approximately one in ten reported “regularly” or “often.” Id.  
Lay Judges Reporting to Acquaintances and Colleagues

<table>
<thead>
<tr>
<th>Age</th>
<th>Regularly</th>
<th>Often</th>
<th>Sometimes</th>
<th>Not at all</th>
</tr>
</thead>
<tbody>
<tr>
<td>under 40</td>
<td>8.1%</td>
<td>8.1%</td>
<td>45.9%</td>
<td>37.8%</td>
</tr>
<tr>
<td>under 50</td>
<td>8.5%</td>
<td>4.3%</td>
<td>40.4%</td>
<td>46.8%</td>
</tr>
<tr>
<td>under 60</td>
<td>2.0%</td>
<td>1.0%</td>
<td>39.0%</td>
<td>58.0%</td>
</tr>
<tr>
<td>over 60</td>
<td>2.7%</td>
<td>1.8%</td>
<td>29.1%</td>
<td>66.4%</td>
</tr>
<tr>
<td>Overall</td>
<td>4.1%</td>
<td>2.7%</td>
<td>36.4%</td>
<td>56.8%</td>
</tr>
</tbody>
</table>

N = 294
Spearman-Rho = .132, p = .023 for reporting to family.
Spearman-Rho = .207, p < .001 for reporting to acquaintances and colleagues.
2.3% did not answer these two questions.


A quarter of the respondents “regularly” or “often” reported to the family about their experiences. One in two said they report “sometimes.” If asked about reporting to acquaintances and colleagues just 7% reported “regularly” or “often” and just 36% “sometimes.” Therefore, the extent of communication is low. Lay judges were especially reluctant to talk outside of their family; 57% did not.

A number of possible influences were analysed to find out why lay judges reported or not. There has, however, been only one significantly correlated factor: the age of the respondent. The older the lay judge, the less he or she reported to family and to acquaintances and colleagues. Older lay judges are either less forthcoming with communication or their social contacts are more limited, perhaps because of the loss of family

30. Machura, Ehrenamtliche, supra note 17, at 91.
31. Id.
32. Id.
33. Id. In an earlier study, Schiffmann similarly found that lay judges at administrative courts communicated most often in the family (52%), to be followed by colleagues (30%), friends and acquaintances (26%), relatives (8%), and private rounds (3%, “Stammtischrunde u.ä.”). Schiffmann, supra note 18, at 205. Altogether, administrative court lay assessors reported “rarely.” Id. at 208.
34. In multivariate analyses, the following factors have been tested: other demographic factors like gender, Province, and perceptions like the justice of the administrative law, the fairness of the presiding judge to the respondent and to the parties, or the justice of the court decisions. Machura, Ehrenamtliche, supra note 17, at 92.
35. See supra Table 1.
members, retirement, or other unemployment related to age.\textsuperscript{36} To summarize, administrative court judges are unlikely to have contributed much to the legitimization of the courts through sharing their experiences. But, to the extent that they exerted an influence, it was likely favorable because of the nature of their court experience. For example, majorities stated that judges treated parties fairly and that the courts reached just decisions.\textsuperscript{37}

II. LAY ASSESSORS AT CRIMINAL COURT

At criminal courts, cases have an added moral and emotional element. The defendants stand accused of having breached important social rules that can be enforced by punishments. More than at the administrative courts, judges are defending the peace of their community. Defendants can even be regarded (stigmatised) as social outsiders. According to Durkheim and others, society is held together by the chance to successfully and adequately punish offenders.\textsuperscript{38}

Reflecting the seriousness of the offenses, almost all cases of medium and high significance in Germany are dealt with by mixed tribunals consisting of professional and lay judges.\textsuperscript{39} At criminal court, decisions to the disadvantage of the defendant require a two-thirds majority according to the law. Lay judges at the lower criminal court, the Schöffengericht, usually sit with one presiding professional judge.\textsuperscript{40} There are two lay judges in each case who can outvote the professional judge.\textsuperscript{41}

Data were gathered with questionnaires in 1996 and 1997 in Bochum, an industrial city, and in 1997 in Frankfurt on the Main, the financial capi-

\textsuperscript{36} In 1997, 38.1\% of Germans aged between 55 and 64 years were economically active, ten years later their percentage reached 51.1\%. Katharina Puch, \textit{Erwerbsbeteiligung älterer Arbeitnehmer [Labor Force Participation of Older Workers]}, \textsc{Statistisches Bundesamt [Fed. Statistical Office]} (2009), http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/DE/Navigation/Publikationen/STATmagazin/2009/Arbeitsmarkt2009_01,templateId=renderPrint.psmll_nnn=true.

