Accuracy, Efficiency, and Accountability in the Litigation Process- The Case for the Fact Verdict

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ARTICLES

ACCURACY, EFFICIENCY, AND ACCOUNTABILITY IN THE LITIGATION PROCESS — THE CASE FOR THE FACT VERDICT

Mark S. Brodin*

"The judge and jury are two remarkably different institutions for reaching the same objective—fair, impersonal adjudication of controversies. The judge represents tradition, discipline, professional competence and repeated experience with the matter. This is undoubtedly a good formula. But the endless fascination of the jury is to see whether something quite different—the layman amateur drawn from a wide public, disciplined only by the trial process, and by an obligation to reach a group verdict—can somehow work as well or perhaps better."¹

INTRODUCTION

It has long been recognized that the "jury trial is the central element in the American conception of justice" and the one feature that sets the American system of adjudication apart from others.² In criminal cases the jury operates to "safeguard [the citizen] against arbitrary law enforcement"³ and to protect the accused "against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."⁴ In civil litigation the jury brings the common wisdom of the community to bear on the resolution of the private dispute, and serves to legitimize that resolution in the eyes of that community.⁵ Trial by jury is said to reinforce the democratic

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2. R. Hastie, S. Penrod & N. Pennington, Inside the Jury 1 (1988) [hereinafter R. Hastie]. The Constitution guarantees the right to jury trial in "all criminal prosecutions," U.S. Const. amend. VI, and in "suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. amend. VII.
4. Id. at 100 (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)).
5. See Sioux City & Pac. R.R. Co. v. Stout, 84 U.S. (17 Wall.) 657 (1873) (discussed infra notes 62-67 and accompanying text). It has been observed that "in the process of gaining public acceptance for the imposition of sanctions, the [legitimating] role of the jury is highly significant. The jury is a sort of ad hoc parliament convened from the citizenry at large to lend respectability and authority to the process. ... Any erosion of
political framework of American society and to be both "the most effective way of establishing the people's rule and the most efficient way of teaching them how to rule." As demonstrated by the classic film *Twelve Angry Men*, the jury has become part of the national folklore.

Yet ambivalence about the institution persists. Jury control devices like the directed verdict and judgment notwithstanding the verdict (permitting the judge to "take the case from the jury") together with exclusionary rules such as Rule 403 of the Federal Rules of Evidence (permitting the judge to keep from the jury probative evidence which they may misuse) illustrate the fears of the professionals regarding decision-making by amateurs. One observer suggested that through such procedures "we recognize in every imaginable way that the jury is the weakest element in our judicial system, and yet we pand to it as a sacred institution."

Citizen participation in the sanctioning system is in the long run likely, in my view, to result in a reduction in the moral authority that supports the process." In re Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069, 1093 (3d Cir. 1980) (Gibbons, J., dissenting).


To regard the jury simply as a judicial institution would be taking a very narrow view of the matter, for great though its influence on the outcome of lawsuits, its influence on the fate of society itself is much greater still. The jury is therefore above all a political institution, and it is from that point of view that it must always be judged.

Id. at 250. Jefferson described trial by jury as "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." 3 Writings of Thomas Jefferson 71 (Washington ed.).

Modern versions of this view abound. See, e.g., Shannon, Texaco and the $10 Billion Jury xxi (1988) ("Our system of justice is unique in all the world. It requires twelve citizens, with no ax to grind in the matter at hand, to wield the awesome power of the state."); Botein & Gordon, The Trial of the Future 114, 124 (1965) ("The jury system has been a visible, close-at-hand symbol of democracy. In both civil and criminal cases it affords our citizens an opportunity to participate directly in the processes and responsibilities of government — a participation that has been decreasing steadily in our highly complex and urban society. . . . The jury remains one of the stoutest chains binding the citizen to the law, since it is one of the very few areas where the layman and not officialdom governs directly.")

7. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ."Fed. R. Evid. 403.

8. Boston, Some Practical Remedies For Existing Defects in the Administration of Justice, 61 U. Pa. L. Rev. 1 (1912). He continued: "We treat the jury as a sacred institution, and we regard it, in all ways in which our regard can be measured, as wholly incompetent for the purpose for which we establish it." Judge Learned Hand noted the inconsistency in professing to "trust [jurors] as reverently as we do, and still surround them with restrictions which, if they have no rational validity whatever, depend upon our distrust." Hand, The Deficiencies of Trials to Reach the Heart of the Matter, in 3 Lectures on Legal Topics 89 (1926).
While prevailing opinion in and out of the legal community has seemingly come to accept the jury as an integral part of the criminal justice process, its role in civil litigation has stirred considerable controversy. Although the Supreme Court has spoken of the right to jury trial in civil cases as "a basic and fundamental feature of our system of federal jurisprudence" which "should be jealously guarded by the courts," commentators over the years have nonetheless criticized the jury for burdening the dispute resolution system with unnecessary delay and cost. A writer in 1905 described the perception of the civil jury "in these modern days [as] more of a clog upon justice than otherwise, while the growing tendency of professional minds is to regard it as an anomaly." Chief Justice Warren Burger expressed the opinion that "civil juries waste time and are often incapable of understanding the issues presented to them." Some have called for outright abolition of the civil jury, which has been accomplished de facto in Britain. Others propose the imposition of "no-fault" systems or alternative dispute resolution processes, both of which divert cases from court (and thus jury) control. A recent study has concluded:

Despite the long history of the jury trial and despite its current significance in the legal system, its future is uncertain. Changes in American society have created new demands for justice which may not be met by traditional jury trials. Increases in the volume of civil and criminal trials have clogged the court system and placed unprecedented strains on the ability of the jury system to dispense high quality justice. There have been dramatic increases in the length and complexity of

11. G. Clementson, Special Verdicts and Special Findings By Juries 9 (1905).
15. As one article responds, "Strong and bold must be the efforts of those of us who believe that the courthouse is the best place for the resolution of disputes." Pope & Lowette, The State of the Special Verdict—1979, 11 St. Mary's L.J. 1, 57 (1979).
trials. In some jurisdictions, jury selection alone may last as long as a week in a typical criminal case. Although not common, civil and criminal cases lasting months and even years place a burden on the system.\textsuperscript{16}

Considerable skepticism has been voiced over the years about the average juror's ability to comprehend and recall the evidence presented at trial as well as the judge's instructions on the law, particularly in "big" or "technical" cases.\textsuperscript{17} Such concerns have even led to suggestions in the decisional law that the constitutional right to civil jury trial in the federal courts may not apply in complex litigation because presentation of such a case to an uncomprehending jury would constitute a denial of due process.\textsuperscript{18} Criticism has been

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  \item \textsuperscript{16} R. HASTIE, \textit{supra} note 2, at 1.
  \item \textsuperscript{17} "On the civil side, advances in science and engineering have created complexities in disputes that challenge the experts in the field and would seem to require an unattainable level of sophistication on the part of jury members." \textit{Id.} \textit{See also} J. FRANK, \textit{COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE} 116-120 (1949) (illustrating inability of jury to understand and apply legal rules without specialized training).
  \item \textsuperscript{18} \textit{See, e.g., In re Japanese Elec. Prod. Antitrust Litig.,} 631 F.2d 1069 (3d Cir. 1980). Several of the defendants in this massive treble damages antitrust case moved to strike the jury demands of plaintiffs, arguing that the case was too large and complex for a jury. While rejecting the contention that the seventh amendment does not guarantee a right to jury trial when the particular lawsuit is so complex to be beyond the ability of a jury to decide, the court nevertheless held that the seventh amendment preservation is limited by the constitutional right to due process of law, and that the latter precludes trial by jury "when a jury will not be able to perform its task of rational decisionmaking with a reasonable understanding of the evidence and relevant legal standards." \textit{Id. at} 1086. The court thus remanded, holding that a litigant must be given the opportunity to make such a showing. \textit{Id. at} 1090. \textit{See also}, ILC Peripherals Leasing Corp. v. IBM, 458 F. Supp. 423, 447-49 (N.D. Cal. 1978) (after questioning members of hung jury in five-month trial, judge ruled that any retrial would be before bench because of jury's inability to comprehend case), \textit{aff'd sub. nom.} Memorex Corp. v. IBM, 636 F.2d 1188 (9th Cir. 1980), \textit{cert. denied}, 452 U.S. 972 (1981).


It has been argued that the right to jury trial in English practice in 1791, which is "preserved" by the seventh amendment, did not include the trial of complex cases. \textit{See} Comment, \textit{supra}, 51 U. Chi. L. Rev. 581. The author demonstrates "the simplicity of the cases submitted to common law juries in contrast to those tried by the court in equity," and concludes that "the common law recognized no complex case exception because the procedural limits within which the jury functioned insured that no complex cases would
leveled as well at the inherent power given juries to act in effect as transient mini-legislatures, making what amount to policy decisions modifying or even nullifying the law made by elected bodies.\textsuperscript{19} Reflecting still another current of complaint, a noted journalist/novelist has described the civil jury simply as “a vehicle for redistributing the wealth.”\textsuperscript{20}

In short “the jury, as the highest profile aspect of our dispute resolution mechanisms, predictably has come under sharp and even severe scrutiny,”\textsuperscript{21} and fundamental questions persist about its role in civil litigation. Has the institution become an inefficient anachronism, a luxury of democratic illusion which we can no longer afford? Does the civil jury have (in the words of one treatise) “sufficient utility to justify its retention in light of the need to streamline our complex and increasingly burdened judicial system?”\textsuperscript{22}

It is the thesis of this article that many of the concerns that have been raised over the years about the civil jury are a function not so much of the institution itself but rather of the manner in which we have utilized it, specifically the routine use of the general verdict. Unlike a bench trial in which the judge as decision-maker is required to draft findings of fact and conclusions of law,\textsuperscript{23} juries are typically asked to provide merely a bottom-line resolution of the litigation, a “liable or not liable” answer which “affords no satisfactory information about the jury’s findings.”\textsuperscript{24} Because the deliberations occur

\textsuperscript{19} See J. FRANK, supra note 17, at 127-35.

\textsuperscript{20} TOM WOLFE, THE BONFIRE OF THE VANITIES 392 (1987). See also Kester, Are Lawyers Becoming Public Enemy Number One?, WASHINGTON, Feb. 1989, at 114. “Every jury is a one-night stand. It is not very expert, it is not held accountable, and it never has to live with the consequences of its actions. Civil litigation often is an opportunity for juries to play Robin Hood and redistribute wealth.” Id. at 117.

\textsuperscript{21} THE AMERICAN CIVIL JURY: FINAL REPORT OF THE 1986 CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES ix.

\textsuperscript{22} J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 11.1 (1985) [hereinafter FRIEDENTHAL, KANE & MILLER]. The treatise describes the two “principal lines of attack on jury trial” as challenges to “the basic unfairness and inefficiency of trial by a group of citizens unskilled in the application of frequently particularized and difficult legal concepts,” and concern “with the cost to the judicial system caused by the delays inherent in the jury process.” Id.

\textsuperscript{23} FED. R. CIV. P. 52.

\textsuperscript{24} Skidmore v. Baltimore & O.R.R., 167 F.2d 54, 56 (2d Cir. 1948), cert. denied, 335 U.S. 816 (1948). Judge Frank added that such verdicts shed no light, but rather “greater darkness” on the process of factfinding. 167 F.2d at 56.
private and generally remain shrouded in secrecy, the impenetrable general verdict ensures that meaningful review of the jury's decision-making process by appellate courts or the public is virtually impossible.

Moreover, despite the ostensible division of labor that gives "fact" questions to the lay jurors while reserving "law" questions for the trained judge, the general verdict merges both together in the ultimate resolution of the case. The jury, with the combined tasks of determining what occurred and then of applying the controlling law to those facts, has in practice "the power utterly to ignore what the judge instructs it concerning the substantive legal rules." As one court described it,

25. The rules of the game strongly discourage after-the-fact probing into the jury's work. See Tanner v. United States, 483 U.S. 107 (1987) (affirming district court's refusal to permit interviewing of jurors and denial of motion for new trial despite statements from two jurors indicating that several members of jury had consumed alcohol and narcotic drugs repeatedly during criminal trial). See also Fed. R. Evid. 606 ("Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent or to dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror"); Krouse v. Graham, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977) (discussing evidentiary doctrine precluding post facto probing into mental processes of jury and limiting such inquiry to overt acts of misconduct occurring in jury room).

It has recently been observed that

[ ]his secrecy is intentional. One purpose is to encourage jurors to share their views with one another, a notion reflecting our democratic ideals and faith in the value of free expression and exchange of views—the faith that underlines the First Amendment. Another purpose is to insulate verdicts, both from public scrutiny (which would lead to relentless examination and criticism in the press) and from judicial review (which could have no purpose but to provide additional ground for reversal). Paradoxically, one reason for such precautions is the widespread belief that jury deliberations may not live up to an ideal of enlightened exchange of views and sifting of evidence, and that the jury as an institution might not survive close scrutiny of its deliberative process.

C. Mueller & L. Kirkpatrick, Evidence Under the Rules: Text, Cases and Problems 12-13 (1988). As Judge Frank explained the secrecy policy, "judges feel that, were they obliged to learn the methods used by jurors, the actual workings of the jury-system would be shown up, devastatingly." J. Frank, supra note 17, at 115.

26. Skidmore, 167 F.2d at 57. As one treatise has put it, since the grounds of a general verdict cannot be ascertained, "[j]uries in fact have the power to decide cases on grounds which they are not supposed to consider—indeed those which they have been forbidden to consider. For many purposes, however, the law blandly assumes that juries do what they are told by the court to do." F. James & G. Hazard, Civil Procedure § 7.15 n.15 (3d ed. 1985).
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a Jury, by means of a general verdict are entrusted with a power of blending law and fact, and of following the prejudices of their affections or passions. It is the duty of the Judge, in all cases of general justice, to tell the Jury how to do right, though they have it in their power to do wrong, which is a matter entirely between God and their own consciences.27

The fact-determination and law-application functions which the general verdict combines are quite different endeavors, requiring different knowledge, skill, training, and education. Not surprisingly, the empirical and experiential data indicate that juries are more adept at finding facts than interpreting and applying legal doctrine.28 Yet the use of the general verdict sacrifices the strengths of the jury to its weaknesses.

The procedural opportunity exists to preserve the jury’s central role in the fact-finding process while avoiding the difficulties and excesses associated with its responsibility as law-applier. The special verdict, once rarely employed but used with increasing frequency in recent years, can serve to focus the jurors’ attention on the critical fact issues in dispute and to record their precise findings with regard to each. At the same time, the device dispenses with the necessity for elaborate instructions on legal doctrine and, consequently, minimizes our dependence on the ability and willingness of lay persons to follow such instructions. As set forth below, the special verdict returns the jury to its original historical role, that of reporter of facts.29

Use of the special verdict has, however, sparked much contention over the years. In calling for repeal of Rule 49 of the Federal Rules of Civil Procedure, the federal version of the device, Justices Black and Douglas characterized the special verdict as “but another means utilized by courts to weaken the constitutional power of juries and to vest judges with more power to decide cases according to their own judgments.”30 The continuing debate over the special verdict pits those who would like to constrain jury decision-making into a more scientific, rational, and accountable mode against those who would have the jury continue to “dispense justice” without tight confines.

Traditional attachment to the general verdict, together with a marked reluctance to intrude upon the jury’s prerogatives, have in-

27. Morris v. United States, 156 F.2d 525, 530 (9th Cir. 1946) (quoting PHILLIPS ON JURIES 172).
29. See infra notes 37-40 and accompanying text.
hibited use of the special verdict. Moreover, when the device is used, the "special" questions typically posed are broad in form, mingling elements of law and fact in a manner similar to the general verdict. This article proposes routine use of the special verdict in a manner that presents the jury with questions of actual fact, leaving the task of law application to the judge. Used in this way, the special verdict has the significant potential for enhancing the reliability and efficiency of our judicial dispute resolution process.

I. THE JURY AS ARBITER OF FACT AND LAW — THE OPERATION OF THE GENERAL VERDICT

The jury finds the truth. It decides the facts. This is the major function of the jury—to find the truth. The jury does not decide the rules of law to be applied to the facts in the case.31

The function of the jury is supposed to be fact-finding. According to the official or naive theory, when a case is tried before a judge and jury, there is a nicely divided tribunal: to the judge is left the determination of the rules of law; to the jury is left solely the ascertaining of facts. The jury, so the story goes, must in no manner encroach upon the powers of the judge. It must not concern itself in any manner with the authority or wisdom of the law. What the judge announces as law must be taken by the jury as completely authoritative... But seldom is anything approximating such a plan followed. In the great run of cases the 'general verdict' is used... In most cases, then, the jury determine not the 'facts' but the legal rights and obligations of the parties to the suit.32

Adjudication involves three basic tasks—determination of the facts underlying the dispute, identification of the controlling principles of law, and the application of the latter to the former. Given the venerable maxim that issues of fact are for the jury while issues of law are left to the judge,33 one might expect that the jury's role in litigation would be confined to the determination of disputed facts (i.e., what happened? when? by whom?) which would then be reported to the judge for application by her of the appropriate rule of law. In reality, however, issues of fact and law are not easily distinguished. As one writer has put it,

The questions which a jury is called upon to decide are commonly denominated "questions of fact."... But the questions passed upon by the jury are not to-day, nor have they ever been, unmixed questions of fact. They have ever required an-

32. J. FRANK, supra note 13, at 183-85.
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answers containing elements of opinion and of law. In many cases the "question is mixed, consisting of law and fact, so intimately blended as not to be easily susceptible of separate decision," in fact incapable of separation. 34

One need only consider the question of negligence to appreciate the intermingling of fact and law elements in a typical case before the jury.

The routine operation of the general verdict further blurs the line between the two by merging the law-application and fact-determination functions, both of which are allocated to the jury. The judge's role is to identify and articulate for the jury the legal principles that should be applied by them. The jurors then go about the final resolution of the case, disclosing only their chosen winner. Lay persons35 are consequently given effective power, subject only to the limited constraints of the various jury control devices,36 over both law and fact in our litigation process.37 The way in which this has come about, and its implications for the adjudication process, will be discussed in this section.

34. G. CLEMENrSON, supra note 10, at 4 (footnote omitted). The dichotomy between fact and law has always been among the most elusive. See generally T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 417-418 (5th ed. 1956); Weiner, The Civil Jury Trial and the Law-Fact Distinction, 54 CALIF. L. REV. 1867 (1966). Thus, although "[f]rom the beginning juries were called upon to decide disputed issues of fact," there was no "refinement of a distinction between law and fact." F. JAMES & G. HAZARD, supra note 25, at 304. The line between issues of fact and law lies at the center of the historical power struggle—"a striving for power and relative advantage—between judge and jury." Id. at 305.

35. As Professor Galanter has pointed out, the jury is "lay" in two senses: "First, it is not made up of professionals or experts who possess special knowledge of legal norms or their application. Second, jurors don't do it for a living—they are transients, who remain citizens rather than workers—and they don't do it recurrently or often." Galanter, Jury Shadows: Reflections on the Civil Jury and the "Litigation Explosion," in THE AMERICAN CIVIL JURY, supra, note 10, at 15.

36. See infra, note 80.

37. See generally J. FRANK, supra note 13, at 183-99; F. JAMES & G. HAZARD, supra note 25, at 304-05, 333-37; Weiner, supra note 35. "Even when it theoretically is possible to draw a distinction between issues of fact and law, it often is difficult in practice to limit the jury to a decision concerning the former." FRIEDENTHAL, KANE & MILLER, supra note 22, § 11.2. "It is useful to distinguish between the jury's right to decide questions of law and its power to do so. The jury's power to decide the law in returning a general verdict is indisputable." Comment, The Changing Role of the Jury in the Nineteenth Century, 74 YALE L. J. 170, 170 n.2 (1964). See also Howe, Juries as Judges of Criminal Law, 52 HARV. L. REV. 582, 584 (1939) ("[T]he jury's right to return a general verdict in criminal cases gives it only a power, and not a moral or legal right to determine the law upon their own initiative regardless of the court's instruction.")
In its earliest incarnation in England the jury did not have broad power. Originally local residents were called upon as jurors because they had either personal or "communal" knowledge of the events underlying the dispute, and they functioned more as fact witnesses than impartial arbiters; judges applied the law to the facts the jurors related. Thus, through at least the thirteenth century, the job of the jury "was not so much to decide the case as to indicate what they thought to be the facts of the matter." It was not uncommon for the judge to engage in a dialogue with the jurors in which he questioned them about what they knew of the case and the source of their knowledge; if their verdict was obscure or incomplete, they could be resummoned for further questioning.

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38. The modern civil and criminal jury both derive from a common origin, and the former "descended from the old criminal jury through the action of trespass, which was at first partly criminal and later entirely civil in its character." T. PLUCKNETT, supra note 34, at 107, 130-31. Plucknett concludes that in its early days, the jury was no more regarded as 'rational' than the ordeals which it replaced, and just as one did not question the judgments of God as shown by the ordeal, so the verdict of a jury was equally inscrutable. It was but slowly that the jury was rationalized and regarded as a judicial body.

Id. at 125. For the history of the jury in England, see generally T. PLUCKNETT, supra note 33, at 106-38; Thayer, The Jury and Its Development, 5 HARV. L. REV. 244, 295, 357 (1892); W. HOLDSWORTH, A HISTORY OF ENGLISH COMMON LAW 332-50 (7th ed. 1956); CAENEGEM, THE BIRTH OF ENGLISH COMMON LAW 62-73 (1973); DAWSON, A HISTORY OF LAy JUDGES 118-28; J. GUINTHER, supra note 10, at 1-35.

39. See T. PLUCKNETT, supra note 34, at 120-31, 417-18; Thayer, supra note 38, at 249-50, 302-307; DAWSON, supra note 38 at 122-128; FRIEDENTHAL, KANE & MILLER, supra note 22, at 474-75.

The English jury arose as a twelfth-century institution by which private individuals gave government officials (judges, in most cases) the information that they needed to administer the law. Jurors provided facts that royal officials could not easily obtain in any other way, and judges applied the law to those facts.

Murrin, Magistrates, Sinners, and a Precarious Liberty: Trial By Jury in Seventeenth-Century New England, in SAINTS AND REVOLUTIONARIES 152, 155 (Hall ed. 1984). Thus Maitland's definition of a jury was "a body of neighbors . . . summoned by some public officer to give upon oath the true answer to some question." F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 138 (2d ed. 1905).

40. D. LOUISELL, G. HAZARD, JR. & C. TAIT, CASES AND MATERIALS ON PLEADING & PROCEDURE 22 (5th ed. 1983). Plucknett quotes the text from a plea roll case dating to 1220 concerning the alleged stealing of a horse by one Philip le King. The summoned jurors were not asked and did not say whether the accused was guilty or not, but rather they returned reports to the court setting forth their beliefs as to the events in question. In so doing, the jurors distinguished between those matters they were sure of and those they were not and cited as the source of some of their beliefs the general agreement of people in the region regarding the incident. T. PLUCKNETT, supra note 34, at 121-24.

41. See, e.g., Thayer, supra note 38, at 310, 371. The jurors in an assize of novel disseisin, for example, found that the tenant had previously brought an action for the...
It was not until the seventeenth century that the jury began to emerge in its modern form, as a body of strangers to the dispute who were charged with deciding its merits based not on their personal knowledge but on the evidence presented by the parties in court and the judge's instructions regarding the controlling law. The jury's decision came typically in the form of a general verdict which blended fact and law issues in what Judge Arnold has called a "plebiscite-on-the-case." There would be no explanation of how the decision was reached—there would simply be the decision. In this regard the use of the jury resembled its ancient forbears, trial by ordeal and by battle, where similarly there was no division between fact and law but only a decision on the general question of guilt. The English jury reached a high point of its power when in the late eighteenth century in criminal cases of a political character, such as seditious libel, the jurors were given explicit authority to determine the legal effect of the facts as well as to resolve the fact disputes. This practice reflected the belief that the jury's independence from the sovereign could be more confidently trusted than that of the judiciary.

Yet the history of the jury is one of constant tension between the desire to preserve its independence on the one hand and to control the same land and had recovered, and the judges "asked the jury how they knew this," which they went on to explain. Id. at 310.

42. T. PLUCKNETT, supra note 34, at 129-30; Thayer, supra note 38, at 383-85. It was not until 1816 that the English judiciary formally recognized that in "order to give an impartial verdict, [a juror] should enter the box altogether uninformed on the issue he will have to decide." Id. at 385 n.1. When a case was deemed "of too great nicety for the discussion of ordinary freeholders," i.e., the more complicated cases, "special juries" were chosen "out of a better class of jurymen." Thayer, supra note 38, at 300-01.

43. For some of the earliest recorded charges to the jury, see Thayer, supra note 37, at 312-13.

44. Arnold, Law and Fact in the Medieval Jury Trial: Out of Sight, Out of Mind, 18 AMER. J. LEG. HIST. 267, 278 (1974). See also T. PLUCKNETT, supra note 34, at 125, 137-38, 417-18; J. GUINTHER, supra note 11, at 12. It has been suggested that the general verdict developed at least in part in response to the lack of sufficient numbers of professional lawyers to administer a more sophisticated system. See Arnold, supra note 18, at 267.

45. "[N]o separation of law from fact could be imposed upon the judgment of God [in the ordeals of fire, water, or battle]. The verdict of the jury necessarily occupied the same position." T. PLUCKNETT, supra note 34, at 137.

46. See Fox's Libel Act of 1792, 32 Geo. 3, ch. 60 (jury authorized to "give a general verdict of guilty or not guilty upon the whole matter put in issue"), discussed in T. PLUCKNETT, supra note 34, at 137-38. Thus the jurors were to decide not only what had happened but also whether the conduct amounted to "libel," i.e., whether it satisfied the legal requirements of criminality. See also Henderson, The Background of the seventh amendment, 80 HARV. L. REV. 289, 328-35 (1966); Howe, supra note 36, at 385. The Act was designed to bring libel cases into the general ambit of criminal cases in which the jury rendered a general verdict on fact and law. Id.
strain its discretion on the other. The latter concern gained in importance as the doctrine of the law became increasingly technical and thus less accessible (and sometimes even counter-intuitive) to laypersons. From the earliest time that jurors were given authority over law as well as fact, the problem of jury control arose. Thayer thus notes that from the outset, "the [judge's] charge had the effect not merely to bring clearly to the jury's mind what they were to pass upon, but also to prevent their wandering away into irrelevant matters—matters that were not in issue." Judges sought to fashion their instructions so that "the jury might not pass upon questions of law, and might not go wrong through any misapprehension of the facts," or err by "not separating facts from law." Another method of jury control, directing the verdict, is described by Chief Justice Vaughn:

True it is, if it fall out upon some special tryal, that the jury being ready to give their verdict, and before it is given, the Judge shall ask, whether they find such a particular thing pronounced by him? or whether they find the matter of fact to be as such a witness, or witnesses have depos'd? and the jury answer, they find the matter of fact to be so; if then the Judge shall declare, the matter of fact being by you so found to be, the law is for the plaintiff, and you are to find accordingly for him.

If notwithstanding they find for the defendant, this may be thought a finding in matter of law against the direction of the Court; for in that case the jury first declare the fact, as it is found by themselves, to which in fact the Judge declares how the law is consequent.

And this is ordinary, when the jury find unexpectedly for the plaintiff or defendant, the Judge will ask, how do you find such a fact in particular? and upon their answer he will say, then it is for the defendant, though they found for the plaintiff, or e contrario, and thereupon they rectifie their verdict.

The procedure of attaint developed as a much more drastic means of control in which the jurors were imprisoned for having rendered

47. Thayer, supra note 37, at 376.
   The Court always held towards the jury a relation of control, and the books are full of traces of ordinary discipline. In an early case the jury appeared to be answering subtly, so as to conceal something. The judge calls for a better answer, or he will shut them up over night.

