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Cover Page Footnote

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THE POWER AND THE PROCESS: INSTRUCTIONS AND THE CIVIL JURY

Elizabeth G. Thornburg*

INTRODUCTION

Mention the possibility of jury trial in certain circles and a pattern emerges: distrust; discomfort; disdain; dismay. As the century draws to a close, procedure and tort “reformers” clearly *dislike* the civil jury.¹ Changes in the rules regarding summary judgment and directed verdict allow judges to decide cases that would formerly have gone to the jury.² Changes in the rules concerning expert testimony allow judges to exclude from evidence certain kinds of information.³ Changes in post-verdict review require judges to exercise more stringent review of juries’ decisions in areas such as the award of punitive damages.⁴ All of these changes are designed to limit the power and role of the civil jury. Because the jury cannot be eliminated,⁵ groups of litigants who distrust it are likely to seek still more ways in which to curtail its function.⁶ The general verdict, in which the jury renders an

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1. See Robert P. Burns, *The History and Theory of the American Jury*, 83 Cal. L. Rev. 1477, 1490 (1995) (reviewing Jeffrey Abramson, *We the Jury: The Jury System and the Ideal Democracy* (1994)) (contending that a truly representative jury that maintains its traditional role of engaging in highly contextual moral evaluation will be attacked by elite with political and economic power in other institutions); see, e.g., *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 335 (Tex. 1993) (Doggett, J., dissenting) (reacting to a case creating a threshold requirement that plaintiffs show “extreme degree of risk” as a matter of law, thus removing certain issues from the jury). The dissent stated: “The only further insight offered to its thinking is the majority’s recurrent fear of our right to trial by jury.” *Id.*

2. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (discussing summary judgment); see also Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court’s Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 Ohio St. L.J. 95 (1988) (discussing the Court’s expanded use of summary judgment and directed verdict).

3. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 597 (1993) (limiting expert testimony); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995) (same).

4. See, e.g., *BMW of North America v. Gore*, 517 U.S. 559 (1996) (reviewing punitive damage award); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (engaging in due process analysis of judge and jury roles in punitive damage cases); cf. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996) (holding that *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), requires federal courts to accommodate state law procedural devices limiting jury discretion in assessing damages).

5. U.S. Const. amend VII (“[T]he right of trial by jury shall be preserved . . .”).

6. See Marc Galanter, *The Civil Jury as Regulator of the Litigation Process*, 1990 U. Chi. Legal F. 201, 206 [hereinafter Galanter, *The Civil Jury*] (discussing newly focused attacks on juries and proposals to limit their power); Stephan Landsman, *The*

unexplained decision on the case as a whole, will surely be among the reformers' next targets.

The form of the court's charge to the jury is not an insignificant question of technical format. Like most issues in civil procedure, the form of the jury charge affects the allocation of power.⁷ The form of the charge can change relationships between judge and jury, between trial courts and appellate courts, and between plaintiffs and defendants. It can also affect the very nature of the functioning of the jury and the underlying substantive law. Jury instruction format is an important issue that must be faced by judges and practitioners every day. Nevertheless, all of these issues have been almost completely ignored by legal scholars.⁸ The proper form of jury instructions needs serious analysis before it becomes enmeshed in partisan political debate. Otherwise, important questions will be resolved in a practical and theoretical vacuum.

Part I of this article briefly discusses the current federal law concerning the jury charge. It demonstrates that the federal system has given trial judges almost complete discretion in this area without providing any guidance concerning the policies at stake or the goals to be achieved. The decision about the form of the jury charge is thus unguided by standards at the trial level. It is also free from meaningful review at the appellate level. As long as it is legally correct in its statement of legal principles, the trial court's decision is, as a practical matter, unreviewable. The courts of appeals have chosen a method of reviewing jury instructions that operates to save appellate time and analysis, but which, even after almost sixty years of case law, speaks in

Civil Jury in America: Scenes from an Unappreciated History, 44 *Hastings L.J.* 579, 580 (1993) (tracing the practices of opponents to the civil jury who utilized procedural changes to marginalize juries and decrease their power).

7. See Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 *U. Chi. Legal F.* 87, 93 [hereinafter Yeazell, *The New Jury*] (describing the eighteenth-century changes that altered relationships of power among judges, counsel, and jury); see also David Millon, *Juries, Judges, and Democracy*, 18 *Law & Soc. Inquiry* 135, 152 (1993) (reviewing Shannon C. Stimson, *The American Revolution in the Law: Anglo-American Jurisprudence Before John Marshall* (1990)) (describing the nineteenth-century procedural changes used to gradually diminish jury authority).

8. This article attempts to place the issue of the form of jury instructions in the context of recent jurisprudential discussions of and empirical insights into the nature and function of the jury. Scholars have begun to analyze the composition of the jury in light of these theories. See Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 *Cornell L. Rev.* 325 (1995); Phoebe A. Haddon, *Rethinking the Jury*, 3 *Wm. & Mary Bill Rts. J.* 29 (1994); Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 *Tex. L. Rev.* 1041 (1995). Scholars have also discussed the effect of other procedural changes on the jury. See Richard L. Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 *U. Pitt. L. Rev.* 725 (1989); Yeazell, *The New Jury*, *supra* note 7. But no one has re-examined the issues raised by charge format itself in light of these changes in our understanding of the political and process issues implicated by the civil jury.

general platitudes that provide little meaningful help for trial courts making difficult decisions about charge format.

All this would be insignificant if jury instruction format were merely a matter of syntactical preference. Part II of this article begins to show, by using examples, the ways in which the form of the jury charge can make a difference. By using potential charges in a simple product liability case, this part shows the kinds of choices a trial court can make. These sample charges help to demonstrate the effects of format choices on issues such as juror unanimity, the jury decision-making process, the prominence given to various claims and defenses, the jury's knowledge of the effect of its answers, and the relationship between instruction format and substantive law.

The remainder of the article argues that abandoning the general verdict as the norm would not be desirable. Part III begins a specific examination of the values implicated in decisions about the jury charge format by looking at issues of instruction format from a political perspective: How would changes in the format of the jury charge change the political function of the jury? Both the allocation of power between judge and jury and the actual functioning of the jury as arbiter of community values are affected by the nature of the jury charge. Part IV then examines process concerns by asking whether charge formats differ in their ability to produce "accurate" outcomes and in their level of "efficiency" as measured by their ability to save time or money in transaction costs at the trial or appellate levels. Part V takes a different process perspective, examining the charge's impact on the comparative power of the parties to the lawsuit. In doing so, it explores whether format confers procedural advantages and disadvantages.

Part VI suggests that decisions about jury instructions should be guided by a policy of enabling the jury to perform its political and procedural functions, and not by a search for an illusory precision. The courts' primary concern should be an effort to empower the jury to understand and apply the law in a holistic and contextual way. Greater clarity in jury instructions would be an improvement.⁹ Greater fractionalization would be a curse. This article concludes that the courts should adopt a presumption in favor of the general verdict, with narrower questions allowed only in exceptional circumstances. The general verdict is well suited to the functional and political needs of the American judicial system. Reformers' distaste for the diverse

9. See Robert L. McBride, *The Art of Instructing the Jury* (1969); Amiram Elwork et al., *Juridic Decisions: In Ignorance of Law or in Light of It?*, 1 *Law & Hum. Behav.* 163 (1977). See generally Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 *Colum. L. Rev.* 1306 (1979) (describing empirical research concerning jurors' understanding of instructions).

jury¹⁰ and disagreement with pro-plaintiff verdicts¹¹ should not be allowed to disempower this important institution.

I. THE DISCRETIONARY VACUUM: CURRENT FEDERAL PRACTICE

In any case tried to a jury, the instructions governing the jury's activities play a central role. This is particularly true of the instructions the judge provides to the jury at the end of trial. These instructions explain the law applicable to the case and direct the jurors to reach a verdict in accordance with certain legal definitions and instructions.¹² The effect of jury instructions on juror deliberation and decision-making is an essential part of the jury's fulfillment of its duties.

The format of the jury charge can make a tremendous difference in trial process, law application, and outcome. This part examines current federal practice¹³ to determine how the courts understand their role in writing jury charges. It demonstrates that current law gives trial judges virtually complete discretion in framing the charge, as long as the explanation of substantive law is legally accurate. Further, this discretion is unguided by any consistent vision of the role of the jury or the effect of different formats.

Courts and commentators agree that the majority of federal jury-tried civil cases are submitted to the jury using a general charge.¹⁴ It is not clear, however, whether this is the result of policy or inertia, and it

10. See, e.g., Burns, *supra* note 1, at 1490 (noting that a truly democratic jury may be "incongruent with the distribution of power in economic and political spheres of American society"); Dooley, *supra* note 8, at 326-27 (discussing how limits on jury power coincide with the jury's increasing diversity).

11. See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 Cornell L. Rev. 1124 (1992) (reviewing empirical data that shows that unsophisticated belief in the pro-plaintiff nature of juries is oversimplified and misleading).

12. Juries have not always been instructed in the law. Until the nineteenth century, American juries were presumed to be capable of deriving the law from community norms, and judges did not instruct them on applicable law. See Millon, *supra* note 7, at 137 n.4; William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 Cal. L. Rev. 731, 732-37 (1981).

13. Federal practice is important both in its own right and in its tendency to be seen as a model for state procedural practices. While federal courts handle only about two percent of all civil cases in American courts, they conduct from seven to ten percent of all civil jury trials. Galanter, *The Civil Jury*, *supra* note 6, at 214.

14. See *Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1519 (6th Cir. 1990); *Guidry v. Kem Mfg. Co.*, 598 F.2d 402, 405 (5th Cir. 1979); Charles Alan Wright & Arthur R. Miller, 9A Federal Practice and Procedure § 2501 (2d ed. 1995); Shaun P. Martin, *Rationalizing the Irrational: The Treatment of Untenable Federal Civil Jury Verdicts*, 28 Creighton L. Rev. 683, 694 (1995). While this assumption is probably correct, it does not rest on an actual empirical study of federal practices regarding jury submission. It is also probable that federal courts sitting in states which use special verdicts (such as North Carolina, Texas, and Wisconsin) tend to use some form of special verdict, at least in diversity cases. In addition, use of the special verdict is becoming increasingly common throughout the federal system. See Wright & Miller, *supra*, § 2505.

is not compelled by the rules. Rule 49 of the Federal Rules of Civil Procedure generally describes two alternatives to the general verdict, and allows the trial court to do as it likes. Rule 49(a) provides:

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 several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. 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.¹⁵

The rule's advice, then, is meager. The special verdict should ask "issues of fact" and the questions should be accompanied by "necessary" explanations and instructions. Rule 49(b) describes the separate procedure of using a general verdict accompanied by some specific questions:

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.¹⁶

This part of the rule also leaves much room for discretion. The written interrogatories should be about "one or more issues of fact" whose decision is "necessary to a verdict" and the jury again should get "necessary" explanations and instructions. Thus, Rule 49 neither requires any particular overall format (general/special/general with interrogatories) nor dictates the internal format of whatever option is chosen.¹⁷ Nor do the interrogatories need to cover all of the issues; the court has discretion to choose which questions to ask.¹⁸

The trial judge has unfettered discretion in deciding whether to use a general or special verdict. The judge "cannot be reversed for his decision in this regard, whatever an appellate court may think of it. The rule is a grant of authority to the judge."¹⁹ While theoretically the court's decision to use or not use special verdict format could be reversed as an abuse of discretion, there do not appear to be any cases

15. Fed. R. Civ. P. 49(a).

16. *Id.* 49(b).

17. See Wright & Miller, *supra* note 14, § 2512; see also *Elston v. Morgan*, 440 F.2d 47, 49 (7th Cir. 1971) (stating that the district court has discretion in deciding what issues to submit and the form in which they are submitted).

18. See Wright & Miller, *supra* note 14, § 2512.

19. Charles Alan Wright, *The Use of Special Verdicts in Federal Court*, 38 F.R.D. 199, 203 (1966).

that have been reversed on this basis.²⁰ In the unlikely event that a judge announced his intention to use a particular format to give an advantage to one of the parties, the decision might be a reversible abuse of discretion. Under normal circumstances, however, the judge can make a format decision "for any reason or no reason whatever."²¹

The rules not only fail to demand a particular format, they also fail to provide guidance as to how the trial judge should exercise her discretion.²² Six decades of case law have not filled in the gaps. The courts of appeals have done no more than communicate vague notions that complex cases require special verdicts more often than simple ones.²³ Nor have they given any guidance whatsoever regarding whether and when to use interrogatories along with a general verdict.²⁴ An examination of decided cases shows that courts have used and approved a wide variety of verdict formats, from extremely broad "omnibus questions" to extremely narrow questions that submit each element of each factual/legal contention as a separate question, generally without questioning anything but the legal accuracy of the content of the charge.²⁵

20. See Wright & Miller, *supra* note 14, § 2505.

21. Edward J. Devitt et al., *Federal Jury Practice and Instructions* § 6.05 (4th ed. 1992) (quoting *Skidmore v. Baltimore & O.R. Co.*, 167 F.2d 54, 66-67 (2d Cir. 1948)). This level of discretion is particularly striking when examined in the context of all of the Federal Rules of Civil Procedure governing the trial itself. Collectively, these rules allow the trial judge extremely wide discretion to run the trial as she chooses because the content of the rules is discretionary rather than prescriptive. See, e.g., Fed. R. Civ. P. 40 (assignment of cases for trial); Fed. R. Civ. P. 43 (taking of testimony); Fed. R. Civ. P. 47 (selection of jurors); Fed. R. Civ. P. 48 (number of jurors).

22. See Pamela J. Stephens, *Controlling the Civil Jury: Towards a Functional Model of Justification*, 76 Ky. L.J. 81, 105-09 (1987); Robert M. Dudnik, Comment, *Special Verdicts: Rule 49 of the Federal Rules of Civil Procedure*, 74 Yale L.J. 483, 515-16 (1965) (stating that most opinions addressing the use of special verdicts are very broad and communicate only "attitudes, not standards").

23. See, e.g., *Bank of Nova Scotia v. San Miguel*, 196 F.2d 950, 959-60 (1st Cir. 1952) (noting that the special verdict has the greatest value in complex cases); *Cohen v. Travelers Ins. Co.*, 134 F.2d 378, 384 (7th Cir. 1943) (observing that special verdicts are not useful where pleadings raise only one issue). *But see* Samuel M. Driver, *The Special Verdict—Theory and Practice*, 26 Wash. L. Rev. 21, 25 (1951) (asserting that the special verdict has the least value in complex cases) (article written by district judge).

24. See Dudnik, *supra* note 22, at 516-17 (listing undecided issues and referring to the "almost total failure of the courts to develop standards").

25. Most cases are submitted using a general verdict. The reporters, however, show that a variety of possibilities are actually in use. For examples of narrow special issues, see *P & L Contractors, Inc. v. American Norit Co.*, 5 F.3d 133, 136 n.3 (5th Cir. 1993) (illustrating a fractionalized submission of contract claim); *Klein v. Sears Roebuck & Co.*, 773 F.2d 1421, 1426 (4th Cir. 1985) (submitting express warranty, implied warranty, and negligent misrepresentation separately); *Thrash v. O'Donnell*, 448 F.2d 886, 890 n.11 (5th Cir. 1971); *Ratigan v. New York Cent. R.R. Co.*, 291 F.2d 548, 554 (2d Cir. 1961) (noting factual submission of negligence claims); *McDonnell v. Timmerman*, 269 F.2d 54, 58 (8th Cir. 1959) (indicating that defendant's negligence, plaintiff's negligence, comparative negligence, and damages were submitted separately); *Tillman v. Great Am. Indem. Co.*, 207 F.2d 588, 591 (7th Cir. 1953) (submitting sepa-

Once a trial court decides to use some form of special verdict, Rule 49 and its case interpretation provide only the most minimal guidance on how that special verdict should be structured.²⁶ The questions as a group should cover all the issues supported by pleadings and proof.²⁷ On issues such as the breadth or narrowness of the questions, the placement and wording of instructions, and the treatment of apparently conflicting answers, the judge is left to her own unguided discretion.²⁸ Courts are also split on the issue of whether the jury can be informed of the effect of its answers.²⁹

The federal courts, then, currently cannot or do not articulate the basis for their choice of instruction formats. They are therefore only prepared to deal on an ad hoc basis with proposals to increase the use of special verdicts. The next part begins to examine why this lack of standards creates the potential for significant, if inadvertent, shifts in function and power.

II. WHAT IT CHANGES: THE DIFFERENCE A CHARGE MAKES

The law-giving function of the jury charge can be accomplished in a number of different ways. The different choices provide different amounts of control over the jury's subsidiary decision-making processes, modify those processes, and provide different amounts of information about those processes. Constructing a charge also involves decisions about whether and how much to emphasize certain claims or defenses and about the nature of the law itself. Specifically, jury charge format can affect: (1) the degree of unanimity and agreement required for the jury to reach a verdict; (2) the degree of control the charge attempts to exert over the jury's thought processes; (3) the ability to highlight specific claims or defenses; (4) the impact of greater complexity on the difficulty of constructing the charge; (5) the

rate questions regarding speed, control of automobile, lookout, exercise of judgment and skill, causation, damages, and a question regarding the insurance contract); *Scarborough v. Atlantic Coast Line R.R. Co.*, 190 F.2d 935, 937 (4th Cir. 1951) (illustrating a fractionalized submission of fraud claim). For examples of broad form questions, see *Bradshaw v. Freightliner Corp.*, 937 F.2d 197, 200-01 (5th Cir. 1991); *Dreiling v. General Electric Co.*, 511 F.2d 768, 773 (5th Cir. 1975) (submitting negligence, defect, and damages to the jury). For an example of a general verdict with interrogatories, see *Thompson v. State Farm Fire & Casualty Co.*, 34 F.3d 932, 946 app. (10th Cir. 1994).

