

# Reasoned Criminal Verdicts in the Netherlands and Spain: Implications for Juries in the United States

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## INTRODUCTION

The American system of criminal law and justice is often more visible to and discussed by the general public than other fields of law.<sup>1</sup> Perceived deficiencies in the criminal justice system are numerous, and American legal scholars often look toward international criminal justice systems to determine whether more feasible and effective alternatives exist to remedy the deficiencies in the American system. The Netherlands, like other European countries, has a criminal justice system with several major differences from the American system.<sup>2</sup> Spain, on the other hand, is more similar to the American system than the Netherlands, but its jury system has major differences from its American counterpart.<sup>3</sup>

A large body of scholarly literature exists on comparative criminal justice, including many contrastive studies of American and European legal systems.<sup>4</sup> There are major differences between the American and European criminal law systems and even among the various European countries; this may explain the large number of comparative criminal

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<sup>1</sup> See STEPHEN A. SALTZBURG, JOHN L. DIAMOND, KIT KINPORTS, THOMAS H. MORAWETZ & RORY K LITTLE, *CRIMINAL LAW-CASES AND MATERIALS* 1 (3d ed. 2008) (“Crime is the main preoccupation of news and culture, and it has played this role throughout human history. Even those who are lucky enough to avoid direct involvement in crime experience it vicariously. . . . [C]rime is psychologically important both as fact and symbol. Symbolically it represents the essence of law in general, the imposition of order and reason over impulse and arbitrary action.”).

<sup>2</sup> See *infra* Part II and note 11.

<sup>3</sup> See *infra* Part III and note 48.

<sup>4</sup> See generally Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 AM. J. COMP. L. 227, 227 (2000); Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 507–508 (1973).

studies involving the United States and European countries.<sup>5</sup> However, legal scholarship is light on its treatment of the Netherlands; instead, researchers have generally focused on larger European countries, including the United Kingdom, Germany, France, and Italy.<sup>6</sup> Additionally, the body of literature comparing Spanish criminal law to American criminal law is small, especially in the area of jury verdicts.

This Note will use the framework of a comparative analysis between the criminal justice systems of the Netherlands, Spain, and the United States to determine whether the American criminal justice system would more effectively serve the rights and interests of criminal defendants and crime victims if reasoned jury verdicts were adopted in the United States. Specifically, this Note will examine the Dutch practice of requiring written justifications from judges and the Spanish practice of requiring juries to issue reasoned verdicts in a criminal trial. It will then look at the potential implications of implementing such practices in the U.S. criminal justice system.

The following section will describe the debate between “inquisitorial” and “adversarial” legal systems and provide an overview of the major differences between the criminal justice systems in the Netherlands and in the United States. Part II of this Note compares Spanish and U.S. criminal law and explores the Spanish jury procedure. Part III addresses the use of “special verdicts” in the United States. Following this is a discussion of the potential implications of implementing a reasoned verdict requirement into the U.S. criminal jury system and potential avenues for countering negative implications. The Note will conclude with suggestions for how to implement this practice most effectively in the United States, hopefully in a manner that will overcome potentially negative ramifications.

## I. DUTCH CRIMINAL LAW

Dutch criminal law, and its legal system in general, have been described as “inquisitorial,” as compared to the “adversarial” nature of the American system.<sup>7</sup> Generally, an inquisitorial system aims to reach the truth, while an adversarial system focuses on a fair trial with the two

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<sup>5</sup> See generally Julia G. Mirabella, *Scales of Justice: Assessing Italian Criminal Procedure Through the Amanda Knox Trial*, 30 B.U. INT'L L.J. 229, 230 (2012); Volker F. Krey, *Characteristic Features of German Criminal Proceedings—An Alternative to the Criminal Procedure Law of the United States?*, 21 LOY. L.A. INT'L & COMP. L.J. 591, 591 (1999).

<sup>6</sup> See e.g. CRIMINAL PROCEDURE IN EUROPE 46–47, 177–78, 275 (Richard Vogler & Barbara Huber eds., 2008); STEPHEN C. THAMAN, COMPARATIVE CRIMINAL PROCEDURE 14–18 (2d ed., 2008); ERIKA S. FAIRCHILD, COMPARATIVE CRIMINAL JUSTICE SYSTEMS (1993); COMPARATIVE CRIMINAL PROCEDURE 16, 99, 179 (John Hartchard, Barbara Huber & Richard Vogler eds., 1996); See generally MIREILLE DELMAS-MARTY & J.R. SPENCER, EUROPEAN CRIMINAL PROCEDURES (2002).

<sup>7</sup> See Peter J. van Koppen, *Miscarriages of Justice in Inquisitorial and Accusatorial Legal Systems*, 7 J. INST. JUST. & INT'L STUD. 50, 51 (2007).

opposing parties deciding which side prevails.<sup>8</sup> Under the inquisitorial system, truth is the “proximate goal,” a legal procedure is an “official and thorough inquiry directed at establishing the true facts,” and technicalities of fair play are “put aside” if they threaten to obstruct discovery of the truth.<sup>9</sup> Legal proceedings under the adversarial model are “essentially contests between equivalent rivals,” defined by the concept of “fair play” which “requires that both [parties] have ample opportunity to present their respective positions with uninhibited and partisan zeal.”<sup>10</sup>

Various scholars have argued over whether the system is better than an inquisitorial system and vice versa.<sup>11</sup> Of course there are problems with both arguments. Is it possible to accurately compare the inquisitorial and adversarial systems? How is “better” defined? The distinction between inquisitorial and adversarial systems is also rather ambiguous, as no country’s criminal justice system can be considered purely one or the other.<sup>12</sup> Rather, most countries are “mixed or hybrid systems” located somewhere on the spectrum between the inquisitorial and adversarial poles.<sup>13</sup> “The Netherlands, however, can be considered the country that is probably the most inquisitorial in Western Europe.”<sup>14</sup> The United States, on the other hand, is strongly adversarial.<sup>15</sup> Thus, a comparison between

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<sup>8</sup> *Id.*

<sup>9</sup> Hans F.M. Crombag, *Adversarial or Inquisitorial: Do We Have a Choice?*, in *ADVERSARIAL VERSUS INQUISITORIAL JUSTICE: PSYCHOLOGICAL PERSPECTIVES ON CRIMINAL JUSTICE SYSTEMS* 21, 23 (Peter J. van Koppen & Steven D. Penrod eds., 2003) (internal quotations omitted).

<sup>10</sup> *Id.* at 22–23.

<sup>11</sup> See WILLIAM T. PIZZI, *TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT* 1–4 (1999) (criticizing the U.S. adversarial system generally for several deficiencies); Kent Roach, *Wrongful Convictions: Adversarial and Inquisitorial Themes*, 35 N.C. J. INT’L L. & COM. REG. 387, 392 (2010) (recognizing that many blame wrongful convictions in adversarial systems on a lack of attention to factual accuracy in verdicts, and suggesting that both adversarial and inquisitorial systems would each benefit from borrowing aspects of the other system); David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1635–36 (2009) (arguing that originalist, holistic, and instrumental considerations do not justify the role that inquisitorialism has played a “contrast model,” or a model of what to avoid, in the American criminal justice system); Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 57 (1998) (lauding the virtues of adversary-based fact presentation); see also Daniel Givelber, *The Adversary System and Historical Accuracy: Can We Do Better?*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 253, 255–58 (Saundra D. Westervelt & John A. Humphrey eds., 2001); Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1009 (1974); Sean Doran et. al., *Rethinking Adversariness in Nonjury Criminal Trials*, 23 AM. J. CRIM. L. 1, 59 (1995).

<sup>12</sup> van Koppen, *supra* note 7, at 51.

<sup>13</sup> Peter J. van Koppen & Steven D. Penrod, *Comparing Systems*, in *ADVERSARIAL VERSUS INQUISITORIAL JUSTICE: PSYCHOLOGICAL PERSPECTIVES ON CRIMINAL JUSTICE SYSTEMS* 1, 2–5 (Peter J. van Koppen & Steven D. Penrod eds., 2003).

<sup>14</sup> *Id.* at 4; see also van Koppen, *supra* note 7, at 51 (“The Dutch system is the most inquisitorial among inquisitorial systems and provides a good baseline to understand how such a system works.”).