48. Id. at 313.
49. Id. at 313-15.
a "false verdict," and their decision was reversed.\footnote{51} By the time of 
Bushel's Case in 1670,\footnote{52} however, it was explicitly recognized that 
since the judge's instructions on the law are not given in the abstract 
but are "inextricably bound up with some definite supposition of 
fact," and since the jurors are the sole finders of fact, considerable 
deference must be given to their general verdict which inescapably 
blends the law with those facts.\footnote{53} Bushel's Case has been described as 
a declaration of the jury's right to independence, if not "irresponsi-
bility."\footnote{54} The attaint was eventually supplanted by the more hu-
mane device of the new trial which could be granted when the 
verdict was plainly contrary to the law or evidence.\footnote{55}

The institution of the jury was enthusiastically welcomed in the 
colonies and later the new American republic, particularly in the 
criminal context, where it was understandably viewed by the Foun-
ders as a check on governmental overreaching.\footnote{56} As embodied in

\footnote{51. For a discussion of attaint, see infra notes 152-55 and accompanying text.}
\footnote{52. See Thayer, supra note 38, at 382; T. PLUCKNETT, supra note 34, at 134. Bushel 
was a member of the jury that acquitted William Penn of unlawful assembly. The verdict 
was deemed to be against the court's instructions as to the law and against the evidence, 
and the jurors were imprisoned. Chief Justice Vaughn's opinion in the habeas corpus 
case releasing them ended the practice of disciplining jurors in this way and is viewed as 
pivotal in defining the role of the jury, particularly in its suggestion that they were not 
bound to follow the direction of the court. \textit{Id.} For an extended discussion of Bushel's 
Case, see J. GUINTHER, supra note 10, at 24-35.}
\footnote{53. Thayer, supra note 38, at 394.}
\footnote{54. T. PLUCKNETT, supra note 34, at 134.}
\footnote{55. Thayer, supra note 38, at 384; T. PLUCKNETT, supra note 34, at 135-36; 
Henderson, supra note 45, at 311. "It was inevitable . . . that the practice should arise of 
setting aside verdicts for erroneous conclusions as to facts, in the same way as decisions 
upon law [made by judges] could be reversed if they were erroneous." T. PLUCKNETT, 
supra note 34, at 137.}
\footnote{56. Comment, supra note 37, at 171. Thayer wrote of the American tendency to 
"exalt in some ways the relative functions of the jury beyond all English precedent." J. THAYER, 
PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 219 (1898). "Ever 
since the seventeenth century when juries began to express sentiments against the 
government, there has been a tendency for the jury to become, at least in popular 
thought, a safeguard of political liberty." T. PLUCKNETT, supra note 34, at 107.}

In colonial America, the jury stood between the colonists and judges representing the 
king. \textit{See} Howe, supra note 36, at 591. Thus it is not surprising that the very first 
recorded statute in New England was one guaranteeing trial by jury in "all Criminal 
acts, and also all [matters] of trespasses and debts between man & man." Murrin, 
supra note 39, at 157 (citation omitted). The Massachusetts Body of Liberties of 1641 
granted either party in civil suits and the defendant in criminal cases a right to request 
jury trial. \textit{Id.} at 183.

The Founders' enthusiasm for juries in criminal cases, however, did not always carry 
over into civil litigation. \textit{See} THE FEDERALIST Nos. 81, 83 (A. Hamilton). Yet some 
historians have concluded, contrary to the prevailing wisdom, that the colonists were 
more enthusiastic about jury trials in civil cases and rarely used juries in non-capital 
criminal cases. \textit{See} Murrin, supra note 39, at 153.
the Constitution, the right to jury trial in both civil and criminal cases also reflected the then-prevalent democratic faith in the innate judgment of the common people, as well as the belief in natural law theory—i.e., that natural justice, accessible to each citizen, was a better guide to conduct than man-made law. As Judge Arnold has described it:

What kind of world allowed nonprofessionals to have this much power and authority? It was, I believe, a world in which law was regarded as a concrete, discoverable, and palpable fact. It was something that was discoverable by observation and by the application of moral minds to facts. Law, substantive law, was regarded as something organic and internal, not imposed from the outside by an external sovereign whose job it was to make it. Law, in fact, was not made, in the modern sense, not nearly to the same extent. Law was produced by discovery process, but a discovery process of a common-law character that could be resorted to, not just by judges, but also by lay persons—any moral person could do it. In that kind of world with that concept of law, an untrammeled jury makes a lot of sense.

In the early years of the Republic the courts went so far as to explicitly recognize the right of juries to ignore the judge’s instructions on the law to be applied by them. In Georgia v. Brailsford, a jury trial heard by the Supreme Court in its original jurisdiction, Chief Justice Jay instructed the jury:

It may not be amiss here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court, to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of

57. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed....” U.S. CONST. amend. VI. “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules at common law.” Id. amend. VII.

58. Comment, supra note 37, at 171. As Plucknett observed in the earlier English context, the “idea of the jury representing the public of a particular locality has enormous consequences in an age when representative institutions were rapidly developing.” T. PLUCKNETT, supra note 34, at 137.


60. 3 U.S. (3 Dall.) 1, 4 (1794), discussed in Sunderland, Verdicts, General and Special, 29 Yale L. Rev. 253, 253-54 (1920); and Howe, supra note 36, at 589. The facts in this matter were not in dispute.
both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt, you will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of the law. But still both objects are lawfully, within your power of decision. 61

It took the Court one hundred years to repudiate this expansive view of jury power. 62

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61. 3 U.S. at 4. Justice Black, writing in 1943, asserted: "In 1789, juries occupied the principal place in the administration of justice. They were frequently in both criminal and civil cases the arbiters not only of fact but of law." Galloway v. United States, 319 U.S. 372, 399 (Black, J., dissenting) (citations omitted). For a good part of the nineteenth century, American juries were specifically told that they could disregard the judge's instructions on the law and determine the matter themselves—the "people's law." Howe, supra note 37, at 584, 589; Henderson, supra note 45, at 321.

When the Sedition Law was adopted in 1798, it included an amendment to the original version which provided that "the jury ... shall have a right to determine the law and the fact, under the direction of the court, as in other cases." Act of July 14, 1798, Ch. 74, 1 Stat. 596, discussed in Howe, supra note 37, at 586-587. The Georgia constitution of 1777 provided in article 41 that "the jury shall be judges of law, as well as of fact" and forbade the finding of special verdicts. Howe, supra note 37, at 597 n.58 (citation omitted). A Massachusetts statute of 1808 provided that civil juries should "decide at their discretion, by a general verdict, both the fact and the law involved in the issue." See Henderson, supra note 45, at 304 n.43 (quoting Laws of Mass. ch. 139, Sec. 15, 389 (1808)). But in Silva v. Low, 1 Johns. Cas. 336 (N.Y. Sup. Ct. 1800), the court granted the defendant's motion for a new trial, noting: "The jury, in finding this verdict, must have intended to disregard the determination of this court on the questions of law previously settled, and their verdict must therefore be considered as against law."

62. See Sparf & Hansen v. United States, 156 U.S. 51 (1895) (recognizing jury's obligation to follow judge's instructions as to what law is in both criminal and civil cases). "[W]here the jury must of necessity often pass upon a question, 'compounded of fact and law,' their duty, when considering the evidence, was to apply the law, as given by the court, to the facts proved. . . ." Id. at 67. The majority decision of Justice Harlan set forth the "mischievous consequences that would flow from the doctrine that the jury may, of right, disregard the directions of the court, and determine the law for themselves." Id. at 71. The dissent asserted the jury's right to disregard the judge's instructions in criminal cases. Id. at 110-83 (Gray, J., dissenting). The dissenters assumed that questions of criminal law are "elementary and simple, and easily understood by jurors taken from the body of the people." Id. at 173 (Gray, J., dissenting). See also Howe, supra note 37, at 583-84, 589.

By the beginning of the 1900s, most of the states had also repudiated, by statute or case law, earlier assertions of jury power over law, especially in civil cases. See generally Howe, supra note 37, at 614. The 1821 Revision of the Laws of Connecticut, for example, had provided that in civil cases, it was the duty of the court "to decide all questions of law arising in the trial of a cause, and in committing the cause to the jury, to direct the jury to find it accordingly." In criminal cases, it was the duty of the court to state its opinion on questions of law to the jury, but to submit the case for their consideration of both law and fact questions without any direction as to what their verdict should be. A statute of 1918 brought the two types of cases into line by providing that "the court shall decide all issues of law and questions of law arising on the trial of criminal causes. . . ." Id. at 602-04 (citations omitted).
Preference for the wisdom of the lay jury over the professional judge is reflected in the United States Supreme Court's *Sioux City & Pacific R.R. v. Stout* decision in 1873. The dispute involved a claim for injuries sustained by a child on an unguarded and unlatched turntable. Although the underlying facts were not in dispute, the trial judge submitted the case to the jury for a determination of whether the railroad had acted negligently. The railroad contended that negligence is an issue for the jury only when there were disputed facts to resolve, but otherwise it is a legal question for the judge. Rejecting this view, the Court held that in those cases where the ultimate question "is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts," the law "commits to the decision of the jury." The Court waxed poetic:

Twelve men of the average of the community, comprising men of education, and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and

It has been argued that the notion that the jury has "the right to decide the law" was the result of fundamental misunderstanding of the role of the jury in criminal cases. The jury's unlimited right to acquit in such cases, recognized by the mid-seventeenth century, was in actuality a one-sided protection for the accused. It was, the argument goes, erroneously extrapolated into civil cases as a right to decide for either party regardless of the law or evidence. See Henderson, *supra* note 46, at 290-91, 327. It has also been observed that American juries never in fact had complete power to decide law questions, because jury control devices operated to constrain such power. *Id.* at 299-320.

63. 84 U.S. (17th Wall.) 657 (1873).
64. *Id.* at 657-58.
65. *Id.* at 659.
66. *Id.* at 663, 664. The Court distinguished a class of cases where, on undisputed facts, the ultimate decision is a matter of law left for the judge:

If a deed be given in evidence, a contract proven, or its breach testified to, the existence of such deed, contract or breach, there being nothing in derogation of the evidence, is no doubt to be ruled as a question of law. If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled as a matter of law that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So if a coach-driver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there was no negligence and no liability. But these are extreme cases.

*Id.* at 663.
draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.67

The Court thus mandated that “when the facts are disputed, or when they are not disputed, but different minds might honestly draw different conclusions from them, the case must be left to the jury for their determination.”68

Whether the Pacific Railroad’s turntable was latched or not was a pure question of fact concerning an actual physical event, and had it been disputed by the parties it would clearly have been a question for the jury. Whether the defendant that admittedly operated an unlatched device was acting “negligently,” however, was a question requiring interpretation and application of a legal construct. While the judge will articulate the contours of negligence law to the jury,69 Stout leaves it to them to apply as they see fit. If their conclusion can be justified under “any construction which the jury was authorized to put upon the evidence, or by any inferences they were authorized to draw from it,” then their judgment “cannot be disturbed” by trial or appellate judge.70

67. Id. at 664.
68. Id. at 665. The Court reiterated this view 20 years later in Richmond & D.R.R. v. Powers, 149 U.S. 43, 45 (1893):
   It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fairminded men will honestly draw different conclusions from them.

69. The trial judge had instructed the Stout jury:
   [T]o maintain the action it must appear by the evidence that the turntable, in the condition, situation, and place where it then was, was a dangerous machine, one which, if unguarded or unlocked, would be likely to cause injury to children; that if in its construction and the manner in which it was left it was not dangerous in its nature, the defendants were not liable for negligence; that they were to further consider whether, situated as it was as the defendants’ property in a small town, somewhat remote from habitations, there was negligence in not anticipating that injury might occur if it was left unlocked or unguarded; that if they did not have reason to anticipate that children would be likely to resort to it, or that they would be likely to be injured if they did resort to it, then there was no negligence.

70. Id. at 661. Judges, the Court continued, “are not called upon to weigh, to measure, to balance the evidence, or to ascertain how . . . [they] should have decided if acting as jurors.” Id. at 663.
The institution which had begun as a group of local inhabitants summoned to provide the court with factual information about the dispute had become interpreter and applier of the law. Jefferson recognized the significance of this role when he wrote: "Were I called upon to decide, whether the people had best be omitted in the legislative or judiciary department, I would say it is better to leave them out of the legislative. The execution of the laws is more important than the making them."

It does not appear that allocation of the law-application function to the jury in civil cases is in any way constitutionally required. The Stout Court made no reference anywhere in its opinion to the seventh amendment. That amendment's second clause speaks tellingly of "facts" tried by juries (which cannot be "reexamined in any Court" except in accordance with the common law), and the Supreme Court has consistently read the amendment to require "that questions of fact in common law actions shall be settled by a jury." The broader preservation of jury trial provided in the first clause of the amendment is written on a sufficiently cloudy historical record that it is not entirely clear how the law application function was allocated and controlled in English and American law in 1791.

It has been observed that nowhere in the legislative history of the United States Constitution "can any evidence be found that the relation of judge to jury was considered as affected in any but the most general possible way by the seventh amendment, or even that it was

71. Letter from Jefferson to L'Abbe Arnold, in 3 WRITINGS OF THOMAS JEFFERSON 81-82 (Washington ed. 1854), quoted in Howe, supra note 37, at 582.

72. Walker v. New Mexico & S.P. Ry., 165 U.S. 593, 596 (1897) (emphasis added); Hodges v. Easton, 106 U.S. 408, 412 (1882) ("It was the province of the jury to pass upon the assays of fact, and the right of the defendants to have this done was secured by the Constitution of the United States.").

73. See generally Weiner, supra note 34, at 1889; Shapiro & Coquillette, supra note 10, at 448-56. The actual power of the civil jury in the thirteen original states "and the extent of judicial control over its verdicts varied enormously and unsystematically from state to state." Henderson, supra note 46, at 299. Moreover, since concepts like negligence were not developed in English or American law as of 1791, and the most analogous questions of the time were generally reserved for the judge, it has been suggested that "from a strict historical test . . . there is no federal constitutional right to have a jury apply the reasonable man standard." Weiner, supra note 34, at 1891.

The Supreme Court has held that the seventh amendment "did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing." Galloway v. United States, 319 U.S. 372, 390 (1943) (citation omitted). Rather, "the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions." Id. at 392 (citation omitted).
considered at all."74 Moreover, procedural devices that circumvent the jury, such as summary judgment, directed verdict, and judgment notwithstanding the verdict, have passed constitutional muster on the reasoning that where no facts are genuinely in dispute, or where reasonable jurors could not find for the party moved against, the judge can decide the case as a matter of law.75

Notwithstanding the apparent lack of constitutional mandate, and the frequent reference to the jury as a "fact-finding body,"76 that institution remains the primary law-applier in civil cases tried to a jury.77

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74. Henderson, supra note 46, at 290. There is a paucity of evidence concerning the intention of the Framers with regard to the seventh amendment. Id. at 290-91. What is clear is that the lack of a provision in the original Constitution concerning civil juries, together with the grant to the Supreme Court of appellate jurisdiction over law and fact, became a prominent part of the Anti-Federalist call for a bill of rights. Six ratifying states proposed amendments calling for the preservation of jury trial in civil cases. Id. at 295-99. In order to assure ratification of the Constitution by the Massachusetts convention in 1788, for example, it was necessary to recommend the following proposed amendment: "In civil actions between citizens of different States, every issue of fact arising in actions at common law, shall be tried by a jury, if the parties, or either of them, request it." Id. at 298 (citation omitted).

There was, however, little discussion of the powers such juries should have, or the extent of judicial control over them. Id. at 295-99. In short, while "a general guarantee of the civil jury as an institution was widely desired, . . . there was no consensus on the precise extent of its power," and "no one discussed that question in any detail." Id. at 299. See also Galloway v. United States, 319 U.S. 372, 396 (Black, J., dissenting).

75. See, e.g., Galloway, 319 U.S. at 396 (upholding constitutionality of directed verdict); Page v. Work, 290 F.2d 323, 334 (9th Cir. 1961), cert. denied, 368 U.S. 875 (upholding device of summary judgment). For a discussion of the special verdict, see infra notes 180-83 and accompanying text. See generally Henderson, supra note 46, at 299-320 (presenting extensive history of use and acceptance of jury control devices in English and American practice). Where the legal sufficiency of the pleadings is challenged, the case may of course be disposed of by the judge on demurrer or motion to dismiss for failure to state a claim, and no jury will ever be involved.


77. See Friedenthal, Kane & Miller, supra note 22, at § 11.2. The American Bar Association has stated: "The traditional province of the jury in civil cases [includes] . . . determining standards of conduct that the law itself defines as those that an ordinary reasonable person would observe." Standards Relating to Trial Courts § 2.10 (Commentary). A typical standard jury instruction reads:

When I use the word negligence in these instructions, I mean the failure to do something which a reasonably careful person would do or the doing of something which a reasonably careful person would not do under the circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under these circumstances; that is for you to decide.


Some cases hold that the question of the interpretation of a contract, even in the absence of a factual dispute as to its existence or terms, is a matter for the jury. See, e.g., Dobson v. Masonite, 359 F.2d 921, 923 (5th Cir. 1966). Cf. United States Fire Ins. Co. v. Pressed Steel Tank Co., 852 F.2d 313, 316 (7th Cir. 1988) (if contract is unambiguous, task of interpretation is for judge). Weiner notes that certain mixed questions of law /
Implications of Using the Jury As Law Applier Through the General Verdict

When the task of law application is performed as it routinely is in the context of the general verdict, we have the ultimate in “black box decision-making”—the evidence and law are fed into one end of the box and the box sends a result “without an opinion to explain or justify its decision.”78 This product of jury deliberations comes into court “unexplained and impenetrable,”79 with no indication whether it is based upon particular findings of fact, or particular interpretation of law, or both, or neither. It cannot be determined from the general verdict whether the jurors followed, ignored, or misunderstood the judge’s instructions on the law.80 A defendant’s verdict in a civil case, just as a not-guilty verdict in a criminal case, may mean, for example, that the jury found the defendant did not commit the acts alleged, or it may reflect the jury’s conclusion that (despite the judge’s instructions) the commission of those acts should not constitute liability. Moreover, a seemingly unanimous general verdict may actually hide wide disagreement among the jurors. Where, for example, half the jurors conclude that defendant was negligent but that plaintiff was contributorily negligent, and the other half conclude that neither plaintiff nor defendant acted negligently, a defendant’s verdict may nevertheless be reached despite the lack of consensus on the underlying premises.

and fact, such as the issue of reasonable time in commercial law cases or of what constitutes probable cause in malicious prosecution actions, are often left for the judge. Weiner, supra note 34, at 1895. Appellate courts may establish per se rules, e.g., failure to stop at a railroad crossing constitutes negligence as a matter of law, that take the ultimate question from the jury’s hands. Id. at 1880.

The jury’s authority to award relief is of course limited to money damages; equitable relief, such as reinstatement in an employment case, is a matter within the judge’s discretion. See Conklin v. Lovely, 834 F.2d 543 (6th Cir. 1987). But see Curtis v. Loether, 415 U.S. 189 (1974) (findings of fact made by jury are binding on judge in injunction decision); Ward v. Texas Employment Comm’n, 825 F.2d 907 (5th Cir. 1987) (trial judge adopted jury’s responses to special interrogatories on plaintiff’s Section 1983 claim in ruling against plaintiff on Title VII claim).

79. G. Clementson, supra note 11, at 12.
80. As Professor Sunderland put it, with the general verdict “it is impossible to tell how or whether the jury applied the law. They may have applied it in a wholly wrong way, or they may have failed to apply it at all. No analysis of the verdict can be made which will throw any light on the process.” Sunderland, supra note 60. The jury will be governed by the judge’s statement of the controlling law “only if they understand its meaning and are willing to be guided by it.” F. James & G. Hazard, supra note 26, at 309. As Thayer documents, the jury’s willingness and ability to follow the judge’s directions on the law has been a concern since the earliest days of the general verdict. See Thayer, supra note 38, at 313.
FACT VERDICT

Review of jury verdicts by trial and appellate judges remains restricted, as Stout suggested, and the verdicts are accorded considerable deference. Indeed, given the nature of the general verdict and the process leading up to it, it is hard to imagine a meaningful method of review. As one writer has put it, the "general verdict has always been highly indulged, and presumptions which the reason and method which produced it would rarely sustain have been entertained in its favor."

Using the jury and not the judge as law applier has had momentous implications for the administration of our civil litigation system. When a judge decides a case there will be a written (and usually published) opinion finding facts and applying the controlling law. Law application thus becomes law declaration because "the result of the specific application is to establish a principle applicable to future cases." In contrast, jury verdicts do not carry precedential value and jury decision-making does not establish general principles applicable to other cases involving similar fact situations. Two litigants with virtually identical fact situations subject

81. For a discussion of the review of jury verdicts under Stout, see notes 63-70 and accompanying text.

82. Because the judge cannot take the case from the jury if the evidence could support a verdict for either side, the availability of jury control devices "can only ensure that the jury will return one of a range of possible verdicts that the court finds reasonably but minimally supported by the evidence." In re Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069, 1087-88 (3d. Cir. 1980).

It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.


83. G. Clementson, supra note 11, at 33.

84. The law of evidence itself, with its many rules excluding logically relevant information, is of course a "product of the jury system ... where ordinary untrained citizens are acting as judges of fact." J. Thayer, supra note 56, at 509.

85. Weiner, supra note 34, at 1924 (citation omitted).

86. Jury-made law, as compared with judge-made law, is peculiar in form. It does not issue general pronouncements. You will not find it set forth in the law reports or in text-books. It does not become embodied in a series of precedents. It is nowhere codified. For each jury makes its own law in each case with little or no knowledge of or reference to what has been done before or regard to what will be done thereafter in similar cases.
to the same standards of law may receive quite different results from two different juries.\footnote{87} This creates obvious inequities among similarly situated persons and makes unenviable the task of prediction for those counselling clients on the specific conduct required by the law or the prospects of going to trial on a particular matter. If uniformity and predictability are goals to be achieved by our judicial system, law application by the jury stands as a major obstacle.\footnote{88} A South Carolina judge observed in 1792, granting a new trial in a case in which two consecutive juries had found for the defendant in obvious disregard of the judge's instructions on the law,

\begin{quote}
[H]ere is a clear and established principle, uncontrolled by any facts, which two juries have said shall not have its fixed operation. Shall their opinions be allowed to change the law? If they were, there would very soon be no certainty in any law, or in any of our rights as freemen. \[D\]ifferent juries would make different constructions, and the law would be the fluctuating opinion of every twelve men who happened to sit as jurors at any court.\footnote{89}
\end{quote}

The product of our litigation system has been aptly described as "juriesprudence."\footnote{90}

\footnote{87. The American tort recovery system, dominated by jury trial or the expectation of jury trial, has been described as a lottery. See Sugarman, \textit{Holding Down the Tort}, 74 A.B.A.J. 115, 118 (Sept. 1, 1988). It has been estimated that of the patients in the United States who suffer a loss because of medical malpractice, "at most 1 in 25 received compensation through the 'capricious' tort system." R. \textsc{Litan} & C. \textsc{Winston}, \textsc{Liability: Perspectives and Policy} 116 (1988). There is a common perception among litigators that jury trials in general are "crap shoots." See Tillers, \textit{Introduction to Boston University Symposium on Probability and Inference in the Law of Evidence}, 66 B.U.L. Rev. 381, 381 (1986).

88. Without question there is a tension between the "competing values of the commitment to the jury as 'finders of fact' and the legal system's goal of achieving both consistency and efficiency." FRIEDENTHAL, KANE \& MILLER, \textit{supra} note 22, at § 11.2. The argument for predictable results from the courts has frequently been made. \textit{See}, e.g., O.W. HOLMES, \textsc{The Common Law} 123 (1923); Brunet, A \textit{Study in the Allocation of Scarce Resources: The Efficiency of Federal Intervention Criteria, 12 Ga. L. Rev. 710, (1978) ("Inconsistent findings of fact [and law] are inefficient for numerous reasons. They fail to perform the conflict-avoidance or law-making functions of dispute resolution that represent the very rationale for a civil litigation system and produce the harmful negative externalities associated with undecided conflict. Lack of confidence in the judicial system damages society" and "[i]nconsistent determinations of matters of fact and law tend to degrade the public's confidence in the judiciary and government.")


90. Skidmore v. Baltimore & O.R.R., 167 F.2d 54, 58-59 (2d Cir. 1948), \textit{cert. denied}, 335 U.S. 816 (1948). While it is true that few cases actually reach a contested jury trial, \"decisions [at every pre-trial stage] are in part informed by expectations of what the jury will do. Thus, the jury is not controlling merely the immediate case before it, but the host of cases not before it which are destined to be disposed of by the pre-trial process. The jury thus controls not only the formal resolution of controversies . . . but also the
When we depend on jurors untrained in the law to comprehend legal concepts provided to them through oral instructions by the judge and further to properly apply them to the facts as found, we make reliance on such rules in the conduct of one's daily affairs a matter of questionable wisdom. Thus one study concluded that of the variety of external pressures felt by large manufacturers with regard to the safe design of their products, liability litigation had the greatest influence on design decisions, but that the signals sent by jury verdicts were "extremely vague." In this manner does "the law" supposedly order society's affairs.

There has been considerable debate concerning the choice of juror over judge for the task of law application. Holmes was among those who took issue with the Stout Court's assumption that the jury was the better purveyor of societal values and argued that the judge's experience on the bench made him a better representative of the "common sense of the community" than the average jury. More recently the United States Court of Appeals for the Third Circuit has observed that "[a]lthough we cannot presume that a judge will be more intelligent than a jury or more familiar with technical subject matters, a judge will almost certainly have substantial familiarity with informal resolution of cases that never reach the trial stage. In a sense the jury, like the visible cap on an iceberg, exposes but a fraction of its true volume."

H. Kalven & H. Zeisel, supra note 28, at 31-32.

91. For Judge Frank, a "better instrument than the usual jury trial could scarcely be imagined for achieving uncertainty, capriciousness, lack of uniformity, disregard of former decisions—utter unpredictability... Only a very foolish lawyer will dare guess the outcome of a jury trial." J. Frank, supra note 13, at 186. "Surely, if any law is retroactive—unknowable at the time of action—it is jury law. As long as the jury system flourishes it will be peculiarly absurd to say that any man warrantably acted with reference to a known state of law." Id. at 186 n.5.

Writing of the problem of the jury in complex cases, the United States Court of Appeals for the Third Circuit observed:

If judicial decisions are not based on factual determinations bearing some reliable degree of accuracy, legal remedies will not be applied consistently with the purposes of the laws. There is a danger that jury verdicts will be erratic and completely unpredictable, which would be inconsistent with evenhanded justice. Finally, unless the jury can understand the evidence and the legal rules sufficiently to rest its decision on them, the objective of most rules of evidence and procedure in promoting a fair trial will be lost entirely. We believe that when a jury is unable to perform its decisionmaking task with a reasonable understanding of the evidence and legal rules, it undermines the ability of a district court to render basic justice.


93. See O.W. Holmes, supra note 88, at 124.
with the process of civil litigation, as a result of experience on the bench or in practice," and among other things, this gives the judge an advantage over the jury in applying complicated legal standards to the facts of the case.\textsuperscript{94} Moreover, "the requirement that a judge issue findings of fact and conclusions of law offsets the substantial tendency to overlook issues in order that a verdict may be reached in . . . difficult cases."\textsuperscript{95} Yet while acknowledging that the judge has certain advantages of training, experience, and discipline over the jury, Judge Higginbootham concludes that "it is by no means certain that a properly assisted jury with its collective experience and recall will be inferior." He suggests that "much decisionmaking actually rests on hunch and intuition," and thus "in comparing the unexplained decision of the jury with the explained decision of the judge, we are not compelled to make the inference that the unexplained decision is for that reason the less accurate."\textsuperscript{96}

The allocation of the law-application function to the jury has been defended on a number of grounds. Primary among them is the notion of "jury equity"—that the jurors are thus permitted to modify the "harsh results of law to conform to community values in cases where a judge would have to apply the law rigidly."\textsuperscript{97} "To a certain extent judges have represented the government, juries the people; judges the theoretical law and its rational implications, juries the layman's common sense and also the more or less 'passional elements in our nature.'"\textsuperscript{98} As Dean Wigmore put it:

Law and justice are from time to time inevitably in conflict. That is because law is a general rule (even the stated exceptions to the rules are general exceptions); while justice is the

\begin{quote}
\textsuperscript{94} In re Japanese Elec. Prod. Antitrust Litig., 631 F.2d at 1087. \textit{See also} Huskie v. Griffin, 75 N.H. 545, 74 A. 595, 598 (1909) ("[T]he trial judge has distinct advantages [over] the jury. So far as he is a juror, his experience with many trials gives him a training for his job; the distractions and interruptions do not confuse him as they are likely to confuse the ordinary juryman. And obviously, the trial judge is far better able to understand the legal rules and the method of applying them to the facts.")

\textsuperscript{95} In re Japanese Elec. Prod. Antitrust Litig., 631 F.2d at 1087.