26. Devitt et al., *supra* note 21, § 6.03.

27. *Duke v. Sun Oil Co.*, 320 F.2d 853, 864 n.5 (5th Cir. 1963) (stating questions must cover issues tried by consent); *Mickey v. Tremco Mfg. Co.*, 226 F.2d 956, 957 (7th Cir. 1955) (requiring charge to cover all issues pleaded and proved). Anything omitted without objection, however, can be determined by an actual or deemed finding by the trial judge. Fed. R. Civ. P. 49(a).

28. See Stephens, *supra* note 22, at 105-09.

29. See Wright & Miller, *supra* note 14, § 2509; see also Gunnar H. Nordbye, *Comments on Selected Provisions of the New Minnesota Rules*, 36 Minn. L. Rev. 672, 682 (1952) (suggesting that juries not be informed).

jury's knowledge or ignorance of the effect of its answers; and (6) the implementation of the substantive law the charge describes.

To illustrate some of the choices, it is helpful to look at some different ways that the same case might be submitted to the jury. Assume a case in which the plaintiff, Ward Cleaver, is injured by an allegedly defective lawn mower manufactured by Acme Mowers. Cleaver has three legal theories of recovery, some involving multiple factual claims. He alleges that Acme was negligent in manufacturing the mower in several ways, that the mower is a defective product for various reasons, and that the mower breaches an implied warranty of merchantability. Acme, in turn, has different defenses to these claims, such as comparative negligence, lack of causation, and lack of damages. How could such a case be submitted to a jury?

Any charge should contain a clear, full, and accurate explanation of the applicable substantive law.³⁰ None of the formats involve a return to the nineteenth century practice of letting the jury supply the law as well as finding the facts. The issue here is what format information about the law will take, how it will be allocated between instructions and questions, and how many questions the jury will be required to answer. One possibility is a general charge. This would begin with a narrative discussion of the claims and defenses of Cleaver and Acme, together with an explanation of the law of negligence, strict liability, and warranty, and their associated defenses. It would also contain information about the potential elements of damages. Following this discussion, the jury would be asked only one or two questions:

We, the jury, find for _____.

Answer "Cleaver" or "Acme," according to your findings. If you find for Acme you will not complete the second item. If you find for Cleaver, you must complete the following item.³¹

We fix Cleaver's damages at \$_____.

Under general verdict format, then, Cleaver, who has the burden of proof on each of his claims, must get only one "Cleaver" answer in order to prevail on liability. This answer will not reveal whether Cleaver convinced the jury on only one theory or on multiple theories. Within legal theories, it will not reveal whether the jury agreed on a single version of the "facts." It will show that the jury rejected all of Acme's defenses, including both affirmative defenses and those that are basically denials of plaintiff's claims. Similarly, an "Acme" answer will not reveal whether the jury was simply unconvinced by Cleaver's evidence or whether Acme succeeded in proving affirmative defenses

30. Jury instructions also contain general procedural instructions for the jury concerning matters such as selecting a presiding juror, communicating with the court, and proper jury conduct. These types of instructions, while important, are beyond the scope of this article.

31. In cases involving comparative fault, the jury might be required to answer an additional question or questions attributing percentages to the various parties.

applicable to all theories or both. This lack of public revelation does not indicate that the jury process was flawed; it just means that an outsider will know only the ultimate result.

If a decision is made to use a narrower method of jury submission, there are still many options available. One possibility would be to combine tort-based theories into one question, contract-based theories into another, and consolidate damage questions except where different theories provide different measures of damages. Under such a system, the jury in Cleaver's case would be asked one question about negligence and strict liability, one question about warranty, and one or two questions about damages. Another possibility, still narrower, would be to ask a separate question, sometimes called an "omnibus" or "broad form" question, for each substantive theory (and associated affirmative defenses) and a question concerning damages. Such a charge might look something like this:

1. Was there a manufacturing defect and/or design defect in the mower at the time it left the possession of Acme that was a producing cause of the occurrence in question?³²

Yes _____

No _____

2. Was the negligence, if any, of any of the parties listed below a proximate cause of damages to Ward Cleaver?³³

Answer "yes" or "no."

a. Acme Mowers _____

b. Ward Cleaver _____

If you have answered question 1 or question 2(a) "yes" and question 2(b) "yes", then answer question 3. Otherwise, go on to question 4.

3. Find the percentage of fault, if any, attributable to the parties listed below.
 - a. Acme Mowers _____
 - b. Ward Cleaver _____

The percentages found should total 100%.

32. The charge would also need to include definitions of all legally significant terms used in the questions. These definitions might be placed adjacent to the question or in an introductory section.

33. This question combines both plaintiff's theory of negligence and defendant's contributory negligence defense. The jury would have to be properly instructed concerning burden of proof (namely, that a "yes" answer requires proof by a preponderance of the evidence). An alternative format for all of these questions would place the burden of proof and standard of proof within each question through a phrase such as "do you find from a preponderance of the evidence that . . ."

4. Was the mower unfit for the ordinary purposes for which mowers are used such that the unfit condition, if any, caused the occurrence in question?

Yes _____

No _____

If you have answered question 1, 2(a), or 4 yes, and, if you answered question 3(b) with a number less than 50%, then answer question 5. Otherwise, do not answer question 5.

5. What amount of money, if any, if paid now and in cash would reasonably compensate Cleaver for his damages, if any, caused by the mower?

You are instructed that in answering this question you may consider past and future reasonable medical expenses, past and future pain and suffering, physical impairment, past lost earnings, and future lost earning capacity.

Answer in dollars and cents, if any.

Answer: _____

This format has some consequences that are different from the general charge. Now the plaintiff must convince all of the jurors to agree on the same theory of liability. The format also compels the jurors to address each cause of action separately. They may in fact do that under a general charge; but now they have to do it to answer the questions. Because any of the theories would permit the plaintiff to prevail, a "yes" answer to any of the liability questions³⁴ along with a finding of damages could serve as the basis for a judgment in favor of the plaintiff. The construction of this kind of charge will become somewhat more technical. The court will have to take care that each question correctly places the burden of proof. In addition, there will be controversy about the placement of definitions and instructions relevant to particular questions. Should they all be at the beginning of the charge? Should they be next to the question to which they pertain? Does it matter?³⁵

Nothing in the logic of special verdict questions, however, requires that a court stop there. The charge can be made far narrower. Each cause of action could be broken down into its component elements, as

34. Depending on the law of the jurisdiction in question, the plaintiff may also need a finding that he was less than 50% (or some other percentage) at fault in order to be able to recover anything.

35. Some of these issues will be more significant in state systems that prohibit the judge from commenting on the weight of the evidence than they will be in federal court. Nevertheless, this kind of issue will have to be faced even under the more discretionary federal system. For an example of these kind of issues in a special verdict jurisdiction, see *Hyundai Motor Co. v. Chandler*, 882 S.W.2d 606 (Tex. Ct. App. 1994). See generally Gus M. Hodges & T. Ray Guy, *The Jury Charge in Texas Civil Litigation* §§ 11-24 (2d ed. 1988 & Supp. 1997) (discussing issues raised by definitions and instructions).

could each defense and each element of damages. Further, each can be tied to particular factual theories and submitted separately. This article refers to this model as “separate and distinct” format. As a check on the jury’s understanding or to highlight what are considered particularly important theories, inferential rebuttal defenses³⁶ could also be submitted as questions. The resulting charge in Ward Cleaver’s case might look like this:³⁷

1. Do you find from a preponderance of the evidence that Acme was negligent in designing the output guard on the mower?
2. Do you find from a preponderance of the evidence that Acme’s negligence, if any, in designing the output guard was a proximate cause of the occurrence in question?
3. Do you find from a preponderance of the evidence that Acme was negligent in designing the automatic shutoff switch on the mower?
4. Do you find from a preponderance of the evidence that Acme’s negligent design, if any, of the automatic shutoff switch was a proximate cause of the occurrence in question?
5. Do you find from a preponderance of the evidence that Acme was negligent in designing the rotary blades of the mower?
6. Do you find from a preponderance of the evidence that Acme’s negligent design, if any, of the rotary blades was a proximate cause of the occurrence in question?
7. Do you find from a preponderance of the evidence that Acme was negligent in manufacturing the output guard of the mower?
8. Do you find from a preponderance of the evidence that Acme’s negligence, if any, in manufacturing the output guard was a proximate cause of the occurrence in question?
9. Do you find from a preponderance of the evidence that Acme was negligent in manufacturing the automatic shutoff switch of the mower?
10. Do you find from a preponderance of the evidence that Acme’s negligence, if any, in manufacturing the automatic shutoff switch was the proximate cause of the occurrence in question?

36. An inferential rebuttal defense is different from an affirmative defense. Rather than offering an independent reason for the defendant to prevail, an inferential rebuttal defense offers a factual theory of the case that, by inference, makes it impossible for the plaintiff to win. For example, the defendant may claim that the occurrence was caused by an “unavoidable accident,” generally defined as some unforeseeable natural condition. This defense actually negates the element of causation, already present in plaintiff’s burden of proof, and is in that sense a type of denial. Nevertheless, a number of jurisdictions allow unavoidable accident to be specifically mentioned in a jury charge, and some have let separate questions on unavoidable accident be submitted to the jury. For an example of a state court struggling with whether to include an instruction on unavoidable accident, see *Reinhart v. Young*, 906 S.W.2d 471 (Tex. 1995), and cases cited therein.

37. I have omitted answer lines from this sample format in the interest of space, but they would be similar to the Yes/No options above.

11. Do you find from a preponderance of the evidence that Acme was negligent in manufacturing the rotary blade of the mower?
12. Do you find from a preponderance of the evidence that Acme's negligence, if any, in manufacturing the rotary blade of the mower was a proximate cause of the occurrence in question?
13. Do you find from a preponderance of the evidence that design of the output guard of the mower was defective?
14. Do you find from a preponderance of the evidence that the defective design, if any, of the output guard was a producing cause of the occurrence in question?
15. Do you find from a preponderance of the evidenced that the design of the automatic shutoff switch was defective?
16. Do you find from a preponderance of the evidence that the defective design, if any, if the automatic shutoff switch was a producing cause of the occurrence in question?
17. Do you find from a preponderance of the evidence that the design of the rotary blade of the mower was defective?
18. Do you find from a preponderance of the evidence that the defective design, if any, of the rotary blade was a producing cause of the occurrence in question?
19. Do you find from a preponderance of the evidence that Acme defectively manufactured the output guard of the mower?
20. Do you find from a preponderance of the evidence that the defective manufacture, if any, of the output guard was a producing cause of the occurrence in question?
21. Do you find from a preponderance of the evidence that Acme defectively manufactured the automatic shutoff switch of the mower?
22. Do you find from a preponderance of the evidence that the defective manufacture, if any, of the automatic shutoff switch was a producing cause of the occurrence in question?
23. Do you find from a preponderance of the evidence that Acme defectively manufactured the rotary blades of the mower?
24. Do you find from a preponderance of the evidence that the defective manufacture, if any, of the rotary blades was a producing cause of the occurrence in question?
25. Do you find from a preponderance of the evidence that the design of the output guard made the mower unfit for the usual purpose for which mowers are used?
26. Do you find that the unfit output guard, if any, was the proximate cause of the occurrence in question?
27. Do you find from a preponderance of the evidence that the design of the automatic cutoff switch made the mower unfit for the usual purpose for which mowers are used?
28. Do you find from a preponderance of the evidence that the unfit cutoff switch, if any, was the proximate cause of the occurrence in question?

29. Do you find from a preponderance of the evidence that the design of the rotary blades made the mower unfit for the usual purpose for which mowers are used?
30. Do you find from a preponderance of the evidence that the unfit rotary blades, if any, made the mower unfit for the usual purpose for which mowers are used?
31. Do you find from a preponderance of the evidence that Ward Cleaver was negligent?³⁸
32. Do you find from a preponderance of the evidence that Ward Cleaver's negligence, if any, was a proximate cause of the occurrence in question?
33. Do you find from a preponderance of the evidence that the occurrence in question was not the result of an unavoidable accident?³⁹
34. Do you find from a preponderance of the evidence that Eddie Haskell was not the sole cause of the occurrence in question?
35. What percentage of responsibility do you find from a preponderance of the evidence should be attributed to the following:
Acme Mowers _____
Ward Cleaver _____
36. What sum of money, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Ward Cleaver for his injuries resulting from the occurrence in question?

Answer separately in dollars and cents, if any, with respect to the following elements:

- a. pain, mental anguish, and loss of capacity for enjoyment of life in the past;
- b. pain, mental anguish, and loss of capacity for enjoyment of life in the future;
- c. future medical expenses;
- d. past medical expenses;

38. These contributory negligence questions could also be made fact specific. For example, the jury could be asked whether Cleaver was negligent in mowing across a hillside, mowing in bare feet, or whatever. Each factual theory of contributory negligence would then have two questions, one on breach and one on causation. Similarly, if there is a defense that Cleaver modified the mower in a way that is relevant to the defect or warranty claims, those issues could be submitted factually and separately. Notice also how the separate submission of these questions forces the court to make decisions about the order in which the questions should be placed. Acme, for example, might argue that the defensive issues should be placed at the beginning, with instructions not to answer the liability questions if certain defenses are found to exist, rather than toward the end. Rule 49 contains absolutely no direction on issues such as this.

39. Note that because an inferential rebuttal defense negates an element of the plaintiff's claim, plaintiff retains the burden of proof to *disprove* it. Thus the question needs to be worded in this convoluted fashion to properly place the burden of proof, and plaintiff needs a "yes" answer to win. While the wording problem could be cured by shifting the burden of proof to the defendant, the result of that shift would be simultaneously placing the burden of proof on both parties to prove opposite facts, for example, that Acme was the cause of the occurrence (plaintiff's burden) and was not the cause of the occurrence (defendant's burden).

- e. future loss of earning capacity;
- f. loss of earnings in the past.

With these three examples⁴⁰ for comparison, one can begin to see the differences that progressively narrower charge formats could make. First, there is a significant difference in the degree of unanimity required for the jury to reach a verdict. This will be felt particularly by the party with the burden of proof. With the general verdict, the plaintiff could win by getting all of the jurors to agree with at least one of his theories. For example,⁴¹ six jurors could believe that the mower was defective in design, three that it was defectively manufactured, and three that it was negligently manufactured in some way, and a plaintiff's verdict would result. To win under a charge in separate and distinct format, plaintiff must get twelve jurors to agree on both a particular factual theory and the application of the law to that theory.⁴² In the narrowest example above, Cleaver has to get a "yes" answer to each element of the factual incarnation of his cause of action. A "no" to any element will defeat that claim. With the general verdict above, Cleaver had to convince the jurors that Acme had been negligent in some way or breached some warranty or marketed a product with some kind of defect in manufacture or design. Now Cleaver would have to convince all twelve jurors that, for example, the mower's blade was defective and that caused his injury, or that Acme was negligent in the way that it manufactured the output guard of the mower and that that caused Cleaver's injury. It wouldn't matter if all the jurors thought that Acme was negligent in some respect or that the mower was defective in some way. Unless they all agree on the same factual underpinnings, Cleaver would lose under this system of jury submission. Cleaver would also have to separately convince the jury to reject the inferential rebuttal defenses, and to fail to find that Acme proved its affirmative defenses.

A second difference one can notice from reading the different charge formats—general verdict, broad form questions, and separate

40. I have not set out a separate example of a general verdict accompanied by interrogatories, the most discretionary of verdict forms. It would look like a general verdict with the addition of a number of questions. Those additional questions could cover all issues and look like either the broad form set or the separate and distinct set. Otherwise, the court has the option of choosing just a few key questions and asking them specifically in addition to the general verdict. Fed. R. Civ. P. 49(b). Note that in case of irreconcilable conflict between the general verdict and the interrogatory answers, the latter control. *Id.*

41. These examples assume a twelve member jury. There are, of course, jurisdictions in which smaller juries are used in civil cases, and jurisdictions in which a non-unanimous verdict is sufficient. U.S. Dep't of Justice, Bureau of Justice Statistics, State Court Organization 1993, at 274 tbl. 37 (1995). The point remains the same: a general charge allows the requisite number of jurors to rely on different factual or legal bases for their answers.

42. As before, the judge will have to instruct the jury about the meaning of applicable legal terms.

and distinct questions—is the difference in control that the charge attempts to exert over the jury's thought processes. The general verdict provides the least control, giving a general narrative description of the parties' theories and the applicable law, then leaving it to the jury to decide how to evaluate the evidence, reach decisions about ultimate facts, and render a verdict. The jury also controls the order in which it considers various issues. The broad form charge provides somewhat more structure, forcing the jury to focus separately on individual causes of action. The separate and distinct format is the most structured, requiring the jury to separate out each factual theory as applied to each element of each legal theory in the order in which the charge discusses them.

Third, the charge's potential to highlight certain legal or factual theories increases as the questions become more specific. In the example above, the court has given special prominence to Acme's inferential rebuttal defenses by posing them as separate questions. Cleaver, therefore, has to convince the jurors to reject theories of unavoidable accident and sole causation by a non-party. Both of these defenses factually attack Cleaver's claim that Acme's wrongful conduct was a cause of his damages. Thus, Cleaver bears the burden of disproving the defenses. By submitting these issues as separate questions, the court has chosen to flag these particular defensive theories. The same result can be accomplished by choosing topics for special interrogatories accompanying a general verdict. Also, by submitting these defenses as separate questions, the charge requires the plaintiff to get a favorable answer to the causation issue twice. Because the charge requires multiple affirmative findings and because it increases the chances for conflicting answers, it works to the disadvantage of the party with the burden of proof.