\textsuperscript{37} \textsc{Machura, Ehrenamtliche, supra} note 17, at 47, 75, 78.

\textsuperscript{38} \textsc{Emile Durkheim, The Rules of Sociological Method} 78–80 (Steven Lukes, ed., W.D. Halls trans., The Free Press 1982).

\textsuperscript{39} The range of cases involving mixed courts starts where the public prosecutor expects a minimum prison sentence of two years. At the other end of the spectrum, certain crimes against the state are dealt with by panels made up exclusively by professional judges. The juvenile lay assessor court is specialised on two classes of cases. Crimes of juveniles go before a mixed panel if a juvenile prison sentence is expected. In addition, some crimes involving juvenile victims are dealt with by the juvenile courts, e.g. sex offenses.

\textsuperscript{40} Walter Perron, \textit{Lay Participation in Germany}, 72 \textsc{Int'l Rev. Penal L.} 181, 182 (2001).

\textsuperscript{41} Upon special request of the public prosecutor, mixed tribunals at the lower criminal court may have a second professional judge. In this case still, the two lay judges can veto suggestions of the two professional judges which are disadvantaging the defendant. However, this "expanded court of lay assessors" is rare.
tal of Germany. In addition, fifty-one personal interviews were conducted with respondents in Bochum. Criminal courts and juvenile courts were covered. Juvenile courts are slightly different. The law requires lay judges in Juvenile Court to have pedagogical experience; thus, many of the juvenile lay judges are teachers, social workers, or volunteers that work with youth. Yet, as these people are numbered, sometimes simply being a parent is accepted. It is generally known that professional juvenile judges tend to value their lay colleagues for their special knowledge and contribution to the deliberations.

Bochum and Frankfurt form two contrasting courts. In Bochum, with its strong labour movement tradition, lay assessors were very much accepted and supported. During the mid-morning break, the observer found all the professional and lay judges from various panels having their coffee break together on a long table in the court canteen. The familiar atmosphere did not fail to impress the lay judges. In Bochum, defendants tended to be seen by professional and lay judges as members of the community who have failed but deserve to be rehabilitated. The focus of deliberations was often on the needs of the defendants. In contrast to this welfare approach, the climate in Frankfurt was more retributive. The Amtsgericht in Frankfurt is the busiest lower criminal court in Germany. Unlike in Bochum, many defendants are alien to the locals as the international airport brings along many foreign nationals accused of offenses like drug trafficking. Many professional judges had started to cut corners to cope with massive caseloads. According to the lay assessors, some professional judges hurried through the cases disregarding the procedural code and effectively, by reducing time for hearing and deliberation and by reaching premature agreements with the parties without proper consulting of the lay judges, cut short their influence. A list of their professions already reveals that lay judges in Frankfurt were different from those in Bochum,

42. MACHURA, FAIRNEB, supra note 3, at 167.
43. Id.
44. For a more detailed account of professional judges and Schöffen in Bochum and Frankfurt on the Main, see Stefan Machura, Interaction Between Lay Assessors and Professional Judges in German Mixed Courts, 72 INT'L REV. PENAL L. 451 (2001).
45. MACHURA, FAIRNEB, supra note 3, at 184, 203, 206, 242, 246–247.
46. Author’s observation and interviews with Bochum Schöffen.
47. MACHURA, FAIRNEB, supra note 3, at 209—210, 213, 216.
48. Id at 210—211, 215—217.
49. Id. at 216.
50. Id at 201—202.
51. Id. at 201—202.
with more white-collar employees. The lay judges' stance in Frankfurt more often was retributive rather than rehabilitative if compared with their Bochum colleagues. Yet, on balance, the work experience of most lay judges in Frankfurt was positive and most defendants must have had a fair chance at court.