\textsuperscript{96} Higginbootham, Juries and the Complex Case: Observations About the Current Debate, in \textit{The American Civil Jury}, supra note 10, at 74-75. \textit{See also} Pease v. Sinclair Ref. Co., 104 F.2d 183, 187 (2d Cir. 1939) ("As the experience of one man usually differs from that of another, our law wisely says that what is 'reasonable' is to be determined by the jury—that is, it is to be the result of the, to a certain extent varying, opinions of twelve different persons."). Judge Charles Clark, the principal drafter of the Federal Rules of Civil Procedure, authored the \textit{Pease} opinion. \textit{See id.} at 184.

\textsuperscript{97} In re Japanese Elec. Prod. Antitrust Litig., 631 F.2d at 1085.

\textsuperscript{98} F. JAMES & G. HAZARD, supra note 26, at 305. The conflict between judge and jury, which is "basic . . . in the legal history of America," is a conflict "between the people's aspirations for democratic government, and the judiciary's desire for the orderly supervision of public affairs by judges." Howe, supra note 37, at 615.

fairness of this precise case under all its circumstances. . . .
The jury, in the privacy of its retirement, adjusts the general
rule of law to the justice of the particular case. Thus the
odium of inflexible rules of law is avoided, and popular satis-
faction is preserved. That is what the jury trial does. It sup-
plies that flexibility of legal rules which is essential to justice
and popular contentment. And that flexibility could never be
given by judge trial. The judge . . . must write out his opinion,
declaring the law and the findings of fact. He cannot in this
public record deviate one jot from those requirements. The
jury, and the secrecy of the jury room, are the indispensable
elements in popular justice.99

Dean McCormick observed in a more pragmatic vein:

The familiar maxim places on the judge the duty of declar-
ing the law and upon the jury the task of finding the facts. But
this statement leaves out of the account the main purpose of
the trial, namely, to get a decision of a lawsuit between two
parties. The declarations of law and findings of fact are not
sought as ends in themselves. They are parts of a process in
which the judge and jury are called upon to cooperate in
reaching the determination of a dispute between A and B. . . .
The jury's part is more than merely ascertaining and declaring
facts. If that were all, surely we could find more accurate and
less expensive methods of doing it, than by asking twelve lay-
men to hear eye-witnesses months or years after the event and
to make their report thereon.

The jurors when asked to give a general verdict undoubt-
edly conceive their function more broadly. They feel that they
are being called on to decide the dispute. They would ac-
knowledge that they should follow the facts and apply the law,
if they can, in reaching their decision, but actually they often
short-circuit this tedious task without any attempt to perform
it. And in any event, they feel that their sense of justice may
be weighed in the balance with the law, and may outweigh it.
It is probably this insistence of juries upon making their popu-

Pound has stated that the purpose of extending broad powers to the jury is
to keep the letter of the law the same in the books, while allowing the jury
free rein to apply different rules or extra-legal considerations in the
actual decision of causes. . . . If the ritual of charging the jury on the law
with academic exactness is preserved, the record will show that the case
was decided according to the law, and the fact that the jury dealt with it
according to extra-legal notions of conformity to the views of the
community for the time being, is covered up.
Pound, Law in Books and Law in Action, 44 Am. L. Rev. 12, 18 (1910).
lar sense of right a factor in their decisions, that has given to
the jury its chief survival-value.100

In opposing the use of special verdicts in federal civil litigation,
Justices Black and Douglas invoked the "jury equity" theme when
they spoke of the general verdict as necessary to "preserve the right
of trial by jury as an indispensable part of a free government."101

A second justification advanced for the allocation of broad deci­
sion-making authority to the jury is that this "accord[s] a greater
measure of legitimacy to decisions," especially those that "depend
upon determinations of degree rather than of absolutes, such as
whether particular conduct constitutes negligence," because such
"'line-drawing' seems less arbitrary when made by a representative
body like the jury."102 If the judicial process is viewed as function-

100. McCormick, Jury Verdicts Upon Special Questions in Civil Cases, 2 F.R.D. 176, 177
(1973). More recently a noted jurist observed that
[t]o this day it is supposed that the jury serves as a merciful, albeit at
times lawless, element in the daily administration of the law," and he
characterized the institution as "a sort of sounding board to indicate, by
its refusal to convict on a showing of technical lawbreaking, that a certain
law is unpalatable to the community. Jurors represent the community;
and it is healthy for legislators to know that the laws they pass must
square with the jury's notions of fair play before they will be enforced.

BOTEIN & GORDON, supra note 6, at 39.
Professor Kalven has written:
It has been a traditional point of argument against the jury that it amelio­
rated the harsh rule of law just enough to dampen any enthusiasm or
momentum toward proper reform. . . . It is easy to say that a rule of law
is either sound or unsound. If it is sound it should be enforced as writ­
ten; if it is unsound it should be changed by proper process. This logical
scheme, however, seems to me too rigid. Reform of private law is notori­
ously hard to effectuate, and in the long term there is room for the jury's
touch. Further, there is no inconsiderable evidence that jury resistance to
a rule is often a catalyst of change.

Kalven, supra note 77, at 1071.

101. Minority Statement of Justices Black and Douglas opposing the 1963
justices continued:
Many of the most famous constitutional controversies in England
revolved around litigants' insistence, particularly in seditious libel cases,
that a jury had the right to render a general verdict without being
compelled to return a number of subsidiary findings to support its
general verdict. Some English jurors had to go to jail because they
insisted upon their right to render general verdicts over the repeated
commands of tyrannical judges not to do so.

Id. at 868.

Writing of colonial times, one historian concluded:
In civil cases the primary function of the jury may very well have been to
express the community's consensus about which disputant owed the
other how much. By yielding gracefully, the loser reabsorbed himself
into the community and restored harmony with the other party. The jury
ing primarily to justify the imposition of sanctions, rather than to search for the truth, then "[i]n this legitimizing process, the seventh amendment is not a useless appendage to the Bill of Rights, but an important resource in maintaining the authority of the rule of law," because as a "sort of ad hoc parliament convened from the citizenry at large" the jury lends "respectability and authority to the process.""108

Yet another advantage that has been articulated less frequently in support of law application by the jury is that controversial questions that are difficult to resolve in the open political arena are shunted into the black box where they can be handled discreetly, beyond close scrutiny. As one writer has put it, the Stout approach passes the buck to the jury "to wrestle with the slippery and elusive concept of how the hypothetical, prudent man would have acted."104 Judge Frank observed in a similar vein that:

\[\text{by such use of the jury, you can eat your cake and have it too.} \]
\[\text{You can preserve your rules and principles unswerving and unyielding—in the form of the judge's instructions—and you can have a jury's decision (which determines the rights of the parties to the case) that is based upon scant respect for those abstractions as against emotional appeals. The rules and principles remain pure and unsullied—because, while clearly enunciated, they are not applied.}105

Ironically, then, allocation of the law-application function to the ostensibly democratic institution of the jury actually diverts some of society's most significant and vexing questions of policy (i.e., how and against whom will the laws be enforced?) into a part of the gov-

expressed the will of ordinary church members, rather than of exalted magistrates, and helped to define the community's expectations for everyday behavior.

Murrin, supra note 39, at 188.


104. Weiner, supra note 34, at 1889 (citations omitted). Judge Arnold has similarly pointed out that:

The plebiscite-on-the-case which a general verdict amounts to was simply thought to be the fairest means of deciding a dispute that may seem to involve irreconcilable equities. In an accidental fire case, for example, one of the two parties will have been ruined, and it will be a nice question as to which it shall be.

Arnold, supra note 44, at 278. It has been further suggested that, given the deference accorded jury verdicts, the allocation of mixed questions of law and fact to the jury rather than the judge also serves to discourage appeals by the losing party. Weiner, supra note 34, at 1922.

105. J. Frank, supra note 13, at 187.
ernmental process that is conducted behind closed doors and beyond the realm of meaningful scrutiny or review.

Notwithstanding these justifications, law application by jurors through use of the general verdict has been the subject of considerable criticism over the years. As Professor Kalven put it, what to the jury’s admirers is “its sense of equity” is to its detractors “its taste for anarchy.” Dean McCormick conceded that the “hidden escape-valve from the hardships of fixed law [permitted by way of the general verdict] may become an abuse, and may degenerate into a system in which juries tend not merely to temper law with equity in occasional cases of conflict, but to disregard the law generally and follow prejudice or personal favor.” Oliver Wendell Holmes similarly observed that the jury’s strength in keeping “the administration of the law in accord with the wishes and feelings of the community” is also “precisely one of their gravest defects from the point of view of their theoretical function: that they will introduce into their verdict a certain amount—a very large amount, so far as I have observed—of popular prejudice.”

It has been described as “common knowledge that the general verdict may be the result of anything but the calm deliberation, the weighing of evidence, exchange of impressions and opinions, resolution of doubts, and final intelligent concurrence which, theoreti-

108. McCormick, supra note 100, at 176, 177. Because “there is no way of knowing whether the jury actually had considered the facts and determined that the facts legally prerequisite to [that verdict] existed, or whether they found [as they did] solely because they thought [the verdict winner] had right and justice on his side,” the general verdict facilitates the “occasional subordination of the law as laid down by the judge to the popular equity of the jury.” Id. at 177.
109. O.W. HOLMES, Law in Science and Science in Law, in Collected Legal Papers 237-38 (1920). See also Traynor, Fact Skepticism and the Judicial Process, 106 U. PA. L. REV. 635, 640 (1958); Friedenthal, Kane & Miller, supra note 22, § 12.1. It must be remembered that the same jury justice that has set free criminal defendants charged with the mercy killing of hopelessly ill loved ones has also acquitted racists accused of murdering blacks and their white supporters.
cally, produce it.” Indeed, it is recognized that the deliberations may sometimes resemble “horse trading” among the jurors resulting in a compromise verdict. The following is a description of the deliberations in a seminal products liability action against several asbestos manufacturers:

[T]he twelve members of the jury had been evenly split when they took their first vote, and had subsequently divided eleven to one in favor of the plaintiff. The lone holdout was a man who felt deeply that workers were lucky to have jobs and that no company which provided them should be judged too harshly for its actions, whatever they might be. Finally, after the other jurors had tried vainly to get him to change his mind, a face-saving deal was struck in which, in return for their finding [plaintiff] Borel guilty of contributory negligence, he agreed to find that four of the defendants were negligent, and all six of them liable to Borel under the doctrine of strict liability.

Such “let’s-make-a-deal” decision-making, which several studies indicate is widespread, has nonetheless been defended as “the time-honored right of a jury to render a compromise verdict.” “Courts,” Chief Justice Burger wrote, “have long held that in the practical business of deciding cases the fact finders, not unlike negotiators, are permitted the luxury of verdicts reached by compromise.”

Professor Sunderland, complaining that the general verdict throws “a mantle of impenetrable darkness over the operations of the jury,” wrote:

The peculiarity of the general verdict is the merger into a single indivisible residuum of all matters, however numerous, whether of law or fact. It is a compound made by the jury which is incapable of being broken up into its constituent parts. No judicial reagents exist for either a qualitative or a

110. G. Clementson, supra note 11, at 12.
112. See Guinther, supra note 10, 53.
quantitative analysis. The law supplies the means for determining neither what facts were found, nor what principles of law were applied, nor how the application was made. There are therefore three unknown elements which enter into the general verdict: a) the facts; b) the law; c) the application of the law to the facts. . . . [I]f error does occur in any of these matters it cannot be discovered, for the constituents of the compound cannot be ascertained. No one but the jurors can tell what was put into it and the jurors will not be heard to say. The general verdict is as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi. Both stand on the same foundation—a presumption of wisdom. The court protects the jury from all investigation and inquiry as fully as the temple authorities protected the priestess who spoke to the suppliant votary at the shrine. It is quite probable that the law is wise in not permitting jurors to testify as to how they compounded their verdict, for all stability would disappear if such inquiries were open. . . . [T]he general verdict . . . confers on the jury a vast power to commit error and do mischief by loading it with technical burdens far beyond its ability to perform, by confusing it in aggregating instead of segregating the issues, and by shrouding in secrecy and mystery the actual results of its deliberations. 115

Judge Jerome Frank, perhaps the jury's harshest critic, held general verdicts responsible for most of the problems that have been associated with the civil jury. 116 He particularly questioned the allocation of law application to the jury, arguing: "It is inconceivable that a body of twelve ordinary men, casually gathered together for a few days, could, merely from listening to the instructions of the judge, gain the knowledge necessary to grasp the true import of the judge's words. For these words have often acquired their meaning as the result of hundreds of years of professional disputation in the courts." 117 Judge Frank further complained that:

115. Sunderland, supra note 60, at 256-61. He described the general verdict as "the great procedural opiate, which draws the curtain upon human errors and soothes us with the assurance that we have attained the unattainable," i.e., the perfect trial. Id. at 262.


117. J. FRANK, supra note 17, at 116. See also J. FRANK, supra note 13, at 64, 185; Sunderland, supra note 60 ("[T]welve men can easily misunderstand more law in a minute than the judge can explain in an hour. . . . The instructions upon the law given by the court to the jury are an effort to give, in the space of a few minutes, a legal education to twelve laymen upon the branch of the law involved in the case. Law cannot be taught in any such way.").
When a jury returns an ordinary general verdict, it usually has the power utterly to ignore what the judge instructs it concerning the substantive legal rules, a power which, because generally it cannot be controlled, is indistinguishable for all practical purposes, from a "right." Cases are often decided according to what the jury suppose the law is or ought to be; the "law," when juries sit, is "as fluctuating and uncertain as the diverse opinion of different juries in regard to it;" and often jurors are "not only judges but legislatures as well." Indeed, some devotees of the jury system praise it precisely because, they say, juries, by means of general verdicts, can and often do nullify those substantive legal rules they dislike, thus becoming ad hoc ephemeral (un-elected) legislatures.\footnote{118. Skidmore, 167 F.2d at 57-59 (footnote omitted). See also J. Frank, supra note 17, at 127-40 (criticizing legal arguments that support function of jurors as legislators).}

Judge Frank argued that the jury was not the proper institution to adjust substantive law because it is not representative of the entire citizenry, and that ad hoc jury "legislation" results in unequal treatment before the law.\footnote{119. J. Frank, supra note 17, at 127-35.} Moreover, he suggested that reliance on jury nullification to remedy the ills of unwise legislation may very well impede the enactment of remedial legislation.\footnote{120. Skidmore, 167 F.2d at 59 n.14.}

The general verdict has thus been portrayed as "an invitation to the jurors to act irresponsibly, to ignore the judge’s instructions, and to render a verdict in accord with their feelings rather than with the law and the facts of the case."\footnote{121. Comment, supra note 106, at 489.} While there has long been substantial anecdotal support for the attack on the general verdict and the use of the jury to apply law as well as find facts,\footnote{122. Judge Rossman, for example, wrote regarding his interviews with numerous jurors over the years that "in many cases where the general verdict was employed principal issues received no consideration whatever from the jury.” Rossman, The Judge-Jury Relationship in the State Courts, 3 F.R.D. 98, 108 (1944). In Melvyn Zerman’s account of his service as a juror in a murder trial, he notes that “however enlightening [the judge’s charge] may have been as regards the law . . . in our deliberations there was scarcely any reference to [it].” M. B. Zerman, Call the Final Witness 125 (1977). Attorney William S. Bailey, writing of his experience as a juror, was “impressed with the command of details possessed by the group as a whole,” noting that with “twelve sets of eyes watching and ears listening, very little had been missed,” but as “the judge read the jury instructions to us, they seemed so vague and circuitous to me in my new-found role as a lay person.” Bailey, A Lawyer Looks at Jury Duty, 13 Docket (Newsletter of the National Institute for Trial Advocacy) (Winter 1989) 15.} the tight secrecy surrounding jury deliberations has impeded the development of empirical supporting evidence.\footnote{123. For a summary of the problems researchers have had in gaining access to the jury room, see S. Kassin & L. Wrightsman, The American Jury on Trial: Psychological Perspectives 12-14 (1988); Comment, supra note 106, at 520 n.139.} This has led one com-
mentator to suggest some years ago that the “state of uninformed speculation” cried out for the development of descriptive and statistical information on the comparative use of the general and the special verdict. 124 The call has not, as far as this author knows, been answered. There is now, however, a body of empirical knowledge concerning the decision-making processes of juries that does shed significant light on the controversy surrounding the general verdict. 125

A recent major study on the psychology of jury decision-making used a methodology of simulated trials and mock deliberations to evaluate how well juries perform the tasks of factfinding and of applying the judge’s instructions on the law. 126 The general conclusions were that “[i]n their task of factfinding, juries perform efficiently and accurately” and that “[t]he view of the evidence produced by deliberation processes is invariably more complete and more accurate than the typical individual juror’s rendition of the same material.” 127 The study attributed the “remarkably competent” job juries do of factfinding to the “group memory advantage” that the body has over any one particular individual. 128

The picture of jury efficiency with regard to the law application task was, however, quite different. The researchers found that the “major obstacle to proper jury decision making is . . . the difficulty of correctly comprehending, remembering, and applying the trial judge’s substantive instructions on the law,” and that even when the judge’s instructions are clear and concise “comprehension, memory, and application of the law are major problems for juries.” 129 As a result of these shortcomings, errors commonly occur in the translation of facts and law into the “verdict categories” which the judge’s instructions are designed to yield. 130 In the deliberations studied, errors on legal questions occurred twice as frequently as

124. See Comment, supra note 106 at 519.
125. For a summary of the jury research literature, see J. Guinther, supra note 10, at xvi-xviii; S. Kassin, supra note 120.
126. See R. Hastie, supra note 2. The authors describe their work as “the most extensive analysis of behavior during jury deliberation that has been conducted to date.” Id. at 36.
127. Id. at 230. Not all would agree that jurors are good fact-finders. Judge Frank asserted that jurors are “notoriously gullible and impressionable” and open to manipulation by attorneys, making the experienced trial judge by far a better evaluator of credibility. J. Frank, supra note 13, at 192-93. See also Skidmore v. Baltimore & O.R.R., 167 F.2d 54, 63 (2d Cir. 1948), cert. denied, 335 U.S. 816 (1948) (“[T]rial judges, because of experience, are more skilled in fact-finding than juries and better armored against the seductive wiles of lawyers.”).
128. R. Hastie, supra note 2, at 230, 236.
129. Id. at 238, 251.
130. Id. at 234.
erroneous statements about the evidence presented. These conclusions are consistent with a "significant number of studies uniformly indicat[ing] that pattern instructions frequently leave jurors confused or in error about the applicable law." Other researchers have similarly praised the jury's role as factfinder while raising questions about its ability to apply legal concepts properly. Kalvin and Zeisel in their classic work on the American jury concluded that "the jury does by and large understand the facts and get the case straight" and found impressive their collective recall and intelligence. In a substantial percentage of cases, however, it was found that juries were moved to a particular result by "sentiment;" ambiguities in the evidence were resolved by resort to values shared by the jurors and not by reference to the law upon which they were instructed by the judge. In "reformulating" these instructions, "the jury . . . is able to conduct its revolt from the law within the etiquette of resolving issues of fact." Jury "nullification" of established law, it was found, does occur and is most common, not surprisingly, in cases involving the enforcement of unpopular laws such as those prohibiting gambling and drunk driving.

Kalven and Zeisel further concluded that extraneous factors such as the race or gender of the litigant or victim, as well as the demeanor of the litigant and the perceived competence of his attorney,
can influence a jury's view of the evidence.\textsuperscript{137} This confirmed the conventional wisdom that "Mr. Prejudice and Miss Sympathy are the names of witnesses whose testimony is never recorded, but must nevertheless be reckoned with in trials by jury."\textsuperscript{138} Courts have long recognized the phenomenon of the jury in which "runaway emotion overcomes judgment," particularly in civil cases where the injuries sued upon are egregious or widespread.\textsuperscript{139} It is important to note, however, that despite the common assumption, recent studies indicate no general tendency of civil juries to find against a defendant simply because it is a "deep pocket."\textsuperscript{140}

Thus while it has been argued that the "jury introduces into the trial process a fresh, constant stream of uncommitted, undogmatic transients with no hardened preconceptions, no grouping by types, no vested interest in convictions as to the outcome of the litigation,"\textsuperscript{141} this view of the disinterested juror is highly questionable. Most trial lawyers believe in picking "the right jury" for a particular


Regarding the influence of counsel, see also J. Guinther, supra note 10, at 121-22 (summarizing the data on the "likeability" factor); \textit{Through the Juror's Eyes}, 74 A.B.A.J. 79 (Oct. 1, 1988) (discussing skewing effect of mismatched attorney skills). Balzac is said to have defined a jury as "twelve men chosen to decide who has the better lawyer." J. Frank, supra note 17, at 122.

\textsuperscript{138} Skidmore v. Baltimore & O.R.R., 167 F.2d 54, 62 (2d Cir. 1948), cert. denied, 335 U.S. 816 (1948) (citation omitted); Boehm, \textit{Mr. Prejudice, Miss Sympathy, and the Authoritarian Personality: An Application of Psychological Measuring Techniques to the Problem of Jury Bias}, 1968 Wis. L. Rev. 734 (1968). Judge Frank's experience on the bench led him to conclude that the decisions of many cases are products of irresponsible jury caprice and prejudice. That the defendant is a wealthy corporation and the plaintiff is a poor boy; that the principal witness for one of the parties is a Mason or a Catholic; that the attorney for the accused is a brilliant orator; such facts often determine who will win or lose.

\textsuperscript{139} Lynch v. Merrell-National Laboratories, 830 F.2d 1190, 1196 (1st Cir. 1987).

\textsuperscript{140} See Galanter, supra note 34, at 20; Guinther, supra note 9 at 52-53. The studies, for example, indicate that defendants in malpractice and products liability cases win more often than other defendants. \textit{id.} at 52. There is support for the proposition that juries are more apt to assess higher damages against deep pockets once liability is determined. \textit{id.} at 56-68.

\textsuperscript{141} Botein & Gordon, supra note 6, at 113. The Supreme Court seems to have equated representativeness with impartiality:

[T]he Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can
case. Treatises on trial practice typically devote considerable space to the selection of jurors based on factors of gender, nationality, age, marital status, physical appearance, and occupation,\textsuperscript{142} as well as to the "conditioning" of jurors by questioning during voir dire.\textsuperscript{143} Large sums of money are spent (for clients who can afford it) on jury selection experts who determine a profile of those persons who should be sought or avoided in using peremptory challenges in the selection of a jury.\textsuperscript{144} Moreover, trial lawyers spend a significant amount of time and energy developing techniques of advocacy and presentation that are designed to induce jury verdicts on bases other than those called for by the evidence and law.\textsuperscript{145} It is beyond doubt that a talented advocate in front of "the right jury" can prevail despite the facts and law."\textsuperscript{146}

In sum, the picture that emerges from the empirical and anecdotal data provides considerable support to those who have criticized the general verdict for merging the fact-determination and law-application functions of adjudication. Procedural controls like the directed verdict and judgment notwithstanding the verdict are of limited utility in correcting errors hidden in the general verdict. Instructions from the judge can serve to limit jury prerogatives, but they are not self enforcing and may be ignored.\textsuperscript{147} The alternative approach of the special verdict will be explored in the following section.

\textsuperscript{142} See, e.g., Goldstein, Trial Technique §§ 9.29-9.32 (2d ed. 1969).
\textsuperscript{143} See Through the Juror's Eyes, supra note 137.
\textsuperscript{144} See J. Guinther, supra note 10, at 55-56.
\textsuperscript{145} See id. at 58-60; Gold, Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom, 65 N.C.L. Rev. 481 (1987). Such techniques include the adoption of certain styles and demeanor, as well as the manipulative use of language, voice, and dress. See generally Bennett & Feldman, Reconstructing Reality in the Courtroom (1981). The Duke Law and Language Project concluded that the type of diction used by a witness can significantly affect the jury's verdict. See Parkinson & Parkinson, Speech Tactics for Successful Trials, 15 Trial, Sept. 1979, at 96.
\textsuperscript{146} See Frankel, The Search for the Truth: An Imperial View, 125 U. Pa. L. Rev. 1031 (1975).
\textsuperscript{147} A judge may, for example, instruct the jury in a negligence case that failure to slow down at an intersection is unreasonable conduct, thus focusing the jury's attention on the fact issue of whether defendant failed to slow down, rather than asking the jury to determine the reasonableness of defendant's conduct without such direction. See Friedenthal, Kane & Miller, supra note 22, at § 11.2. The decision remains, of course, for the jury.
II. The Special Verdict As Separator of Fact and Law

In view of the mandate of the Seventh Amendment, time might be better spent in searching for ways to improve rather than erode the jury system.148

For decades certain commentators have argued for the more extensive use of the special verdict in order, among other things, to avoid the problems of law application by jurors.149 Unlike the general verdict, the special verdict is designed to submit specific fact questions to the jury.150 Their answers are taken by the judge, who applies the controlling law to the facts found and enters the appropriate judgment. Thus while a “general verdict is a finding in favor of one of the parties to an action,” a special verdict “finds the facts, but is not in favor of either party until the court declares the law arising thereon.”151 On its face this seems a procedure tailor-made for taking advantage of the impressive fact-finding abilities of juries while avoiding the distortions that occur between the judge’s instructions on the law and the bringing in of a general verdict. As Thayer noted, however, the matter is of course more complicated:

[While] logic and neatness of legal theory have always called loud, at least in recent centuries, for special verdicts, so that the true significance of ascertained facts might be ascertained and declared by the one tribunal fitted to do this finally and with authority, . . . considerations of policy have called louder for leaving to the jury a freer hand. The working out of the jury system has never been shaped merely by legal or theoretical considerations. That body always represented the people, and came to stand as the guardian of their liberties; so that whether the court or the jury should decide a point could not

148. In re United States Fin. Sec. Litig., 609 F.2d 411, 432 (9th Cir. 1979).

Because of his distrust of the jury as fact-finder as well as law applier, Judge Frank argued that use of the special verdict “would merely palliate the fundamental difficulty,” but not eliminate it. J. FRANK, supra note 13, at 194. For Frank it was the “jury [itself that] makes the orderly administration of justice virtually impossible.” Id. at 195.

150. See generally F. JAMES & G. HAZARD, supra note 26, at 364-70; FRIEDENTHAL, KANE & MILLER, supra note 22, at § 12.1.
151. G. CLEMENTSON, supra note 11, at 171 (footnote omitted).
be settled on merely legal grounds; it was a question deeply tinged with political considerations.152

A debate has thus ensued over the use of the special verdict. Missing from the dialogue, however, has been a recognition that (as developed below) even where it is used, the special verdict is typically not serving its historical function of separating law application from fact determination. Instead, the broad-form nature of the special questions usually submitted to the jury merges, as does the general verdict itself, matters of law and fact, and thus suffers the same defect.

In order to appreciate the debate over the special verdict and to assess its potential utility in modern litigation, it is necessary to explore the historical evolution of the device as well as its contemporary use.

A Brief History of the Special Verdict153

The special verdict dates back to thirteenth century English law when it appeared as a measure by which jurors could protect themselves against the procedure of attaint. The attaint was the device employed in civil cases154 for several centuries in lieu of any formal route of appeal from a jury verdict. As described by Thayer, after a jury rendered its verdict "an aggrieved party, by the writ of attaint, through the oath of twenty-four men of much better estate than the [original jury of] twelve, may convict the latter of a false oath, and subject them to the severest punishment."155 A second jury, in other words, was convened to review the first jury's verdict; and if it was found to be a "false verdict," the original jurors suffered pun-

153. See generally G. Clementson, supra note 11; Henderson, supra note 46 at 307-10.
154. Thayer notes that while the attaint existed on the books for criminal cases as well, there is no record of its use to challenge false criminal verdicts. Thayer, supra note 38, at 377-78. "Always scope was allowed to the sentiment that there should be mercy and caution in [criminal] cases." Id. at 378. See also T. Plucknett, supra note 34, at 132.
155. Thayer, supra note 38, at 361. The attaint was premised on the early conception of the jury as individuals with their own independent knowledge of the facts of the case. "Falsification" of a verdict by such persons was, therefore, deemed perjury. As the jury developed into a body that decided cases based on knowledge gained from evidence presented in court, the attaint could no longer be justified. It fell into general disuse by the late sixteenth century but was not officially abolished until 1825. Id. at 364-65, 374-75.
ishment for perjury, which included loss of their property (real and personal) and imprisonment for at least a year.\textsuperscript{156} The attaint also secured the reversal of the previous verdict.\textsuperscript{157}

Special verdicts emerged as a response to the "very real danger" of punishment by way of the attaint.\textsuperscript{158} As early as 1202 it was reported that a jury, refusing to bring in a general verdict, told the court "we will speak the truth of the matter, and having heard it, let the justices judge."\textsuperscript{159} As one writer described the spontaneous origins of the special verdict:

\textbf{[K]nowing that the theoretical function of the jury was simply to decide questions of fact arising upon the issue, the jurors refused to group and arrange the facts with a view to returning a general result involving an element of legal and judicial deduction or construction. In doubtful cases, and in some instances undoubtedly distrustful of themselves, they drew well within their province, withholding an opinion, and presenting, as the result of their deliberations, merely the naked facts.\textsuperscript{160}}

By enactment of statute in 1286, it was provided that "the Justices assigned to take Assizes shall not compel the Jurors to say precisely whether there has been a disseisin or not when they want to speak the truth of the matter and seek the help of the Justices."\textsuperscript{161} As Blackstone described practice under this statute, "if there arises in the case any difficult matter of law, the jury, for the sake of better information, and to avoid the danger of having their verdict attained, will find a special verdict [in which] they state the naked facts, as they find them to be proved, and pray the advice of the court thereon . . . ."\textsuperscript{162}

\textsuperscript{156} Id. at 374.