Fourth, the separate and distinct format greatly increases the number of technical issues that must be addressed in constructing a jury charge. A format with numerous narrow questions requires more precision in order to avoid legal error. There are more questions to be written correctly, more potential for conflict to be reconciled or not, and more opportunity for harmful error. And the example above involves only one plaintiff and one defendant. The addition of more parties multiplies the complications geometrically, as does the addition of factual and legal theories.

The increased technicality will manifest itself in a number of ways. For example, the court must decide how to word questions. Just as lawyers currently strive to get the court to include definitions worded favorably for their clients, they will suggest ways to word questions that are similarly adversarial.⁴³ Other issues involve the order of

43. See, e.g., Scott Baldwin et al., *Art of Advocacy: Jury Instructions* (1991) (providing that almost every possible instruction in two versions—plaintiff's instruction

questions and instructions to the jury not to answer the remaining questions if it answers preliminary questions in a certain way. These kinds of decisions can also affect emphasis and comparative advantage.

Because definitions and instructions are required, problems of wording and placement will arise. These issues exist with the general charge, but are even more pointed with the special verdict because their impact can be increased by placing them immediately before a narrow, related question. Where do you put them, at the beginning of the whole charge or next to the relevant questions? How do you word them? For example, do you say:

“Negligence” means doing something that a reasonable person in the same or similar circumstances would not have done, or failing to do something that a reasonable person in the same or similar circumstances would have done.

or do you say:

If you find that Ward Cleaver’s decision to mow the lawn in bare feet was not reasonable, then you must find him negligent.

Technical issues also arise because of the jury’s answers rather than the court’s drafting process. Special verdicts, and general verdicts with interrogatories, by their very nature increase the probability that the jury will come back with answers that conflict or might conflict. The treatment of conflicts requires another set of principles of decisionmaking. How hard should the trial and appellate courts try to find an explanation for the answers that makes the conflict disappear or become immaterial? What do you do with conflicting answers that are not legally material but that seem to indicate some confusion? Can you send the jury back to deliberate further if you recognize a conflict before discharging the jury? If you can, how much can you tell them about the conflict? What do the lawyers have to do, and when do they have to do it, in order to preserve error to complain about conflicting answers? The rules can become so complex that only parties who can afford the most skillful lawyers have any chance of raising jury charge issues on appeal. All of these issues have been raised in federal decisions⁴⁴ and in states that use special verdicts.⁴⁵

and defendant’s instruction—covering the same substantive law but with different emphasis).

44. These issues have created serious problems for the federal courts even with the current very limited use of the special verdict. For example, sometimes federal courts are unable to tell a special verdict from a general verdict with interrogatories, Martin, *supra* note 14, at 697 n.49, have reached conflicting decisions about what to do if the jury’s answers conflict, *id.* at 701; Donald Olander, Note, *Resolving Inconsistencies in Federal Special Verdicts*, 53 Fordham L. Rev. 1089, 1092-98 (1985), and differ about the requirements for preserving error, Martin, *supra* note 14, at 727.

45. For examples of the legal intricacies of preserving error and dealing with conflicting and missing answers when special verdicts are used, see Hodges & Guy, *supra* note 35, §§ 91-127.

They are, in a narrow sense, technical questions, but the answers to those questions can affect party advantage and disadvantage, the relationship of judge and jury, and the role of the appellate courts in supervising trial court outcomes.

Comparing the possible charge formats reveals a fifth difference that could prove significant. Under most circumstances, a series of narrower and more numerous questions will make it harder for the jury to know the effect of its answers.⁴⁶ With a general verdict, the jury knows who “wins,” as they actually find for plaintiff or defendant. A lengthy special verdict format, on the other hand, makes it more difficult for the jury to know which party will benefit from particular answers. The jury may also mistakenly assume that certain answers are not important and can be answered so as to give a little credence or benefit to each party. Such misunderstandings could lead to judgments that do not reflect anyone’s idea of the merits of the case.

Sixth, the wording of the charge has the potential to change how and by whom the substantive law is applied. The jury’s role in reaching consensus in a general verdict as to who they “find” for, is different from deciding whether Acme was “negligent,” which in turn is different from its role in deciding whether Acme was negligent in failing to include an output guard and that that negligence proximately caused damages to Cleaver.⁴⁷

All of the charge formats discussed above leave the jury to apply basic legal definitions to the evidence they have heard. Even the separate and distinct format requires the court to define of legal terms; to omit them would be reversible error.⁴⁸ There are, however, other possible approaches which are real-world possibilities. They are not currently in use, but could be implemented if courts wished to do so.

One possibility is to remove the process of law application from the role of the jury. It is grammatically possible to write a special verdict form so that the jury is asked to find only historical facts, with no legal component. Some advocates of the special verdict recommend exactly this. Professor Saltzburg, for example, suggests that rather than asking the jury whether defendant was negligent, the judge should ask a question about the underlying factual allegations: “Surely it is easier for jurors to understand that they are being asked to decide whether it

46. The federal courts are split as to whether juries may be informed of the effect of their answers. See Wright & Miller, *supra* note 14, § 2509. Texas and Wisconsin, states that use special verdicts, have consistently held that the jury may not be so informed. *Id.*; see, e.g., Grieger v. Vega, 271 S.W.2d 85, 87 (Tex. 1954) (stating jury may not be told effect of its answers).

47. See *infra* Part III.

48. When the jury is asked mixed questions of law and fact, the court must supply the proper legal definition. See Wright & Miller, *supra* note 14, § 2506; see also Fed. R. Civ. P. 49(a) (“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.”).

is more likely than not that the defendant drove through a red light than for them to master the law of negligence and apply it to the facts of a case."⁴⁹ Similarly, the jury could be asked how fast defendant was driving or how closely defendant's car was following plaintiff's car. If plaintiff claimed that defendant was negligent in having an inadequate number of quality control inspectors, the jury could be asked how many defendant had and how many it should have had. Or the court could retreat even farther into evidentiary facts. "[D]id the driver have one or two drinks? [W]as the street dry or damp?"⁵⁰ Presumably the judge would then take these answers, apply the legal definition of "negligence" and "causation" and render a judgment.

This kind of issue formulation would represent a radical change in our procedure for submitting cases to juries and in our understanding of tort law.⁵¹ It is not, however, without precedent in other areas. Judges have sometimes taken decisions that involve the application of law to fact, defined them as "questions of law" and therefore put them beyond the power of the jury. Consider, for example, Justice Holmes' attempt to transform negligence into a constituent set of precise rules of conduct that a judge could apply. In *Baltimore & Ohio Railroad v. Goodman*,⁵² the Supreme Court found that a driver at a railroad crossing, if he could not otherwise be sure whether a train was approaching, had to stop and get out of his vehicle. Failure to do so was negligence *as a matter of law*.⁵³ Such a splitting of the decisionmaking process would make it proper to ask the jury whether the driver could see whether a train was approaching and whether he or she had stopped and gotten out of the car. Based on these answers, the judge would then apply the "law" and decide whether the driver was negligent.

This kind of jury charge would no longer require the judge to explain applicable law to the jury or the jury to understand and apply the law. It would, however, require considerable thought about which fact issues should be submitted. Since they are not "ultimate" or

49. Stephen A. Saltzburg, *Improving the Quality of Jury Decisionmaking*, in *Verdict: Assessing the Civil Jury System* 341, 360 (Robert E. Litan ed., 1993) [hereinafter *Verdict*].

50. Dudnik, *supra* note 22, at 484 n.2; *see also* Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 Cal. L. Rev. 1867, 1869-71 (1966) (identifying the jury's role as fact-finder).

51. It is also not clear whether such an attempt would violate the Seventh Amendment (in federal court) or state constitutional rights to jury trial (in state courts). *See* Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. Rev. 993, 1008-10 (1986).

52. 275 U.S. 66 (1927).

53. *Id.* at 70. The Court recognized the problem with such attempts to make ultimate fact findings a question of law when, seven years later, it reversed a directed verdict for defendant railroad and limited *Goodman* to its facts in *Pokora v. Wabash Railway Co.*, 292 U.S. 98, 106 (1934) ("[W]hat is suitable for the traveler caught in a mesh where the ordinary safeguards fail him is for the judgment of a jury.").

“controlling,” how would the judge know what to ask? In a state court system that required fact pleading, the charge might be able to track the factual allegations of the pleadings. Federal notice pleadings, however, do not lend themselves to that kind of precision, and neither do the liberal rules regarding trial amendments.⁵⁴ Certainly the parties could be required to suggest possible questions in a pretrial order, but the problem would remain: How would the judge recognize a proper question? Can one construct meaningful issues that require the jury to provide a simple yes/no answer and not a complex narrative?⁵⁵ What weight would the answer receive when the judge was applying the legal standard to the finding in order to arrive at a proper judgment?⁵⁶

Adopting a law and economics model could also change the format and content of the jury charge. The three format possibilities discussed above assume that the jury will be asked questions, broad or narrow, that reflect traditional ways of talking about the law and legal terms. The questions and/or instructions would talk about “negligence” or “defect” or “causation.” There is also another possibility. Some commentators have suggested that if the law really reflects an economic decision about efficiency and costs, then the jury should be instructed in those terms. In a negligence case, for example, Learned Hand’s classic formula could be used: a party is negligent if the burden of avoiding the risk (B) is less than the product of the *ex ante* probability that the risk will materialize in injury (P) and the gravity of the risk if it materializes in injury (L).⁵⁷ Stated mathematically, a party is negligent if $B < PL$.⁵⁸ Under such a system, the jury, instead

54. Fed. R. Civ. P. 15(b) allows trial amendments to be made freely in the absence of surprise or prejudice.

55. I suppose it would be possible to write an open-ended question like “describe how you think the crash occurred” but that would raise another set of mind boggling questions ranging from the logistical to the legal/jurisprudential. What, for example, if they answer the questions by talking about whose “fault” it was?

56. It is possible that in certain kinds of contract disputes, questions that are more purely factual would be easier to frame. See Nordbye, *supra* note 29, at 683. For example, if a contract required Seller to deliver 100 widgets to Buyer on June 1, 1995, and Buyer claimed that Seller had delivered only 75 widgets on that date, the jury could be asked, “Do you find from a preponderance of the evidence that Seller failed to deliver 100 widgets on June 1?” Indeed, there is a tradition of treating certain contract issues as questions of law to be decided by the judge rather than the jury, presumably because these commercial issues need more consistency than multiple juries can achieve, or because the democratic jury is not wanted in business cases. See Louis, *supra* note 51, at 1028 (listing questions of ultimate fact traditionally categorized as “legal”); Weiner, *supra* note 50, at 1896-1906 (discussing split of authority in commercial cases over whether judge or jury decides the reasonableness or timeliness of commercial conduct). Even in commercial cases, though, many traditional jury decisions require the jury to apply law to fact, and a change to questions only about historical occurrences would change the jury’s function.

57. Thomas C. Galligan, Jr., *The Louisiana Products Liability Act: Making Sense of it All*, 49 La. L. Rev. 629, 641 n.68 (1989).

58. *Id.*

of being asked about "negligence," would be asked to apply the Hand formula.⁵⁹ Better yet, to avoid juror-based mathematical error, the jury could be asked simply to find B, P, and L (given proper instructions) and the judge could do the math.⁶⁰ In a strict liability case, the formula would have to be adapted but the method would remain the same. One commentator has suggested a formula of $B - BK$ (with BK representing the burden of knowing or discovering the risk) $< PL$ for strict liability. Again, the jury need only find B, BK, P, and L.⁶¹

Formulas need not be limited to primary liability findings.⁶² Others have suggested charging the jury in mathematical terms in order to make findings regarding comparative fault. In a case with only two parties (A and X), for example, the court could determine A's percentage fault by using the following formula: $((P[A] \times L[A]) / B[A]) / ((P[A] \times L[A]) / B[A] + (P[B] \times L[B]) / B[B])$.⁶³ Again, the jury wouldn't have to do this scary math. They would, however, be given information about how to take concepts such as risk, causation, and culpability and translate them, together with fact findings, into B, P, and L for each party. These numbers would substitute for the more conventional yes/no answers and more intuitive percentages. While courts don't seem to have gone as far down this road, the Oregon Supreme Court has discussed the possibility of using formulas rather than traditional questions in order to calculate comparative fault.⁶⁴

59. Thomas C. Galligan, Jr., *A Primer on the Pattern of Negligence*, 53 La. L. Rev. 1509, 1529-32 (1993).

60. Note, however, that among those who argue for greater use of law and economics analysis in jury instructions, some have rejected the idea of questioning the jury in this way. See Stephen G. Gilles, *The Invisible Hand Formula*, 80 Va. L. Rev. 1015, 1028 (1994) ("No one thinks that cost-benefit analysis in negligence law is, or could be, a rigorous quantitative inquiry into continuous increments of marginal care." (citing Learned Hand's rejection of quantitatively applying the Hand formula in *Moisan v. Loftus*, 178 F.2d 148, 149 (2d Cir. 1949))).

61. See Thomas C. Galligan, Jr., *Strict Liability in Action: The Truncated Learned Hand Formula*, 52 La. L. Rev. 323, 324 (1991).

62. For a suggested formula to govern a type of antitrust case, see Gary Myers, *Litigation as a Predatory Practice*, 80 Ky. L.J. 565, 605 (1992) (liability if $(1 - s)(xJ + L) + s(1-p)(xJ + L) + s(p)(B) \geq C + sCd + s(p)(mD + Cp)$). In this formula, s = Probability of antitrust claim; p = probability that target would prevail in antitrust case as perceived by predator; x = probability of winning the case; J = anticipated value of money judgment and injunctive relief; L = anticipated marketplace profit from the litigation; B = benefits from predation until final judgment in antitrust case; Cp = cost of target's antitrust claim; Cd = cost of predator's defense of antitrust claim; m = damages multiplier for successful antitrust claim; D = probable antitrust damages suffered by target firm. *Id.* at 602-05. Note, however, that the author does not recommend submitting this formula as a jury question. *Id.* at 605.

63. David C. Sobelsohn, *Comparing Fault*, 60 Ind. L.J. 413, 420 n.58 (1985).

64. See *Sandford v. Chevrolet Div. Gen. Motors*, 642 P.2d 624, 634-35 & n.19 (Or. 1982). The court suggested that the trial judge could instruct the jury to compare plaintiff's conduct with that of a reasonable person, assigning plaintiff a number on a scale of 0 to 10 (0 = no negligence; 10 = intent). The jury would then compare defendant's product with a product that would not have been defective, assigning that defective product a number on a scale of 0 to 10. The jury would then add the two

Unlike the very narrow factual issues discussed above, questions phrased in terms of economic concepts would require the jury to apply the law. For example, the proponent of the comparative fault formula recommends that the negligence jury be instructed about concepts such as causation and culpability.⁶⁵ On the other hand, if the jury is given no information about the final formula to be applied, this method of submission might actually hide the effect of its answers from the jury in a way that no other method of submission has accomplished.⁶⁶

Taken together, all of these examples of potential charge formats should make it clear that format choices are extremely significant.⁶⁷ The lack of guiding principles about how to structure a charge is thus a serious problem. The next sections of this article explore in more detail the kind of process and substantive policy choices that the courts make (consciously or unconsciously) when drafting a jury charge.

III. THE IMPACT OF CHARGE STRUCTURE ON THE POLITICAL FUNCTION OF THE JURY

The jury, as an institution, has both a political function⁶⁸ and a procedural function. This part examines the jury as a political institution, asks whether the form of the jury charge affects that political role, and concludes that it does. Except in unusual circumstances, the general verdict is best suited to empower the jury to perform its constitutional

numbers, then divide each party's fault number into the total. The result will be each party's percentage of fault.

65. "The court should instruct the jury to consider causation, but only as it affects their assessment of the dangerousness of each party's risk-producing behavior." Sobelson, *supra* note 63, at 424. "[B]oth culpability and direct causation aid in understanding the magnitude of the risk of dangerous conduct, as well as the cost of avoiding that risk." *Id.* at 424-25 n.88. In strict liability cases, instructions would also include information about how to define "fault" on the part of the manufacturer. *Id.* at 431; *see also id.* at 432-35 (discussing formulas for finding comparative fault in design defect and manufacturing defect cases).

66. It is reasonable to predict, however, that the jury would still get strong clues from the substance of the lawyers' closing arguments and from the testimony in the trial itself.

67. Given the potential significance of the format chosen, one must question the standard conclusion that *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), does not require federal courts to consider state court methods of instructing the jury when trying diversity cases. *See Wright & Miller, supra* note 14, § 2502 (stating that federal courts have uniformly concluded that state law does not govern whether to use general or special verdict, what questions to submit, the form of the questions submitted, the effect of inconsistent answers, or any other detail of special verdict and interrogatory practice).

68. For a general discussion of the Framers' view of the political significance of the jury, see Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639 (1973).

role.⁶⁹ As a political institution, the jury serves two functions that are relevant here: It expresses community values and experience by incorporating them into legal decisionmaking, and it serves as a check on the power of the less democratic judge. Both functions are important and better facilitated by the general verdict.

A. *Injecting Community Values*

Commentators discuss the jury's ability to inject community values into legal judgments in different ways. Sometimes the jury is praised for its tendency to ignore rather than to enforce "the law," as when the jury refuses to apply unpopular law, a kind of civil jury nullification. Thus, early twentieth-century juries that disliked the fellow servant rule in worksite injury cases are said to have refused to apply it. Juries that disliked the impact of the old contributory negligence doctrine are said to have invented an ad hoc kind of comparative negligence judgment.⁷⁰ While there is some truth in this picture, it tends to identify the jury's virtue with lawlessness, a value which one tends to applaud only when one agrees with the particular jury.⁷¹

Some commentators, while not suggesting nullification, still identify the jury with a refusal to rigorously apply the law. They describe the jury as an agent of "mercy" in contrast to the judge's sterner role of law application.⁷² This view, while appreciating the jury's ability to

69. See Yeazell, *The New Jury*, *supra* note 7, at 117 ("[B]oth those who attack and those who defend the modern jury ought to be clear about the political character of the institution under discussion . . . one cannot simply discuss the jury as if it were an entirely utilitarian institution to be judged by how well it performed a factfinding function.").

