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## Reasoned Verdicts: Oversold?

Kayla A. Burd  
*Cornell University*

Valerie P. Hans  
*Cornell Law School*, [valerie.hans@cornell.edu](mailto:valerie.hans@cornell.edu)

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# Reasoned Verdicts: Oversold?

Kayla A. Burd & Valerie P. Hans†

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† Authors' Note. Kayla A. Burd, Human Development, Cornell University; Valerie P. Hans, Professor of Law, Cornell Law School. We wish to thank Kevin M. Clermont, Zachary Clopton, Jonathan Corbin, Nancy Marder, Jay Russo, and Steven Thaman for their extraordinarily helpful comments on earlier drafts of this manuscript.

## Introduction

For centuries, the process of jury decision making has been shrouded in secrecy, permitting juries to decide cases without outside scrutiny. But in the last few decades, there have been increasing efforts to go inside the black box of the jury in both the United States and other countries. In the 2009 case of *Taxquet v. Belgium*, a panel of the European Court of Human Rights (ECtHR) opened the lid, finding that the defendant's right to a fair trial was violated because the jury failed to provide sufficient reasoning to support its verdict.<sup>1</sup> Further, the court indicated that the questions the judge posed to the jury had been "vague" and "general," and as such, the defendant could have "an impression of arbitrary justice lacking in transparency."<sup>2</sup> In 2010, the Grand Chamber upheld this decision, although the court noted that so long as other protections are available, the jury is not required to provide reasons for the verdict to be valid.<sup>3</sup> Nonetheless, the *Taxquet* decision sends a strong signal to European lawyers and legislators about the desirability of jurors providing reasons for their verdicts.<sup>4</sup>

Increasingly, European countries are turning to trial procedures that require extensive written reasoning to support legal decisions, including decisions reached by lay fact-finders.<sup>5</sup> Spain offers one contemporary example: it restored its tradition of trial by jury following the death of the dictator Francisco Franco.<sup>6</sup> Rather than participating in free deliberation and deciding on a general verdict as common-law juries typically do, the Spanish jury receives a set of specific "yes or no" questions from the judge.<sup>7</sup> The jurors must indicate which charges and factual assertions they believe were proved, whether the vote was unanimous or by majority, and the vote count. The jury then gives an overall verdict of "guilty" or "not guilty."<sup>8</sup> Lastly, jurors must provide a written description of which pieces of evidence they relied upon when reaching their decisions, including an explanation of *why* they believe the evidence proved or did not prove certain facts.<sup>9</sup> The trial judge subsequently reviews the jury answers and the

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1. *Taxquet v. Belgium*, App. No. 926/05, Eur. Ct. H.R., at 15 (Jan. 13, 2009); *Taxquet v. Belgium*, App. No. 926/05, Eur. Ct. H.R., at 19 (Nov. 16, 2010). See Stephen C. Thaman, *Should Criminal Juries Give Reasons for Their Verdicts?: The Spanish Experience and the Implications of the European Court of Human Rights Decision in Taxquet v. Belgium*, 86 CHL-KENT L. REV. 613, 613 (2011) [hereinafter Thaman, *The Spanish Experience*].

2. *Taxquet v. Belgium*, App. No. 926/05, Eur. Ct. H.R. (Jan. 13, 2009).

3. *Taxquet v. Belgium*, App. No. 926/05, Eur. Ct. H.R. at 26-27 (Nov. 16, 2010).

4. See Thaman, *The Spanish Experience*, *supra* note 1, at 625.

5. See STEPHEN C. THAMAN, *COMPARATIVE CRIMINAL PROCEDURE: A CASEBOOK APPROACH* 193 (2002) [hereinafter THAMAN, *COMPARATIVE CRIMINAL PROCEDURE*].

6. Ley Orgánica de 22 de Mayo art. I (B.O.E. 1995, 122) [hereinafter, *LOTJ*]; see, e.g., Mar Jimeno-Bulnes & Valerie P. Hans, *Legal Interpreter for the Jury: The Role of the Clerk of the Court in Spain*, 6 OÑATI SOCIO-LEGAL SER. 197, 200 (2016); Mar Jimeno-Bulnes, *Jury Selection and Jury Trial in Spain: Between Theory and Practice*, 1(9) OÑATI SOCIO-LEGAL SER. 1 (2011) [hereinafter Jimeno-Bulnes, *Between Theory and Practice*]; Nancy S. Marder & Valerie P. Hans, *Introduction to Juries and Lay Participation: American Perspectives and Global Trends*, 90 CHL-KENT L. REV. 789, 793 (2015).

7. See Thaman, *The Spanish Experience*, *supra* note 1, at 628.

8. *Id.* at 629.

9. *Id.*

supportive reasoning and determines whether the responses meet legal requirements.<sup>10</sup>

Opinions are divided over whether courts should require juries to provide reasons for their verdicts. Some of the arguments in support of reasoned verdicts are that they promote careful reflection,<sup>11</sup> reduce bias and arbitrariness in jurors' decisions,<sup>12</sup> and ensure that jury nullification is uncommon.<sup>13</sup> Further, some argue that reasoned verdicts can contribute to greater transparency and legitimacy and may be helpful upon appeal.<sup>14</sup> Some of the arguments against reasoned verdicts are that they reduce jury independence and undermine the power of the jury. It may also be inappropriate to require lay fact-finders to engage in a form of reasoning that requires extensive legal training.<sup>15</sup>

Some of the differences in opinion regarding reasoned verdicts seem to stem from a general trust or mistrust of jury decision making.<sup>16</sup> Countries that show more trust in jury decision making tend to shy away from procedural changes that would channel or otherwise limit jurors' decision-making tasks, while those less trusting of jurors or those who feel jurors should behave more like judges tend to favor reasoned verdicts and structured decisions.<sup>17</sup>

The reasoned verdicts debate resonates in the U.S. as well. A parallel discussion exists in the United States regarding the use of special verdicts and general verdicts with answers to written questions. In a true special verdict, jurors do not return a general verdict, but instead "fin[d] certain facts and leav[e] the rest to the court."<sup>18</sup> In a general verdict with written questions, jurors provide answers to written questions of fact and provide a general verdict.<sup>19</sup>

Kate Stith-Cabranes argues that juror accountability is an increasingly important value.<sup>20</sup> Jury decisions that include information concerning the basis for their decisions—such as special verdicts and general verdicts with answers to written questions—promote transparency. In the recent case *Peña-Rodriguez v. Colorado*, the U.S. Supreme Court provided a boost to the

10. See Jimeno-Bulnes, *Between Theory and Practice*, *supra* note 6, at 13–14.

11. Mar Jimeno-Bulnes, *A Different Story Line for 12 Angry Men: Verdicts Reached by Majority Rule - The Spanish Perspective*, 82 CHI.-KENT L. REV. 759, 774 (2007) [hereinafter Jimeno-Bulnes, *A Different Story Line*].

12. See Thaman, *The Spanish Experience*, *supra* note 1, at 620.

13. Stephen C. Thaman, *Spain Returns to a Jury Trial*, 21 HASTINGS INT'L & COMP. L. REV. 241, 321 (1997) [hereinafter Thaman, *Spain Returns*].

14. Thaman, *The Spanish Experience*, *supra* note 1, at 620 (describing benefits for appeals); 625 (describing benefits for transparency and legitimacy).

15. See Jimeno-Bulnes & Hans, *supra* note 6, at 202.

16. See Marder & Hans, *supra* note 6, at 798.

17. *Id.* at 798–99.

18. Kate Nepveu, *Beyond "Guilty" or "Not Guilty": Giving Special Verdicts in Criminal Jury Trials*, 21 YALE L. & POL'Y REV. 263, 263 (2003).

19. FED. R. CIV. P. 49(b).

20. Stith-Cabranes discusses the importance of juror accountability and public access to information. She concludes that the need for "greater equality, rationality, and accountability" may trump the need for secrecy and confidentiality. Kate Stith-Cabranes, *The Criminal Jury in Our Time*, 3 VA. J. SOC. POL'Y & L. 133, 143 (1995).

importance and value of accountability and transparency in jury verdicts.<sup>21</sup> The Court held that an exception to the longstanding rule that jurors could not impeach their verdicts following trial was permissible in cases in which racial bias may have infected the jury's decision making.<sup>22</sup> Allowing a post-trial inquiry into the content of jury deliberations under these circumstances would "prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right."<sup>23</sup>

As in the reasoned verdict debate, those for and against special verdicts and general verdicts with answers to written questions disagree about the extent to which these procedures enhance or undermine jury decision making. Additionally, greater transparency may come at a cost, thus weakening the authority and power of the jury.<sup>24</sup>

The current legal debate regarding reasoned verdicts contains multiple assertions about the psychological impact, some positive and some negative, of requiring juries to deliver publicly reasoned verdicts. Though they are central to the debate, many of these assertions remain unexplored. How do jurors approach the task of fact finding when they are required to supply reasons for their verdicts, or to answer specific questions about their fact finding? How might these cognitive processes differ from those that they engage in as they deliberate and decide on a general verdict? Are reasoned verdicts likely to be successful in increasing jurors' cognitive processing of the evidence, and in enhancing their ability to apply legal standards to the case at hand? Can reasoned verdicts reduce arbitrary judgments and biased decision making? Further, by what metric should a comparison be made between reasoned verdicts and verdicts of other kinds? Should courts consider the outcome accuracy, jury independence, and the transparency and reviewability of decisions? If so, how should the courts balance these tradeoffs?

This Article explores the legal and psychological questions at the heart of the debate over reasoned verdicts abroad, as well as the parallel debate regarding special verdicts and general verdicts with answers to written questions in the U.S. There is no empirical work comparing these diverse approaches directly. Therefore, to assess the likely impact of requiring reasoned verdicts, this article draws on insights from psychological research on human decision making, as well as empirical research on jury decision making.