\textsuperscript{157} Id. at 367. Ultimately the attaint was functionally replaced by the authority of the trial judge to grant a new trial. \textit{See} G. Clementson, \textit{supra} note 11, at 3. The Massachusetts colony experimented with its own form of the attaint, which quickly became simply a method of obtaining a new trial. \textit{See} Murrin, \textit{supra} note 59, at 200.

\textsuperscript{158} G. Clementson, \textit{supra} note 11, at 3.

\textsuperscript{159} T. Plucknett, \textit{supra} note 34, at 417. Plucknett writes that all through medieval times down to our own day, a jury was always at liberty to find a special verdict by stating the facts (often at great length and drafted by counsel as an agreed statement of facts) as it found them, and leaving it to the court to determine whether this verdict was in law a determination for the plaintiff or the defendant.

\textsuperscript{160} G. Clementson, \textit{supra} note 11, at 5.


\textsuperscript{162} 3 W. Blackstone, Commentaries 77. Thayer speaks of the practice under an earlier thirteenth century legislative ordinance which directed the twelve knights chosen as "jurors" to "either say, directly and shortly, that one party or the other has the
The jurors could thus refuse to bring in a general verdict and instead report their findings of fact to the judge, requesting that he apply the law and render a judgment. The special verdict device "was very often employed as it allowed juries to avoid liability in an attainant for misapplication of the law to the facts." It was not until the eighteenth century that special verdicts could be requested by counsel as well on motion to the court.

The English special verdict, which began as a device to protect jurors, developed in American practice as a method of jury control, initiated not by the jurors but by the judge as a "means by which the jury could be required to disclose the basis upon which it reached a decision for one side or the other." At first jurors bringing in a general verdict which the judge had questions about or disagreed with might be required to explain or justify their conclusion to the judge. This authority to inquire into the jury's work product was greater right, or merely set forth the facts, and thus enable the justices to say it.”

163. See Thayer supra note 38, at 261. In the case of Babington v. Venor, tried in 1465, the judge charged the jury:

Sirs, you have had much evidence from both parties. Do in this matter as God will give you grace and according to the evidence and your conscience. You will not be compelled to say, precisely, disseisin or the contrary, but you may find the fact, i.e., the special matter, so as to give a special verdict on that and pray the judgment of the Court. And so go together, etc.

Id. at 363. Writing in a case of 1697, Lord Holt observed:

In all cases and in all actions the jury may give a general or special verdict, as well in causes criminal as civil, and the Court ought to receive it, if pertinent to the point in issue, for if the jury doubt they may refer themselves to the Court, but are not bound so to do.

Henderson, supra note 46, at 308 (emphasis in original) (footnote omitted).

164. Arnold, supra note 44, at 268. "[T]he enormous number of special verdicts in actions of novel disseisin recorded in the Year Books attests the usefulness of the technique." Id. at 270 (footnotes omitted). By contrast to property actions, the special verdict seems to have been used less frequently in trespass actions, the rough equivalent of the modern tort case. Id. at 271.


166. F. James & G. Hazard, supra note 26, at 312, 364. See also G. Clementson, supra note 11, at 7-8, 16-17.

167. See Walker v. New Mexico & S. Pac. R.R., 165 U.S. 593, 597 (1897). See also F. James & G. Hazard, supra note 26; G. Clementson, supra note 11, at 16-23. The Supreme Judicial Court of Massachusetts held that the trial judge has a discretionary power to make such inquiries of the jury in relation to the business before them, as the proper administration of justice may require. . . . It sometimes happens, that the verdict first returned by the jury is not entirely certain, or does not precisely meet the issue joined, or some of the issues do not appear to be definitely found. In such cases, before the verdict can be drawn in form, it is not only proper, but necessary, to ascertain from the jury the real meaning of their finding, that when the verdict is affirmed it may with certainty express the true
deemed "important to the due administration of justice or to prevent unnecessary litigation, to ascertain whether certain points have been determined, and how they have been determined." In the New England states it was explicitly recognized that judges had the power to submit written questions to be answered by the jury together with their return of a general verdict. 

The special verdict appeared in the early practice of most state and federal courts. In 1797, for example, the United States Supreme Court decided an appeal from a special verdict rendered in the Circuit Court for Virginia. By 1905 it was asserted in a treatise on the subject that "special verdicts or special findings on particular questions of fact, and in some instances both, are in daily use in more than half of our states." As of 1925 a majority of the intent of the jury, or that the jury may again be sent out for further deliberation, if any material question appears not to have been determined by them.


168. Dorr, 29 Mass. at 526. The Court continued:
It is not uncommon to have several grounds relied upon in a trial, when it cannot be ascertained from the verdict itself upon which ground it was [based or whether the jury] found upon an illegal principle or if the jury did not agree upon any one ground, the verdict may be set aside.

Id.


170. Henderson, supra note 46, at 310.

171. See Brown v. Barry, 3 U.S. (3 Dall.) 365 (1797). In an action on a debt, the jury rendered the following verdict:
We of the jury find, that the consideration given for the bill of exchange in the declaration mentioned, was the undertaking of Andrew Clow & Co., a party interested in receiving the same, to deliver to James Brown, the drawer thereof, other bills of exchange, in sterling money to the same amount: If the court shall be of the opinion that the consideration above mentioned, did not come within the operation of the [disputed statute], then we find for the Plaintiff $4404.42 damages; or otherwise, we find for the Plaintiff $3303.82 damages.

Id. at 366. After argument on the law, the trial judge entered judgment based on the first option presented by the verdict. Id. See also Sim's Lessee v. Irvine, 3 U.S. (3 Dall.) 425, 425 (1799) (in land dispute action in federal court in Pennsylvania, jury rendered special verdict constituting lengthy narrative of the facts found); Croudson v. Leonard, 8 U.S. (4 Cranch.) 434, 434 (1808) (in action on cargo insurance policy, federal court jury in District of Columbia rendered special verdict).

Recognition of the use of the special verdict in early American practice appears in an observation of Alexander Hamilton in 1791: "[J]uries are frequently influenced by the opinions of judges. They are sometimes induced to find special verdicts, which refer the main question to the decision of the court." The Federalist No. 65, at 399 (A. Hamilton) (C. Rossiter ed. 1961).

172. G. Clementson, supra note 11, at iii. Twenty-one states at that time had specific provisions authorizing the use of special verdicts, with seven of those states making the submission of special questions mandatory upon the request of a party. Id. at 24-33.
states had formally authorized use of the special verdict in civil cases. Typically under these rules any party might request a special verdict, but the decision was left to the discretion of the court. In a handful of states, namely Texas, Wisconsin, and North Carolina, use of the special verdict was made mandatory upon the request of any party.

Despite widespread authorization, however, employment of the special verdict device was significantly limited by technical restrictions. There was a "rigid requirement" that the jury's verdict include findings on all the material facts in issue, so that the omission of any was fatal to the verdict; and the findings had to be in the form of "ultimate facts," not "evidentiary facts" or conclusions of law. Professor Sunderland thus described the history of special verdicts as a "rocky road strewn with innumerable wrecks." Also inhibiting more widespread use was judicial reluctance to interfere with traditional jury discretion. General verdicts consequently remained the rule.

Formal authorization for the discretionary use of the special verdicts and interrogatories in federal court came with the adoption of Rule 49 of the Federal Rules of Civil Procedure in 1938. To

173. Comment, supra note 106, at 487. The special verdict has not been available generally in criminal cases, where it has been held it would "impeir the right of trial by jury." See G. Clementson, supra note 11, at 49.
174. F. James & G. Hazard, supra note 26, at 366; Friedenthal, Kane & Miller, supra note 22, at § 12.1.
175. See generally McCormick, supra note 100, at 178-81. As of 1914 any party to a civil action in Texas could demand that the case be submitted to the jury upon special issues. Tex. Rev. Civ. Stat. Ann. art. 2202 (historical note) (Vernon 1964). Wisconsin practice since 1907 has established a preference for the special verdict. Wis. Stat. Ann. § 805.12 (Interpretive Commentary by J. DeWitt) (West 1977). North Carolina practice in the early part of this century provided that instead of taking a general verdict, "the issues arising upon the pleadings, material to be tried, shall be made up by the attorneys appearing in the action and reduced to writing, or by the judge presiding, before or during the trial," and these issues would be presented to the jury. See G. Clementson, supra note 11, at 170 n.5.
176. Comment, supra note 106, at 487.
177. Driver, Extended Use, supra note 149, at 47-48. See, e.g., Graham v. Bayne, 59 U.S. (18 How.) 60, 63 (1855) (if jury's special verdict is ambiguous or imperfect and not based on facts themselves, it is mistrial).
178. Sunderland, supra note 60, at 261.
179. Friedenthal, Kane & Miller, supra note 22, at § 12.1. "The failure of the new procedures to catch on rapidly may . . . be attributed to the continued force of the belief that the jury should be free to use the general verdict as a means of neutralizing harsh laws, and, in general, dispensing 'rough justice.'" Comment, supra note 106, at 487-88.
180. Rule 49 provides:
(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the
avoid the difficulties associated with the common law procedure, the United States district judge was given the power to make findings of fact on issues that had been omitted from the submissions to the jury.\textsuperscript{181} Nevertheless use of the special verdict continued to be “very limited” in the federal courts.\textsuperscript{182} Nearly thirty years after the adoption of Rule 49, a commentator referred to the “failure [of the special verdict] to gain wide acceptance” and noted that the device is “rarely used.”\textsuperscript{183}

While the United States Supreme Court has apparently never directly addressed the constitutionality of the special verdict, its decisions over the years strongly indicate that the device is not in conflict with the seventh amendment right to jury trial. Emphasizing that the amendment requires only that questions of fact be settled by a jury, the Court upheld the constitutionality of a state procedure authorizing the judge to disregard a jury’s general verdict, which “embodies both the law and the facts,” when the general

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\begin{enumerate}
\item[(b)] General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict.
\end{enumerate}

\textbf{FED. R. CIV. P. 49(a), (b).}

\textbf{181. Id.}

If in [submitting special questions to the jury] the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

\textbf{FED. R. CIV. P. 49(a). See also Freidenthal, Kane & Miller, supra note 22, at § 12.1.} The Rule also deals with the problem of inconsistent answers.

\textbf{182. Driver, Extended Use, supra note 149, at 44.} For the decade from 1939 to 1949, Judge Driver found only four published district court and eight circuit court opinions that used special verdicts. \textit{Id.} at 44-45. Writing in 1965, Charles Alan Wright observed that the special verdict was not frequently employed in federal litigation and “has not had a major impact on the conduct of trials in the federal courts.” Wright, \textit{supra} note 149, at 200.

\textbf{183. Comment, supra note 106, at 488, 510 n.89.}
verdict is inconsistent with the jury's special findings of fact.\textsuperscript{184} Other traditional jury control devices have consistently passed constitutional scrutiny despite their obvious interference with jury prerogatives.\textsuperscript{185} Further, the Court has on several occasions reviewed special verdicts entered below without questioning the legality of the procedure.\textsuperscript{186} The position that the seventh amendment prohibits the use of any device which impinges upon jury power has never commanded more than a minority view on the Court.\textsuperscript{187}

\textit{The Debate Over The Special Verdict}

It is against this historical background that the argument for more extended use of the special verdict in modern litigation has been made over the years. The device has been touted as "a long step towards removing the cumbersome, expensive, and unsatisfactory machinery of trial by jury."\textsuperscript{188} Judge Jerome Frank advocated the compulsory use of either special verdicts or general verdicts accompanied by interrogatories in all civil litigation,\textsuperscript{189} while two colleagues on the Second Circuit, Learned Hand and Charles E. Clark, argued for a more expanded but still discretionary use, particularly in complicated cases.\textsuperscript{190} The proponents of the "handy,

\begin{itemize}
  \item \textsuperscript{184} Walker v. New Mexico & S. Pac. R.R., 165 U.S. 593, 596 (1897) (emphasis added). The Court, in dicta, spoke with approval of the common law practice of asking for a special rather than a general verdict. \textit{Id.} at 596-98. One commentator has, however, read \textit{Walker} to refer to issues of ultimate, not evidentiary facts, and thus concluded that the seventh amendment guarantees jury trial on these mixed questions of law and fact. \textit{See} Comment, \textit{supra} note 106, at 503 n.72.
  \item \textsuperscript{185} For a discussion of the constitutionality of special verdicts, see \textit{supra} notes 72-75.
  \item \textsuperscript{186} \textit{See} Atlantic & Gulf Stevedores v. Ellerman Lines, 369 U.S. 355 (1962); Sim's Lessee v. Irvine, 3 U.S. (3 Dall.) 425 (1799); Brown v. Barry, 3 U.S. (3 Dall.) 365 (1797).
  \item \textsuperscript{187} \textit{See}, e.g., Galloway v. United States, 319 U.S. 572, 396 (1943) (Black, J., dissenting) (asserting that because directed verdict allows judge, in effect, to decide issues of fact, its use violates seventh amendment); Minority Statement of Justices Black and Douglas opposing the 1963 amendments to the Federal Rules of Civil Procedure, 374 U.S. 865 (1963) (asserting that the directed verdict, summary judgment, and the special verdict violate the seventh amendment, the first two representing a "process by which the courts have been wrestling from juries the power to render verdicts," and the special verdict infringing on "the power of a jury to render a general verdict.").
  \item \textsuperscript{188} G. CLEMENTSON, \textit{supra} note 11, at 12.
  \item \textsuperscript{189} \textit{See} Skidmore v. Baltimore & O.R.R., 167 F.2d 54, 67 (2d Cir. 1948), \textit{cert. denied}, 335 U.S. 816 (1948).
  \item \textsuperscript{190} \textit{Id.} at 70 (L. Hand, J., concurring) ("[I]t would be desirable to take special verdicts more often. True, it would often expose the general verdict to defeat by showing how irrational had been the operation of the juror's minds. However, like my brother Frank, I am not among those who appear to esteem the system just because it gives rein to the passional element of our nature, however inevitably that may enter all our conclusions. I should like to subject a verdict, as narrowly as was practical, to a review which should make it in fact what we elaborately pretend that it should be: a
workable, reasonably simple, and over-ignored tool”191 of special verdict have claimed the following advantages flow from its use.

It has been argued that the special verdict can improve the deliberation process by packaging the dispute in distinct, manageable components, by focusing the jurors’ attention on those critical issues, and by exerting pressure on them to decide those issues based solely on the evidence because their specific findings will be recorded.192 The jurors are also relieved of the necessity of comprehending and applying legal doctrine. One court has explained:

The main object of special questions is to bring out the various facts separately, in order to enable the court to apply the law correctly, and to guard against misapplication of the law by the jury. It is a matter of common knowledge that a jury, influenced by a general feeling that one side ought to recover, will bring in a verdict accordingly, when at the same time it will find a certain fact to have been proved which in law is an insuperable barrier to a recovery in accord with the general verdict. And this does not imply intentional dishonesty in the jury, or a failure on the part of the court to instruct correctly, but rather a disposition to jump at results upon a general theory of right and wrong, instead of patiently grasping, arranging, and considering details. Scarcely any jury will, when questioned as to a single separate fact, respond that it exists, without some sufficient evidence of its existence.193

The special verdict can compel the jurors “to do more than flip a copper and keep still about it; . . . that is, if their verdict is to stand [they] must justify [it].”194 “[B]y requiring the jury to return the naked facts only we may fairly expect to escape the results of symp-

decision based upon law.”); Morris v. Pennsylvania R.R., 187 F.2d 837, 841 (2d Cir. 1951) (Clark, J.) (special verdict is an “often-desirable practice”).

192. F. James & G. Hazard, supra note 26, at 366. Dean McCormick wrote that there are some cases “where it is desirable to make sure that the jury has considered not merely the question, which party they want to win, but also those questions of fact which the law makes crucial.” McCormick, supra note 100, at 178.
193. Morrow v. County Comm’rs of Saline, 21 Kan. 352, 367 (1879). The special verdict holds the jury to the line of its duty, and searches the conscience of the individual juror. Such are the contradictions in human nature that many a man who will unite in a general verdict for a large and unwarranted sum of money will shrink from a specific finding against his judgment and sense of right and wrong.

G. Clementson, supra note 11, at 15. It has been recognized, however, that a “perverse verdict may still be returned, granted a jury clever enough to appreciate the effect of its answers, and to shape them to harmonize with its general conclusion.” Id. at 12.

194. G. Clementson, supra note 11, at 14.
thy, prejudice, and passion.” \footnote{Id. at 12.} The jury “would be confined to its proper role as an impartial, rational finder of fact,” and the lawyers would thus “concentrate on informing the jurors, not on arousing their passions.” \footnote{Comment, supra note 106, at 490-91.}

Special verdicts can, its proponents claim, expedite litigation because instructions are easier for the judge to frame at trial and less likely to result in appeals. \footnote{See \textit{id}. at 491.} In a trial that will end in a general verdict, the judge must fully instruct the jury both on the law and its application to all possible constructions of the evidence. The latter task is usually performed by way of hypotheticals: “If you find facts A, B, and C, then you must find for the plaintiff; but if you find facts D, E, and F, then you must find for the defendant.” The general charge given to the jurors prior to their deliberations on a general verdict has been aptly described as consisting of “numerous lengthy and involved instructions on the law subject to many objections and exceptions made by the litigants, and frequently supplemented by a multitude of special instructions requested by opposing advocates.” \footnote{Green, \textit{The Submission of Issues in Negligence Cases}, 18 U. MIAMI L. REV. 30, 30-31 (1963).} The general verdict is clearly “responsible for the elaborate instructions given to the jury” and these instructions are the single greatest source of appellate argument and reversible error, with all their attendant costs to the system and the parties. \footnote{See L. GREEN, \textit{JUDGE AND JURY} 351 (1930); Rossman, \textit{The Judge-Jury Relationship in the State Courts}, 3 F.R.D. 98, 109 (1944).}

When Texas adopted its mandatory special verdict statute, for example, it did so because practice under the general verdict had resulted in “such a gradual accumulation of instructions considered helpful to juries, that an errorless charge became almost impossible.” \footnote{Lemos v. Montez, 680 S.W.2d 798, 801 (Tex. 1984).} As Judge Frank noted: “Decisions, in cases which have taken weeks to try, are reversed on appeal because a phrase, or a sentence, meaningless to the jury, has been included in or omitted from the charge. When a decision is reversed on such a ground, there results, at best, a new trial at which the trial judge will intone a more meticulously worded \{legal rule\} to another uncomprehending jury. This leads to an enormous waste of time and money.” \footnote{J. FRANK, supra note 17, at 117. \textit{See also} J. FRANK, supra note 13, at 195: Time and money and lives are consumed in debating the precise words which the judge may address to the jury, although everyone who stops to see and think knows that these words might as well be spoken in a foreign language—that, indeed, for all the jury’s understanding of them, they are
judge in the special verdict case, however, need only formulate the fact questions for the jury; there is no need to instruct on controlling legal doctrine and definitions. Thus many remands for new trial as a result of errors in instructions are avoided.

The special verdict can, it is further contended, improve the manner in which trial and appellate judges review the jury’s decision and thus enhance the efficiency of the appellate process. The device cuts away “the mantle of mystery in which the general verdict is enveloped” and lets us see “how the principle facts were determined.” The appellate court need not attempt to penetrate the general verdict, which often involves speculation as to what the jury’s intermediate conclusions might have been. Moreover, the special verdict enables errors “to be localized so that the sound portions of the verdict may be saved.” If substantial error is found in the admission of evidence or in the instructions to the jury in a case that resulted in a general verdict, then reversal is required under the prevailing rule because that error may have tainted the verdict. In contrast, since the separate findings underlying the special verdict are set out it can more readily be determined whether the error that occurred was actually harmless, i.e., unrelated to the findings critical to the ultimate decision.

Professor Sunderland summed up both the jury assistance and jury control functions of the special verdict:

[T]he analysis and separation of the facts in the case which the court and the attorney must necessarily effect in employing the special verdict, materially reduces the chance of error. It is easy to make mistakes in dealing at large with aggregates of facts. The special verdict compels detailed consideration. But above all it enables the public, the parties and the court to see what the jury has really done. . . . The morale of the jury also is aided by throwing off the cloak of secrecy, for only through publicity is there developed the proper feeling of responsibility in public servants.

Some have responded to this call for expanded use of the special verdict by disputing that these goals would in fact be achieved. One

spoken in a foreign language. Yet, every day, cases which have taken weeks to try are reversed by upper courts because a phrase or a sentence, meaningless to the jury, has been included in or omitted from the judge’s charge.

203. G. Clementson, supra note 11, at 12.
205. F. James & G. Hazard, supra note 26, at 367.
206. Sunderland, supra note 60.
commentator suggests that it is doubtful that the use of special questions would actually neutralize jury emotion and prejudice and thus avoid result-oriented verdicts, because the jurors are likely to be able to predict the implications of their answers in terms of a final judgment and lawyers would still seek to reach jurors in that way. It is argued that the necessity for complicated legal instructions and appellate review thereof would not be obviated because, in the guise of a special verdict, juries would still be deciding mixed questions of fact and law, such as whether a party was negligent. Further, the special questions themselves would serve as a new source of delay and expense because problems of wording and distortion arise frequently.

Still others, such as Justices Black and Douglas, have bemoaned the potential "transition from jury supremacy to jury subordination." Leon Green saw the special verdict as "abortive of jury trial," viewing the "very heart of jury trial" to be "the doing of justice as between the parties by the shaping of their verdict accordingly." One sitting judge even challenged the fundamental assumption of special verdict proponents that "a jury suffers from human frailties in arriving at a verdict and a judge is never affected by such frailties."

Some have warned that if we demand that every jury act without bias and vote only upon the evidence before them, "it is doubtful whether more than one in a hundred verdicts would stand." It has been suggested that by "multiplying the number of points at which formal agreement must be reached," the special verdict procedure increases the probability of hung juries and jury frustration. "[J]ury verdicts often represent compromises, and it is not so easy to reach separate compromise agreements on several fact findings of a special verdict as it is to agree on one all-inclusive general verdict." Critics of the special verdict have also observed that requiring the spelling out of all the intermediate steps along the way to the resolution of a matter runs counter to the notion that good judgment is often "an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; im-

207. See Comment, supra note 106, at 491-97.
208. Id. at 500.
210. Green, supra note 198, at 31 n.5.
211. Guinn, supra note 149, at 175.
pressions which may lie beneath consciousness without losing their worth."\textsuperscript{215}

Proponents of the special verdict respond in rebuttal that the "real objection to the special verdict is that it is an honest portrayal of the truth . . ."\textsuperscript{216} and "expose[s] jury malfunctions that we might rather not know about."\textsuperscript{217}

There the debate has stood for decades. As will be explored in the next section, experience with the special verdict in modern federal litigation demonstrates both the advantages and drawbacks of the device, as well as the nearly universal failure of the courts to use the special verdict to separate the law-application and fact-determination functions of adjudication.

\textit{The Special Verdict and Special Interrogatories in Contemporary Federal Litigation}

The special verdict has not replaced the general verdict as the routine in federal litigation, but it is no longer the rarity it once was. Special interrogatories accompanying a general verdict are even more common because the procedure "allows the jury to retain more of its traditional role" and so is "less controversial and thus often is preferred by more judges over the special verdict."\textsuperscript{218} The use of these alternatives to the general verdict is increasingly encountered in tort,\textsuperscript{219} civil rights,\textsuperscript{220} maritime,\textsuperscript{221} patent,\textsuperscript{222} and anti-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{215} Chicago B. & O.R.R. v. Babcock, 204 U.S. 585, 598 (1907) (Holmes, J.).
\item \textsuperscript{216} Sunderland, supra note 60, at 262.
\item \textsuperscript{217} Friedenthal, Kane & Miller, supra note 22, at § 12.1.
\item \textsuperscript{218} Id. at § 12.1; see also F. James & G. Hazard, supra note 26, § 7.14.
\item \textsuperscript{219} See, e.g., Massie v. Godfather’s Pizza, Inc., 844 F.2d 1414, 1419-20 (10th Cir. 1988) (jury in action seeking damages for rape suffered during course of robbery of defendant restaurant was asked seven questions as to amount of plaintiff’s damages, whether defendants acted negligently while within scope of their employment, and whether plaintiff herself had been negligent); Connaughton v. Harte Hanks Communications, 842 F.2d 825, 839 (6th Cir. 1988) (jury in defamation action was asked whether article was defamatory, whether it was false, and whether it was published with actual malice); Meschino v. North Am. Dreager, Inc., 841 F.2d 429, 431 (1st Cir. 1988) (jury in medical malpractice case was given special verdict form containing thirteen questions as to whether they found that each defendant had been negligent in his treatment of plaintiff, and, if so, whether that negligence was cause of plaintiff’s injury); Sprankle v. Bower Ammonia & Chem. Co., 824 F.2d 409, 411 (5th Cir. 1987) (jury was asked whether ammonia in question was in defective condition and unreasonably dangerous when it was used by plaintiff).
\item \textsuperscript{220} See, e.g., Hand v. Gary, 838 F.2d 1420, 1423 n.2 (5th Cir. 1988), aff’d, 109 S. Ct. 2678 (1989) (jury was asked whether they found that defendant had intentionally deprived plaintiff of constitutional right, whether defendant had acted under color of law, whether such action was proximate cause of plaintiff’s damages, and whether defendants acted in good faith).
\end{enumerate}
\end{footnotesize}
Recent years have even witnessed the entry of special questions into criminal litigation, where their use is invariably attacked as an unjustifiable interference with the prerogatives of the jury. Special verdicts and interrogatories have proven useful in achieving many of the goals their proponents have advertised. The devices operate to improve the reliability of jury decision-making through the recognized psychological impact specific questions have in concentrating juror attention on certain matters to the exclusion of others. Special verdicts are thus used to encourage jurors to

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221. See, e.g., McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958) (jury found in special verdict that plaintiff was injured while walking down ships stairs, that area around stairs was not watertight, that these defects were not due to negligence of defendants, and that vessel was not rendered unseaworthy by this condition).


223. See, e.g., Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 329 (1978) (jury was asked whether defendant had violated Sherman Act, whether defendant fraudulently concealed violation, and whether plaintiff knew or should have known of violation).


To ask the jury special questions might be said to infringe on its power to deliberate free from legal fetters, on its power to arrive at a general verdict without having to support it by reasons or by a report of its deliberations; and on its power to follow or not to follow the instructions of the court. Moreover, any abridgement or modification of this institution would partly restrict its historic function, that of tempering rules of law by common sense brought to bear upon the facts of a specific case.

Special verdicts have on occasion been used in criminal cases without controversy. See, e.g., Kawakita v. United States, 343 U.S. 717, 737 (1952) (special verdict in treason case with regard to each of eight overt acts).

The submission of special questions is required when the government seeks the forfeiture of property used by the defendant in connection with the crime. See 18 U.S.C. § 1963(a) (1988); Russello v. United States, 464 U.S. 16 (1983). Special instructions are also commonly used in death penalty cases to seek the jury's determination of the existence of aggravating and mitigating circumstances. See Mills v. Maryland, 486 U.S. 367 (1988); Satterwhite v. Texas, 486 U.S. 249 (1988) (special questions to jury as to whether defendant's conduct in causing victim's death was deliberate and whether there was probability that defendant would commit further acts of violence).

