

Guilty Before Trial: A Comparison of American and Spanish Juries and their Treatment of Pretrial Publicity

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Introduction

In the U.S., the right of the public to attend trials is implied in the First Amendment's guarantees.¹ Spain, as a civil law country, does not have direct regulation on the press's right to cover trials.² Allowing trials to be accessible to the citizenry does have benefits from the public's standpoint. Public trials increase public confidence in the justice system and allow for community approval when they "see[] justice done."³ However, the public's access to a trial may come into tension with the Sixth Amendment guarantee to a fair jury trial.⁴ Thus, it may become necessary to implement protections to balance public access to trials with trial fairness. This Note will compare the U.S. and Spanish system's respective approaches to the press's right to access jury trials, review the structural safeguards each country has implemented to prevent pretrial publicity from influencing jurors, and evaluate the benefits and drawbacks of each approach.

I. The American Jury System

Trial by jury has been a facet of the American justice system since the early development of the colonies and of the Republic.⁵ Both the U.S. and

† J.D., Cornell Law School, 2019; B.S., Cornell University, 2016. Firstly, I would like to thank Professor Valerie Hans for her guidance and feedback throughout the writing process. I would like to thank Stephen C. Thaman for donating his collection of research about Spanish juries to the Cornell Law School Library. I am also grateful to Professor María Jimeno-Bulnes for communicating with me about numerous aspects of Spanish juries and providing me with very insightful articles. Thank you to the Cornell Law School Library for allowing me to access the Thaman 'Juries' collection. Thank you to the Cornell ILJ team for their work editing this piece. Finally, thank you to my wonderful parents and sister who have provided endless support and love in every aspect of my life.

1. *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 556 (1980).

2. María Jimeno-Bulnes, *El Ejemplo "Emblemático" De Jucio Por Jurado En España: El Caso Gürtel*, 26 REVISTA VASCA DE DERECHO PROCESAL Y ARBITRAJE 4, 16 (2014) [*The "Emblematic" Example of Trial by Jury in Spain: The Gürtel Case*] [translation by author] [hereinafter, *Emblemático*].]

3. James H. Landman, *Balancing Act: First and Sixth Amendment Rights in High-Profile Cases*, 69 SOC. EDUC. 182, 183 (2005).

4. U.S. CONST. amend. I; U.S. CONST. amend. V; U.S. CONST. amend. VI; U.S. CONST. amend. XIV; Landman, *supra* note 3, at 183.

5. Albert Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 871 (1994).

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Spain contain a constitutional provision providing for the existence of juries.⁶ The Sixth Amendment of the U.S. Constitution provides that defendants in criminal cases have the right to a jury trial, and the Seventh Amendment allows the right to trial by jury so long as the amount in controversy meets the legal minimum.⁷

The Jury Selection and Service Act requires that jurors be chosen at random from an equitable cross section of the community where the court sits.⁸ Section 1865 enumerates the qualifications for federal jury service which are very similar to the Spanish requirements as exhibited later.⁹ The Federal Rules of Civil Procedure require that a jury be comprised of at least six jurors, and at most twelve jurors, all of whom must participate in the jury verdict.¹⁰ The Federal Rules of Criminal Procedure require that, in general, a jury should be composed of twelve people unless otherwise provided in the rule.¹¹

Attorneys conduct *voir dire*, the process of questioning prospective jurors with the goal of finding jurors who meet the statutory requirements, to determine whether jurors are capable of exclusively relying on law and evidence when coming to a verdict and which are willing to provide personal information that permits lawyers to select which jurors to challenge.¹² Lawyers on each side are permitted an unlimited amount of challenges for cause, that is, challenges against jurors who demonstrate, biases, beliefs, or qualities that would lead to an unfair assessment during trial.¹³ Each party is also permitted peremptory challenges, or challenges permitted without stating a cause.¹⁴ The amount of peremptory challenges allowed is limited and depends on the type of suit being tried.¹⁵ Juror candidates that are selected

6. U.S. CONST. amend. VI; U.S. CONST. amend. VII; CONSTITUCIÓN ESPAÑOLA, B.O.E. n.311, Dec. 29, 1978 (Spain) [hereinafter, C.E.].

7. U.S. CONST. amend. VI; U.S. CONST. amend. VII.

8. Jury Selection and Service Act, 28 U.S.C. §1861 (1968).

9. Qualifications for Jury Service, 28 U.S.C. § 1865 (1968) (The Jury Selection and Service Act assumes the eligibility of a citizen unless he or she is: (1) not a citizen who has attained the age of eighteen and resided in the jurisdiction in which the crime is being brought for at least one year, (2) illiterate, (3) unable to speak English, (4) physically or mentally incapable, or (5) awaiting a charge or is a felon for a crime punishable for more than one year and whose civil rights have not been restored); Maria Rosa Gutiérrez Sanz, *El Estatuto Juridico del Ciudadano Jurado Desde la Ley Organica del Tribunal del Jurado*, 2 Anuario Juridico de la Rioja 345, 357–61 (YEAR) [*The Legal Status of the Citizens Jury Since the Organic Act on the Jury*] [translation by author].

10. FED. R. CIV. P. 48(a); Fed. R. Civ. P. 48(b).

11. FED. R. CRIM. P. 23(b).

12. BRIAN H. BORNSTEIN & EDIE GREENE, *THE JURY UNDER FIRE: MYTH, CONTROVERSY, AND REFORM* 37–38 (2017).

13. *Challenge for Cause*, Legal Information Institute, https://www.law.cornell.edu/wex/challenge_for_cause (last visited Oct. 10, 2017); *How Courts Work: Selecting the Jury*, American Bar Association, https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryselect.html [hereinafter, *Selecting the Jury*].