70. See Landsman, *supra* note 6, at 610; Richard O. Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 Mich. L. Rev. 68, 81-82 (1981).

71. For example, one might applaud the early juries that refused to award no damages to a plaintiff who was one percent negligent but deplore the jury that acquitted the assailants of Rodney King. Jury nullification even in criminal cases also remains extremely controversial. For a sampling of the recent debate on jury nullification in criminal cases, see Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 Yale L.J. 677 (1995); Andrew D. Leipold, *Rethinking Jury Nullification*, 82 Va. L. Rev. 253 (1996); Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice*, 30 Am. Crim. L. Rev. 239 (1993); Richard St. John, Note, *License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking*, 106 Yale L.J. 2563 (1997).

72. See Devitt et al., *supra* note 21, § 6.03 (stating proposition that special verdicts make the law cold and business-like, rather than warm and human); see also Jennifer M. Granholm & William J. Richards, *Bifurcated Justice: How Trial-Splitting Devices Defeat the Jury's Role*, 26 U. Tol. L. Rev. 505, 536 (1995) (labeling the jury as the "humanitarian custodian of the law"); John H. Wigmore, *A Program for the Trial of a Jury Trial*, 12 J. Am. Judicature Soc'y 166, 170 (1929) ("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 satisfaction is preserved.").

apply community values, nevertheless contributes to the picture of the jury as a kind of rogue element within the judicial process.⁷³

The jury's role in infusing the trial process with community values, however, is both more subtle and more pervasive. First, in most cases the jury's decision is explicitly value-laden.⁷⁴ For example, decisions such as whether a party's actions were "reasonable," whether a product's social utility exceeds its risk, whether a contract term was unconscionable, whether a breach of contract should be excused, or whether a police officer's use of force was "excessive" are not value-neutral inquiries into historical fact. They are questions to which the answers depend on societal norms, as supplied by the jury.⁷⁵

Second, jurors apply community norms, in the form of each juror's experience of life in the community, in evaluating the evidence presented—for example, deciding what witnesses they believe and don't believe and which party's story is more consistent with their understanding of reality. Recent psychological research indicates that as jurors are presented with conflicting evidence in the courtroom, they "resolve these conflicts by constructing a story which reflects what they believe 'really happened.'"⁷⁶ In deciding which story is more credible, jurors use their experience of the world and their experience as members of the community.⁷⁷ Their assessment of what they hear and see, like all human cognition, is "mediated by the assumptions

73. There is a persistent, if subtle, tendency to associate female imagery with this allegedly non-rational behavior of juries. See, e.g., Edsun R. Sunderland, *Verdicts, General and Special*, 29 Yale L.J. 253, 258 (1920) (asserting that juries are "as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi"); Olander, *supra* note 44, at 1089 (analogizing jury processes with "the veil of secrecy"). See generally Gerald Torres & Donald P. Brewster, *Judges and Juries: Separate Moments in the Same Phenomenon*, 4 Law & Ineq. J. 171, 181-85 (1986) (discussing how female qualities are used to characterize juries).

74. See Marder, *supra* note 8, at 1052 (1995); see also ABA/Brookings Symposium, Charting a Future for the Civil Jury System 9 (1992) ("[T]he standards used to resolve disputes on public standards are based on the community's sense of justice."); Alexis de Tocqueville, *Democracy in America* 272 (J.P. Mayer ed. & George Lawrence trans., 13th ed., Doubleday & Co. 1969) (1850) (discussing role of American jury); Jonathan D. Casper, *Restructuring the Traditional Civil Jury: The Effects of Changes in Composition and Procedures*, in *Verdict*, *supra* note 49, at 414, 450 (stating that legal concepts are not state of nature questions).

75. See Patrick E. Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 Tex. L. Rev. 47, 58-59 (1977); Marcus, *supra* note 8, at 782 (noting that the need to apply community standards makes a jury decision more accurate than a decision by a judge); Alan Schefflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, Law & Contemp. Probs., Autumn 1980, at 51, 69 ("Civil jurors . . . must often decide how the parties ought to have acted, or how a reasonable person would have acted, under the circumstances. This judgment requires a policy decision—not just an evaluation of the facts.")

76. Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. Rev. 273, 284 (1989).

77. See generally W. Lance Bennett & Martha S. Feldman, *Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture* 162 (1981) (theorizing that jurors use experience to evaluate evidence).

and expectations [they] have about it. These assumptions or knowledge structures are used to filter, order, and interpret the world that presents itself to [their] senses. . . . [T]he jurors' prior assumptions about the nature of the social world are an important ingredient of the jury's verdict."⁷⁸ Thus, juries do not use a linear model in which given facts are applied element by element to a cause of action to make decisions. Instead, the information presented to the jury will be "mediated through the subjective mental structures of the individual."⁷⁹

Researchers Nancy Pennington and Reid Hastie studied jury processes and learned that jurors, using stories as their models, reason about the evidence and then try to match the accepted story with a verdict category.⁸⁰ Two principles, coverage⁸¹ and coherence, govern whether jurors accept a story and how confident they feel about it. In deciding whether a story is "coherent," one of the things that jurors consider is whether it is plausible, that is, whether it is consistent with the "decision-maker's knowledge about what typically happens in the world."⁸² Another researcher has noted that a juror's "interpretive schemata," their pre-existing structure for understanding experience, influence how jurors select, store, recover, combine, and interpret what they hear during the trial.⁸³ A juror's life experience is thereby made central to the decision-making process. Coherence analysis also means that jurors consider whether a possible story is internally consistent and whether it is complete.⁸⁴ This kind of decision-making requires a holistic analysis of the evidence and law.⁸⁵ Empirical researchers have demonstrated, in the context of other procedural devices, that when the trial is broken into separate parts, the jury is thrown back onto less reliable heuristic devices in making its decisions.⁸⁶

78. Mark Cammack, *In Search of the Post-Positivist Jury*, 70 *Ind. L.J.* 405, 462 (1995).

79. *Id.* at 467; see also James A. Holstein, *Jurors' Interpretations and Jury Decision Making*, 9 *Law & Hum. Behav.* 83 (1985) (stating jurors' own mental filters affect their understanding of evidence).

80. Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 *Cardozo L. Rev.* 519, 530-31 (1991) [hereinafter Pennington & Hastie, *Cognitive Theory*]. For further examples of their work, see Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 *J. of Personality & Soc. Psychol.* 242 (1986); Nancy Pennington & Reid Hastie, *Practical Implications of Psychological Research on Juror and Jury Decision Making*, 16 *Personality & Soc. Psychol. Bull.* 90 (1990).

81. "Coverage" of the evidence refers to the extent to which the story accounts for all the evidence. Pennington & Hastie, *Cognitive Theory*, *supra* note 80, at 527-28.

82. *Id.* at 528.

83. See Holstein, *supra* note 79, at 84-85.

84. See *id.*

85. See Granholm & Richards, *supra* note 72, at 542.

86. See, e.g., Kenneth S. Bordens & Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 *Judicature* 22, 27 (1989) (studying the impact of different types of bifurcation on juries).

What does all this imply for the jury charge? From a standpoint of the jury as a political institution,⁸⁷ we need to analyze which kind of jury charge format best enables the jury to bring its community values and experience into the decision process.⁸⁸ This part examines the general, broad form, and separate and distinct formats and their effects on the jury's political function.

The general charge facilitates all of the models of the jury as supplier of community values. To the extent that one sees jury nullification as legitimate, the general verdict appears to make that easier, because the jury only has to understand who they want to win the case (because they merely find for plaintiff or defendant). If the jury is seen as the agent of mercy, the general charge allows the jurors to factor their sympathies into their analysis.

The general charge is also well suited to the more subtle task of including community values in the jury process. The general charge allows the jury to consider the case as a whole. It gives the jurors general instructions about evaluating evidence and about burden of persuasion. It explains the relevant causes of action and defenses. It gives the jury the ability to provide specific content to policy questions such as "reasonableness." Then it leaves the jury to construct its "story" and to consider how the whole story fits into the legal categories. So long as the instructions are not confusing, this format should enable jurors to use their cognitive processes normally, and to use them in a way that factors in the their underlying community values.

A special verdict format in broad form would create greater, but perhaps not insurmountable, obstacles to the jury's political role. Jury nullification would be a bit harder, as the jury would have to figure out how to answer more specific questions to counteract the portion of the law that they found to be unjust. For example, assume a state that still applies the old doctrine of pure contributory negligence, meaning even one percent of plaintiff negligence will result in no recovery. Assume further a jury that understands and rejects that legal principle. That jury, with a broad form jury charge, would probably be faced with a question like this:

Whose negligence, if any, proximately caused the occurrence in question?

_____ Defendant

_____ Plaintiff

87. The question of which format best lends itself to "accurate" outcomes will be considered in part IV.A, *infra*.

88. See Haddon, *supra* note 8, at 87 (advocating for a jury process that involves "authentic representation, meaningful communication, and deliberative accountability" and valuing the jury as representing the community's values). This also underscores the crucial importance of assuring that jury composition mirrors the diversity of the community. *Id.* at 99-101; see sources cited *supra* note 8.

The jury would have to realize that for plaintiff to receive any judgment, they would have to leave the "plaintiff" line blank, whatever their view of the evidence. If they wanted to impose a kind of home-grown comparative negligence, they would have to reduce the amount they found as the damage to plaintiff by the amount that they believed resulted from the plaintiff's culpability. A jury's ability to make this kind of response may depend in part on the leeway that lawyers are given in making closing arguments and in part on the experience and sophistication of the jurors. This format clearly makes jury nullification more difficult than the general verdict.

In the same way, the broad form charge may make more difficult the jury's generalized role of counteracting situations in which the strict application of the law would be unduly harsh. Again, the jury would have to know how to adapt specific answers in order to achieve the desired result.

The broad form charge is less likely to damage the jury's role in applying community norms. As long as the questions retain general legal definitions and are no narrower than one question per broad legal theory,⁸⁹ the process could remain sufficiently whole to allow the jury to function. First, the jury would still make determinations such as what kind of conduct is reasonable in light of all the facts. The format would require the jury to consider each cause of action separately, but not in ways that compel logically related elements to be de-linked. The format would be more harmful if the causes of action functionally overlap, even though technically separate. For example, both a negligence determination and a strict liability question may require consideration of foreseeable risk. A decision about whether a product is fit for its customary use or for a particular purpose may require similar considerations. Compartmentalizing the law application process must be done with care to avoid artificially limiting the jury's ability to apply its understanding of the totality of the circumstances to each legal category.

Second, the charge would still allow the jury to use the cognitive "story" process to evaluate the evidence as a whole and to apply the relevant legal categories to that story. The broadly defined legal categories would not preclude consideration of certain stories or require that the stories be pulled into separate pieces.

The separate and distinct special verdict format would cause the most serious damage to the political role of the jury. Jury nullification would become even more difficult because the jury would have to correctly answer a complex series of questions in order to achieve a desired result. Injecting situation-specific "mercy" in hard cases would

89. For example, in a negligence claim the question would include both primary negligence and comparative negligence defenses, would include both breach and causation, and would not use "definitions" that were fact specific. *See supra* Part II.

be similarly difficult. A series of separate and distinct questions would also severely limit the jury's ability to apply community values. The special verdict format is intended to change, or at least channel, the jury's thought processes, to compel the jury to consider the case in fragments, and to limit what the jury is allowed to consider. It is meant to limit both its value-application and its fact-consideration processes.

The general charge or broad form charges discussed above provide the jury with general definitions of legal terms to apply. For example, the jury is told that negligence means failure to use reasonable care under the same or similar circumstances, and is then told to apply that definition to the evidence. A separate and distinct format, however, limits the circumstances that the jury is allowed to consider. The jury will be asked whether some specific act was negligent, and then whether it was the cause of the injury.⁹⁰ The jurors are not permitted to consider all the circumstances, nor are they permitted to consider the interaction of various allegedly negligent acts. For example, in a car wreck case, the jury will be asked separately whether the defendant drove too fast, failed to keep a proper lookout, failed to yield the right of way, etc. It will not be asked whether defendant drove negligently. They will also be required to think about the negligence of specific acts separately from the issue of causation for each of those acts; they will be asked to analyze causation separately as to each factual claim about negligence. This kind of narrow format, then, limits the kind of community values that the jury is allowed to apply and the way in which it is allowed to apply them.⁹¹

If successful, the separate and distinct format also changes the jury's fact determination process, and its ability to use its experience in evaluating the evidence. Rather than instructing the jury to consider everything properly before it, the separate and distinct jury charge attempts to force the jury to decide particular factual questions in isolation from related factual questions. Thus the jurors' ability to use their experience as members of the community in evaluating the evidence is disrupted and the political influence of the lay person is minimized.

B. *Limiting the Judge's Power*

In light of the above, it is not surprising that the format of the charge also affects the other political reason for the civil jury: the use

90. See, for example, the sample separate and distinct charge *supra* part II.

91. Combining specific questions with a general verdict, as permitted by Rule 49(b), does not solve the problem. Although the jury renders a general verdict in addition to answering specific questions, the use of the questions may influence even deliberation on the general verdict by isolating specific elements for separate consideration. And the specific interrogatories have all the same problems as the special verdict in isolation. In addition, if the answers to the general verdict question conflict with the answers to specific questions, the judgment is to be based on the interrogatory answers rather than the general verdict.

of the jury as a limit on the power of the judge.⁹² As a part of democratic self-government, the jury is supposed to serve the people by checking the judge "much as the legislature was to check the executive, the House to check the Senate, and the states to check the national government."⁹³ Early in the debate over the federal constitution, for example, the jury's role of representing the people was emphasized:

"Juries are constantly and frequently drawn from the body of the people, and freemen of the country; and by holding the jury's right to return a general verdict in all cases sacred, we secure to the people at large, their just and rightful controul [sic] in the judicial department." . . . [T]he democratic branch of the legislature and the jury trial are the means of effective and popular control.⁹⁴

It is therefore not surprising that many of our modern debates about procedural devices are debates about the proper allocation of power between the judge and the jury. The format of the jury charge also makes an important difference in this power struggle.

Since about the sixteenth century, the law/fact distinction has been a way to talk about the allocation of power between judges and juries.⁹⁵ Any first year law student can recite that judges determine the law and juries determine the facts. Behind this simple recitation, however, lie a myriad of possibilities and a continuum of real power. An examination of the different jury charge formats illustrates the ways in which different choices reallocate decision-making responsibility.

The general verdict format provides the greatest amount of control to the jury, with the judge exercising comparatively less control. The judge does explain fully the governing legal principles and so, in this sense, the traditional explanation is correct. The judge does determine the law. But the process of law application,⁹⁶ of applying the law to the facts, is very much left in the hands of the jury. Within the limits of the legal definitions, the jury is left to give content to legal norms as applied to the particular case. In making this decision, the jury is free to consider all admissible evidence and to make any reasonable inferences from that evidence. The jury can proceed with its deliberations in any order that it chooses.

92. See Higginbotham, *supra* note 75, at 58 ("The jury serves as a check upon the judge's power in each case.").

93. Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. Davis L. Rev. 1169, 1174 (1995); see also Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 999 (1987) ("The jury provides the counterforce of several lay people to the single, powerful, trial judge.").

94. Yeazell, *The New Jury*, *supra* note 7, at 112-13 (citations omitted).

95. Weiner, *supra* note 50, at 1867.

96. See Louis, *supra* note 51, at 994-98 (discussing the law/fact distinction and standard of review as methods of allocating power between trial and appellate courts).

The general verdict provides another kind of power to the jury: the power *not* to explain its verdict. The ability to disclose a decision without having to formally justify it is itself a kind of power, rather like the parents' "because I said so." The right to return a general verdict is, in fact, a historical source of conflict between juries and judges, and the decision about what kind of verdict to return was originally within the control of the jury.⁹⁷ As Justices Black and Douglas stated:

One of the ancient, fundamental reasons for having general jury verdicts was to preserve the right of trial by jury as an indispensable part of a free government. 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.⁹⁸

The broad form special verdict is again a kind of middle ground. The judge, by using a charge format that requires the jury to focus on each cause of action separately, exercises greater control over the jury. The order of questions (although the jury can choose to ignore it) also tends to give the judge greater control over the shape of the deliberations. As long as the broad questions and definitions remain fairly generic⁹⁹ the jury retains the power to fill in community norms and to freely apply the law to the facts.

The separate and distinct question format represents a more dramatic shift of control to the judge. While the jury is still determining ultimate facts, its choices have been narrowed. They get to decide, for example, whether John Doe failed to yield the right of way rather than whether all things considered his driving was negligent. In choosing what questions to ask, the judge is deciding in advance that some acts can be alleged as negligent and that some cannot. The judge is also deciding that each act should be considered in isolation rather than in the context of other allegedly negligent acts.

Further, the judge strictly controls the order of deliberations.¹⁰⁰ The separate and distinct format generally requires that numerous questions be answered in order. Often, if a question is answered in a

97. See Dudnik, *supra* note 22, at 485-86 (suggesting that juries choose to make specific fact findings to avoid personal punishment through attainder process).

98. Statement of Mr. Justice Black and Mr. Justice Douglas on the Rules of Civil Procedure and the Proposed Amendments, 31 F.R.D. 617, 618-19 (1963).