225. In contending that the wording of a special question misled the jury, for example, Chief Judge Rosenn observed that it "psychologically drew the jury's attention away from [the co-defendant]." See Tyson v. Litwin Corp., 826 F.2d 1255, 1264 (3d Cir. 1987) (Rosenn, J., dissenting).
focus on the discrete issues which are critical to the lawsuit. This is particularly important in those categories of cases where jurors' sympathy for the alleged victim may overpower their willingness to enforce legal doctrine. In public-figure defamation actions, for example, the District of Columbia Circuit Court of Appeals has observed that "separate questions on the issues of defamatory meaning, falsity, and actual malice would impel the jurors to advert to the framework within which the judge has instructed them to consider the case and could assist them to hold the distinct legal questions in clear and separate view. The inquiries thus may promote both comprehension and actual application of the governing first amendment law." Similarly, where there are reasons to doubt the jurors' willingness to apply a "technical" rule that would deprive an otherwise deserving party of recovery, the special verdict has been employed to obtain a preliminary fact determination from the jurors which the judge then applies in the context of the rule. In the case of a statute of limitations triggered by a particular event, for example, the special verdict can preserve the jury's role in fact-finding while minimizing the potential distortion that might result if the jury were given the task of enforcing the counter-intuitive rule of law.

Since it is harder for the group discussion to stray into extraneous matters when the jurors have before them specific questions to address, such questions can serve to structure the jury's deliberations.

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226. The jury sympathy problem in such cases has been the subject of considerable concern. See Bose Corp. v. Consumers Union, 466 U.S. 485 (1987).

New York Times v. Sullivan presents a standard that may slip from the grasp of lay triers unfamiliar with legal concepts and perhaps unsympathetic to publishers who print statements shown to be false. Careful efforts of judges to make the legal rules genuinely accessible to jurors may reduce some of the turbulence in this unsettling area of the law.

Id. (Ginsburg, J., concurring).

See also Sunward Corp. v. Dun & Bradstreet, Inc., 811 F.2d 511 (10th Cir. 1987) (on retrial of defamation case court directed that special interrogatories be used to determine precise nature of defamation in challenged report and manner in which recipients actually understood it); Parker, Free Expression and the Function of the Jury, 65 B.U. L. Rev. 485, 550-56 (1985) (advocating use of special interrogatories in free expression cases).
228. See Beard v. J.I. Case Co., 823 F.2d 1095, 1097 n.2 (7th Cir. 1987) (court directed jury to answer a special interrogatory asking whether installation of rollers constituted "substantial reconditioning" of machine, and based on jury's negative response trial judge concluded that claim was time-barred); Bruno v. Western Elec. Co., 829 F.2d 957 (10th Cir. 1987) (question of whether employer's actions involved continuing violation of ADEA, so that plaintiff's complaint was timely, would usually involve fact question for jury, although parties may waive jury decision on that issue and permit judge to decide it). See also Spell v. McDaniel, 824 F.2d 1580, 1596 (4th Cir. 1987) (special verdict required jury to specify which defendants if any had policy-making functions so as to determine liability of city in action under 42 U.S.C. § 1983).
in a manner that highlights the judge's instructions. Indeed, some courts have included written instructions and legal definitions on the special verdict form itself for additional reinforcement and to avoid problems of juror lapse of memory.229

In cases where the anticipated difficulty for the jury is not with the instructions on the law but with an overwhelming amount of evidence or with the presentation of inconsistent theories of recovery or defense, special verdict questions can be used to aid the jurors in sorting out the facts and avoiding confusion.230 When the special verdict is employed to require the jury to itemize damages, it minimizes the potential problem of double recovery on overlapping claims.231 In conspiracy cases the device has been utilized to prevent prejudicial spillover from one defendant to another by focusing the attention of the jury on the particular underlying predicate acts of each defendant rather than the larger and more complex picture.232 Requiring the jury (as we would a judge) to disclose their specific findings can help ensure that a sentence imposed by the jury was not motivated by an impermissible reason.233 Where the maximum sentence in a conspiracy case depends upon the nature of the underlying acts the accused is found to have committed, some courts have held it to be reversible error for the trial judge to ask the jury to bring in a general rather than special verdict.234 The device

[229. See, e.g., Costilla v. Aluminum Co. of Am., 826 F.2d 1444, 1446 n.3 (5th Cir. 1987) (each interrogatory was followed by definition of legal terms used therein, such as "defectively designed," "negligence," and "proximate cause.")


231. See Berry v. Curreri, 837 F.2d 623, 627 (3d Cir. 1988) (special verdict is necessary to separate claim for lost earnings from claim for other damages so that limitations on recovery set by Malpractice Act can be enforced); Gautreaux v. Insurance Co. of N. Am., 811 F.2d 908, 916 n.5 (5th Cir. 1987) ("We take this opportunity to remind litigants that in cases involving numerous elements of damages, using special interrogatories under Fed.R.Civ.P. 49(a) to return an itemized award rather than a lump sum verdict, is not only helpful to the appellate court but will very likely spare the parties the expense of a new trial on damages.") See also Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 589-90 (1974).

232. See, e.g., United States v. Coonan, 839 F.2d 886, 891 (2d Cir. 1988).

233. See, e.g., Chaffin v. Stynchcombe, 412 U.S. 17, 18 (1973) (observing that Pearce doctrine prohibiting higher sentence in retaliation for having successfully pursued appeal can be enforced on jury by requiring special verdict stating reasons for sentence they imposed or stating that prior conviction or appeal were not taken into account). See also United States v. Wood, 834 F.2d 1382, 1389 n.5 (8th Cir. 1987) (special interrogatories can establish jury's conclusion as to amount of narcotics defendant was dealing for purposes of judge's imposition of sentence).

234. See Newman v. United States, 817 F.2d 695 (10th Cir. 1987). The conspiracy charged involved both narcotic and non-narcotic drugs, the former carrying a maximum sentence of fifteen years while the latter was limited to five. Id. at 637-39. Reversing the sentence below, the court wrote:
is also invaluable in determining the allocation of fault among codefendants.235

Courts have used the special verdict to ensure a truly unanimous decision of the jury, and avoid the mere illusory appearance of agreement sometimes presented by the general verdict. Where, for example, a verdict in favor of the defendant can result from a finding that either Fact A, or Fact B, or Fact C is true, a general verdict may be entered for the defendant even if four jurors find Fact A, four other jurors find Fact B, and the remaining jurors find Fact C. Given the lack of unanimity as to the particular state of facts, such a verdict would be unjustified, but the flaw would be hidden. Submission of each of the fact issues separately would avoid this problem. Thus in an action for termination of parental rights where the controlling law required the agreement of 10 jurors that the defendant parent committed at least one of the two acts alleged, it was held error for the trial court to submit the single question of whether parental rights should be terminated, because a finding against the parent could result from the agreement of only five jurors on each ground.236 Similarly in a criminal prosecution where the indictment charged two conspiracies, one to obstruct justice and the other to defraud the government, defendants' conviction was reversed be-

We agree with petitioner's contention that the trial court erred in imposing a sentence for the conspiracy offense in excess of the five-year maximum prescribed for the two lesser predicate offenses. . . . When, as here, a defendant is charged with a conspiracy involving both narcotic . . . and non-narcotic . . . drugs and the jury returns only a general verdict, the sentencing court cannot know for certain whether the fifteen-year maximum sentence for the narcotics or only a five-year maximum sentence for the non-narcotic drugs is authorized. The use of a special verdict identifying which underlying offenses were the objects of the conspiracy would have eliminated this ambiguity.

Id. at 637.

235. See, e.g., Kostelecky v. NL Acme Tool Indus., 837 F.2d 828, 932 (8th Cir.) (1988) (special verdict usually required to establish apportionment of liability among tortfeasors); Austin v. Raymark Indus., 841 F.2d 1184, 1188 (1st Cir. 1988) (special interrogatories used to determine proportionate fault of each defendant in asbestos case to establish basis for contribution claims). See also Rheuport v. Ferguson, 819 F.2d 1459, 1164 n.7 (8th Cir. 1987) (given the general verdict brought in, it was "sheer speculation as to what damages the jury assessed as to each cause of action in finding individual defendants liable. We recommend in such situations where there are multiple claims against multiple parties, the trial judge should submit special verdicts as to the various claims and damages . . . "). But see Faison v. Nationwide Mortgage Corp., 839 F.2d 680, 685-87 (D.C. Cir. 1987) (jury should not be required to apportion fault where defendants are jointly and severally liable).

236. See E.B. v. Texas Dep't. of Human Serv., 766 S.W.2d 387 (Tex. Ct. App. 1989). See also Roosth & Geneco Prod. Co. v. White, 152 Tex. 619 (1955) (where plaintiff alleged twenty-one separate factual bases for claim of defective design, trial court was required to submit separate special questions for each to ensure unanimity).
cause "there was a distinct possibility of a non-unanimous jury verdict." The Court reasoned:

Some jurors could have voted to convict [the defendants] believing [them] guilty of conspiracy to obstruct justice but innocent of conspiracy to defraud (or vice versa). When there is such a genuine possibility of jury confusion or that a conviction may occur as a result of different jurors concluding that the defendant committed different acts, the trial judge is obligated to give curative instructions or submit special interrogatories to ensure a unanimous verdict.

Furthermore, the special verdict has operated to facilitate the appellate process by spelling out the premises underlying the jury's ultimate conclusions. This obviates the need for the reviewing court to engage in speculation with regard to those premises, such as the familiar "the jury could have found," or "the jury was entitled to find." Appellate courts often express frustration over the difficulties of reviewing the inscrutable general verdict, as the Supreme Court did when it observed: "[The verdict's] generality prevents us from perceiving upon which plea [the jury] found. If, therefore, upon any one issue error was committed, either in the admission of evidence, or in the charge of the court, the verdict cannot be upheld." And

237. United States v. Gordon, 844 F.2d 1397, 1401-02 (9th Cir. 1988).
238. Id.
239. See, e.g., Miaues v. Fibreboard Corp., 662 F.2d 1182, 1188-89 (5th Cir. 1981). Appellate courts often indulge in arbitrary assumptions about the jury's decisionmaking process. See, e.g., General Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795, 801 (8th Cir. 1987) ("In the absence of special interrogatories we [must] presume the existence of factual findings and legal conclusions necessary to support the verdict reached by the jury.") (citations omitted); DMI, Inc. v. Deere & Co., 802 F.2d 421, 425 (Fed. Cir. 1986) ("While the jury in this case did not answer interrogatories or supply special verdicts addressing those factual areas, its answer on obviousness must, in light of the instructions it received, be taken as establishing that the jury considered them.").
240. Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co., 370 U.S. 19, 29-30 (1962). See also United States v. Kattar, 840 F.2d 118, 123 (1st Cir. 1988) ("The jury was not asked for a special verdict on whether its finding of guilty was based on economic or physical extortion. Therefore, if either ground is found wanting, we must vacate the verdict. This comports with the rule that a 'general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground' "); Haupt v. United States, 330 U.S. 631, 641 (1947) ("[W]here several [overt] acts are pleaded in a single count and submitted to the jury, under instructions which allow a [general] verdict of guilty on any one or more of such acts, a reviewing court has no way of knowing that any wrongly submitted act was not the one convicted upon [and] we would have to reverse if any act were insufficient or insufficiently proved."); United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki, 358 U.S. 613, 619 (1959) (confirming rule requiring new trial where appellate court concludes that any one of alternative theories of liability underlying general verdict is unsupported by substantial evidence).
where error is found the appellate court is left to speculate as to whether the jury based its verdict on the tainted information, necessitating a general rule permitting affirmation only if it appears "reasonably certain that the jury was not significantly influenced by [the error]."241

The advantage of the special verdict in disclosing more about the decision-making process has been widely noted by appellate courts.242 Trial judges have thus been encouraged to anticipate the problems of reviewing general verdicts, as District Judge Pamela Ann Rymer did in an action alleging breach of an oral agreement to finance a $10 million real estate purchase:

For example, if the jury came in with a 17 million dollars number and the motion for a new trial is in part based upon error in permitting the jury to consider lost profits evidence, it would be—it might be very difficult or impossible to know whether $17 million was based on [the lost profits] theory, or, rather, was based on a fair market value theory and they just happen to disagree with the experts on what constitutes fair market value.243

241. Asbill v. Housing Auth. of Choctaw Nation, 726 F.2d 1499, 1504 (10th Cir. 1984) (citations omitted).

242. See also id. at 1504 n.11 ("This case [in which reversal of the general verdict was required because one of the two claims submitted to the jury was not substantial] illustrates the usefulness of special verdicts or interrogatories in cases where more than one claim is made against the defendant."); O'Neil v. Krzeminski, 839 F.2d 9, 12 (2d Cir. 1988) ("Normally, when two claims have been submitted to a jury and one of them should not have been submitted, a general verdict in favor of the claimant cannot stand, since it is not possible, in the absence of special interrogatories, to know upon which claim the jury rested its decision."); Needham v. White Laboratories, 847 F.2d 355, 364 (7th Cir. 1988) (Bauer, C.J., dissenting) (trial judge's erroneous instructions authorized jury to award damages on improper as well as proper basis, but "because the jury did not return a special verdict, we will never know if it did so [on the improper basis]"). In Garziano v. E.I. DuPont Nemoirs & Co., 818 F.2d 380 (5th Cir. 1987), the court noted:

"This Court is not in a position to reverse and render final judgment for DuPont, nor can we allow the jury verdict to stand due to the district court's failure to instruct the jury on the proper standards to apply to the determination of the issue of qualified privilege. There is some evidence in the record which could support a verdict for [the plaintiff], but we can only surmise or speculate on what the jury actually held. The question of whether the qualified privilege was abused by excessive publication must be determined on remand."

Id. at 394. The court suggested that this be accomplished by giving the jury special interrogatories on any disputed facts underlying the privilege question. Id.

243. Landes Constr. Co. v. Royal Bank of Canada, 833 F.2d 1365, 1374 n.2 (9th Cir. 1987). The Court of Appeals characterized this "presence of the trial court" as "startling." Id. The suggestion of the trial judge that a special verdict be used was, however, opposed by counsel, who could not agree upon the form, and the judge ultimately decided to "send in the general verdict form and we'll let the chips fall where they may." Id. at 1374.
Indeed jurors themselves have on occasion spontaneously provided explanation and elaboration of their decision in obvious frustration over the confines of the general verdict. In a civil rights action alleging an unjustified beating by a prison guard, for example, the jurors returned a verdict stating: "We, the jurors, find for the defendant in as much as the evidence does not prove the plaintiff was severely injured." In effect these jurors rendered a special verdict finding that the beating had occurred but that there were insufficient injuries to justify recovery. In another instance, a jury foreman reported a general verdict and then asked the judge whether he could explain the reasons behind it, which he proceeded to do.

In a well-publicized case pitting a controversial actress against a major symphony orchestra, the jury rendered a broad-form special verdict but subsequently wrote a letter to the judge setting forth a "clarification as to the verdict" because "there was one issue we thought was clearly proved by a preponderance of the evidence that we could find no way to express within the confines of the verdict questions and your explanation to us as to the parameters within which the law required we must decide."

By breaking down and spelling out the results of the jury's deliberations, the special verdict makes review more meaningful and effective. This compartmentalization of the jury's work product

244. Williams v. Boles, 841 F.2d 181, 182 (7th Cir. 1988) (emphasis added). The Court of Appeals, interpreting this as a finding that plaintiff had indeed been beaten by his jailers, nevertheless affirmed judgment for the defendants based on the jury's verdict.

245. See Sim's Crane Serv., Inc. v. Ideal Steel Prod., Inc., 800 F.2d 1553 (11th Cir. 1986). The district judge had instructed the jury that the plaintiff could prevail only upon a showing of gross negligence. Despite the court's suggestion that the case be submitted on special interrogatories, the parties requested a general verdict and the court sent the jury out to deliberate on one. When the jury returned and reported its verdict for the plaintiff in the amount of $32,500, the foreman added: "Would you like for me to explain our reason?" Hearing no objection from counsel, the judge agreed, and the foreman explained that the jurors could not find gross negligence on the part of either party but "feel that both parties were at fault in some way and that the only fair thing would be to divide up the damages." Id. at 1555 n.5. The Court of Appeals held that the "jury's contemporaneous, extemporaneous exegesis" could not be used to impeach the general verdict. Id. See also Lowe v. Commack Union Free School District, 886 F.2d 1364, 1377 (2d Cir. 1989) (foreman made comment expressing jury's criticism of defendant's hiring practices after return of verdict in defendant's favor).


247. Each separate fact finding is reviewable under the usual standard of whether there is evidence to support it, with all reasonable inferences that can be drawn in favor of the prevailing party. See Cerro Gordo Charity v. Fireman's Fund AmLife Ins. Co., 819 F.2d 1471, 1485 (8th Cir. 1987). Review is thus similar to that of a judge's separate
also operates to localize error and thus avoid the necessity for retrial in a number of cases, saving the system and litigants considerable time and expense. In *City of Newport v. Fact Concerts, Inc.*,248 for example, the Court observed: “Ordinarily, an error in the charge is difficult, if not impossible, to correct without retrial, in light of the jury's general verdict. In this case, however, we deal with a wholly separable issue of law, on which the jury rendered a special verdict susceptible of rectification without further jury proceedings.”249

The case law is replete with illustrations of how an error in jury instructions, which in a general verdict context would have required reversal and retrial, was shown to be harmless because of the jury's answers to special questions. Where, for example, error was found to have occurred in the instructions to the jurors concerning the qualified immunity of defendants in a civil rights action, reversal was avoided because the special verdict made clear that the jury had found against plaintiff on the determinative issue of excessive force and had “carefully distinguished among each claim.”250

Rule 49 provides a unique opportunity to test the reliability of the jury's conclusions by permitting a comparison of their findings with one another (in the special verdict situation) or with the ultimate result (in the special interrogatory accompanying a general verdict situation). Thus special verdict answers can be a valuable indication of how carefully the jurors weighed the evidence, particularly in a multi-claim, multi-party lawsuit.251 Special interrogatories answered together with a general verdict serve as “a sort of 'exploratory opening' into the abdominal cavity of the general verdict . . . by

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findings, albeit not subject to the same "clearly erroneous" standard of review. See *Fed. R. Civ. P. 52.

249. Id. at 256 n.12.
250. Kladis v. Brezek, 823 F.2d1014, 1018 (7th Cir. 1987). See also *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 204 (1st Cir. 1987) (confusing and erroneous instruction on retaliatory discharge was rendered harmless by jury's unequivocal answer to special interrogatory that properly formulated issue); *Economy Fire & Casualty Co. v. Tri-State Ins. Co.*, 827 F.2d 373 (8th Cir. 1987) (any error in court's instructions regarding defendants' estoppel theory was rendered harmless by jury's response to special interrogatory finding that defendant had not acted in good faith, thus defeating estoppel theory); *United States v. Conners*, 825 F.2d 1384, 1391-92 (9th Cir. 1987) (failure to give limiting instructions in conspiracy trial was harmless error where jury specifically found that overt acts alleged were not committed in furtherance of conspiracy); *Elwood v. Pina*, 815 F.2d 173, 177-78 (1st Cir. 1987) (erroneous instruction requiring jury to find specific intent as requisite to liability under state civil rights act was deemed harmless since jury’s special verdict found that plaintiffs were not fired in retaliation for conduct of protected activities).

251. See, e.g., *Wagenmann v. Adams*, 829 F.2d 196 (1st Cir. 1987) ("jury's responses to the special verdict questions clearly demonstrated careful and discriminating consideration of the evidence against each of the defendants on all of the claims.")
which the court determines whether the organs are sound and in place and the proper treatment to be pursued." The responses will reveal whether or not the jury's verdict is supported by its subsidiary fact-findings.

The disclosure of fact determinations achieved by the special verdict is also extremely helpful in the application of collateral estoppel (issue preclusion). This finality doctrine increases the efficiency of the litigation system by avoiding the relitigation of fact issues between the same parties or their privies, and has in recent years been made available to non-parties for use against those who participated in the prior case. Since it must be demonstrated that the issue in question had been resolved in a particular way in the previous case, however, use of collateral estoppel is frequently not possible where the prior verdict was general because the facts found by the jury are not articulated and not always apparent by implication. In a personal injury action where the defendant raises a contributory negligence defense, for example, a verdict for the de-

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252. G. Clementson, supra note 11, at 45-46. See also Allen Organ Co. v. Kimball Int., Inc., 839 F.2d 1556, 1562 (Fed. Cir. 1988); Lipscomb, supra note 149, at 212.

253. See, e.g., Myers v. Reading Co., 331 U.S. 477, 481 (1947) (jury's answers to special questions provided factual conclusions that supported its general verdict); Hays v. Continental Assurance Co., 831 F.2d 1060 (6th Cir. 1987) (jury's special verdict finding that defendant acted "willfully" indicated that jurors were not confused when they concluded that defendant had violated ADEA, and thus verdict would stand).

254. See Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). Thus a private plaintiff was able to use a prior determination of fraudulent conduct against a defendant who had previously litigated and lost the issue with the Securities and Exchange Commission. Id. at 332-33.


256. See Volk v. Coler, 845 F.2d 1422, 1437-38 (7th Cir. 1988). In United States v. Hogue, 812 F.2d 1568 (11th Cir. 1987), the court stated:

A guilty verdict is fairly to be characterized as a finding that each of those factual propositions [embodied in the essential elements of the offense] is true. A not guilty verdict is fairly to be characterized only as a determination that the government has failed to prove beyond a reasonable doubt one or more of those propositions. A not guilty verdict is not fairly to be characterized as a finding that even one of those propositions is false, or that the opposite is true.

Id. at 1578. The court went on to hold that the defendant, prosecuted for obstruction of justice, could not invoke his fifth amendment guarantee against double jeopardy in the form of collateral estoppel because his prior acquittal on a charge of ballot tampering, arising out of the same events, was by way of a general verdict, and it could thus not be determined what specific aspects of the accusation the jury had rejected. Id. at 1579.

However, in Hoag v. New Jersey, 356 U.S. 464 (1958), a robbery case in which the identity of the defendant was at issue, Chief Justice Warren observed that even if the robber's identity had been submitted to the jury as a special interrogatory, it could not be determined what was actually in the mind of each juror because an answer in favor of the defendant "might reflect a wide assortment of 'facts' believed by each juror." Id. at 471 (Warren, C.J., dissenting).
fendant may mean either that the jury found the defendant was not negligent, or that there was negligence but that plaintiff's carelessness contributed to her injury. In subsequent litigation involving these parties or those in privity with them, and sharing issues with the prior case, relitigation of those questions will be necessary. Had a special verdict been used, the jury's recorded findings might have made such relitigation unnecessary.

When this problem of determining the factual premises underlying a general verdict is translated into the context of mass tort litigation, the costs of such relitigation are all too obvious. In Hardy v. Johns-Manville Sales Corp.,257 for example, a consolidation of numerous suits by asbestosis victims against twenty manufacturers of asbestos, the trial court entered an omnibus order applying offensive collateral estoppel in favor of the plaintiffs on the issues of whether the products in question were "unavoidably unsafe" and whether exposure to them was causally related to the diseases complained of.258 The order was based on prior litigation in which the manufacturers had been held liable to an insulation worker.259 In the prior suit a number of grounds for recovery had been relied upon, including failure to test, failure to inspect, failure to warn, and the unsafe character of the product.260 The jury in the prior case had returned a general verdict accompanied by broad-form special interrogatories separating the claims of negligence and breach of warranty.261 The Fifth Circuit, concluding that the prior verdict was "ultimately ambiguous as to certain key issues,"262 reversed the Hardy trial court and held that collateral estoppel could not be applied. While "sympathiz[ing] with the district court's efforts to streamline the enormous asbestos caseload it faces,"263 the court nevertheless observed:

If it appears that a judgment may have been based on more than one of several distinctive matters in litigation and there is no indication which issue it was based on or which issue was fully litigated, such judgment will not preclude, under the doctrine of collateral estoppel, relitigation of any of the issues.264

257. 681 F.2d 334, 335-536 (5th Cir. 1982).
258. Id. at 334-37.
259. Id. at 336.
261. See Hardy, 681 F.2d at 341 n.8.
262. Id. at 334.
263. Id. at 348.
264. Id. at 341 (quoting Federal Procedure, Lawyers Edition § 51.218 (1981)).
Each factual element of litigation which is not made the subject of a special verdict question is therefore a potential subject for future relitigation.

Obtaining the jury's specific findings is also useful in developing a record in anticipation of a change by the appellate court in the applicable rule of law, thus avoiding the need for further proceedings. In *Silkwood v. Kerr-McGee Corp.*, for example, "in an effort to avoid a new trial in the event that the Court of Appeals disagreed with its ruling on the applicability of strict liability principles, the [trial] court instructed the jury to answer a special interrogatory as to whether Kerr-McGee negligently allowed the plutonium to escape from its plant." As the District of Columbia Circuit Court observed in 1806, "the fairest mode of saving the [unsettled] point [of law] is by a special verdict.

The special verdict, in sum, can be used with great effect to make the litigation process, both trial and appellate, more rational and efficient, especially in complex litigations. Use of the special verdict, however, is not without its costs and pitfalls. The fundamental cost, of course, is to unconstrained jury discretion. No doubt there is also some interference with the jury's ability to resolve cases, because requiring agreement on specific items and in effect forbidding compromise resolutions can be expected to make consensus among the jurors more difficult to achieve.

The most common pitfall encountered with special verdicts is in the formulation of the questions themselves. Thus while the trial court's decision to utilize the special verdict procedure is virtually unreviewable, and the formulation of the questions is left to the

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266. 464 U.S. at 244 n.7. *See also* Williams v. Boles, 841 F.2d 181, 184 (7th Cir. 1988) (special verdict can be used as "precaution against that day" that Supreme Court changes law on injury necessary to make out Section 1983 claim; jury should thus be required to "answer special interrogatories addressing each element of the constitutional tort, answers that might permit the entry of judgment without the need for a new trial.")
269. *See* 5A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 49.03 (court's decision "should not be reviewable, except perhaps, for gross abuse, which can rarely be shown."); 9 C. Wright & A. Miller, *Federal Practice & Procedure* § 2505 ("[T]here ought never [to] be a reversal for use or nonuse of special verdicts."). *But see* Landes Constr. Co., v. Royal Bank of Canada, 833 F.2d 1365, 1372 (9th Cir. 1987) (decision reviewable under abuse of discretion standard); United States v. Gordon, 844 F.2d 1397 (9th Cir. 1988) (reversing convictions in conspiracy case on grounds that court's refusal to submit special interrogatories raised substantial possibility of jury confusion).
trial court's discretion,270 submission of ambiguous or misleading questions can lead to reversal.271 Moreover, courts have recognized the "disadvantages of saddling a jury with lengthy and involved interrogatories, coconed in legal terminology and garnished with words of art."272 The challenge to the trial court is to devise comprehensible questions that will "accurately present the issues in the case so as not to confuse or mislead the jury."273 Where it becomes

Objection to a trial court's refusal to submit special interrogatories must advise the court of the specific reasons the submission is necessary, and upon review of the refusal the appellant must make a specific showing of prejudice. See Liquid Air Corp. v. Rogers, 854 F.2d 1297 (7th Cir. 1987).

270. 5A J. MOORE & J. LUCAS, supra note 270, at ¶ 49.03; FRIEDENTHAL, KANE & MILLER, supra note 22, at § 12.1. "The only limitation [on this discretion] is that the questions asked of the jury be adequate to determine the factual issues essential to the judgment." Kornicki v. Calmar S.S. Corp., 460 F.2d 1134, 1139 (3d Cir. 1972). Objections to proposed questions must be specific, or they will be deemed waived. See Rose Confections, Inc. v. Ambrosia Chocolate Co., 816 F.2d 381, 389 (8th Cir. 1987) (litigant's general request that "all essential elements" of claim appear separately on special verdict form was insufficient to preserve issue of court's omission of competitive injury issue in Robinson-Patman case).

