Twelve Angrier Men: Enforcing Verdict Accountability in Criminal Jury Trials

Alice Curci*

"The general verdict is as inscrutable and essentially as mysterious as the judgment which issued from the ancient oracle at Delphi. Both stand on the same foundation – a presumption of wisdom."
- Edson R. Sunderland[1]

INTRODUCTION

In modern American criminal practice, jury deliberations are conducted in secret and the verdicts they render are inscrutable. Jury verdicts were initially intended as a check on arbitrary power, free from the influence of untrained judges who served at the pleasure of the King.[2] They represented a necessary counter to governmental authority, providing a degree of self-governance and political power to members of the local community in assessing their legal claims and enforcing their legal rights.[3]

But times have changed. Judges now undergo extensive legal training. They are either democratically elected or appointed by democratically elected officials, and enforce laws drafted by democratically elected representatives. Meanwhile, research suggests that jurors do not understand a large portion of jury instructions, and that they might be basing their verdicts on incorrect understandings of the law.[4] In addition,

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*. J.D. 2019, Washington University School of Law.

1. Edson R. Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253, 258 (1920); *see also* Skidmore v. Balt. & Ohio R.R. Co., 167 F.2d 54, 60 (2d Cir. 1948) (quoting Edson R. Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253 (1920)).

2. Jon P. McClanahan, *The "True" Right to Trial by Jury: The Founders' Formulation and Its Demise*, 111 W. VA. L. REV. 791, 799 (2009).

3. Suja A. Thomas, *Blackstone's Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States*, 55 WM. & MARY L. REV. 1195, 1201 (2014); Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 422 (1996).

4. Empirical studies of mock juries found that "most jurors failed to absorb a great many of the judge's instructions and that the process of deliberation did not correct this problem," and that when tested on their comprehension of the law, the jurors' average number of correct answers "was not significantly better than chance." Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL'Y & L. 589, 634 (1997); Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 L. & CONTEMP. PROBS. 205, 218, 223 (1989); Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems*

despite promising during *voir dire* to keep an open mind, apply the law appropriately, and return a verdict based solely on the evidence presented, jurors often fail to check their biases at the door of the deliberation room.[5] Feeling pressured to reach an agreement and sometimes eager to return to their lives, jurors have been known to compromise their views on guilt or innocence so as to achieve unanimous support for a "negotiated mix of convictions and acquittals," often a lesser included charge, in order to avoid deadlock.[6] Despite this substantial potential for error, jury verdicts are virtually unreviewable.[7] The unpredictability of jury outcomes is often cited as a reason to opt for plea bargains, and the cloak of mystery cast over jury deliberations might contribute to the ever-rising number of defendants choosing this option rather than taking their chances at trial.[8] Why then, in a system of checks and balances, do we still allow the power of the criminal jury to go essentially unchecked?

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and Proposed Solutions, 6 PSYCHOL. PUB. POL'Y & L. 788 (2000); Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REFORM 401 (1990); Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL'Y & L. 677 (2000); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161 (1995),; Judith L. Ritter, *Your Lips Are Moving . . . but the Words Aren't Clear: Dissecting the Presumption That Jurors Understand Instructions*, 69 MO. L. REV. 163 (2004). As Judge Frank Jerome commented in *Skidmore v. Ohio*, "[p]erhaps the least desirable feature of the general verdict, … is … the assumption that the jury fully comprehends the judge's instructions concerning the applicable substantive rules." *Skidmore*, 167 F.2d at 61.

5. *See* Nicole B. Cásarez, *Examining the Evidence: Post-Verdict Interviews and the Jury System***,** 25 HASTINGS COMM. & ENT. L.J. 499 *passim* (2003). Research shows that juror bias negatively impacts defendants in a variety of ways, going beyond racial and gender discrimination. *See, e.g.*, David L. Wiley*, Beauty and the Beast: Physical Appearance Discrimination in American Criminal Trials***,** 27 ST. MARY'S L.J. 193 (1995). Moreover, bias can have an indirect impact on the verdict when it affects group dynamics during deliberations. *See, e.g.*, Nancy S. Marder, *Gender Dynamics and Jury Deliberations*, 96 YALE L.J. 593 (1987).

6. Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 782 (1998). *See also* Allison Orr Larsen, *Bargaining Inside the Black Box*, 99 GEO. L.J 1567, 1569 (2011) (stating that compromise jury verdicts result of both the "internal drive to compromise" and "external pressure to reach a collective decision."); Daniel A. Farber*, Toward a New Legal Realism*, 68 U. CHI. L. REV. 279 (2001) (reviewing BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000)).

7. *See infra,* notes 37-67.

8. *See* Albert V. Alschuler, *The Supreme Court and the Jury: Voir Dire Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 153–55 (1989); *see also* LINDSEY DEVERS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, RESEARCH SUMMARY: PLEA & CHARGE BARGAINING (2011), https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf.

This Note argues that justice would be better served if criminal juries were required to return not only a verdict, but also the underlying rationale. While many continue to question the ability of the lay jury to provide a reasoned opinion, a solution modeled after the Spanish system would allow our jurors to accomplish this task without jeopardizing their independence from the court.[9] After independently reaching a verdict through deliberations, a jury should be able to request the assistance of an officer of the court, trained in the law, to express their reasoning and findings.[10] These could then be reviewed by the trial judge and serve as an additional basis for appellate review.[11]

Part II of this Note will examine the origins of the inscrutability of jury verdicts in criminal trials and the evolution of the law to the present day. Part III will look at the issues raised by the low standard of accountability to which criminal juries are held with respect to criminal defendants, society, and the justice system itself. Lastly, Part IV will explore alternatives to the inscrutable, unreviewable verdict and attempt to provide a viable framework for reform to reduce uncertainty and promote accountability and error correction. Such measures would not be easy to implement; they would likely make deliberations longer and would certainly make our twelve angry men even angrier. But if that is the price to fulfill one of our most cherished constitutional rights, then it is one we should all be willing to pay.

I. HISTORY

The inscrutability of jury verdicts traces its roots as far back as twelfth-century England, where it emerged from the ashes of the then-favored methods of proof: compurgation, trial by battle, and trial by ordeal.[12]

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9. *See infra*, notes 125–126.

10. Michael Csere, Note, *Reasoned Criminal Verdicts in the Netherlands and Spain: Implications for Juries in the United States*, 12 CONN. PUB. INT. L.J. 415, 422 (2013).