99. Compare a generic question with a general definition of product defect—for example, "Do you find that the widget was defective?"—with a more specific approach—for example, "Do you find that the lack of a ZZ Device on the throttle made the widget defective?"

100. For a fuller example, see *supra* part II.

particular way, the jurors will also be instructed *not* to answer some or all of the remaining questions. Thus the judge controls to a much greater extent the timing and extent of the jury's decision making process.

The use of jury questions that ask only "historical fact" and leave the judge to apply legal categories would be the most drastic shift of all. To ask a jury only questions like "was the light red," "was the road slippery," "how much would it cost to add a safety valve," and the like would shift the balance of power even further toward the judge and away from the jury. Although jurors would still have a small role, and would still use their experience as members of the community in deciding fact questions, their opportunity to make value decisions would be almost completely eliminated.

It is also possible that common use of narrower questions would tend to make courts think of fact finding as a collection of discrete issues. This, in turn, may suggest to appellate courts more ways to remove certain issues from the jury by (re)defining them as questions of law rather than questions of fact. For example, in a tort case the courts may choose certain threshold questions of duty¹⁰¹ or severity of harm¹⁰² and decree that these are legal issues to be determined by the court. Because the law/fact distinction has tended to be used as a label that justifies a decision rather than as a disciplined thought process,¹⁰³ the appellate courts would face few obstacles in adopting such a practice. Thus a separate and distinct format practice might also indirectly shift even more power away from the jury.

Shifts in power between judge and jury are sometimes thought of as mere procedural devices. But like internal jury process, this, too, is a political decision. In deciding between judge and jury we are choosing to privilege one decision-maker over another.¹⁰⁴

IV. THE IMPACT OF CHARGE STRUCTURE ON PROCESS: "ACCURACY" AND "EFFICIENCY"

In addition to its political role, the jury is also an important actor in the judicial process. Advocates of the special verdict have argued that

101. See, e.g., *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 326 (Tex. 1993) (requiring "extreme risk" as a matter of law before duty exists).

102. See, e.g., *Twyman v. Twyman*, 855 S.W.2d 619, 626 n.21 (Tex. 1993) (defining existence of extreme and outrageous behavior as a question of law (citing Restatement (Second) Torts § 46, cmt. h (1965))).

103. Having converted an issue to a question of law, the jury will be removed from the decisionmaking process completely and the appellate court can review the trial court's decision de novo. This practice would therefore also cause a shift of power from the trial courts to the appellate courts.

104. At the time the Constitution was being debated, for example, the Antifederalists believed that judges would naturally favor litigants that were part of the ruling elite. See Alan Howard Scheiner, Note, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 152-53 (1991).

the narrower question formats will improve both the accuracy and the efficiency of the jury process. This part examines these claims.

A. *More Guided, More Accurate?*

Jurors are the ones who are supposed to determine evidentiary and ultimate fact: what happened, and what does it mean? Various philosophical schools have different views about what the jury is actually doing here. Some, which see historical fact as having a kind of verifiable and independent existence, see the jury's role as scientific: to reach a determination of the facts that matches as closely as possible that external reality. The jury then takes its understanding of factual events and applies certain legal concepts, defined by the judge, and reaches a verdict. Professor Wells describes this "impersonal" model of jury deliberation as "simply a matter of recognizing the case, selecting the appropriate major premise, and mechanically performing the syllogistic act of judgment."¹⁰⁵ For people who take this view, a case is accurately decided if it "is the result of employing an approved rule or principle."¹⁰⁶

Others see the jury's decisional process as more intuitive or contextual. Under this view, the kinds of general principles that determine the proper outcome of a case are not "universal rules that link factual antecedents to normative conclusions; they are simply generalizations of normative attitudes toward a particular context."¹⁰⁷ The jury uses its experience to reconcile conflicting testimony, apply its sense of community values to the legal principles, and reach a contextual judgment. The "accuracy" of the jury's verdict in this theory depends on the integrity of the jury's deliberative *process*. For either school of thought, the form of the jury charge has important implications for the "accuracy" of the jury's result.

These theories, unfortunately, operate in an empirical vacuum. There is little or no evidence regarding how "accurate" juries' verdicts are compared to some kind of outwardly verifiable reality.¹⁰⁸ More to

105. Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 Mich. L. Rev. 2348, 2378 (1990). For another analysis of the role of community standards in decisionmaking, see Jay Tidmarsh, *A Process Theory of Torts*, 51 Wash. & Lee L. Rev. 1313 (1994).

106. Wells, *supra* note 105, at 2382. Another way of explaining the function of the jury, under this view, is: "[F]irst, the jury determines the fact that defendant did *x*; second, the judge provides a rule such as '*x* gives rise to tort liability'; and third, the jury, possessing both a fact and a rule, mechanically draws the conclusion that the defendant is liable for damages." *Id.* at 2387.

107. *Id.* at 2379.

108. Anecdotal evidence exists of particular juries doing things that people regard as irrational, some of which is apocryphal and some of which is later shown to be perfectly rational. See, e.g., *Climbing on Board*, A.B.A. J., Aug. 1997, at 12 (describing apocryphal but oft-repeated story of "frivolous litigation"). No real or simulated studies exist, as far as I know, that are able to match jury verdicts against stipulated facts and legal conclusions.

the point, there is no evidence linking jury accuracy to any particular instruction format. We are therefore left with the need to theorize based on what we do know.

Despite the popular tendency to disparage juries, the empirical evidence that does exist indicates that juries do a good job at an inherently complex and difficult task. "[T]here is a mounting body of evidence suggesting that accounts of jury irrationality were greatly exaggerated."¹⁰⁹ One way in which researchers have tried to measure the accuracy of jury results is to compare jury verdicts to the decision a judge would have made in the same case. For example, the University of Chicago jury project found that in civil cases judges and juries agreed on liability in seventy-nine percent of the cases.¹¹⁰ This compares favorably with the rate of agreement among people making similarly complex decisions.¹¹¹ In addition, we can't assume that any difference between judge and jury reflects error on the jury's part. Some have attributed the disagreement that does exist more to "the

109. Galanter, *The Civil Jury*, *supra* note 6, at 206; see Valerie P. Hans & Neil Vidmar, *Judging the Jury* 49-71 (1986); Rita J. Simon, *The Jury: Its Role in American Society* 49-71 (1980); see also Clermont & Eisenberg, *supra* note 11, at 1151-52 (comparing judge and jury outcomes); Neil Vidmar, *The Unfair Criticism of Medical Malpractice Juries*, 76 *Judicature* 118, 124 (1992) ("In summary, aggregate empirical evidence drawn from multiple sources lends no support to claims that juries are consistently pro-plaintiff, incompetent, or deliver unjustifiably generous awards.").

110. See Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 *Va. L. Rev.* 1055, 1065 (1964).

111. Shari Diamond compiled for comparison a set of representative studies of consistency among judges faced with complex clinical judgments in individual cases where the decisionmaker had to "evaluate and combine incomplete or potentially unreliable information to reach a decision." See Galanter, *The Civil Jury*, *supra* note 6, at 215 n.73 (quoting Shari Seidman Diamond, *Order in the Court: Consistency in Criminal-Court Decisions*, in *Psychology and the Law* 119, 124-25 (C. James Scheirer & Barbara L. Hammonds eds., 1983)). She found the following:

Interjudge Consistency in Complex Human Judgments

Decision makers	Stimulus	Decision	Rate of agreement between 2 judges (%)
NSF versus NAS peer reviewers	150 grant proposals submitted to NSF	To fund or not to fund (half funded by NSF)	75
7 employment interviewers	10 job applicants	Ranked in top 5 or in bottom 5	70
4 experienced psychiatrists	153 patients interviewed twice, once by each of two psychiatrists	Psychosis, neurosis, character disorder	70
21-23 practicing physicians	3 patient-actors with presenting symptoms (Doctors could request further information and receive test results.)	Diagnosis: correct or incorrect Probability of agreement (both correct or both incorrect)	67,77,70 55,65,57
3576 judge-jury pairs	3576 jury trials	Guilty or not guilty	78
12 federal judges	460 presentence reports (at sentencing council)	Custody or no custody	80
8 federal judges	439 presentence reports (at sentencing council)	Custody or no custody	79

Id. (footnotes omitted).

jury's sense of equity" than to its relative competence.¹¹² Whenever the relevant legal standards require the jury to give content to general expressions of policy, the jury may be the superior decision-maker: "[T]he need to apply community standards makes a jury decision in a real sense more accurate than a decision by a judge."¹¹³ One commentator, reflecting on the lack of juries in personal injury cases in Britain, argued that the jury's award of damages would actually be more accurate:

The appreciation of pain and suffering, and the likely impact on an individual's life and his or her ability to earn a living, are not matters which judges are any more qualified to assess than is a member of the public applying his or her life experience. Some might argue that the experience of ordinary people in such an assessment is a great deal more relevant than that of judges.¹¹⁴

The question, then, is not whether a different form of jury charge would rescue a dysfunctional institution. Rather, it is whether a different format would make a fairly reliable decision-maker even better. Consider first the perspective of those who believe the jury to be attempting to accurately determine the nature and legal significance of past events by mechanically applying legal rules. We can think about increased accuracy in two ways: (1) whether a narrower charge will increase the agreement between judge and jury, assuming that the judge is more apt to be correct;¹¹⁵ or (2) whether a narrower charge will be less confusing, so that jurors are better able to understand and apply the law.

If the measure of jury accuracy is agreement with the trial judge, charge formats that give the judge more control of the content and order of deliberations may increase accuracy in that sense. If the judge can structure the charge in a way that prevents the jury from considering factors (for example, sympathy with a party) that the judge would not have considered, then that charge format may be able to increase judge/jury agreement.¹¹⁶ If the judge can structure the charge so that the law application process is removed from the jury, as in Professor Saltzburg's "did defendant run a red light" hypothetical, then the judge *will* have greater power over the ultimate case outcome

112. Kalven, *supra* note 110, at 1065-66.

113. Marcus, *supra* note 8, at 782 ("[T]welve 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." (quoting *Railroad Co. v. Stout*, 84 U.S. (17 Wall.) 657, 664 (1873))).

114. Peter Watson, *The Search for Justice—A Case for Reform to the Civil Justice System in Britain*, 2 ILSA J. Int'l & Comp. L. 453, 457 (1996).

115. This assumption, of course, is questionable. See *supra* notes 112-14 and accompanying text.

116. As noted *supra* notes 88-89 and accompanying text, separate and distinct format will make it far more difficult for juries who want a particular party to win, or who wish to reach a non-legal but "just" result, to answer the questions so as to achieve the outcome they desire.

and judge/jury agreement will increase.¹¹⁷ It seems odd, however, to require a jury for its uniquely democratic value, and then measure its accuracy by comparing it to the decisions of a judge.

Perhaps it is more helpful to look at the issue of jury confusion. A conscientious jury that does not understand how to read and apply its instructions is hampered in its ability to reach an accurate verdict. Are special verdicts by nature less confusing? Some commentators believe that the narrow, step-by-step nature of the special verdict is easier for jurors to deal with than the general verdict's long narrative explanation followed by a single question.¹¹⁸ This may or may not be true as applied to particular charges, but it seems unlikely that special verdicts as a class will be less confusing. This is true for a number of reasons.

First, there is no reason to believe that the language or structure of individual questions will be any clearer than that of the general charge.¹¹⁹ In fact, the need to word questions so as to correctly place the burden of proof and to avoid assuming controverted facts may actually tend to make the wording of some questions somewhat convoluted and harder to understand.¹²⁰

The claim for greater clarity, then, must be that it is the fractionalization itself that makes the charge more understandable by breaking a large decision down into smaller, ordered parts. There is some intuitive appeal to this idea. The claim is a problematic one, however. There are other ways to suggest a manageable *thought* process to jurors without breaking the jury's *answer* process into artificial segments.¹²¹ This also assumes that the questions themselves and their relation to each other will be clearer than the narrative. As noted

117. This decision, of course, would work a dramatic change in the role of the jury as we know it, but it would increase the judge's power to determine the outcome of a case tried to a jury.

118. See, e.g., Saltzburg, *supra* note 49, at 360 (stating special verdicts focus on facts and are easier for jurors to understand); Robert W. Stayton, *Texas' Approach to the Parker Ideal and Her Shortcomings*, 37 Tex. L. Rev. 845, 855 (1959) (stating special verdicts are less perplexing guides to juries).

119. Both can be written in ways that increase or decrease a jury's ability to understand them. Various improvements in word choice, sentence length, sentence structure, and syntax can improve juror understanding. See Elwork et al., *supra* note 9, at 165-69; Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 Hofstra L. Rev. 37, 46-52 (1993). In addition, comprehension can improve if each juror is given written copies of the charge, rather than merely reading the charge to the jury orally. See Reid Hastie et al., *Inside the Jury* 231 (1983). This, too, can be done with either a general or special charge.

120. For an example, see questions in the sample "separate and distinct" charge in *supra* part II. For a general discussion of the systemic forces that tend to cause judges to write jury instructions that are hard to understand, see Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. Rev. 77, 98-105 (1988).

121. See Christopher N. May, "What Do We Do Now?": *Helping Juries Apply the Instructions*, 28 Loy. L.A. L. Rev. 869, 884-86 (1995) (recommending specific sequential instructions).

above, that is not necessarily the case. More fundamentally, separate questions may try to force the jurors into an unnatural kind of pattern of deliberations that actually adds to the confusion.¹²²

There is a second reason to doubt that special verdicts will increase accuracy by decreasing confusion. As long as jurors determine "ultimate facts," they still need to understand and apply legal definitions and instructions. Those commentators who believe that special verdicts eliminate the need for the jury to be instructed in the law simply misunderstand the nature of that type of charge. For example, even Ward Cleaver's simple products liability case used as an example above will require the jury to be instructed as to the meaning of negligence, proximate cause, producing cause, defect, and other legal terms. These instructions are not made any simpler by virtue of being placed in a restricted factual context or by being included in a question. The empirical research on juror comprehension of instructions has tested these very legal definitions and shown that they can cause confusion.¹²³ The need for these definitions does not go away just because a special verdict is used.

Third, in cases in which evidence or legal theories overlap, special verdicts may decrease rather than increase accuracy. "Proponents of the special verdict pay insufficient deference to the interrelationship among trial issues such as negligence, causation and damages. No issue can be fairly or justly decided in a vacuum."¹²⁴ Although lawyers have provided separate labels for the concepts, in a real case questions such as whether defendant acted reasonably, whether its actions caused, in a direct enough way, foreseeable harm to the plaintiff, and how the plaintiff's own actions contributed to the whole incident are not truly separate questions from the standpoint of law application. None of these questions can be rationally decided in the absence of the others; forcing separate answers could hurt rather than help the jury's ability to have its verdict reflect its understanding of the facts and the parties' failure to act appropriately.¹²⁵

A fourth reason to disbelieve that special verdicts lead to improved clarity and accuracy is the experience of Texas, a state that has used the special verdict procedure for decades.¹²⁶ The case reporters are

122. See sources cited *supra* notes 76-86. The same problem occurs when the specific questions accompany a general verdict as permitted by Rule 49(b).

123. See, e.g., Charrow & Charrow, *supra* note 9, at 1311 (describing research on juror comprehension of instructions); Steele & Thornburg, *supra* note 120, at 88-92 (same).

124. Granholm & Richards, *supra* note 72, at 531.

125. Note, for example, that Pennington, Penrod, and Hastie's study reported that during jury deliberations "[a] substantial proportion of the discussion made simultaneous reference to both facts and legal issues." Hastie et al., *supra* note 119, at 97.

126. Federal experience would also tend to make one skeptical that either the Rule 49(a) special verdicts or the Rule 49(b) general verdict accompanied by interrogatories improves juror comprehension, and thereby improves accuracy. See, for exam-

full of cases in which jurors failed to understand their instructions, despite the most fractionalized system of jury submission in America.¹²⁷ In fact, the Texas Supreme Court explicitly acknowledged that juror understanding was not the point: “[I]t would be most unrealistic to expect that all members of the jury as ordinary laymen would thoroughly understand every portion of a complicated charge. . . . Most of our jury verdicts would be of little value” if juror misunderstanding were grounds for new trial.¹²⁸

In summary, there appears to be no evidence that special verdict formats will improve the accuracy of the jury decision-making process when accuracy is defined as the correspondence between the verdict and technical legal rules applied to objective historical fact. Special verdicts are subject to the same kind of linguistic difficulties as the general verdict, with some additional problems of their own. They do

ple, the cases cited for internally inconsistent verdicts in Martin, *supra* note 14, at 700-04 nn.56-72.

127. See, e.g., Stephens County Museum, Inc. v. Swenson, 517 S.W.2d 257, 260 (Tex. 1974) (jurors misunderstood judge's charge regarding "undue influence"); Compton v. Henrie, 364 S.W.2d 179, 183 (Tex. 1963) (juror confused reasonable doubt standard with preponderance of evidence standard); Martin v. United States Trust Co., 690 S.W.2d 300, 309 (Tex. App. 1985) (jurors misunderstood judge's charge regarding "undue influence"); Hoffman v. Deck Masters, Inc., 662 S.W.2d 438, 443 (Tex. App. 1983) (jurors misunderstood damage instruction); Cortez v. Medical Protective Co. of Fort Wayne, Ind., 560 S.W.2d 132, 135 (Tex. Civ. App. 1977) (jurors inferred "consent" in disregard of court's instructions); Norman v. First Bank & Trust, 557 S.W.2d 797, 803-04 (Tex. Civ. App. 1977) (juror stated his erroneous interpretation of court's charge to other juror); Coakley v. Crow, 457 S.W.2d 431, 435 (Tex. Civ. App. 1970) (jurors did not understand and wrongfully applied the definition of actual notice contained in court's charge). Because for a long time Texas permitted parties to introduce evidence of conversations in the jury room (as distinct from juror "mental processes"), there is a substantial body of case law demonstrating the jurors' misunderstanding of the jury charge. See Jack Pope, *The Mental Operations of Jurors*, 40 Tex. L. Rev. 849, 851-52 (1962). This, combined with the Texas special verdict practice, makes it a good source of empirical evidence regarding the impact of the special verdict. It must be noted, though, that Texas took special verdict practice to an extreme that is permitted but not required by Rule 49(a). Even today, when the practice has been substantially liberalized, it requires whole books to explain in detail what the questions should be like, what the instructions should be like, how to preserve error, what to do with omissions, what to do with apparent conflicts, and the like. See Hodges & Guy, *supra* note 35 (the successor to Gus M. Hodges, Special Issue Submission in Texas (1959), which was the practitioner's Bible in this inscrutable area for years).

