The John Wayne and Judge Dee Versions of Justice

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In the previous chapters it has been demonstrated that quite a few differences exist between the adversarial criminal justice system as it is commonly practiced in the U.S.A. and the form of inquisitorial system as it is practiced in the Netherlands. It has been argued that these systems are somewhere at opposite extremes of the continuum adversarial-inquisitorial (Nijboer, 2000; Toornvliet, 2000). In his chapter in the present volume Hans Crombag noted "that the question which of the two models is the better one, is unanswerable, because they do not serve the same (proximate) goals." Although "The ultimate goal of both systems is ... to serve justice," Crombag argued that "In the inquisitorial model truth itself is the proximate goal of the system", while "fair play is the proximate goal of the adversarial model."

Of course, Crombag is right, but in this chapter we attempt to sharpen the contrasts by taking the comparisons a bit further. This chapter is an extension of a series of arguments about the nature and merits of the two systems that the authors have sustained for more than a decade. In preparing this chapter Van Koppen has taken the lead in formulating a series of propositions about the contrasting nature and merits of the two systems and Penrod has responded and offered alternative interpretations and perspectives.

1 Of course, there are other countries with inquisitorial systems that come close to that of the Netherlands, notably France and Belgium. For brevity, we will refrain from discussing these countries. It should be noted that especially the Belgian criminal justice system resembles the Dutch in many ways. It is not clear, however, that all of the other elements of Dutch society hold as strong for Belgium.
DIFFERENT FORMS OF JUSTICE?

In the next several pages we sketch out two contrasting and somewhat idealized visions of Dutch and American legal cultures. These visions underscore the proposition that the two systems have different proximate goals and they do so because they serve different forms or ideals of justice. Because the forms of justice served by both systems differ the characteristics of the systems are consequently different in many important aspects. Furthermore, the different forms of justice served by the American and Dutch criminal justice systems are, arguably, deeply rooted in both societies. The form of justice preferred by the Dutch is based on a preference in Dutch society to reach compromises as much as possible. End results of decisions, then, are evaluated by the extent to which they serve justice in a form that conforms as much as possible to this compromising nature of Dutch social relations. The form of justice preferred by Americans in this idealized vision is based on the assertion and vindication of individual rights.

Among the three principles of justice—need, equality and equity (see for a more refined discussion of these concepts Berkowitz & Walster, 1976; Cohen, 1987; Walster, Walster, & Berscheid, 1978)—the two former better fit into a compromising point of view than the latter. In the principle of need, decisions are evaluated according to the extent that they serve the needs of the relevant recipients as much as possible. According to the principle of equality, decisions are more just if they reach a division as equal as possible between the recipients. An equitable decision is one in which the “input” of the recipients—often framed in terms of better arguments or stronger positions on some dimension—is reflected best. In short, the Dutch consider an end result right and just if it serves the needs of all people involved as much as possible and at the same time does not diverge too much from an egalitarian division. Thus, the Dutch focus more on principles of justice, need and equality, than on equity. Weighing and balancing of interests and opinions are often much more important than taking firm decisions. This manner of serving justice reflects the compromising nature of Dutch society.²

²It should be noted, however, that especially in nowadays Europe a certain level of osmosis is taking place between the systems (Gutwirth & de Hert, 2001, p. 1051). The European Court of Human Rights in its Kruslin decision (ECHR 24 April 1990, Series A, vol. 176-A, par. 29) noted: “but it would be wrong to exaggerate the distinction between common law countries and Continental countries. [...] Statute law is, of course, also of importance in common law countries. Conversely, case law has traditionally played a major role in Continental countries, to such an extent that whole branches of positive law are largely the outcome of decisions by courts.” See on this subject also below.
In the idealized vision of American justice the principle of equity seems to be most preferred principle of justice. Decisions often appear to be made in a manner such that one of the recipients prevails rather than arriving at a compromise in which all recipients receive a share. This preference for equity would seem to be rooted in American society in the same manner in which a preference for need and equality is rooted in the Dutch. These differences, to be discussed below, have led to two different types of proceedings. In short, American law is based on an individual conflict type of proceedings, while European continental law is much more based on a policy implementing type of proceedings (Damaška, 1986, pp. 25–27).

The next section focuses on the roots of these differences, and then the discussion turns the consequences of these preferences for the daily practice of the respective criminal justice systems. We start with the Netherlands.

THE COMPROMISING SOCIETY

Especially during the first half of the 20th Century, Dutch society was strongly divided in so-called zuilen (pillars), parts of society that are divided according to religious and political denominations (Lijphart, 1975). The most important pillars in which Dutch society was divided were Catholics, Protestants, Socialists, and Humanists (an extensive discussion is given by Kossmann, 1978, pp. 567–574). None of the pillars constituted a political majority at any point in time. Although these pillars were in some sense incompatible, still the country needed to be run and thus always political and social coalitions between these pillars were necessary. Thus, to ensure a stable society, the government system was built on negotiation and compromise among the denominations, rather than antagonism between the pillars.