Table 2: Percentage of Reporting Lay Assessors at Criminal Court

<table>
<thead>
<tr>
<th></th>
<th>Reporting to Family</th>
<th>Reporting to Acquaintances and Colleagues</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Bochum</td>
<td>Frankfurt</td>
</tr>
<tr>
<td>Regularly</td>
<td>17.2%</td>
<td>22.8%</td>
</tr>
<tr>
<td>Often</td>
<td>16.6%</td>
<td>18.2%</td>
</tr>
<tr>
<td>Sometimes</td>
<td>55.0%</td>
<td>44.8%</td>
</tr>
<tr>
<td>Not at all</td>
<td>09.3%</td>
<td>11.8%</td>
</tr>
<tr>
<td>Missing</td>
<td>02.0%</td>
<td>02.4%</td>
</tr>
</tbody>
</table>


Most of the lay assessors at criminal court at least “sometimes” reported to their family. In Frankfurt, 41% even communicated their experiences and feelings “regularly” or “often” to family compared to 33.8% in Bochum. In Christoph Rennig’s study of lay judges at criminal courts, 32% of the respondents fell into these two categories. But it also seemed that some lay assessors falsely assumed that the “judicial duty to silence” would demand they should not tell anybody.

Multivariate statistical analyses were used to further explain reporting to family. The explained variance is low, with 28% for Bochum and very low with 11% for Frankfurt. A possible reason for this is that participants were not asked about their individual family background. The importance

52. Id. at 178–179.
53. Id. at 216.
54. Id. at 183.
55. Id. at 272.
56. Id.
57. Rennig, supra note 18, at 516.
58. Machura, Fairneb, supra note 3, at 274.
59. Id. at 273.
60. Id.
61. Id. at 274.
is highlighted by comments at the margins of two questionnaires: “Nobody knows about this work, as I am also single,” or, “Only to my wife.”

Table 3: Reporting to Family, Criminal Court, Multivariate Analysis

<table>
<thead>
<tr>
<th></th>
<th>Bochum</th>
<th></th>
<th>Frankfurt</th>
<th>0.02</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender</td>
<td>-0.07</td>
<td></td>
<td></td>
<td>0.02</td>
</tr>
<tr>
<td>Age</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>under 40</td>
<td>-0.12</td>
<td></td>
<td>0.02</td>
<td></td>
</tr>
<tr>
<td>under 50</td>
<td>-0.10</td>
<td></td>
<td>0.08</td>
<td></td>
</tr>
<tr>
<td>under 60</td>
<td>0.16</td>
<td></td>
<td>0.01</td>
<td></td>
</tr>
<tr>
<td>Fairness of judge to defendants</td>
<td>-0.24*</td>
<td></td>
<td>0.05</td>
<td></td>
</tr>
<tr>
<td>Outcome justice</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>very</td>
<td>-0.07</td>
<td></td>
<td>0.05</td>
<td></td>
</tr>
<tr>
<td>quite</td>
<td>-0.36</td>
<td></td>
<td>0.12</td>
<td></td>
</tr>
<tr>
<td>somewhat</td>
<td>-0.17</td>
<td></td>
<td>0.18</td>
<td></td>
</tr>
<tr>
<td>Fairness of judge to lay assessors</td>
<td>0.02</td>
<td></td>
<td>0.03</td>
<td></td>
</tr>
<tr>
<td>Emotional Stress</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>very</td>
<td>-0.26*</td>
<td></td>
<td>-0.11*</td>
<td></td>
</tr>
<tr>
<td>quite</td>
<td>-0.37*</td>
<td></td>
<td>-0.05</td>
<td></td>
</tr>
<tr>
<td>somewhat</td>
<td>-0.22</td>
<td></td>
<td>-0.01</td>
<td></td>
</tr>
<tr>
<td>rarely</td>
<td>-0.12</td>
<td></td>
<td>-0.10</td>
<td></td>
</tr>
<tr>
<td>Power distance orientation</td>
<td>-</td>
<td></td>
<td>-0.25***</td>
<td></td>
</tr>
<tr>
<td>Interesting cases</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Very</td>
<td>-0.20</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Quite</td>
<td>-0.25</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Somewhat</td>
<td>-0.15</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rarely</td>
<td>-0.03</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pleasure/pride</td>
<td></td>
<td></td>
<td>0.12*</td>
<td></td>
</tr>
</tbody>
</table>
For lay judges in Frankfurt, experiences at court had little explanatory power. For their Bochum colleagues, talking with the family increased when the presiding professional judges treated the defendants unfairly. Emotional stress was a common significant factor for respondents in the two courts. The level of emotional burden was typically moderate: only 35% in Bochum indicated "high" or "quite" and 26% in Frankfurt on the Main. Bochum lay assessors talked to family significantly more often when they felt "very" or "quite" burdened by their office, Frankfurt colleagues if they were "very" burdened. Possibly respondents were trying to ease pressure as Gerken suggested in an earlier study. In personal interviews with lay assessors in Bochum, which had been conducted for additional information, a number said that they could "rid their souls" from burdens when talking to their partners.