11. *Id.*

12. Compurgation required an accused to prove his or her innocence by swearing under oath, with the support of a specified number of oath-helpers, usually six or twelve, that could attest to his good character. Trial by battle, an import of the Norman conquest, allowed for guilt or innocence to be determined by success in combat. Lastly, trial by ordeal was most commonly performed either by immersion in cold water, or through exposure to a hot iron, and rested on the belief that God would not allow for an innocent man to be injured or die as a result of the ordeal. *See* R.C. VAN CAENEGEM, THE

These ancient forms of trial were all premised on some ideal of divine justice, where the issue of guilt or innocence was submitted to the "judgment of God," who would save the innocent from death in battle or ordeal, and would punish perjurers who supported the oath of a guilty man.[13] As their many flaws became apparent, these archaic and irrational modes of trial came under fierce criticism and eventually fell out of practice. [14] Pope Innocent III dealt a fatal blow to these practices at the Fourth Lateran Council in 1215, when he proscribed the performance of religious ceremonies in conjunction with ordeals.[15]

It is in this context that the jury trial made its first appearance in medieval England and established itself at the heart of the Common Law.[16] The jury system presented some obvious advantages over old methods of proof. Among these were the ability to present evidence and the presumption that a verdict would be based on human knowledge, insight, and inquiry rather than divine intervention.[17] Yet, formal records of trials from the time show "no notice either of the evidence or of the direction given by the judge to the jury."[18] Without evidence or instructions, the jury was not that different from the formal tests it sought to replace: rather than submitting the justness of one's position to divine judgment, as was customary in the ordeals, the issue of innocence was now to be submitted "to the essentially inscrutable judgment of a group of fellow citizens."[19]

BIRTH OF THE ENGLISH COMMON LAW 62–67 (Cambridge Univ. Press 1973); WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 312–321 (3rd ed., rewritten 1922); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 96-–118 (1929); Diane E. Courselle, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. REV. 203, 213–15 (2005).

13. VAN CAENEGEM, *supra* note 12, at 68-71.

14. People started to realize that, through breathing exercises, one could learn how to succeed in the water ordeal, and "as far as the ordeal of hot iron was concerned, it was clear that innocence was too closely connected with calluses." Similarly, known criminals would likely fail to find six or twelve compurgators within their community, while trial by battle evidently favored knights and wealthy men, who could afford to hire the best champions. *Id.* at 65–69 (internal quotations omitted).

15. *Id.*; *see also* PLUCKNETT, *supra* note 12, at 106.

16. VAN CAENEGEM, *supra* note 12, at 71.

17. *Id.*

18. HOLDSWORTH, *supra* note 12, at 317.

19. Courselle, *supra* note 12, at 214-15; *see also* PLUCKNETT, *supra* note 12, at 125 ("At first, the jury was no more regarded as 'rational' than the ordeals which it replaced, and just as one did not question the judgments of God as shown by the ordeal, so the verdict of a jury was equally inscrutable. It is but slowly that the jury was rationalized and regarded as a judicial body."); United States v.

Whether based on or warranted by any evidence, the jury verdict was just as binding on the judge as the ordeals had been: "the *vox populi* had simply taken the place of the final and inscrutable *vox Dei*."[20]

Despite attempts over time by the English judiciary to rein in the jury's power, the inscrutability of jury verdicts survived the trip across the Atlantic and established itself as a key feature of jury trials in the American colonies.[21] Having outgrown its numinous origin, the inscrutability of verdicts was now rooted in the colonial experience itself: for "the right to be tried by a jury of one's peers finally exacted from the king would be meaningless if the king's judges could call the turn."[22] Because the jury could not be asked to explain their deliberative process nor their verdict, they had the *de facto* power to "bring in a verdict in the teeth of both law and facts."[23] This law-nullifying power proved crucial during the American Revolution, when jury verdicts became an important tool of defiance and protection against the arbitrary power and abuses of the Crown.[24] The jury's ability to return a general verdict of acquittal in the face of unpopular laws helped cement its role as a bulwark of liberty.[25]

According to Alexander Hamilton, at the Constitutional convention, all delegates agreed on the value of trial by jury to safeguard the liberty of criminal defendants.[26] They did not agree, however, on whether criminal

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Maybury, 274 F.2d 899, 90203 (2d Cir. 1960) (quoting THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 125 (1929)). HOLDSWORTH, *supra* note 12, at 317.

20. VAN CAENEGEM, *supra* note 12, at 71; *see also* HOLDSWORTH, *supra* note 12, at 317 ("The record tells us that when the jury was first introduced the method by which it arrived at its verdict inherited the inscrutability of the judgements of God").

21. *See* Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 388–89 (1999). For an overview of judicial control over jury verdicts in the Colonial period, see generally Renee B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505, 508–18 (1996); Martin D. Beirne & Scott D. Marrs, *Judicial Control Over Questionable Jury Verdicts: Historical Underpinnings of an Age-Old Practice*, FED. LAW., June 2004, at 23.

22. United States v. Hyde, 448 F.2d 815, 853 (5th Cir. 1971) (Rives, J., dissenting) (citing Bushel's Case, 124 Eng.Rep. 1006 (C.P. 1670)).

23. Horning v. District of Columbia, 254 U.S. 135, 138 (1920); *see also* Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 584 (1939).

24. Harrington, *supra* note 21, at 393.

25. *Id.* at 378.

26. As Alexander Hamilton wrote in Federalist 83,

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them

juries should issue verdicts based on the law as well as on the facts.[27] When the debate was settled about a century later in favor of having juries be only the finders of facts,[28] it became clear that, due to the widespread preference for general, inscrutable verdicts of "guilty" or "not guilty," the point was largely moot. In practice, these verdicts make it "impossible to know whether the jurors have judged the facts, the law, or the position of the planets."[29] Even Justice Story, as he denied the jury any moral right to decide the law "according to their own notions, or pleasure" in *U.S. v. Battiste*, had to acknowledge the futility of the point, by recognizing that a general verdict is "necessarily compounded of law and fact."[30]

What this debate suggests, however, is that in guaranteeing a right to trial by jury in the Sixth Amendment, the framers did not necessarily intend to crystalize the inscrutability of general jury verdicts. This inference is confirmed by more recent case law, indicating that there is no constitutional requirement that criminal jury verdicts be general and inscrutable.[31] Still, despite having reached a consensus that juries should not be charged with findings of law, courts continue to overwhelmingly support the use of general verdicts of "guilty" or "not guilty."[32]

In *U.S. v. Spock*, for example, the First Circuit observed that the historic function of the jury, "tempering the rules of law by common sense," would be hampered if the jury were required to support its verdict with

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> it consists in this: the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.

THE FEDERALIST NO. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

27. DeWolfe Howe, *supra* note 23, at 588–89.

28. *See, e.g.*, Sparf v. United States, 156 U.S. 51, 106 (1895) (holding that in criminal cases the determination of the law is for the court, and not for the jury).

29. Albert V. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 913 (1994).

30. United States v. Battiste, 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545); *see also* Harrington, *supra* note 21, at 434.

31. *See, e.g.*, United States v. O'Looney, 544 F.2d 385, 392 (9th Cir. 1976) (holding that there is no per se rule forbidding special verdicts in criminal trials); Heald v. Mullaney, 505 F.2d 1241, 1245 (1st Cir. 1974) (saying that there is no mechanical per se rule of unconstitutionality for all special questions in criminal cases); United States v. Ogull, 149 F. Supp. 272, 278 (S.D.N.Y. 1957) (saying that "departures from the unqualified general verdict are certainly not breaks with tradition").