Review of the psychological research has led us to some surprising, albeit preliminary, conclusions. Although reasoned verdicts may be more transparent, requiring lay fact-finders to provide reasons for their decisions may have little to no positive impact on the quality of decision making. Some studies suggest that reasoning about decisions occurs *following* deci-

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21. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 871 (2017).

22. *Id.*

23. *Id.* at 869.

24. *Nepveu*, *supra* note 18, at 266.

sions, rather than beforehand.<sup>25</sup> If true, reasoned verdicts are unlikely to promote sounder decision making in a jury context. Furthermore, requiring reasons or structuring verdicts may paradoxically lead to negative effects, by unnecessarily complicating jurors' and judges' duties and undermining the jury's independence.

This Article ends with a call for empirical research of the effects of requiring reasoned verdicts from juries. The Article recommends that until the effects of reasoned verdicts are confirmed to be largely positive, general verdicts remain the best way to maintain the power of juries to reflect the conscience of the community.

## I. Reasoned Verdicts: Where and How Reasoned Verdicts are Used

It is useful to review practices in the countries that currently require reasoned verdicts, special verdicts, or general verdicts with answers to written questions. Much variability exists in the structure and application of such procedures. However, for many courts, the aim is to provide a stronger basis for verdicts by requiring reasons or by otherwise structuring the decision-making process of jurors. To show the range and detail of implementing such verdicts, this section surveys countries that require jurors to provide reasons for their verdicts. Some countries utilize a more classic jury model (e.g., Austria, Belgium, Russia, and Spain); others employ mixed courts (e.g., France, Germany, Italy, and Switzerland). This Article explores several courts' use of reasoned verdicts to highlight examples of, and differences between, the reasoning requirements. It also distinguishes between general verdicts in the U.S. on the one hand, and the alternative practices of special verdicts and general verdicts with answers to written questions on the other.

### A. The Reasoning Requirement in Classic Jury Systems

Classic jury systems allow jurors to deliberate independently, and largely without input from external sources. Below, several examples are presented of countries with juries that deliberate separately from judges, but that nonetheless require jurors to provide reasons for their verdicts. This group of countries includes Spain, Belgium, Austria, and Russia. While the list is not exhaustive, it provides a picture of how reasoning is incorporated into traditional jury system procedures.

#### 1. *The Reasoning Requirement in Spain*

The court system of Spain requires that jurors provide reasons for their verdicts in criminal cases.<sup>26</sup> Spanish judges prepare a verdict form

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25. Jonathan Haidt, *The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 *PSYCHOL. REV.* 814, 822 (2001) [hereinafter Haidt, *The Emotional Dog*].

26. See MARIJKE MALSCH, *DEMOCRACY IN THE COURTS: LAY PARTICIPATION IN EUROPEAN CRIMINAL JUSTICE SYSTEMS* 52 (2009).

consisting of a list of questions regarding the case and charges.<sup>27</sup> The jury receives the verdict form, directions, and the judge's summary of the case facts presented at trial.<sup>28</sup> Jurors are asked to deliberate on, and answer, each question included in the verdict form. Jurors deliberate independently of the judge. For each crime and for each defendant, jurors must address:

- (1) the facts which prove the commission of the crime (*corpus delicti*) and the defendant's identity as the perpetrator; (2) the defense allegations; (3) the facts which could completely justify or excuse the charged criminal acts; (4) a narrative of the facts that determine the degree of execution or participation in the offense, or any statutory aggravating or mitigating circumstances; and (5) the "criminal act as to which the defendant must be declared guilty or not guilty" . . . .<sup>29</sup>

The Ley Orgánica de 22 de Mayo proposes a specific format that jurors should utilize when drafting their verdict.<sup>30</sup> Specifically, Ley Orgánica de 22 de Mayo requires that verdicts include "a succinct explanation of the reasons why [the members of the jury] have declared, or refused to declare, certain facts as having been proved."<sup>31</sup> Jurors must determine the culpability for every offense. They must also record the votes of jurors for each question.<sup>32</sup> In this unique system, majority rule decides verdicts; five jurors (out of nine) are required to reach a decision on facts unfavorable to the accused, while seven votes are required for facts unfavorable to the accused.<sup>33</sup> Jurors may request the law-trained clerk of the court to join them in the deliberation room to assist them in writing their responses.<sup>34</sup>

The judge reviews the verdict form and the reasons provided by jurors to determine the adequacy of their reasoning.<sup>35</sup> This judicial review primarily focuses on whether or not the jurors have met the requirement to explain their reasoning.<sup>36</sup> Judges reportedly take a range of approaches in their review. Judges may interpret reasons based on the "maximalist" approach (the most strict interpretation), which requires that jurors provide an in-depth description of the entire process and include a determina-

27. See generally, e.g., Thaman, *Spain Returns*, *supra* note 13, at 325 (citing several fact patterns used in Spanish trials).

28. Thaman, *The Spanish Experience*, *supra* note 1, at 651; see generally Thaman, *Spain Returns*, *supra* note 13, at 322.

29. Thaman, *Spain Returns*, *supra* note 13, at 322 (citing § 52(2) LOTJ, reprinted in *Ley Del Jurado*).

30. LOTJ, *supra* note 6.

31. See Thaman, *Spain Returns*, *supra* note 13, at 364 (citing § 61(1)(d) LOTJ, reprinted in *Ley Del Jurado*). In one case, the reason jurors gave for acquitting a defendant was "witnesses." See *id.* at 366 (citing MA-2).

32. See *id.* at 364; See Thaman, *The Spanish Experience*, *supra* note 1, at 628-29.

33. See Jimeno-Bulnes, *A Different Story Line*, *supra* note 11, at 765; See Jimeno-Bulnes, *Between Theory and Practice*, *supra* note 6, at 600.

34. Jimeno-Bulnes & Hans, *Legal Interpreter for the Jury*, *supra* note 6, at 200; Thaman, *The Spanish Experience*, *supra* note 1, at 627.

35. Jimeno-Bulnes, *A Different Story Line*, *supra* note 11; see LOTJ, *supra* note 6; Thaman, *The Spanish Experience*, *supra* note 1, at 630.

36. Jimeno-Bulnes, *A Different Story Line*, *supra* note 11, at 770-72.

tion as to whether specific facts have or have not been proven.<sup>37</sup> Conversely, in the “minimalist” approach, judges interpret juror reasons based on general references to the evidence rather than detailed accounts.<sup>38</sup> Lastly, verdicts may be assessed using an intermediate approach.<sup>39</sup> Here, jurors are required to provide itemized documentation of the relevant evidence that they relied upon, and the judge may provide the judicial reasoning after the jurors have completed their verdicts.<sup>40</sup> Importantly, improperly reasoned or unreasoned verdicts can be contested twice.<sup>41</sup> Jury decisions can be reversed by the Magistrate-President of the trial, as well as by appeals made to the Regional Supreme Court.<sup>42</sup> Overall, the utmost importance is placed on the quality and sufficiency of juror verdicts.<sup>43</sup>

## 2. The Reasoning Requirement in Belgium

Beginning in 1930, Belgium expanded jury participation to include a system of three judges and twelve jurors, with jurors deliberating independently of the judge.<sup>44</sup> For criminal cases, judges create question lists that jurors must answer regarding elements of the crime, justifications, excuses, and aggravating or mitigating circumstances.<sup>45</sup> Before 2009, jurors were not required to give reasons for their verdicts. Instead, jurors were told to follow their sincere belief or *intime conviction*:

The law does not ask jurors to account for how they reached their personal conviction; it does not lay down rules on which they are to place particular reliance as to the completeness and sufficiency of evidence; it requires them to ask themselves questions, in silence and contemplation, and to discern, in the sincerity of their conscience, what impression has been made on their rational faculties by the evidence against the defendant and the submissions of defence.<sup>46</sup>

If the panel of three judges deems that a jury reached an erroneous decision, the judges may set aside the verdict and order a retrial.<sup>47</sup>

In *Taxquet v. Belgium*, the ECtHR showed support for reasoned verdicts.<sup>48</sup> In this case, a defendant was convicted of murder of a government official and of attempted premeditated murder of the official’s companion. Thirty-two questions had been submitted to the jurors, all requiring a “yes”

37. See Thaman, *The Spanish Experience*, *supra* note 1, at 634.

38. *Id.*

39. *Id.*

40. *Id.*; see also Jimeno-Bulnes, *A Different Story Line*, *supra* note 11, at 771.

41. See Jimeno-Bulnes, *A Different Story Line*, *supra* note 11, at 771-72.

42. *Id.* at 772.

43. See, e.g., Thaman, *The Spanish Experience*, *supra* note 1, at 620.

44. See generally MALSCH, *supra* note 26, at 33-34; Thaman, *The Spanish Experience*, *supra* note 1, at 621.

45. Thaman, *The Spanish Experience*, *supra* note 1, at 621.

46. *Id.* at 622.

47. *Id.*

48. See *Taxquet v. Belgium*, App. No. 926/05, Eur. Ct. H.R. at 15 (Jan. 13, 2009); *Taxquet v. Belgium*, App. No. 926/05, Eur. Ct. H.R. at 19 (Nov. 16, 2010); Thaman, *The Spanish Experience*, *supra* note 1, at 625.



or “no” answer.<sup>49</sup> Of these thirty-two questions, only four related to the defendant Taxquet.<sup>50</sup> Following his conviction, Taxquet appealed, listing several factors which he argued influenced the verdict, including a broadcast that he indicated was prejudicial, his inability to examine an anonymous informant, and the jury’s verdict, which did not provide detailed reasons for the jury’s responses to the questions.<sup>51</sup> After his appeal was denied in Belgium, the defendant took his case to the ECtHR, which determined that the defendant’s rights were violated because the defendant could not determine from the responses to these questions why the jurors had convicted him.<sup>52</sup> As noted above, the Grand Chamber affirmed this decision in 2010.<sup>53</sup>

*Taxquet* led to a substantial change in the process of jury deliberation and verdict-making in Belgium. Beginning in 2009, instead of allowing a subjective standard of *intime conviction*, jurors must now provide reasons for their decisions.<sup>54</sup> As such, jurors independently deliberate, reach a verdict, and then discuss their judgments with the panel of three judges who help the jurors draft reasons for their verdict. If the panel of judges determines that the jurors have erred in their reasoning regarding the evidence or their application of legal concepts, the jury’s decision may be set aside.<sup>55</sup>

### 3. *The Reasoning Requirement in Other Classic Jury Systems*

Austria employs classic juries, called jury courts, and mixed courts consisting of lay and professional judges. Jurors are tasked with independently deciding the most serious criminal offenses and those classified as “political.”<sup>56</sup> Jurors do not render general verdicts; rather, jurors must respond to yes/no questions and must then give reasons for their decisions.<sup>57</sup> Jurors must provide short responses to each individual question.<sup>58</sup> In contrast to Spain, jurors receive no assistance in drafting their reasons.<sup>59</sup> Judges then review their responses and if they find the verdict form is incomplete or contains contradictions, may ask jurors to correct their decision form.<sup>60</sup>

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49. Thaman, *The Spanish Experience*, *supra* note 1, at 623.