This form of "pacificatory democracy" or pillarization requires, among others, a cabinet to appoint both political allies and allies of the opposition to important offices. If a cabinet did not, it could likewise expect the present opposition to fill every important vacancy with their own allies when the opposition came into power. But, more important, it could be expected that a coalition with the present opposition would be necessary after the next elections. So the opposition cannot be alienated too much at any point in time. In this manner, appointment of allies of the opposition is an essential part of the compromising structure that ensures a stable government, even with incompatible political and religious pillars. As a byproduct, this political situation produces a tendency to "de-politicize" political questions (Andeweg, 2000; Lijphart, 1975).
In the political arena this works as follows. The seats in the lower house of the Dutch Parliament are usually divided among 10 to 15 political parties, none of which either ever had or probably will have the absolute majority. Until recently, cabinets were always based on coalitions between the Christian parties (recently unified into the Christian Democratic party CDA) on the one hand and either the Socialist party (PvdA) or the Conservative party (VVD) on the other. Sometimes other, smaller, parties took part. Until the fall of 1989, a coalition of VVD and CDA was in power; after that a coalition of CDA and PvdA. From 1994 a coalition of PvdA and VVD, together with the smaller liberal party D66 formed a coalition. The coalition structure of Dutch government makes the process of legislating quite tedious, and stimulates compromise, if not ambiguity in most statutes. The need to compromise fragmented political interests also produces complicated and detailed statutes in The Netherlands. In contrast, Atiyah and Summers argue that the sharp political divisions in Britain between the two parties and the prevailing strong party discipline make such compromising legislation unnecessary there, resulting in shorter and clearer statutes (see Atiyah & Summers, 1987).

In fact, the Dutch legislator often refrains from regulating certain issues, and leaves the regulation of these issues to the judiciary. It may be argued that one consequence or aspect of Dutch judicial specialization and differentiation from the legislative branch is that the development of Dutch civil law has almost entirely been left to the Supreme Court. But also in criminal law, the Supreme Court gave rulings on important subjects like abortion, euthanasia, labor strike, and the law of evidence without any legislative intervention.

Especially in the last two decades the legislature has left more and more subjects to decision by the courts. Indeed statutes often include vague norms that need to be fully defined by judicial decisions (e.g., contract have to be executed in “good faith”, behavior of the government has to accord to “principles of decent administration”, see Schoordijk, 1988). Partly, these vague concepts are used in statutes because the legislators today realize that it is impossible to make a specific rule for everything; partly these vague concepts are necessary because that is the best political thing that can be attained in a coalition compromise.

It might be noted that judging in the Netherlands is a life-long career—Dutch judges are trained in the law just as are Dutch lawyers but lawyer and judge career paths quickly diverge, with judges receiving special training in their profession. Whether such specialization is a desirable matter (a point we return to below) is subject to debate. During a recent speech concerning the slow pace of federal judicial appointments in the United States, Chief Justice Rehnquist observed “We have never had, and
should not want, a judiciary composed only of those persons who are already in the public service.... We must not drastically shrink the number of judicial nominees who have had substantial experience in private practice.... Reasonable people, not merely here but in Europe [believe European systems of career judges] simply do not command the respect and enjoy the independence of ours” (Greenhouse, 2002). Although we do not tackle the question of independence, survey data presented below cast significant doubt on the respect proposition advanced by the Chief Justice.

THE JUDGE DEE MODEL OF JUSTICE

The compromising nature of Dutch society is not only reflected in the political arena, but is a constituent part of much of Dutch society; also in the subject of the present contribution: the criminal justice system. This compromising nature of the criminal justice system is essential to its operations. We will call this the judge Dee version of justice, after Judge Dee, a Chinese judge who actually lived under T’ang dynasty (618–907 before Christ), but has recently become famous because of the mystery novels written by the Dutch diplomat Robert van Gulik (see for instance van Gulik, 1959, 1961). In the novels, Judge Dee (or in Dutch rechter Tie) is the person who is not only a cunning detective, but also a decision maker who achieves quite wise decisions by balancing facts and interests.

THE CONTENDING SOCIETY

It has often been argued that the United States is the most litigious country in the world (Holland, 1988) and this characterization of the American justice system underscores a version of justice that Americans seem to prefer. American society is not a pillarized society of groups with contrasting values but a compromising ethic. In contrast to that vision of Dutch society one can identify a vision of values in the United States where the central moral elements of society are shared by almost all citizens. Huntington describes this phenomenon as follows:

Ideas of constitutionalism, individualism, liberalism, democracy, and egalitarianism are no monopoly to Americans. In some societies, some people subscribe to many of these ideas and in other societies many people subscribe to some of these ideas. In no other society, however, are all of these ideas so widely adhered to by so many people as they are in the United States. (Huntington, 1981, p. 15)
According to Huntington this has a decisive influence on all of American society. The American society has a broadly shared moral passion, that distinguishes it from other Western democracies (p. 11) and that has changed remarkably little during the last 200 years since Alexis de Tocqueville (1863) wrote down his observations on America. Bryce (Bryce, 1891, pp. 417–418) summarizes these shared moral values in what he calls the American Creed: (1) the individual has sacred rights; (2) the source of political power is the people; (3) all governments are limited by law and the people; (4) local government is preferred to national government; (5) the majority is wiser than the minority; and (6) the less government, the better. These shared values point to the importance of the rule of law in the United States to govern conflict and social behavior and the limited role for a government. Bryce remarked therefore: “Americans had no theory of the State and felt no need for one…. The nation is nothing but so many individuals. The government is nothing but certain representatives and officials.”