128. *Whited v. Powell*, 285 S.W.2d 364, 367-68 (Tex. 1956). In *Whited*, the jury was asked "whether the defendant discovered that plaintiffs were in a position of peril within such time and distance that by the exercise of ordinary care and the use of all means at his hand consistent with the safety of himself, his passenger and his automobile, he [defendant] could have avoided the collision in question." *Id.* at 365. During deliberations one juror opined to the others that this question required a finding of deliberate misconduct: "We can't answer that 'Yes'; if we do it will be saying this boy is the same as a murderer. I won't vote to make a criminal of the boy." *Id.* Another juror, based upon the erroneous statement by the first juror, changed his vote. The Texas Supreme Court categorized this as "express misconstruction of the court's charge" but held that such misunderstanding is not grounds for new trial. *Id.* at 367.

not eliminate the problem of explaining complex legal concepts to lay jurors. And they may, by interfering with jurors' natural method of processing complicated information, actually decrease accuracy of results.

What if commentators with a different view of the jury's role are correct, and the jury's job is to make a holistic assessment of the way that community standards apply to the conflicting stories and interrelated events that are presented to the jury? Here the question of accuracy is not the ability to reconstruct some external reality but the ability to use the jurors' collective experience of life as members of the community to determine a just outcome:

Concepts such as negligence, foreseeability, prudence, due care, and the "reasonable person," are not simply state of nature questions. Rather, they involve a number of complex decisions about a variety of matters: who did what; interpretations of how human beings behave or should behave; what is reasonable to expect others to do or not do; and what motivations lead to what types of behavior. They also involve judgments about the consequences of deciding a case one way or the other—for example, who will be helped or harmed or what types of behavior will be encouraged or discouraged by certain outcomes.¹²⁹

If this is what the jury is doing, then charge format is still important. The general verdict allows the jury to consider the evidence and law as a whole. Other than explaining the applicable legal doctrines, the general verdict does not structurally emphasize certain theories or limit the jury's deliberations. Special verdicts, on the other hand, are specifically designed to focus and control the jury, to limit what can be considered, to isolate certain issues from other issues, and to control the sequence of deliberation. If reality is socially constructed and jurors arrive at their understanding by using their community experience, and if the application of many legal standards depends on the derivation and application of community standards, special verdicts seem likely to interfere with the process.¹³⁰ Therefore, they would make jury decision-making less accurate in this sense; the narrower the questions, the more obstacles, and the less "accurate" the outcome.¹³¹

129. Casper, *supra* note 74, at 450.

130. See Marcus, *supra* note 8, at 782 (stating that the application of laws that incorporate community standards require consideration and understanding of a wide variety of circumstances, including those giving rise to the out of court event that precipitates the litigation).

131. This "process" issue is necessarily related to the "political function" issue discussed above. A system of jury submission that increases the jury's power to decide how to decide naturally increases the power of the jury. By doing so it increases the power of lay people in the community as compared to the legal professionals. One might fear that this view of the jury system will result in unpredictable results. This will only be true if juries in a community tend to vary widely in their understanding of community standards. Even if it does increase uncertainty, "as normative proposi-

B. *More Narrow, More Efficient?*

Proponents of narrower jury instruction formats believe that the special verdict is more efficient. In other words, they claim that the special verdict saves time at both the trial and appellate levels. This section of the article examines whether special verdict formats are likely to result in decreased transaction costs.

1. Trial Court—Initial Trial

Narrower special verdicts could be more efficient at the trial court level if they either save time or decrease the need for re-trials. Some special verdict proponents make this claim.¹³² A careful look at the task of constructing and applying special verdicts, however, shows that this outcome is unlikely, both from the standpoint of the jury and the trial judge.

a. *The Jurors' Perspective*

From the jurors' point of view, the special verdict would be more efficient if it were easier to understand and therefore led to quicker deliberations. As discussed above, there is no reason to believe that this is true.¹³³ The special verdict format is not inherently clearer than the general verdict. On the contrary, a special verdict in a separate and distinct format may actually conflict with a jury's normal thought processes and be more difficult to understand. Thus, the special verdict is unlikely to lead to faster or more accurate verdicts than would a clearly drafted general verdict. Commentators in fact believe that the special verdict may actually be more difficult for the jury and more time consuming.¹³⁴

There is one circumstance in which a special verdict could save time at the trial level. If one clearly separable question could, if answered in a particular way, eliminate the need for any other questions to be considered, it could shorten the deliberations. For example, a defense of accord and satisfaction¹³⁵ might appropriately be submitted as a

tions, rationality and predictability are not the only goals of the civil justice system. The sense of justice that emerges from the community is also critical to a civil justice system that is likely to endure and produce outcomes acceptable to the community at large." Casper, *supra* note 74, at 451.

132. See Dudnik, *supra* note 22, at 491 (citing arguments made by special verdict proponents).

133. See *supra* notes 118-28 and accompanying text.

134. See Devitt et al., *supra* note 21, § 6.03 ("[T]he use of special verdicts is not a panacea for the defects of the general verdict."); Driver, *supra* note 23, at 24-25 ("Jurors seem to have more trouble reaching an agreement on special verdicts."). Note also that the general verdict accompanied by interrogatories by its very nature requires questions to be answered more than once, which seems likely to increase the time required for deliberations.

135. Accord and satisfaction is defined as "compromise and settlement." See Bryan A. Garner, *Dictionary of Modern Legal Usage* 15 (1995) ("An accord is an agreement to substitute for an existing debt or obligation some alternative form of discharging

separate question at the beginning of the charge. If the defense is factually separate from the other claims and defenses and has support in the evidence, a defense answer to this question might eliminate the need for the jury to answer the remaining questions.

Such a strategy, however, would be inadvisable for two reasons. First, there are few issues that should be selected for such prominent treatment. Most potentially dispositive issues will be affirmative defenses. They are likely to be factually intertwined with other issues, making their isolation unsuitable for accurate decision making.¹³⁶ The judge would also need to take care not to draw inappropriate attention to a particular issue by pulling it out of order and highlighting its impact.

Second, it might turn out to be *inefficient* when considered in light of both trial and appeal. Suppose the judge did instruct the jury to stop after finding accord and satisfaction without answering the other questions. If that question turns out to be improper for any reason—legally inapplicable, incorrectly worded, or insufficiently supported by the evidence—the entire case would have to be retried. If, however, the trial judge had instructed the jury to answer all the questions whatever their response to the accord and satisfaction question, a judgment could be entered based on the jury's other responses and a retrial would be unnecessary. Therefore, it would be unwise for trial courts to dismiss juries based on their answers to potentially dispositive introductory questions. Accordingly, the time saving is severely minimized.

b. *The Judge's Perspective*

From the trial judge's point of view, a special verdict would be more efficient if it were easier to draft or led to a greater number of judgments. This also seems unlikely. Drafting both general and special verdicts requires the trial judge to correctly identify and understand the legal theories involved in a case, the way in which those theories interact, and the relationship between the theories and the facts alleged. Both general and special verdicts require the judge to correctly define relevant legal terms, whether well established or cutting edge. Both general and special verdicts require the judge to decide whether the parties have met their burdens of production to send issues to the jury. Is there nevertheless something about the special verdict that makes it easier to draft?

No. On the contrary, the special verdict introduces several new kinds of technical issues into the jury charge process. First, drafting a

that debt; a satisfaction is the actual discharge of the debt by the substituted means. . . . Any claim . . . may be discharged by an accord and satisfaction.") (emphases omitted).

136. See *supra* notes 124-25 and accompanying text; see also Dudnik, *supra* note 22, at 495 n.50 (discussing interrelationship of jury's answers on different issues).

series of questions is at least as hard as drafting a narrative explanation of the law. It is likely to be harder because the judge must draft carefully in order to correctly place the burden of proof and to avoid assuming disputed facts. The judge in drafting a special verdict must also cope with the question of which definitions are necessary¹³⁷ and where they should be placed in relation to the questions. And at least at the federal level, there are no handy form books to use as an aid in drafting; the judge's only starting points would be partisan requested charges prepared by the parties.

Once the jury responds to the special verdict questions, a number of problems may arise which do not occur with the general verdict. First, multiple answers mean multiple chances for answers to conflict.¹³⁸ The trial judge must deal with this conflict and decide whether to ignore it (conflict immaterial) or send the case back to the jury (conflict material but fixable).¹³⁹ In some cases, the jury may not be able to resolve the conflict, or the existence of conflicting answers may not become clear until after the jury has been dismissed, and a new trial will be required. Second, the jury may omit certain answers.¹⁴⁰ The judge must decide whether the omissions are material and what to do about them.

All of these are new technical difficulties created by the special verdict format. If they bring to light confusion that always exists but is masked by the general verdict, the special verdict might allow a new opportunity for the judge to cure the jurors' confusion.¹⁴¹ If the new conflicts result from new confusion created by the special verdict format itself, they have made the jury deliberation process less rather than more efficient.¹⁴²

137. See, e.g., Hodges & Guy, *supra* note 35, §§ 17, 20, 24 (reviewing definitions of legal or technical terms, instructions that "tilt" or "nudge" jury, general considerations in the drafting and placement of jury instructions).

138. This is also true of the general verdict with interrogatories, the structure of which actually requires the jury to answer the same question multiple times and therefore maximizes the potential for answers which conflict internally. Other types of charges, absent inferential rebuttal questions, would ask each question once if properly drafted.

139. See John R. Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338, 350; see also Dudnik, *supra* note 22, at 511-13 (noting the intricate problems of reconciling answers).

140. Despite instructions to the contrary, juries do leave questions unanswered. See Hodges & Guy, *supra* note 35, § 122; Wright & Miller, *supra* note 14, § 2510.

141. In at least some jurisdictions, however, the judge clarifies at his peril, because the appellate court might reverse the case if it finds that the judge's further instructions were a comment on the weight of the evidence. For such a case, see *Teaney v. City of St. Joseph*, 548 S.W.2d 254, 255-56 (Mo. Ct. App. 1977).

142. Current case law provides some evidence that the federal courts already have problems dealing with the technical aspects of special verdicts, even when they are infrequently used. For example, federal courts are confused about the difference between a special verdict under Rule 49(a) and a general verdict with interrogatories under Rule 49(b). See Brown, *supra* note 139, at 339-40; Wright & Miller, *supra* note

2. Court of Appeals

We must also examine whether narrower special verdict format is more efficient at the court of appeals level. We should therefore consider whether the appeal of a judgment based on a special verdict would help conserve the resources of the appellate courts.¹⁴³ This could occur if the special verdict format isolated issues factually or legally, thereby allowing the reviewing court to limit its consideration of the record or of the legal issues raised by the parties.¹⁴⁴

In a lawsuit involving a single legal and factual theory, the special verdict would be virtually indistinguishable from the general verdict. It is in cases involving multiple claims and defenses that efficiency gains might theoretically exist. When one considers the entirety of the appellate decisionmaking process, however, the gains at the appellate level prove to be largely illusory.¹⁴⁵

One kind of error involving the charge is an error in the wording of the charge itself. This can occur either in the general verdict or special verdict format.¹⁴⁶ It is not likely to be either easier or harder to isolate those issues based on the number of questions asked of jurors. Nor will the question of whether an error was harmful be less complex. General verdict or special verdict, the court of appeals will need to look at the flawed portion of the charge in context to decide whether it had a tendency to confuse or mislead the jury with respect to the applicable principles of law.¹⁴⁷ An analysis of harmfulness will require, at minimum, the error to be considered in light of the charge as a whole,¹⁴⁸ whether the charge is constructed as a general verdict or special verdict. If a decision about harmfulness requires a review of the record,¹⁴⁹ the same amount of record will need to be reviewed whether the charge was general or special.

14, § 2501, at 151 n.1. Federal courts are also inconsistent in their treatment of conflicting answers and the requirements for preservation of error. *Id.* §§ 2508, 2510.

143. For information on appellate caseloads, see generally Administrative Office of the U.S. Courts, Federal Judicial Workload Statistics (1993) (providing statistics for federal courts); Conference of State Court Admins. et al., State Court Caseload Statistics, 1994 (1995) (providing statistics for state courts).

144. There might also be a time saving from the perspective of a decreased need to remand. Because this actually impacts the trial court, it is discussed in part IV.B.3, *infra*.

145. See Nordbye, *supra* note 29, at 684 (“[T]he history of [special verdict] practice in the [s]tates which have followed it [shows that] reversals and mistrials . . . appear to be fully as many as in trials where a general verdict is returned.”).

146. As discussed above, this may be even more likely in the more technical special verdict format.

147. See Wright & Miller, *supra* note 14, § 2558.

148. The court of appeals examines the error in the charge in light of the charge as a whole to determine whether there is reversible error. *See id.*

149. Occasionally, federal courts are willing to examine more than just the charge itself in order to determine whether the error was harmless. This could occur, for example, if the erroneous portion of the charge concerns an issue that played a very minor role at trial or if the evidence is overwhelmingly in favor of the verdict. *See id.*

Another kind of challenge on appeal focuses on the sufficiency of the evidence to support the jury's findings. There may be an allegation on appeal that one of the claims was supported by so little evidence that the jury's verdict was clearly erroneous. Appellate review of this type of claim requires the court to consider the evidence offered that is relevant to that issue. This, too, is true whether the jury charge is in broad or narrow format.

There is, however, a possibility that a special verdict might occasionally reduce appellate workload by eliminating an issue entirely. In a multiple theory case submitted to the jury with a general verdict, the jury's answer does not provide complete information as to the basis for its findings. For example, in a case in which plaintiff has three theories of recovery, a pro-plaintiff verdict tells us that the jury found that plaintiff proved at least one of her claims. The jury might have believed one, two, or all three of the claims; we just don't know. Suppose that one of the claims was not adequately supported in the evidence but the other two were, or that one claim was incorrectly stated but the other two were legally correct. With a general verdict, the court of appeals will not know whether the jury's verdict was based on the questionable theory. The court might therefore have to take the time to consider that issue on appeal.¹⁵⁰

With a special verdict, however, it is possible that the verdict form would demonstrate conclusively that the jury did not find for plaintiff on the flawed theory, or that such a finding was immaterial because the jury also found for plaintiff on an independent and error-free theory. If either of the latter situations exists, the problematic claim would not be raised on appeal because it would not have the capacity to result in reversal.¹⁵¹ This would result, therefore, in a time saving for the judges on the court of appeals.

Note, however, that this assumes that the theories are so unrelated that there can be an issue of law or evidentiary sufficiency that affects only one of them. This seems likely to happen only in situations in which multiple theories are based on quite different facts, or when one claim has a unique element that is neither legally nor factually related to the other theories (and the unique element is the problematic one). It is less likely to occur in a situation such as a product liability case in which plaintiff has factually-related claims based on different but overlapping legal theories.¹⁵²

150. See *infra* part IV.B.3 for a discussion of whether an error needs to be considered when other parts of the charge are legally correct and supported by sufficient evidence.

151. A variant on this situation would occur when multiple issues are raised by appellant but the court's disposition of some issues demonstrates the existence of an error-free theory that provides a ground for affirmance and makes the other issues immaterial.

152. For example, in a products liability case such as the Cleaver hypothetical, the same or similar facts will be relevant to the negligence claims, the strict liability

3. Trial Court—Necessity for Remand¹⁵³

Another possible efficiency gain could come in a decreased need for new trials following initial trial error. Proponents of the special verdict argue that the special verdict may demonstrate the harmlessness of certain trial errors and thereby reduce the need to remand cases for new trial.¹⁵⁴ The fragmented nature of the special verdict means that these scholars are correct in predicting the greater ability to isolate issues than with the general verdict. As noted above, this kind of analysis would be proper only when issues are truly separate, and not merely when it is possible to write a question that states an element as a separate issue.¹⁵⁵ The argument also assumes the need for remand in general verdict cases. This reflects a policy choice rather than an empirical necessity, and requires further examination.¹⁵⁶

In multiple-theory general verdict cases, an error that infects less than all of a party's theories leaves the appellate court faced with imperfect knowledge. The error may have affected the verdict; it may not have affected the verdict. The verdict may have been based on the flawed theory, or it may have been based on other parts of the case. By the time the error comes to light, the jury has been dismissed. Even if we could find the jurors and question them, the rules of evidence prohibit examining them about their deliberations.¹⁵⁷ The court of appeals is therefore forced to make a *policy* decision rather than an empirical one. The court must weigh its desire for a correct outcome against its concerns about the expense of retrial.

Automatic remand of the whole case is not the only procedural option. The court can reverse and remand all general verdicts containing an error, because there is the possibility that the error infected the verdict. It can affirm all cases in which there remains at least one theory that is correctly stated and supported with sufficient evidence, because that error-free theory could support a verdict. Or it could do

claims, and the breach of warranty claim. Similarly, the legal concepts of breach of duty in the negligence claim; the comparison of risk and utility in the strict liability claim; and the warranty question of whether a product was fit for the ordinary purpose for which that product is used are all functionally related. It seems unlikely in such a situation that a problematic issue will uniquely affect one claim.