271. See, e.g., United States Fire Ins. Co. v. Pressed Steel Tank Co., 852 F.2d 313, 318 (7th Cir. 1988) (since it was impossible to determine whether juror's negative answer to ambiguously phrased question indicated their determination that there was no violation of insurance contract at all, or merely that there was no violation up to that point in time, case would be remanded for new trial); Chang v. Johns-Manville Sales Corp., 847 F.2d 523, 525 (9th Cir. 1988) (defendant contended that interrogatory asking jury "[o]n what date was [the plaintiff] informed or on what date should he have known that this disease was a result of the Defendant's negligence or Defendant's defective products?" improperly assumed existence of asbestos-related disease, negligence of defendant, and causation); Boston Trading Group, Inc. v. Burnazos, 835 F.2d 1504 (1st Cir. 1987) (special verdict question in fraudulent conveyance case lumped two transfers together and thus failed to make critical distinction); Siegel v. Mazda Motor Corp., 835 F.2d 1475, 1478 (D.C. Cir. 1987) (verdict form did not ask jurors to vote on each basis for liability and court thus could not tell what, if any, determination jury made on implied warranty theory); Furr v. AT & T Technologies, Inc., 824 F.2d 1537 (10th Cir. 1987) (form of questions in ADEA action, which failed to inquire first whether there was policy or practice of discrimination, was "less than ideal."); Urland v. Merrell-Dow Pharm. Inc., 822 F.2d 1268 (3d Cir. 1987) (dissenting judge suggested that form of special interrogatory represented misstatement of proper rule on tolling of statute of limitations and failed to distinguish three significant time periods).

Conditioning instructions (e.g., "If you answer Question 1 'No,' then skip Questions 2 and 3") have been a particular source of problems. In Stevens v. Corbell, 832 F.2d 884 (5th Cir. 1987) cert. denied, 108 S. Ct. 2018 (1988), the jury was asked whether the defendant police officer had used unreasonable force against the plaintiff on each of three occasions. The jury answered "No" for each, and in compliance with the court's instructions did not answer the remaining interrogatories relating to other officers and to the amount of damages. Id. at 886. When it was subsequently determined that the court's charge to the jury was erroneous, there was no jury finding on the then-critical questions. Id. at 890 n.8.


apparent that the questions submitted do not meet this goal, the trial judge has the discretion to withdraw them from the jury even after deliberations have begun.  

Illustrative of the problems encountered in drafting special verdict questions for the jury is Anderson v. W.R. Grace, a toxic tort case alleging contamination of drinking water in Woburn, Massachusetts. After approximately four months of trial, much of it involving highly technical testimony from hydrogeologists as to the movements of underground water, United States District Judge Skinner submitted four special questions to the jury. The questions, the product of considerable negotiation among counsel and the judge, required the jury to determine whether either of the two defendants had disposed of particular chemicals at particular sites by particular dates, and if so whether the disposal was negligent.

(1988) (confusing language in special questions in medical malpractice case could not have affected verdict).

274. See Diniero v. United States Lines Co., 288 F.2d 595, 597 (2d Cir. 1961), cert. denied, 368 U.S. 81H (1961). It has also been held that the trial court may clear up ambiguities in the original interrogatories by submitting amended interrogatories together with additional instructions. See United States v. 0.78 Acres of Land, 81 F.R.D. 618, 622 (E.D.Pa. 1979), aff’d without opinion, 609 F.2d 504 (3d Cir. 1979). The withdrawal of an unanswered interrogatory after the jury has returned with a verdict, however, has been deemed error where the interrogatory was material and necessary to the verdict. See Grey v. United Leasing, Inc., 91 A.D.2d 457, 457 N.Y.S.2d 823 (1983).


276. “[A]s the lawyers wrangled for days over the exact wording of the questions, most became blind to the fact that the turgid legalese they concocted was ambiguous, at best.” Contaminated Verdict, THE AMERICAN LAWYER, Dec. 1986, at 76. One of the defense attorneys has been quoted as explaining the unclear nature of the questions as follows: “Everybody [had] their own axe to grind and [was] trying to advance the phraseology best to them. . . . We lost sight of the way [the jurors] would receive it.” Id. at 80.

277. The questions read:

1. Have the plaintiffs established by a preponderance of the evidence that any of the following chemicals were disposed of at the Grace site after October 1, 1964 and substantially contributed to the contamination of Wells G and H by those chemicals prior to May 22, 1979?

   [List of three chemicals]

   If you answered “No” to all these chemicals, you need not proceed further.

2. If you answered “Yes” in question 1 as to any chemical(s), what, according to the preponderance of the evidence, was the earliest time that such chemical(s) disposed of on the Grace site after October 1, 1964 made a substantial contribution to the contamination of Wells G and H— with respect to:

   [List of three chemicals, with Month/Year to be filled in]

   (If, on the evidence before you, you are unable to determine by a preponderance of the evidence the appropriate date, write “ND” for Not Determined).
The jury deliberated for nine days and, after first reporting itself deadlocked, finally provided answers to the questions. The responses were ambiguous and contradictory. As a result, Judge Skinner ordered that the case be retried. Rather than go through another trial, the parties reached a settlement. Post-verdict interviews with the jurors strongly indicate that they did not understand either the individual questions or the relationship between them.

3. If you have answered "Yes" in question 1 as to any chemical(s), please answer the following question:

Have the plaintiffs established by a preponderance of the evidence that the substantial contribution to the contamination of Wells G and H prior to May 22, 1979, by chemicals disposed of on the Grace site after October 1, 1964 was caused by negligence of Grace, that is, the failure of Grace to fulfill any duty of due care to the plaintiffs—with respect to:

[List of chemicals]
(Only answer with respect to a chemical as to which you answered "Yes" on question 1.)

4. If you have answered "yes" to any part of question 3, what, according to a preponderance of the evidence, was the earliest time at which the substantial contribution referred to in question 3 was caused by the negligent conduct of this defendant — with respect to:

[List of chemicals]
(If, on the evidence before you, you are unable to determine by a preponderance of the evidence the appropriate date, write "ND" for Not Determined.)

Id. at 77.

278. The jurors responded as follows: To question 1, that two of the listed chemicals had been disposed of at the site and had substantially contributed to the contamination at the wells. To question 2, that they could not determine the earliest date of substantial contribution. To question 3, that the substantial contribution was caused by negligence of the defendant. To question 4, that they could not determine the date of earliest negligent contribution for one of the chemicals, and that they could determine the date for the other, which they supplied. Id.

Thus the jurors found contamination of the wells by two of the chemicals. Yet while they were unable to determine when the chemicals got to the wells in question 2, they were able to determine the time of negligent contribution for one of the chemicals in question 4. The dating of the events was crucial to the case. Id.

In explaining to the jurors his decision to grant a new trial because of "problems" with their answers, Judge Skinner stated: "I did not make it as clear as I should have what the relationship was between these various elements of time and, in particular, how critical that was with respect to [the ultimate resolution of the lawsuit]." Id. at 80.

In a later phase of the Anderson litigation, the jury responded to similar interrogatories regarding another defendant. The Court of Appeals for the First Circuit, reviewing that set of answers, observed:

"[B]ecause of the compound and conjunctive nature of the question, the jury's negative answers . . . were arguable ambiguous. The ambiguous responses could be read to mean either that there had been no disposal after 1968, or that no chemicals had travelled to the wells. And there was yet a third possibility: the 'no' answers could have meant that the jury felt both prongs of the interrogatory remained unproven."

862 F.2d at 917.

279. See Contaminated Verdict, supra note 277, at 75-76. "Interviews with five of the six jurors reveal that it wasn't the trial testimony that was too complicated. Rather, Judge
The teaching of cases like *Anderson* is that the problem of communicating clearly to the lay jury exists in the special verdict context just as it does in general verdict situations. While use of the special verdict obviates the necessity for the judge to give a comprehensive course to the jury on all pertinent areas of the controlling law, judges must still be aware of the need for comprehensible questions together with adequate guidance as to how the questions should be approached.

The goal is of course to obtain definitive answers from the jury which can be translated by application of the controlling legal principles into a judgment disposing of the dispute. If the jury's responses to special verdict questions are ambiguous, the judge may (as Judge Skinner did in *W.R. Grace*) refuse to enter judgment on them. Other options are available as well. Trial judges are given some latitude to correct apparent errors (both substantive as well as clerical) in the responses "so as to give effect to the jury's intentions," as for example where the jury seems to have mistakenly calculated damages. This may include an attempt to reconstruct the thinking processes of the group to determine the bottom line result they seem to have sought, as where the jurors find a violation of an act even though they also find that an affirmative defense was made out. Judges are deemed to have authority under Rule 49 of the

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281. FREIDENTHAL, KANE & MILLER, supra note 22, at § 12.1.

282. See Geosearch, Inc. v. Howell Petroleum Corp., 819 F.2d 521, 528 (5th Cir. 1987) (holding that trial court had acted properly when, concluding that jury in its responses had mistakenly deducted an amount attributable to contributory negligence from award, judge restored that amount). See also Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines Ltd., 369 U.S. 355, 364 (1962) (trial court may correct clerical errors in verdict and attempt to harmonize conflicting responses); G. A. Thompson & Co. v. Partridge, 636 F.2d 945, 963-64 (5th Cir. 1981) (in securities case with four defendants in which jury found each defendant liable for exactly one quarter of total damages, trial court was held to have properly inferred that jury had misunderstood instructions on joint and several liability and thus court's entry of judgment against each defendant for four times jury's award was affirmed.); Bond-Johnson Exploration v. Schlumberger Technology, 580 F.2d 391, 399-98 (10th Cir. 1978) (district court held to have properly inferred that jury had reduced award based on plaintiff's comparative negligence). The trial court is required to interpret the special verdict in light of the instructions, evidence, and other surrounding circumstances. McVey v. Phillips Petroleum Co., 288 F.2d 55, 59 (5th Cir. 1961).

283. See Mozart Co. v. Mercedes-Benz of N. Am., Inc., 833 F.2d 1342, 1344 (9th Cir. 1987) (in Sherman Act case, jury returned special verdict finding that defendant had violated Act through its tying arrangement, but that it had business justification for
Federal Rules of Civil Procedure to enter a final judgment even if
the jury failed to answer all the questions submitted, as long as the
responses obtained are sufficient to dispose of the key issues in the
litigation.\(^{284}\) This authority to extrapolate from the jury’s responses
is limited, however, and the court must refrain from too much mind-
reading into ambiguous or omitted answers.\(^{285}\)

The court itself must exercise care to cover all the material issues
in the questions submitted to the jury. Under Rule 49(a) the omiss-
don of an issue is not necessarily fatal to entry of a final judgment as
it was under the common law. The judge is explicitly authorized to
make findings on issues that had been omitted without objection
from the parties, and failure of the judge to do so shall be deemed a
specific finding in accord with the final judgment entered in any
event.\(^{286}\) There has been, however, some reluctance on the part of
the appellate courts to countenance use of this fail-safe provision.

\(^{284}\) See Kinnel v. Mid-Atlantic Mausoleums, Inc., 850 F.2d 958 (3d Cir. 1988). The
trial court “filled in” a missing finding against a co-defendant in the jury’s special
verdict; in affirming, the court of appeals recognized that a district court may “amend
a special verdict after it is rendered to make it conform to the jury's obvious but
unexpressed intention.” Id. at 965. See also Furr v. AT & T Technologies, 824 F.2d
1537, 1545 (10th Cir. 1987) (“When special interrogatories are submitted to a jury
under Fed.R.Civ.P. 49(a) and the jury’s responses do not provide an answer on a vital
issue, then remand for a new trial is appropriate, at least as to the unresolved issue. But
if there is a view of the case that makes the jury’s answers to special interrogatories
complete and consistent, we will adopt that view and enter judgment accordingly.”);
Griffin v. Matherne, 471 F.2d 911, 915-16 (5th Cir. 1973); Aquachem Co., Inc. v. Olin
Corp., 699 F.2d 516, 520 (11th Cir. 1983); Maddox v. City of Los Angeles, 792 F.2d
1408, 1418 (9th Cir. 1986).

special verdict for the plaintiff in a product design case, but answered only one of the
done submitted questions inquiring as to specific aspects of the design of the hoist. Id. at
87. The Court of Appeals, interpreting the jury’s omission as a finding of no negligence
as to the four aspects not addressed and ruling that the evidence on the fifth aspect was
insufficient to support a verdict of negligence, reversed the judgment in plaintiff’s favor.
Id. On review the United States Supreme Court reversed, observing:

We do not share the Court of Appeals’ confidence as to the meaning, in
light of the trial court’s instructions, of the jury’s failure to answer four
subdivisions of the interrogatory. Perhaps the jury intended to resolve
these questions in respondent’s favor; but the jury might have been
unable to agree on these issues, or it simply might not have passed upon
them because it concluded that respondent had negligently designed the
hoist in another respect. In either of the latter two situations, petitioner
would clearly deserve a new trial, at least as to these unresolved issues of
negligence.

Id. at 87-88. The Court remanded the case to the trial judge who was in the best posi-
tion to interpret the jury’s action. Id. at 88.

\(^{286}\) See supra, note 181.
In *Cullen v. Margiotta*, a civil RICO action charging that local politicians had coerced campaign contributions from town employees, the trial court submitted seventy-seven special questions to the jury. The jury's answers "left a gap" because significant fact issues had not been covered in the special questions. Counsel had not at the time objected to these omissions, and the district judge thus entered judgment. While recognizing that the drafters of Rule 49, in an effort to preserve where possible the work product of the jury, had designed the rule to permit the trial judge to do this, the Second Circuit Court of Appeals nevertheless chose to remand for further findings on the omitted fact issue. In so doing the court noted the "difficult task confronting the trial judge [in a complex case where there are a large number of permutations of fact interpretations] who wishes to pare down the number of possibilities in order to avoid confronting the jury with a package that is neither manageable nor understandable." The Second Circuit added, however, that the use of special questions "is not designed to be a trap for counsel who, failing to anticipate the precise distinctions the jury may make between parties or the judgments it may make as to the credibility of various witnesses, thereby fail to insist on the presentation of interrogatories as to details that later prove crucial."

As *Margiotta* illustrates, use of the special verdict in a complex case may mean submitting dozens of questions to the jury. Some courts have found this inevitable proliferation of questions to render the special verdict both unworkable as a matter of judicial management and incomprehensible to the average jury.

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287. 811 F.2d 698, 705 (2d Cir. 1987).
288. Id. at 707.
289. Id. at 708. Other circuits have also limited or refused application of the fail-safe provision. See *Leonard v. Aluminum Co. of Am.*, 800 F.2d 523 (15th Cir. 1986) (holding that rule deeming trial court to have made implicit finding on omitted issue applies only where that issue was clearly "raised by the pleadings or by the evidence."); *Solis v. Rio Grande City Indep. School*, 734 F.2d 243 (5th Cir. 1984) (court refused to deem omitted issue of causation to have been determined by judgment).
290. *Margiotta*, 811 F.2d at 731.
291. Id. Some courts have not been so sympathetic to the plight of trial counsel. See, e.g., *Anderson v. Cryovac, Inc.*, 862 F.2d 910 (1st Cir. 1988) (holding that district court judge acted properly when he made findings of fact on issue that was omitted from special questions with acquiescence of plaintiffs' counsel); *Strauss v. Stratojac Corp.*, 810 F.2d 679 (7th Cir. 1987) (holding that defense counsel waived any objection to general verdict accompanied by special interrogatory answers because, even though there were inconsistencies between the two, counsel had failed to anticipate them prior to submission to jury and failed to raise objection before jury was discharged).
292. See *In re Roberts*, 846 F.2d 1360 (Fed. Cir. 1988). In this patent infringement action, it was observed:

When only two or three narrow issues of fact, such as the date of invention or perhaps the date of first public sale, determine the issue of
The increased specificity of the verdict can also generate inconsistency. While a general verdict may conceal wildly contradictory findings of the jurors,293 such flaws would likely be revealed by their responses to specific questions. The common law experience led the drafters of Rule 49 to anticipate the problem, but they dealt with it only in the context of special interrogatories accompanying a general verdict:

When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered . . . . When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered . . . in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.294

The Supreme Court has emphasized the obligation of the trial court to reconcile seemingly inconsistent responses, where possible, in order to preserve jury decision-making in accord with the seventh amendment.295 In Gallick v. Baltimore & Ohio R.R.,296 for example,
plaintiff brought a FELA action in state court alleging that he had suffered an insect bite while working near a stagnant pool of water and that the subsequent infection of the wound resulted in the loss of both legs. Liability was predicated on the alleged negligence of the employer in permitting the pool to become infested with insects. The defendant denied negligence and contended that such injuries in any event were beyond the realm of reasonable foreseeability. The case was submitted to the jury on twenty-four special verdict questions, and they found that plaintiff had been bitten by an insect while at work, that the bite did cause his injuries, that the stagnant pool had attracted the insect, and that the employer knew that the accumulation of water would attract insects to the area. The jury also concluded, however, that the defendant could not have reasonably foreseen the chain of events leading from the stagnant pool to the plaintiff's injuries. Judgment was entered for the plaintiff and damages awarded, but the appellate court reversed on the ground that causation had not been adequately established by the evidence.

The United States Supreme Court reversed and reinstated the judgment. It held that the causation issue had properly been left to the jury and their result was supported by the evidence. Further, while agreeing with the defendant that reasonable foreseeability of harm (which the jurors determined had not been proven) was an essential element of plaintiff's claim, the Court nevertheless rejected the contention that the jury's finding against plaintiff on this point constituted a "fatal inconsistency" with its other findings. Noting "the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them," the Court reconciled the answers: The jury's response on the foreseeability question, taken in context with their other responses, "might simply mean that while an insect bite was foreseeable, there was no reason

297. Id. at 109.
298. Id. at 110.
299. Id. at 110-11.
300. Id. at 111.
301. Id. at 112-13.
302. Id. at 122.
303. Id. at 121-22.
304. Id. at 120.
305. Id. at 119.
to anticipate" the further consequences of that bite. Because a defendant is liable for consequential damages even if he could not foresee the particular consequences of his negligence, the Court thus discounted the apparent inconsistency.

There is some disagreement as to whether courts should seek to reconcile inconsistent special verdict responses returned under Rule 49(a), as the reconciliation provisions appear only in Rule 49(b). It has been suggested that the duty to reconcile should arise only in cases in which special interrogatory responses are consistent with one another but in conflict with a general verdict, for in those particular situations the courts are working to preserve the jury's specific findings of fact in accord with the seventh amendment. Where the fact findings are inconsistent with one another, as where special verdict responses conflict, it is argued that no meaningful preservation is possible and a new trial should be ordered.

The majority of courts, however, have read the various options for handling inconsistencies under F.R.C.P. 49(b) into Rule 49(a) as well. Thus trial courts have been permitted to return the jury for further deliberations when they bring back inconsistent special verdict answers. In Nance v. Gulf Oil Corp., for example, the jury in a personal injury action responded to two questions by finding that the defendant was not negligent or strictly liable, but went on to apportion ninety-five percent of the fault to the defendant in response to a third question. Unable to reconcile the answers and enter an appropriate judgment, the district court resubmitted the case to the jury. The court explained to the jurors that the answers previously returned were inconsistent and submitted to them a new verdict form (drafted by defendant Gulf) which clarified that they should not apportion fault if they found for the defendant on the negligence and strict liability claims. The jury rendered a new ver-

306. Id. at 120.
307. Dissenting Justices Stewart, Goldberg, and Harlan found the jury's answers "irreconcilably inconsistent" and would have ordered a new trial. Id. at 122-127 (Harlan, J., dissenting) (Stewart and Goldberg, JJ., dissenting).
308. Gallick, 372 U.S. at 124-25 (Stewart and Goldberg, J., dissenting); J. Moore & J. Lucas, supra note 270, at 49.04. See also Elliot v. Watkins Trucking Co., 406 F.2d 90, 92 (7th Cir. 1969) ("[W]hen a jury has specially found facts which compel a certain result as a matter of law and has, by general verdict, reached a result which the specially found facts do not permit, it may reasonably be assumed that the jury erred in the legal reasoning by which it proceeded from the specially found facts to the general verdict and not in the fact finding process."); Connor v. Jefferies, 67 F.R.D. 86, 90 (E.D. Pa. 1975) ("The jury's more specific findings of fact are allowed to control their general conclusion embodied in the general verdict. The general verdict may be confused because the jury misunderstood the law, whereas their specific findings of fact—and the jury after all is only a fact-finding body—are a better guaranty of their intentions.")
309. 817 F.2d 1176, 1178 (5th Cir. 1987).
dict against Gulf on those claims and the Fifth Circuit affirmed, reject­ing Gulf’s contention that resubmission by way of a revised verdict form was beyond the power of the court and amounted to coercion of the jury.\textsuperscript{310} Other appellate decisions recognize the power of trial judges, confronted with inconsistent special verdict responses, to resubmit the case to the jury on the original questions,\textsuperscript{311} or to submit an additional interrogatory designed to clarify the apparent ambiguity.\textsuperscript{312}

One additional area of controversy in the courts regarding use of the special verdict concerns the issue of whether the jurors should be instructed as to the legal effect of their answers.\textsuperscript{313} Rule 49(a) provides that the court “shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue.” In advocating against informing the jurors how their fact findings will translate into legal conclusions, it has been argued that the objectivity of the special verdict device would be lost if the jury knew the effect of their answers. Judge Frank observed that when “the jury is less able to know whether its findings will favor one side or the other, the appeal to the jurors’ cruder prejudices will frequently be less effective.”\textsuperscript{314} While some courts have considered instruction as to legal effect to be reversible error, most have not.\textsuperscript{315} In any event, it has been recognized that the jury may be “clever enough to ap-

\begin{footnotesize}
\textsuperscript{310} Id. at 1176-79. The court, conceding that the drafters of Rule 49(a) had not provided for resubmission, concluded that such authority was implicit in the rule. \textit{Id.} at 1178.

\textsuperscript{311} See \textit{Landry v. Offshore Logistics, Inc.}, 544 F.2d 757 (5th Cir. 1977) (approving of district judge’s resubmission of same five interrogatories to jury following their return of inconsistent responses on contributory negligence).

\textsuperscript{312} See \textit{Morrison v. Frito-Lay, Inc.}, 546 F.2d 154 (5th Cir. 1977). The jury in this multi-vehicle wrongful death action answered one of twenty-two interrogatories in a manner which raised an ambiguity as to its finding with regard to the responsibility of one of the drivers. The trial judge submitted an additional interrogatory that asked the jurors in effect to explain their original answer, which they did. The Court of Appeals approved of this procedure, noting that the answer to the additional interrogatory “demonstrated with reasonable certainty that the apparent inconsistency in [the] verdict was no more than apparent” and reasoning that the courts can fulfill their obligation to harmonize answers on their own, or with the assistance of the jurors themselves. \textit{Id.} at 161.


\textsuperscript{314} \textit{Skidmore v. Baltimore & O.R.R. Co.}, 167 F.2d 54, 66 (2d Cir. 1948), cert. denied, 335 U.S. 416 (1948). Leon Green asserted that the “idea of blindfolding the jury as to the significance of its verdict, or to the issues that support its verdict, is a complete repudiation of jury trial in its historic sense . . . .” Green, supra note 198, at 47.

\textsuperscript{315} See \textit{Friedenthal, Kane & Miller}, supra note 22, at § 12.1 n.12.
\end{footnotesize}
preciate the effect of its answers and to shape them to harmonize with its general conclusions' even in the absence of such instruction, particularly with hints from counsel, and thus "the attempt to keep the jury in the dark as to the effect of its answers is likely to be unavailing."517

As one court has aptly summed up the benefits and costs,

[the special verdict permitted by Rule 49(a) is a splendid device for clarification of jury verdicts and for focusing the jurors' attention on the disputed facts without the possible confusion that may result from a lengthy charge concerning the different legal rules that would apply if the jury reaches one factual conclusion rather than another. . . However, like all fine tools, it must be skillfully employed and its successful use requires the careful attention of counsel for all parties as well as of the court to be certain that the questions are framed to avoid the possibility of inconsistent answers.518](#)

**What Constitutes an "Issue of Fact:" Ultimate vs. Actual Fact**

Rule 49(a) speaks in terms of special questions on "each issue of fact." A survey of the use of the special verdict in contemporary litigation reveals a marked lack of uniformity as to the meaning of this phrase. A few cases like *Anderson v. W.R. Grace*519 and *Gallick v. Baltimore & Ohio R.R.*520 represent use of what could properly be called the "fact verdict"521—the jurors are asked to determine actual facts such as the presence of toxins in drinking water or the connection between an insect bite and the victim's subsequent infection. Far more often, the questions posed are in the nature of a "separate issue" verdict—the jurors are asked whether the plaintiff has established each element of the claim. In a negligence action, for example, they will be asked whether there was adequate proof of negligence, causation, and injury. Sometimes the special verdict is

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317. *Wright*, *supra* note 149, at 206. See also Comment, *supra* note 106, at 494, 513-14 (arguing that it is unrealistic given our tradition of adversary advocacy to expect that attorneys will not be able to convey to jurors the import of their findings).
319. See *supra*, notes 276-80 and accompanying text.
320. See *supra*, notes 297-308 and accompanying text.
321. This was a term used by Judge Frank. See *Skidmore v. Baltimore & O.R.R. Co.*, 167 F.2d 54, 57 (2d Cir. 1948), *cert. denied* 335 U.S. 816 (1948).
actually a "separate claim" verdict—the jurors are asked whether
plaintiff has made out each separate claim asserted.\textsuperscript{322}

The special verdict, in other words, is typically used to divide the
dispute into "ultimate," not actual facts.\textsuperscript{323} Each unit of "ultimate
fact" constitutes, like the general verdict, its own impenetrable in­
termingling of law and fact.\textsuperscript{324} Thus while the special verdict
originated as a procedure to relieve jurors of the troublesome task
of law application and focus their efforts solely upon fact finding,
the device in modern use generally does not serve that function.

\textit{Simone v. Golden Nugget Hotel \& Casino}\textsuperscript{325} is illustrative. Simone
brought an action for assault and battery, false imprisonment and
malicious prosecution, based upon his forcible removal from the
Golden Nugget and subsequent arrest by city police.\textsuperscript{326} Upon the
completion of the evidence the jury was requested to answer special
interrogatories and responded as follows:

1. Has the plaintiff proven a claim of malicious prosecution?
   \begin{itemize}
   \item[YES] —
   \item[NO] —
   \item[X] —
\end{itemize}

2. If you answered question no. 1 "yes," were defendant's ac­
tions a proximate cause of any harm to plaintiff?
   \begin{itemize}
   \item[YES] —
   \item[NO] —
\end{itemize}

3. Has the plaintiff proven a claim of false imprisonment?
   \begin{itemize}
   \item[X] —
   \item[NO] —
\end{itemize}

4. If you answered question no. 3 "yes," were defendant's ac­
tions a proximate cause of any harm to plaintiff?
   \begin{itemize}
   \item[X] —
   \item[NO] —
\end{itemize}

5. Has the plaintiff proven a claim of abuse of process?

\textsuperscript{322} See Simone v. Golden Nugget Hotel \& Casino, 844 F.2d 1031 (3d Cir. 1988).
\textsuperscript{323} The drafters of the Federal Rules of Evidence speak in terms of three categories
of facts; "ultimate, intermediate or evidentiary." Advisory Committee's Note, 56 F.R.D.
that "[f]rom the beginning, the courts distinguished between issues of evidentiary fact
and issues of ultimate fact, holding that Rule 49 guarantees only the right to have
questions directed to the latter." Comment, supra note 106, at 510.
\textsuperscript{324} Ultimate issues imply conclusions reached after consideration of
extensive factual detail offered in evidence by the litigants. Moreover,
ultimate issues in most instances require conclusions reached in light of
instructions on the law given by the court. Thus the determination of
ultimate issues is based on both facts and law.
Green, supra note 198, at 50.