<sup>15</sup> Herbert M. Kritzer, *American Adversarialism*, 38 LAW & SOC’Y REV. 349, 355 (2004) (agreeing that “the culture of the American legal profession produces a greater emphasis on adversarialism than is true of legal professions in other countries[.]”). See also ROBERT A. KAGAN,

the United States and Dutch criminal justice systems is useful because the systems of these two countries “are somewhere at the extremes of the inquisitorial-adversarial continuum.”<sup>16</sup>

There are several areas of difference between the Dutch and American criminal justice systems.<sup>17</sup> One area is the background, qualifications, and appointment process for legal actors.<sup>18</sup> In the Dutch system, career judges are professionally trained; the paths of lawyers and judges usually diverge right after law school.<sup>19</sup> In contrast, judges in the United States are either elected by the public or appointed by politicians and approved by a legislative body.<sup>20</sup> American judges do not undergo a standard training process like those in the Netherlands, and American judges generally practice as attorneys in the legal profession for at least ten years—usually longer—before joining the bench.<sup>21</sup>

The criminal defendants’ process of acquiring legal counsel also differs. If the defendant cannot afford an attorney in the Netherlands, the defendant may select an attorney and the state will pay attorney’s fees.<sup>22</sup> In the United States, however, a poor defendant is usually assigned a government-employed attorney by the court; the defendant often gets little input in this choice.<sup>23</sup>

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ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 3 (2002); Frank B. Cross, *America the Adversarial*, 89 VA. L. REV. 189, 189 (2003). Cross’s article provides an excellent overview and critique of Kagan’s book, *Adversarial Legalism*. Kagan, Cross writes, “has made virtually an entire research career of declaiming what he calls ‘adversarial legalism’ in America,” and actually “coined the term adversarial legalism to describe what he terms the ‘American way of law.’” *Id.* Indeed, Kagan even provides a comparative example of asbestos tort litigation that is particularly relevant to this Note because it compares the Netherlands and the United States to illustrate the proposition that the United States is significantly more adversarial than European countries. See Robert A. Kagan, *On Surveying the Whole Legal Forest*, 28 LAW & SOC. INQUIRY 833, 835–36 (2003).

<sup>16</sup> van Koppen & Penrod, *supra* note 13, at 4–5.

<sup>17</sup> For a more detailed overview of the differences listed here, see *id.* at 1–11.

<sup>18</sup> *Id.*

<sup>19</sup> Michael Tonry & Catrien Bijleveld, *Crime, Criminal Justice, and Criminology in the Netherlands*, 35 CRIME & JUST. 1, 3 (2007) (“As in most of western Europe, [Dutch] criminal justice officials are neither elected nor politically selected, and most are career civil servants.”); van Koppen, *supra* note 7, at 52 (“Professional judges undergo special training. One can become a professional judge in the Netherlands with five years of law school and after that, six years of special judicial training. Part of the training consists of various courses . . . [including] courses about the psychology of law and witnesses.”).

<sup>20</sup> F. Andrew Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges*, 28 J. LEGAL STUD. 205, 205 (1999); Hon. Daniel R. Deja, *How Judges Are Selected: A Survey of the Judicial Selection Process in the United States*, 75 MICH. B.J. 904, 904 (1996).

<sup>21</sup> See Nina Totenberg, *Will Judges be Chosen Rationally?*, 60 J. AM. JUDICATURE SOC’Y 92, 93 (1976–1977); Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 J. AM. JUDICATURE SOC’Y 228, 229 (1986–1987); Ronald Schneider & Ralph Maughan, *Does the Appointment of Judges Lead to a More Conservative Bench? The Case of California*, 5 JUST. SYS. J. 45, 45 (1979–1980).

<sup>22</sup> van Koppen & Penrod, *supra* note 13, at 6.

<sup>23</sup> See Stacey L. Reed, *A Look Back at Gideon v. Wainwright After Forty Years: An Examination*

The roles of the legal actors in criminal law differ greatly, both in the pre-trial and trial proceedings. In the Netherlands, juries do not exist.<sup>24</sup> The Dutch judge presides over the trial, acts as the fact-finder, and issues the verdict and sentence.<sup>25</sup> However, in the United States, lay jurors usually decide the verdict in criminal trials, while the judge acts as an independent arbiter between the parties.<sup>26</sup>

In both systems, the judge makes decisions on the admissibility of evidence,<sup>27</sup> although the evidence rules are much stricter in the United States.<sup>28</sup> For example, hearsay evidence is generally admissible in Dutch criminal trials.<sup>29</sup> A Dutch judge will usually admit all evidence and then ignore low quality or unconvincing evidence in making a decision on the verdict.<sup>30</sup> Illegally obtained evidence usually does not lead to dismissal of charges in the Netherlands, although it can result in a reduced sentence if the defendant is found guilty.<sup>31</sup> The United States, however, has a general rule prohibiting the introduction of hearsay evidence in trials,<sup>32</sup> and illegally obtained evidence is also inadmissible.<sup>33</sup>

Dutch judges question the witnesses at trial and then allow the prosecutor and defense attorney an opportunity to question the witnesses.<sup>34</sup> The witnesses are called either by the court or the prosecutor, and the defense must request permission from the prosecutor or the court if it wishes to call a witness.<sup>35</sup> Often, there is no oral testimony from witnesses at trial, as the entire trial is based on a detailed written statement.<sup>36</sup> In U.S. criminal trials, evidence must usually be presented orally at trial, in front of the jury.<sup>37</sup> The prosecution and defense each call witnesses for a formal examination and cross-examination procedure.<sup>38</sup> The judge does not

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*of the Illusory Sixth Amendment Right to Assistance of Counsel*, 52 DRAKE L. REV. 47, 48 (2003–2004).

<sup>24</sup> van Koppen, *supra* note 7, at 52 (“[The Dutch] do not have any lay-participation in [their criminal justice] system, there is no jury.”); Tonry & Bijleveld, *supra* note 19, at 9 (“Juries are not involved in the trial of cases, and lay judges are almost absent.”). By “lay judges,” Tonry and Bijleveld refer to judges with no specialized academic training. *Id.*

<sup>25</sup> van Koppen, *supra* note 7, at 55.

<sup>26</sup> See van Koppen & Penrod, *supra* note 13, at 11.

<sup>27</sup> van Koppen, *supra* note 7, at 55.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> van Koppen & Penrod, *supra* note 13, at 8.

<sup>32</sup> FED. R. EVID. 802. There are, however, various exceptions to the rule against hearsay. FED. R. EVID. 803–05.

<sup>33</sup> *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that “all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court”).

<sup>34</sup> van Koppen & Penrod, *supra* note 13, at 12.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 11.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

question the witnesses but participates in the examination by ruling on evidentiary objections posed by the parties.<sup>39</sup>

In the Dutch system, the verdict is issued by the judge in a written statement that justifies the decided verdict by specifying the grounds upon which the judgment is based.<sup>40</sup> The written statement must state why the judge has arrived at a specific verdict, addressing key arguments made by the prosecution and defense on evidence presented during trial.<sup>41</sup> In the United States, the verdict is issued by the jury as either “guilty” or “not guilty,” and the judge does not issue a written opinion to justify the decision.<sup>42</sup>

In both systems, the judge issues the sentence if a finding of guilt is made.<sup>43</sup> However, Dutch judges generally have more discretion than American judges in sentencing guilty defendants.<sup>44</sup> While Dutch judges can decide a sentence between a specific maximum for that crime and a general minimum for all crimes,<sup>45</sup> an American judge must decide between a specific maximum and minimum for each crime.<sup>46</sup>

There are also differences in the post-trial process. In the Netherlands, almost all court decisions can be appealed and tried again, *de novo*, at an appeals court.<sup>47</sup> In the United States, criminal appeals are generally not reviewed *de novo* but are based upon specific objections to procedural actions taken at the trial level.<sup>48</sup> Punishment is usually more severe in the United States,<sup>49</sup> while the Netherlands (and all other countries in the European Union) have abolished capital punishment.<sup>50</sup>

## II. SPANISH CRIMINAL LAW

Perhaps the Spanish jury system serves as a more appropriate model for the American criminal justice system than the Dutch system; Spanish criminal law is more adversarial in nature than Dutch criminal law and thus

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<sup>39</sup> *Id.*

<sup>40</sup> Grondwet voor het Koninkrijk der Nederlanden [GW] [CONSTITUTION] art. 121 (Neth.) (“Except in cases laid down by Act of Parliament, trials shall be held in public and judgments shall specify the grounds on which they are based. Judgments shall be pronounced in public.”).