50. *Id.*

51. *Id.* at 624.

52. *Id.* at 613.

53. *Id.*

54. *Id.* at 624.

55. *Id.* at 622-24.

56. See Greg Taylor, *Jury Trial in Austria*, 14 *NEW CRIM. L. REV.* 281, 284 (2011).

57. For example, the first question might be “Did D cause the death of V by {short description of method} in {place} on {date}?” A follow-up question might be “Did D act in defense against an immediate and illegal attack?” *Id.* at 308.

58. These are sometimes limited. For instance, in one case from 1988 involving two brothers charged with robbery, the jurors acquitted one of the brothers. In their reasons, they said this acquittal was based on “the evidence of the victim.” This particular judgment and reasoning were contradictory to their judgment of the other brother and contained very little in the way of reasoning. *Id.* at 312.

59. *Id.* at 307.

60. *Id.* at 311.

In 1993, Russia introduced trial by jury for criminal cases.<sup>61</sup> Jury trials are used in cases involving aggravated murders, some serious felonies, and some lesser crimes.<sup>62</sup> After closing arguments, the judge prepares a special question list that is submitted to the jury.<sup>63</sup> Jurors must deliberate on these questions for a minimum of three hours, unless the jury reaches a unanimous decision before that time.<sup>64</sup> If the jury cannot reach a unanimous verdict after three hours, it may return a verdict by a majority vote.<sup>65</sup> After the jury has deliberated, the trial judge prepares the judgment based on the jurors' answers to the questions.<sup>66</sup>

In 1952, Switzerland became the first jurisdiction to require reasoned verdicts in criminal jury trials.<sup>67</sup> The Swiss Federal Court argued that jurors' judgments must include reasons for their decisions or must answer "sufficiently specific questions."<sup>68</sup> In 1977, the parliament for the Canton of Geneva required jurors to give reasons describing their choice of punishment,<sup>69</sup> and in 1992 began allowing jurors to "give succinct reasons in cases where it felt its verdict might not be otherwise readily understood."<sup>70</sup> Similar to Spain, in 1996 the Genevan parliament amended its code and began requiring reasons in response to each question on the question list and determined that the clerk of the court could aid jurors in conveying their reasons.<sup>71</sup> Changes to federal procedures in 2011 largely abolished jury trials in Switzerland.<sup>72</sup> Now, only one canton—Ticino—maintains a semblance of a jury, and even there a mix of professional judges and lay assessor-jurors are used.<sup>73</sup>

## B. The Reasoning Requirement in Mixed Jury Systems

Several mixed courts, which are decision-making bodies that combine lay and professional judges, also require reasoned verdicts. Below we discuss several examples of mixed courts that require reasons for verdicts.

In Italy, citizens participate as lay judges and are required to provide reasons for their verdicts and votes in criminal trials. Professional and lay judges deliberate together, and every judge, including professional and lay

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61. See Stephen C. Thaman, *The Nullification of the Russian Jury: Lessons for Jury-Inspired Reform in Eurasia and Beyond*, 40 CORNELL INT'L L.J. 355, 358 (2007) [hereinafter Thaman, *The Nullification of the Russian Jury*].

62. *Id.* at 363.

63. *Id.* at 364.

64. *Id.* at 365.

65. *Id.*

66. *Id.*

67. Thaman, *The Spanish Experience*, *supra* note 1, at 626.

68. *Id.* at 627.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. Gwladys Gilliéron, Yves Benda & Stanley L. Brodsky, *Abolition of Juries: The Switzerland Experience*, 25 THE JURY EXPERT 6, 8 (2015).

judges, has a vote.<sup>74</sup> The presiding judge leads the discussion and poses questions to the judges pertaining to guilt and sentencing. All judges explain their reasoning and opinions, and then each judge must vote on each question. The voting is not secret, and all judges must provide reasons in support of their decisions. A professional judge subsequently drafts the opinion summarizing the court's decision.<sup>75</sup>

France's classic jury system, which until the 1940s utilized lay jurors who deliberated independently as in the classic jury approach, is now a mixed court that consists of both lay and professional judges.<sup>76</sup> Since 2011, in criminal trials—where jurors were once able to freely evaluate evidence and come to a conclusion based on their *intime conviction*, or subjective certainty of guilt<sup>77</sup>—jurors must now provide reasons for their decision.<sup>78</sup> In 2011, the number of jurors was reduced from nine to six and from twelve to nine for appeals.<sup>79</sup>

The presiding judge structures a set of questions pertaining to the accused's guilt and culpability.<sup>80</sup> These questions typically include a detailed set of issues, including charges and excuses.<sup>81</sup> Collectively, the professional and lay judges deliberate on these specific questions. The professional judges have the power to organize the deliberation and reasoning processes and must help lay judges apply their opinions and knowledge to the evidence at hand.<sup>82</sup> Professional and lay judges vote in secret on all of the questions posed, and a majority vote is needed to support each decision.<sup>83</sup> The presiding judge drafts the judgment, summarizing the reasoning behind the group's verdict and identifying the evidence that supports each decision.<sup>84</sup> Deliberations are secret, so there is little direct information about their content or about the role of the lay jurors in the discussions. However, one field study found that the power allotted to lay judges appears to vary by presiding judge: At times, lay judges are given

74. See MALSCH, *supra* note 26, at 53; Valerie P. Hans & Anne Jolivet, *Iron Fist in a Velvet Glove? Judicial Behavior in Mixed Courts*, COMP. L. & ECON. 182, 197 (2016).

75. See Hans & Jolivet, *supra* note 74, at 197; Thaman, *The Spanish Experience*, *supra* note 1, at 634.

76. Hans & Jolivet, *supra* note 74, at 191-93. See generally THAMAN, *COMPARATIVE CRIMINAL PROCEDURE*, *supra* note 5. The mixed panel includes three professional judges (a president and two associate judges) and six "lay assessors." See also Mathilde Cohen, *The French Case for Requiring Juries to Give Reasons. Safeguarding Defendants or Guarding the Judges?*, in *COMPARATIVE CRIMINAL PROCEDURE* 422, 422 (Jacqueline E. Ross & Steven C. Thaman eds., 2016).

77. Valerie P. Hans & Claire M. Germain, *The French Jury at a Crossroads*, 86 CHL-KENT L. REV. 737, 740 (2011).

78. Cohen, *supra* note 76, at 423.

79. Claire M. Germain, *The Rise and Fall of Lay Participation in French Criminal Courts*, Presentation at Conference on Juries and Mixed Tribunals Across the Globe, at 5 (June 2014) (describing legal changes in French jury system) (unpublished manuscript) (on file with authors).

80. Hans & Jolivet, *supra* note 74, at 193.

81. Thaman, *The Spanish Experience*, *supra* note 1, at 615.

82. Hans & Jolivet, *supra* note 74, at 194; see also Cohen, *supra* note 76, at 430.

83. Hans & Jolivet, *supra* note 74, at 193; Thaman, *The Spanish Experience*, *supra* note 1, at 615.

84. Hans & Jolivet, *supra* note 74, at 192-94.

more latitude, while in other circumstances, the presiding judge is more directive.<sup>85</sup>

### C. General and Special Verdicts in the U.S.

#### 1. General Verdicts

Most criminal jury trials in the United States only require the jury to deliver a general verdict of guilty or not guilty.<sup>86</sup> Jurors hear evidence, receive jury instructions, and then retire to deliberate in private. The deliberation is a free process without many procedural rules. Once jurors have discussed the case and the evidence and reached a conclusion about culpability, jurors then give a general verdict that is often required to be unanimous. No reasons are required. General verdicts are often also utilized in civil trials in the United States.<sup>87</sup>

#### 2. General Verdicts with Answers to Written Questions

Beginning in 1938, Federal Rule of Civil Procedure (“FRCP”) 49 allowed judges to order civil juries to use general verdicts accompanied by questions that the jury must answer.<sup>88</sup> A general verdict is rendered and jurors must answer specific factual questions in writing.<sup>89</sup> Responses to the questions are meant to give the court insight into jurors’ comprehension and decision making.<sup>90</sup>

General verdicts with answers to written questions (formerly labeled interrogatories) are employed more often in civil than in criminal cases. The verdict and written responses to the questions must be consistent.<sup>91</sup> When such questions are used in criminal cases, they may be used to determine mixed questions of fact and law. This includes when jurors must assess legal components within a defense, or during cases in which jurors must determine which ground to convict on, or in cases involving options of lesser included offenses.<sup>92</sup> Written questions can also be employed during sentencing to determine relevant facts, such as the presence of aggravating and mitigating circumstances,<sup>93</sup> issues of culpability,<sup>94</sup> the amount of

85. Hans & Jolivet, *supra* note 74, at 195. For a survey of the limited role that lay judges play in mixed courts, see Sanja Kutnjak Ivkoviæ, *Exploring Lay Participation in Legal Decision Making: Lessons from Mixed Tribunals*, 40 CORNELL INT’L L.J. 429, 429–30 (2007).