14. *Peremptory challenge*, Legal Information Institute, https://www.law.cornell.edu/wex/peremptory_challenge.

15. *Id.*

are sworn in and those not selected are excused.¹⁶

The role of the jury involves listening to the arguments from each side and interpreting the evidence.¹⁷ While a number of states permit jurors to ask questions, not all states expressly encourage this practice.¹⁸ Jurors, by and large, are not allowed to ask witnesses questions and cannot discuss the case with individuals outside of the jury.¹⁹ Prior to deliberations, the judge gives the jury instructions and “charges” the jury by explaining the law and issues present, and further defining any legal terms necessary.²⁰ The judge will also explain the burden of proof, for example: “beyond a reasonable doubt,” and will remind jurors of their duty to solely rely on evidence presented at trial during deliberation.²¹ The Federal Rules of Criminal Procedure require that a jury produce a unanimous general verdict of guilt or innocence, but do not require the rationale behind the decision.²² Although jurors are only supposed to consider the evidence presented at trial, trouble can arise when jurors integrate information learned outside of the trial proceedings into their deliberation.

II. The Spanish Jury System

In 1995, criminal jury trials in Spain were restored through legislation that executed the Constitutional provisions of Article 125 regarding lay participation.²³ Spanish Jury Law, or *Ley Orgánica del Tribunal del Jurado* (L.O.T.J.) governs the jury system in Spain.²⁴ Whereas the U.S. constitution contemplates jury trials as a right of the accused, juries in Spain are viewed instead as a right of the citizenry to participate in the judicial system.²⁵ Thus, the accused in Spain cannot choose if they prefer a trial by jury or bench trial

16. *Selecting the Jury*, *supra* note 13.

17. *Id.*

18. Nancy S. Marder, *Answering Jurors' Questions: Next Steps in Illinois*, 41 Loy. U. Chi. L.J. 727, 747 (2010) (As of 2010, over half of U.S. states and all federal circuits allowed jurors to ask questions, but five states allow judge discretion in determining whether to allow it for a particular case); *Questioning of Witnesses by Jurors*, US LEGAL, <https://courts.uslegal.com/jury-system/issues-pertaining-to-the-jurys-performance-of-its-duties/questioning-of-witnesses-by-jurors/> (last visited May 7, 2019).

19. *Id.* See *Questioning Witnesses by Jurors*, *supra* note 18.

20. Fed. R. Crim. P. 49; *How Courts Work: Instructions to the Jury*, American Bar Association, https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryinstruct.html [hereinafter, *Instructions*].

21. *Instructions*, *supra* note 20.

22. FED. R. CRIM. P. 31; For information on civil verdicts see FED. R. CIV. P. 48; FED. R. CIV. P. 49; *General Verdict*, Legal Information Institute, https://www.law.cornell.edu/wex/General_verdict (last visited Dec. 1, 2017).

23. C.E., B.O.E. n.311, Dec. 29, 1978 (Spain); Stephen C. Thaman, *Spain Returns to Trial by Jury*, 21 HASTINGS INT'L & COMP. L. REV. 241, 241–42 (1998).

24. See generally *Ley Organica del Tribunal del Jurado* [hereinafter L.O.T.J.]; Maria Jimeno-Bulnes, *Jury Selection and Jury Trial in Spain: Between Theory and Practice*, 86 CHI-KENT L. REV. 585, 585 (2011) [hereinafter, *Theory and Practice*].

25. U.S. CONST. amend. VI; U.S. CONST. amend. VII; See *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968); Thaman, *supra* note 23 at 257.

in cases where the jury has exclusive control.²⁶ The rationale behind this rule is that permitting a defendant to choose the manner in which his adjudication is conducted violates Spain's constitutional guarantee of "equality before the law and the right to a lawful judge."²⁷

Procedurally, a jury trial in Spain resembles a jury trial in the U.S.²⁸ There are, however, various differences between the two. The criminal cases that require a trial by jury are led by a court magistrate (hereinafter judge).²⁹ Unlike in the U.S., nine people who must meet the qualifications for service are chosen to be jurors after the process of eliminating jurors through self-disqualification or challenges.³⁰ The jurors then take an oath to perform their obligations faithfully.³¹ Like in the U.S., during the trial jurors are permitted to ask questions and examine the evidence as necessary.³² In contrast to the general verdict system in the U.S., Spanish juries require "reasoned verdicts" which demands concise justifications for the reasons the jury has declared or not declared that certain facts have been proved.³³ Verdicts that are not reasoned, or not reasoned well, can be submitted for review where it will be determined if they need to be nullified.³⁴ While there are other procedures and rules regarding trials in Spain, it is through this general process that a trial by jury is conducted.³⁵

III. Pretrial Publicity

The media coverage of pretrial information is called pretrial publicity (PTP). PTP may influence perceptions of the defendant, cause sympathetic feelings towards the defendant, affect defendant's likability, and impact pretrial evaluations of defendant's guilt.³⁶ PTP may be more likely to

26. Maria Jimeno-Bulnes, *Lay Participation in Spain: The Jury System*, 14 INT'L CRIM. JUST. REV. 164, 173-74 (2004) [hereinafter, *Lay Participation*].

27. Thaman, *supra* note 23, at 258.

28. *Cf. Theory and Practice*, *supra* note 24, at 587.

29. *Theory and Practice*, *supra* note 24, at 587; Isabel Lantigua, *Veredicto al jurado popular* [Verdict by Popular Jury], EL MUNDO (June 30, 2013), <http://www.elmundo.es/elmundo/2013/06/28/espana/1372432389.html>. For more information on the general procedural jury process in Spain, see Maria Jimeno-Bulnes, *Theory and Practice*, *supra* note 24, at 585.

