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Adversarial or Inquisitorial

Comparing Systems

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The most extensive reforms in criminal justice probably took place during the last decade in England and Wales. Following well known miscarriages of justice as the *Guildford Four* (Jessel, 1994) and *Birmingham Six* (Gilligan, 1990), the commission chaired by Runciman proposed a host of legislation (Royal Commission on Criminal Procedure, 1993). The objective of all these reforms "has been to create a criminal justice process which is administratively efficient and minimizes the 'risk' of an adversarial trial," Belloni and Hodgson (2000, p. 203) conclude. The Runciman Commission, according to its own contention, aimed at making mostly practical recommendations without a thorough theoretical basis, but admits that its recommendations "can fairly be interpreted as seeking to move the system to an inquisitorial direction" (Royal Commission on Criminal Procedure, 1993, p. 3). Would a turn to the inquisitorial system save the British?

Likewise, the inquisitorial systems on the European continent seem to incorporate more and more adversarial elements. This happens partly under the influence of the European Court of Human Rights in Strasbourg. This court, composed of justices from diverse legal backgrounds, seems to regularly introduce adversarial elements into the inquisitorial criminal justice systems on the continent (Harding, Swart, Jörg, & Fennell, 1995). Would such enhance the quality of these systems?

For more than a decade we two have, whenever we met, been arguing what system is better. Van Koppen, coming from the quite inquisitorial Dutch system, has taken the position that a carefully

designed inquisitorial system as the Dutch is in many ways better than any adversarial system. Penrod has always pointed to the superior elements in the system where he comes from: the United States. Being psychologists, the discussions always centered on more "psychological" comparisons of the systems.

The discussions became more interesting in recent years when we abstained from harassing each other and turned the argument on the following type of questions: How do we define 'better'? What are we actually comparing? And, most important: what would a decisive experiment or set of experiments look like, which might decide our dispute? This book is the result of our quest for the answers to these questions with, as you will notice, the help of many learned colleagues in our field. In the present chapter we will go into these questions and will try to define the problem under discussion.

COMPARING SYSTEMS

Comparing criminal justice systems is like shooting rabbits on a fair: you always shoot too high or too low, you always hit another rabbit than the one you were aiming at, and if you hit one in the belly, you are under the illusion that you shot the whole rabbit. Likewise, each inquisitorial system differs dramatically from each other, as great differences can be found between the criminal justice systems of every adversarial country. Each national system is also a moving target that keeps on changing all the time, both in practice and in law. And, all these systems differ in so many respects, that a system-wide comparison is foolhardy.

The most fundamental differences between systems of criminal law and procedure in European countries can be characterized on a rough dimension of *inquisitorial* and *adversarial systems* (cf. Damaška, 1986; Jörg, Field, & Brants, 1995). These systems have different roots (for an overview see Nijboer, 2000, pp. 347 ff.), but also share common characteristics. In all systems there is, for instance, some form of standard of proof that differs only slightly from country to country; all systems have a presumption of innocence in one form or another; all systems have the right to counsel and, in varying degrees, a right of confrontation.

For our present discussion, however, the differences between the systems are of more importance. Under the adversarial model, legal proceedings are essentially contests between equivalent rivals (see also the chapter by Crombag in this volume). A contest is only a real contest if it is played in a fair way and the essential feature of fair play is the formal equality of the contestants. This feature constitutes, according to

Damaška, *essentialia* of the adversarial tradition. Under this model one is usually judged by one's peers (the jury) and the system emphasizes oral presentation of evidence. These features are "not indispensable to the adversary model. Yet... the ideological assumptions underlying the model make... these non-essential features a matter of natural choice." He therefore calls them *naturalia* of the adversary style (Damaška, 1973, p. 564). Because the adversarial system employs lay decision makers, heavy emphasis is placed on the development of rules of evidence designed to assure the flow of reliable evidence to jurors. There are concerns, for example—as reflected in general prohibitions against hearsay evidence—that lay jurors may have difficulty giving appropriate weight to evidence which, although relevant to the issues being tried, may be unreliable to some degree. In the adversarial system one major role of the trial judge is to serve as a gatekeeper for evidence—in this role the judge determines which evidence is admissible at trial and available for the jury to consider.

Under the inquisitorial model, on the other hand, a legal procedure is considered an inquest: "an official and thorough inquiry" directed at establishing the true facts. The "court-controlled pursuit of facts cannot be limited by the mutual consent of the participants. Once a case is brought before the court, the court takes its own responsibility for finding the truth" (Damaška, 1973, p. 564). Whenever technicalities of fair play threaten to get in the way of finding the truth, they are put aside. These are the *essentialia* of the inquisitorial tradition. Since, for instance, plea-bargaining "raises conflicts with the... search of substantive truth" (Van Cleave, 1997), it must be considered irreconcilable with the *essentialia* of the inquisitorial procedure. Although oral presentation of evidence would be quite consistent with the inquisitorial model, it is a historical fact that inquisitorial systems have a preference for documentary presentation of evidence, which Damaška considers one of the *naturalia* of the inquisitorial model (see also Nijboer, 2000). In contrast to adversarial systems reliance on rules of evidence, inquisitorial systems tend to be systems of "free proof" in which any relevant evidence may reach the judge and the judge is trusted to give weight to that evidence in a manner that appropriate to the reliability of the evidence.