This vision of American justice puts—more than in the Netherlands—an emphasis on the individuals and his rights and duties. There is much less need to compromise than in the Netherlands and there is less need for a strong government to pacify incompatible parts of society. In contrast, Americans depend on their individual actions to rectify whatever conflict may arise. This manner in which social relations are managed seems to be related much more to the justice principle of equity (again see Berkowitz & Walster, 1976; Cohen, 1987; Walster et al., 1978). There is no strong government that can equalize the divisions of proceeds—of whatever nature—in society or attend to the needs of individual recipients as in the Netherlands. Rather, individual actions to solve conflict in the United States depend on the “input” individuals can bring to a conflict—be it the rule of law that is on their side or any other input. This will almost automatically lead to a much more “tougher” interaction of participants in a conflict. In conflict one does not look for a compromise but try to get one of the parties to prevail. “This is a country in which order exists because basic rules are accepted by the people, or insisted upon by them” (Barone, 1999).

**THE JOHN WAYNE MODEL OF JUSTICE**

Van Koppen is fond of promoting this idealized American model of justice as a cowboy enterprise and is inclined to see the fictional life and times of John Wayne as a model of this vision. In this vision of American justice John Wayne “said it all” in the movie *The Alamo* (1960): “There’s right and there’s wrong. You got a do one or the other. You do the one and you’re living. You do the other and you may be walking around, but
you’re dead as a beaver hat.” Of course, this perception of American values and American justice and a tendency to perceive affairs in black and white terms are reinforced by American leaders such as Ronald Reagan—who characterized his Soviet adversary as an “evil empire” and more recently, George W. Bush who has described American efforts against terrorism as a “struggle ... between good and evil, and nothing else” and has most recently characterized the regimes in Iraq, Iran and North Korea as an “evil axis.” Rhetoric aside, one can, of course, fairly ask whether the American justice is as contentious as these images suggest.

As noted above, the United States certainly has the reputation of being a highly litigious country. Whether this is really true, of course, may depend on how one counts. Although the popular image of American litigation is probably the jury trial, it turns out that most cases filed in the United States never reach trial. For example, when Herbert Kritzer (1986) analyzed 1649 cases in five federal judicial districts and seven state courts, he found that only 7% of cases went to full trial and reached a jury verdict or court decision. Of course, another 15% ended as a result of some other form of adjudication, such as dismissal or arbitration and a further 9% settled following a judicial ruling on a significant motion. But, in this study and other studies of civil litigation (e.g., Trubek, Sarat, & Felstiner, 1983) it is clear that between one-half and two-thirds or cases settle through negotiations between the parties without significant involvement of judges—in a sense, the system is one in which the vast majority of disputes are settled through negotiation and the courts are perhaps used mostly to get the attention of the opposing party. Even on the criminal side, the use of plea-bargaining assures that the vast majority of cases are resolved through negotiations; though, of course, there are intense arguments over the desirability of using plea bargaining to dispose of criminal cases (see for instance Gorr, 2000; Micelli, 1996; Palermo, White, Wasserman, & Hanrahan, 1998).

A study by Miller and Sarat (1980–1981) is quite interesting because it suggests the possibility there is actually too little litigation in the United States. The study, a survey of 5000 adults who were queried about a broad range of tort, consumer, debt, discrimination, government, divorce and landlord tenant problems (each had to involve stakes of $1000 or more—in 1980 dollars) revealed that large proportions of some problems (e.g., 70% of discrimination problems) were unresolved because no complaint was made—probably because those injured had little hope the problem would be resolved. For most types of problems court filings were quite uncommon—typically 5–10% or less—with the exception of divorce problems in which filings occurred in 45% of the “cases”. These results hardly paint a picture of aggressive litigiousness—though, of course, the
possibility remains that the frequency of not following through with complaints is much higher in other countries such as the Netherlands. There is even the possibility that the frequency with which problems arise is lower. This is clearly an arena in which comparative research is needed.

**THE CRIMINAL JUSTICE SYSTEMS**

In these idealized accounts, the Dutch structure of society has led to a compromising nature in both government and many other parts of society. This compromising nature of society has led to a preference for the use of the principles of justice need and equality. For divisions in society according to need and equality a relatively strong government is necessary. In contrast, American society is much more directed at individual actions that are governed by the justice principle of equity. With a relatively weak ordering of relationships at the governmental level, individuals have to try to prevail in conflict, rather than rely on equitable distributions achieved through governmental action. Individual rights play a much more important role in the United States than in the Netherlands, where often the most "reasonable" solution is sought.

Are the differences discussed above between the Netherlands and the United States reflected in their criminal justice systems? In the Dutch inquisitorial criminal system the government—in the form of the court—plays a much more active role than in the United States adversarial system, where the judge is more an arbiter who has to choose between the position of both antagonist parties. As a consequence, decisions in the Dutch criminal justice system may often reflect the more compromising nature of Dutch society, while decisions in the American criminal justice system more often seem to involve a choice for either one or the other party. In that sense, the Dutch criminal justice system is much "softer" than the American "tough" way of handling cases. Evidence for these differences can be seen in many aspects of the respective criminal justice systems. The following sections highlight differences that surface in previous chapters in this volume.³

³We could also point at elements in civil law. One example: American contract are much longer than Dutch contracts. This is related to the manner in which courts interpret these contract if a conflict ensues. In the USA judges much more than in the Netherlands look at the letter of the contract and provisions in it than Dutch judges do. American judges in that manner evaluate which litigant is right in its interpretation of contractual provisions. Dutch judges take a more compromising stance: they look for what is behind the contractual provisions (what the parties intended to reach with their contract) and judicial decision making in contract law is heavily governed by what is the most resonable in the relation between the parties.
Chris Slobogin compared in his chapter, among others, search and seizure in Europe and the United States. He noted that American lawyers often criticize European procedures as "relatively nonchalant." He quotes Justice Jackson, who explained that the Fourth Amendment's protection "consists in requiring that ... inferences [about criminal activity] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime" (Johnson v. United States, 1948, p. 14). Doing so without a warrant leads to exclusion of the evidence generated by the then illegal search or seizure. Thus, illegal search and seizure leads to a binary decision by the court.