153. I am indebted to my colleague Bill Dorsaneo for raising and discussing with me the issue of appellate disposition of partially flawed jury cases, and for sharing with me his case file on standard of review. See William V. Dorsaneo, III, *Broad-Form Submission of Jury Questions and the Standard of Review*, 46 SMU L. Rev. 601 (1992).

154. See Brown, *supra* note 139, at 341-42; Wright, *supra* note 19, at 202.

155. See *supra* Part IV.B.2.

156. This also leaves aside for now the question of weighing an efficiency gain from fewer remands against the other policy considerations involved in decisions about the jury charge.

157. Fed. R. Evid. 606(b). Studies have also shown that juror accounts of their own behavior are not completely reliable. See Robert G. Nieland, *Pattern Jury Instructions: A Critical Look at a Modern Movement to Improve the Jury System* 24-25 (1979).

something in between. If efficiency is our concern, we can reduce the number of remands by changing the standard of review, whatever the form of the charge. Once this decision has been made, it is only eliminating some of the remands that remain that will allow verdict format to create additional efficiency gains.

The problem is best considered from the standpoint of the trial judge who is about to make a decision about verdict format. The judge will need to ask herself whether that particular case is the type in which the special verdict has a strong potential for generating remand-related time saving. In order to consider this problem concretely, assume a lawsuit in which plaintiff has three claims: A, B, and C. Assume further that all three claims were submitted to the jury in general verdict format and that the jury found for plaintiff. We will examine various possible flaws in Claim B¹⁵⁸ and consider whether error is likely to require a remand of the entire case.

First, suppose that the charge misstates the law creating Claim B in a significant way, either by erroneously explaining established law or by including a "cutting edge" claim that the court of appeals rejects. Claims A and C are correctly explained and all claims are supported by sufficient evidence, although the record would support a verdict for either plaintiff or defendant. Should the court of appeals reverse and remand? It is at least possible that the jury relied only on the misstated Claim B in rendering its verdict. Because the jurors are lay people, we have no reason to believe that they had the capacity to correct the judge's misstatement of the law and they would in any case have been instructed to follow the court's explanations of the law. Further, the jurors will have been presented with evidence supporting this flawed claim. There is, therefore, nothing in the record to minimize the likelihood that the jurors relied on Claim B. The risk that the error harmed the defendant may thus be too great to ignore, and a remand of the whole case may be required.¹⁵⁹

Under these circumstances, a broad form special verdict in which Claims A, B, and C are submitted to the jury separately¹⁶⁰ would be more efficient. If the jury does not find for plaintiff on Claim B, the issue will not even be raised on appeal. If the jury found for plaintiff on Claim B, but also found for plaintiff on flawless Claim A and/or Claim C, the court of appeals can affirm the case because the error in Claim B will be harmless. In either case, a remand will be avoided

158. Assume further that the identified flaw in Claim B is the only error alleged.

159. On the other hand, the court of appeals could value efficiency more highly even in general verdict cases. It might decide that as long as an error-free theory supporting the verdict can be traced through the pleadings, evidence, and jury charge, the case should be affirmed. A court system taking this position would affirm the case with legally flawed Claim B, and the special verdict would not create efficiency gains. Reversal would be required only when harmful error existed as to each theory that could support the verdict.

160. See, for example, the sample charge, *supra* part II.

because separate submission of the flawed claim demonstrates that the legal error did not play a part in the jury's verdict. In a system with this attitude about remand, a multi-theory case with a claim known to be problematic creates possible efficiency gains from the use of a special verdict.

What about a multiple-theory case with a different type of error? Suppose the problem with Claim B is the sufficiency of the evidence to support the jury's pro-plaintiff verdict. Now we have a situation in which the law is correctly explained in the charge, there is sufficient evidence to support the verdict on Claims A and C, but insufficient evidence for Claim B. The general verdict still does not tell us whether the jury relied on this flawed claim in finding for plaintiff. Here, however, it seems reasonable to assume that a jury following its instructions was more likely than not to have based its verdict on Claim A or Claim C. The jury was correctly instructed on its duty to weigh evidence in reaching a verdict and correctly instructed on the law. Why assume that the jury based its decision only on a claim that was so weak that the court of appeals rejects it? If the court of appeals finds that Claim B should not even have been submitted to the jury (that is, a judgment as a matter of law would have been proper), it seems unlikely that the jury based its decision on the evidence-free claim rather than on the adequately supported Claims A and C. If the court of appeals finds that while plaintiff met its burden of production on Claim B a jury verdict for plaintiff based on Claim B would be clearly erroneous, it still seems more probable that the verdict was based on the claims with solid evidentiary support. In this situation of insufficient evidence for one of multiple claims, then, an efficiency-maximizing court of appeals could choose to affirm rather than reverse. There would then be no efficiency gain in terms of remand from the special verdict format.

On the other hand, the court of appeals might weigh the mere possibility of harm more strongly and reverse and remand even in this situation. This is still a policy decision, because we still do not *know* whether the jury relied on Claim B. If the policy is to reverse general verdict cases when any error is found, the broad-form special verdict would again allow an efficiency gain if the jury's separate answers on Claims A, B, and C demonstrated that Claim B was not necessary to support the judgment.

Real cases, of course, are more complex than these examples. Appellants rarely urge only a single error, and challenged claims are rarely conceded to have only a single flaw. Nevertheless, we can learn something from the examples about the universe of cases with separable claims. First, it is only if the court of appeals adopts a policy of remanding all cases, no matter how unlikely (yet possible) that the error affected the outcome, that special verdicts work an across-the-board efficiency gain. Second, the potential efficiency gain is most

likely to occur in cases in which a legal theory is in such a state of *ex ante* uncertainty that there is a substantial probability of error. Legal errors, more than evidentiary problems, are able to cause harm to the losing litigant and are therefore more likely to require remand. Third, when there exists a potential efficiency gain, a broad form question for each claim and its associated defenses is narrow enough to avoid unnecessary remand.

The various possibilities for appellate standard of review are not mere academic fantasies. In the federal courts alone, several different approaches exist. Furthermore, state systems also treat the question differently. For example, the United States Supreme Court held in an antitrust case that when a general verdict is returned and one of the multiple theories submitted to the jury is legally erroneous, reversal is required.¹⁶¹ In a more recent criminal case, however, the Court distinguished between legal and factual errors in a multiple theory case, upholding a general verdict when one of the possible bases of conviction was supported by inadequate evidence.¹⁶²

The lower federal courts also follow divergent rules, sometimes without realizing it. Some circuits state a general rule, without qualification, that when one of two or more issues submitted to the jury was submitted erroneously, a general verdict cannot stand because it cannot be determined whether the jury relied on the improper ground.¹⁶³ These cases presume harm. Other cases use various harmless error analyses to determine whether an error in one of multiple claims undermines a general verdict. These cases tend to make harm a rebuttable presumption, requiring reversal unless the appellate court can be "reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it."¹⁶⁴ The Ninth Circuit uses a harm-

161. See *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962).

162. See *Griffin v. United States*, 502 U.S. 46, 59 (1991) ("Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors *are* well equipped to analyze the evidence.") (citations omitted).

163. See *Bone v. Refco, Inc.*, 774 F.2d 235, 242 (8th Cir. 1985); *Neubauer v. City of McAllen*, 766 F.2d 1567, 1575 (5th Cir. 1985); *Collis v. Ashland Oil and Ref. Co.*, 722 F.2d 625, 627 (10th Cir. 1983); *Avins v. White*, 627 F.2d 637, 646 (3d Cir. 1980).

164. *Asbill v. Housing Auth. of Choctaw Nation of Okla.*, 726 F.2d 1499, 1504 (10th Cir. 1984) (quoting *E.I. du Pont de Nemours & Co. v. Berkley & Co.*, 620 F.2d 1247, 1258 (8th Cir. 1980)); see also *Jordan v. Paccar, Inc.*, 37 F.3d 1181 (6th Cir. 1994) (holding harmless an error in explaining law where directed verdict would have been proper); *Kirschner v. Broadhead*, 671 F.2d 1034, 1040 (7th Cir. 1982) (stating it is prejudicial error for the court to give instructions unsupported by evidence unless the record shows error clearly harmless); *Collum v. Butler*, 421 F.2d 1257, 1260 (7th Cir. 1970) (examining entire record, including opening statements, evidence, and closing arguments and concluding that "[t]o permit . . . issues which occupied positions of . . . relative insignificance in the trial to be treated now as so important as to make their submission to the jury prejudicial would not serve the interest of justice").

less error analysis which does not seem to include a presumption of harm. That court considers that it has "discretion" to affirm a general verdict if one theory is correctly stated and supported by the evidence:

In deciding whether to exercise this discretion, the reviewing court should determine the potential for confusion of the jury which may have resulted from an erroneous submission of a particular claim or cause of action, whether privileges or defenses of the losing party apply to the count upon which the verdict is being sustained so that they would have been considered by the jury with reference to the count, the strength of the evidence supporting the count being relied upon to sustain the verdict, and the extent to which the same disputed issues of fact apply to one or more of the theories in question.¹⁶⁵

Later Ninth Circuit cases seem to distinguish between legal and factual errors.¹⁶⁶ At least some Seventh Circuit cases have upheld partially-flawed general verdicts as long as one theory remains that will support the general verdict, apparently applying a presumption that the jury verdict is based on the correctly stated and supported theories.¹⁶⁷

In diversity cases, the circuits are also split as to whether they should follow federal or state standards regarding the standard of review in these cases. The Fourth, Fifth, Seventh, Ninth, and Tenth Circuits have held that federal law controls even in diversity cases, while the Second, Sixth, and Eighth Circuits believe that *Erie* requires them to follow state law.¹⁶⁸ The states, in turn, often follow the so-called "two-issue rule." Under this standard of review, if at least one of the theories submitted to the jury in the general verdict was properly submitted, the case must be affirmed regardless of errors in other included theories.¹⁶⁹

165. *Traver v. Meshriy*, 627 F.2d 934, 938-39 (9th Cir. 1980).

166. *See Syufy Enters. v. American Multicinema, Inc.*, 793 F.2d 990, 1002 (9th Cir. 1986) (recognizing but not resolving difference between law and fact); *Brocklesby v. United States*, 767 F.2d 1288, 1294 (9th Cir. 1985) (stating that judgment must be reversed if any theory is legally defective).

167. *See McGrath v. Zenith Radio Corp.*, 651 F.2d 458, 464 (7th Cir. 1981) (stating that, to win an appeal, defendant must show that none of plaintiff's theories would support a judgment); *Cross v. Ryan*, 124 F.2d 883 (7th Cir. 1941) ("[I]f there is substantial evidence to sustain any one count in favor of each plaintiff, the general verdict must be upheld.").

168. *See* Walter W. Jones, Jr., Annotation, *Sufficiency of Evidence as Question of Federal or State Law in Diversity Action*, 10 A.L.R. Fed. 451 (1996).

169. The two-issue rule has been followed in at least the following cases: *Larriva v. Widmer*, 415 P.2d 424 (Ariz. 1966); *Berger v. Southern Pac. Co.*, 300 P.2d 170 (Cal. Dist. Ct. App. 1956); *Knight Realty Co. v. Caserta*, 10 A.2d 597 (Conn. 1939); *Colonial Stores, Inc. v. Scarbrough*, 355 So. 2d 1181, 1185-86 (Fla. 1977); *Olson v. Kelly Coal Co.*, 86 N.E. 88 (Ill. 1908); *Harper v. Henry*, 169 N.E.2d 20 (Ohio App. 1959); *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 336 S.E.2d 472, 473-74 (S.C. 1985); *Tennessee Cent. Ry. Co. v. Umenstetter*, 291 S.W. 452 (Tenn. 1927); *Barson v. E.R. Squibb & Sons*, 682 P.2d 832 (Utah 1984); *Keller v. Hartman*, 333 S.E.2d 89 (W. Va. 1985). The application of the rule sometimes depends on whether appellant has

From the standpoint of the trial judge deciding how to draft a jury charge, there are a limited number of situations in which, thinking only of the possibility of avoiding unnecessary remand, she might choose broad form special verdict questions rather than the general verdict format. These situations would occur only when: (1) the jurisdiction's appellate courts have adopted a standard of review under which the predictable error would cause a general verdict to be reversed; and (2) multiple claims are genuinely separable in the sense of involving little or no overlap of relevant facts and legal concepts so that the problem can be properly isolated. This is most likely to occur when the law regarding one of the multiple claims is unclear and, therefore, more vulnerable to reversal. If the court of appeals also reverses multiple-theory cases in which one claim lacks evidentiary support, the trial judge would also decrease the probability of remand by using a special verdict format in cases in which one of the claims has very weak evidentiary support. If, on the other hand, the jurisdiction uses the two-issue rule or otherwise affirms partially-correct general verdicts, there is no efficiency gain to be had from the special verdict format.

Finally, note that in all of these examples there is something of a shift in workload going on; the efficiency gains must be offset to some degree by increased time and effort in other parts of the process. The burden of identifying and correcting errors moves back and forth between the trial court and the court of appeals.¹⁷⁰ For example, a standard of review in which the court of appeals examines only the language of the charge and then reverses for any error requires comparatively little time from the appellate judges. They must read the charge and read the law, but they need not undertake the time-consuming task of examining the trial record. The trial court, on the other hand, will bear the burden of the re-trial. Conversely, a standard of review that requires the court of appeals to search the entire trial record to determine which theories are strongly supported and whether harm is likely will consume considerably more appellate time. The trial court, though, may be spared the time and attention needed to re-try the case.¹⁷¹

preserved error by requesting a special rather than general verdict. *See Colonial Stores*, 355 So. 2d at 1186.

170. Changes in standard of review can also shift power between the trial courts and courts of appeals. *See Louis*, *supra* note 51, at 993-97. If changes in verdict format change the types of issues the court of appeals is willing to review, that, too, will shift control between trial and appellate courts.

171. To the extent that it takes more time to draft a charge in special verdict format than to draft a general charge, the trial court also loses some efficiency from the special verdict process. This loss must be offset against the potential but uncertain efficiency gain in avoiding remand.

V. THE IMPACT OF CHARGE FORMAT ON PROCEDURAL ADVANTAGE

In theory, court procedure merely provides a neutral setting in which the substantive claims of the parties are displayed. Procedure is not supposed to affect the outcome of a case. It is nevertheless true that procedural rules can confer advantages and disadvantages on the litigants. This becomes particularly disturbing when a procedural rule operates to confer predictable benefits on particular types of litigants and thus actually increases the likelihood that those favored litigants will prevail. This part examines whether jury charge format is apt to have an uneven impact on the parties.

Inherited trial lawyer wisdom holds that general verdicts favor plaintiffs while narrower question formats favor defendants. This belief flows from the stereotype of the jury as a sucker for an emotional argument.¹⁷² It is said that all the plaintiff's lawyer with a general charge need do is elicit the sympathy of the jurors; law and evidence go out the window.

Empirical research, too, supports the theory that splitting claims into multiple questions tends to favor defendants while unitary treatment favors plaintiffs. In an experiment involving actual bifurcation of trials, Professors Borden and Horowitz found that unitary trial conditions resulted in significantly more liability verdicts against the defendant.¹⁷³ The differences between general and special verdicts might easily follow the same pattern.

It is true, as noted above, that the general verdict format makes it simpler for a jury that wants to consciously nullify the law to reach the result it wants.¹⁷⁴ There is, however, no empirical evidence that juries tend to operate that way or that such nullification would favor the plaintiff.¹⁷⁵ In the current climate of distrust of "frivolous lawsuits" and increasing insurance premiums, the opposite may be true.¹⁷⁶ In any case, the impact of charge format on party advantage is probably much more subtle.

172. *Skidmore v. Baltimore & Ohio R.R. Co.*, 167 F.2d 54, 61 (2d Cir. 1948) ("The general verdict enhances, to the maximum, the power of appeals to the biases and prejudices of the jurors, and usually converts into a futile ritual the use of stock phrases about dispassionateness almost always included in judges' charges.").

173. Borden & Horowitz, *supra* note 86, at 25-27.

174. *See supra* notes 88-91 and accompanying text.

175. The recent study by Professors Clermont and Eisenberg, for example, shows judges to be more pro-plaintiff than juries in certain classes of cases. *See Clermont & Eisenberg, supra* note 11, at 1126.

176. *See Developments in the Law: The Civil Jury*, 110 Harv. L. Rev. 1408, 1427 n.39 (1997) (quoting Edward Felsenthal, *Juries Display Less Sympathy in Injury Claims*, Wall St. J., Mar. 21, 1994, at B1 (discussing a study demonstrating that civil juries have become less sympathetic to plaintiffs since the 1980s: "Some evidence exists to suggest that 'powerful and deep-pocketed advocates of reform have spread their message so successfully in the media that juries have changed their behavior.'")).

There are several ways in which a narrower charge format, especially one in "separate and distinct" form, favors defendants over plaintiffs.¹⁷⁷ First, narrower questions increase the burden of achieving unanimity. Consider the sample charges provided in part II. For a plaintiff to prevail on the merits in a case submitted by general charge, that plaintiff must convince the requisite majority of jurors to find for plaintiff on one question. They need not all agree on the legal theory; they need not agree on the factual theory. They simply must agree that defendant breached some duty to plaintiff. The jury needs neither legal nor factual unanimity on a narrower theory, and only a single answer is needed to support plaintiff's judgment.¹⁷⁸

Note what happens as the judge moves toward a narrower and narrower charge. In "broad form" special verdict format, the plaintiff must convince the requisite majority of jurors to agree on the same legal theory to win. They must all think that defendant was negligent, or that it breached a warranty, or whatever, before plaintiff will prevail. Thus, plaintiff's job has gotten harder. Now consider the "separate and distinct" format. Each cause of action is further subdivided into factual theories, and each factual theory is divided into components based on the elements of the legal theory. Plaintiff's job is harder in two ways. First, plaintiff can only win by convincing the jurors to agree to a particular atomized factual incarnation of the cause of action. This is much more difficult even than agreeing on "negligence" as opposed to "warranty." Second, a "no" answer on any element eliminates the cause of action; plaintiff needs all "yes" answers while defendant needs only one "no."¹⁷⁹ If inferential rebuttal issues are submitted, plaintiff bears the additional burden of having to prove parts of the cause of action more than once.