For both courts, the age and gender of the respondents, perceived justice of case outcomes and the fairness of the professional judge to the lay assessors did not contribute to an explanation. In Frankfurt on the Main, those talked less to family who showed a higher power distance orientation. Power distance orientation is a psychological concept by Geert Hofstede that measures the degree to which people feel that they should not take part in the exercise of power. They would avoid challenging authori-

62. ld. at 273.
63. ld.
64. ld.
65. ld. at 187.
66. ld. at 274–75.
67. GERKEN, supra note 18.
68. MACHURA, FAIRNEB, supra note 3, at 275.
69. ld. at 273.
70. ld.
ties. Respondents with a high power distance orientation expected less from their role at court and therefore reported less while lay assessors who were convinced of having to play an active role reported more often. Similarly, those who felt more pleasure and pride from their office as a lay judge also liked to share their experience significantly more often.

Only about one in ten lay assessors said they reported “regularly” or “often” to colleagues and acquaintances. More than a third said that they would never do this. Almost half of the respondents reported “sometimes.” In Christoph Rennig’s study, only 4.1% reported “regularly” or “often” while 58.9% reported “not at all” outside their family.

Personal interviews with Bochum Schöffen (lay judges) revealed some reasons for not reporting experiences. Certainly, some characterised themselves as not very outgoing and reluctant to speak. Others would have liked to talk but were put off trying by the way their colleagues discussed criminal cases and penal politics. The German language has the expression “Stammtischniveau” for situations where people regularly meet to drink beer and Schnaps and sometimes start exchanging “populist” views in a very rude tone and simplified way. Typically, even lay judges who started out with a rigorous stance on the “war on crime” after experiencing actual trials arrive at a more nuanced judgment. At court, defendants appear as people who are often visibly marred by terrible life circumstances. Lay assessors reported defendants’ problems like drug addiction, indebtedness, family problems, and failing attempts to return to a better life. In Frankfurt, a respondent noted on his questionnaire:

You are learning to regard the individual (offender) higher when in personal contact compared to what you learn from the media. Perhaps more understanding for the defendants. Not just wanting to punish.

Colleagues at work are often influenced by the simplified articles in the yellow press. Firsthand experience of lay judges is pitted against secondary experience of media consumers. Especially the most popular newspa-

72. Id. at 31. In the Bochum and Frankfurt study, power distance orientation was measured by using the following statements: “In order for the courts to function, lay assessors should follow the presiding judge’s opinion without question.” “There are few qualities more admirable in a lay assessor than dedication and loyalty to his/her court.” “If lay assessors trust professional judges completely, the court will be most successful.” (Cronbach’s α = .68). MACHURA, FAIRNEB, supra note 3, at 195.

73. MACHURA, FAIRNEB, supra note 3, at 272.
74. Id.
75. Id.
76. RENNIG, supra note 18, at 516.
77. MACHURA, FAIRNEB, supra note 3, at 275.
78. Id.
79. Id.
80. Id.
pers and private TV channels, together with political voices, feed the stereotype of the "weak" judge.  If lay assessors try to advocate a more liberal view or if they only mention the richer experience at court they encounter opposition. Some may continue to argue but it is certainly more likely that most will stop sharing their experience. One Schöffe said that when he returned to his office after having served at court, colleagues regularly greeted him shouting, "And how many have you let off the hook today again?" A youth court lay judge noted at the end of his questionnaire that he stopped talking to his colleagues because they would "make Nazi comments—and this as public servants."

Some of the interviewees in Bochum had functions in the Social Democratic Party (governing in the city for decades) and the ChristianDemocratic Union (permanent opposition locally). When confronted with the question whether their party had already held a meeting to discuss lay participation in court given that the party regularly suggested people for the office and they had served as lay judges, they were stunned. Never had they thought about it. Rather, some Schöff en discuss matters with fellow lay assessors, perhaps at a meeting of the lay judge association, or with lawyers among their friends.