<sup>41</sup> van Koppen & Penrod, *supra* note 13, at 13; van Koppen, *supra* note 7, at 55.

<sup>42</sup> van Koppen & Penrod, *supra* note 13, at 12–13.

<sup>43</sup> *Id.* at 12.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 14.

<sup>48</sup> van Koppen & Penrod, *supra* note 13, at 14.

<sup>49</sup> *Id.* at 8.

<sup>50</sup> *Id.* at 18.

bears more similarity to the United States.<sup>51</sup> Both inquisitorial and adversarial traditions have roots in Spanish legal history,<sup>52</sup> but over the years Spain has transformed the framework of its criminal law to emphasize its adversarial, or accusatorial, tradition over its inquisitorial elements.<sup>53</sup> Spain's 1882 Code of Criminal Procedure and its 1978 Constitution both evidence "evolution[s] from the inquisitive system" to a more adversarial model.<sup>54</sup> The 1978 Constitution provides many rights found in U.S. law, including rights of the accused: a public trial, protection from self-incrimination, and the presumption of innocence, among others.<sup>55</sup>

The Spanish criminal prosecution consists of two stages: the preparation of a written summary and the trial.<sup>56</sup> The criminal trial is "predominantly oral," similar to the United States and unlike the Netherlands, and a conviction or acquittal must be based on the evidence presented during the public trial.<sup>57</sup> The accused is entitled to present evidence during that trial<sup>58</sup> and is also entitled to be represented by counsel and to cross-examine witnesses, although these rights are slightly limited compared to similar rights of American defendants.<sup>59</sup> The Constitution encourages criminal defendants to challenge alleged violations of their constitutional rights in front of appellate courts; this development in Spanish law is said to have evolved based on the American contribution of judicial review.<sup>60</sup> Since the adoption of the 1978 Constitution, Spanish courts have rigorously upheld the presumption of innocence<sup>61</sup> and have

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<sup>51</sup> Dennis P. Riordan, *The Rights to A Fair Trial and to Examine Witnesses Under the Spanish Constitution and the European Convention on Human Rights*, 26 HASTINGS CONST. L.Q. 373, 378–81 (1999).

<sup>52</sup> *Id.* at 378.

<sup>53</sup> *Id.* at 378–79.

<sup>54</sup> *Id.* at 378 ("A clear objective of this constitutionalization of procedural guarantees was to emphasize the accusatorial and adversarial aspects of the criminal justice system over its inquisitorial features.")

<sup>55</sup> *Id.* at 378 ("The 1978 Constitution . . . provides for the rights of an accused. Article 17 guarantees that no person shall be deprived of their liberty except as provided by law, and requires that an arrested party be brought before a judge within 72 hours to be informed of his rights and the charges against him. Article 24.2 grants a person accused of a crime the following rights: to be informed of the accusation against him, to a public trial without unnecessary delay, to present evidence in his defense, to refuse to testify against himself or to incriminate himself, and to the presumption of innocence.")

<sup>56</sup> *Id.* at 379.

<sup>57</sup> Riordan, *supra* note 51, at 379–80.

<sup>58</sup> *Id.* at 380.

<sup>59</sup> *Id.* at 380–81.

<sup>60</sup> *Id.* at 381–84.

<sup>61</sup> *Id.* at 390 ("In view of the Constitutional Court's case law in this area, the Supreme Court has extended the scope of proceedings in appeals on points of law. It has held that the presumption of innocence can be relied upon before it in respect of an infringement of the law resulting from an error made by the trial court when assessing the evidence . . . , or on some other ground."). *See also id.* at 416 ("It is finally of great importance that the court meaningfully applied the presumption of innocence. . . . The fact that a confession is coerced surely means it may be false, but information obtained under duress can be accurate, and often is. On the record before it, the *Audiencia Nacional*

overturned convictions on the basis of illegally obtained evidence.<sup>62</sup>

The Spanish Constitution guarantees the people's right to participate in the administration of justice through a jury trial<sup>63</sup> and also requires that justifications be provided for all judgments.<sup>64</sup> Additionally, the Organic Law on the Jury Court of 1995 (LOTJ)<sup>65</sup> provides further specific guidelines and procedural rules regarding the Spanish jury.<sup>66</sup> LOTJ requires Spanish juries to "articulate a 'succinct explanation of the reasons why they have declared, or refused to declare, certain facts as having been proved.'"<sup>67</sup> In addition to the "succinct explanation" and statement of the verdict, a jury must list the questions or propositions it has found to be proved or not proved, note whether each vote was unanimous or by a majority, and list the evidence upon which it has relied in determining the verdict.<sup>68</sup>

Several provisions provide what appear to be safeguards against insufficiently reasoned jury verdicts, aimed at ensuring the adequacy of the jury's explanations.<sup>69</sup> While formulating its reasons, the jury may summon the secretary of the court, who holds a law degree, for help in expressing its explanation.<sup>70</sup> The judge reviews the verdict and explanation before issuing the final judgment; he may return the verdict and explanation to the

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could not have acquitted the defendants if it had assumed their guilt until the contrary was proven. Rather, its judgment reflects a rather rigorous application of Blackstone's maxim, adopted as a cornerstone of the American criminal justice system, that 'the law holds that it is better that ten guilty persons escape than that one innocent suffer.'" (quoting *Coffin v. United States*, 156 U.S. 432, 455–56 (1895)).

<sup>62</sup> See *id.* at 384–418 (providing detailed examples of cases where the Spanish constitutional tribunal has overturned convictions after finding that inadmissible evidence was allowed in at trial).

<sup>63</sup> C.E., B.O.E. n. 125, Dec. 29, 1978 (Spain) ("Citizens may engage in popular action and take part in the administration of justice through the institution of the jury, in the manner and with respect to those criminal trials as may be determined by law, as well as in customary and traditional courts.") (English text available at [http://www.lamoncloa.gob.es/IDIOMAS/9/Espana/LeyFundamental/titulo\\_sexto.htm](http://www.lamoncloa.gob.es/IDIOMAS/9/Espana/LeyFundamental/titulo_sexto.htm)).

<sup>64</sup> *Id.* at art. 120 (3) ("Judgments shall always specify the grounds therefore, and they shall be delivered in a public hearing.").

<sup>65</sup> Ley Orgánica del Tribunal del Jurado [L.O.T.J.], B.O.E. n. 122, May 22, 1995 (Spain), Spanish text available at <http://dgraj.justicia.es/SecretariosJudiciales/docs/jurado.pdf> [hereinafter LOTJ].

<sup>66</sup> For a brief, general overview of the LOTJ, see Stephen C. Thaman, *Should Criminal Juries Give Reasons for Their Verdicts?: The Spanish Experience and the Implications of the European Court of Human Rights Decision in Taxquet v. Belgium*, 86 CHI-KENT L. REV. 613, 628–30 (2011). For a more detailed description of the act, see Jorge A. Vargas, *Jury Trials in Spain: A Description and Analysis of the 1995 Organic Act and A Preliminary Appraisal of the Barcelona Trial*, 18 N.Y.L. SCH. J. INT'L & COMP. L. 181 (1999). See also Mar Jimeno-Bulnes, *A Different Story Line for 12 Angry Men: Verdicts Reached by Majority Rule-The Spanish Perspective*, 82 CHI-KENT L. REV. 759, 769–73 (2007) [hereinafter Jimeno-Bulnes].

<sup>67</sup> Thaman, *supra* note 66, at 629 (quoting L.O.T.J., B.O.E. n. 122, May 22, 1995 (Spain) at art. 61(1)(d)).

<sup>68</sup> *Id.*

<sup>69</sup> See, e.g., L.O.T.J., B.O.E. n. 122, May 22, 1995 (Spain) at art. 49, 61(2), 63(1).