What Slobogin calls "relatively nonchalant" European rules on search and seizure in fact—at least in the Netherlands—is a compromise between the needs of the police and the needs of the suspect. Indeed, usually a warrant must be issued by a judge before a search can be undertaken, but under certain circumstances searches can be done with the permission of a officier van justitie (i.e., a prosecutor, but a different one than the American, see below) and if his or her permission cannot be awaited even without such a permission. In practice, courts are quite lenient to the police on this point and rather than keeping the police strictly to the rules, they tend to weigh the probative results of the search to the violation of the rules.

Of course, one can argue over that question of whether "nonchalant" is an apt characterization of European policies. From a Dutch perspective, search and seizure policies and practices are not a matter of "nonchalance" as Slobogin contends, but rather a search for a reasonable compromise consistent with the compromising nature of Dutch values and politics. From an American perspective—especially from a perspective which exalts the individual and individual privacy over the state—European practices may appear out of balance.

A similar difference between the USA and the Netherlands seems to hold for suspect interrogations. In the USA the interrogation model of Inbau and Read (Inbau, Reed, & Buckley, 1986) may seem predominant (see Vrij in this volume). The essence of their nine-phase model of suspect

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4 Another source of the manner in which Dutch courts handle possibly illegal searches is the general trust courts have in the police (see for a more general discussion of this trust Wagenaar, van Koppen, & Crombag, 1993, pp. 82 ff.). The central role that the Dutch government plays in the pillarized Dutch society is only possible if government officials are basically trusted. This trust is not only extended to judges, but also to the police. These kinds of decisions in American society are, in contrast, influenced by a basic distrust of government and thus of its officials. For instance, in 2000 a little more that 50% of the district court judges and prosecutors in the Netherlands were female (Bruinsma, 2001).
interrogations is that it is assumed that the suspect is guilty. The Inbau-
model is aimed at eliciting a confession. In doing so, trickery (as for instance
presenting nonexistent evidence to the suspect) is permitted. Slobogin may
seem to support this, when he writes: "Based on the work of moral philoso-
pher Sissela Bok, I contended that if the police have probable cause that the
suspect is guilty (which is normally the case if custodial interrogation is
occurring), they may treat him as an 'enemy,' a situation in which Bok, nor-
mally hostile to deceit, would permit it" (Slobogin, 1997).

Deceit and trickery by the police may be common in the USA (Leo, 1996),
but it is normally rejected by Dutch courts. Dutch defendants sometimes
claim the police lured or tricked them into a confession, but always have
great trouble in proving that such really happened. Dutch courts tend to
believe the statements by the interrogating officers and it has been suggested
that part of the difficulty in demonstrating misconduct by the police arises
from the fact that the Dutch do trust their police (Wagenaar et al., 1993).

Of course, the implication of this view is that Americans do not trust
their police. One of the difficulties in gauging whether Americans or
Europeans have found a better balance with respect to police practices is
that such a judgment must be made, at least in part, against the backdrop
of public perceptions of the police, the courts and even legislators. Thus,
American search and seizure practices might, arguably, arise from an
American distrust of the police; although toleration of suspect trickery in
some ways suggests that the police are trusted. Ultimately, in any system
in which there is some fluidity in the relationships among legal and polit­
cical actors, we might expect that the systems of checks and balances that
prevail among police, courts, legislators and citizenry will reflect general
levels of trust and mistrust among those groups. Of course, in democratic
countries the perceptions of the citizenry presumably should count more
than the perceptions of the institutional actors and there is always a dan­
ger that relationships among institutional actors can become “too
friendly”—e.g., perhaps Dutch judges, in their role as investigating mag­
istrates, identify too closely with the police and are therefore more
inclined than American judges to overlook police misconduct.

In the United States, at least, there has been significant fluidity in per­
ceptions of the police (though less fluidity with respect to courts, judges
and politicians). It is true that there is and has been a significant level of
distrust of police in the American public—especially in minority com­
unities—but the extent of distrust of police in the United States is
easily overstated—particularly in comparison to prior times and in com­
parison to the levels of distrust of other actors in the political and justice
arenas. A 1999 national survey in the USA revealed that less than 43%
or respondents had a “great deal” of trust/confidence in local police
(Rottman & Tomkins, 1999). This may seem a relatively low number, but police actually fared better than the courts—the corresponding percentage for the U.S. Supreme Court was 32% and for local courts 23%. Though these numbers look low, the police and courts both fared better than state legislatures (18%) and the media (10%).

Similarly, results from a Gallup 2001 survey (Gallup Organization, 2001) which asked respondents to rate the honesty and ethical standards of people in different fields indicate that the percentage saying "very high" or "high" was 68% for police (up from 37% in 1977) which was not as high as the 90% for firefighters or the military (81%), but was on a par with doctors (66%) and clergy (64%) and college teachers (58%) and vastly better than business executives and senators (25% each) and lawyers (18%). In a sense, these numbers do confirm the general view of Americans as distrusting of government, but also indicate that Americans are much less inclined to trust policy makers and the policymaking branches of government (legislatures and courts) than they are to trust the police and military who execute those policies.