From these basic (formal) differences a host of practical differences between the systems in the manner in which courts handle cases are derived. The manner in which trials are handled, has a consequence for the manner in which officers in other stages of the proceeding act (Nijboer, 1999). The emphasis on written documents in the Netherlands, for instance, makes the recording of witness and suspect statements in so-called *proces-verbalen* (sworn statements by police officers) of major importance during the police investigation. The emphasis on written

documents causes Dutch courts to be reluctant to hear witnesses at trial. Thus, if during the trial the court considers it necessary to hear additional witnesses or further hear certain witnesses, the case is usually referred to a judge-commissioner to hear the witnesses and present the *proces-verbalen* of the interrogations to the court. But this, again, usually causes a postponement of the trial for another three months. Since it is quite common in more complex cases that additional witnesses need to be heard or additional investigations need to be conducted, these trials most often proceed in sessions many months apart, which can produce significant waiting times for the accused.

Relevant differences for the accused involve, for instance, the extent to which he or she plays an active role in different stages of the process, the immediacy of evidence presented against the accused, the role of plea bargaining, the amount and nature of information communicated to the accused at different stages in the process and the role of dossiers, processing times, treatment by criminal justice officials, role of judge and jury, and possibilities for appeal. It should be evident that such aspects may have considerable impact on experiences, perceptions and attitudes of defendants who are involved in these criminal processes.

From a comparative perspective, some of these differences will have a positive effect on the experiences and attitudes of the accused and the flow of his or her case, while other aspects may work in the opposite direction. A systematic empirical comparison of these different criminal procedures from the point of view of the accused is, therefore, appropriate. Of course, the distinction between inquisitorial and adversarial systems is, however, not always clear-cut and frequently subject to debate. Most countries can in fact be characterized as more or less mixed or hybrid systems (Jörg et al., 1995).

None of the European criminal law systems can be considered a "pure" inquisitorial or a "pure" accusatorial system, but all are somewhere in between on this dimension. The Netherlands, however, can be considered the country that is probably the most inquisitorial in Western Europe, while the English/Welsh system, for instance, may be considered the most accusatorial. Both Sweden and Germany, for instance, belong to what is commonly called a Nordic continental law system that may be situated somewhere between the Netherlands and England and Wales on the dimension adversarial-inquisitorial (cf. Nijboer, 2000; Toornvliet, 2000, Table 1 on p. 26).

Let us set the scene for the present volume. We primarily compare the United States criminal justice system to that of the Netherlands. Not only do we know these systems best but, at least at first glance, these two systems are somewhere at the extremes of the inquisitorial-adversarial

continuum. Second, we compare the systems as they are now, knowing that, especially the continental European systems may see dramatic changes in the next decade. Third, we take a psychological perspective, not a legal one. We are thus much more interested in how these systems work in practice, than in how they are supposed to work, as laid down in law and acts of parliament.

DUTCH INQUISITION AND AMERICAN ADVERSARIES

To further set the scene, we give an overview of the most obvious differences between the Dutch and American system. We do so by following a suspect of an armed robbery in each country from the time he committed the crime to his punishment. In our description we take the point of view that a criminal justice system is some kind of organic body. It is quite fruitless to compare one point in one system to a comparable point in the other, without taking the rest into account. How can we, for instance, compare the decision-making behavior of jurors in the U.S.A. to the decisions of professional judges in the Netherlands without taking into account how prosecutors and attorneys may differ in both countries? Both attorneys and prosecutors may anticipate judge versus jury decisions differently, so they behave differently. The differences in their pretrial behavior may in turn result in a completely different selection of cases going to trial in the two systems and thus influence fact finder's behavior.

Indeed, many of the differences between the two systems seem to stem from the fact that the criminal legal system in the United States is based on the jury system while in the Netherlands decisions on guilt or innocence are always rendered by professional judges. The jury system is not essential to an accusatorial criminal legal system nor is decision-making by professional judges essential to the inquisitorial system. In fact, due primarily to widespread plea bargaining, only about 8% of the criminal cases in the United States are dealt by with a jury and a much smaller share of cases is decided in so-called "bench trials" in which the judge is the sole fact-finder (Hans & Vidmar, 1986, p. 43). Nonetheless, the jury model serves as the primary backdrop or frame of reference for the remaining trials. On the other hand, the Netherlands actually employed the jury for a short period during the unification with Belgium in the beginning of the 19th Century (Bossers, 1987). The Belgians reintroduced the jury system after the secession, but have fewer than a hundred cases a year tried by their so-called assissen court (van Langenhove, 1989).