<sup>70</sup> *Id.* at art. 61(2). See also Stephen C. Thaman, *Spain Returns to Trial by Jury*, 21 HASTINGS INT'L & COMP. L. REV. 241, 374–75 (1998).



jury upon a determination that certain standards have not been met in ensuring their sufficiency.<sup>71</sup> The judge also has the power to dissolve the jury, similar to a Judgment of Acquittal under Rule 29 of the United States Federal Rules of Criminal Procedure,<sup>72</sup> if he finds that no inculpatory evidence upon which the defendant could be convicted existed in the trial.<sup>73</sup> This “gate-keeping” role of the judge is the “primary protection against letting juries deliberate on cases based on shoddy evidence.”<sup>74</sup>

Professor Thaman provides an analysis of the Spanish reasoned jury verdicts in practice as well as the possible implications this would have on the American criminal justice system.<sup>75</sup> The adequacy of reasons for verdicts has been an issue, especially in the two years after the LOTJ was implemented.<sup>76</sup> The reasons given were often “skeletal” or “conclusory,” and “reveal[ed] little information” as to how the jury actually determined its verdict.<sup>77</sup> While some juries gave “admirably detailed,” “extensive,” and “individualized” reasons for their verdicts, others mentioned only the “witnesses,” “evidence,” or “experts” and failed to provide further detail.<sup>78</sup> While Thaman attributes these problems mainly to the “novelty” of the law requiring reasoned jury verdicts and the “judges’ lack of experience” in instructing the jury accordingly, he also notes that judges at the trial court level paid more attention to how they instructed juries to formulate reasons after the Spanish Supreme Court began to overturn verdicts due to inadequate reasoning.<sup>79</sup> Thaman places great importance on the judge’s ability to craft appropriate jury instructions, noting that “[w]hether the jury’s reasons are properly expressed depends on the conciseness and clarity of the verdict form and on the careful attention given to the instructions.”<sup>80</sup>

The Spanish Supreme Court has provided a notable array of case law concerning the adequacy of a jury’s reasons for a verdict.<sup>81</sup> This case law has resulted in three distinct tests by which the adequacy of a jury’s reasons may be assessed: the “maximalist” or strict interpretation, the

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<sup>71</sup> L.O.T.J., B.O.E. n. 122, May 22, 1995 (Spain) at art. 63(1). *See also* Thaman, *supra* note 66, at 629.

<sup>72</sup> FED. R. CIV. P. 29.

<sup>73</sup> L.O.T.J., B.O.E. n. 122, May 22, 1995 (Spain) at art. 49.

<sup>74</sup> Thaman, *supra* note 66, at 629.

<sup>75</sup> *See generally* Thaman, *supra* note 66, at 628–630; Thaman, *supra* note 70, at 374–75.

<sup>76</sup> Thaman, *supra* note 66, at 630.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 630–31 (internal citations and quotations omitted).

<sup>79</sup> *Id.* at 631.

<sup>80</sup> *Id.* at 632 n.108 (internal citations omitted).

<sup>81</sup> *See* Jimeno-Bulnes, *supra* note 66, 770–73 (citing STS, June 13, 2005 (R.J. No. 6007); STS, Sept. 13, 2005 (R.J. No. 8658); STS, Oct. 18, 2005 (R.J. No. 7659); STS, Nov. 16, 2006 (R.J. No. 116)).

“minimalist” or flexible interpretation, and the intermediate approach.<sup>82</sup> The maximalist approach “requires a thorough description of the whole deliberation process” and “concludes with a declaration that certain facts have or have not been proven,” while the minimalist approach “permits general references to the evidence with less detail.”<sup>83</sup> The intermediate approach, favored by the Spanish Supreme Court, “supports an itemized specification of all points relevant to the evidence without requiring the accuracy of judicial reasoning.”<sup>84</sup> The various panels of the Court have advocated each of the approaches at different times, depending on the verdict and whether the verdict was based upon direct or circumstantial evidence.<sup>85</sup> Generally, the Court has required a lesser degree of reasoning for verdicts based upon direct evidence as opposed to those based upon circumstantial evidence.<sup>86</sup>

### III. SPECIAL VERDICTS IN THE UNITED STATES

Could the U.S. criminal justice system be improved by requiring that all criminal verdicts include a written statement by the judge or the jury noting the considerations and grounds upon which the verdict was based? U.S. legal scholarship is mostly silent on this topic, aside from the recent literature on the new Spanish jury law, instead focusing more on the concept of “special verdicts.”<sup>87</sup> A jury delivers a true special verdict when it “does not render a general verdict of guilty or not guilty, but simply finds certain facts and leaves the rest to the court.”<sup>88</sup> However, “[a]s a rule, special verdicts in criminal trials are not favored”<sup>89</sup> and, in fact, are “almost never used” in criminal cases.<sup>90</sup> This is because a true special verdict effectively eliminates the constitutionally protected Sixth Amendment

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<sup>82</sup> See generally *id.*; Jimeno-Bulnes, *Jury Selection and Jury Trial in Spain: Between Theory and Practice*, 86 CHI.-KENT L. REV. 585, 601 n. 84 (2011); Thaman, *supra* note 66, at 634–35.

<sup>83</sup> Jimeno-Bulnes, *supra* note 82, at n.84.

<sup>84</sup> Jimeno-Bulnes, *supra* note 66, at 770–71; See also Thaman, *supra* note 66, at 634 (providing an alternatively worded yet generally similar definition of the three approaches: the maximalist approach requires a “detailed and minutely critical description of the reasoning the jury used to find whether a proposition was proven or not” where the jury must “actually say why and how it arrived at its determination of the facts”; the minimalist approach requires “only a skeletal affirmation of which propositions were found proved” or simply “stating the evidence presented at trial upon which [the jury] based its verdict”; the intermediate approach “requires the jury to articulate the means of proof upon which it relied”) (internal citations omitted).

<sup>85</sup> Thaman, *supra* note 66, at 651–60.

<sup>86</sup> *Id.* at 652.

<sup>87</sup> See Kate H. Nepveu, *Beyond “Guilty” or “Not Guilty”: Giving Special Verdicts in Criminal Jury Trials*, 21 YALE L. & POL’Y REV. 263 (2003).

<sup>88</sup> *Id.* at 263. See also *Commonwealth v. Licciardi*, 443 N.E.2d 386, 390 (Mass. 1982) (noting that “a ‘special verdict’ involves no determinative, ultimate verdict from a jury but only a statement of facts the jury have found from which the judge determines the appropriate judgment”).

<sup>89</sup> *United States v. Reed*, 147 F.3d 1178, 1180 (9th Cir. 1998).

<sup>90</sup> Nepveu, *supra* note 87, at 263.

“right to have a jury make the ultimate determination of guilt.”<sup>91</sup>

There are other types of special verdicts sometimes used by courts that allow the jury to “provide additional information that accompanies, but does not replace, the general verdict.”<sup>92</sup> These types of special verdicts, sometimes known as “special verdict forms and special interrogatories,”<sup>93</sup> are much more commonly used in U.S. criminal trials than are true special verdicts.<sup>94</sup> They are also, in fact, closer in similarity to the verdicts issued by Dutch judges than are true special verdicts; special verdict forms and interrogatories allow the jury to render a verdict as well as additional information, just as a Dutch judge issues a verdict and additional information, while true special verdicts do not allow the jury to render an actual verdict.<sup>95</sup>

However, they are not the same as Dutch criminal verdicts. Special verdict forms and special interrogatories might allow the jury to issue a verdict with a special designation, such as “guilty but mentally ill.”<sup>96</sup> The jury may be asked a series of specific factual questions about the case that it must answer along with the verdict.<sup>97</sup> Even these types of special verdicts raise constitutional questions about interference in jury deliberations and possible intimidation of jurors to achieve a specific result.<sup>98</sup> Allowing, or requiring, a U.S. jury to issue a written justification for its verdict in the fashion of Dutch criminal judges or Spanish jurors may raise fewer constitutional issues about a defendant’s right to a jury trial than would special verdict forms and interrogatories; the jury would have more freedom as it would not be restricted to specific interrogatories as to its reasoning.

Would modeling the U.S. criminal trial procedure after the Dutch or Spanish system in this respect increase and more effectively enforce the rights of criminal defendants, the victims of crimes, and the general public? There are several policy considerations that justify this proposition.