82. MACHURA, FAIRNEB, *supra* note 3, at 276.

83. Id.

84. Id.

85. Id. at 277.

86. Id.

87. Id.
Table 4: Reporting to Acquaintances and Colleagues, Criminal Court, Multivariate Analysis

<table>
<thead>
<tr>
<th></th>
<th>Bochum</th>
<th>Frankfurt</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender</td>
<td>-0.27**</td>
<td>-0.03</td>
</tr>
<tr>
<td>Age</td>
<td></td>
<td></td>
</tr>
<tr>
<td>under 40</td>
<td>-0.23*</td>
<td></td>
</tr>
<tr>
<td>under 50</td>
<td>-0.22*</td>
<td>0.26***</td>
</tr>
<tr>
<td>under 60</td>
<td>0.02</td>
<td></td>
</tr>
<tr>
<td>Outcome justice</td>
<td>-.027**</td>
<td>0.07</td>
</tr>
<tr>
<td>Fairness of judge to defendants</td>
<td></td>
<td>-0.02</td>
</tr>
<tr>
<td>very</td>
<td>-0.26</td>
<td></td>
</tr>
<tr>
<td>quite</td>
<td>-0.38</td>
<td></td>
</tr>
<tr>
<td>Fairness of judge to lay assessors</td>
<td></td>
<td>0.03</td>
</tr>
<tr>
<td>very</td>
<td>0.14</td>
<td></td>
</tr>
<tr>
<td>quite</td>
<td>0.03</td>
<td></td>
</tr>
<tr>
<td>Emotional stress</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Very</td>
<td>-0.13</td>
<td>-0.10</td>
</tr>
<tr>
<td>quite</td>
<td>-0.38*</td>
<td>-0.13</td>
</tr>
<tr>
<td>somewhat</td>
<td>-0.33</td>
<td>-0.07</td>
</tr>
<tr>
<td>rarely</td>
<td>-0.26</td>
<td>-0.16</td>
</tr>
<tr>
<td>Power distance orientation</td>
<td>-</td>
<td>-0.26***</td>
</tr>
<tr>
<td>Interesting cases</td>
<td>-</td>
<td>0.05</td>
</tr>
<tr>
<td>Pleasure/pride</td>
<td>-</td>
<td>-0.02</td>
</tr>
<tr>
<td>$R^2$</td>
<td>0.38</td>
<td>0.17</td>
</tr>
<tr>
<td>$N$</td>
<td>132</td>
<td>317</td>
</tr>
</tbody>
</table>
Entries are Betas, * $p < .05$, ** $p < .01$, *** $p < .001$.

Age: reference group “over 60.”
Fairness of judge to defendants: reference group “somehow/less/not at all fair.”
Emotional stress and interesting cases: reference group “not at all.”


Table 4 presents a multivariate statistical analysis for when lay assessors are more likely to report their experiences to colleagues and acquaintances. The explained variance for Bochum Schöff en is 38% and much lower for Frankfurt with 17%.\(^88\) The results suggest that having work is a decisive factor.

Frankfurt Schöff en reported their experiences significantly more often the younger they were.\(^89\) It is likely that older lay judges were out of work already. Since really young lay assessors, perhaps in their thirties, had been rare, “younger” lay judges refers to people typically in the prime of their work career. The only other significant factor was again power distance orientation. Those who scored higher also reported less often.\(^90\) This is similar to the result before on reporting to family. Schöff en who did not expect much in terms of real participation (high power distance orientation) also kept quiet about their experience.\(^91\)

Bochum lay assessors also reported more often to colleagues and acquaintances the younger they were. Other significant factors were the perceived justice of trial outcomes and the emotional burden of working as lay judge. Individuals feeling “quite” burdened communicated more often. Respondents reported more if they found the court’s decisions unjust. The same explanatory force as this factor was presented by gender. Males reported more often to colleagues and acquaintances, which is likely to reflect the lower participation of women in the German labor market.\(^92\)