32. *O'Looney*, 544 F.2d at 392 (claiming that "as a rule, special verdicts in criminal cases are not favored"); *see also* United States v. Jackson, 542 F.2d 403, 412 (2d Cir. 1976) (stating that "special interrogatories to the jury and verdicts are generally looked upon with disfavor in criminal cases").

reasons. [33] The Court found that the general verdict in criminal trials is "one of the most essential features of the right of trial by jury," and that "the removal of this safeguard would violate its design and destroy its spirit." [34] Similarly, in *U.S. v. Sababu*, the Seventh Circuit maintained that special verdicts are disfavored in criminal cases "because they conflict with the basic tenet that juries must be free from judicial control and pressure in reaching their verdicts."[35] Interestingly, in *Sababu,* it was the defendant who advocated for the removal of this "safeguard," and requested interrogatories to expand on the jury's general verdict.[36] Thus a tool designed to protect the rights of criminal defendants inured to the benefit of the government who could get a jury to convict without agreement on a coherent narrative.

Courts are so committed to the idea that we should not inquire any further into the verdict than a general finding of guilt, that they have promulgated a set of corollary rules and practices at the back end of criminal trials to protect the finality and inscrutability of verdicts.[37] Most notably, Federal Rule of Evidence 606(b) forbids jurors from impeaching their own verdicts:

During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.[38]

Under this rule, jurors may only testify as to whether "extraneous prejudicial information was improperly brought to the jury's attention," whether "an outside influence was improperly brought to bear on any juror," or "a mistake was made in entering the verdict on the verdict form."[39] Courts have interpreted this rule to forbid jurors from impeaching

33. United States v. Spock, 416 F.2d 165, 181 (1st Cir. 1969) (quoting *Ogull*, 149 F. Supp. at 276).
34. *Id.* (quoting GEORGE B. CLEMENTSON, A MANUAL RELATING TO SPECIAL VERDICTS AND SPECIAL FINDINGS BY JURIES 49 (1905)).
35. United States v. Sababu, 891 F.2d 1308, 1325 (7th Cir. 1989) (citing *Jackson,* 542 F.2d at 413).
36. *Id.*
37. *See generally* Alschuler, *supra* note 8.
38. FED. R. EVID. 606(b)(1).
39. FED. R. EVID. 606(b)(2)(A)–(C).

their verdicts by admitting to misconduct in the jury room.[40] This see-no-evil doctrine was officially embraced by the Supreme Court in *Tanner v. U.S.* where, after convicting two co-defendants of conspiracy and mail fraud, jurors independently approached the defense attorney to "clear [their] conscience" and confess to serious juror misconduct.[41] The jurors described the trial and deliberations as "one big party," and reported that a number of them had consumed various types of alcohol, smoked marijuana, and ingested cocaine throughout the course of the proceedings.[42] Jurors were reportedly falling asleep in the jury box, and one of them described himself as "flying."[43] Presented with sworn affidavits by the jurors, the Supreme Court refused to admit the evidence on the grounds that drug and alcohol abuse were not "an outside influence improperly brought to bear on any juror" under Rule 606.[44] The Court's opinion reflects an unwillingness to probe behind criminal verdicts, "solemnly made and publicly returned."[45] Even the claim by a juror that the jury did not "review the facts right" had no bearing for the majority: the jury had fulfilled its role by returning a general verdict of guilty; probing any further would "disrupt the integrity of the process."[46]

This principle is taken a step further when verdicts are inconsistent on their face.[47] Courts, rather than inquire into the jury's rationale in order to

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40. *But see* Clark v. United States, 289 U.S. 1, 12–13 (1933) (holding that the admission of testimony as to conduct of juror during deliberation of jury was not denial of juror's privilege against disclosure of happenings in jury room, where juror had sworn falsely in order to be accepted on the jury). For an argument that the Supreme Court misconstrued FED. R. EVID. 606, *see* Alschuler, *supra* note 8, at 219–21.

41. Tanner v. United States, 483 U.S. 107, 115 (1987).

42. *Id.* at 115–16.

43. *Id.*

44. *Id.* at 118, 127.

45. *Id.* at 119 (quoting McDonald v. Pless, 238 U.S. 107, 267–268 (1987)).

46. *Id.* at 116, 120. It should be noted that in March 2017 the Supreme Court finally recognized an exception to Rule 606. In *Pena-Rodriguez v. Colorado*, where two jurors disclosed post-verdict that a member of the jury had expressed anti-Hispanic bias towards the defendant, the Court held that

> [w]here a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (2017). *See also* Tharpe v. Sellers, 138 S. Ct. 545 (2018).

47. Verdicts are inconsistent when a jury "following the court's instructions could not have

understand an inconsistent verdict, choose to accept the verdict as issued and assume that the jury exercised its power of nullification over one or more of the charges.[48] The seminal Supreme Court case dealing with this issue is *Dunn v United States*.[49] In *Dunn*, the defendant was indicted on three counts: maintaining a common nuisance by keeping for sale at a specified place intoxicating liquor, unlawful possession of intoxicating liquor, and unlawful sale of such liquor.[50] The jury found the defendant guilty on the first count, and acquitted him on the last two, somehow finding that the defendant kept liquor for sale, but at the same time he neither possessed nor sold any liquor.[51] Referencing a similar case in the Second Circuit, *Steckler v. U.S.*, the Court determined that the verdict in this case showed that "either in the acquittal or the conviction the jury did not speak their real conclusions," but that it did not show that they were not convinced of the defendant's guilt.[52] The Court interpreted the acquittal "as no more than [the jury's] assumption of a power which they had no right to exercise, but to which they were disposed through lenity."[53]

In *U.S. v. Maybury*, the Second Circuit linked judicial acceptance of inconsistent verdicts to the arbitrary and inscrutable origins of the jury as an alternative to the ancient methods of compurgation and ordeal.[54] Quoting Professor Theodore Plucknett, the court explained that at first, jury verdicts were regarded as no more rational than ordeals, and "just as one did not question the judgments of God as shown by the ordeal, so the verdict of a jury was equally inscrutable."[55] While we now consider the jury to be a rational decision-making body, *Steckler* and *Dunn* show that "it has not yet been deemed wise that this process of rationalization should be carried to the point of requiring consistency in a jury's verdict in a criminal trial."[56]

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produced them." Muller, *supra* note 6, at 778.

48. *See* Courselle, *supra* note 12, at 221–29; Alschuler, *supra* note 8, at 211–14.

49. Dunn v. United States, 284 U.S. 390 (1932).

50. *Id.* at 391–92.

51. *Id.*

52. *Id.* at 393 (quoting Steckler v. United States, 7 F.2d 59, 60 (2d Cir. 1925)).

53. *Id.*

54. United States v. Maybury, 274 F.2d 899, 902–03 (2d Cir. 1960).

55. *Id.* (quoting THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 125 (1929)).

56. *Id.* at 903.