Other survey results from Gallup (Gallup Organization, 2001) indicate that other impressions of the police have changed in dramatic ways. In 1965 9% of the respondents thought there was police brutality in their area. By 1991 the percentage had increased to 39% (38% in 1999). Much more rapid changes occurred with respect to the question: Have you personally ever felt treated unfairly by the police or by a police officer? In 1995, 9% of whites (but 34% of blacks) said "yes." Less than four years later, 24% of whites and 43% of blacks said yes. Clearly, changes in numbers of this magnitude reflect fairly subtly differentiated views of the police: police can be perceived to be honest and doing their essential job well, but perhaps exercising more force than the public is willing to endorse.

Although we are not prepared to undertake comparative analyses of public perceptions of police or other legal actors—nor to explore the more complicated dynamic relationships among public trust of justice actors and the legal relationships among those actors—we do suggest that resolving questions such as what constitutes proper practice in search and seizure and interrogation.

**AT TRIAL**

**PROSECUTORS**

The most telling difference between the Dutch Judge Dee and the John Wayne versions of justice may be the roles of the participants at trial.
Typical for the difference under discussion is the role of the prosecution. In the Netherlands the public prosecutor (officier van justitie) is a magistrate. He or she leads police investigations, a role that in most investigations is more a formal responsibility. Only in major cases does the public prosecutor really give directives to police officers. Also at the Dutch trial the prosecutor accuses the defendant. But there are two striking differences between the American and the Dutch prosecutors.

First, the Dutch prosecutor is not there to prosecute, but is an independent magistrate. He or she is supposed to form their own opinion on the merits of the cases against the defendant and act accordingly. As a consequence, it sometimes happens in Dutch courts that the prosecutor asks for an acquittal at trial. Why the prosecution did not drop such a case in an earlier stage is generally related to practical matters. After the police complete their investigations and send the case file to the prosecutor’s office, it is first handled by a junior employee (parketsecretaris) who will prepare the case for trial. Only in the few days before the actual trial does the prosecutor proper prepare the case. At this point in time the prosecutor may decide that the police did not present enough evidence and then ask for an acquittal. More often this happens in appeal (see below) in cases where the prosecutor at the lower court appealed a court decision, but the prosecutor who handles the case at the appellate court considers the evidence too thin for a conviction.

In some ways American prosecutors are, at least in principle, similarly situated. American Bar Association ethical standards governing the function of the prosecutor specify that prosecutors should refrain from prosecuting charges the prosecutor knows are not supported by probable cause, that the prosecutor is an administrator of justice and officer of the court who must exercise sound discretion in the performance of their functions, and that the duty of the prosecutor is to seek justice and not merely to convict. Although the mandates appear to be similar, the extent to which the behavior Dutch and American prosecutors is also similar is a complicated matter. The prevalence of plea bargaining in the United States particularly obscures the extent to which American prosecutors exercise their discretion in dropping charges against defendants for lack of evidence.

A second point in which Dutch cases clearly diverge considerably from U.S. cases is the manner in which witnesses are called at trial. Dutch criminal trials are predominantly conducted using documents; the file of the case. The file is filled with witness statements (as recorded by the police), police reports and all other relevant pieces of information gathered during the investigation. In most cases, the court decides on the file alone, without hearing live testimony from witnesses. If, however, the prosecution, the defense or the court deems it necessary to hear
live witnesses, they can be summoned to trial. The prosecution does the summoning. If the defense attorney wants to hear certain witnesses, he or she has to ask the prosecution to do so. The defense has to give reasons for calling witnesses to the prosecutor. The prosecution can refuse to summon all or certain witnesses, and often does so, sometimes with the argument that calling a certain witness is "not in the interest of the defense." Of course this decision can be appealed to the full court—for more serious cases always a three judge panel—and if the court agrees with the defense, the witness in question is summoned for the next session of the court. Because of overloaded court dockets, that session make take place only after three months. In this manner the prosecutor presents the defense with a dilemma: it has to choose between the gamble that its case is sufficiently strong to convince the court without the witness in question and awaiting the next session of the court, including an extra three month of custody for the defendant.

The Attorneys

The latter nicety of the Dutch system may seem peculiar for foreign lawyers, but it fits into the manner in which criminal cases are handled—or at least used to be handled—in the Netherlands. In the days of old, when the first author's father still was an attorney, a Dutch trial was anything but a battle. It took much more the form of a polite conversation between gentlemen (the vast majority of the professional participants were male in these days) who—although each departing from his own point of view—together were searching for the truth. The conversation was based on mutual trust and each participant expected the others to respect its position. These gentlemen participants also needed each other; they could expect to encounter each other in future and if one of them took a too uncompromising position, it could haphazard future relations (and cases). In this situation, the defendant her- or more often himself really was the object of investigations rather than participant. He could not give directions to his attorney but rather the attorney held the so-called domus litis: in the end the defense attorney always decided what procedural strategy should be taken.

In recent years this picture has changed somewhat. Especially in high profile cases (usually major drug cases) both the prosecution and the defense attorneys take a harder stance. This kind of behavior is called, by the way, an American form of trial.