30. FED. R. CIV. P. 48(a); FED. R. CIV. P. 48(b); *Lay Participation*, *supra* note 26, at 177; Qualifications for Jury Service, 28 U.S.C. § 1865 (1968) (Similar to the U.S. qualifications, Spanish law requires that jurors be: (1) above the age of eighteen, (2) eligible to vote, (3) literate, (4) residents of the province in which the crime was committed, and (5) without a disability that would inhibit them from serving as jurors); Sanz, *supra* note 9, 357-6.

31. *Lay Participation*, *supra* note 26, at 178.

32. L.O.T.J. art. 46; Marder, *supra* note 18, at 747; see generally Shari Seidman et al., *Jurors' Unanswered Questions*, 2004 COURT REV. 20.

33. See FED. R. CRIM. P. R. 31; L.O.T.J. art. 61(1)(d).

34. *Theory and Practice*, *supra* note 24, at 600-01.

35. For more information on jury procedures, see generally L.O.T.J.; See Lantigua *supra* note 29; see generally *Theory and Practice*, *supra* note 24.

36. NEIL BREWER & KIPLING D. WILLIAMS, *PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE* 254-55 (2005). Much of the scholarly work on PTP has been conducted in the U.S., thus most of the explanation and findings on PTP will be done in light of that work.

influence jurors depending on when exposure occurred, how much is consumed, the absence of procedures available to monitor inadmissible material, and the lack of occasions to refute PTP.³⁷ While it is not completely clear why PTP influences jurors, several theories exist.³⁸ Jurors may consider PTP to be fact or confuse it with evidence presented in trial, PTP can change the way subsequent evidence is analyzed, and PTP can cause an emotional reaction that leads to verdicts that are based on feelings.³⁹ Generally, jurors exposed to negative PTP are more likely to find a defendant guilty than jurors who encountered less negative PTP or none at all.⁴⁰

An effect called generic prejudice can develop through exposure to heavily publicized cases.⁴¹ This phenomenon occurs when a juror shifts categorical biases about a person or matter to a trial.⁴² Thus, jurors may not even need to hear facts about the case before them to form conceptions about the guilt of the defendant.⁴³ This phenomenon is especially prevalent in cases involving child abuse, sexual abuse, or other highly stigmatized crimes, but may also arise based on the particular charge or category of crime as a whole.⁴⁴

Moreover, entertainment media has also been on the radar of fair trial advocates.⁴⁵ A phenomenon called the “CSI Effect” contemplates whether continuously watching television shows like *Crime Scene Investigation* (CSI) influences jurors’ perception of prosecutors and the forensic evidence introduced in trial. Still, it is possible that the opposite effect may be true. Jurors may overvalue scientific evidence due to these shows’ overemphasizing the reliability of forensic evidence.⁴⁶ There is a current lack of empirical evidence on the matter, but it is worth considering in the effort to reduce PTP effects.⁴⁷ Furthermore, docudramas present fairness concerns.⁴⁸ Docudramas are media productions that contain some truth and creative interpretation about a real case.⁴⁹ These productions are particularly problematic when they are run concurrently with the actual trial.⁵⁰ Hence, given the possible effects of PTP on jurors, it is important to implement

37. *Id.* at 254.

38. BORNSTEIN & GREENE, *supra* note 12, at 258 (2017).

39. *Id.* at 258–59.

40. Tarika Daftary-Kapur et. al., *Are Lab Studies on PTP Generalizable?: An Examination of PTP Effects Using a Shadow Jury Paradigm*, THE JURY EXPERT (May 7, 2014), <http://www.thejuryexpert.com/2014/05/are-lab-studies-on-ptp-generalizable-an-examination-of-ptp-effects-using-a-shadow-jury-paradigm/>; Nancy Steblay et al., *The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review*, 23 L. & HUM. BEHAV. 219, 229 (1999).

41. NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 113 (2007).

42. *Id.*

43. BORNSTEIN & GREENE, *supra* note 12, at 260.

44. *Id.*; VIDMAR & HANS, *supra* note 41, at 113.

45. Landman, *supra* note 3, at 187.

46. VIDMAR & HANS, *supra* note 41, at 197.

47. *Id.*

48. Landman, *supra* note 3, at 187.

49. *Id.*

50. *Id.*

safeguards to prevent non-trial information from infiltrating deliberation.

A. The Evolution of Pretrial Publicity in the United States

One of the first cases that truly highlighted the power of the media to affect a trial was the case of Sam Sheppard.⁵¹ In 1954, a pregnant Marilyn Sheppard was murdered in her lakeshore house.⁵² Speculation that her husband, Sam Sheppard, had killed her immediately pervaded newspaper headlines and comprised the atmosphere in which his pretrial proceedings began.⁵³ The names and addresses of all prospective jurors were published in various newspapers and, consequently, all prospective jurors received mail and phone calls, from anonymous sources and friends, concerning the case.⁵⁴ During the trial, media personnel occupied most of the seats in the courtroom and the media continuously covered the trial throughout its duration.⁵⁵ The jurors also had exposure to the media concerning the trial.⁵⁶ During *voir dire*, all but one juror admitted to having read about the case in a newspaper or having heard broadcasts about it.⁵⁷ With this media-frenzy background, Sheppard was convicted of the second-degree murder of his wife.⁵⁸

After serving ten years of his sentence, the Supreme Court reversed the Sixth Circuit's habeas petition denial, citing how the "carnival atmosphere" at trial created a prejudicial environment that prevented the administration of justice.⁵⁹ During retrial, the jury was sequestered and returned a not guilty verdict following a twelve-hour deliberation.⁶⁰ A number of subsequent cases have delineated the extent to which the press can report on trials and pretrial proceedings.⁶¹

B. The Evolution of Pretrial Publicity in Spain

One of the first jury trials to occur after the restoration of the jury in Spain was the case of Mikel Otegi.⁶² Otegi, the defendant, was a part of a

51. VIDMAR & HANS, *supra* note 41, at 109.

52. *Sheppard v. Maxwell*, 384 U.S. 333, 335 (1966).