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<sup>91</sup> U.S. CONST., amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury”); *See also* United States v. Gaudin, 515 U.S. 506, 510 (1995) (holding that the Fifth and Sixth Amendments “require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt”); WILLIAM BLACKSTONE, COMMENTARIES, 349–350 (1769) (describing trial by jury as requiring that “the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant’s] equals and neighbors.”)

<sup>92</sup> Nepveu, *supra* note 87, at 263–64.

<sup>93</sup> *Id.* at n.7.

<sup>94</sup> *See generally id.* at 269–80.

<sup>95</sup> *See* van Koppen & Penrod, *supra* note 13, at 12–13.

<sup>96</sup> Nepveu, *supra* note 87, at 264.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

#### IV. POSITIVE IMPLICATIONS OF REASONED VERDICTS IN THE UNITED STATES

A reasoned verdict requirement for U.S. juries would be beneficial because it would alleviate several deficiencies in our criminal justice system and further fulfill the rights of defendants, victims, and the public. Reasoned jury verdicts could prevent wrongful convictions, allow the parties to have a dialogue with the jury in a criminal trial, and ensure more meaningful and effective appellate review. Other benefits include an educational advantage to attorneys and their clients and greater peace of mind for all involved in the criminal justice process.<sup>99</sup>

One benefit of reasoned verdicts is the potential to prevent miscarriages of justice or wrongful convictions. Thaman notes that since 1989, 266 wrongfully convicted persons have been exonerated through DNA testing; almost all of these people were originally convicted by juries.<sup>100</sup> Furthermore, over 130 people sentenced to death since 1976 have been exonerated through DNA testing or other means.<sup>101</sup>

Based upon this history of inaccuracy, Thaman argues that perhaps the United States should consider requiring reasons in jury verdicts, even if only for the more serious felonies.<sup>102</sup> Likewise, Jackson writes that a “duty to give reasons concentrates the mind with the result that a reasoned decision is more likely to be soundly based on the evidence than one which is not reasoned.”<sup>103</sup> A reasoned verdict requirement would force jurors to spend more time thinking carefully about whether the evidence truly shows that the defendant is guilty beyond a reasonable doubt.<sup>104</sup> A more careful deliberation could conceivably translate into a more accurate verdict, creating a fairer criminal justice process for defendants, victims, and the general public.<sup>105</sup>

Jackson notes other deficiencies in the current American jury system, which could be improved through the use of reasoned verdicts. Parties cannot have a dialogue with jurors during the trial because the parties cannot “understand and examine the thought processes of jurors as they are

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<sup>99</sup> See *infra* text accompanying notes 114–18.

<sup>100</sup> Thaman, *supra* note 66, at 660.

<sup>101</sup> *Id.* at 660–61.

<sup>102</sup> *Id.*

<sup>103</sup> John D. Jackson, *Making Juries Accountable*, 50 AM. J. COMP. L. 477, 487 (2002).

<sup>104</sup> See *id.*; see also *infra* note 106.

<sup>105</sup> See also Richard L. Lippke, *The Case for Reasoned Criminal Trial Verdicts*, 22 CAN. J.L. & JURIS. 313, 319–20 (2009) (“Unjust punishment, resulting from improper understanding of the law or misapplication of legal concepts such as the burden and standard of proof in criminal case, is tremendously burdensome to the public and a standing threat to it as well. Requiring juries to articulate the grounds of their verdicts might reduce the frequency with which these burdens are imposed and diminish the threat that punishment is inflicted on the innocent . . .”).

assimilating the evidence.”<sup>106</sup> The secrecy of the deliberations “prevents disclosure of *how* . . . [the jury’s] decision is arrived at;” although the jurors must swear an oath to give a true verdict, there are, in fact, few “means of knowing whether jurors actually do go about deciding the case in accordance with the evidence.”<sup>107</sup> A reasoned verdict would not necessarily allow the parties to have a direct dialogue with the jurors, but it would allow them a greater level of understanding of the jurors’ thought processes while examining the evidence. It would be far easier to determine whether jurors actually determined the verdict in accordance with the evidence.<sup>108</sup>

Furthermore, because the general verdict accompanied by no facts makes it “impossible to know what has grounded the decision,” an appeals court cannot properly review a verdict.<sup>109</sup> Jackson argues that the lack of a proper appellate review, in addition to the lack of a dialogue between the parties and the jury, contributes to a “lack of accountability” for juries.<sup>110</sup> A requirement of a reasoned verdict would alleviate some of these concerns and create increased juror accountability.<sup>111</sup> It would make appellate courts better equipped to review verdicts, as the appellate courts would have some sense of how the jury arrived at the verdict and upon which evidence the verdict was based.<sup>112</sup>

Written reasoning for a jury verdict would have an educational impact; it would allow lawyers, both prosecutors and defense attorneys, to learn more about jury habits and the jury’s decision-making process based upon the evidence presented in a criminal trial. Numerous studies have been published about jury behavior and patterns,<sup>113</sup> but the reason for reaching a verdict in the jury’s own words would introduce a new element into this research and may provide attorneys a more effective way to study how juries examine trial evidence.

This improved educational experience for attorneys would also have implications for the rights of defendants, victims, and the general public. If both attorneys in a criminal trial are more experienced in jury behavior and better able to predict how jurors will respond to and examine particular types of evidence, they are able to more effectively advocate on behalf of

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<sup>106</sup> Jackson, *supra* note 103, at 488.

<sup>107</sup> *Id.*

<sup>108</sup> See Lippke, *supra* note 105, at 318–20.

<sup>109</sup> Jackson, *supra* note 103, at 488.

<sup>110</sup> *Id.*

<sup>111</sup> See generally Lippke, *supra* note 105.

<sup>112</sup> See *id.* at 315–17 (suggesting a standard of appellate review for such situations).

<sup>113</sup> See generally Jeremy A. Blumenthal, *Law and Social Science in the Twenty-First Century*, 12 S. CAL. INTERDISC. L.J. 1 (2002); Monica K. Miller & R. David Hayward, *Religious Characteristics and the Death Penalty*, 32 LAW & HUM. BEHAV. 113, 114 (2008); Diane E. Courselle, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. REV. 203, 204 (2005).

their respective clients. This would seem to enhance the goal of a fair trial, a hallmark of an adversarial legal system. The criminal defendant is entitled to legal counsel to advocate on his behalf, so if the defense attorney has studied the reasoning offered by juries in past verdicts, he should be better able to represent his client. Likewise, the prosecutor would be better able to represent his client, the public.

A reasoned jury verdict may also grant defendants and victims peace of mind without hindering the administration of justice.<sup>114</sup> The defendant, in particular, if found guilty of a serious crime, faces a potentially substantial deprivation of his life and liberty. Given this fact, it seems that the defendant has, or should have, a right to hear why he has been found guilty or not guilty in addition to the verdict itself.<sup>115</sup> The victim, on the other hand, has a right to notice under congressional statute.<sup>116</sup> Perhaps this right to notice should include notice on how the jury arrived at its decision regarding the guilt of the defendant. The victim, depending on the seriousness of the crime, may have suffered a serious deprivation of life, liberty, or property as a result of actions allegedly taken by the defendant. Therefore, if the defendant has been found not guilty of the crime, it seems that the victim has, or should have, the right to know how the jury arrived at its verdict. That would be a small consolation for the victim not only in a miscarriage of justice but also if the jury reached the correct conclusion.<sup>117</sup>

The peace of mind benefit of reasoned jury verdicts also extends to members of the general public. Increased transparency in the jury deliberation process may quell some outrage and anger often directed at the legal system after a jury verdict that is perceived as incorrect or unjust, or may simply educate the public about due process rights.<sup>118</sup> It may additionally relieve some of the mystique associated with jury verdicts and the jury deliberation process.<sup>119</sup>

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<sup>114</sup> Defendants' and victims' rights are often seen as conflicting, and defendants' and victims' goals are almost always conflicting. For example, the prohibition of hearsay evidence in U.S. criminal proceedings, which aids defendants in omitting evidence that may be aversive to their goal of being found not guilty, conflicts with the victims' interests in finding the truth and ensuring the achievement of justice. While many laws which provide criminal defendants with certain rights may hinder the discovery of truth and allow a jury to arrive at an incorrect verdict, the knowledge of how the jury arrived at a verdict would not do so.