THE LIVES AND TIMES OF A DUTCH AND AN AMERICAN SUSPECT

Both our Dutch suspect Jan Jansen and his American counterpart the defendant James Smith were arrested soon after their robbery, but there the differences already started. Following *Miranda* (*Miranda v. Arizona*, 1966), the American police officers inform James Smith at the time of his arrest of his right to remain silent, his right to legal counsel, and that anything he says can be used against him in court. The Dutch police did not do this while arresting Jan Jansen. Dutch policemen have to do something different: they begin every interrogation of the suspect by telling him that he has the right to remain silent (the so-called *caution*). Not that this difference may matter much, since most suspects do not understand the *Miranda*-rules (Fulero & Everington, 1995; Stricker, 1985; Wall & Rude, 1985), and the police have a fine-tuned system to circumvent these rules (Leo, 1995, 1996b). Although there is no study on the effect or non effect of the Dutch caution, it is a fair assumption that the effect of giving that caution is not any greater than reading *Miranda* in the USA, given all the possibilities for police officers to circumvent that caution (Leo, 1995, 1996a).

Counsel

Smith has the right to have counsel present during the police interrogations, but most suspects do not use that right (Leo, 1995, 1996a). Jansen does not have the right to counsel during police interrogations (Fijnaut, 1988; Lensing, 1988), but many police forces have the habit of routinely inviting the suspect's attorney to be present. Attorneys, however, seldom make use of the invitation, claiming that they have other duties. We suspect, however, that few of them like to spend much time in small rooms attending interrogations which are usually quite boring, except maybe in high profile cases.

In the Netherlands defendants who cannot afford an attorney can select an attorney themselves and he or she is paid for by the state. In the United States a defendant without money is provided with a government employed attorney. Since most criminal defendants cannot pay for their own attorney, this difference in arrangement may produce great quality differences in the defense of suspects. We are not sure, however, whether this makes much of a difference. Penrod's personal experience is that many public defenders are sharper and better prepared than privately retained counsel, although of course much money—as for instance in the O.J. Simpson case—can hire the best.

The Written and Oral Trials

In both countries the police aim at obtaining a confession during interrogations (van Koppen, 1998; Leo, 1996a). If Smith confesses, he is asked to produce a handwritten statement. If Jansen confesses, he is not. Rather, the police write down his statement in a *proces-verbaal*, recounting in what can be called policemen's prose what the suspect told the interrogating officers. Whether Jansen signs this proces-verbaal is quite unimportant. This is related to the hearsay structure of Dutch criminal procedure.

In 1926 the so-called 'principle of immediacy' was introduced in the then new Code of Criminal Procedure (*Wetboek van Strafvordering*; Sr.). Art 342 Sr. stipulates that a witness statement is a statement of "facts and circumstances that the witness has noticed or experienced personally." Witness statements should be given orally in front of the court at trial. The Supreme Court almost immediately after introduction of the new Code ruled that hearsay is acceptable, simply reasoning that a hearsay witness personally experienced what another person had said (HR 20 December 1926, *NJ* 1927, 87). This rather practical point of view had a dramatic influence on how Dutch criminal investigations are conducted by the police. Under the Supreme Court's ruling, the sworn statement of police officers containing a description of the suspect's statement is as good evidence as the suspect's statement itself. If the court uses such statements to prove its decision, formally, a document—the sworn statement by the interrogating police officers—instead of the suspect's statements is used as evidence. This is even done if the suspect later retracted the confession. This is also related to the great trust Dutch courts have in the work of the police. Recent discussions of police behavior (Crombag, van Koppen, & Wagenaar, 1994; van Traa, 1996; Wagenaar, van Koppen, & Crombag, 1993), however, have caused courts to become more critical of police *proces-verbalen*.

It should be noted that suspect and witness statements are recorded in the words of the police officers conducting the interrogations. It is not uncommon for the *proces-verbalen* to contain all kinds of legal lingo introduced by the police in the statement or in other ways diverge from what the suspect or witness actually said. In a *proces-verbaal* a witness may, for instance, talk about a "four wheel vehicle," when he in fact said "car". Of course there may be less innocent examples of this. Recently, for instance, an admitted cocaine dealer told Van Koppen the following story. During all his interrogations, he used his right to remain silent. To each question by the interrogating officers he answered: "I use my right to remain silent." In one of the sessions, the police officers wanted to know who financed his cocaine trade and again he gave the same answer. In the

proces-verbaal, however, this particular answer was recorded as follows: "I refuse to tell you who paid all my cocaine" (see for more examples Wagenaar et al., 1993). Statements by suspects and witnesses—with the exception of child witnesses—are usually not recorded on video or audio tape, so there is no way to check what a witness actually said.

The Dutch police are under "a duty to prepare an investigative record that is complete and formally correct, available to the defense as well as the prosecution, and able to withstand a searching examination" (Langbein & Weinreb, 1978, pp. 1553–1554). And that is what they do. They produce a dossier that in simple cases is about 2 cm thick, but in more complicated cases can grow to 2 meters thick or even more.