The complexity of the special verdict also works against the party with the burden of proof and the party seeking to change the status quo, usually the plaintiff. Until a judgment can be entered, there will be no order to pay. The longer a resolution can be delayed, the greater the possibility that memories will fade and the burden of proof become insuperable. Even procedures that lead to mistrials or new trials therefore, by acting to delay a final judgment tend to benefit defendants. Procedures that tend to require the expense of a retrial

177. It is more accurate to say that it disfavors the party with the burden of proof, or the party who seeks to disturb the status quo. Stated conversely, the general verdict favors the party with the burden of proof.

178. Hodges & Guy, *supra* note 35, § 36. There is also, however, a disadvantage to the plaintiff because the plaintiff has only a single chance to win. One defendant answer completely eliminates plaintiff's case. The fact that the burden of proof rests with plaintiff, so that defendant can prevail without proving anything, leaves the general verdict advantage a qualified one.

179. Granholm & Richards, *supra* note 72, at 532; see Norman J. Wiener, *Simple Lessons from a Complex Case*, Litig., Spring 1986, at 14, 16 ("For defendants, there is another, less noble, but important, reason for using a special-verdict: It can give a defendant a lot of chances to win.").

will also tend to benefit institutional defendants and disadvantage one-shot litigant plaintiffs.¹⁸⁰ Special verdicts, including the general verdict with interrogatories, have the ability to work this way. The very existence of multiple questions with multiple answer lines increases the likelihood of mistrials and of conflicting answers. Both will prevent the entry of judgment and postpone the day of reckoning. That kind of delay hurts the plaintiff. Further, if it is true that defense lawyers as a group are apt to be better prepared to take advantage of legal complexities,¹⁸¹ then the very complexity of the special verdict will also tend to help defendants who can better preserve error and otherwise deal with charge related issues.

There are other aspects of the special verdict format that have the ability to benefit defendants, but whether that benefit materializes depends on the court's choices within the special verdict format. For example, the structure of the special verdict creates the potential for greater impact of instructions and definitions. The comparative impact here, if any, depends on the trial court's implementation of the special verdict scheme. It is already true that lawyers try to get the court to define legal terms in a way that is biased in favor of their clients.¹⁸² In special verdict formats the stakes are higher, as both sides strive to achieve an aggregation of instructions that "nudge" the jury toward their side.¹⁸³ These instructions are potentially more powerful in swaying the jury because they tend to be placed immediately before or after the question in which the legal concept is used. Thus, the special verdict format gives the trial court the ability to grant favor, by wording or by placement, to one side rather than the other. This is not an inevitable result of special verdict format. Judges may achieve complete evenhandedness. But the potential for the choice

180. See Thomas W. Church, Jr. et al., *Pretrial Delay: A Review and Bibliography* 12 (1978) (asserting that civil defendants benefit from delay); Paul R.J. Connolly & Sandra Smith, *The Litigant's Perspective on Delay: Waiting for the Dough*, 8 Just. Sys. J. 271, 276 (1983) (suggesting that plaintiffs are more likely to suffer from financial and emotional pressure during pendency of lawsuit).

181. Institutional defendants and their insurers, at least, are more apt to be repeat litigants and to employ lawyers experienced in dealing with the types of issues involved in the litigation. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc'y Rev. 95, 97, 114-19 (1974) (describing advantages that those who are repeatedly involved in litigation enjoy over the occasional participant); Kenneth W. Graham, Jr., *The Persistence of Progressive Proceduralism*, 61 Tex. L. Rev. 929, 939 (1983) (reviewing Julius Byron Levine, *Discovery: A Comparison Between English and American Civil Discovery Law with Reform Proposals* (1982)) ("[I]ncreasing [procedural] complexity . . . makes it much more likely that the outcome of the case will be determined by the relative skills of the lawyers in manipulating the rules. . . .").

182. See, e.g., Baldwin et al., *supra* note 43, § 1.02[4] (explaining that suggested instructions come in two versions: "plaintiff's instruction" and "defendant's instruction" covering the same legal concept).

183. See generally Hodges & Guy, *supra* note 35, §§ 19, 20 (instructions couched in terms of victory or defeat; instructions that "tilt" or "nudge").

and placement of instructions to influence the jury is stronger, and the federal judge's decision is unlikely to be reversed as an abuse of discretion.

In addition, the court can choose to confer advantage by selecting a single question (generally an affirmative defense), placing it at the beginning of the charge, and conditioning the jury's ability to reach the remainder of the questions on a particular answer to that first question. In other words, unless the jury answers that first question in a certain way, the jury will answer no further questions. One commentator advised defense lawyers to take advantage of this possibility: "When using a special-verdict form, pay careful attention to the organization and number of questions. A defendant will want some of the earliest inquiries to be knockout questions: If the jury can answer 'no' to the question, then it need not proceed to any others."¹⁸⁴ The existence of pro-plaintiff answers, even if not technically material, could "produce[] a less favorable [defense] setting for appeals and postjudgment motions. And it might [cause] later battles over the collateral estoppel effect of the verdict."¹⁸⁵ Empirical research supports the value of the parties' struggles over the order of questions. Professors Borden and Horowitz discovered that the order in which issues were submitted to the jury affects the outcome, so that a charge structure that lets a judge control the order of the jury's deliberations may easily have an effect on outcome in a predictable way.¹⁸⁶

A third implementation-dependent power shift could arise at an appellate level. It is also possible, though not necessary, that using narrower questions would encourage appellate courts to intervene more often in the fact-finding process and thus shift power from juries and trial judges to appellate judges.¹⁸⁷ With certain adjustments to its own standard of review and briefing rules,¹⁸⁸ the existence of particularized findings of fact would make it easier for the appellate court to examine the evidentiary support for a narrow issue of fact without having to review the entire record. The court could also control the extent of remand: retry the particular issue, or retry the entire case. This kind of review would move more control of fact-finding to the

184. Wiener, *supra* note 179, at 16.

185. *Id.*

186. See Borden & Horowitz, *supra* note 86, at 26. Similarly, singling out particular questions to include as "interrogatories" accompanying a general verdict can highlight particular theories.

187. Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 Wis. L. Rev. 631, 642 (acknowledging that appellate control of jury instructions increases control over trial results).

188. For example, the court could require the parties to identify all parts of the record relevant to fact issue and separately reproduce those parts, thus reducing the burden of reviewing the trial court record. It could also adopt a standard of review that allows harm to be analyzed issue by issue, also facilitating review of particular issues. The standard of review is the primary determinant of the allocation of power between trial and appellate courts. See Louis, *supra* note 51, at 997.

appellate level and thus is a power shift in itself. If, in a particular jurisdiction, there were a difference between trial and appellate courts in terms of their tendency to favor certain parties,¹⁸⁹ it could create advantages or disadvantages for certain types of litigants.

It appears, then, that conventional wisdom may be correct, although for more complicated reasons than those generally assumed. As a general rule, broader question formats will tend to favor plaintiffs and narrower question formats will tend to favor defendants merely because of the nature of the structural differences and the existence of the burden of proof. There is no neutral position with respect to breadth and number of questions. In addition, narrower question formats create greater possibilities for favoring particular parties, especially defendants, should courts choose to do so. Under current law, these kinds of subtle advantages and disadvantages will be within the discretion of the trial court and not, therefore, a source of reversible error.

VI. USING THE CHARGE TO EMPOWER THE JURY

The jury is an institution with constitutional significance. Its operation implicates both political and process values. The form of the jury's instructions, because it controls the process by which the jury reaches its verdict, has an important effect on the jury's political and process roles. A meta-theory about proper jury instruction format, therefore, must be founded on principles that maximize the jury's ability to fulfill both of those roles.

This article has reviewed the interaction between the form of instructions and the values underlying the jury's function. It has demonstrated that it is the general verdict that best allows the jury to do its job. The general verdict is the best promoter of the jury's political function, enabling it to infuse its decisionmaking with community values. It is also the most likely to lead to accurate verdicts, because it maximizes the jury's ability to process and analyze the complex evidence and legal concepts before it. Even efficiency concerns should lead us to prefer the general verdict in most cases.

We also know that there are some things we do not want to do with instruction format. The instructions should not be drafted in badly organized legal jargon. The jury cannot be empowered by confusing it. The courts should also refuse to employ narrow questions, whether in "separate and distinct" law application format, narrow questions of historical fact, or questions framed as variables in a mathematical formula. All improperly interfere with the jury's political role and its ability to reach an accurate verdict. They are also apt to decrease, rather than increase, the efficiency of the jury process.

189. *Id.* at 1010 (stating juries are "regarded as more 'liberal' or responsive to the needs of certain constituencies than are appellate judges").

Like Rule 49(a) special verdicts, narrower questions accompanying a general verdict, as allowed by Rule 49(b), improperly interfere with the jury's thought process, thus impeding the jury's political and process functions. Because it by definition requires overlapping answers, this format also multiplies the possibility of conflicting answers, decreasing jury efficiency. By highlighting certain questions as more important, it can also confer procedural benefit on one of the parties.¹⁹⁰ The point of jury instructions is not to test the jury, or confuse it, or to highlight favored claims and defenses. It is to help the jury to use holistic decision-making processes and community values in assessing the evidence and understanding how the law applies to the events leading to the lawsuit.¹⁹¹

There may be a very limited number of situations in which the jury is best empowered by choosing a broad form instruction format¹⁹² rather than the pure general verdict because the existence of separate answers helps to preserve the effect of its verdict. This exception arises in cases involving *ex ante* likelihood of reversal on appeal based on unsettled substantive law, a pro-reversal standard of review, and a request at the trial level to use a special verdict format. In a case involving multiple claims and in which the law underlying one of those claims is unclear, the trial judge submitting a case by general charge runs the risk that a wrong choice on the unclear claim can undermine the entire verdict if the case is reversed on appeal.¹⁹³ Even though the jury may not have based all or part of its decision on the erroneously explained claim, the court of appeals will likely reverse. If, however, the judge uses broad form submission of the unsettled claim, separating it from the remaining claims, the court of appeals can deal with that portion of the jury's verdict separately and the jury's decision on the remainder of the case remains untainted.¹⁹⁴ There may even be situations in which there are two identifiable possibilities for the content of the unsettled claim, one of which is likely to be correct. In

190. See Wright & Miller, *supra* note 14, § 2511 (stating that the use of a general verdict with interrogatories can spotlight the more important issues and tests the general verdict); see also Brown, *supra* note 139, at 339-40 ("Rule 49(b) offers . . . nothing but trouble because it seeks to meld a general verdict and special answers with the high likelihood of conflict which extinguishes both.").

191. Thus, whatever the format chosen, the court should use its discretion to give the jury a written copy of the charge. See Hastie et al., *supra* note 119, at 231 (explaining how providing jurors with a written copy of the court's instructions aids jury comprehension and understanding); Wright & Miller, *supra* note 14, § 2555 (noting that the judge has discretion).

192. See *supra* Part II (providing sample charges in the hypothetical *Cleaver* case). Remember that "broad form" is a term of art for omnibus, but narrower, questions—generally one question per legal theory—and does not mean the same as "general verdict."

193. See *supra* notes 159-60 and accompanying text.

194. The use of broad form rather than separate and distinct questions limits the damage to the jury's political and process functions while accommodating the need for more identifiable findings.

such a case, the judge may be able to submit each possibility as a broad form question (with appropriate explanations to the jury), and whichever way the court of appeals rules will enable a judgment to be entered based on that jury's verdict.¹⁹⁵

What about the effect of substantive law more generally? Our understanding of the purposes underlying substantive law already affects our beliefs about the *content* of jury instructions.¹⁹⁶ Should the purposes underlying substantive law also affect the *format* of those instructions? In complex multi-party cases, it is already likely to require at least separate answer lines for each party. Substantive law may also require separate questions to be answered on issues such as comparative fault or contribution and indemnity. Beyond that, what role should the substantive law play in deciding what form the instructions should take?

While I believe that the general verdict should be preferred in any case, it is particularly imperative that it be used in cases in which the substantive law explicitly includes issues of public values, issues which will ask the jury to decide how the community expects a person to behave. This would include not only issues of constitutional law, but also issues such as reasonableness of conduct. Whether a case involves driving a car, manufacturing a product, negotiating a contract, investigating an insurance claim, arresting a suspected criminal, expanding a business' market share, or marketing an investment, the jury's decision requires it to give content to community standards and to apply those standards to the facts as it finds them. These are the kinds of issues in which a narrower format is particularly likely to interfere with the jury's decisionmaking process.

It could be argued that the substantive law, or rather the policies underlying the substantive law, sometimes require a more structured verdict in order to get more focused jury findings. The general verdict, as noted above, allows a plaintiff to prevail without unanimity as to any particular theory. In the hypothetical Cleaver case in part II, for example, Cleaver could prevail on a general charge by convincing four jurors that the mower was defectively designed, four jurors that the mower was defectively manufactured, and four jurors that Acme was negligent, without convincing all twelve jurors of any single legal theory. The jurors have agreed on a general level that the defendant is culpable. Is that enough?

A general verdict might be seen to be substantively undesirable if the aims of tort law require that *all* jurors believe that, for example, some *particular* community norm has been violated, or that some *particular* risk was unacceptable given particular costs. In the case of tort

195. See Brown, *supra* note 139, at 344.

196. See Gilles, *supra* note 60; Edward J. McCaffery et al., *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 Va. L. Rev. 1341 (1995).

law, such a requirement would likely be based on the deterrent function of tort judgments, and a claim that the defendant would need to have specific notice of what it has done wrong in order to know how to modify its behavior in the future. Thus, the substantive law underpinning for a special verdict requirement would not be fear of an irrational jury, or opposition to the democratic institution of the jury, but a need for more specific information about community standards as applied.¹⁹⁷

Such an argument seems to have no logical stopping point. If the substantive policy requires a finding of negligence as opposed to strict liability, would it not also require a finding of negligence in design as opposed to negligence in manufacture? Or a finding of negligence in designing the outlet guard rather than the rotary blade? Or in designing the third bolt from the end on the outlet guard rather than the grill on the outlet guard? I am unconvinced that the substantive law requires that degree of jury specificity,¹⁹⁸ but I leave the influence of substantive law values as an issue that deserves empirical research.

As a political matter, a legislative body might want to *disadvantage* certain kinds of claims by mandating the use of special verdicts. The format would be chosen specifically because it can make claims more difficult for the party with the burden of proof. For example, a jurisdiction might decide that parental rights are so important that they should not be terminated without specific findings of misconduct, and specific juror agreement on those findings. Such a jurisdiction could require special verdicts in suits to terminate parental rights.¹⁹⁹ Or a state could choose to protect the media's role in reporting on matters of public significance by requiring special verdicts in defamation cases. These kind of intensely political decisions to favor or disfavor a cause of action, however, should be made with extreme care and not on an ad hoc, case by case basis.

With these limited exceptions, the general verdict must be the norm. Rule 49 should be amended to reflect the policies underlying jury charge format. First, while special verdicts should not be completely eliminated, the rule should provide that the general verdict is strongly preferred. For example, the rule could require general verdicts absent extraordinary circumstances, and require those circumstances to be specified by a trial court using a special verdict. Second, current Rule 49(b) should be eliminated. The general verdict accom-

197. As discussed above, if an argument for greater specificity of findings is based on the allegedly greater consistency of judge-made decisions, the unreliability and/or irrationality of juries, or the desire for a less democratic decisionmaker, the argument is based not on substantive law but on political or process values.

198. For an argument questioning the theory of deterrence on psychological grounds, see Daniel W. Shuman, *The Psychology of Deterrence in Tort Law*, 42 U. Kan. L. Rev. 115 (1993).

199. *Cf. Texas Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) (terminating parental rights on broad form findings).

panied by answers to interrogatories has all the problems of narrower formats generally, with an added likelihood of creating conflicting answers. The format is thus more likely to result in inaccuracy, inefficiency, and in undermining the jury's political role.²⁰⁰ Nor does it have advantages that offset these risks. While one commentator has argued that Rule 49(b) could be used to help avoid reversal in partially flawed cases,²⁰¹ a broad form special verdict would accomplish this goal without adding the enhanced potential for confusion and conflicting answers.

CONCLUSION

It is not inertia but principle that should lead courts to use general verdict format in sending cases to the jury. A change to narrower forms of submission, by interfering with the jury's role, would create rather than solve problems. "[S]hifting the mode of decision strikes at the very heart of the process and threatens to change the law."²⁰² The civil jury is a vital and important institution that deserves to be preserved rather than undermined. The general verdict must be protected from the reformers' zeal.

200. See Brown, *supra* note 139, at 339-40. Eliminating this second type of special verdict would also have the incidental benefit of reducing court confusion in trying to tell the two types apart. The confusion is not immaterial, because rules about preserving error are sometimes different for the two verdict types and thus lawyers can unwittingly lose their clients' rights to raise issues on appeal.

201. See Ernest Guinn, *The Jury System and Special Verdicts*, 2 St. Mary's L.J. 175, 179 (1970).

202. Marcus, *supra* note 8, at 785.

Notes & Observations