Twelve Angrier Men: Enforcing Verdict Accountability in Criminal Jury Trials

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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

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. 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.

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. In addition, 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.”

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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?


7. See infra, notes 37-67.

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. 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. These could then be reviewed by the trial judge and serve as an additional basis for appellate review.

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.
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. As their many flaws became apparent, these archaic and irrational modes of trial came under fierce criticism and eventually fell out of practice. 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.

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. 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. 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.” 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.”

References:

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 CONClSE HISTORY OF THE COMMON LAW 96–118 (1929); Diane E. Courselle,

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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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”).


24. Harrington, supra note 21, at 393.

25. Id. at 378.

26. As Alexander Hamilton wrote in Federalist 83,
juries should issue verdicts based on the law as well as on the facts. When the debate was settled about a century later in favor of having juries be only the finders of facts, 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.”

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.”

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. 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.”

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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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).
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”).

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reasons. 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.” 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.” 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. 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. 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.

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.” Courts have interpreted this rule to forbid jurors from impeaching
their verdicts by admitting to misconduct in the jury room. This see-no-evil doctrine was officially embraced by the Supreme Court in \textit{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. 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. Jurors were reportedly falling asleep in the jury box, and one of them described himself as “flying.” 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. The Court’s opinion reflects an unwillingness to probe behind criminal verdicts, “solemnly made and publicly returned.” 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.”

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

40. \textit{But see} \textit{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 \textit{Alschuler, supra note 8, at 219–21.}


42. \textit{Id. at 115–16.}

43. \textit{Id.}

44. \textit{Id. at 118, 127.}

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

46. \textit{Id. at 116, 120. It should be noted that in March 2017 the Supreme Court finally recognized an exception to Rule 606. In \textit{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.


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

produced them.” Muller, *supra* note 6, at 778.
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.*
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. In 1984, however, the Supreme Court overturned one such lower court opinion in U.S. v Powell. 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.” Since jurors take an oath to follow the law as charged, the Court deemed it sufficient to take them at their word.

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. On one end of the spectrum, there is the well-established doctrine that verdicts of acquittal are unreviewable by the trial court and nonappealable. The government is precluded from being granted a directed...
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.”

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: “whether a reasonably minded jury must necessarily entertain a reasonable doubt as to [a] defendant's guilt.” 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. 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. Even if a deeper analysis were allowed, there is not much information an appellate

discussion”.

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

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”); Guardian 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. 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.
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.” 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.

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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. 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.” 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. 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.” 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.
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. 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?

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. 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. 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).


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, 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. 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. 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.”

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.

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

89. Id.
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.” 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.”

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. Since a general verdict gives no elucidation of the jury's reasoning, it necessarily treats all conclusions of non-guilt in the same manner. 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. When it comes to acquittals, then, “it would be hard to devise a verdict that is less informative than the one currently in use.” 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. 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, neighbors, neighbors, neighbors…”

92. Tanner, 483 U.S. at 120.
93. Skidmore, 167 F.2d at 61.
95. Id. at 1302.
96. Id.
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,
“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
Special verdicts, however, are notoriously disfavored in criminal trials. 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.” 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.

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. The first variation within the collaborative model is the “Schöffen Court,” a German tribunal comprised of one professional judge and two lay citizens. In this model,

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116. 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.


117. Id.


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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{125} The Organic Law on the specifics of the case, such as the nature of the crime or punishment involved.

\textsuperscript{121} Id.
\textsuperscript{123} Dudzinski, \textit{supra note} 119, at 1620–21.
\textsuperscript{124} Id.
Jury (“L.O.T.J.”) Court of 1995\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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


\textsuperscript{128} Id.

\textsuperscript{129} Id.

\textsuperscript{130} Id.

\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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

\begin{enumerate}
\item\textsuperscript{132} See supra note 87 and accompanying text.
\item\textsuperscript{133} Csere, supra note 10, at 423, see also Thaman, supra note 127, at 628–30.
\item\textsuperscript{134} Csere, supra note 10, at 423.
\item\textsuperscript{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:
(2007).
\item\textsuperscript{136} See Marder, supra note 87; Case Note, Trial-Polling of Jury – Effect of a Juror’s Dissent, 39
YALE L. J. 1218 (1930).
\end{enumerate}
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. 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/.
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.