86. *United States v. Spock*, 416 F.2d 165, 180–83 (1st Cir. 1969) (describing value of the general verdict of the jury).

87. RICHARD H. FIELD ET AL., *CIVIL PROCEDURE: MATERIALS FOR A BASIC COURSE* 182–83 (11th ed. 2014) (describing the common usage of the general verdict in civil cases).

88. FED. R. CIV. P. 49.

89. FED. R. CIV. P. 49(b)(1).

90. Kevin J. Wright, *Misplaced Treasure: Rediscovering the Heart of the Criminal Justice System Through the Use of the Special Verdict*, 19 T.M. COOLEY L. REV. 409, 418 (2002).

91. FED. R. CIV. P. 49; Elizabeth A. Larsen, *Specificity and Juror Agreement in Civil Cases*, 69 U. CHI. L. REV. 379, 379 (2002).

92. *Nepveu*, *supra* note 18, at 276–78.

93. *Id.* at 270.

94. *Id.* at 274.

a theft,<sup>95</sup> or the danger that a defendant poses.<sup>96</sup>

### 3. Special Verdicts

FRCP 49 also allows for special verdicts.<sup>97</sup> Special verdict forms are meant to assist jurors by identifying and organizing key issues of fact.<sup>98</sup> Special verdicts bear some similarity to the reasoned verdicts in some foreign courts. When a special verdict is used, the jury provides written answers to a series of questions pertaining to issues of facts in the case, and the judge enters a verdict based on the jury's factual findings.<sup>99</sup>

Unlike the use of special verdicts in civil cases, there is no rule of criminal procedure similar to the FRCP 49 that permits such verdicts in criminal cases.<sup>100</sup> The use of special verdicts in criminal trials is controversial because some scholars believe that it violates a defendant's Sixth Amendment right to have a jury make the ultimate decision.<sup>101</sup>

#### D. Comparing Reasoned Verdicts, Special Verdicts, and General Verdicts with Answers to Written Questions

As we will discuss further below, it is not clear how changes to the verdict structure may affect the decision-making process of jurors, or how jurors might approach these different decision-making tasks. As noted above, in Spain, jurors first answer "yes" or "no" to a list of factual questions, and describe in writing which facts have been proved and which have not been proved.<sup>102</sup> Then, jurors give an overall verdict of "guilty" or "not guilty," and lastly, describe in writing which pieces of evidence they relied upon in answering the questions, and why they found each fact proved or

95. *Id.* (citing *State v. Mickens*, 462 N.W.2d 296, 298 (Iowa 1990); *People v. McCoy*, 764 P.2d 1171, 1178 (Colo. 1988); *Hagberg v. State*, 606 P.2d 385, 386 (Alaska 1980)).

96. *Id.* (citing *State v. Sammons*, 749 P.2d 1372, 1376 (Ariz. 1988)).

97. FED. R. CIV. P. 49.

98. See Jonathan Casper, *Restructuring the Traditional Civil Jury: The Effects of Changes in Composition and Procedures*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 435 (Robert E. Litan ed., 1993); Elizabeth C. Wiggins, *Procedural Innovations to Enhance Juror Comprehension in Complex Litigation* (1987) (unpublished Ph.D. dissertation, Johns Hopkins University) (on file with authors). An additional option for change in trial structure is the approach of bifurcation, in which claims and issues are tried and decided separately but sequentially. See FED. R. CIV. P. 42(b). Bifurcation is employed for "convenience, to avoid prejudice, or to expedite and economize." *Id.* However, it can sometimes produce unexpected effects on decisions. See Stephan Landsman, Shari Diamond, Linda Dimitropoulos & Michael J. Saks, *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 WISC. L. REV. 297, 298-99, 333, 335 (1998) (finding, in a mock jury study, that bifurcation did not generally lead to improved juror comprehension, but caused changes in liability judgments and punitive damage awards decisions).

99. FED. R. CIV. P. 49; see also Casper, *supra* note 98, at 435; Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 604 (1998); Wiggins, *supra* note 98, at 25-26.

100. See Jennifer M. Granholm & William J. Richards, *Bifurcated Justice: How Trial Splitting Devices Defeat the Jury's Role*, 26 U. TOL. L. REV. 505, 535 (1994).

101. *Nepveu*, *supra* note 18 at 263 (citing *United States v. Gaudin*, 515 U.S. 506, 510 (1995)); U.S. CONST. amend. VI.

102. Thaman, *The Spanish Experience*, *supra* note 1, at 628-29.

not proved.<sup>103</sup> For general verdicts with answers to written questions, jurors first make an overall judgment of “guilty” or “not guilty” and then provide written answers to questions of fact.<sup>104</sup> Lastly, for special verdicts, jurors do not provide an overall judgment, but instead provide answers to questions of fact.<sup>105</sup>

In theory, jurors take to the above verdict tasks in the order provided in jury instructions. In some circumstances, however, jurors may not complete these tasks in the prescribed order. For instance, jurors required to give reasons for their verdicts may, hypothetically, first come to an overall determination of guilt (“guilty” or “not guilty”), might then go back to answer the factual questions (“yes” or “no” as to which items are proved), and may end with providing reasons for why they believe that the facts were proved or not proved. However, because jurors are not asked to give an overall determination of guilt in special verdicts, they may proceed one item at a time, in order, as questions are presented to them, without considering the case holistically.<sup>106</sup> These potential differences in jurors’ decision-making processes may influence overall trial outcomes. Because we do not know how jurors approach each of these tasks, it is hard to determine how each might compare in terms of strengths and weaknesses.

In sum, in both the U.S. and foreign countries, courts have taken a variety of approaches to attempt to get inside the black box of a jury’s verdict. Like Europe’s reasoned verdicts, the U.S.’s special verdicts and general verdicts with answers to written questions aim to uncover the bases for the jury’s decision. Some courts ask juries to specify in writing the reasoning that undergirds their verdicts, whereas others structure decision making by asking juries to answer a court-imposed sequence of specific questions.

## II. Current Debate Regarding Reasoned Verdicts: Comparing Reasoned, Special, and General Verdicts Through a Psychological Lens

Scholars have highlighted many important considerations in the debate about whether jurors should be required to provide reasons for their verdicts. Some say that such a requirement may safeguard against poor decision making, while others maintain that it is detrimental to juror independence and power. Here, we identify and discuss competing claims regarding reasoned versus general verdicts, and analyze a large body of psychological literature that explores the capacities, strengths, and potential weaknesses of human reasoning. That work informs our understanding of the potentially different cognitive processes that jurors may use in arriving at these verdicts. We apply these insights to the U.S. case of special and

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103. *Id.*

104. *Id.*

105. *Id.*

106. However, as discussed in detail below, there is reason to believe that jurors, even when using a special verdict, still base their judgments on their overall impressions on the facts and witnesses. See *infra* Part II.

general verdicts as well, although we keep in mind that reasoned and special verdicts differ significantly.

#### A. Verdict Accuracy and Strength of Decision Making: Relevant Psychological Research on Judgment and Decision Making

Perhaps the most significant and central issue of the debate over reasoned and structured jury verdicts, such as special verdicts, is whether they increase verdict accuracy and the strength of the jury decision-making process. Some contend that requiring jurors to justify their decision may lead to better, more deliberative decisions based first and foremost on evidence rather than intuitions, emotions, or other factors. For example, Steven Thaman argues that in Europe “there is a conflict between the tradition of the classic jury— which may decide according to their conscience or *intime conviction*— and the requirement that judgments be reasoned to prevent arbitrariness and to ensure an effective right to appeal.”<sup>107</sup> Mar Jimeno-Bulnes argues that the reasoned verdict “obliges jurors to participate in a debate of sorts or at least forces them to reflect more carefully on their decisions.”<sup>108</sup> Reasoned verdicts may lead to stronger decisions that are less arbitrary and more dependent on concrete evidence, as juries must identify the specific evidence they used to support their conclusions about each legal issue in the case.<sup>109</sup> Research on deliberative democracy, which emphasizes the value of citizens exchanging reasons supporting different public policy choices, suggests that reason-giving could improve juries’ decision-making quality.<sup>110</sup> In a parallel context, Doron Menashe explains the value of requiring judges to provide the reasoning that supports their decisions, stating that the “requirement of reasons brings judges to consider matters brought before them with greater meticulousness, conscious as they are of the fact that they will have to explicate their considerations

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107. Thaman, *The Spanish Experience*, *supra* note 1, at 620.

108. Jimeno-Bulnes, *A Different Story Line*, *supra* note 11, at 774.

109. Thaman, *The Spanish Experience*, *supra* note 1, at 631 (citing *Anexo, Informe Sobre la Aplicacion de la Lo del Tribunal del Jurado Desde el 1 de Abril de 1997 al 31 de Marzo de 1998* (CGPJ), 13 ACTUALIDAD PENAL 615, 632 (2000)). In one trial in Spain, jurors were very thoughtful in their responses in which they rejected a defense that a stabbing was an accident: “(d) The number and type of wounds which convinced the jury that there was a struggle, and that the wounds were mortal and thus the possibility of accident alleged by the defense was consequently eliminated; (e) With the corpulence of the defendant and the lack of corpulence of the victim it would have been possible to overcome the victim with other means. The use of the knife and the type of wounds convince the jury as to the intentionality of the defendant’s actions.” Thaman, *Spain Returns*, *supra* note 13, at 369 (citing Prot. Ver. (PM-2) (on file with authors)).