The Prosecutor

In the Netherlands the police investigation is lead by the *Officier van Justitie* (OvJ), i.e. the public prosecutor. Usually this is only a formal position but in the more complicated cases the OvJ is actively involved in the guiding of the investigations. After the police submitted the case to the prosecution, more documents are added to the dossier. Also other participants play a role in shaping the dossier, as for instance the defense, the investigating judge, and the trial judges (Field, Alldridge, & Jörg, 1995, p. 235). If the defense considers it necessary—for instance because of discrepancies between its client's story and what is in the dossier—it may ask the prosecution to conduct additional investigation. This places the prosecutor in a position to engage in an impartial weighing of the all interests involved in the case (van de Bunt, 1985, p. 398).

The Dutch prosecutor is a magistrate, who should independently come to a judgment on the merits of the case before it is submitted for trial. Thus, as in the United States, the prosecutor may dismiss a case (*seponeren; sepot*) for a host of reasons. The most important ones are dismissal for lack of evidence of any policy reason. The prosecutor can also offer the suspect *sepot* on the condition that he pays a fine. This can be done in every case, although it is usually limited to the less serious crimes. In most cases, however, the prosecutor only reads the dossier a few days before the trial is scheduled. If the prosecutors then consider the evidence too thin, they may actually ask for an acquittal at trial without loosing face.

In the Netherlands there is no system of plea-bargaining, for the simple reason that the defense does not have to issue a formal plea. To obtain a conviction, the prosecutor always has to bring the case to a full trial in which the court evaluates the evidence in cases where the suspect made a full confession. Of course, in the latter kind of case the discussion at trial centers more on the sentence than on the determination of guilt. In fact,

most Dutch trials are minimal in length. Since all participants have read, or are supposed to have read, the file, even a murder trial may take less than a day and typically would consist mainly of the opening and closing statements of the prosecution and the defense.

In the United States plea-bargaining is a common manner to resolve criminal cases (Schulhofer & Nagel, 1997). This procedure poses a dilemma to the innocent defendant: the choice posed during bargaining is heavily influenced by the risk involved in a jury trial, rather than by the strength of the evidence against him. A now famous case in which plea-bargaining led to a miscarriage of justice is the Ingram case: his sentence was agreed upon just before his innocence became clear (Ofshe, 1989; Wright, 1993a,b). In The Netherlands plea-bargaining is (at least formally) not allowed and the evidence in each case is reviewed by the court, even after the defendant confessed. Formally, the court needs two pieces of evidence for a conviction, but after a defendant confessed, it may take the (written) report of the pathologist that the victim in fact died by a bullet as the second piece of evidence.

Custody

The robberies of which Smith and Jansen are suspect are typically the more serious cases. In contrast to the USA, the Dutch system does not know bail. Suspects can be detained for six hours by the police. This can be extended for three days by the prosecution after which extensions have to be authorized by the court. For any extension there always has to be serious suspicion against the suspect and one of three additional requirements: (a) the risk of fleeing; (b) danger of committing other grave offense; or (c) the risk that the suspect may obstruct the investigations. An extension can also be based on the seriousness of the crime that shocked the community. The differences between with the USA may be smaller than this suggests, since there is release on recognizance exists and release on supervision, ordering the defendant to report to someone periodically.

The Investigating Judge

In many more serious crimes an investigating judge is involved. The prosecution may demand the start of a judicial inquiry (*Gerechtelijk Vooronderzoek*; GVO) by an investigating judge. He or she must do so if certain coercive measures (*dwangmiddelen*) are necessary, such as pretrial detention, phone tapping or house searches. The role of the investigating judge in the Netherlands, however, is much more limited that the French *juge d'instruction*. The involvement of the investigating judge largely

depends on the seriousness of the case. Usually it is no more that authorizing some coercive measures. Even if the judge is more involved—for instance hears witnesses—he or she never writes a report or draws conclusions, but rather collects information to be placed in the *dossier*. The judge does not decide whether the evidence is enough to bring the case to trial, as his or her French colleague does.

In many ways, the role of the investigating judge is parallel to the role of magistrates and judges in the USA who are responsible for the issuance of search warrants, arrest warrants and wiretap warrants—such warrants are issued by the judge or magistrate only on a showing or presentation of proof by the investigating police of probable cause that the defendant has committed a crime. In the case of search warrants, the warrant must narrowly specify what the police are looking for and will, therefore, be permitted to seize. Improperly issued warrants and improperly seized evidence can result in seized evidence being excluded at trial.

Going to Trial

In the Netherlands the prosecutor decides whether a case is brought to trial. This is done under the principle of opportunity: the prosecution can dismiss a case for many reasons. In addition to the one's mentioned above, Dutch prosecutors hold the attitude that non-criminal law solutions are usually preferable to a trial. The prosecutor may impose conditions on the suspect, as for instance taking therapy or not having contact with the victim.