<sup>115</sup> See Lippke, *supra* note 105, at 321–22 (arguing that because individuals have a “fundamental moral right to be treated with equal respect and concern,” guilty verdicts therefore must be justified to the defendant “in the form of clear and adequate reasons.”).

<sup>116</sup> Crime Victims' Rights, 18 U.S.C. § 3771 (2006).

<sup>117</sup> See Lippke, *supra* note 105, at 313.

<sup>118</sup> *Id.* at 320.

<sup>119</sup> See Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 58, 59 (2009) (“The popular mystique of the jury could be attributed to classic cinematic portrayals of jury deliberations in

Although there appear to be several benefits to the implementation of a reasoned jury verdict in the United States, there are also negative implications of such a procedure.

## VI. POTENTIAL NEGATIVE IMPLICATIONS OF REASONED VERDICTS IN THE UNITED STATES

The several negative implications that could result from the implementation of reasoned jury verdicts in the United States can be grouped into two main categories: concerns about jury independence and concerns about administration and practicality. The maintenance of jury independence is an important issue, implicating the criminal defendant's Sixth Amendment right to a trial by jury; this is why there are many strong arguments in defense of the traditional general verdict. There are concerns that increased assistance in the jury room from court clerks and greater obstacles to jury nullification could compromise the jury's independence. Likewise, there are several administrative and practical concerns regarding reasoned jury verdicts that potentially implicate the defendant's Sixth Amendment right to a speedy trial as well as traditional policy considerations of legal certainty and finality. These concerns include difficulties in achieving juror agreement on reasons, increased appeals, and special cases like split verdicts which present complex challenges for juries. Additionally, there are questions about the effectiveness and sufficiency of such verdicts based on the Dutch and Spanish experience and about the feasibility of implementing such a procedure in the United States.

### A. Jury Independence

#### 1. A Defense of the General Verdict?

The constitutional arguments against the requirement of a reasoned verdict stem from the same constitutional arguments against special verdicts. True special verdicts are seen as violating the defendant's right to be tried by a jury of his peers and the right to have a jury render a final determination of guilt.<sup>120</sup> Special verdict forms and interrogatories also pose constitutional questions about interference in jury deliberations and possible juror intimidation in order to achieve a specific result.<sup>121</sup>

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films like *12 Angry Men* where the jurors painstakingly excavate their individual biases and human weaknesses while deliberating in a criminal trial. . . . The commitment to secrecy, the inability to interrogate jurors concerning jury decisions, and popular imagery together make jury deliberations the least understood aspect of the trial process.”)

<sup>120</sup> See *United States v. Gaudin*, 515 U.S. 506, 522–23 (1995).

<sup>121</sup> Some have also argued that allowing juries to give reasons for a “not guilty” verdict unconstitutionally violates the presumption of innocence (See Thaman, *supra* note 66, at 659 (quoting

That is why many defend the traditional general verdict as fulfilling an important purpose in the American legal system that a “reasoned” verdict may fail to achieve. Indeed, the First Circuit has called the general verdict a necessary safeguard on the jury’s independence.<sup>122</sup> Those who defend the general verdict argue that by taking a “broad, lay view” of the issues, the jurors “add desired flexibility” to the process of applying sometimes complicated law to the facts and thus “dispense common sense justice.”<sup>123</sup> This argument stems from the belief that issues of fact are not easily framed and that the jury should not become a “scientific fact-finding body;” the primary value of a general verdict is that it applies sometimes technical law to the facts “in an earthy fashion” to achieve “justice as conceived by the masses, for whom . . . the law is mainly meant to serve.”<sup>124</sup>

Others, however, have described the general verdict as “afford[ing] no satisfactory information about the jury’s findings,” “private and shrouded in secrecy,” and “impenetrable,” thereby “ensur[ing] that meaningful review of the jury’s decision-making process by appellate courts or the public is virtually impossible.”<sup>125</sup> When a jury issues a general verdict, one court has noted, it has the “power utterly to ignore what the judge instructs it concerning the substantive legal rules.”<sup>126</sup>

## 2. Assistance in the Jury Room

If reasoned jury verdicts were implemented in the United States, juries would be more likely to require assistance to formulate their explanations, depending on the degree of rigor required in the verdict justification. A judge, a court clerk, or an unbiased lawyer who is unaffiliated with the court may need to step into the jury deliberation room after the jury has determined a verdict to assist the jury in ensuring that its reasoned justification adequately supports the verdict. While this is not an issue in the Dutch system where judges write the reasons, the Spanish system allows the jury to summon the court clerk for assistance in formulating its reasons.<sup>127</sup>

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María Emilia Casas Baamonde, President of the Spanish Constitutional Court, in S.T.C., Oct. 6, 2004 (B.O.E., No. 19069, 82, 91–92 (Casa Baamonde, dissenting)), 662–63 which, although not explicitly mentioned in the U.S. Constitution, has been widely held to follow from the Fifth, Sixth, and Fourteenth Amendments (See *Coffin v. United States*, 156 U.S. 432, 453(1895); *In re Winship*, 397 U.S. 358, 363 (1970)).

<sup>122</sup> See *United States v. Spock*, 416 F.2d 165, 181 (1969).

<sup>123</sup> Samuel M. Driver, *The Special Verdict: Theory and Practice*, 26 WASH. L. REV. & ST. B. J. 21, 23 (1951).

<sup>124</sup> *Id.* (quoting Moore’s Federal Rules (1949), Footnote to Rule 49, Sec. 0.05, p. 1148).

<sup>125</sup> Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—the Case for the Fact Verdict*, 59 U. CIN. L. REV. 15, 19–20 (1990).

<sup>126</sup> *Skidmore v. Baltimore & O. R. Co.*, 167 F.2d 54, 57 (2d Cir. 1948).

<sup>127</sup> L.O.T.J., B.O.E. n. 122, May 22, 1995 at art. 61(2) (Spain). See also Thaman, *supra* note 70,



However, allowing anyone else into the jury room to “assist” poses serious constitutional issues, as that person may, intentionally or not, inject his opinion into the jury’s written justification.<sup>128</sup> Indeed, the practice of allowing the court secretary to assist has been criticized in Spain for allegedly violating the secrecy of jury deliberations.<sup>129</sup> In some early cases under the new jury law, secretaries answered legal questions and played “substantive” roles in the jury room, which, Thaman argues, “signals a lack of antipathy toward giving Spanish juries the kind of tutelage their cousins on ‘mixed courts’ in other western European countries receive from the professional bench” and may suggest a future “transformation” into a mixed court.<sup>130</sup>

If the verdict is already decided before assistance is required for the formulation of the reasons, it is difficult to see how the court clerk could affect the actual verdict.

### 3. *Jury Nullification*

The introduction of reasoned jury verdicts in the United States would likely limit the ability of the jury to nullify laws, a traditional area of jury independence, which could have both positive and negative implications. As one scholar notes, “nullification is inextricably linked to the jury’s power to render a general verdict without explaining itself.”<sup>131</sup> As mentioned above, the First Circuit has called the general verdict a necessary safeguard on the jury’s independence.<sup>132</sup> The Third Circuit has noted that “an equilibrium has evolved—an often marvelous balance—with the jury acting as a ‘safety valve’ for exceptional cases, without being a wildcat or runaway institution.”<sup>133</sup> Indeed, a required written justification would make it more difficult to ignore the law when rendering a verdict.<sup>134</sup>

However, the U.S. Supreme Court has noted that nullification is merely a power of the jury, and not a constitutional right, indicating that a jury’s determination of law in addition to the facts would result in a system where “the protection of citizens against unjust and groundless prosecutions, would depend entirely upon juries uncontrolled by any settled, fixed, legal principles.”<sup>135</sup> It could be argued that a limit on jury nullification inhibits the ability of the jury to ignore just laws that should

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at 374–75.

<sup>128</sup> This practice could violate a defendant’s constitutional right to a jury trial. *See* U.S. CONST. amend. VI.

<sup>129</sup> Thaman, *supra* note 70, at 374–76.