110. For a summary of empirical findings in deliberation democracy research, see Nicole Curato et al., *Twelve Key Findings in Deliberative Democracy Research*, 146(3) *DAEDALUS* 28, 28-34 (2017) (summarizing research to date). For an experiment exploring the effects of reason-giving in the administrative agency context, see Edward H. Stiglitz, *Bureaucratic Reasoning*, 24-42 (June 26, 2018) (unpublished manuscript) (on file with authors). For an application of deliberative democracy theory to juries, see JOHN GASTIL ET AL., *THE JURY AND DEMOCRACY* (2010).

and grounds convincingly.”<sup>111</sup>

Supporters of general verdicts have several counterarguments about the quality of general verdicts. They argue that deliberations under a unanimity rule are inherently filled with reasoning and debate, even if a court requires only a submission of a general verdict. Jeffrey Abramson emphasizes the fact that “the jury is distinctly designed to encourage rational deliberation.”<sup>112</sup> Further, Robert Burns argues “the methods of the trial are the methods best adapted to allow triers of fact properly to interpret and evaluate the human actions that are always the topics of criminal trials.”<sup>113</sup> In the view of these legal commentators, jurors’ reasons for their verdicts are already very clear, and based strongly on evidence.<sup>114</sup> Requiring that juries offer reasons for their verdicts and answer specific questions is apt to have no impact or even negative effects on the quality of jury decision making.<sup>115</sup>

Supporters of special verdicts focus on how they affect the quality of jury decision making. Some scholars argue that because special verdict forms contain questions about separate, disputed factual issues, juries are “better able to identify and understand contested issues” than if they are instructed to reach a general verdict.<sup>116</sup> James Henderson and his colleagues argue that by separating out complex issues in a given case with multiple issues (e.g., during a product liability case, design defect, causation, and damages could all be contested issues), jurors are better able to address each factual issue independently, rather than giving an overall, gestalt determination that “feels right.”<sup>117</sup> Further, Henderson and colleagues argue, since special verdicts separate out issues, jurors must consider each piece independently and are discouraged from considering the case holistically, which means they are less likely to “frame answers according to some desired outcome.”<sup>118</sup> Henderson and colleagues do acknowledge that some juries may take a holistic approach even when

111. Doron Menashe, *The Requirement of Reasons for Findings of Fact*, 8 INT’L COMM. L. REV. 223, 230 (2006). Further, Menashe states that “detailed and methodical analysis, conducted in writing, is far more likely to detect and rule out potential errors—and thus to reduce the scope of the range of reasonableness—than offhand, unsystematic, unwritten analysis.” *Id.* at 239.

112. Jeffrey Abramson, *Four Models of Jury Democracy*, 90 CHI.-KENT L. REV. 861, 872 (2015).

113. Robert P. Burns, *Some Limitations of Experimental Psychologists’ Criticisms of the American Trial*, 90 CHI.-KENT L. REV. 899, 905 (2015).

114. See Richard O. Lempert, *The American Jury System: A Synthetic Overview*, 90 CHI.-KENT L. REV. 825, 836–37 (2015); see also Richard O. Lempert, *The Internationalization of Lay Legal Decision-Making: Jury Resurgence and Jury Research*, 40 CORNELL INT’L L.J. 477, 478 (2007) (describing research showing that “juries evaluated evidence rationally and had other important strengths”).

115. See Abramson, *supra* note 112, at 875–76; Burns, *supra* note 113, at 924; Lempert, *supra* note 114, at 836–37.

116. James A. Henderson, Fred Bertram & Michael J. Toke, *Optimal Issue Separation in Modern Products Liability Litigation*, 73 TEX. L. REV. 1653, 1673 (1995).

117. *Id.*

118. *Id.*



using special verdicts.<sup>119</sup> They surmise that jurors may first decide the case as a whole and then respond to individual questions by answering in a way that each will lead to the already favored result.<sup>120</sup> Even so, Henderson and colleagues maintain that, overall, special verdicts increase rational decision making by controlling the jury, facilitating judicial review, decreasing personal biases in decision making, and simplifying instructions for jurors.<sup>121</sup> Pamela Stephens, too, has argued that judicial instructions would be less problematic under a regime of special verdicts.<sup>122</sup>

Jonathan Casper summarizes the advantages and disadvantages of verdict alternatives and notes that there is some anecdotal evidence— but little systematic empirical evidence— that special verdicts increase juror comprehension and enhance the jury’s ability to organize testimony and legal rules.<sup>123</sup> Casper discusses the concern of some theorists that special verdicts may generate systematic biases toward one side or the other.<sup>124</sup> Special verdicts might create anti-plaintiff bias because the jury is required to make specific findings for the plaintiff on all issues, and because jurors are tasked with an increased number of decisions.<sup>125</sup> However, special verdicts might give plaintiffs more opportunities for success in cases involving multiple claims or ones with alternate theories.<sup>126</sup> In line with this concern, David Lombardero argues that the structure of special verdicts may be biased in favor of plaintiffs during civil cases, while general verdicts may often be favorable to defendants.<sup>127</sup> In his view, because special verdicts require jurors to answer questions in a specific order, Lombardero argues that they “restric[t] the jury’s ability to reject collectively improbable multiple-element claims,” and that the order of presentation will in fact determine the outcome of the trial.<sup>128</sup> In contrast, Kevin Clermont argues that jurors do not, and should not, consider any overall question in a case regarding multiple elements.<sup>129</sup> Instead, judges instruct jurors to apply the

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119. *Id.* at 1675.

120. *Id.*

121. *Id.* at 1672–74.

122. See Pamela J. Stephens, *Controlling the Civil Jury: Towards a Functional Model of Justification*, 76 KY. L.J. 81, 142 (1987) (noting that special verdicts might assist jurors as they mitigate the effect of confusing judicial instructions “by reducing the instructions that the judge gives. More broadly construed, by limiting the availability of the jury trial or by expanding the situations in which the court may take the case away from the jury, jury instructions and their contribution to reversals would decline substantially”).

123. Casper, *supra* note 98, at 437–38.

124. *Id.* (citing Richard O. Lempert, *Civil Juries and Complex Cases: Let’s Not Rush to Judgment*, 80 MICH. L. REV. 68, 113 (1981)).

125. *Id.* at 438.

126. See Elizabeth C. Wiggins & Steven J. Breckler, *Special Verdicts as Guides to Jury Decision Making*, 14 LAW & PSYCHOL. REV. 1, 9 (1990); Neil Vidmar, *Effects of Decision Alternatives on the Verdicts and Social Perceptions of Simulated Jurors*, 22 J. PERSONALITY & SOC. PSYCHOL. 211, 215 (1972).

127. David A. Lombardero, *Do Special Verdicts Improve the Structure of Jury Decision-Making?*, 36 JURIMETRICS 275, 289–90 (1996).

128. *Id.*

129. See Kevin M. Clermont, *Common Sense on Standards of Proof* (Cornell Legal Studies Research Paper No. 17–36, 2017), <https://ssrn.com/abstract-3007129> [https://perma.cc/KEP8-6021].

standard of proof to each element.

Several theories of memory and reasoning can help explain how jurors reach general verdicts, and how a reasoning requirement or a structural change, such as answering questions about their fact finding, might affect their approach to reaching judgments. The following sections describe: (1) dual process models of judgment and decision making; (2) the story model of juror decision making; (3) moral reasoning; (4) the phenomena of predecisional distortion and motivated cognition; and (5) relevant jury research. We consider the debate over reasoned verdicts in light of these psychological theories and research.

### 1. Dual-Process Models of Judgment and Decision Making

Dual-process models posit that humans make decisions and reason about problems using two separate systems. System I is a quick, intuitive, and effortless processor that works spontaneously, while System II is slower, more deliberative, and requires more effort.<sup>130</sup> According to such models, both systems are valuable and sophisticated processors of complex information.<sup>131</sup> System I often produces fast, intuitive judgments about problems that arise, while System II monitors the quality of such intuitions and helps correct or override them when necessary. However, because these processes are in competition, the rational/deliberative System II at times loses control to intuitions.<sup>132</sup> When intuitions gain control, people are more susceptible to errors or biases in their decision making.<sup>133</sup> This is more common when people are faced with novel or complex tasks.<sup>134</sup>

These ideas are relevant to juror decision making, especially during complex trials. In these situations, much of the information jurors process will be difficult and novel, and deliberation will be more arduous. In these challenging settings, there is a tendency for intuitions to prevail over deliberative thought; however, the deliberative system is capable of overriding intuition.

The anticipation of having to provide reasons for their decisions could be helpful if it induces jurors to engage with their deliberative system while they consider and analyze trial evidence and testimony. The unanswered question is whether requiring reasoned verdicts produces more deliberative System II thinking when compared to a situation in which jurors deliberate

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130. See Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 49, 51 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002). The deliberative system is more controlled and can help us with novel tasks. Some scholars reject the “contrast between intuition and reasoning as if these were two quite different forms of inference”; rather, they consider “reasoning itself is a kind of intuitive inference.” HUGO MERCIER & DAN SPERBER, *THE ENIGMA OF REASON* 7 (2017).

131. Kahneman & Frederick, *supra* note 130.

132. *Id.* at 51–52

133. *Id.* at 58–59. The intuitive system works quickly to produce answers. We are often confident in our intuitions because of the ease with which they come to mind. System II may give way to System I, and we may begin to accept intuitions that come easily to mind.

134. *Id.*

when deciding a general verdict. That is, do jurors benefit from the additional requirement of public reason-giving in support of a verdict when they already engage in private reason-giving during jury discussions?

## 2. Story Model of Juror Decision Making

Most jury researchers consider the story model of juror decision making to be the best account of the approach that jurors take in a system in which a general verdict of guilty or not guilty is required.<sup>135</sup> In systems using general verdicts, jurors first listen to and interpret evidence for themselves and then develop their own narrative account or story of the case.<sup>136</sup> As jurors construct their narratives, they search these stories for inconsistencies, check for contradictions in evidence, and explore the fit of alternative stories.<sup>137</sup> However, jurors might dismiss or underweight evidence that does not fit the emerging story that they find most compelling.<sup>138</sup> This approach to inconsistent evidence is in line with other psychological tendencies.