\(^{88}\) Id. at 276.
\(^{89}\) Id.
\(^{90}\) Id.
\(^{91}\) Id.
\(^{92}\) But in 2006, 67.5% of all Germans between fifteen and sixty-four years of age were “economically active” and 62.2% of women. Christian Wingerter, Erwerbstätigkeit: Steigende Erwerbstätigenzahl nicht nur auf Wirtschaftswachstum zurückführbar, STATISTISCHES BUNDESAMT [FED. STATISTICAL OFFICE] 6 (2007), http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/DE/Content/Publikationen/STAtmagazin/Arbeitsmarkt/2008_1/PDF2008_1.property=file.pdf. The percentage of economically active women has significantly risen; the percentage of “economically active” men has declined. Back in 1991, 57% of women and 78.4% of men were “economically active.” Gender Datenreport [Gender Data Report], BUNDESMINISTERIUM FÜR FAMILIE, SENIOREN,
from the demographical factors of age and gender, emotional burden and finding outcomes unjust therefore prompted Bochum lay assessors to communicate more often.

Perhaps additional motivation is needed for lay judges to become very active propagandists of their cause. A female juvenile assessor wrote she would report “sometimes” to colleagues and acquaintances “already to recruit new Schöffen!” and continued: “Work patterns and efficiency of judges (psychological empathy, speed, efficient conduct of trials) very much depend on the person. Lay assessors have to correct slips in this area or oppose professional blindness with ‘healthy common sense.’”

**CONCLUSION**

One of the reasons given for the institution of lay judges cooperating with professional judges in mixed courts is that they contribute to the legitimation of the third power, or more broadly, educate the public about the application of the law. Lay assessors participate in the work of the courts and can report about their experiences to their environment: families, friends, work colleagues and so on. Legal authors are commonly confident enough to assume that the lay judges’ experience is not primarily negative. But even if it is a sad one, in a democracy, one would wish a debate.

Only, German lay judges do not report much about their work as our analyses of Schöffen at criminal and juvenile court and of honorary judges at administrative courts has shown. The initial assumption that lay judges will report more frequently to family members than to friends and colleagues has been reinforced. A number of factors have been found to correlate with their reporting behaviour. Individuals who felt burdened by their office tended to talk more often about their work, especially to family members. Here, they are more protected which allows them to open up, let off steam, or find relief. Friends and work colleagues proved to be a difficult environment for some lay judges, as they had been the object of banter and even ridicule. Members of the public with more punitive attitudes often criticise courts and by implication their lay judge colleagues. Impressions from sensational media portrayals of crime are more convincing to them than the much more nuanced accounts of those citizens actually serving at

---


93. Machura, Faimett, supra note 3, at 278.
the courts. Such patterns throw a dark shadow on the functioning of public opinion in a state of law.

According to our data, the perceived fairness of the professional judges to the lay judges and the perceived justice of the verdicts reached by the panels must have been of some significance for the reporting behavior. Respondents reported a relative high degree of fairness of professional judges to their lay colleagues. Lay judges also have rarely left the court building with the impression that the verdicts rendered and the punishments imposed amounted to injustice. There were reservations but no devastating image among Schöffen and honorary judges. If a larger majority of German lay judges were in the habit of regularly communicating their views, a positive impact on public opinion would result. Only, many refrain from a public display of their experience.

Another circumstance comes into play here—the individual character of lay judges. Some people are very outgoing and rarely miss an opportunity to state their opinion to others. But many people are the opposite or at least less outgoing. According to a recent survey, about half of Germans try to avoid the attention of others: they do not like to express anger in public, or even to deliver a speech to a circle of friends. If these inclinations meet with hostile comments of punitive, law and order-minded work colleagues and friends, acquiescence becomes very likely. It is not everyone’s cup of tea to challenge hostile views. In the Frankfurt Schöffen sample, power distance orientation was measured and those respondents ready to accept having little say at court were less likely to report experiences. Power distance orientation is a personality trait measuring the inclination to accept other people’s decisions—decisions made by those perceived to be more powerful. We can assume that it also approximates the readiness to speak out against opposition.