<sup>130</sup> *Id.* at 375–76.

<sup>131</sup> Nepveu, *supra* note 87, at 266.

<sup>132</sup> *See* *United States v. Spock*, 416 F.2d 165, 181 (1st Cir.1969).

<sup>133</sup> *United States v. Dougherty*, 473 F.2d 1113, 1134 (D.C. Cir. 1972).

<sup>134</sup> *See* Nepveu, *supra* note 87, at 266.

<sup>135</sup> *Sparf v. United States*, 156 U.S. 51, 101–02 (1895).

be kept on the books.<sup>136</sup>

## *B. Administrative and Practical Concerns*

### *1. Juror Agreement on Reasons*

In the United States, both in popular culture and reality, it is often difficult for a jury to reach a unanimous verdict in a criminal case.<sup>137</sup> It would seem to be much more difficult to achieve unanimous agreement on a reasoned or written justification as opposed to the verdict itself, and scholars have argued whether certain types of evidence make it more difficult.<sup>138</sup>

A problem would arise if the jury were to reach agreement on a verdict but not a written justification. Certainly, procedures would have to be in place to deal with such an event. One option to address this problem would be to allow jurors to issue separate justifications (similar to appellate level concurring opinions) in which they explained their agreement with the verdict but allowing for variation in different reasoning or evidence. Questions remain, however, as to whether this procedure is really feasible, as some jurors may not be educated enough to articulate their own reasoning. Even Spanish law does not allow separate reasoning from the dissenting jurors.<sup>139</sup>

Another option is to allow a majority of the jurors to agree on the written justification.<sup>140</sup> There is no unanimity requirement in the Spanish jury system; of the nine jury members, at least seven votes are required for a guilty verdict, while at least five votes are required for a verdict of not guilty.<sup>141</sup> Additionally, Spanish juries are given a verdict form listing certain questions and propositions about the case, which may aid them in

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<sup>136</sup> See also Lippke, *supra* note 105, at 326–27 (concluding that the jury nullification argument against reasoned verdicts is unconvincing).

<sup>137</sup> See *12 Angry Men* (Orion-Nova Productions 1957). See also Jimeno-Bulnes, *supra* note 66, at 770–72 (2007).

<sup>138</sup> See Thaman, *supra* note 70, at 365 n.559–60 (“[I]t is one thing to argue and then vote and distinctly another to agree with the reason or reasons which led to a certain verdict”).

<sup>139</sup> See *id.* at 364 n.555 (noting that while one draft of the LOTJ provided for dissenting jurors to give their reasons, that provision was later removed for fear of violating the secrecy of jury deliberations).

<sup>140</sup> For example, even if the jury unanimously agrees on a verdict, only a majority would have to agree on a written justification.

<sup>141</sup> L.O.T.J., B.O.E. n. 122, May 23, 1995 at art. 59(1) (Spain); see also Thaman, *supra* note 66, at 628–29; Thaman, *supra* note 70, at 359–63 (providing a detailed overview of the voting procedures of the jury and suggesting that the LOTJ’s authors, in opting for a majority or qualified majority voting procedure rather than a system of unanimity, compromised the possibility of a “richer debate” among jurors in the interest of avoiding mistrials and hung juries); Jimeno-Bulnes, *supra* note 66, at 760–61, 765–68 (noting that, as in the United Kingdom, majority voting was adopted in the jury system for “efficiency” purposes).

formulating a written explanation.<sup>142</sup>

Although the lack of a unanimity requirement probably makes it easier for Spanish juries to agree on a verdict and a reason, it is highly unlikely that the American jury system would abandon its requirement of unanimous agreement in criminal trials. It would not be wise to allow disagreement on a written justification to upset or affect a unanimously agreed upon verdict, as this would potentially inhibit the defendant's Sixth Amendment rights.<sup>143</sup> The best approach may be to produce the written justification in a separate process from the verdict deliberation stage, and to allow a simple majority of the jury to agree on the written justification.<sup>144</sup>

### 2. Increased Appeals

Some have argued that demanding extreme rigor in reasoned jury verdicts causes increased reversals of jury verdicts, leading to repetition of trials, which has a negative effect on the constitutional right to a speedy trial.<sup>145</sup> If the written justifications allow attorneys to believe that the jury examined evidence improperly or based its verdict on inadmissible evidence, this could increase the likelihood that defense attorneys will appeal the verdict. An increase in appeals creates greater legal uncertainty for crime victims, who would often prefer to see the matter settled rather than risk a lesser sentence or an overruled guilty verdict for the person who victimized them. Uncertainty is also created for criminal defendants, for whom an appeal generally means additional years before their fate is determined. On the other hand, an increased opportunity for defendants to appeal their verdicts is generally seen as enhancing their legal rights,<sup>146</sup> especially if an appeal may help to prevent a wrongful conviction.

### 3. Special Cases: Split Verdicts, Multiple Charges, and Multiple Defendants

Cases of split verdicts, multiple charges, and multiple defendants

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<sup>142</sup> L.O.T.J., B.O.E. n. 122, May 23, 1995 at art. 52(1) (Spain); *see also* Thaman, *supra* note 70, at 352–53.

<sup>143</sup> U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”).

<sup>144</sup> *See also* Lippke, *supra* note 105, at 324–25 (discussing the difficulty jurors may have in agreeing on reasons and suggesting a less rigorous requirement where jurors would only be expected to articulate the “primary considerations” upon which the verdict is based).

<sup>145</sup> *See* Thaman, *supra* note 66, at 662 (quoting a panel of the Spanish Supreme Court, which noted that demanding “extreme rigor” in the reasoning of a jury’s verdict could have a detrimental effect on certain constitutional rights).

<sup>146</sup> Theoretically, an increased opportunity to appeal a verdict would give a criminal defendant a better chance to thoroughly explain his case in a new trial and ensure a more accurate verdict.

would pose potential complications, including increased time and workloads demanded of juries, if a reasoned jury verdict requirement were introduced in the United States. Trials with multiple charges and defendants would obviously require a separate written justification for each charge and for each defendant. Split verdicts would be much more complicated, as the jury may have to take greater care in its written justifications to ensure that no conflicting reasoning appears that would contradict any of the verdicts. In these cases, there is a need for greater judicial control over the jury's reasoned verdict. Cases with split verdicts and multiple charges and defendants also raise constitutional issues with respect to the reasoned jury verdicts;<sup>147</sup> in these types of cases, the length of trial could be either significantly prolonged or delayed.

#### 4. Feasibility of Implementation

One of the crucial issues concerning a reasoned jury verdict in the United States is the procedure of implementing it—can it actually be done? The Dutch<sup>148</sup> and Spanish<sup>149</sup> Constitutions both provide that criminal verdicts must be reasoned.<sup>150</sup> A constitutional amendment would probably not be necessary to implement reasoned verdicts within the United States, as this practice, if designed appropriately, would probably not be unconstitutional on its face. In any case, it is extremely difficult to adopt an amendment to the U.S. Constitution.

If not implemented through a constitutional amendment, this practice would need to be implemented through an amendment to the Federal Rules of Criminal Procedure. The Federal Rules, promulgated by the U.S. Supreme Court under the authority of the Rules Enabling Act,<sup>151</sup> are generally drafted and amended first by the standing Advisory Committee of the Judicial Conference of the United States, which is the policymaking body of the federal courts.<sup>152</sup> The Judicial Conference recommends new rules to the Supreme Court for approval, after which Congress retains the power to reject the rules.<sup>153</sup> Congress may also pass or amend rules of procedure on its own without the Supreme Court's approval.<sup>154</sup> The

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<sup>147</sup> See U.S. CONST. amend. VI.

<sup>148</sup> Grondwet voor het Koninkrijk der Nederlanden [GW] [CONSTITUTION], at art. 121 (Netherlands).

<sup>149</sup> C.E., B.O.E. n. 311, at art. 121, sec. 3 Dec. 29, 1978 (Spain).

<sup>150</sup> Some scholars maintain that it can be argued that the provision in art. 120(3) of the Spanish Constitution applies only to the sentences and not to the verdicts. See Jimeno-Bulnes, *supra* note 66, at 772–73 nn.68–69. In any case, the L.O.T.J. specifically provides that reasons must accompany verdicts.