In the USA the prosecution of a case can travel several different paths depending on the jurisdiction (that is, states have different procedures which may also differ from federal procedures). In almost all instances there are procedural hurdles the prosecution must cross before a case can be brought to trial. In some jurisdictions there may be a hearing before a judge—who makes a preliminary judgment about the merits of a case—before the case is 'bound over' for prosecution. In about half the states, the prosecutor must secure permission for prosecuting a case from a grand jury. The grand jury comprises a group of citizens who sit for varying periods of time and have responsibility for assuring that meritless cases do not proceed. In any event, a prosecutor may, once suitable evidence has developed, drop the charges against a defendant. There are also a number of plea bargaining arrangements in which a defendant can, for example, agree to some sort of supervision or program of treatment which, if successfully completed, will result in the dropping of charges. Another variant of this procedure is that charges will not be pressed against a defendant if the defendant stays out of further trouble (e.g., no further arrests) for a stated period of time. In many instances in the US,

plea bargains or arrangements which do not result in a prosecution or criminal conviction are a preferred method of handling cases in which a defendant is relatively young and does not have a prior criminal record.

At Trial

In the Netherlands the trial is based on a very detailed and precisely written charge (*telastenlegging*) by the prosecution. If the defendant is charged with a number of crimes, the prosecution may charge him with a few of these and submit the dossiers of the other cases to the court *ad informandum*. The prosecution does not have to produce evidence on the *ad informandum* cases, but the court may take these in consideration for the sentence. In a USA trial, prior convictions and uncharged offenses are almost always not before the jury in the guilt phase of a trial—on the theory that this information could prejudice the jury against the defendant. However, prior convictions, and sometimes, uncharged offenses, do play an important role in sentencing.

At trial, the most marked differences between the two systems become evident. In the USA the model of a trial is that of a contest between two parties in from of a jury trial in which the judge serves primarily as an independent arbiter between the parties and is responsible for assuring that rules of evidence and procedure are followed during the trial. In the Netherlands misdemeanors and less serious crimes are decided by a *unus iudex*, while a three-judge court decides the more serious crimes. In the USA, the presence of a jury in some ways requires oral presentation of all the evidence anew at trial. Both parties call witnesses who are subject to cross-examination by the other party.

In the Netherlands decision-making is done by professional judges who decide most cases on the dossier without hearing witnesses at trial. They must arrive at the material truth. The legal criterion is that the court must be convinced that the suspect is guilty as charged based on legal evidence, i.e. evidence that is enumerated in the Code of Criminal Procedure. Since what is considered legal evidence is very broadly defined in the code, this means a system of free proof, with one exception: nobody can be convicted on one single piece of evidence—for instance a confession, a DNA match or a witness statement; at least two pieces of evidence are necessary.

In contrast to the USA, the Dutch court is both gatekeeper of the quality of evidence and the decision-maker. As a consequence, Dutch judges routinely admit all evidence—it is in the dossier anyway—and just ignore evidence they consider too low of quality. Illegally obtained evidence usually does not lead to dismissal of the case, but can result in a reduced sentence for the defendant.

In the USA the quality of evidence is maintained by decisions of the judge on the admissibility of evidence. Thus, the difference between the two countries can best be characterized as follows: the USA is a country with admissibility rules; the Netherlands is a country with decision rules.

In the USA witnesses are called by the parties and are examined by the calling party and cross-examined by the opposing party. In the Netherlands, witnesses are called either by the prosecution or by the court. The defense has to ask the prosecution to call witnesses it deems necessary for the court to hear and must argue why the witnesses need to be heard at trial. The prosecution can refuse to hear all or certain witnesses, even with the argument that hearing a witness is "not in the interest of the defense." The defense can then ask the court to hear certain witnesses at the beginning of the trial, but this almost always leads to a postponement or continuation of the trial for three months (and a prolonged pretrial detention of the defendant).

In Dutch trials there is no formal cross-examination. Usually the judges in the court start asking questions of a witness and then give the prosecution and defense an opportunity to do so. As in the USA, the defendant has a right to speak at trial, but in contrast to American trials, the defendant is not sworn in as he does so.

Verdict and Sentencing

In all cases in the Netherlands and most cases in the USA the court decides on the sentence if the defendant is found guilty. In the USA this is a second phase of the trial, in which additional witnesses may be called to testify on aspects that are relevant for the sentence. In the Netherlands there is a so-called one-phase trial in which all information relevant to both determination of guilt and the sentence is presented in the dossier at the beginning of the trial. This includes prior convictions of the defendant.

American judges have much less discretion in sentencing that Dutch judges have. American judges typically have to choose between a specific maximum for a crime and a specific minimum ("departures" from guidelines for sentencing are permitted though the judge typically has to explain the basis for the departure), and sometimes have even less options; for instance in the so-called three strikes laws (Ardaiz, 2000; Marvell & Moody, 2001). The Dutch courts can choose a sentence anywhere between a specific maximum and a general minimum for all crimes: one day in jail or a 7 euro fine. They can even find the defendant guilty without imposing a sentence.