It has been asserted that as long as mixed questions such as proximate cause are ac­
accompanied by instructions from the judge defining the legal terms, they "do not call for
findings of law, but only for findings of fact." Hough v. Grapotte, 127 Tex. 144, 146, 90
S.W.2d 1090, 1091 (1936). This assertion, of course, depends entirely on the jurors'
comprehending and abiding by the instructions.
\textsuperscript{325} 844 F.2d 1031 (3d Cir. 1988).
\textsuperscript{326} Id. at 1032-33.
YES — X — NO —

6. If you answered question no. 5 "yes," were defendant's actions a proximate cause of any harm to plaintiff?
YES — X — NO —

7. Do you find defendant responsible to plaintiff for assault and battery?
YES — NO — X —

8. If you answered question no. 7 "yes," were defendant's actions a proximate cause of any injury to plaintiff?
YES — NO —

9. In what lump sum do you assess damages?
$150,000 327

Concluding that the evidence did not support the findings against the Casino on the claims of false imprisonment and abuse of process, the district court granted the defendant's post-trial motion for judgment notwithstanding the verdict on the latter and for a new trial on the former. 328 A second trial thus took place on the false imprisonment claim, and the new jury found in favor of the Golden Nugget. 329 Simone appealed, challenging the judge's action in taking away the two verdicts in his favor after the first trial and the jury's verdicts against him on his other two claims. Simone also appealed the jury's verdict against him in the second trial. 330

To the United States Court of Appeals for the Third Circuit fell the task of sorting out what had occurred in the jury-deliberation process during each trial. This task was not aided by the special verdict responses, which merely parroted the plaintiff's legal claims. 331 The jurors who had heard the evidence at both trials were not asked to state what they, in their collective wisdom, determined had actually occurred at the Golden Nugget. Rather the appellate court was compelled to speculate as to the factual premises underlying the jury's broad conclusions by reviewing the transcript of the evidence and the judge's instructions on the elements and

327. Id. at 1033 n.6.
328. Id. at 1032.
329. Id. at 1032-33.
330. Id.
331. The trial judge was equally without guidance from the jury's responses. Because it was "not clear from the jury's answers to interrogatories whether it attributed any of Simone's physical injuries to the claim of false imprisonment" or another claim, the trial court could not separate out the liability and the damages questions in ordering a new trial and was thus required to retry the entire matter. Id. at 1041. See also Ryco Mfg. Co. v. Eden Services, 823 F.2d 1215, 1240 (8th Cir. 1987) (jury's failure to specify in its responses to special interrogatories which of five different fraud theories it relied upon in finding defendant liable required that appeals court set verdict aside and remand for new trial).
defenses for each claim. On this basis the court ruled that the first jury "could have found that any touching of Simone by security guards was justified under the circumstances," "could have found that Simone failed to prove the requisite malice," "could have found that [the erroneous criminal complaint filed against Simone] was attributable to the Atlantic City police and not to the guards or the Golden Nugget," and "could have found that Simone was held at the police station for reasons independent of his detention by Golden Nugget security." The court of appeals underscored the speculative nature of its endeavor when it noted its disagreement with the district court as to the meaning of the jury's conclusion that plaintiff had failed to establish a claim of malicious prosecution. The district court had assumed this conclusion must have followed from a finding that the defendant had probable cause to initiate the criminal proceeding; but the reviewing court viewed it instead as the result of an apparent finding that defendant acted without malice.

Writing for the Third Circuit, Judge Hutchinson observed:

In reviewing this record and the parties' briefs, we have contended with about as many versions of the facts as there are witnesses, a situation not uncommon in this kind of case. It was, therefore, particularly the jury's function to assess the credibility of these witnesses, to draw inferences from the evidence it found credible and, having done so, to weigh all the evidence and inferences and render its verdict. So viewed, this verdict is not against the weight of the evidence.

The jury's responses to the questions posed, however, do not disclose which version of the facts they accepted or their assessment of the credibility of the witnesses who appeared before them. Indeed it cannot be determined whether their conclusions were generated by particular facts found, or law applied, or both; nor can it be determined whether the jurors misunderstood or ignored the judge's instructions. Put another way, the "special verdict" in Simone suffers the same infirmities as the general verdict. The dispute is resolved, but we learn no more about the steps along the way than we would if the method were trial by ordeal, combat, or fire.

The necessity for reconstructing (or, more accurately, attempting to reconstruct) jury deliberations in order to review their conclusions can be avoided by use of the special verdict, but as Simone demonstrates this can be accomplished only if the questions submitted to

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332. Simone, 844 F.2d at 1034, 1036, 1041 (emphasis added).
333. Id. at 1036.
334. Id. at 1035 n.9.
335. Id. at 1043.
the jury isolate their findings on the actual facts in dispute. Special questions which merge fact and law determinations may serve some useful purposes, such as localizing error to particular issues and thus avoiding the need to retry the entire case. Such questions do not, however, enhance the appellate process by spelling out the findings to be reviewed, increase the accuracy of jury decision-making by focusing attention on the pivotal fact disputes which must be resolved, or avoid the perils of law application by jurors.

The formulation of conclusory special questions in Simone is not, as noted above, atypical. The questions utilized in a highly publicized tobacco liability case, for example, required that the jurors determine whether the plaintiff had proven all of the elements necessary to establish fraudulent misrepresentation of the health risks of smoking. Juries have been asked whether "the discharge of plaintiff . . . resulted from the application of an employment policy or practice which, although neutral on its face, had a significantly adverse effect against women, and which was not justified by legitimate business requirements? Yes or No." In addition to the obvious problems raised by the multiple nature of this question, it requires the jurors to comprehend and apply legal concepts such as disparate impact and business necessity, concepts that challenge the minds of those trained in the law.

In the guise of a special question, jurors have been asked whether the defendant "defrauded" the plaintiff, causing the reviewing court to observe in apparent frustration: "The Interrogatory makes no reference to and requires no findings regarding any of the individual theories of fraud. The fraud verdict thus is a general verdict, even though it took the form of an answer to a special interrogatory." In a patent infringement action jurors were required to determine the issue of "obviousness," rather than being required to find the specific facts bearing upon this legal issue; the court of appeals found this "so-called special interrogatory" to be improper.

In civil rights actions special verdicts have required juries to deter-

339. Ryco Mfg. Co. v. Eden Services, 823 F.2d 1215, 1236 n.21 (8th Cir. 1987). The court added: "Because we have no way of knowing which of the fraud theories the jury relied upon in rendering its verdict, each of the theories must be supported by sufficient evidence." Id. at 1236.
mine whether the defendants had violated the plaintiff’s constitutional rights, thus simply repackaging into questions the plaintiff’s conclusory claims and clouding in mystery the basis for the jury’s ultimate decision.\footnote{341} And jurors in personal injury cases are typically asked to determine not what occurred, but rather whether there was negligence, causation, and injury.

Juries on occasion have even been given questions that appear to be primarily legal in nature. In one notable case the United States Court of Appeals for the Fifth Circuit held that it was proper to require the jury to characterize, for the purpose of applying the statute of frauds, an oral contract as either one for sale or for services.\footnote{342} On other occasions, juries have been asked to determine whether the plaintiff met the statutory definition of “employee” for purposes of the workers’ compensation statute.\footnote{343}

The special verdict as used typically, then, carries the same fundamental defect as the general verdict; ingredients of fact and law are mixed together in the jury room and only ultimate, unexplained conclusions are disclosed. The more issues that are grouped to-

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\footnote{341} See, e.g., Lundgreen v. McDaniel, 814 F.2d 600, 607 (11th Cir. 1987). The court wrote:

> The jury could have reasonably believed that the officers were neither threatened by a weapon, nor appeared to be threatened by a weapon, nor were fired upon, but rather that the officers without provocation shot at a nondangerous suspect. Indeed, this is apparently what the jury did conclude, since it answered ‘yes’ to special interrogatory questions regarding whether the deputies violated one or more of plaintiff’s or decedent’s constitutional rights.

\textit{Id.} at 603 (emphasis added).

\footnote{342} See Dobson v. Masonite, 359 F.2d 921, 923 (5th Cir. 1966). The contract provided that defendant would clear plaintiff’s land of timber in return for the proceeds from the sale of the such lumber. Application of the statute of frauds turned on whether this contract for both sale and services should be viewed as one for sale or service. This was deemed to have been properly submitted as a special question to the jury. \textit{Id.} See also Green Tree Acceptance, Inc. v. Wheeler, 832 F.2d 116 (8th Cir. 1987). The trial court, ruling that the non-competition agreement sued upon was ambiguous as far as its time of termination, submitted that issue of interpretation to the jury. \textit{Id.} at 117. The Court of Appeals reversed because of “the improper submission to the jury of a question of law.” \textit{Id.} at 118. The court added: “It is impossible, of course, to determine in the present case whether the jury’s answer was based on the defense of waiver, release, or estoppel, or on the jury’s interpretation of [the] noncompetition agreement.” \textit{Id.} City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 256 n.12 (1981) (jury rendered a special verdict on “a wholly separable issue of law.”); Spectra-Physics, Inc. v. Coherent, Inc., 827 F.2d 1524, 1533 (Fed. Cir. 1987) (legal issue of enablement in patent case may be submitted to jury as special verdict question).

\footnote{343} See Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958); Tipton v. Socony Mobil Oil Co., 375 U.S. 34, 35 (1963) (whether plaintiff was “seaman” within Jones Act was given to jury in special interrogatory); Hust v. Moore-McCormack Lines, Inc., 328 U.S. 707, 712 n.9 (1946) (jury given special interrogatory as to whether plaintiff was “employee.”).
together for submission to a jury, either by way of general verdict or
broad-form special verdict, the more likely it is that the verdict will
mask disagreement, misunderstanding, and horse-trading among
the jurors. The potential for avoiding the problems of law applica-
tion by jurors, which was the original purpose of the special verdict,
is thus frustrated.

The Case for the Fact Verdict

Nearly 60 years ago, Judge Jerome Frank observed that if we actu-
ally followed the theory that the judge decides the law and the jury
the facts, then

the judge would ask the jury to determine, from the evidence,
specific facts. “Do you believe from the evidence that Jones
fell through the elevator shaft and broke his leg?” “Do you
believe from the evidence that Smith represented to McCarthy
that there was an oil well on the premises?” “Do you believe
from the evidence that Robinson agreed to marry Miss Brown?” After the jury had reported its specific “findings,”
the judge would then decide, in light of these findings, the re-
spective legal rights and liabilities of the parties.344

Like the general verdict, the broad-question special verdicts dis-
cussed in the previous section defy this theory. It is only when the
device is employed as a fact verdict that the division of labor envi-
sioned by Judge Frank is achieved. The fact verdict, it is submitted,
thus offers the best opportunity for increased accuracy, efficiency
and accountability in the civil litigation system. Further, Rule 49
authorizes such a verdict; as the Fifth Circuit noted recently, a fed-
eral trial court pursuant to Rule 49 may “properly divide a single
ultimate fact issue into separate components with separate factual
questions submitted regarding the various components in dis-
pute.”345

Each argument proponents of the special verdict have advanced is
most compelling when applied to the fact verdict. The litigation is
packaged for the lay jurors into those components they are most
familiar and comfortable with: actual facts. The necessity for in-

344. J. Frank, supra note 13, at 183-84. In a negligence case, by way of example, the
jury would be required to resolve the fact issues in dispute while the judge would apply
the substantive legal rule to their findings. See Skidmore v. Baltimore & O.R.R. Co., 167
F.2d 54, 66 n.30a (2d Cir. 1945), cert. denied, 335 N.S. 816 (1948).
345. Holt Oil & Gas Co. v. Harvey, 801 F.2d 773, 782 (5th Cir. 1986). A
commentator in 1965 described as a “radical step” the notion of putting to the jury
evidentiary, rather than ultimate, fact questions. Comment, supra note 106, at 494. But
the cases discussed in this section demonstrate that courts have on significant occasions
taken this step and further illustrate the advantages of the approach.
structions on legal constructs is completely avoided, thus streamlining the trial and appellate stages and obviating the problems of jury comprehension. Since the jurors must go on record with their fact findings, and the judge for her application of legal principles, accountability of the actors in the litigation process is increased while reviewability of their work is enhanced. The fact verdict also removes doubt as to what was decided in the particular action which allows for the orderly operation of collateral estoppel in subsequent litigation. As will be seen, however, use of the fact verdict requires considerable care and attention on the part of the court and counsel.

In exploring the utility of the fact verdict it is helpful to look at a category of cases that has traditionally caused the courts particular difficulty. The employment discrimination area is one in which the legal doctrine, especially concerning causation, is particularly convoluted and dense. When a plaintiff claims that her termination was wrongful on constitutional or other similar grounds, it must first be determined whether the employer was in fact motivated by the alleged impermissible reason. If this is found to have been the case, it must further be determined whether that reason was the "but for" cause of the discharge. If it is found that the plaintiff would have been terminated for lawful cause in any event, regardless of the impermissible basis, then the plaintiff is deemed not to have been harmed and the employer prevails under established doctrine.

When such an action is tried to either a general verdict or broad-question special verdict, it is necessary to instruct the jury on this legal standard of causation as well as the surrounding substantive law. The difficulty of this task is illustrated by the instructions given to a jury in an action brought against Boston University by a former administrator alleging she was fired because of her opposition to discriminatory practices:

The question now is: Why was she fired? Was she fired because of what she said and/or did in good faith and upon reasonable belief, or was she fired because she wasn't doing her job? What caused Dean Nesmith to decide to terminate Nancy Richardson? That's the gut question . . . .

If you decide that he fired her for a lot of reasons, including what she said in writing, orally, and/or did as well, if that was the reason that he terminated her, the question then becomes: If she hadn't done that stuff, if she hadn't said or done things

in opposition to what she reasonably and in good faith believed to be the BU School of Theology's discriminatory practices, if she hadn't done that, would she still have been fired? If the answer to that is no, then she has been fired because of what she said or did. Do you understand that? Is that clear? Most of you aren't shaking your heads. Do you want me to do it again? Okay . . .

[Judge repeated the instructions.]

Where there is also a dispute between the parties about whether the alleged wrongful motive is unlawful under the applicable substantive law, additional instructions become necessary. Thus in Rowland v. Mad River Local School District, an action by a guidance counselor claiming she was wrongfully terminated because of her homosexuality, the legality of that basis (even if established as the motive behind the discharge) was in controversy. The parties submitted voluminous proposed jury instructions on the question of whether homosexuality was protected by the first, fourth, fifth, ninth, and fourteenth amendments, submissions that the magistrate in frustration characterized as comparable to "a short course on the Constitution."

With the fleeting memory of the legal instructions and of the conflicting evidence presented by the parties, the jurors in the prototypical discrimination case would then be sent to deliberate. If they are required to return a general verdict or a conclusory special verdict, their responses will conceal the particular version of events the jurors adopted as well as any difficulties or disagreements they may have had with application of the legal doctrine. Moreover, the blank check given the jury in resolving the lawsuit may very well encourage (and at the least does not discourage) counsel to play upon, and jurors to act upon, prejudice, emotion, or sympathy.

Use of the fact verdict, in contrast, would focus the jurors' attention solely on the material fact disputes. In Rowland, for example, the jury was given a series of questions along the following lines:

1. Are you satisfied by a preponderance of the evidence that the decision to terminate the plaintiff was motivated at least in part by her admitted homosexuality?

2. If so, are you satisfied by a preponderance of the evidence that the plaintiff would have been terminated anyway for other reasons. If your answer is "Yes," state the other reasons.

349. 730 F.2d at 447. The judge decided to utilize special questions in order to avoid having to so instruct the jury. Id.
3. Did the plaintiff’s homosexuality in any way interfere with the proper performance of her duties as a guidance counselor. If your answer is "Yes," state how it interfered.

4. Are you satisfied by a preponderance of the evidence that in their decision to terminate the plaintiff, the defendants treated her differently than heterosexual employees because of her sexual preference? The narrow scope of these questions encourages counsel in their presentation and the jurors in their deliberations to avoid reference and resort to improper bases (such as bias against homosexuals) for resolution of the case. Freed of the necessity to master elusive and sometimes counter-intuitive concepts of constitutional jurisprudence, the jury can operate as the effective fact-finding body it is justifiably heralded as being, with its members bringing their own life experiences to such tasks as weighing the credibility of witnesses and the probability of various scenarios. The combination of "Yes/No" and "Explain how" questions utilized in Rowland also permits the jurors to expand upon their responses in narrative fashion while at the same time confining them to the pivotal fact disputes.

Once the factual disputes are thus resolved and the findings recorded, the jurors' work would be complete. Final resolution of the case then turns upon application of the controlling legal principles by a judge who is both trained in that endeavor and, equally important, who must spell out her reasoning on the public record. The underlying findings of fact and conclusions of law are then readily reviewable on appeal.

350. Id. at 456-60.

351. In Rowland, for example, the judges on the circuit court panel disagreed as to whether the plaintiff’s homosexuality was constitutionally protected. The majority concluded it was not, 730 F.2d at 449, while the dissent argued that it was, id. at 452-53. Use of special interrogatories and a fact verdict at trial exposed this policy disagreement. See id. at 447. Use of a general verdict would have obscured it completely.

352. Fact interrogatories were similarly used in Floyd v. Kellogg Sales Co., 841 F.2d 226, 228 (8th Cir. 1988), cert. denied, 109 S. Ct. 501 (1988), in which the plaintiff claimed he was fired in retaliation for his request that the company investigate his complaints of racial harassment. The promissory estoppel claim was submitted to the jury on five special interrogatories:

1. Did Mr. Harper promise Mr. Floyd that if he requested an investigation of his claim of race discrimination he would not be terminated during this investigation?
2. Did Mr. Harper expect or should he have reasonably expected Mr. Floyd to request the investigation in reliance on his promise?
3. Did Mr. Floyd reasonably rely on Mr. Harper’s promise when making the request for an investigation?
Fact questions of the type submitted in Rowland have also been used effectively in personal injury litigation. In an action under the Federal Employers' Liability Act for personal injuries sustained when the plaintiff fell from the defendant's freight car, conflicting versions of fact presented by the parties were submitted to the jury in the form of special questions, avoiding the need to instruct the jury on the requirements for statutory liability. Similarly, in a case against an asbestos manufacturer which, under applicable law, turned on the knowledge of the defendant as to the hazards of exposure as well as the availability of protective measures, the jurors were asked to address those very fact issues rather than the elaborate legal construct of product liability.

Courts have devised a number of variations on the form of the fact verdict in negligence cases. Interrogatories can be formulated for each alleged act of negligence. Thus, for example, the jury would be asked whether defendant drove at an excessive speed, or failed to apply his brakes, or failed to look before entering the intersection. An alternative approach uses a check list to differentiate the claimed acts or omissions.

4. Did the employee of Kellogg Sales Company who made the decision to terminate Mr. Floyd do so because he requested an investigation?
5. Did the investigation conducted by Mr. Harper fail to conform to the investigation he promised Mr. Floyd?

_Id._ at 228 n.1.

The jury answered each in the affirmative and awarded damages. The district judge, concluding there was insufficient evidence to support the answer to Number 4, entered a judgment for the defendant notwithstanding the verdict. _Id._ at 228. On appeal the jury's verdict was reinstated. _Id._ at 230.

353. _Myers v. Reading Co._, 331 U.S. 477 (1947). The questions were as follows:
1. Was the brake in question an efficient brake?
2. If you find that the brake in question was not an efficient brake, did that fact contribute to or cause any injuries to the plaintiff? [the plaintiff's version of events]
5. Was the plaintiff thrown from a moving train? [the defendant's version]


354. _See Wingo v. Celotex Corp._, 834 F.2d 375 (4th Cir. 1987).

355. For example:

QUESTION 1: On the occasion in question, was Don Davis negligent in his speed, in the application of his brakes, or in his lookout. Answer "Yes" or "No" on each line in Column 1. If any of your answers in Column 1 are "Yes," was any such negligence a proximate cause of the occurrence in question. Answer "Yes" or "No" on the corresponding line of Column 2.

<table>
<thead>
<tr>
<th></th>
<th>Column 1/Negligence</th>
<th>Column 2/Causation</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Speed</td>
<td></td>
<td></td>
</tr>
<tr>
<td>b. Brakes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>c. Lookout</td>
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_Id._ at 228.
Fact questions have been used to sort out complicated legal claims by establishing the factual record necessary for their resolution. In a litigation seeking recovery for unlawful business surveillance, for example, the jury found that: 1) the defendant told the plaintiff he was going to put him out of business; 2) the defendant instructed his agent to use particularly intrusive surveillance techniques in an effort to frighten away the plaintiff’s customers; 3) use of these techniques did drive customers away; 4) the defendant acted with a conscious intent to harm the plaintiff’s business; 5) the defendant intentionally signaled out the plaintiff for surveillance activities.556 Where an insurer in another action sought to avoid liability arising out of an automobile accident on the grounds that the insured had made a material misrepresentation in obtaining the policy, the jury found that the insured had not read the insurance application before signing it, that the agent had asked her if there were any occasional drivers in the household, and that she failed to disclose that her son was an occasional driver.557 In both cases the judge was able to fit these specific findings into the established rule of law and enter a well-supported final judgment.558


357. Economy Fire & Casualty Co. v. Tri-State Ins., 827 F.2d 373, 374 (8th Cir. 1987).

358. An early example of the effective use of specific fact questions in a complex dispute is Walker v. New Mexico & S. Pac. R.R., 165 U.S. 593 (1894). The plaintiff alleged that the defendant obstructed the natural flow of certain watercourses and thus caused a flood, damaging the plaintiff’s property. Questions answered by the jury included the following:

Q.2. Was there a cloudburst in the Magdalena or Socorro Mountains on September 8, 1886; and if so, was the water therefrom the water which ran over plaintiff’s land?

Q.3. Was the water which came down the arroyos from the Magdalena and Socorro Mountains on September 8, 1886, surface-water?

Q.4. Was it customary for water to collect and stand on plaintiff’s land in the immediate vicinity thereof, in times of heavy rains or floods?

Q.5. How often upon an average in any one year did the water come down the arroyos leading toward the valley in the vicinity of Socorro from the Magdalena and Socorro Mountains prior to September 8, 1886?

Q.6. How far is the mouth of the main arroyos which runs through the western part of the city of Socorro in a northerly direction from the main line of the railroad?

Q.25. Which was constructed first, the railroad company embankment or the houses of plaintiff which were damaged by the water?

Id. at 599-601.

The jury’s answers were consistent with one another, but not with their general verdict (which required them to apply the elaborate and conflicting legal doctrine on landowner liability in such circumstances). Id. at 602-05. The Supreme Court, describing the jury’s fact findings as “clear,” “obvious,” and “positive,” upheld a statute authoriz-
Fact questions can further serve as a tool to minimize the risk of jury prejudice or bias against a litigant. In a major RICO prosecution, United States v. Coonan, United States District Judge Knapp was concerned about the possibility of prejudicial spillover from certain defendants to others. If the jurors were permitted to deliberate on a general verdict, such prejudice would be difficult if not impossible to detect or control. The judge thus proposed to ask the jury special questions that would first require them to determine whether the government had proven the existence of a RICO enterprise. If so, the jurors would then have to determine with respect to each individual defendant whether the government had established his membership in the enterprise. Finally, the jurors would be required to find whether each individual committed specific enumerated acts related to the conspiracy. In explaining his decision to break with the customary practice of the general verdict and also to omit an instruction to the jury as to how many acts constitute a “pattern” of racketeering, Judge Knapp wrote:

I have tried to isolate out what facts have to be found to support what I conceive is the correct meaning of RICO, and, therefore, for example, I don't invite the jury to find whether or not there is a pattern of racketeering.

I believe a pattern of racketeering is established on two racketeering acts and they have to be related in some way. The jury is not asked to find out whether there is a pattern of racketeering. Usually in these Charges they say you have got to find a pattern of racketeering, give a lot of vague language and if the jury wants to find a verdict, it does . . . .

What I am trying to work out is a Charge which merely asks the jury to find specific things, and those findings should be able to mathematically tell us whether the RICO statute has been violated or not.

... If [the jurors] are told they’ve got to have 2 [acts] to find a defendant guilty, they may go back and say, gee, if we need 2, we better be careful not to acquit, and I don't see why the government should have that benefit.

All they have to do is, each act is found, either found or not found, as to an individual defendant. If one act is clear and
they are kind of fuzzy on the other, in that situation the jury should find the fuzzy one not proven.

If the jury is told that finding that fuzzy one not proven will release that defendant, they may go back and think it over, which I don't think they should. 361

The government objected to this approach, contending that the jury in a criminal case must be required to return a general verdict and that the judge was obligated to instruct the jury on the definition of "a pattern" of illegal activities. Taking the government's position to be an effort to protect "the possibility of its obtaining guilty verdicts through prejudicial spillover from the numerous violent and otherwise criminal acts before it," the Second Circuit disagreed. 362 The court explained that "the criminal law's historical preference for general verdicts" and "distaste for special interrogatories" were generated by the "unique rights of the criminal defendant:"

There is apprehension that eliciting "yes" or "no" answers to questions concerning the elements of an offense may propel a jury toward a logical conclusion of guilt, whereas a more generalized assessment might have yielded an acquittal. The possibility also exists that fragmenting a single count into the various ways an offense may be committed affords a divided jury an opportunity to resolve its differences to the defendant's disadvantage by saying "yes" to some means and "no" to others, although unified consideration of the count might have produced an acquittal or at least a hung jury. . . . In general, those opposing interrogatories fear that any particularization of the jury's decision-making will risk interference with the jury's romantic power of nullification . . . . 363

361. Coonan, 839 F.2d at 894-95.
362. Id. at 890. The Court had suggested an alternative approach at oral argument, whereby the jury would answer special interrogatories as to the predicate acts committed by each defendant before being told how many such acts were necessary for conviction. The jury would only then be instructed as to the definition of a "pattern" of RICO activities and would be asked to render general verdicts for each defendant. This separation of the deliberations into two parts, however, met with objection from the government because "the special interrogatories would cause the jury to view the predicate acts in an unconnected fashion." Id. at 889-90.

In his dissent Judge Altimari observed that "the power of the jury to render general verdicts in criminal cases has been carefully guarded, admitting exceptions only in limited circumstances." Id. at 897 (Altimari, J., dissenting). He concluded that "the district court's decision here to remove from the jury its power, right and duty to render a general verdict . . . constitutes a clear usurpation of the jury function and a denial to the parties of their right to a jury trial as that has always been known." Id. (Altimari, J., dissenting), "Quite simply," he contended, the jury "must be allowed to apply the law
The Second Circuit reasoned that because the government, “unlike a defendant, may not rightfully seek the benefit of an irrational verdict,” it cannot prevent the use of special interrogatories in a case such as this.364

Another advantage the narrow fact question has over the broad-form special verdict is minimizing the risk of inconsistent answers.365 Such risk is greatest when the questions posed to the jury group together matters of law and fact. In Arrington v. McDonald,366 for example, the plaintiff sought damages under Section 1983 for unlawful arrest. The district judge submitted special interrogatories inquiring whether the officers had “probable cause” to arrest and whether they were entitled to “good faith immunity.” The jury responded negatively to the former and positively to the latter. Concluding that these answers were inconsistent, the Court of Appeals vacated and remanded. In so doing, the court observed that the formulation of a narrower question ascertaining the actual reasons for the plaintiff’s arrest might have avoided this problem.367

Along the same lines, the jurors in Costilla v. Aluminum Company of America368 was asked whether the product in question had been “defectively designed,” to which they responded “No.”369 They were also asked on the breach of warranty claim whether the product was “unfit for ordinary use,” to which they answered “Yes.”370 Because the district judge had properly instructed the jury that a defective product was one unfit for the ordinary purposes for which it was intended, the Court of Appeals concluded that there was an irreconcilable conflict and remanded for a new trial.371 In Rose v. Hearst Magazine Division,372 an age discrimination action, the jury found by means of special verdict questions that the plaintiff had been terminated in retaliation for filing a complaint against his employer, but to the facts, not to have this done for them by someone else.” Id. at 898 (Altimari, J., dissenting).

364. Id. at 891 (Altimari, J., dissenting). Judge Altimari argued that the government was properly seeking to avoid not an irrational verdict but an “uninformed one.” Id. at 892 (Altimari, J., dissenting). He found it “inconsistent with the revered traditions of the jury system that instructions should be designed deliberately to prevent jurors from appreciating the import of their actions.” Id. at 895 n.1 (Altimari, J., dissenting).

365. The problem of inconsistency in special verdicts is discussed supra at notes 294-313 and accompanying text.

366. 808 F.2d 466 (6th Cir. 1986).

367. Id. at 467-68. The court also concluded that the issue of immunity was a pure legal question which should have been resolved by the judge. Id. at 467.

368. 826 F.2d 1444 (5th Cir. 1987).

369. Id. at 1446 n.3.

370. Id.

371. Id. at 1447-48.

372. 814 F.2d 491, 493 (7th Cir. 1987).
also that the retaliation was not "willful." The Court of Appeals reversed and remanded, concluding that the answers were "hopelessly irreconcilable" because retaliation was by definition "willful." The jurors in Cipolone v. Liggett Group, Inc. returned a special verdict finding that the plaintiff had established neither fraudulent misrepresentation or concealment of material facts concerning the significant health hazards associated with smoking nor a "conspiracy" among the defendants to conceal such risks. The same jurors found, however, that the defendants "should have warned consumers regarding health risks of smoking," that the defendants had made express warranties to consumers regarding the health aspects of cigarettes, and that the defendants had breached those warranties.