53. *Id.* at 338–43.

54. *Id.* at 342.

55. *Id.* at 343–44.

56. *Id.* at 345.

57. *Id.*

58. *Id.* at 335.

59. *Id.* at 358, 363.

60. VIDMAR & HANS, *supra* note 41, at 109.

61. *Gannett v. DePasquale*, 443 U.S. 368, 390 (1979) (establishing that the pretrial proceedings of a case could be closed); *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 557 (1980) (finding that the public's right to access trial existed because losing the historically-rooted ability to attend trials would put crucial features of the freedom of speech and press clauses in jeopardy); *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984) (ruling that there is a presumptive openness to the *voir dire* procedure and that individual jurors may request closed questioning if they feel uncomfortable answering questions publicly); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 14–15 (1986) (establishing that in criminal cases the First Amendment right to access extends to preliminary hearings).

62. The cases concerning the first juries in Spain in this section, including the *Otegi* case, come from Stephen C. Thaman's work 'Spain Returns to Trial by Jury.' The

youth nationalist group who was charged in 1997 with the crime of killing two Basque police officers or *ertzaintza*.⁶³ According to the evidence presented at trial, Otegi had been drinking heavily throughout the day when two policemen appeared at the defendant's residence. An argument ensued when the police informed him that he was under arrest. Thereafter, Otegi told the policemen to leave and he testified that a policeman took a gun out and pointed it at him. Otegi then retreated to his house where he retrieved a loaded shotgun and returned outside. Otegi testified that a policeman again pointed the gun at him when Otegi "blacked out." When Otegi came to, he saw that the two policemen were dead. He subsequently used the police car radio, said that "a farmer has killed two [policemen] because of their politics," and thereafter was arrested.⁶⁴

Forensic experts attested that the policemen were shot at close range and a neighbor said Otegi kicked the policemen and murmured insults at them. Forensic clinic directors attested that Otegi's control over aggression was low and that he had a "paranoid personality disorder" which "slightly or moderately attenuated his responsibility during the killing."⁶⁵

The jury returned a not guilty verdict reasoning that Otegi had a "complete excuse of temporary insanity."⁶⁶ The jury verdict caused outrage in Spain.⁶⁷ Similar to the "carnival" environment created during the *Sheppard* case, in the months following the verdict, newspapers published hundreds of articles in various newspapers and media mediums covering the verdict, the reactions to the verdict, and suggestions pertaining to jury reform.⁶⁸ Some of the articles included statements from the victim's family calling the verdict "maddening," "inconceivable," and others stating that the jury "does not have

documents and other sources he collected to write this piece are currently being archived in a special 'Juries' collection at the Cornell Law Library. I analyzed these documents relying primarily on newspapers and printouts of online newspapers. While there may be some media or newspaper articles that were written during that time not included in the collection, the available copies give an idea of the types of articles Spanish citizens were exposed to during the first trials of Spain. The great majority of the resources were printed in Spanish and I have translated most of the materials myself for the purposes of this Note.

63. Throughout this Note, I shall refer to the *ertzaintza* as policemen.

64. Thaman, *supra* note 23, at 498.

65. *Id.*

66. *Id.*

67. See Aingeru Munguia, *Es para volverse loco, dice el padre de uno de los ertzainas muertos en Itsasondo* [*'It is maddening,' says the father of one of the policemen murdered in Itsasondo*], EL DIARIO VASCO, March 7, 1997; See Javier Peñalba, *Fue un acto vil y cobarde, movido por el oído de Otegi hacia la Ertzaintza, afirman las acusaciones* [*It was a 'vile and cowardly' act, motivated by Otegi's 'hate' of policemen affirm the accusations*], EL DIARIO VASCO, March 7, 1997, at 6; See DV, *Atutxa dice que algunos ertzainas lloraron al conocer el veredicto* [*Atutxa says that some ertzainas cried after hearing the verdict*], EL DIARIO VASCO, March 8, 1997 [hereinafter, *Atutxa*]; See DV, *No estaba ni borracho ni loco," afirma el hermano de uno de los ertzainas muertos* [*[He] was not drunk or crazy,' says the brother of one of the dead policemen*], EL DIARIO VASCO, March 8, 1997, at 5; See DV Y Agencias, *Estupor e indignación en los partidos vascos por la absolución* [*Stupor and outrage in the Basque parties for the acquittal*], EL DIARIO VASCO, March 7, 1997, at 5.

68. This figure was calculated from counting the physical articles in Thaman's collection.

a conscience.”⁶⁹ Various surveys conducted by the Basque government and other sources showed that the citizenry at the time held extreme animus towards the verdict and the jury system.⁷⁰

About three months after the trial, the acquittal was overturned by the Superior Court of Justice (TSJ) in the Basque Country.⁷¹ The TSJ found that the jury inadequately explained their reasoning for why they had “doubts” as to the proof.⁷² Thaman cites the “outbreak of outrage” throughout the region as a main factor towards the TSJ’s pressure to reverse the acquittal.⁷³ He remarks that seemingly only when the judge and most of the population disagree with an acquittal, is it that the judiciary asks for the jury to state its rationale for a verdict.⁷⁴ *Otegi* is still considered one of the most publicized jury cases in recent Spanish history.⁷⁵

More recent cases, like the *Gürtel* cases, are reported somewhat differently from the first jury trials in Spain.⁷⁶ While much of the content type reported has remained the same, earlier jury trials, with the exception of sensationalized cases, were often published in local newspapers or media outlets.⁷⁷ Like in the U.S., the internet now allows Spaniards access to press from cases all over the world.⁷⁸ Moreover, many of the first Spanish jury trials included photos of the jurors in the jury box during the trials.⁷⁹