Jurors then engage in group deliberation, armed with their own construction of the story, which they must defend as they deliberate with other jurors.<sup>139</sup> In this discussion, jurors must reason with one another about each story in order to determine which story is best.<sup>140</sup> The deliberation generally leads to acceptance of the most fitting story, which is the one that most comprehensively accounts for the facts in the case.<sup>141</sup>

Some research on the story model suggests that there are benefits to having jurors render general verdicts wherein they can structure their own deliberations and decision making. In a series of studies, Pennington and Hastie explored how narrative construction impacted mock juror decision making. In one study, participants served as mock jurors and reviewed

135. Lora M. Levett & Dennis Devine, *Integrating Individual and Group Models of Juror Decision Making*, in *THE PSYCHOLOGY OF JURIES* 11, 13 (Margaret Bull Kovera ed., 2017) ("The story model of juror decision making has been lauded as the most descriptively accurate way to explain how jurors make decisions . . ."); NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 135 (2007) ("Many subsequent studies . . . have lent support to the basic assumptions of the story model . . .").

136. See Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 *J. PERSONALITY & SOC. PSYCHOL.* 242, 252 (1986) [hereinafter Pennington & Hastie, *Evidence Evaluation*]; Nancy Pennington & Reid Hastie, *Explanation-based Decision Making: Effects of Memory Structure on Judgment*, 14 *J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION* 521, 527 (1988) [hereinafter Pennington & Hastie, *Explanation-based Decision Making*]; Nancy Pennington & Reid Hastie, *Explaining the Evidence: Test of the Story Model for Juror Decision Making*, 62 *J. PERSONALITY & SOC. PSYCHOL.* 189, 189-90 (1992) [hereinafter Pennington & Hastie, *Explaining the Evidence*]; Nancy Pennington & Reid Hastie, *Reasoning in Explanation-Based Decision Making*, 49 *COGNITION* 123, 125-26 (1993) [hereinafter Pennington & Hastie, *Reasoning*].

137. See Pennington & Hastie, *Reasoning in Explanation-Based Decision Making*, *supra* note 136, at 125-26.

138. Pennington & Hastie, *Evidence Evaluation*, *supra* note 136.

139. See Pennington & Hastie, *Explanation-based Decision Making*, *supra* note 136, at 530-31.

140. *Id.*

141. *Id.*

case evidence presented either in story order or by issue.<sup>142</sup> Participants who were presented with evidence in story order showed evidence of organizing the evidence in their memory in story order, while those who were presented with evidence ordered by issue showed memory organization along issue lines. Further, when mock jurors were presented with evidence in story order, and in turn, structured their memories in a narrative fashion, they made decisions more faithful to the preponderance of the evidence compared to when they were presented with evidence by legal issue.<sup>143</sup> When evidence was presented in story order as opposed to issue order, participants also expressed more confidence in their decisions.<sup>144</sup> Item-by-item judgments, which bear some similarity to reasoned verdicts, special verdicts, and general verdicts with answers to written questions, led to less explanation-based reasoning and lower confidence by participants in their decisions.<sup>145</sup> The story model research provides evidence that allowing jurors to structure evidence in a narrative fashion might lead to better decision making than the imposed legal issue order, which resembles the question lists of reasoned verdicts.<sup>146</sup>

A concern raised by research on the story model is that jurors may misremember and mischaracterize evidence in order to shoehorn it into their story narrative. Mock jurors' recognition memory for evidence was higher for items that supported their chosen verdict, and mock jurors incorrectly remembered some case facts that fit well with their narratives, even when that evidence was not actually provided.<sup>147</sup>

Overall, the story model research buttresses the arguments of supporters of general verdicts because it suggests that jurors already reason deeply about trial evidence and case facts even without specific prompting.<sup>148</sup> Jurors make complex inferences about evidence, reason in terms of negation through contradiction, reason through analogy, and discount other alternatives.<sup>149</sup> It seems that general verdicts with unstructured deliberation imposes at least some requirements on jurors to engage in reasoning with others.

### 3. Moral Reasoning

In a line of research relevant to reasoned verdicts, moral and cultural psychologist Jonathan Haidt and colleagues argue that morality and political ideology greatly affect our decisions in many contexts. In contrast to rational or deliberative models of moral judgments and decision making, which suggest that moral reasoning is the basis of moral judgments, Haidt and colleagues propose that moral reasoning occurs post hoc, once moral

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142. Pennington & Hastie, *Explaining the Evidence*, *supra* note 136, at 194.

143. *Id.* at 195.

144. *See id.*

145. *See id.* at 202-03.

146. *See id.*

147. Pennington & Hastie, *Explanation-based Decision Making*, *supra* note 136, at 526.

148. *See generally* Pennington & Hastie, *Reasoning*, *supra* note 136.

149. *See id.* at 155.

judgments have already been made.<sup>150</sup> This theory proposes that decision making is greatly affected by social and cultural influences, which cause us to have fast, automatic gut reactions in response to moral stimuli.<sup>151</sup> Once we assess our intuitions by taking stock and analyzing what we are feeling, we form moral judgments. Haidt suggests that moral emotions such as shame, disgust, contempt, and anger directly cause moral judgments.<sup>152</sup> Afterwards, we engage in reasoning to explain, understand, and justify our judgments. As Haidt explains it, “one becomes a lawyer trying to build a case rather than a judge searching for the truth.”<sup>153</sup>

In one illustrative study, Haidt and colleagues found that judgment often precedes reasoning and that individuals often cannot support their judgments with reasoning.<sup>154</sup> Participants in this study read a series of stories regarding moral issues and two “non-moral intuition” acts.<sup>155</sup> In the first story, individuals read about the “Heinz dilemma” in which a man steals drugs from a pharmacy to save his dying wife’s life.<sup>156</sup> Participants then heard two stories detailing immoral acts, one about siblings engaging in consensual incest, and one regarding a woman cooking and eating human flesh from a cadaver in a research facility.<sup>157</sup> After each story, participants were asked if the depicted acts from the stories were wrong and were asked to provide reasons to support their answers.<sup>158</sup> The experimenter would then try to undermine the participants’ reasons.<sup>159</sup> In many situations, participants seemed to be unable to provide reasons for their judgments and often reported that they were dumbfounded.<sup>160</sup> Participants often made judgments based on intuitions and gut feelings, and typi-

150. Joshua Greene & Jonathan Haidt, *How (And Where) Does Moral Judgment Work?*, 6 TRENDS IN COGNITIVE SCI. 517, 517 (2002).

151. See *id.* at 517.

152. See generally Paul Rozin et al., *The CAD Triad Hypothesis: A Mapping Between Three Moral Emotions (Contempt, Anger, Disgust) and Three Moral Codes (Community, Autonomy, Divinity)*, 76 J. PERSONALITY & SOC. PSYCHOL. 574 (1999). Moral intuitions occur quickly in response to moral stimuli and are often accompanied by moral emotions. New research utilizing neuroimaging also suggests a strong role of emotion in moral judgments and decision making. See Greene, *supra* note 150, at 517.

153. Haidt, *The Emotional Dog*, *supra* note 25, at 818. Furthermore, Haidt argues that in many cases we never even begin this reasoning process. Haidt argues that this reasoning “is hypothesized to be rare, occurring primarily in cases in which the initial intuition is weak and processing capacity is high.” *Id.* at 819. Even when we do, Haidt argues that we are extremely adept at searching for information to support our moral judgments, and thus, our information searches are often biased in favor of supporting our preexisting beliefs. Haidt says that this gives us the “illusion of objective reasoning.” *Id.* at 822.

154. Jonathan Haidt, Fredrik Björklund & Scott Murphy, *Moral Dumbfounding: When Intuition Finds No Reason* 5 (Aug. 10, 2000) (unpublished manuscript) (on file with authors) (citing Lawrence Kohlberg, *Stage and Sequence: The Cognitive-Developmental Approach to Socialization*, in HANDBOOK OF SOCIALIZATION THEORY AND RESEARCH (D. A. Goslin ed., 1969)).

155. See *id.* at 5-6.

156. See *id.*

157. See *id.*

158. See *id.*

159. See *id.* at 6.

160. See *id.* at 7.

cally could not provide reasons, or provided post hoc reasons, to support their judgments.<sup>161</sup>

Haidt argues “people rarely override their initial intuitive judgments just by reasoning privately to themselves because reasoning is rarely used to question one’s own attitudes or beliefs.”<sup>162</sup> He warns that generating reasons post hoc may only give the illusion of objectivity.<sup>163</sup> However, Haidt acknowledges that intuitions can sometimes be overridden through deliberative reasoning in which new intuitions are triggered through taking different roles or perspectives.<sup>164</sup>

It is interesting to consider how Haidt’s research applies to the debate over reasoned verdicts. On the one hand, evidence that reasons for individual judgments are often generated post hoc leads us to doubt that the requirement of reasoning will produce stronger juror fact finding. On the other hand, the jury experience requires that jurors explain the reasons for their individual judgments to one another, and exposure to these different perspectives in jury deliberation may allow individuals to overcome their initial intuitions and engage in more robust decision making. Then too, in situations where the jurors are morally dumbfounded, the reasons they provide to one another for their judgments might be flawed or inconsistent. Jury deliberation, even without a reasoning requirement, could well expose these weakly supported judgments. Or, if a verdict is required to be reasoned, these weaknesses could be discovered during judicial review of their

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161. See *id.* at 7–8. In a parallel context, Allen and Seniuk argue that judges’ reasons about facts can often be false. They state, “based on all the observations at trial, a view of what happened begins to emerge in the mind of the fact finder and it is the emergence of this overall sense of what transpired that in turn generates subsequently conclusions that this or that witness’ story is consistent or inconsistent with the truth.” Ronald J. Allen & Gerald T. G. Seniuk, *Two Puzzles of Juridical Proof*, 76 CAN. B. REV. 65, 76 (1997). Allen and Seniuk also indicate that biases or corruption in decision making are likely hidden from the reasons provided. *Id.* at 78. However, Menashe argues that a reasoning requirement for judges would, at a minimum, “rein in the judge’s intuitive impressions, which may be swayed by various biases, errors or stereotypes.” Menashe, *supra* note 111, at 239.