In the years following *Dunn*, several circuits attempted to carve narrow exceptions to the rule that consistency in the verdicts is unnecessary.[57] In 1984, however, the Supreme Court overturned one such lower court opinion in *U.S. v Powell*.[58] The *Powell* Court rejected "as imprudent and unworkable" a rule that would allow criminal defendants to challenge inconsistent verdicts on the ground that the verdict was the product of an error, rather than of lenity: "such an individualized assessment of the reason for the inconsistency would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake."[59] Since jurors take an oath to follow the law as charged, the Court deemed it sufficient to take them at their word.[60]

The judiciary's commitment to keep the criminal verdict a riddle, wrapped in a mystery, inside an enigma, is further underscored by a standard of review that defers to irrational jury determinations of fact.[61] On one end of the spectrum, there is the well-established doctrine that verdicts of acquittal are unreviewable by the trial court and non-appealable.[62] The government is precluded from being granted a directed

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> [The judge] is ... supposed to submit an issue to the jury if, as the judges say, the jury can decide reasonably either way. But to say that I can decide an issue of fact reasonably either way is to say, I submit, that I cannot, by the exercise of reason, decide the question. That means that the issue we typically submit to juries is an issue which the jury cannot decide by the exercise of its reason. The decision of an issue of fact in cases of closely balanced probabilities, therefore, must, in the nature of things, be... [other] than a rational act.

Charles P. Curtis, *The Trial Judge and the Jury*, 5 VAND. L. REV. 150, 166 (1952) (quoting Professor Jerome Michael, Address to the Association of the Bar of the City of New York (1950)).

57. *See, e.g.*, United States v. Hannah, 584 F.2d 27 (3d Cir. 1978) (holding that if the jury finds defendant not guilty of a felony, they cannot convict her for using a communication facility in committing that same felony); United States v. Brooks, 703 F.2d 1273 (11th Cir. 1983) (holding that a conviction for using a communication facility in committing a conspiracy cannot be sustained if the defendant is acquitted of the underlying conspiracy).

58. United States v. Powell, 469 U.S. 57 (1984).

59. *Id.* at 66.

60. *Id.*; *see also* SIR PATRICK DEVLIN, TRIAL BY JURY 90 (Stevens and Sons Ltd. 1956) ("I do not mean that juries are above the law. They should obey the law. But it is an obedience which they cannot be compelled to give. They are the wardens of their own obedience and are answerable only to their own conscience ").

61. *See* Alschuler, *supra* note 8, at 214–18.

62. *See* United States v. Hyde, 448 F.2d 815, 853 (5th Cir. 1971) (Rives, J., dissenting) (citing Bushel's Case, 124 Eng.Rep. 1006 (C.P. 1670)) (stating that the principle that a court may not direct a verdict of guilty in a criminal case is "so well-established that its basis is not normally a matter of

verdict or from obtaining a judgment notwithstanding the verdict "no matter how clear the evidence in support of guilt," nor can it secure a new trial on the ground that an acquittal "was plainly contrary to the weight of the evidence."[63] This restriction, rooted in the Fifth Amendment, is generally understood as a key due process guarantee for criminal defendants.

On the other end, courts also give a high degree of deference to jury determinations in cases of conviction. On paper, courts employ a standard of review in assessing the sufficiency of the evidence to support a conviction that "would amply guard" against wrongful convictions:[64] "whether a reasonably minded jury must necessarily entertain a reasonable doubt as to [a] defendant's guilt."[65] In making this assessment, however, courts must view the evidence presented in the light most favorable to the Government, and any conflicts in the evidence must be resolved in the Government's favor.[66] Not only is this standard stacked in favor of the prosecution, but the reality is that in most cases a jury's mistake in analyzing the evidence would not be subjected to any review at all. Most of the questions examined on appeal are procedural, rather than substantive: appellate courts typically review whether materials were properly admitted into evidence or whether there were any errors in the instructions submitted to the jury, rather than the reasonableness of the jury's conclusions in light of the instructions and the evidence.[67] Even if a deeper analysis were allowed, there is not much information an appellate

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discussion").

63. Standefer v. United States, 447 U.S. 10, 22 (1980); *see also* United States v. Ball, 163 U.S. 662, 671 (1896).

64. *See* Alschuler, *supra* note 8, at 214.

65. *See, e.g.*, United States v. Gianni, 678 F.2d 956, 959 (11th Cir. 1982); United States v. Jones, 418 F.2d 818, 825 (8th Cir. 1969); United States v. Fearn, 589 F.2d 1316, 1321 (7th Cir. 1978); United States v. Palmere, 578 F.2d 105, 106 (5th Cir. 1978).

66. *Fearn*, 589 F.2d at 1321; United States v Burns, 597 F.2d 939, 941 (5th Cir. 1979).

67. Mirjan Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 515 (1975). Unsurprisingly, the right to a criminal appeal, while granted to defendants in every jurisdiction, is not guaranteed by the Constitution. *See* McKane v. Durston, 153 U.S. 684, 687 (1894) (stating that a review by an appellate court of the final judgment in a criminal case is not a necessary element of due process of law); Griffin v. Illinois, 351 U.S. 12, 18 (1956) (acknowledging that "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all"); Ross v. Moffitt, 417 U.S. 600, 606 (U.S. 1974) (reaffirming "the traditional principle that a State is not obliged to provide any appeal at all for criminal defendants").

court could discern from a general verdict of "Guilty."

On the other hand, appellate review of the factual and legal basis of guilt is not without precedent in the American criminal justice system. While bench trials are by no means the norm where criminal adjudication is concerned, some jurisdictions require that judges deliver clearly reasoned opinions in support of their verdicts.[68] The Federal Rules of Criminal Procedure require that, if a party so requests before the finding of guilty or not guilty, "the court must state its specific findings of fact in open court or in a written decision or opinion."[69] Not only must a court state its findings, but federal circuits have also ruled that the reasoning and conclusions "must be adequate to enable *intelligent* appellate review of the basis for the decision."[70] The "enhanced appealability" resulting from this rule provides an additional safeguard to criminal defendants: the greater the extent to which the decision-maker is called upon to justify a finding and the more clearly articulated the grounds for the decision, the more susceptible to challenge the basis of that decision becomes.[71]

It is true that not all jurisdictions demand specific findings in open court or written opinions following bench trials, and that in those that do, the right to these findings must be positively asserted by the defendant.[72] Still, the system, in some measure, holds judge and jury to different standards, and requiring reasoned judgments from one but not the other "is an implicit recognition that the sense of finality that attaches to the jury's verdict is of less force in the nonjury context."[73] This finding is not surprising, given the clear historical reasons for the difference in how we treat judges as finders of fact, dating all the way back to the colonial

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68. *See* Sean Doran, John D. Jackson & Michael L. Seigel*, Rethinking Adversariness in Nonjury Criminal Trials*, 23 AM. J. CRIM. L. 1, 44–46 (1995).

69. FED. R. CRIM. P. 23(c).

70. United States v. Silberman, 464 F. Supp. 866, 869 (M.D. Fla. 1979) (emphasis added) (citing United States v. Pinner, 561 F.2d 1203, 1206 (5th Cir. 1977)).