The decision by a Dutch court is usually rendered two weeks after the trial formally ended and again is given is writing. Dutch courts at any

level present their decisions as unanimous; dissenting opinions are not allowed because judges have to maintain the secrecy of the court chambers. Unlike the USA, the decisions are argued—that is, defended and justified in a written opinion. In the verdict, courts have to specify why they consider the defendant guilty and have to address the key arguments by both defense and prosecution on the evidence presented at trial. Also, the sentence has to be argued. It should be noted, however, that the argument on the evidence often is not more than an enumeration of the documents and parts thereof that support the court's decision. In most cases it is self-evident how the documents support the decision; sometimes is remains unclear why, for instance, the court believed one witness and not another who testified to the opposite state of affairs.

In the USA the jury, deciding on the guilt of the defendant, does not have to do anything other than make the finding that the defendant is guilty or not guilty, which (particularly in jurisdictions which do not permit interviews of jurors) will leave people completely in the dark on how the evidence was evaluated. Even in instances where jurors can be interviewed after trial, little they say—other than evidence of misconduct on the part of the jury—can be used as a basis for appealing the verdict. It is possible—though uncommon—for a trial judge to dismiss the charges against a defendant if, in the judgment of the trial judge, the evidence offered by the prosecution could not reasonably support a conviction of the defendant. It is even possible, but rarer yet, for a judge to do this after a jury conviction.

JUDGE OR JURY?

An interesting question—and the subject of intense dispute between the authors—is whether judges or juries render better or worse decisions. The question was addressed by Kalven and Zeisel (1966) in their hallmark comparison of American judges and juries. That study, however, is hardly relevant for a comparison of Dutch judges and American juries, since in the Netherlands trials of more serious crimes are handled by a three-judge bench, rather than by a single judge. The very size of panels may influence verdicts.

Apart from these effects, we know that decision-makers fall prey to all kinds of biases. These biases are much better documented for jurors than for professional judges who are vastly under-studied, so it would be unfair to point at the known biases for jurors as a basis for claiming superior decision-making by professional judges. Still, some of the biases may be absent in Dutch (or professional continental) judges and may make them better in handling criminal cases than jurors, at least to the extent

they do not fall prey to any of the undesirable biases, cognitive limitations and faulty inferences detected with American jurors (McEwan, 2000).

Because of their greater experience with deciding cases, judges may be better in some respects to jurors. There exists, for instance, poor juror sensitivity to variations in trial evidence in cases involving eyewitnesses (who, in some conditions, make identifications under conditions that are thought, by psychologists, to either promote or impair accurate identifications). Dutch judges may be better calibrated to these conditions, though US jurors are not (Cutler & Penrod, 1995). Jury research in Belgium by Van Langenhove (1989) shows that it is, with some exaggeration, virtually impossible to be juror if one has finished high school. Such selection effects may produce juries who on average are less informed than judges and thus their decisions may involve more errors.

On the other hand, another biasing effect may stem from the following. In a series of judgments, conviction rates on a weak case are lower when the weak case has been preceded by cases with strong evidence as opposed to weak evidence (Kerr, Harmon, & Graves, 1982). Since professional judges decide longer series of cases, they may be prone to this effect.

On other factors there may be no difference between professional judges and jurors. Jurors generally underutilize probabilistic evidence (Thompson, 1989), but there is no reason to expect professional judges to do better (Wagenaar et al., 1993). Also, pretrial publicity (Otto, Penrod, & Dexter, 1994; Studebaker & Penrod, 1997) seems to influence jury behavior and again there is no reason to expect judges to do better.

On some aspects jury may do better. For instance, defendants charged with multiple crimes are more likely to be convicted on any one of those crimes when all crimes are tried together rather than separately. A very strong argument can be made under US law that this should not happen (Tanford, 1985; Tanford & Penrod, 1982, 1983, 1984; Tanford, Penrod, & Collins, 1985). So, the extent to which multiple crimes are charged in one trial—quite common in The Netherlands—may influence on decision-making.

Appeal

With a few exceptions, all court decisions can be appealed in the Netherlands to the court of appeal (*Gerechtshof*). There, the case is tried *de novo*, meaning that in principle the case is tried anew. In the USA, although it is possible to secure de novo trials following judge-alone decisions on minor offenses in some jurisdictions, for the most part appeals are judged not de novo, but on the basis of appellate documents with reference to actions taken at trial. Appeals by the defendant are possible in

all cases that go to trial, though the likelihood of success will largely depend on whether a serious error (e.g., evidence was inappropriately admitted or something prejudicial was said or done by the prosecutor) was made during the trial. Prosecutorial appeals are extremely limited and most likely to occur during trial over evidentiary issues.

WHICH SYSTEM IS BETTER?

Above we have tried to identify key differences in criminal procedure between the USA and the Netherlands. It should be evident that there is no way to answer the question "what system is 'better'" in any direct way. In part the difficulty arises from the problematic nature of the term 'better'. Let us just enumerate some possible definitions of 'better'.

Although some might be inclined to define "better" in terms of clearance rates for crimes or crime rates, we prefer a much more pronouncedly psychological perspective when defining "better" and from that perspective, quality of decision-making within criminal justice systems and perceptions of the justice rendered by systems loom large. With respect to quality of decision-making, a most obvious criterion would be that the system that produces the least number of miscarriages of justice would be the better one, where a miscarriage of justice is defined as the conviction of somebody for a crime which is proved either to have been committed by somebody else or has not occurred at all.