<sup>151</sup> Rules Enabling Act, 28 U.S.C. §§ 2071–77 (2006).

<sup>152</sup> 28 U.S.C. § 2073 (2006).

<sup>153</sup> 28 U.S.C. § 2074 (2006).

<sup>154</sup> *Id.*

practice of reasoned verdicts must be introduced to the Judicial Conference and approved by the Supreme Court, or passed as an act of Congress, if it is to be adopted in the United States.

### 5. Effectiveness and Sufficiency of Reasoned Verdicts: The Dutch and Spanish Experiences

Perhaps the most compelling objection to reasoned verdicts is based on flaws discovered in the Dutch and Spanish models of this procedure; would reasoned verdicts even work in the United States? There are two major concerns here: the institutional competence of the jury to successfully implement this procedure and the general effectiveness of such verdicts.

The first problem stems from the difficulties involved in transposing a procedure carried out by judges in one legal system into a procedure to be carried out by juries in a different legal system. Indeed, this problem brings up the great debate regarding bench trials and jury trials, to which substantial legal scholarship has been devoted.<sup>155</sup> This is a question of competency: can lay juries be reasonably expected to perform the same task generally undertaken by a judge and to the same level of effectiveness?

Jurors are laypeople; they are nonprofessional, untrained arbiters of justice.<sup>156</sup> Dutch judges, on the other hand, are professionally trained legal experts, who spend their careers presiding over criminal trials and rendering verdicts.<sup>157</sup> The American criminal justice system, however, is based on the concept of trials determined by lay jurors; in fact, during the voir dire jury selection process, prosecutors and defense lawyers routinely try to select jurors who are relatively uneducated or know almost nothing about criminal law.<sup>158</sup>

The United States places its trust in the jury process, while the

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<sup>155</sup> See generally Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 HARV. J. ON RACIAL & ETHNIC JUST. 165, 166 (2011); Hon. John F. Irwin & Daniel L. Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 MCGEORGE L. REV. 1, 2 (2010); Chris Guthrie et. al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 3 (2007); Richard M. Re, *Re-Justifying the Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury*, 116 YALE L.J. 1568, 1568 (2007); Andrew J. Wistrich et. al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1277 (2005); Paul Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 U. CHI. L. REV. 179, 182 (1998).

<sup>156</sup> *Jury* Definition, BRITANNICA ONLINE ENCYCLOPEDIA, <http://www.britannica.com/EBchecked/topic/308620/jury> (last visited Apr. 01, 2012).

<sup>157</sup> See van Koppen, *supra* note 7, at 52.

<sup>158</sup> Hillel Y. Levin & John W. Emerson, *Is There a Bias Against Education in the Jury Selection Process?*, 38 CONN. L. REV. 325, 326 (2006) (“[T]here is widespread belief that relatively educated members of jury pools are weeded out during the selection process, resulting in relatively undereducated juries.”); See also Steven L. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 194 (1990).

Netherlands places its trust in judges. Despite the large difference in legal education, training, and experience between jurors and judges in these two systems, both countries recognize the competence of each institution to do the same thing: make factual determinations based on the evidence presented at trial and determine the guilt of a defendant in the form of a verdict.

If U.S. juries are trusted and required to determine verdicts, why are they not trusted and required to issue a written justification for their verdict like Dutch judges? Perhaps requiring, or even allowing, juries to do this would be taking a step too far. Perhaps trained judges possess a higher level of competence needed to issue a proper written justification which juries do not have. Juries may have the competence to determine a verdict of one or two words, but to do anything more than that would stretch their prescribed duties beyond their level of competence to participate in criminal legal proceedings.<sup>159</sup>

The second problem is the general effectiveness of reasoned verdicts. In Spain, there is a model where juries issues reasons for their verdicts,<sup>160</sup> which probably makes it a better model for the United States than the Netherlands. But the Spanish and Dutch models are not necessarily perfect. There are questions about whether professionally trained judges and lay juries are effective in issuing written justifications for their verdicts. For example, Dutch judges sometimes cite only some of the evidence that was presented in trial and ignore other evidence which does not support their verdicts.<sup>161</sup> This leaves some to wonder exactly how that evidence not mentioned in the written justification was viewed by the judges.<sup>162</sup> In this situation, the written justification could actually raise more questions than it answers. If that is the case in bench trials, that same fault could affect jury trials as well. In fact, some statistics show that more than fifty percent of all Spanish criminal verdicts are “improperly or inadequately reasoned.”<sup>163</sup> It is not only the issue of institutional competency that is potentially problematic in assigning a traditionally judicial practice to jurors; the fact that the practice may not be executed effectively by judges poses questions as to whether this is an appropriate model for any legal system.

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<sup>159</sup> See Lippke, *supra* note 105, at 324 (noting the questionable competence of jurors to give reasoned verdicts but suggesting other means to work around this problem, such as giving the jurors further instructions or training).

<sup>160</sup> Thaman, *supra* note 66, at 629.

<sup>161</sup> van Koppen & Penrod, *supra* note 13, at 11.

<sup>162</sup> *Id.* at 13.

<sup>163</sup> Jimeno-Bulnes, *supra* note 66, at 773.

## VI. CONCLUSION

To what extent are we willing to compromise the traditional nature of our criminal jury system to possibly achieve more accurate verdicts and a fairer process benefitting defendants, victims, and the general public? There are several aspects of our jury system that could be negatively impacted by the implementation of reasoned jury verdicts, while the potential benefits of such a practice are neither definite nor easily measured. A requirement of written justifications for jury verdicts in criminal cases that minimizes the interference with the traditional jury procedure would be a proportional and reasonable act where the potential benefits to the public interest would outweigh the possible costs. There are several specific suggestions that would allow this practice to operate most effectively and aim to avoid the negative implications discussed above.

First, juries should be held to a flexible standard in formulating their reasons for verdicts. Given the difficulty in agreeing on a reason would depend on the degree of rigor required, the jury should be required to state only the minimum necessary in order to express a succinct explanation for the verdict, nothing more. A basic written justification, such as the Spanish system's "flexible" approach discussed by Thaman and Jimeno-Bulnes, would more easily facilitate juror agreement than a longer or more complicated justification.<sup>164</sup> This would also limit possible invasions into the secrecy of jury deliberations and ensure that the deliberations are not unreasonably prolonged.<sup>165</sup>

Second, the jury deliberations should be conducted in a two-stage process. The jury first determines and then informs the court of its verdict. The jury then formulates its reasons for the verdict and may summon the court clerk for assistance in drafting the reasons. The two-stage process ensures that the court clerk or someone else does not purposely or accidentally inject his or her own opinion into the deliberations and affect the verdict. As far as the possibility of the clerk affecting the jury's formulation of the reasons, this is a reasonable potential downside to concede, given the prospective benefit of having properly reasoned verdicts.

Third, the judge should review all reasons before issuing the judgment, and return the reasons to the jury if he finds them insufficient. This is an

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<sup>164</sup> See *id.* at 770–71; Jimeno-Bulnes, *supra* note 82, at 601 n.84; Thaman, *supra* note 66, at 634.

<sup>165</sup> By imposing written justifications on juries in a fashion that requires only a minimal foray into the secrecy that surrounds the jury deliberation process, an adequate level of flexibility for the jury can be preserved. For example, the flexible approach mentioned can allow the jury to divulge only the skeletal outline of its reasoning while still making the process more transparent and reviewable by others. Even a minimal invasion of the jury's secrecy may help ensure that verdicts are more accurate, thereby establishing a fairer criminal process for the defendant, the victim, and the public.

important safeguard against improperly reasoned verdicts and can help prevent appeals and ensure more finality in the criminal justice process.

The introduction of reasoned verdicts into our federal criminal system has the potential to benefit society by enhancing the rights of criminal defendants, victims, and the public. Although there are potential downsides caused by such a change in our traditional jury process, these can be limited, perhaps even prevented, if this new procedure is implemented as outlined above, with certain safeguards to preserve the most sacred aspects of the American jury. The implementation of reasoned verdicts through a change to the Federal Rules of Criminal Procedure could serve as a model to criminal law at the state level and perhaps improve what may be the most devastating problem in our legal system: the conviction of innocent defendants.