71. Doran et al., *supra* note 68, at 49.

72. Arizona, Ohio, and Texas, for example, never require that the court make special findings in criminal trials. *See* ARIZ. R. CRIM. P. 26.1(b) (defining *"*judgment" as "the court's adjudication that the defendant is guilty or not guilty based on […] the court's verdict); OHIO CRIM. R. 23(c) (prescribing that "in a case tried without a jury the court shall make a general finding"); Guadian v. State, 420 S.W.2d 949, 952 (Tex. Crim. App. 1967) (stating that the Texas Code of Criminal Procedure does not require a trial court to make findings of facts and conclusions of law even following the defendant's request).

73. Doran et al., *supra* note 68 at 45.

period and the general sentiment of distrust directed at them as agents of the Crown.[74] More than two centuries and one revolution later, however, bias, corruption, and the exercise of arbitrary power by members of the judiciary are not the only concerns that must be addressed.

In *U.S. v. Pinner*, when the Fifth Circuit remanded the case to the trial court for special findings, it did not do so because of alleged bias.[75] Rather, the Court found due to the lack of specificity in the trial court's oral and written findings, it was unclear whether the trial judge had applied "the correct rule of law in evaluating the circumstantial evidence presented by the Government."[76] The Fifth Circuit's ruling is an implicit recognition of the fact that mistakes in the interpretation and application of the law can and do happen, even when the process is entrusted to individuals learned in the law. Unfortunately, the vast majority of defendants standing trial before a jury of their untrained peers rather than a professional are afforded no such protection from misapplication of the law.

II. ANALYSIS

As Justice Harlan articulated in his dissent in *Duncan v. Louisiana,*

> the principal original virtue of the jury trial – the limitations a jury imposes on a tyrannous judiciary – has largely disappeared. We no longer live in a medieval or colonial society. Judges enforce laws enacted by democratic decision, not by regal fiat. They are elected by the people or appointed by the people's elected officials, and are responsible not to a distant monarch alone but to reviewing courts, including this one.[77]

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74. In the late eighteenth century, judges were only allowed to try defendants for minor offenses, and in the late nineteenth century the Supreme Court recognized that a defendant could not waive his criminal jury trial right. Only in the twentieth century, when the Court considered whether the criminal jury trial provisions established a frame of government or simply guaranteed the right to the accused, the Court answered that the right was the defendant's and the jury trial was not part of the structure of government. Thomas, *supra* note 3.

75. United States v. Pinner, 561 F.2d 1203, 1206 (5th Cir. 1977).

76. *Id.*

77. Duncan v. Louisiana, 391 U.S. 145, 188 (1968) (Harlan, J., dissenting). It is important to note that Justice Harlan was not advocating for the abolition of the jury system, and neither is this Note.

If inscrutable general verdicts in criminal trials are no longer standing on their medieval or colonial foundations, and the Sixth Amendment does not require them, then on what basis are courts so adamantly preserving the practice? It is not uncommon for old institutions and rules to survive the customs and needs on which they were founded, and for legal doctrines to evolve.[78] As the old rationales fade, some new ground or policy is advanced, "which seems to explain it and to reconcile it with the present state of things; […] then the rule adapts itself to the new reasons which have been found for it, and enters on a new career."[79] But inscrutable general verdicts do not seem to have undergone this process. Literature and case law show that the very same rationales used to justify verdict inscrutability in 1765, such as jury independence from the arbitrary power of the judiciary, are the ones being advanced today.[80] Rather than evolving alongside our legal institutions, verdict inscrutability seems to be stuck in the eighteenth century.

This collective unwillingness to move forward is usually coupled with one of two attitudes. The first one is the romanticizing of the jury, regarded as the palladium of our freedom and the bulwark of our liberty. Despite their lack of training, juries are believed to have an "uncanny ability to grasp the truth and to provide common sense justice."[81] What underlies this view of the jury's ability is a misplaced trust in an old institution because of the ideals it represents: civic engagement, community representation, and popular participation in the democratic system. If justice could be administered through sheer common sense, however, we likely would not need an extensive body of laws and an array of professional figures entrusted with drafting and enforcing them. We expect jurors to apply the law to the facts, not merely to make judgment

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Whether trial by jury still has a place and reason to exist in our modern, democratic society is an issue that goes beyond the scope of this analysis. Justice Harlan's dissent was concerned with whether the State of Louisiana "was prohibited by the Constitution from trying charges of simple battery to the court alone," an issue on which this Note also takes no position.

78. For a discussion of the analytical framework of justification, see Ellen E. Sward, *Justification and Doctrinal Evolution*, 37 CONN. L. REV. 389 (2004).

79. *Id.* at 389 (quoting OLIVER WENDELL HOLMES, THE COMMON LAW 5 (1881)).

80. *See, e.g.*, United States v. Sababu, 891 F.2d 1308, 1325 (7th Cir. 1989); United States v. Spock, 416 F.2d 165, 181 (1st Cir. 1969).

81. Alschuler, *supra* note 8 at 153.

calls.[82] The idea that the system is working well as is, and that jurors somehow do not commit mistakes in applying the law flies in the face of facts.[83] If the system accounts for the possibility that experienced judges might make these sort of mistakes, how can we expect lay people to be ready for the task?[84]

One view that seeks to reconcile this discrepancy is that non-jury trials place a lot of responsibility on one fallible individual, and that jury trials instead diffuse responsibility for the decision and ensure accuracy through the deliberation process.[85] The idea that twelve heads are better than one might certainly seem to be a matter of common sense. Indeed, the system validates this tenet through the use of judicial panels, rather than an individual judge, on appellate courts.[86] But problems arise when the twelve heads belong to people drawn from the public at large. In most spheres of our lives, we would not dream that twelve lay people are more qualified than a professional with special education, training, and experience. This is not to say that the jury system does not present some advantages, or that community involvement in the justice system is of no

82. This issue was settled for the federal system as early as 1895 in the case of *Sparf v. United States*, where Justice Harlan, writing for the majority of the Court, held that the jury in criminal cases is bound to follow the judge's instructions upon all matters of law. *Sparf*, 156 U.S. 51, 87–88 (1895); *see also* Dale W. Broeder, *The Function of the Jury Facts or Fiction?*, 21 U. CHI. L. REV. 386, 404 (1954).

83. *See supra* note 4. Empirical studies also show how jurors are generally unable to follow limiting or curative instructions and end up instead focusing their attention on the inadmissible evidence. *See* Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL'Y & L. 677 (2000); R. L. Wissler & M. J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 L. & HUMAN BEHAVIOR 37 (1985); Tanford, J. Alexander, *Thinking About Elephants: Admonitions, Empirical Research and Legal Policy*, 60 UMKC L. REV. 645 (1992).

84. *See supra* notes 75–76.