69. Munguia, *supra* note 67.

70. According to a survey conducted by the Basque government of 1,500 people the week after the verdict, 82% believed the verdict was “unjust, incorrect, or incomprehensible.” Moreover, 72% believed the jury had “set someone free with the license to kill.” The same survey revealed that only two out of every ten people approved of the jury system generally. *El 60% de los vascos cree que Otegi fue absuelto por medio a represalias* [60% of Basques believe that Otegi was acquitted through reprisals], EL CORREO; In an online poll conducted by *El Mundo*, 66.5% of participants believed that the jury system needed to be modified. *¿Cree usted que debe modificarse la Ley del Jurado? [Do you think the Act on the Jury should be modified?]* EL MUNDO, March 12, 1997 (Article available in Thaman’s archived collection at the Cornell Law Library).

71. Thaman, *supra* note 23, at 498.

72. Thaman, *supra* note 23, at 372.

73. Thaman, *supra* note 23, at 373.

74. Thaman, *supra* note 23, at 386.

75. *Emblemático*, *supra* note 2, at 1.

76. The *Gürtel* cases received abundant attention from the media and concern the political corruption of high profile officers from the People’s Party. The media has reported continuously on different aspects of the case, some reaching as far back as 2009. *Emblemático*, *supra* note 2, at 1–6. As of May 2018, twenty-nine high ranking people have been convicted of bribery among other crimes. *Gurtel corruption case: Spanish ruling party officials found guilty*, BBC NEWS (May 24, 2018), <https://www.bbc.com/news/world-europe-44247770>. The differences in reporting from the first Spanish jury trials to today reflect my own comparisons of Thaman’s documents and current media covering Spanish trials. My findings do not represent results derived from a formal study as none currently exists.

77. See Thaman’s archived collection at the Cornell Law Library.

78. Rob Tricchinelli, *Pretrial publicity’s limited effect on the right to a fair trial*, Reporters Committee: FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-spring-2013/pretrial-publicitys-limited>.

79. See articles cited *supra* note 67. For more examples of the photos being published in articles covering the early Spanish trials, see articles available in Thaman’s archived collection at the Cornell Law Library.

Coverage of Spanish jury trials today does not typically include photos of the jurors.⁸⁰

IV. Remedies and Reform Efforts

A. United States

A concern that defendants raise is that highly publicized trials impede them from receiving a fair trial particularly within the community in which the crime took place.⁸¹ One remedy against a prejudiced community that is non-existent in Spain is a change of venue provision.⁸² Federal Rule 21(a) requires a change of venue where the court believes the prejudice is so pervasive that a fair trial would not be possible.⁸³ Trials have historically been kept in the jurisdiction where the crime took place in order to maximize convenience and to ensure that jurors have knowledge of local custom.⁸⁴ Thus, judges must assess the possibility of a biased jury and the likelihood that safeguarding procedures would eliminate biased jurors with the inefficiency concerns that come with relocating a trial.⁸⁵ Defendants usually offer evidence showing the existence of local media reporting as well as affidavits from community residents confirming the reports and opining that a fair trial could not be obtained in that community.⁸⁶ Overall though, judges are not likely to grant changes in venue.⁸⁷

What is more, all federal courts and most state courts require prosecutorial consent or “veto” for jury trial waivers.⁸⁸ This requirement can especially affect defendants who have had their request for a change of venue denied.⁸⁹ Without being able to have a bench trial, defendants risk trial in front of a potentially media-biased jury.⁹⁰ Thus, with the tendency for judges to deny changes of venue along with existence of the prosecutorial veto, other remedies may be necessary to protect a defendant’s rights against jurors exposed to PTP.

Another method employed to mitigate the effects of PTP, which is also

80. See e.g., *Agencias, Sergio Morate, condenado a 48 años por los asesinatos de Marina Okarynska y Laura del Hoyo* [*Sergio Morate sentenced to 48 years for the murders of Marina Okarynska and Laura del Hoyo*], EL PAIS, Nov. 7, 2017, https://politica.elpais.com/politica/2017/11/07/actualidad/1510071504_888392.html; *Elisa Lois, Hallado culpable el único acusado del doble crimen de Arbo* [*The jury has found the only person accused of the double murder in Arbo guilty*], EL PAIS, Oct. 25, 2017, https://elpais.com/ccaa/2017/10/25/galicia/1508923597_546778.html.

81. VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 57 (1986).

82. *Id.*; See generally L.O.T.J.

83. FED. R. CRIM. P. 21(a).

84. HANS & VIDMAR, *supra* note 81, at 57–58.

85. *Id.* at 58.

86. *Id.* at 59.

87. VIDMAR & HANS, *supra* note 41, at 115.

88. Evan G. Hall, *The House Always Wins: Systemic Disadvantage for Criminal Defendants and the Case Against the Prosecutorial Veto*, CORNELL L. REV. 1717, 1723 (2017).

89. *Id.* at 1729–30.

90. *Id.*

used in Spain, is sequestering the jury.⁹¹ Jury sequestration may involve having jurors live in a hotel where they are unable to access media stories about their case.⁹² While the court may be able to better control external influences on the jury, jury sequestration is not popular due to the great interference it causes on the lives of the jurors, the compromised representation of the jurors, and defendant's fears that jurors may hold sequestration against them.⁹³

The most pervasive remedy utilized by judges in the U.S. against any biases acquired through PTP is the *voir dire* process.⁹⁴ Judges favor this remedy because jurors can be asked to avoid media and to use the evidence presented to guide their decisions.⁹⁵ There are criticisms, however, of the effectiveness of *voir dire*. For example, the presentation of evidence during the trial may not do much to neutralize the effects of PTP due to the anchoring effect.⁹⁶ The anchoring effect arises when people evaluate all subsequent information in light of the initial information they had.⁹⁷ Thus, the initial information learned through PTP may act as an anchor to which all subsequent evidence is molded to fit the conclusion the juror made through the PTP.