Ideally, people with this personality should not serve as lay judges. The recruiting mechanisms in Germany today rarely imply a screening against deference as a candidate’s general attitude. One could however, invest more energy and resources in the initial education of lay judges before they begin their term. Furthermore, an opportunity to resign could be offered for those who find themselves ill suited to take part in panel deliberations. Such an option could be offered for everyone after their first two

94. Wort und Bild Verlag, Repräsentativbefragung zum Thema “Selbstbewußtsein” durch die GfK [Representative Survey of “Self-Consciousness” by the GfK] 6 (2010). In another study, 36.5% of the respondents were inclined to “rarely” or “never” talk about politics to family, 35.6% to friends, 52.5% to acquaintances, and 80.7% to strangers. ALLBUS, supra note 9, at 311–13.
95. See GERKEN, supra note 18, at 186–87; RENNIG, supra note 18 at 580.
or three days of sitting. As German lay judges in surveys repeatedly stated that they would very much like to serve for an additional period, with percentages around 85%, there is no danger of lay participation collapsing.

If this is the picture of German lay judges, how likely is it that the main results apply to other countries? In most parts of Continental Europe, mixed courts form a part of the traditional legal institutions. Court proceedings, especially criminal cases, sometimes involve shocking details of recklessness, malice, and human suffering. It is likely that lay judges everywhere tend to discuss those cases with the ones who are closest to them as part of coping. More broadly, age is related to the number of contacts people have everywhere. People reach the official retirement age or go into early retirement and find themselves deprived of the social life offered by factories, offices, and other workplaces. Often, one partner survives the other for years without entering into new relations. Talking to family and friends will occur more often than talking to acquaintances and colleagues. This should be fairly universal also because there is a general problem for many people to speak out. In particular, when lay judges bring in their more detailed insider view, they will encounter prejudice among some of their friends and work colleagues. A wave of punitive attitudes, fed by the media and politicians of authoritarian creed, can be observed on an international scale. Lay judges who have seen the appearance of defendants, had insights into their lives, and are familiar with judicial arguments will often have a hard time confronting punitive views. Two lay philosophies of justice collide. One is often shared by wide strata of the society.

---

96. MACHURA, FAIRNER, supra note 3, at 279; MACHURA, EHRENAMTLICHE, supra note 17, at 50. In Rennig's study, only 7.7% of responding lay judges indicated they would have used a right to decline becoming a Schoffe should they had the legal opportunity to do so. RENNIG, supra note 18, at 495.


98. Two studies in countries other than Germany show that lay judges are not typically emotionally stressed. The majority of Russian people's assessors did not feel very burdened by their work at mixed courts. MACHURA, DONSKOW & LITVINOVA, supra note 13, at 55. Lay judges in Switzerland showed less emotional stress than their professional colleagues. Revital Ludewig & Evelyne Angehrn-Guggenbühl, Sind Schöfften noch zeitgemäß? [Are Lay Judges Still Appropriate?], 97 BETRIFFT JUSTIZ [JUSTICE CONCERNS] 32, 35 (2009). In both countries, lay assessors were not only taking part in criminal cases. In Switzerland, respondents might have worked as a single judge and/or in mixed panels.

99. For a discussion of the influence of U.S. and English jurors outside of the circle of family and friends, see MARC GERDING, TRIAL BY JURY 471 (2007). Gerdming assumes that lawyers would be more convincing than lay people. But this depends on the public prestige of lawyers and people may value views by non-professional participants—by their peers—in the legal system. On the other hand, Gerdming and others may underestimate the degree to which legal topics can be disputed. After all, there are often personal value differences and political convictions involved.
and relates to the idea to severe punishment. In essence, it is about retribution. The other one, which often comes with a more detailed insight into cases, focuses more on the defendant’s needs, especially on ways to stop them from re-offending, and addresses the social and individual roots of norm violations and successful re-integration of outsiders into society. This is the philosophy of rehabilitation, i.e., rebuilding peaceful social relations. The struggle between both justice principles is not confined to the criminal area, but can also have an impact on other disputed cases. Add to this a generic aspect of power struggle in everyday discussions—who is truly speaking for the community: lay judge John Smith?—plus variability in subjective desire to contribute, indeed variability in feelings of affiliation to a community, and the chance that lay judges will shape views about the law indeed becomes very limited.


101. In legal thought, retribution and rehabilitation form only two of a number of objectives which underpin punishments. Rennig has investigated their relevance for lay and professional judges at criminal courts and found both groups holding very similar views. RENNIG, supra note 18 at 539. Julian V. Roberts studied the North American research literature and concluded, “To the public, then, all the aims of sentencing sound worthwhile.” Julian V. Roberts, Public Opinion, Criminal Record, and the Sentencing Process, 39 AM. BEHAV. SCIENTIST 488, 493 (1996) (emphasis in the original).