The apparent inconsistencies in each of these situations may very well have been the result of juror confusion or misunderstanding over legal terms of art such as "probable cause," "defective design," and "willfulness." Formulation of questions inquiring as to actual events might have avoided the problem. Rather than compelling the jurors to fit their verdict into illusive and ambiguous legal constructs, the fact verdict speaks in everyday language.

While the fact verdict can thus add precision to the litigation process, it must nonetheless be used with considerable care. Together with the obvious need to draft questions that will be readily understood by the jurors, there is the equally important need to anticipate any possible ambiguities or inconsistencies in the jury's responses to the questions posed. In Rowland v. Mad River Local School District, for example, the jury reported that the plaintiff's termination was at least in part motivated by her admitted homosexuality; that the plaintiff would not have been terminated if she had not been a homosexual; that the plaintiff's homosexuality did not interfere with the proper performance of her duties; and that in terminating the plaintiff, the school officials had treated her differently.

373. Id. See also Powell v. Rockwell International Corp., 787 F.2d 279 (5th Cir. 1986) (holding that jury finding of retaliatory discharge necessarily includes "willfulness"); Bates v. Jean, 745 F.2d 1146, 1151 (7th Cir. 1984) (holding inconsistent jury response that defendant knowingly violated plaintiff's rights but was unaware that action was unconstitutional).


375. 893 F.2d at 553.

376: Id. at 554.

377. For an illustration of the importance of understandable questions, see the discussion of Anderson v. W.R. Grace, supra notes 276-80 and accompanying text.

378. For a further discussion of Rowland, see supra notes 349-51 and accompanying text.
than similarly situated employees because she was a homosexual.\textsuperscript{379} These findings constituted a sufficient basis for the entry of judgment in her favor.\textsuperscript{380} The jury, however, in response to another question, determined that the plaintiff was not performing her job in a satisfactory manner at the time of termination, because on one occasion she had inappropriately revealed to a co-worker the sexual orientation of two students she had been counseling.\textsuperscript{381}

Because of the apparent inconsistency between this latter finding and the jury's other conclusions, the Court of Appeals reversed the judgment that had been entered in favor of the plaintiff.\textsuperscript{382} Chief Judge Lively identified the source of the problem: the special question concerning the plaintiff’s unsatisfactory performance had not been included in the other question as to whether Rowland would have been terminated notwithstanding her homosexuality, thus giving rise to the ambiguity.\textsuperscript{383} While Judge Edwards on the circuit panel and Justice Brennan, dissenting from the denial of certiorari review, both thought the jury's findings unambiguous in determining that the cause of the plaintiff’s termination was her sexual preference,\textsuperscript{384} the problem could have been anticipated and avoided by omission of questions whose coverage was overlapping.

Another problem with use of the narrow fact verdict is the potential proliferation of questions that must be submitted to the jury. In \textit{Rowland},\textsuperscript{385} for example, the jurors answered fifty-four questions. While the broad-form special verdict is problematic because it bunches too many issues together, the fact verdict may result in unmanageable fragmentation of the case. The experience with the special verdict in Texas illustrates the dilemma.

Early Texas practice had provided for use of the special verdict to "find the facts as established by the evidence, and not the evidence

\textsuperscript{380} \textit{Id}. at 448.
\textsuperscript{381} \textit{Id}. at 460.
\textsuperscript{382} \textit{Id}. at 450-52. The Court also ruled that the plaintiff had not engaged in constitutionally protected activity. \textit{Id}.
\textsuperscript{383} \textit{Id}. at 450.
\textsuperscript{384} \textit{See id}. at 452 (Edwards, J., dissenting); 470 U.S. at 1011 (Brennan, J., dissenting). Both dissenters concluded that the jurors did not intend their finding of one isolated impropriety to undercut their general determination of proper performance. Justice Brennan added that the "jury's role was to find the facts, which it did in detail [and] [i]t is the court's proper role to analyze, not avoid, those facts in light of the applicable legal principles." \textit{Id}. at 1016 n.11. The jury was "entitled to make rational inferences and apply its common-sense knowledge of the world, which includes the knowledge that most teachers are openly heterosexual and yet go undismissed for that sexual preference." \textit{Id}. at 1012 n.3.
\textsuperscript{385} 730 F.2d at 456-60.
by which they are established, and the findings must be such that nothing remains for the court but to draw from such facts the conclusions of law." 386 Courts customarily formulated mixed questions of fact and law in applying this mandate. In an effort to avoid the extensive and complicated jury instructions that must typically accompany such questions, it was provided in 1913 that the special verdict must pose "distinctly and separately" each fact issue controverted in the pleadings. 387 Thus in a personal injury case, each specific allegation of negligence and contributory negligence had to be presented as a separate question. 388 Similarly, it was held reversible error for the trial court in a product liability case to have submitted a single question on the issue of the alleged defective character of an oil derrick. 389 The mandate for specificity led over time to what was described as "a system of fractionization of special issues far beyond that employed in any other jurisdiction in the common-law world." 390 As the state supreme court later put it, "Texas courts, while escaping from the voluminous instructions to jurors [that had developed under earlier practice], had substituted in the place of instructions, a jury system that was overloaded with granulated issues to the point that jury trials were again ineffective." 391

In response, the practice was changed in 1973 to eliminate the requirement for narrow fact issues and to permit instead "broad-form questions." 392 Consequently, the Texas Supreme Court held in 1974 that the appropriate question to be submitted to the jury in a negligence case is "whether the defendant was negligent," and not

386. Pope & Lowerre, supra note 356, at 579 (quoting TEX. CIV. STAT. art. 1331 (1879)).
387. Id. at 579 (quoting TEX. LAWS art. 1984a, ch. 59, Sec. 1, (1913) 113).
388. See Fox v. Dallas Hotel Co., 111 Tex. 461, 475-76, 240 S.W.2d 517, 522 (1922).
389. See Roosth & Genecoy Prod. Co. v. White, 152 Tex. 1, 19, 262 S.W.2d 99 (1953) ("As to each particular fact... said to render the whole instrument unsafe, its existence should be the subject of a separate issue.")
390. Pope & Lowerre, supra note 356, at 579.
392. TEX. R.P. 277: "In all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict." See generally, Pope & Lowerre, supra note 356; Pope & Lowerre, supra note 15, at 11.
the subsidiary fact allegations underlying that conclusion. Explanatory instructions and legal definitions were to replace specific questions. The evolution had thus come full circle.

While this state court experience with the fact verdict certainly provides grounds to proceed cautiously, federal litigation should be far more amenable to a fact-question approach. Liberal discovery practice under Fed. R. Civ. P. 26-37, together with active judicial management under Fed. R. Civ. P. 16, should facilitate the reduction of triable issues to a workable level in most cases.

Moreover, it must be remembered that although the fact verdict brings the issue-proliferation problem to the fore, it is also present, though less prominent, in cases tried to a general or a broad-question special verdict. Regardless of the form of the verdict, a jury deliberating on a case must resolve all the fact disputes raised by the evidence in order to conclude its work properly. At least when the fact verdict is employed, the jurors are made acutely aware of the need for accurate resolution of these issues, and any problems in this regard are exposed so that they may be corrected on review by the trial or appellate court. Both the general verdict and the broad-form special verdict, like the proverbial physician, bury such mistakes.

The problem of defining the appropriate level of specificity has followed the special verdict throughout its history. As one writer

393. Mobil Chem. Co. v. Bell, 517 S.W.2d 245, 252 (Tex. 1974). "[T]he better practice in the great majority of cases is to submit only the ultimate negligence issue." Id. The court suggested that the jury be asked whether the plaintiff had sustained the injury, whether there was negligence, if the negligence was a proximate cause, and the amount of damages. Id. at 256-57.

394. See Pope & Lowerre, supra note 356, at 587. See also Pope & Lowerre, supra note 15, at 45.

395. Wisconsin travelled a similar road from specific to broad-form special questions. Wisconsin practice required the submission of "separate questions concerning each respect in which it was alleged that a party was negligent." Baierl v. Hinshaw, 32 Wis. 2d 593, 597, 146 N.W.2d 433, 435 (1966). A statutory amendment gave courts discretion "to submit such questions in terms of issues of ultimate fact, or to submit separate questions with respect to the component issues which comprise such issues of ultimate fact." Wis. Stat. Ann. § 270.27 (West 1977). Thus, the judge was given authority to submit broader questions such as negligence and causation. Bairel, 32 Wis. 2d at 597-601, 146 N.W.2d at 435-37. The rule directs that the jury be provided "written questions relating only to material issues of ultimate fact.... In cases founded upon negligence, the court need not submit separately any particular respect in which the party was allegedly negligent." Wis. Stat. Ann. § 805.12(1) (West 1977). The court does retain discretionary authority to "direct the jury to find upon particular questions of fact." Id.

396. See G. Clementson, supra note 11, at 78-81. The typical state statute authorizing special verdicts in early American practice spoke of "particular" or "material" questions of fact, and the interpretative case law generally defined those as ultimate rather than evidentiary facts. Thus it was held improper to ask the jury to recite testimony they
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put it, "'fact' is a highly variable concept that will not submit to stable definition but takes its meaning from its context." Yet, the pleadings and evidentiary presentation in the particular case before the court should serve as the basic guidelines for formulating jury questions. Further, widespread experience with the fact verdict may over time make possible the development of form questions for different categories of actions, thus expediting the litigation process.

In certain types of cases, it may not be possible to avoid jury questions that mix elements of law and fact. In negligence and product liability cases, for example, it may be deemed desirable to retain jury (i.e., "community") input into the issue of the "reasonableness" of defendant's conduct. Rule 49(b) should be utilized in such situations to compel accompanying findings of fact so that the jury's ultimate conclusion can be tested against them. Similarly where liability is predicated on the reasonableness of the defendant's belief as to certain matters, as in a civil rights action charging arrest without probable cause, the jurors should be required to make specific findings as to what the defendant knew at the time together with their ultimate conclusion concerning reasonableness. A mere general finding on "reasonable belief" leaves too much to juror discretion, particularly in cases where their sympathies are likely to lie with the police officer-defendant and not the arrestee-plaintiff.

deemed reliable, or to answer whether a particular witness testified truthfully. It was similarly held improper to require the jury to specify "in what did the negligence consist," rather than simply ask the jury whether the defendant was negligent. Id. at 214 (citations omitted).

398. Professor Sunderland suggested in 1920 that special questions be reformulated from the pleadings. See Sunderland, supra note 60, at 263.
399. "Whether a product is defective is almost inevitably a blackbox call; . . . cases are tilted [by the substantive definition of defect] toward resolution on a case-by-case call by juries." Higginbotham, supra note 96, at 76.
400. In areas like products liability, the legal doctrine requires an explicit balancing of a variety of factors to determine liability. Typically, for example, the definition of "defective design" involves a conclusion that the product is "unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use." See Turner v. General Motors Corp., 584 S.W.2d 844, 847 n.1 (Tex. 1979). The jurors should be required to make specific findings regarding each factor.
401. See, e.g., International Terminal Operating Co. v. N.V. Nederl. Amerik Stoom Maats, 393 U.S. 74 (1968) (jury in action against shipowner for injuries suffered on job found by special interrogatory that plaintiff had acted reasonably in continuing to work in reliance on promise to activate ventilation system); Woodson v. AMF Leisureland Centers, Inc., 842 F.2d 699 (3d Cir. 1987) (jury in wrongful termination case found by special verdict that discharged bartender reasonably believed patron to be intoxicated at time she refused to serve him).
 Leon Green observed that the "submission of a case to the jury is the most difficult step in negligence litigation and also the most treacherous." Counsel will typically disagree as to what the real issues in the case are and will seek to focus attention on areas favorable to their cause and away from the trouble spots. Yet correct identification and formulation of the disputed issues is essential to the proper resolution of the litigation, and deserves the careful attention of all concerned. As one judge has put it:

[O]ne of the sometimes unexpected, but wholesome results of special interrogatories jury submission is to emphasize the absolute necessity that there be first a clear understanding of the precise legal issues for jury resolution and then a translation of them into articulate questions which may be authoritatively answered by a simple categorical. In a general way this is to say that not only is it the jury's imprecision which is hidden by the traditional general charge and verdict. Many juridical errors of omission and commission by court and counsel are likewise perpetually concealed.

The decision regarding what questions will be asked of the jury ideally should be made before the trial begins. That way, from the opening moments of the trial, the participants will be focused on the matters that the jury ultimately will resolve.

A lawsuit that cannot be broken down into its component factual and legal issues on the basis of the pleadings, discovery, and evidence presented, and then translated into comprehensible fact questions for the jury and legal questions for the judge is an unmanageable lawsuit that, if tried to a general verdict, would likely constitute a mere roll of the dice. As Judge Higginbotham has suggested that in complex cases, the lawyers and judge should draft the jury interrogatories prior to depositions of the experts. See Higginbotham, supra note 96, at 76.

Some writers have suggested that in order to avoid the complexity of much modern litigation, plaintiffs should be required to cull their claims down to a single theory of recovery before trial. See Green, Strict Liability Under Sections 402A and 402B: A Decade of Litigation, 54 Tex. L. Rev. 1185, 1192, 1211-12 (1986); Keeton, Torts, 32 S.W.L.J. 1, 1-2 (1978); Keeton, Products Liability—Inadequacy of Information, 48 Tex. L. Rev. 398, 409 (1970).

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404. See Orthokinetics, Inc. v. Safety Travel Charis, Inc., 806 F.2d 1565, 1571 (Fed. Cir. 1986) ("[C]ourts should consider pretrial orders in jury trials that specify precisely what the jury will be asked to do after it has been given instructions prepared in light of the evidence and at the end of its deliberations."). See also Sakamoto v. N.A.B. Trucking Co., 717 F.2d 1000, 1006 (6th Cir. 1983) (holding that prior to final argument, court must disclose to counsel substance of special verdict questions and instructions that will be given to jury, so that counsel will be prepared to properly argue to jury).
405. Some writers have suggested that in order to avoid the complexity of much modern litigation, plaintiffs should be required to cull their claims down to a single theory of recovery before trial. See Green, Strict Liability Under Sections 402A and 402B: A Decade of Litigation, 54 Tex. L. Rev. 1185, 1192, 1211-12 (1986); Keeton, Torts, 32 S.W.L.J. 1, 1-2 (1978); Keeton, Products Liability—Inadequacy of Information, 48 Tex. L. Rev. 398, 409 (1970).
suggested, "a question we ought to ask, when we conclude that a case is beyond the ken of a jury, is whether it belongs in a court at all."\textsuperscript{406} For a system of adjudication such as ours that advertises accurate fact-finding and uniform application of general neutral principles, it is submitted that use of the fact verdict should become the norm.

**CONCLUSION**

The study and practice of law, in large measure, requires the capacity to handle and think in terms of a special professional vocabulary. But a trial system involving jurors as the conscience of a community requires lawyers to communicate law words to the lay fact finders in terms that they can understand. Most professions need not confront this dilemma. They use their loaded words and perform their ministry without the necessity of communicating with a committee of six or twelve individuals who must make ultimate fact decisions. A workable system of trials, however, must be comprehensible to jurors.\textsuperscript{407}

This article proposes a rethinking of the way in which we use the civil jury. It is suggested that the jury be returned to its original role, that of fact-finder, and be relieved of its most problematical role, that of law applier. The fact verdict can achieve this result in federal litigation under Rule 49 within constitutionally acceptable parameters.\textsuperscript{408}

American society looks askance at decision-making that takes place behind closed doors. This is illustrated by the ubiquity of open-meeting laws as well as the prevalence of video cameras in courtrooms and legislatures. The jury deliberating in secrecy on a general verdict represents a dramatic exception. Yet the impact of such decision-making is not dissimilar from the enactment of legislation. There can be no doubt that the cumulative effect of jury verdicts in areas such as products liability and medical malpractice is tantamount to the making of social policy, influencing, if not directing, the future conduct of manufacturers, drug companies, and

\textsuperscript{406} Higginbotham, supra note 96, at 75.

\textsuperscript{407} Pope & Lowerre, supra note 15, at 20.

\textsuperscript{408} For a discussion of fact verdicts under Rule 49 see supra notes 180-83 and accompanying text. One commentator, however, has suggested that "the jury rendering a general verdict must be seen as in part a political, not merely legal institution," and that "abolition of the central role of the jury in the legal process [by use of the special verdict in place of the general verdict] should perhaps be accomplished only by a constitutional amendment." Comment, supra note 106, at 496.
hospitals.\textsuperscript{409} The jury, in short, operates not merely as an ad hoc resolver of the dispute before it, but as a law-maker as well.

We tolerate and indeed boast about the black-box nature of jury deliberations, claiming this is essential to maintaining a "democratic input" into the judicial process.\textsuperscript{410} But the jury panel seated in a particular case consists of persons who, while originally part of a larger group randomly selected from the community, have now passed the careful scrutiny of highly partisan attorneys who use the voir dire and peremptory challenges to exclude the fair- (as well as unfair-) minded among them.\textsuperscript{411} The resulting panel of six or twelve, the so-called conscience of the community, is far too small to satisfy any pollster's requirements for a representative sample of that community. When returning a general verdict, this group may nonetheless nullify law enacted by democratically elected legislatures, or in effect make new law, and it may do so without having to provide any explanation whatever.

The untrammeled jury, which developed in a world dominated by natural law theory,\textsuperscript{412} simply does not translate well into a society at least purportedly controlled by positive law, a government of laws and not of people. One can maintain a healthy skepticism about the neutrality, objectivity, and consistency of legal doctrine applied by judges\textsuperscript{413} and nevertheless be disturbed about the blank-check nature of civil jury decision-making. One need not have an elitist belief in "law as sacrament to be administered exclusively by an

\textsuperscript{409} See, e.g., J. Guintner, supra note 10, at 227-30. Jury verdicts by their ripple effects "can set into motion events that change the law and set boundaries upon permissible conduct." Id. at 227. While one may applaud A.H. Robins' withdrawal of the Dalkon Shield from the marketplace in response to the imposition of liability awards against it, one may also be troubled by the withdrawal of an effective anti-pertussis vaccine after several large jury verdicts against the pharmaceutical producers. Id. at 184. Similarly, a spate of defendants' verdicts in tobacco liability litigation over the years has flashed a green light to manufacturers to continue advertising, producing, and distributing their harmful product. The basic question raised by these examples is whether the jury is the proper institution to be making such decisions for our society.

\textsuperscript{410} Some have even argued that we should give the jury complete independence to decide civil cases, without any constraints of legal doctrine. See White, The Reasonably Just Man, 5 Hous. L. Rev. 575 (1968).

\textsuperscript{411} See J. Guintner, supra note 10, at 49-58. The "real reason lawyers like to do the questioning [of prospective jurors] is to get, not impartial jurors, but rather ones they think will be favorable to their side." Id. at 53. See also S. Kassin & L. Wrightsman, supra note 123, at 50-64.

\textsuperscript{412} For a discussion of natural law and the jury, see supra notes 57-58 and accompanying text.

endowed priesthood”414 to be concerned about the power the general verdict places in the hands of a small group of persons who return to their private lives without any accountability for a decision that may significantly impact the society around them.

When the legislature enacts a law that proscribes certain practices, such as discrimination against homosexuals, and provides for a civil remedy, a jury serving in a suit filed under that law should act as fact-finder to resolve any disputes as to what actually occurred. The jury should not, it is submitted, be asked simply who should win? That question, posed by the general verdict, is an open invitation to debate and rule on the merits of the legislature’s mandate, or to engage in a popularity contest between the parties or their attorneys. The general verdict permits the playing out of sympathies, prejudices, and biases that have no place in a dispute-resolution system that claims to “make reasoned applications of legal rules to the carefully ascertained facts of particular lawsuits.”415 That the jury may be, from a political science viewpoint, “the most independent part of our judiciary”416 does not justify the complete lack of accountability that the general verdict affords its work.

Actions seeking equitable relief are tried to judges, not juries, and thus “democratic input” is absent in some of the most important cases our courts handle. Professional judges daily decide cases involving such momentous issues as desegregation of public schools and housing projects, protection of the environment, and centralization of corporate power. It is only the fortuitous request for money damages that, under the seventh amendment, invites the jury into the judicial process.417 And even in those cases the judge has the authority to circumvent the jury by granting a dismissal, summary judgment, a directed verdict, or a judgment notwithstanding the verdict.

When a judge decides a case after bench trial she must write out the findings of fact on which the decision is based, state the control-

414. J. Guinther, supra note 10, at 224.
415. J. Frank, supra note 17, at 110.
416. White, supra note 411, at 609.
417. Under the Seventh Amendment, therefore, a civil case is either common law or equitable based on the relief being sought: The forum has nothing to do with the nature of the evidence, complex or simple. If the relief sought is money (more than $20) then the case is jury-trievable; if the relief is to force a party to do something it doesn’t want to do—such as uphold a contract—then the case goes into equity. J. Guinther, supra note 10, at 203 (footnote omitted). See also Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry, 110 S. Ct. 1339 (1990) (holding that duty of fair representation action seeking money damages is triable to a jury under the seventh amendment).
ling rules of law, and apply the latter to the former. The findings must include as many of the subsidiary facts as is necessary to permit the appellate court to review the logic used in reaching the ultimate conclusion on each issue. This requirement serves several purposes: 1) it facilitates appellate review by disclosing the precise basis of the decision; 2) it facilitates the operation of claim and issue preclusion; and 3) it engenders care on the part of the decision-maker. As the Supreme Court has observed, trial judges “will give more careful attention to the problem if they are required to state not only the end result of their inquiry, but the process by which they reached it.” Similar care should be required of jurors in civil cases.

The jury in criminal prosecutions plays a unique and valued role, with the “overriding responsibility to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction.” It has been recognized over the years that criminal juries have the power to nullify established law or to acquit out of leniency or “in the interests of justice,” although it has been uniformly held that the judge should not explicitly inform them of this power. The general verdict has thus been consid-

418. See Fed. R. Civ. P. 52(a); Friedenthal, Kane & Miller, supra note 22, at § 12.2.
419. See Friedenthal, Kane & Miller, supra note 22, at § 12.2; Fed. R. Civ. P. 52(a) advisory committee’s note (1946 amendment).
420. United States v. Merz, 376 U.S. 192, 199 (1964). Judge Higginbotham disputes the underlying “assumption that the judge’s written explanation of his decision describes the decisional process and the true basis of decision,” noting that “written opinions may often simply justify a decision arrived at in ways not fundamentally different from the jury’s decision and may serve primarily to make the decision more acceptable to consumers of court services, with their demand for an air of intellectual disinterest.” Higginbotham, supra note 96, at 75. Acceptability of process is, however, a matter not to be underestimated when considering the future of the civil jury. And at the very least the written decision provides the means for review, both judicial and public.
For this reason, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, regardless of how overwhelmingly the evidence may point in that direction. The trial judge is thereby barred from attempting to override or interfere with the jurors’ independent judgment in a manner contrary to the interests of the accused.
Id. at 572-73 (citations omitted).
Juries in criminal cases have acted, at times, in a way that seems to reflect bigotry more than conscience. See J. Frank, supra note 15, at 191. See generally Boehm, supra note 138.
422. See generally United States v. Trujillo, 714 F.2d 102, 105-06 (11th Cir. 1983) (cases collected); United States v. Ruggiero, 726 F.2d 913, 927 (2d Cir. 1984), cert. denied, 469 U.S. 831 (1984). As Judge Newman points out, courts have traditionally refused to inform juries of this prerogative. Id. at 927 (Newman, J., concurring in part and dissenting in part). The First Circuit Court of Appeals has explained that “jurors may have the power to ignore the law, but their duty is to apply the law as interpreted by
ferred integral to the function of the criminal jury. But a private civil dispute over money represents a very different event than a criminal prosecution, with far different stakes and players. Moreover, reasonable predictability of results and equitable distribution of compensation are goals that separate the tort recovery system from the criminal process. Thus, as Plucknett observed in discussing the implications of *Bushel's Case* and its declaration of jury independence "[h]owever useful this might have been in certain types of political trial, it was obvious that it worked hardship in private litigation."

The hardship is multifaceted. Law application by jurors is unreliable, and thus the end products of litigation are often inequitable and unpredictable. Some plaintiffs will score windfalls, while similarly situated persons take little or nothing. A premium is placed on presentation and pitch to the jurors, making access, financial and otherwise, to talented trial counsel a major factor in success. Indeed, anyone who has sat through a jury trial in juxtaposition with a bench trial is struck by the marked contrast in

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423. It has been noted that the "difference in our pricing of civil and criminal juries is evidenced today by the Supreme Court's incorporating the Sixth Amendment right to a jury in a criminal case into the Fourteenth Amendment, while leaving the states free of the Seventh Amendment." Higginbotham, *supra* note 96, at 79.

424. For a discussion of *Bushell's Case*, see *supra* notes 52-55 and accompanying text.

425. T. PLUCKNETT, *supra* note 34, at 134. As another writer has put it: "The immense importance of the eighteenth-century criminal libel cases and of Fox's Libel Act in the history of free government is unquestioned; but their relevance to damage suits for negligence, breach of contract, or illegal restraint of trade is nil." Henderson, *supra* note 46, at 291.

426. Leon Green once observed that "[d]oing justice by jury trial can never be more than approximate." Green, *supra* note 198, at 47.

427. A jury lawyer, Judge Frank observed, does not confine himself to "clear and concise logical arguments based on a passionless summary of the evidence." Rather he does the reverse; he uses every trick of oratory and acting to appeal to the crudest emotions of the twelve good men and true. He knows only too well that they will not nicely weigh the testimony nor discriminately consider what the judge has told them of the law. The jury lawyer is a realist, seeking a result, and he plays upon every weakness of the dozen men who will decide the fate of his client.

approach taken by the attorneys. The former is likely to be a highly polished and rehearsed show directed to lay persons, while the latter is a more straightforward effort to persuade a professional arbiter by application of fixed principles to accurately determined facts. Therefore, among the reasons for the current popularity of alternative dispute resolution must be counted the unpredictability and unreviewability of jury trials as well as the cost in money and time involved in "presenting" a case to a jury.

We have lived with the recognized imperfections of the general verdict in part because "of the practical necessity of achieving finality." But our litigation system should be as concerned with accuracy of results as it is with spitting out those results by any means necessary. The maintenance of public confidence in litigation as a desirable form of dispute resolution would seem to dictate such concern. As the Supreme Judicial Court of Massachusetts observed in the early part of this century, "[i]f trial by jury is to retain its efficiency, the presiding judge by means of suitable instructions must enable jurors to see their way clearly to a right verdict."

By confining the civil jurors' role to the facts and leaving law application to the judge, the fact verdict draws upon the strengths of each. In addition, jurors who are aware that their specific findings will be publicly recorded will be encouraged to focus impartially on those issues and to be accurate in their resolution of them. They will not be required to quick-study the law of product liability, antitrust, or securities fraud. The avoidance of elaborate instructions on the law will in turn cut down the cost of trial as well as appellate litigation. Equally important, judges will no longer be able to pass the buck to the jury on so many of the most challenging and perplexing problems of modern law. Rather, those questions will

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429. As William Twining has recently noted, "rectitude of decision and accuracy in fact-determination are central values not only of adjudication, but of nearly all official decisions." W. TWINING, RETHINKING EVIDENCE: EXPLORATORY ESSAYS 346 (1990).


431. The cost to the government of running a single federal courtroom has been estimated at $10,000 to $15,000 per day. See Chappee v. Massachusetts, 659 F.Supp. 1220, 1227 n.9 (D. Mass. 1987), rev'd sub. nom. Chappee v. Vose, 843 F.2d 25 (1st Cir. 1988).
have to be answered in publicly accessible written decisions by re­sort to evolving standards of conduct. As one historian has noted:

[T]he special verdict, by forcing facts out in the open, obliged professional lawyers to grapple with such recondite difficulties as contingent remainders and the duty of care owed by execu­tors in dealing with the assets of the deceased; and it was this device that gave English property law the toughness it would need to survive relatively unscathed for four or five more centuries.432

Returned to its original role, the unique institution of the jury will better be able to survive, and indeed prevail, in a highly competitive dispute-resolution market. Where the general verdict tangles together all legal and factual issues in a case at the expense of accu­racy and accountability, the fact verdict separates them for more efficient resolution and, if necessary, subsequent review. Where the general verdict hides misunderstanding, error, and bias, the fact verdict exposes them so they may be corrected. The fact verdict, in sum, provides an opportunity for bridging the gap between law pro­fessional and lay juror, and for achievement of the goal desired by both—a workable system of trial by jury.

432. Arnold, supra note 44, at 271 (footnotes omitted).