Furthermore, remedies against PTP are not likely to be useful in eliminating generic prejudice because negative attitudes about a type of case or person would likely endure.⁹⁸ Moreover, *voir dire* efforts to remove biased jurors would be a difficult task against those who possess implicit biases or biases they are unwilling to share with others.⁹⁹ While efforts to instruct jurors of the frequency of false allegations towards that crime may be helpful, a bench trial may help ensure a fairer trial.¹⁰⁰

Courts have also at times used a device known as a "gag order" to ban trial participants from discussing aspects of the case both before and during the trial.¹⁰¹ The orders may also seal certain court documents to prevent them from being dispersed into the public.¹⁰² Gag orders, however, are viewed with a strong presumption against their constitutionality because of First Amendment concerns that may be implicated.¹⁰³ In an attempt to reconcile the defendant's right to a fair trial and First Amendment press guarantees, the

91. L.O.T.J. art. 56; VIDMAR & HANS, *supra* note 41, at 115.

92. *Id.*

93. *Id.*

94. VIDMAR & HANS, *supra* note 41, at 116. While Spain also employs *voir dire*, it is not clear that it is used as pervasively as in the U.S. with the intention to eliminate PTP bias.

95. *Id.*

96. Tarika Daftary-Kapur, et. al, *supra* note 40.

97. *Id.*

98. BORNSTEIN & GREENE, *supra* note 12, at 269.

99. *Id.*

100. *Id.*

101. VIDMAR & HANS, *supra* note 41, at 114.

102. *Id.*

103. *Nebraska Press Association v. Stuart*, 427 U.S. 539, 545 (1976); Landman, *supra* note 3, at 186.

Supreme Court created a test to establish the legality of a gag order.¹⁰⁴

Occasionally, U.S. courts have used anonymous juries to attempt to protect jurors from the defendants or the media.¹⁰⁵ If a court decides that an anonymous jury is necessary, the court may decide to withhold the names and contact information of the jurors and may even withhold identifying features including race, religion, employment, etc. Those with access to the identifying information varies and the court may decide to only withhold the information from the media, or the parties of the case.¹⁰⁶ Anonymous juries may be empaneled for a variety of reasons, including protecting jury safety and avoiding media coverage of a case.¹⁰⁷ With respect to the latter, courts fear that jurors may give into public pressure to decide a certain way in highly publicized cases. For example, the jurors responsible for acquitting the policemen in the Rodney King trial withstood threats over the phone after their names were publicized.¹⁰⁸ Nancy King argues that empaneling anonymous juries could increase truthful answers in the *voir dire* process, better deliberation, reduce juror threats, and enable greater participation among jurors due largely to the safety and privacy that comes along with their anonymous status.¹⁰⁹

Still there are a variety of arguments against using anonymous juries including, among others, unfairness to the defendant, the public interest in having an open jury, and First Amendment concerns.¹¹⁰ With respect to fairness to the defendant, these arguments typically center around the potential for the diminished effectiveness of the *voir dire* process which in turn reduces the impartiality of the trial.¹¹¹ Furthermore, anonymous juries have failed in the past. In the case of John Gotti, a juror with ties to an organized crime organization was selected onto the jury because his anonymity prevented prosecutors from identifying his associations.¹¹² The juror communicated with the defendant and for a sum of money agreed to vote not guilty.¹¹³ Thus, with arguments for and against its use, there is debate as to whether the benefits of anonymous juries have with respect to PTP and other concerns outweigh the costs it has on our legal system.

104. *Nebraska Press Association*, 427 U.S. at 562; Landman, *supra* note 3, at 186–87 (The Court asked: (1) What the nature and extent of the coverage is before trial, (2) Whether other avenues are available to reduce the effects of continued pretrial publicity, and (3) How effectively the order would prevent the possible harm?).

105. Ashley Gauthier, *The growing trend towards anonymous juries*, REPORTERS COMMITTEE: FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/secret-justice-anonymous-juries/growing-trend-toward-anonymous-juries>.

106. *Id.*

107. *Id.*

108. Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123, 127–28 (1996).

109. *Id.* at 136–39.

110. *Id.* at 151; Gauthier, *supra* note 105.

111. Eric Wertheim, *Anonymous Juries*, 54 FORDHAM L. REV. 981, 984 (1986).

112. Christopher Keleher, *The Repercussions of Anonymous Juries*, U. SAN FRANCISCO L. REV., 531, 556 (2010).

113. *Id.*

B. Spain

Civil law jurisdictions do not have specific regulation on point concerning PTP and general media coverage of trials.¹¹⁴ In response, formal public and national European institutions have passed proposals including the “Recomendación nº 13 del Comité de Ministros del Consejo de Europa (Recommendation).”¹¹⁵ The Recommendation discusses the duty of judicial authorities to regularly provide information to the media in the course of a criminal proceeding while still adhering to privacy concerns and the right to a fair trial.¹¹⁶ The Recommendation also allows journalists access to public hearings, judicial accusations, and a general right to recordings from courtrooms unless otherwise provided. This latter right has given rise to debate given the risk of influence which is noted in the Recommendation’s special warning to preserve a fair trial.¹¹⁷ Spain has dealt with the issue by creating “Communication Cabinets” which are the official method of distributing information between the judiciary and the media.¹¹⁸