85. To the contrary, evidence shows that the deliberative process does not result in a correction of all the misunderstandings of the law: Ellsworth's study showed how, while members of the jury fared pretty well in correcting misstatements of fact by fellow jurors, misstatements of law made during deliberations were only corrected in twelve percent of cases. Ellsworth, *supra* note 4 at 220–223. *See also* J. Kevin Wright, Comment, *Misplaced Treasure: Rediscovering the Heart of the Criminal Justice System Through the Use of the Special Verdict*, 19 COOLEY L. REV. 409 (2004).

86. Of note, the only controversial exception to this rule is found in the U.S. Court of Appeals for Veterans Claims, which has the authority to allow the merits of appeals to be decided by a single judge rather than by a panel. *See* James D. Ridgway, Barton F. Stichman &, Rory E. Riley, *"Not Reasonably Debatable": The Problems with Single-Judge Decisions by the Court of Appeals for Veterans Claims*, 27 STAN. L. & POL'Y REV. 1, 3 (2016).

value. The issue is not the we allow jurors to make determinations of guilt or innocence, but that we place their determinations under even less scrutiny than we do those of the judiciary. Even assuming that jurors are indeed better equipped than judges to make these determinations, subjecting their verdicts to review would only render the process more accurate.

This leads us to a second objection often advanced against special verdicts in criminal trials: it is simply not feasible,[87] we simply cannot require twelve jurors to come up with a coherent rationale for their decision. This concept clashes significantly with the romanticized view of jurors outlined above. Essentially, this argument states that while jurors are allegedly better equipped than judges to come to a just and proper decision in light of the law, they are somehow not equipped to explain their decision in a rational fashion. This objection betrays an underlying (and troubling) viewpoint – that in order to keep the judicial system working, there is a pragmatic need to accept a degree of imperfection.[88] In other words, verdicts are, in a way like sausages: if we were to be given details as to how they are made, we might lose our appetite for them.[89] This preoccupation was well expressed by the words of W.R. Cornish: "[t]he absence of reasons for its decision is surely a characteristic which is bound to last so long as the jury system itself – once the inscrutability principle has gone, the time has come to set up another kind of tribunal."[90] This view finds support in a number of the judicial opinions discussed in this Note, where the court, after discussing at length how the inscrutability of verdicts is necessarily embedded in the historical function of the jury, then mentioned, in passing, more pragmatic rationales.[91]

In *Tanner*, for example, after acknowledging how "[t]here is little doubt that post-verdict investigation into juror misconduct would in some

87. *See* John D. Jackson, *Making Juries Accountable*, 50 AM. J. COMP. L. 477, 517–18 (2002); Nancy Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 IOWA L. REV. 465, 533–34 (1997).

88. Clifford H. Ruprecht, *Are Verdicts, Too, Like Sausages?: Lifting The Cloak of Jury Secrecy*, 146 U. PA. L. REV. 217 (1997).

89. *Id.*

90. WILLIAM R. CORNISH, THE JURY 258 (1968).

91. *See, e.g.,* Tanner v. United States, 483 U.S. 107, 120 (1987).; Skidmore v. Balt. & Ohio R.R. Co., 167 F.2d 54, 61 (2d Cir. 1948).

instances lead to the invalidation of verdicts," Justice O'Connor observed how "it is not at all clear […] that the jury system could survive such efforts to perfect it."[92] As Judge Jerome Frank wrote in *Skidmore v. Ohio*, "[the General verdict] serves as the great procedural opiate, . . . [it] draws the curtain upon human errors and soothes us with the assurance that we have attained the unattainable."[93]

There are several issues that stem from the inscrutability of the general verdict, beyond the risk of wrongful convictions without a basis in law or in fact. One is the plight and lack of vindication for innocent, acquitted defendants.[94] Since a general verdict gives no elucidation of the jury's reasoning, it necessarily treats all conclusions of non-guilt in the same manner.[95] Thus, a verdict of acquittal can encompass a variety of situations: first, the defendant is factually guilty and the jury believed so, but the prosecutor failed to persuade all twelve jurors beyond a reasonable doubt that each element of the crime was proven; second, it is not clear whether the defendant is factually guilty, the evidence is confusing, and the jury reaches no consensus on whether the defendant committed the crime; third, the jurors exercise their power of nullification to acquit against the evidence a factually guilty defendant, of whose guilt they are convinced beyond a reasonable doubt; and lastly, the defendant is factually innocent and the jurors are fully convinced of his innocence.[96] When it comes to acquittals, then, "it would be hard to devise a verdict that is less informative than the one currently in use."[97] The issue, then, is that a defendant who is factually innocent is never conclusively declared so: all we are told is that the government could not prove her guilt beyond a reasonable doubt.[98] For defendants who find themselves in such a predicament, it might be difficult to shed the stigma associated with a criminal charge and investigation, and "neighbors,

92. *Tanner*, 483 U.S. at 120.
93. *Skidmore*, 167 F.2d at 61.
94. Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1299 (2000).
95. *Id.* at 1302.
96. *Id.*
97. *Id. See also* U.S. v. Watts, 519 U.S. 148, 155 (1997) (citing U.S. v. Putra, 78 F.3d 1386, 1394 (1996) (Wallace, Chief J., dissenting)) (stating that "it is impossible to know exactly why a jury found a defendant not guilty on a certain charge.").
98. Leipold, *supra* note 94 at 1304.

acquaintances and co-workers may always wonder about the real basis of the acquittal or dismissal."[99] Not only that, but because an acquittal "is not a finding of any fact,"[100] it does not preclude the Government from relitigating an issue in a subsequent action governed by a lower standard of proof, nor does it preclude a "sentencing court from considering conduct underlying the acquitted charge."[101]

Another casualty of the inscrutable general verdict is the law itself: while by the Sixteenth Century civil common law had evolved into one intellectual system, substantive criminal law is still relatively unrefined.[102] According to Milsom, the lack of development lies with the "blankness of the general verdict."[103] In civil cases, indeed, the availability of findings other than "guilty" or "not guilty" forced trial courts to face legal issues that helped shape the common law.[104] Conversely, to this day, the law relating to a criminal case can only be found in appellate judgments.[105] This issue is closely related to that of achieving uniformity in the administration of the law. In *Sparf v. U.S.*, "the Court spoke eloquently of the need for uniformity of statutory interpretation and administration, for a government of law and not of men, for legal signposts lighting the way for future adjudication as contrasted with the hit-or-miss blackness of the jury's general verdict."[106] In reality, however, different juries often end up deciding the law differently, making uniformity in the administration of justice impossible, as "[g]eneral verdicts are not stare decisis; no records are even kept of them."[107] As Judge Frank pointed out, jury-made law,

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99. *Id.* at 1305. An interesting example of this issue is the problem facing bar applicants who have been charged with a crime and then acquitted. In most states, arrest or charge with a criminal offense constitutes conduct that raises issues as to one's character and fitness for the profession. When faced with further inquiry into their conduct, innocent, acquitted candidates would certainly benefit from a finding of factual innocence rather than an inscrutable finding of "not guilty." *See, e.g.*, *Red Flags and Bar Admissions*, La. State Bar Ass'n, http://files.lsba.org/documents/BarAdmissions/RedFlagsBarAdmissions.pdf (last visited Oct. 8, 2018).