There are a number of causes for this change. First, courts put less trust in the police than they used to. This is the product of a parliamentary investigation on police behavior in the beginning of the 1990s (Van Traa, 1996),
which showed that the police conducted investigations in drug cases in an illegal or semi-illegal manner. Second, the prosecution nowadays is much more actively involved in the police investigation in large cases, also as a consequence of the Van Traa-report. Extensive cooperation with the police, however, makes the prosecutor less a magistrate in these cases and more a crime fighter. Third, defense attorneys have changed too. In the last decade a specialized criminal bar has also developed. These specialized attorneys more often than in the past follow their client’s strategy, rather than pursuing their own. Fourth, and last, decision making by the European Court on Human Rights in Strasbourg has had an important influence on Dutch criminal procedure. This court—consisting of justices from both inquisitorial and adversarial countries—through its decisions has made the Dutch criminal justice system somewhat more adversarial. One important consequence is that witnesses are to be summoned to trial more often. Their very presence and the interrogation of witnesses leave less room for a polite gentlemen’s conversation.

THE WITNESSES

Nonetheless, although there are a few tendencies towards a more American way of criminal procedure, most cases in the Netherlands are conducted in the same manner as decades ago. The manner in which witnesses—both experts and other witnesses—are treated in both systems and how they are supposed to behave at trial is quite different in the USA and the Netherlands. The most striking example is children as witnesses. Cordon, Goodman, and Anderson give a description in this volume of how these witnesses are treated in the United States. The Dutch situation is quite different. In the Netherlands child witnesses—often in sexual abuse cases where they are the alleged victims—are interviewed by a specially trained police officer (Dekens & Van der Sleen, 1997). This is done (with a few exceptions) in a specially designed interview room. The interviews are videotaped from an adjacent room with a view of the interview through a one-way mirror. The colors of the room, the type of furniture and toys are designed to make the child feel as much as possible at ease. In almost all cases the one interview with the child is the only interview that is held; children are never summoned to court to testify. The chapter by Cordon et al. demonstrates that the American practice to hear child witnesses in court brings a host of additional issues. It becomes important to find out how much knowledge these children have of the court, how they react to interrogators who are not very qualified to question children, and, most important, how children are able to cope with testifying in public and in front of the defendant who maybe already victimized them.
The Experts

The grilling of expert witnesses in the USA (see Loftus & Ketcham, 1991, for some fine examples) is in the same vein. When the first author has served as an expert witness in the Netherlands, he usually delivers a written report and only sometimes is summoned to court to answer some additional questions. If this happens, he is questioned in a cursory manner about his credentials and the discussion quickly centers at the points at issue (see also the description of the differences by Ton Broeders in this volume).

This is strikingly different from the manner in which experts are treated in the USA. For example, when the second author has served as an expert on eyewitness and jury issues in American trials, he has been called by one of the parties, paid by that party and his testimony elicited in a manner that favors that party. The elicitation of testimony favorable to the calling party may sound as though it will produce a biased outcome and/or compromise whatever neutrality the expert possesses. It is true that the expert may be in an awkward position insofar as the calling party is likely to elicit mostly favorable testimony (the attorney, rather than the witness, does after all, set the question/answer agenda). But, the adversarial system is constructed with the clear expectation that cross-examination will reveal any weaknesses in the testimony and elicit contrary evidence from the testifying expert. This does mean that the cross-examiner has to be prepared and know what sorts of useful testimony can be elicited on cross-examination (and in the second author’s experience that is the primary weakness of the system, supported in this by the chapter by Roger Park in this volume). With respect to what goes on in the courtroom, it turns out that hearings on the question of whether he will be permitted to testify and on what subject matters (hearings which take place with the jury not present) can commonly take much more court time than the actual testimony in front of the jury.

Of course, it is often the case that an American party has undertaken a significant amount of expert shopping in preparation for trial. Thus, while it may be true that only witnesses who support a position advocated by the party will be called, plenty of witnesses who do not support that position may be contacted by a party. Despite perceptions to the contrary, contact by an attorney does not imply that experts will or are expected to adopt the party’s position. They will certainly be called upon to identify what useful testimony they might provide and to further identify weaknesses and contrary evidence that might be elicited on cross-examination—on the basis of such information counsel can determine whether, on balance, the expert is likely to be helpful to the attorney and their client. Of course, expert shopping can certainly present problems that would not arise in a system in
which judges look for and recruit an expert whose opinion reflects consideration of a problem from a neutral perspective.

None of this implies that the experts located by the parties in the American system are necessarily biased or are not independent. Even in instances where an expert is known to testify for one side or the other on a regular basis, that fact may simply indicate that the expert reads the evidence—whether that refers to case facts or underlying science in a different, though unbiased, way as compared to an expert who testifies for the opposing side with some regularity—both unreasonable and reasonable people can disagree. Of course, in the Netherlands an expert is always expected to take an independent and neutral position, even if he is called and paid by one of the parties—though this begs the question of how much consistency there might be across experts who are ostensibly evaluating the same evidence and even ostensibly using the same evaluative criteria. Dutch scientific journals are not filled with univocal interpretations of empirical observations and Dutch scientists have not abandoned the process of generating and testing alternative theories and explanations for observed phenomena.

THE FACT-FINDERS

In light of the points discussed above, the reader will probably appreciate the whole atmosphere at the Dutch trial. Foreign colleagues who attend Dutch trials always remark on the rather informal and cordial behavior of all participants. It still is gentlemen-like—although nowadays most professional participants are female\(^5\)—discussion of the problem at hand.