The reasoned verdict requirement may help prevent biases obtained through PTP from infecting jury decisions because the decision can be nullified in its entirety if deemed unreasoned or inadequately reasoned.¹¹⁹ Thus, presumably, a verdict that was reasoned on material not presented in the case, but instead presented in PTP, would be nullified. However, reasoned verdicts are not a perfect tool to counter juror bias and may not provide a comparative advantage to Spanish defendants. As noted, judges may be discretionary in their enforcement of a reasoned verdict and only choose to enforce the rationale when there is likely to be public outrage or if the judge herself does not agree with the judgment.¹²⁰ However, in cases where the judge’s opinion to acquit aligns with that of the jury, she may not require the reasons for the acquittal.¹²¹ In fact, the L.O.T.J. remarked that there have been issues with satisfying this requirement, noting that at one point about fifty percent of verdicts were either “poorly reasoned or unreasoned.”¹²²

Another method through which the jury could affect the fact-finding process is by asking trial participants questions.¹²³ The Spanish practice of allowing jurors to directly ask questions to the witnesses, experts, and accused may serve to help counteract biases gained through PTP. By allowing jurors to ask questions, jurors may realize that some news stories may have

114. *Emblemático*, *supra* note 2, at 18.

115. *Id.* The English translation is “Recommendation No. 13 of the Committee of Ministers of the Council of Europe.”

116. *Id.*

117. *Id.* at 20.

118. *Id.* at 21–22.

119. *Lay Participation*, *supra* note 26, at 117. A decision may be nullified when the magistrate president submits the decision for review to the jury college, or if the decision is submitted to the Regional Supreme Court for appeal.

120. Thaman, *supra* note 23, at 386–87.

121. *Id.*

122. *Theory and Practice*, *supra* note 24, at 601.

123. Thaman, *supra* note 23, at 304.

contained inaccurate depictions of the facts which may help foster a fairer judgment because jurors who can ask questions are less likely to search for answers themselves outside of court.¹²⁴

Still, critics argue that if jurors are allowed to ask questions, trial length would be prolonged.¹²⁵ However, studies show that, like in Spain, U.S. jurors tend to ask few, mostly relevant questions and that the length these questions add to trials is de minimis.¹²⁶ Furthermore, many other concerns such as the potential of a question that leads to an inadmissible answer being revealed or a legally insignificant question being asked can be remedied through regulated procedure.¹²⁷ In Spain, jurors must submit a written form of their questions to the judge who after determining its relevancy and utility, asks the witness or party the question.¹²⁸

Furthermore, the practice of having jurors ask questions has a number of benefits to jurors. As research in the U.S. has shown, asking questions allows jurors to settle confusion ranging from vague legal jargon to resolving unclear testimony by clarifying both evidence presented during trial and the law applicable to the case.¹²⁹ Relatedly, asking questions allows jurors to maintain focus on the trial by actively engaging with the trial instead of being a passive spectator.¹³⁰ Finally, asking questions can help jurors learn more about their roles in the courtroom and help them to view the process more favorably.¹³¹ Allowing the jurors to ask questions can also help judges and attorneys receive feedback not only on the effectiveness and clarity of the attorneys questions, but also on the jurors grasp on the entire judicial process.¹³²

Interestingly, Spanish juries are subject to isolation when deliberating a verdict.¹³³ This isolation provision is similar to the unpopular U.S. practice of jury sequestration. Jurors are not allowed to speak with the public until a verdict has been issued.¹³⁴ Depending on the length of the trial, isolation includes a hotel stay where they cannot leave or have guests and the police

124. BORNSTEIN & GREEN, note 12, at 301; *Theory and Practice*, *supra* note 24, at 585.

125. *Id.*; Marder, *supra* note 18, at 733.

126. BORNSTEIN & GREEN, note 12, at 301; Thaman, *supra* note 23, at 304; Marder, *supra* note 18, at 734 (noting that a New Jersey pilot program allowing for jury questioning added thirty minutes to the trial); See Mary Dodge, *Should Jurors Ask Questions in Criminal Cases?* (Report to the Colorado Supreme Court's Jury System Committee) 1, 18 (2002).

127. Charles Montaldo, *Can Jurors Ask Questions During Trials?* THOUGHTCO (2017), <https://www.thoughtco.com/jurors-asking-questions-during-trials-970838> (last visited Nov 4, 2017); David Rodhe, 'Your Witness' Now Signals Jury's Turn to Ask Questions, N.Y. TIMES (Aug. 14, 1999), <http://www.nytimes.com/1999/08/14/nyregion/your-witness-now-signals-jury-s-turn-to-ask-questions.html>.

128. Thaman, *supra* note 23, at 304.

129. BORNSTEIN & GREEN, note 12, at 301; Marder, *supra* note 18, at 742.

130. BORNSTEIN & GREEN, note 12, at 302; Marder, *supra* note 18, at 742–43.

131. Marder, *supra* note 18, at 743–44.

132. BORNSTEIN & GREEN, note 12, at 302; Marder, *supra* note 18, at 745.

133. L.O.T.J. art. 56.

134. *Id.*

will supervise the jurors.¹³⁵ This provision allows courts to regulate external factors like the media from influencing juror decision-making. However, José Luis Garrido, the Dean of the Córdoba Bar Association, thinks true isolation today is “impossible” as jurors are inevitably exposed to outside influences.¹³⁶ Marc Molins, vice-president of the Criminal Law section of the Bar Association of Barcelona, notes that it is challenging to find a proper balance between the public’s right to information and the need to be isolated.¹³⁷

In general, there are no laws or rules in Spain made with the particular intent to prevent PTP from infecting the jury.¹³⁸ For example, Spanish law does not provide for a change of venue for trials even when cases have gained widespread attention and have been covered extensively by the media.¹³⁹ However, judges can exercise discretion in their courtrooms in order to prevent PTP bias.¹⁴⁰ Thus, gag-like orders are another device that may be implemented that could help prevent the production of PTP altogether. Although there is a presumption against their use in the U.S. because of the First Amendment, Spain does not have the same historically significant freedom of speech safeguard and will censor speech and expression when deemed appropriate.¹⁴¹ While not called gag orders, the Spanish Code of Criminal Procedure allows judges to limit media presence during a trial if needed protect victims and preserve the rights of the party.¹⁴² Other rules that prohibit phone use or media exposure can be implemented, but these rules may vary from case to case and courtroom to courtroom.¹⁴³