100. *Watts*, 519 U.S. at 155 (citing *Putra*, 78 F.3d at 1394 (Wallace, Chief J., dissenting))

101. *Id.* at 156-57.

102. S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 413 (London Butterworths, 2d ed. 1981). *See also* Damaska, *supra* note 67, at 512, n.79.

103. MILSOM, *supra* note 102 at 413.

104. *Id.*

105. *Id.*

106. Broeder, *supra* note 82, at 403–04.

107. *Id.*

"compared with judge-made law, is peculiar in form."[108] It does not issue general pronouncements, and it is not found in the law reports or in textbooks, nor does it become embodied in a series of precedents.[109] Jury-made law is nowhere codified: "[f]or each jury makes its own law in each case with little or no knowledge of or reference to what has been done before or regard to what will be done thereafter in similar cases."[110]

III. PROPOSAL

When thinking about possible alternatives to the general verdict, the first option that comes to mind would be the extension of special verdicts to criminal trials.[111] As special verdicts are widely used in American civil courts, this solution would present relatively few problems of implementation. In addition, by allowing appellate courts to readily ascertain the basis for the jury's decision, special verdicts have produced a number of benefits in civil trials, as they help prevent jurors from being swayed by prejudice or sympathy and identify other impermissible reasons on which they might have based their verdict.[112] Knowing how the jury based its decision in case of error "can limit the number of retrials that must be conducted," and appellate courts are better able to determine how much weight was given to the error by the jury when conducting a harmless-error analysis.[113] By improving judicial and appellate review of jury decisions in civil cases, special verdicts have increased the efficiency of the system.[114] Even more importantly, they allow society "to have greater confidence and reliance on jury verdicts by understanding the basis of their decisions."[115]

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108. JEROME FRANK, LAW AND THE MODERN MIND 187 n.7 (Anchor Books 1963) (1930). *See also* Broeder, *supra* note 82.
109. *See* FRANK, *supra* note 108.
110. *Id.*
111. For arguments in favor of special verdicts in criminal trials *see, e.g.*, Kate H. Nepveu, *Beyond "Guilty" or "Not Guilty": Giving Special Verdicts in Criminal Jury Trials*, 21 YALE L. & POL'Y REV. 263 (2003); Alvin Stauber & Craig Varn, *Itemized Verdict Requirements: A Challenge for Juries*, FLA. B.J., June 1996, at 16; Wright, *supra* note 85.
112. Wright, *supra* note 85 at 418–19.
113. *Id.*
114. *Id.*
115. *Id.*

Special verdicts, however, are notoriously disfavored in criminal trials.[116] Most of the criticism stems from the idea that special verdicts have a tendency to prejudice the defendant, as "special interrogatories that lead the jury on a path through the elements are thought to push the jury in the direction of a guilty verdict."[117] It is certainly possible that jurors might be influenced by the way particular questions are framed, and could feel pressured to return a verdict that conforms to what they understand to be the judge's desired result. While this risk could be minimized through careful crafting of special interrogatories, due to their long history at common law, they come with a lot of baggage. As easy as it might be to implement within the procedural framework currently in place, a solution involving the use of special verdicts in criminal trials would likely be met with a great deal of resistance. Moreover, since a true 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," special verdicts erode the defendant's Sixth Amendment right to have the ultimate determination of guilt rest with a jury of her peers.[118]

Continental legal systems offer some interesting alternatives. One of them is the "collaborative model," a mixed court comprised of both lay citizens and law-trained judges, which in some cases operate at both the trial court as well as at the appellate court level.[119] The first variation within the collaborative model is the "Schöffen Court," a German tribunal comprised of one professional judge and two lay citizens.[120] In this model,

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> As a general rule...special verdicts...in criminal cases are disfavored. The reason is that they are generally thought to harm the defendant. Special verdicts are thought to put pressure on the jury to report its deliberations or support its verdict; they are thought to "conflict with the basic tenet that juries must be free from judicial control and pressure in reaching their verdicts." A general verdict, on the other hand, does not lead or fetter the jury and in addition allows for jury nullification.

United States v. Acosta, 149 F. Supp. 2d 1073, 1075–76 (E.D. Wis. 2003) (citations omitted) (quoting United States v. Sababu, 891 F.2d 1308, 1325 (7th Cir. 1989)).

117. *Id.*

118. *See* Commonwealth v. Licciardi, 443 N.E.2d 386, 390 (Mass. 1982).

119. Jane E. Dudzinski, Note, *Justification for Juries: A Comparative Perspective on Models of Jury Composition*, 2013 U. ILL. L. REV. 1615, 1620 (2013).

120. *Id.* While this is the standard composition, the number of jurors could change based on the

the lay jurors sit with the judge at the head of the room, and instead of being selected for each proceeding are appointed as members of the court for terms of several months.[121]

A second variation is found in France, in the form of a "hybrid model which represents a via media between the continental jury courts and the Schöffen Courts."[122] While the model still involves citizens and judges deliberating together, the ratio of citizens to judges is higher: a jury may be composed of three judges and nine or even twelve citizens, depending on the type of court. Like in the American system, the lay jurors sit apart from the judge in the courtroom until deliberation, and are drawn at random from the community.[123] The last type of collaborative court is the "expert assessor model," which pairs the expertise of one or more judges with two or three lay jurors who have specialized knowledge and experience that is relevant to a case.[124]

All of these options, however, present even deeper issues concerning jury independence than special verdicts: if there is a concern that judges might unduly influence jurors through the mere act of asking specific questions, then it is hard to conceive of a mixed tribunal in which the jury is truly independent. The risk is that judges in collaborative courts would end up dominating the conversation during deliberation, and that lay jurors might not feel comfortable disagreeing with a judge's interpretation of the evidence and her ultimate conclusions. Jurors would probably attribute a greater weight to a judge's opinion or recollection of the evidence presented than they would to that of a fellow juror.

A better model from which we could draw upon is the Spanish one: "[t]he Spanish Constitution guarantees the people's right to participate in the administration of justice through a jury trial and also requires that justifications be provided for all judgments."[125] The Organic Law on the

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specifics of the case, such as the nature of the crime or punishment involved.

121. *Id.*

122. John D. Jackson & Nikolay P. Kovalev, *Lay Adjudication and Human Rights in Europe*, 13 COLUM. J. EUR. L. 83, 97 (2007). *See also* Dudzinski, *supra* note 119, at 1621.

123. Dudzinski, *supra* note 119, at 1620–21.

124. *Id.*

125. Michael Csere, *supra* note 10, at 421; *see also* 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); Stephen C. Thaman, *Europe's New Jury Systems: The Cases of Spain and Russia*, L. & CONTEMP. PROBS., Spring 1999, at 233..