162. Haidt, *The Emotional Dog*, *supra* note 25, at 819. Other research supports the notion that moral emotions lead to intuitive rather than reasoned responses, and that some emotions are less likely to evoke justification and elaborated reasoning than others. See generally Pascale S. Russell & Roger Giner-Sorolla, *Social Justifications for Moral Emotions: When Reasons for Disgust Are Less Elaborated than for Anger*, 11 EMOTION 637 (2011). In three experiments, Russell and colleagues found that participants were more likely to give elaborated reasoning to explain anger versus disgust in response to immoral actions and sexual or nonsexual norms. *Id.* Participants had great difficulty accessing and elaborating on reasons to explain bodily disgust, but not anger. *Id.* This work suggests that certain moral emotions occur intuitively in response to certain situations, and that judgments about them are not founded on elaborated reasons. *Id.*

163. Allen and Seniuk also argue that, for judges, the reasons they have for believing one witness over another “will be as complex and impenetrable as the sum of the judge’s background and knowledge that he brought to the trial before it began. Once belief has settled, then the conclusion becomes obvious that those championing another version are wrong and not to be believed. But this is not something that can be known in advance; it emerges as beliefs about the case as a whole emerge as the evidence and arguments unfold.” Allen & Seniuk, *supra* note 161, at 76.

164. See Haidt, *The Emotional Dog*, *supra* note 25, at 819.

judgments and reasoning. If so, a judge could return the verdict for correction or the jury's decision could be overturned.<sup>165</sup>

#### 4. Predecisional Distortion and Motivated Reasoning

Two psychological phenomena—predecisional distortion and the allied concept of motivated reasoning—are relevant to the debate on reasoned verdicts. In predecisional distortion, individuals tend to interpret or even distort new information to cohere with their already established preferences.<sup>166</sup> The tendency is most pronounced when information is ambiguous and capable of multiple interpretations.<sup>167</sup> J. Edward Russo and his colleagues explored the possibility of predecisional distortion in jurors' interpretations of evidence. In two experiments simulating civil and criminal trials, Russo found that mock jurors distorted mock trial evidence in support of the leading verdict despite warnings and judicial instructions not to do so.<sup>168</sup> Jurors distorted incoming information so that new information was coherent with their existing beliefs.<sup>169</sup> The tendency to distort information was greater when mock jurors were more confident in the leading verdict.<sup>170</sup>

The phenomenon of predecisional distortion has implications for the requirement of reasoned verdicts. Requiring reasons of jurors is supposed to promote juror rationality, yet it might not actually do so if jurors form their judgments of the case before they draft the reasons underlying their

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165. MERCIER & DAN SPERBER, *supra* note 130, at 262-73 (describing the value of group deliberation on decision quality); email from Zachary Clopton, Assistant Professor of Law, Cornell Law School, to Kayla A. Burd, Human Development, Cornell University & Valerie P. Hans, Professor of Law, Cornell Law School (Sept. 2, 2016) (on file with authors).

166. J. Edward Russo, Margaret G. Meloy & Victoria Husted Medvec, *Predecisional Distortion of Product Information*, 35 J. MARKETING RES. 438, 445 (1998) [hereinafter Russo et al., *Predecisional Distortion*]. Russo and colleagues found that predecisional distortion can occur even when individuals are not asked to make a choice. Such distortion may be even greater in ambiguous or equivocal situations. When information that was roughly equivalent was given to participants, one attribute at a time, the evaluation of this information was distorted to support a preferred choice. *Id.* at 438. However, participants were less likely to distort incoming information when the new information favored one option, as there was less room for subjective interpretation of the information. *Id.* at 448.

167. J. Edward Russo, Victoria Husted Medvec & Margaret G. Meloy, *The Distortion of Information During Decisions*, 66 ORG. BEHAV. & HUM. DECISION PROCESSES 102, 102 (1996) [hereinafter Russo et al., *The Distortion of Information*]. Russo and his colleagues explored the impact of preexisting preferences on the processing of new information and found that preexisting or even developing preferences for an option led to the distortion of incoming information such that the new information was perceived as favoring the leading choice. Thus, preexisting preferences led individuals to process and evaluate new information in biased ways. *Id.* at 106. In addition, cognitive dissonance may affect perceptions of a judgment that has been made. Individuals often distort information so that it favors a preexisting decision in order to reduce discomfort with the decision. *Id.* at 102.

168. Kurt A. Carlson & J. Edward Russo, *Biased Interpretation of Evidence by Mock Jurors*, 7 J. EXPERIMENTAL PSYCHOL.: APPLIED 91, 91 (2001).

169. *Id.* at 99.

170. *Id.* at 95-96.

verdict. Like Haidt's work on moral reasoning, predecisional distortion research suggests that the reasons provided may simply be post hoc justifications for preexisting judgments. In this way, rather than deliberating deeply about the reasons for a verdict, jurors may create justifications and find reasons to support the decisions they have already reached. In sum, the verdict drives the reasons; the reasons do not drive the verdict. However, strong, unambiguous cases leave less room for distorted interpretation of information.

The phenomenon of motivated reasoning, or the tendency to evaluate information with a goal or end in mind, bears some resemblance to predecisional distortion.<sup>171</sup> Motivated reasoning can shift individuals' perceptions of facts and evidence. Research conducted by Avani Sood demonstrates that participants acting as judges engaged in motivated cognition during the evaluation of heinous crimes.<sup>172</sup> When participants were faced with important but illegally obtained evidence, they interpreted how the evidence was obtained in a way that allowed for an exception to the exclusionary rule.<sup>173</sup> When participants thought the commission of a serious crime needed to be punished, they accepted the evidence even when it was obtained illegally.<sup>174</sup> Triers of fact perceive evidence (and even laws) differently depending on their view of what the correct outcome should be.<sup>175</sup> Paradoxically, thinking and reflecting deeply may make individuals more likely to engage in motivated reasoning based on preexisting ideologies. Both liberals and conservatives are equally likely to engage in motivated reasoning, even when predisposed to reason deeply.<sup>176</sup>

## 5. Related Jury Research

Applying these psychological theories to the debate over reasoned verdicts provides several insights about how requiring reasons might affect the accuracy of jury decision making. With this as useful theoretical background, it is also important to examine the extensive body of research on the accuracy and quality of jury decision making.

The aforementioned research reinforces the general soundness of jury verdicts. In the U.S., judges agree with the substantial majority of jury ver-

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171. Dan M. Kahan, *Ideology, Motivated Reasoning, and Cognitive Reflection*, 8 JUDGMENT & DECISION MAKING 407, 408 (2013) (citing Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480 (1990)).

172. See generally Avani Mehta Sood, *Cognitive Cleansing: Experimental Psychology and the Exclusionary Rule*, 103 GEO. L.J. 1543, 1543 (2015).

173. *Id.*

174. *Id.* Other research by Sood suggests that participants rely on motivated cognition when they believe that someone has caused harm. When participants were told that the law required a finding of harm for penalty, they were more likely to interpret non-harmful acts as harmful. Avani Mehta Sood & John M. Darley, *The Plasticity of Harm in the Service of Punishment Goals: Legal Implications of Outcome-Driven Reasoning*, 100 CALIF. L. REV. 1313, 1332 (2012).

175. See Avani Mehta Sood, *Motivated Cognition in Legal Judgments—An Analytic Review*, 9 ANN. REV. L. & SOC. SCI. 307, 308 (2013).

176. *Id.* at 314; Kahan, *supra* note 171, at 407.



dicts in criminal and civil trials over which they preside.<sup>177</sup> The strength of the evidence in a case is the single most significant determinant of jury verdicts, whether evidence strength is measured from the jurors' or the presiding judge's perspective.<sup>178</sup> To be sure, juries encounter fact-finding challenges, especially in complex cases.<sup>179</sup> Would requiring them to provide reasons and insisting that they answer a series of specific questions about their fact finding improve their decision making?

Research using mock jury deliberations provides us with some insights about whether deliberation functions as the reason-giving engine that is claimed by supporters of general verdicts. In one such study, Phoebe Ellsworth analyzed the complexity, depth, and accuracy of juror reasoning during mock jury deliberations.<sup>180</sup> She found that jurors typically discussed factual information coupled with inferences about the information, referenced the law in their discussions, and generally resolved questions about case facts accurately.<sup>181</sup> When some jurors made errors in factual claims during jury deliberation, other jurors usually corrected the errors.<sup>182</sup>

Of course, the deliberation process by which jurors arrive at general verdicts can be less than optimal. Due in part to an effort to protect the jury's independence, judges usually give no directions—or give only very general instructions—to jurors about how to manage their deliberation.<sup>183</sup>

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177. See, e.g., HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 55-65 (1966); Theodore Eisenberg, Paula L. Hannaford-Agor, Valerie P. Hans, Nicole L. Waters, G. Thomas Munsterman, Stewart J. Schwab & Martin T. Wells, *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's The American Jury*, 2 J. EMPIRICAL LEGAL STUD. 171, 182-83 (2005) (showing substantial judicial agreement with jury verdicts); Paula L. Hannaford, B. Michael Dann & G. Thomas Munsterman, *How Judges View Civil Juries*, 48 DEPAUL L. REV. 247, 248-49 (1998) (finding that trial judges strongly support the jury system and believe jurors to be competent); Valerie P. Hans, Paula L. Hannaford-Agor, Nicole L. Mott & G. Thomas Munsterman, *The Hung Jury: THE AMERICAN JURY'S Insights and Contemporary Understanding*, 39 CRIM. L. BULL. 33 (2003) (showing substantial judicial agreement with jury verdicts). Research by Vidmar regarding civil cases suggests that jurors and legal professionals (senior lawyers and former judges) gave damage awards that were similar in terms of the mean and median awards. Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 884 (1998). Further, Vidmar found no evidence that jurors decided on negligence less competently than judges, and in fact, he concluded that jurors' combined judgments might be superior to those made by a single judge.