Miscarriages of justice have been reported both in the United States, the Netherlands, but also in the United Kingdom, Germany, France and elsewhere.[1] Of course, even though more miscarriages of justice have

[1] Dutch suspected miscarriages of justice have been described by Boumans and Kayser (1979), Bijnoord (1989), Blaauw (1996; 2000), Broekhuizen (1991) and Van Straten (1990). See for miscarriages of justice in the United States: Anderson (1999), Bedau and Radelet (1987), Borchard (1932; 1970), Crispin (1987), Dennis (1993), Dillon (1987), Dwyer, Neufeld, and Scheck (2000), Folsom (1994), Frank and Frank (1957), Frasca (1968), Gardner (1952), Gershman (1997), Gross (1987; 1996; 1998), Lassers (1973), Malcolm (1999), Platania, Moran, and Cutler (1994), Radelet, Bedau, and Putnam (1992), Radin (1964), Rattner (1988), Sharlitt (1989), Sotscheck (1990), Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary (1994), Uviller (1996), Westervelt (2001), Yant (1991) and Zimmermann (1964); in the United Kingdom: Belloni and Hodgson (2000), Bentley (1995), Blom-Cooper (1997), Blom-Cooper and Brickell (1998), Brandon and Davies (1973), Dickson (1993), Du Cann (1960), Engelmayer and Wagman (1985), Gilligan (1990), Greer (1994), Hale (1961), Hill, Young, and Sergeant (1985), Hill and Hunt (1995), Huff, Rattner, and Sagarin (1986), Huff and Rattner (1988), Huff, Rattner, and Sagarin (1996), Jessel (1994), Kee (1986), Mullin (1989), Nobles and Schiff (1995), Rolph (1978), Rose (Rose, 1996), Royal Commission on Criminal Procedure (1993), Thornton (Thornton, 1993), Wadham (1993), Walker and

been detected in some countries, notably the United States, it is unclear to what extent detection depends on the number or rate of miscarriages of justice in each country and/or the methods used to detect miscarriages. As a practical matter, until recently miscarriages of justice have been most commonly detected by accident: somebody unexpectedly confesses to a crime for which somebody else has been convicted, the presumed dead victim suddenly reappears or somebody cares enough about the misfortune of the convict and vigorously pursues the evidence in the case. A growing exception to this model of accidental discovery is the increasing use of DNA tests in cases tried before the widespread availability of DNA techniques. In the USA, at least, it seems that hardly a week goes by without a newly DNA-detected miscarriage of justice. As the use of post-conviction DNA testing increases (which, based on recent experience in the US) it appears will happen, it is likely that a growing number of miscarriages will be detected and reported. Of course, once DNA testing is routinely applied in the narrow range of cases (e.g., sexual assault) where it is possible to collect DNA evidence, the source of those miscarriages will be exhausted.

Rather than relying on counts of miscarriages (which constitute a very small percentage of all convictions) a more fruitful way to assess the quality of system outcome might be to try to identify components of criminal justice systems which have a higher probability of generating miscarriages of justice. An example is the study by Wagenaar, Van Koppen, and Crombag (1993), showing that so-called dubious court decisions are often based on errors made in earlier stages of the proceedings.

A second major psychological variant on the notion of better concerns the perceptions of criminal justice participants that justice has been done. In their work on legal procedures, Thibaut and Walker (1975; Thibaut & Walker, 1978) have shown that variations in procedures can contribute considerably to the sense of justice felt by suspects, defendants, and the general public afterwards. It should be noted that most criminal cases, say 88% (Crombag et al., 1994), are clear-cut cases in terms of evidence. In these cases only the sentence is a decisional problem. Since defendants in these cases know there are going to be convicted anyway,

Starmer (1993; 1999), Waller (1989), Woffinden (1987) and Young and Hill (1983); in Germany: Ebermayer (1965), Hirschberg (1960), Judex (1963), Kiwit (1965), Mostar (1956), Peters (1970; 1972), Preute and Preute (1979) and Vosskuhle (1993); in France: Beel (1993), Chemineau (1983), Floroit (1968) and Vidal-Naquet (1984); and in some other countries: Callaghan (1994), Carrington, Dever, Hogg, Bargen, and Lohrey (1991), Chamberlain (1990), Hatakka and Klami (1990), Hogg (1991), Karp and Rosner (1991), Luis Carlos (1973; 1975), Fijnaut (1983), Pizzorusso (1965), Stortino (1976), Sutermeister (1976), Tichane (1984), Tullock (1994), Walsh (1993), Wilson (1991) and Young (1989).

procedural influences on perceptions of justice may be much more important than infinitesimal error rates. Research on procedural justice has shown that justice concerns of individuals likewise apply to police and prosecution behavior (Lind & Tyler, 1988; Tyler, 1990).

Although we are eager to consider and comparatively evaluate inquisitorial and adversarial systems, we are the first to acknowledge that we simply do not have an adequate empirical base upon which to make such judgments. Indeed, our primary objective in assembling this volume is to begin building that base and in doing so, we have placed particular emphasis on examining the quality of decision-making in the Dutch and US criminal justice systems.