One can easily appreciate that if the Dutch would introduce a jury, a change of atmosphere would result and would make the trial more formal.\(^6\) Among other things, such a change would probably necessitate the formulation of rules of evidence akin to those in the United States—rules which guide the admissibility of evidence in a manner designed to facilitate fair decision-making by laypersons. In that sense, the absence and presence of the jury in the Netherlands and the USA, respectively, seems to make a lot of difference. Whether increased formality would result in increased incivility and contentiousness is a different matter—one need only look at British trials as one indication that the presence of juries does not necessitate increases in contentiousness.

\(^5\) In fact the Dutch one knew the jury in criminal cases for a few years in the beginning of the 19th Century (see Bossers, 1987).

\(^6\) In the Dutch system there is nothing like a guilty or not guilty plea. Taking such a formal position at trial by the defendant is irrelevant because the court reviews the evidence anyway. The closest Dutch defendants come to a guilty plea is when they confess to the police and maintain their confession until the trial.
In the present volume Shari Diamond makes the case for the jury; though the first author remains unconvinced. She argues that, under some circumstances, jury leniency offers much protection to innocent defendants and that in the majority of cases juries and judges would decide alike. This of course still begs the question of whether juries and judges in the United States perform as well as professional, career judges in the Netherlands. Van Koppen has argued, for instance, that he could replace his general practitioner for a week and would probably make the same diagnosis in most cases (most diseases solve themselves anyway). But that would not make him a good GP: what he particularly worries about is the need for an expert doctor who can diagnose the three or four patients each week with minor symptoms but major medical problems.

In the same vein the American jury was summarized by Stern in the following manner: “The first thing that happens when a criminal trial starts is both sides get to inquire of the prospective jurors whether they know the defendant, the victim or any of the witnesses. If so, they are not allowed to serve as a juror. We then eliminate those who have had experience with the particular type of offense involved in this trial. Next, we get rid of those with strong feelings about it. In time, we insure that no one sits on the jury if they know anything about the case, the people involved or the issues involved” (Stern, 2001). Although Stern may overstate his case, it points at a dilemma of the criminal justice system that hold for the USA and the Netherlands alike. On the one hand the Dutch have professional judges and the Americans Stern-like juries because they can judge the case as detached as possible. For the same reason Dutch judges excuse themselves from cases or can be excuses on initiative of one of the parties if they are is some way personally involved in the case. The voir dire in the USA and the possibility to excuse judges in the Netherlands may increase detachment, but it also may cause the fact-finders to be too little knowledgeable of the social context in which the crime took place. In this respect the American jury has an advantage if jury selection causes at least some jurors to come from the social circles where crimes usually take place. Dutch judges predominantly come from upper class circles, i.e. 78% of their fathers were senior employees or independent professionals (Bruinsma, 2001, p. 1926, Figure 1). On the other hand jurors are almost always first time decision-makers, while Dutch judges are experienced decision-makers. Whether the social circle arguments outweighs the experience argument or not, remains undecided between the two authors.

The presence of the jury in the USA and the absence in the Netherlands again points at the role of the government in society. It is notable in the historic roots of the jury (see the discussion by Hans & Vidmar, 1986, especially Chapter 2) that the jury originated to protect the parties against
arbitrary decisions by the crown. The jury exists, in part, because professional decision makers appointed by authorities whose interests were seen to be adverse to the general population were not trusted. As Diamond describes in her chapter there are still many constraints on the jury—it is not regarded as fully trustworthy as the judge. Indeed, most of the constraints on the jury are really designed to improve the quality of jury decision-making. Rules and procedures are designed with the intent of filtering out “information” that is deemed to be unreliable or biasing. Although this is the sort of information that we might prefer that judges also never hear, the American justice system presumes that such evidence (e.g., hearsay evidence) will not have the same impact on a judge as it will on a jury—that a judge is better situated to ignore information that he or she deems inappropriate for consideration. Some would argue that this is a highly debatable question—subject to empirical investigation.

**The Suspect**

And where does that leave the suspect and defendant? He faces dilemmas in the US system that are not posed to Dutch defendants, the most important being plea-bargaining (Gorr, 2000; Micelli, 1996; Palermo et al., 1998), which again is a typical instance where Americans resort to individual actions without government interference. Suppose you are an innocent defendant who faces a fair amount of damaging evidence (a fine example is the case of Paul Ingram, see Olio & Cornell, 1998; Wright, 1993a,b)? You are faced with the decision during plea-bargaining to cut your losses or take the chance with an unpredictable jury. Dutch defendants do not face such a dilemma (Gross, 1996). Each case goes to trial and in each case the court reviews the evidence, although there are indications that even in the Netherlands, less attention will be paid to the evidence if the defendants confessed to the police and repeats the confession at trial. This at least gives the innocent defendant a second chance to have the

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7 Case examples show that miscarriages of justice are prevented by the full appeal in the Netherlands. A recent one is the so-called Fitting Room Murder on November 22, 1984 in Zaandam, the Netherlands, in which a female victim was brutally murdered in a fitting room of a fashion boutique. A bicycle mechanic was prosecuted for this murder. The only direct evidence linking him to the crime was a so-called scent lineup in which the dog identified the smell of the suspect to a handkerchief used to gag the victim. The lineup, however, had been conducted in a flawed manner (see the description by the police officer who conducted the lineup Kaldenbach, 1998, pp. 127–139). The defendant was convicted to 12 years imprisonment by the Haarlem court. With the same evidence, the appellate court acquitted. At the time, this was considered a dubious acquittal by many. In the beginning of 2002, however, a reanalysis of the materials found at the scene of the crime
damaging evidence reviewed in court, without being posed which dilemmas in plea-bargaining, and may, at least in some cases, give extra protection to the innocent defendant.