C. Considerations for Spanish Juries

As Spain continues to protect its relatively recently reinstated jury system from biases, it may consider adopting some of the devices used in U.S. courts. In today’s technological age, where access to trial information is available not only locally, but nationally, it may matter now more than ever before to have as many devices as possible to secure the fairness of a trial.¹⁴⁴

One procedural device that Spain may consider adopting is a change of

135. *Aislados e incommunicados, el jurado popular del caso Asunta comienza a deliberar* [Isolated and incommunicado, the popular jury of the Asunta case begins to deliberate], ATRESMEDIA, http://www.lasexta.com/noticias/sociedad/aislados-incomunicados-jurado-popular-caso-asunta-comienza-deliberar_2015102657245f3a4beb28d446009d51.html.

136. Lantigua, *supra* note 29.

137. *Id.*

138. L.E. CRIM. art. 681.

139. *See generally* L.O.T.J.

140. L.E. CRIM. art. 681.

141. *See e.g.* Vera Gutiérrez Calvo, *Free Speech in the Twitter Era: No Laughing Matter in Spain*, EL PAIS, Apr. 28, 2017, https://elpais.com/elpais/2017/04/27/inenglish/1493287498_564542.html; Federico López-Terra, *Spain’s freedom of speech repression is no joke*, INDEPENDENT (Apr. 19, 2017), <http://www.independent.co.uk/news/science/spain-s-freedom-of-speech-repression-is-no-joke-a7688341.html>.

142. L.E. CRIM. art. 682.

143. L.E. CRIM. art. 681.

144. Tricchinelli, *supra* note 78.

venue provision. A change of venue may not be able to counteract the effects of largely publicized cases, but in instances where most of the publicity is local, it can be a very effective device in preventing a jury from being tainted with PTP biases.¹⁴⁵ While the change of venue provision may benefit the accused, it is important to contemplate the purpose of the jury system in Spain. The current lack of a provision for a change of venue is reasonable in light of the Spanish view that juries are a right of the public to participate in the administration of justice and not a procedural right of the defendant.¹⁴⁶ Given that the goal is to allow citizens to represent their communities when a crime occurs, changing the venue for the benefit of the defendant would not seem sensible.

Contrastingly, the U.S. jury right stems from the Sixth Amendment which has been interpreted to stand for the notion that the right to a trial by jury exists to safeguard the interests of the defendant.¹⁴⁷ While certain requirements, like the prosecutorial veto, may undermine this motive, the change of venue provision is still a way in which courts attempt to reduce the effects of PTP at trial.¹⁴⁸ Therefore, a venue change may provide a slight comparative advantage to U.S. defendants because, like *voir dire*, it allows courts to control the effects of PTP after exposure has already occurred. It goes beyond *voir dire*, however, by recognizing the possibility that there may be no unbiased person present in a particular jury pool and that providing a new pool may be the only way to secure an unbiased jury.¹⁴⁹ So, while not a perfect solution, a change of venue nonetheless may be a step towards greater control of PTP effects on Spanish jurors.

Another device Spain may contemplate adopting is the anonymous jury. Anonymous juries, as previously mentioned, allow for concealment of certain identifying information from the court, the media, or the parties of case.¹⁵⁰ Again, because Spain views jury trials as a right of the citizenry and not a procedural right of the defendant, this may offer a solution for trials in which the citizenry wants to participate, but fears their objectivity or safety amidst media attention.¹⁵¹ It would be important, however, to avoid situations like the Gotti trial where a person with connections to the defendant served as a juror and was bought off.¹⁵² Thus, Spain may consider allowing the court to know the identities of the jurors, but disallowing the press from obtaining their personal information.¹⁵³

145. John A. Burgess, *The Efficacy of a Change of Venue in Protecting a Defendant's Right to an Impartial Jury*, 42 NOTRE DAME L. REV. 925, 942 (1967).

146. Thaman, *supra* note 23, at 257.

147. *See Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

148. Hall, *supra* note 88, at 1730.

149. HANS & VIDMAR, *supra* note 81, at 57 (1986).

150. Gauthier, *supra* note 105.

151. Thaman, *supra* note 23, at 257.

152. Keleher, *supra* note 112.

153. *Id.*

Conclusion

While at first glance it may appear as though the U.S.'s older jury system would result in the use of many more devices than Spain to prevent PTP bias, many of the devices, such as jurors asking questions, jury sequestration, gag orders, etc., have been or are to some extent used in both countries.¹⁵⁴ Still, between the change of venue provision, anonymous juries, and a defendant's procedural right to a jury, the U.S. may give defendants a comparative advantage during a jury trial.

More research may need to be performed to see how effective the current Spanish policies of questioning, isolation, and instruction may be in avoiding biases from forming or affecting the jury deliberation. Depending on the results, Spain may consider adopting U.S. remedies and policies such as change in venue, in order to more tightly control the external influences jurors are exposed to and to help ensure a fairer trial.

The remedies each country has adopted have advantages and drawbacks that are important for a country to consider when implementing a jury system. With the integrity of the justice system at stake, it is important to take seriously the effects of PTP and implement many safeguards to prevent its influence on trials.

154. L.E. CRIM. art. 681. L.O.T.J. art. 46; L.O.T.J. art. 56; VIDMAR & HANS, *supra* note 41, at 115; Marder, *supra* note 18, at 747.