SUBJECTS NOT COVERED

Of course a full comparison of systems should include all stages of criminal procedure, from police investigation to Supreme Court decision-making. That would involve many interrelated stages and many aspects of the criminal procedure in each country. Many of these aspects are not dealt with in the present volume. For example, most of police behavior is not covered (exceptions are the chapters by Slobogin and Vrij). The same holds for investigative techniques as offender profiling (Canter & Alison, 2001; Godwin, 2000; Hazelwood & Burgess, 2001; Turvey, 1999). We also do not discuss many pre-trial procedures as reflected in plea-bargaining and the role judge commissioner.

To just mention some other subjects we do not cover in this volume, but of which both of us expect to find important differences: procedural justice considerations, advocates, battered women or other syndromes, effects of media on decision makers, expert versus lay cognitive psychology, and, of course, miscarriages of justice.

THIS VOLUME

Although we do not have space to cover everything, we do believe this volume presents an excellent overview of the primary features of the inquisitorial and adversarial criminal justice systems. In assembling this volume we have particularly emphasized contributors who bring a psychological perspective to the comparative process. Our contributors are drawn for the psychological legal communities and although we have sometimes been successful in our search for contributors who are familiar with both inquisitorial and adversarial systems, we recognize that it is the

rare psychologist who is familiar with both legal systems and the rare legal scholar who is versed in psychological research or practice that is relevant to both systems. What we have tried to do in this volume is to find authors who bring a mix of psychology and comparative law to the volume. In some instances we have chapters from authors who can directly compare systems and in some instances we have paired chapters from authors who can examine a common set of issues by discussing their own systems. Our hope is that our selections will, in the whole, advance comparative psychological research on inquisitorial and adversarial systems.

In the second chapter Hans Crombag describes why he considers a comparison of the two systems, though interesting, futile in the end. Please note that in Chapter 20 we continue that discussion anyway.

The two following chapters are devoted to pre-trial behavior. Christopher Slobogin compares American and European rules and practices of police investigations, while Aldert Vrij discusses the large differences in police interrogations of suspects.

One important difference between the US and Dutch system is the manner in which suspects and defendants are evaluated and treated psychologically. First, John Monahan describes the American manner in which the risk of re-offending is assessed, after which Corine de Ruiter and Martin Hildebrand give an account of how that risk is evaluated in Dutch defendants and how they are treated after a conviction to an asylum.

The rest of the volume is devoted to the trial and trial behavior of the participants. Samuel Gross describes the peculiarities that are brought about by the fact that the USA still knows the death penalty. There is no sister chapter for the Netherlands, because there the death penalty has been abolished long ago. Harald Merckelbach writes on so-called recovered memory cases. As in the USA these are known in the Netherlands after recovered memory therapy practices have been imported from the USA.

As we described above, cross-examination as is practiced in the USA is unknown in the Netherlands. For whomever thinks that the Dutch then miss "the greatest legal engine ever invented for the discovery of truth", as Wigmore contended, should read the chapter on cross-examination by Roger Park.

In Chapter 10, Ingrid Cordon, Gail Goodman and Stacey Anderson present current psychological knowledge on the manner in which children are heard in court in the United States. Again, there is no Dutch sister chapter to this, since in the Netherlands children are almost never interviewed at trial. We return to this subject in Chapter 20.

We go to Germany in the next chapter, because Siegfried Sporer and Brian Cutler give a comparison of identification evidence in practice between the USA and Germany. Their comparison, better than a comparison

between the USA and the Netherlands, demonstrates what difference it makes if guidelines for identification evidence are well integrated in the legal system, as is the case in Germany.

The following five chapters are devoted to expert evidence. First, Petra van Kampen gives an overview of the state of the law in the Netherlands and the United States, which is necessary to appreciate where all the differences come from. Thereafter, both Michael Saks and Ton Broeders, each from his own perspective, compare the role of experts in the two systems. To give an appreciation that even on the European continent major differences exists, Claudia Knörnschild and Peter van Koppen, in the next chapter, compare psychological expertise in the Netherlands and Germany, especially in child sexual abuse cases. In the next chapter Peter van Koppen and Michael Saks analyze how, in different ways, the Dutch and the American systems are badly protected from unsound psychological expertise in the courtrooms and try to give guidelines how to prevent such evidence.

The next three chapters are devoted to comparisons of different systems of decision-making in criminal trials. Francis Pakes shows how judges from both adversarial and inquisitorial systems try to integrate their courtroom styles in the same court: the International Criminal Tribunal for the Former Yugoslavia. Shari Diamond makes the case for the jury in her chapter that follows, while Ruth Hoekstra and Marijke Malsch demonstrate the importance and fallacies of the so-called principle of open justice in the Netherlands.

The volume is concluded by a chapter in which we draw together the observations made about the two systems in the preceding chapters and provide a summary overview of what we now call the "John Wayne and Judge Dee versions of justice."