US defendants may also be more harshly treated further along the system. The differences begin right after the verdict of the jury. Appeals to higher courts are much more limited in scope in the USA than in the Netherlands. In the Netherlands, two stages of appeal are possible in a criminal case. After the trial decision in first instance, appeal to the next higher court is possible, and the second decision is subject to appeal in cassation to the Supreme Court. As in the first appeal, leave to appeal in cassation to the Supreme Court is not required. In an appeal in cassation, however, the facts as determined by the lower courts are not reviewable; the Supreme Court can only decide on issues of law. The most important difference to the USA is that the trial at the Appellate Court is a full trial in the sense that the case is treated de novo. This gives splendid opportunity to weigh the evidence anew and—if the defendant is convicted again—review the sentence rendered by the lower court. Although American cases are not reviewed de novo, cases can actually traverse many layers of appeal—typically, an appeal to an intermediate state court with possible further appeals to state supreme courts, possibly followed by appeals to federal trial and appellate courts and ultimately (though rarely) to the US Supreme Court.

Whether these differences in procedure produce a material difference in outcomes is difficult to gauge, however. In the US the vast majority of cases are disposed of through plea-bargaining and rarely give rise to an appeal (of course, as suggested above, some plea-bargains make reflect pleas to crimes not committed by defendants, though neither author has seen reliable statistics or estimates of the frequency of such events). Appeals from conviction at trial are certainly common and reversals of convictions in criminal cases are not uncommon—one figure circulated is that reversal rates in most types of criminal cases in the US run about 15% of all appeals—but once plea bargains are factored in, appeals may be taken in only 10% of cases which result in a conviction. On the other hand, the thoroughness of American appellate review might be best indexed by reviews of death penalty cases (which are automatically reviewed in almost all states). A study by Liebman and his colleagues (Liebman, 2000; Liebman, Fagan, & West, 2000) examined reversible error rates in all capital cases from 1973 through 1995. The study covered 4578 capital state appeals and found that 41% of verdicts were reversed on direct appeal; an
additional 10% were reversed at state post-conviction hearings; and of cases that survived state review, 40% were reversed by federal review. Over a 22-year period at least 68% of all capital verdicts were overturned. There are no comparable figures for the Netherlands.

It is much harder to dispute that harsher treatment of American defendants goes on after trial and appeal. In addition to implementing some of the harshest penalties and maintaining incarceration rates that are among the highest in the industrialized world, USA judicial discretion in sentencing is much more limited than in the Netherlands. An example is the so-called three strikes and you are out guidelines and similar sentencing guidelines that produce a tendency of higher sentences (Dickey & Hollenhorst, 1999; Nsereko, 1999). These guidelines also have racial effects and are more punitive for minorities (Albonetti, 1997; Provine, 1998). In the Netherlands there is a maximum for each kind of crime, but a general minimum for all crimes: 1 day in prison or a 15-guilder fine. The court can even declare someone guilty without imposing a sentence (which is customary, for instance, in euthanasia cases where medical doctors were prosecuted for murder).

Of course, there are strong indications that American prisons are of poorer quality than their European counterparts (Vaughn & Smith, 1999) and there are two further points which characterize the harsher individualized American criminal justice system: treatment of disturbed defendants and the death penalty. The chapter by Corine de Ruiter in this volume is a fine example of how disturbed offenders are treated in the Dutch system. De Ruiter’s chapter clearly shows how the Dutch try to compromise the needs of the disturbed offender and the necessity to protect society and do so in a manner that is more respectful of disturbed offenders than is true in the USA.

Of course, the most marked difference in Dutch/European versus American treatment of suspects is the application of the death penalty in the USA. Note that the USA is the only industrialized country that still employs the death penalty (Hood, 2001; Van Koppen, Hessing, & De Poot, 2001). Samuel Gross gives an excellent picture in this volume of all problems surrounding the death penalty. When viewed from Europe, justice in the United States appears much more punitive and retributive and consequently much tougher than what is practiced on the Continent.

The American system is much tougher on perpetrators, if one considers the three-strikes laws, the use of sentencing guidelines or the quality of United States prisons. It also involves secondary victimization for victims and other witnesses, where, for example, children testify in open court (Goodman & Bottoms, 1993). In this respect, the death penalty in the United States mirrors the penal harm version of punishment established there.
CONCLUSIONS

In this chapter we have tried to highlight differences between the US and the Dutch criminal justice system—many of which may be explained by basic differences in the societies. These differences are generally consistent with the idealized visions of justice that we identified early in this chapter—a Dutch society governed by compromise and a American society that is—at least as reflected in its criminal justice system—governed by an emphases on individual rights. Although we cannot authoritatively say that the differences in legal practices before and during trial lead to decidedly different outcomes, it is fairly obvious that post-trial justice is much tougher in the USA than in the Netherlands.

These analyses do not directly lead to the conclusion that one or the other system is better. The authors have certainly not resolved their differences on this matter—although the first author clearly prefers the Dutch system and the second author is prepared to concede, as a matter of personal conviction, a preference for Dutch post-trial practices, it is not yet clear that one system has an advantage over the other in terms of the quality of pretrial and trial decision-making.