Jury ("L.O.T.J.") Court of 1995[126] requires Spanish juries, composed of nine jurors and two alternates, to "articulate a succinct explanation of the reasons why they have declared, or refused to declare, certain facts as having been proved," as well as "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."[127] Several provisions in the L.O.T.J. provide "what appear to be safeguards against insufficiently reasoned jury verdicts, aimed at ensuring the adequacy of the jury's explanations."[128] After reaching a verdict, the jury may summon the secretary of the court, who holds a law degree, for help in expressing its explanation while formulating its reasons.[129] Before issuing the final judgment, the judge reviews the verdict and explanation, and if he determines that certain standards have not been met in ensuring their sufficiency he may return the verdict and explanation to the jury.[130] The judge also has the power to dissolve the jury "if he finds that no inculpatory evidence upon which the defendant could be convicted existed in the trial."[131]

A reform modeled after the Spanish system would not present the same issues of jury independence as the proposals explored above. Independence from the court would be safeguarded by allowing the jury to reach a conclusion autonomously before having to formulate its reasoning, unlike in the collaborative model. If needed, jurors would be allowed to enlist the assistance of the secretary of the court. While the secretary of the court would be learned in the law, such a person would not pose the same level of threat to jury independence as a judge would due to the respective

126. For a history of jury trial legislation in 19th century Spain, *see* Stephen C. Thaman, *Spain Returns to Trial by Jury*, 21 HASTINGS INT'L & COMP. L. REV. 241, 246–49 (1998) (citing JUAN ANTONIO ALEJANDRE, LA JUSTICIA POPULAR EN ESPAÑA: ANÁLYSIS DE UNA EXPERIENCIA HISTÓRICA: LOS TRIBUNALES DE JURADOS 79–243 (1981)).

127. Csere, *supra* note 10*; see also* 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); Jury Court Law art. LXI (B.O.E. 1995, 122) (Spain).

128. Csere, *supra* note 10, at 422–23.

129. *Id.*

130. *Id.*

131. *Id.*

positions and authority within the tribunal and society. Moreover, the decision of whether to ask for help would be left entirely to the jurors themselves, further preserving their independence. Receiving assistance from the secretary would also assuage the concern that lay jurors might not have the means to write a full, cogent and well-reasoned opinion on their own.[132] The transition would likely take time: in Spain the adequacy of reasons for verdicts presented a considerable hurdle during the first years of implementation, leading to the overturning of a number of verdicts due to inadequate reasoning.[133] However, the issue was significantly ameliorated as judges gained experience in how to properly and effectively instruct juries and the Supreme Court of Spain developed a considerable body of jurisprudence related to the adequacy of reasoned opinions.[134] The Court's currently favored approach, the "intermediate" one, "supports an itemized specification of all points relevant to the evidence without requiring the accuracy of judicial reasoning."[135] There is no reason, then, why we should doubt the ability of American juries to accomplish this same task. If we feel comfortable entrusting them with another person's life and liberty, we should trust that they can articulate the path to their decision. A corollary critique sometimes advanced with regards to reasoned verdicts is that juries might reach unanimity as to the ultimate verdict, but disagree on the underlying rationale.[136] However, requiring a reasoned verdict would ensure that the jurors spend more time examining and debating all the evidence, and any points of contention or divergence would be addressed more thoroughly and carefully during deliberations. Disagreement as to the relevance and weight of pieces of evidence should be used as a basis to consider whether the evidence truly shows that a defendant is guilty beyond a reasonable doubt, rather than be

132. *See supra* note 87 and accompanying text.
133. Csere, *supra* note 10, at 423, *see also* Thaman, supra note 127, at 628–30.
134. Csere, *supra* note 10, at 423.
135. *Id.* at 424. Other approaches considered were the "maximalist" and "minimalist" interpretations: the first one requires "a thorough description of the whole deliberation process and … a declaration that certain facts have or have not been proven," while the second "permits general references to the evidence with less detail." *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, 770–71 (2007).
136. *See* Marder, *supra* note 87; Case Note, *Trial-Polling of Jury – Effect of a Juror's Dissent*, 39 YALE L. J. 1218 (1930).

swept under the rug of inscrutability.

This Note does not suggest that we should import the Spanish model as a whole, as differences between the two systems would make such implementation cumbersome and unnecessary.[137] However, the Spanish experience shows that a fairer and more transparent jury system, where the rights of criminal defendants are safeguarded without infringing upon jury independence, is attainable. We only need to trust that our jurors are indeed as competent as we set them up to be.

CONCLUSION

This Note argues that justice would be better served if criminal juries were required to return not only a verdict, but a reasoned one that explains its underlying rationale, learning from the experience of the Spanish jury reform of 1995. This proposal would entail allowing the jury, after having independently reached a verdict through deliberations, to request the assistance of an officer of the court, trained in the law, to express their reasoning and findings. This solution would enable our jurors to accomplish this task without jeopardizing their independence from the court. The findings could then be reviewed by the trial judge and furnish an additional basis for appellate review, leading to an increase in

137. For example, in Spain unanimity is not required: seven out of nine votes are sufficient for a finding of guilt, while five out of nine are enough to secure an acquittal. *See* Thaman, *supra* note 127, at 254. While the U.S. Constitution does not require unanimity in criminal trials, currently forty-nine out of fifty states have such unanimity requirement, after Louisiana voted on November 6, 2018 to abolish split jury verdicts, leaving Oregon as the sole outlier. *See* Jordan S. Rubin, *Louisiana Vote for Unanimous Juries May Not Be Last Word*, BLOOMBERG (Nov. 15, 2018), https://news.bloomberglaw.com/us-law-week/louisiana-vote-for-unanimous-juries-may-not-be-last-word. *See also* Apodaca v. Oregon, 406 U.S. 404 (1972); *see also* Ashley Garcia, *Patching the Exhaust Pipe: A Historical Analysis of Oregon's Non-Unanimous Jury Law in Criminal Cases*, 54 WILLIAMETTE L. REV. 113 (2018). This, too, might soon change, as the Supreme Court in March 2019 granted certiorari to *Ramos v. Louisiana*, a case that presents the very question of whether the XIV amendment fully incorporates the VI amendment guarantee of a unanimous verdict. Ramos v. Louisiana, No. 18-5924, 2019 WL 1231752, at *1 (U.S. Mar. 18, 2019); Debra Cassens Weiss, *Are Unanimous Juries Required in State Criminal Cases?*, ABA J. (Mar. 18, 2019), http://www.abajournal.com/news/article/are-unanimous-juries-required-in-criminal-cases-supreme-court-to-consider-overruling-1972-case/.

efficiency and accuracy.

Regardless of one's stance on the competence of our jurors, there are a number of reasons in favor of having juries explain the reasoning behind their verdict. For critics of the jury system and of jurors' biases and capabilities, having an opportunity to inquire into the jury's reasoning might assuage their concerns that cases might be wrongly decided, never to be appealed or overturned. Admirers of the current system would also reap the benefits brought about by increased transparency. Lastly, reasoned jury verdicts would serve a clear educational purpose, and could lead us to discover and tackle serious legal or systemic issues rather than blame a disagreeable verdict on the quirks of a particular jury.