178. Eisenberg et al., *supra* note 177, at 196-97.

179. See generally Valerie P. Hans & Michael J. Saks, *Improving Judge and Jury Evaluation of Scientific Evidence*, DAEDALUS (forthcoming) (describing fact-finding challenges in cases with scientific and complex evidence) (on file with authors).

180. See generally Phoebe C. Ellsworth, *Are Twelve Heads Better than One?*, 52 LAW & CONTEMP. PROBS. 205, 217-20 (1989). See also Valerie P. Hans, *Introduction: Citizens as Legal Decision Makers: An International Perspective*, 40 CORNELL INT'L L.J. 303, 307-08 (2007) (describing how group decision-making promotes sound jury verdicts).

181. Ellsworth, *supra* note 180, at 217-19.

182. *Id.* at 217.

183. See, e.g., a set of guidelines that Wisconsin judges adapted from a document originally developed by the American Judicature Society. Wisconsin Chief Judges' Subcommittee on Juror Treatment and Selection, *Behind Closed Doors: A Guide for Jury Deliberation*, [http://athensdesantis.com/downloads/criminal\\_law/0\\_jury\\_deliberation.pdf](http://athensdesantis.com/downloads/criminal_law/0_jury_deliberation.pdf) [https://perma.cc/7KK3-X4S9].

Jurors may fail to discuss important issues, especially if such issues pertain to a verdict that no juror or perhaps only one juror supports.<sup>184</sup> Deliberation may quickly turn into a “verdict-driven” discussion in which jurors identify evidence that favors their preferred verdicts, rather than a more “evidence-driven” discussion in which jurors initially engage in general analysis of the trial evidence and only later debate the appropriate verdict.<sup>185</sup>

Another challenge is competent interpretation of the law. Jurors turn to the law and legal definitions for verdicts in order to guide their discussions, and research on jury deliberations shows that jurors typically spend a great deal of time trying to understand and apply the law.<sup>186</sup> Nonetheless, juries sometimes struggle with the precise meaning of legal terms and how to apply the law to the facts of the case.<sup>187</sup> Ellsworth’s study found that even though jury deliberation corrected most factual errors, jurors’ misstatements of the law during jury deliberation were not usually corrected.<sup>188</sup>

In one of the only experimental studies comparing special verdicts and general verdicts, Elizabeth Wiggins and Steven Breckler presented mock jurors with a videotape of a mock civil trial.<sup>189</sup> The defamation case presented, *Hennessey v. Morgan*, had roughly balanced evidence for the defendant and plaintiff. Wiggins and Breckler asked half of the participants to render a general verdict, and asked the other half to give a special verdict.<sup>190</sup> In addition to obtaining participants’ general or special verdicts, the researchers measured mock jurors’ perceptions of the plaintiff’s,

184. Ellsworth, *supra* note 180, at 218.

185. REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* 163 (1983) (differentiating evidence-driven and verdict-driven deliberations); Hannaford et al., *supra* note 177, at 35 (finding that verdict-driven deliberations are more likely to result in hung juries than evidence-driven deliberations).

186. Ellsworth, *supra* note 180, at 218.

187. For a contemporary example, see Graham Bowley & Sophie Wodzak, *What Divided the Cosby Jurors? Words, For One Thing*, N.Y. TIMES (June 30, 2017), <https://www.nytimes.com/2017/06/30/arts/television/bill-cosby-jurors-mistrial-wording-unconscious.html> [<https://perma.cc/C7JG-CS2E>] (reporting that jurors in Cosby’s first trial, which resulted in a hung jury, disagreed about how to interpret legal instructions).

188. Ellsworth, *supra* note 180, at 218. See also Joe S. Cecil, Valerie P. Hans & Elizabeth C. Wiggins, *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 749 (1991) (“[I]f the jury had an Achilles heel, it is the comprehension of legal instructions.”); Shari Seidman Diamond, Beth Murphy & Mary R. Rose, *The Kettleful of Law in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537, 1565–66, 1598 (2012) (finding that jurors had special difficulty with figuring out how multiple legal instructions fit together. A road map, along with pattern jury instructions that are rewritten with clearer language and tighter organization, increases juror comprehension of the law substantially).

189. Wiggins, *supra* note 98, at 36–37; Wiggins & Breckler, *supra* note 126, at 1.

190. *Id.* This study was limited in that it did not utilize mock juror deliberation. This study may not indicate how a jury would respond to special verdicts, but rather how individual mock jurors, without deliberation, would respond. Email from Nancy S. Marder, Professor of Law, Chicago-Kent College of Law, to Kayla A. Burd, Human Development, Cornell University & Valerie P. Hans, Professor of Law, Cornell Law School (Oct. 16, 2016) (on file with authors).

defendant's, and witnesses' comprehension of the judicial instructions and confidence in the decision.

Interestingly, the format of the verdict did not lead to differences in individual mock jurors' verdict decisions or the total amount of the damage awards.<sup>191</sup> However, differences in the verdict format affected the proportion of compensatory and punitive damages awarded. Participants in the special verdict condition awarded proportionally more compensatory damage awards than those in the general verdict condition, while punitive damages did not differ across groups.<sup>192</sup> In addition, participants who were asked for a special verdict showed better comprehension of the legal instructions on the burden of proof, compared to participants who were asked only to provide a general verdict.<sup>193</sup>

Regardless of which verdict form participants utilized, jurors' perceptions of the parties were strongly related to their chosen verdict. Wiggins and Breckler concluded that the mock jurors made decisions based on their overall impressions of the case, especially their impressions of the plaintiff and defendant, even when directed to complete a special verdict form.<sup>194</sup> Wiggins and Breckler also discovered that participants who gave a special verdict were less confident than those who gave a general verdict.<sup>195</sup>

One other project, a study of actual criminal and civil jury trials, sheds some light on how jurors react to guidance provided by judges through verdict forms. Steven Penrod and Larry Heuer gave questionnaires to judges and juries in 160 criminal or civil cases, and analyzed the relationship between various trial procedures and juror reactions.<sup>196</sup> The researchers asked judges which trial procedures had been employed in their cases, including notetaking, asking questions, and verdict forms.<sup>197</sup> Jurors who had received verdict forms to record the jury's responses to their verdicts (and any associated questions) felt more informed and more satisfied that they had reached the correct verdict, compared to those who had been in trials in which the judge had not given them a special form.<sup>198</sup> Jurors in cases with verdict forms also expressed more confidence that they had understood the judicial instructions.<sup>199</sup> The study did not experimentally vary whether jurors received verdict forms or not, so it is possible that other differences in the cases or the judges led to the observed greater positivity among the jurors. The authors did not report the content of the ver-

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191. Wiggins, *supra* note 98, at 1; Wiggins & Breckler, *supra* note 126, at 30.

192. Wiggins & Breckler, *supra* note 126, at 30.

193. *Id.* at 31.

194. *Id.* at 32; Allen & Seniuk, *supra* note 161, at 77 ("[A]t the end of the trial, the grounds for believing or disbelieving are a sum of the interaction of all the observations at trial with all the knowledge brought to the case by the fact finder. This cannot be reduced either to rules or to straight forward explanation.").

195. Wiggins & Breckler, *supra* note 126, at 30.

196. Larry Heuer & Steven D. Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 LAW & HUM. BEHAV. 29, 29 (1994).

197. *Id.*

198. *Id.* at 50.

199. *Id.*

dict forms, but the overall results suggest that receiving written guidance relating to verdicts may provide reassurance to jurors in some cases. Whether this guidance is done most effectively through verdict forms or through written copies of the judicial instructions is an open question.

## 6. Summary

The rationales for special verdicts, and for general verdicts with answers to questions, overlap with the impetus for reasoned verdicts—to serve as a check on jury decision making and thereby promote sound and accurate jury fact finding. The exact structure and operationalization of these options differs from jurisdiction to jurisdiction. However, the options share some commonalities. They all attempt to guide the jury's decision process by posing questions, asking jurors to reflect on the factual basis for their responses, and directing the jurors' attention to issues in a particular sequence.

Considering that each of these options encourages or requires reason-giving, the psychological research on reasoning and reason-giving raises significant questions about how such a requirement affects the accuracy and soundness of jury decision making. Reason-based choice analysis explores how individuals make decisions when they must choose among alternatives in times of doubt, uncertainty, or conflict. This approach “explains choice in terms of the balance of reasons for and against the various alternatives.”<sup>200</sup> Eldar Shafir and colleagues explain:

Unfortunately, the actual reasons that guide decisions may or may not correspond to those reported by the subjects . . . [S]ubjects are sometimes unaware of the precise factors that determine their choices, and generate spurious explanations when asked to account for their decisions.<sup>201</sup>

The research indicates that we often justify decisions that we have already made.<sup>202</sup> The empirical data on the effects of special versus general verdicts are limited, and the results are mixed.<sup>203</sup> Further, in a parallel context, Ronald Allen and Gerald Seniuk argue:

Reasons are integral to rational judgment, and the call for reasons seems tantamount to the call for rationality. Yet the human condition impinges.

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200. Eldar Shafir, Itamar Simonson & Amos Tversky, *Reason-Based Choice*, 49 *COGNITION* 11, 12 (1993).

201. *Id.* at 13.

202. People sometimes make decisions that are “easy to explain and justify.” *Id.* at 14. However, this does not ensure that we always make rational choices, and such choices may at times be based on affective judgments without “a thorough evaluation of the options.” *Id.* at 32. Shafir and colleagues explain that, “when faced with the need to choose, decision makers often seek and construct reasons in order to resolve the conflict and justify their choice, to themselves and to others.” *Id.* at 11. Thus, jurors may assign reasons post hoc instead of reasoning first and making judgments later. Objective reasoning may be particularly difficult in long, complex, ambiguous, and/or morally charged cases, and requiring reasons of jurors may not successfully mitigate such difficulties. Here, requiring reasons may not harm decisions, but it may not ensure that reasoning occurs before decision making.

203. Wiggins & Breckler, *supra* note 126, at 2-22.

The factors upon which rational judgment operate can defy the very call for reasons that is designed to guarantee that it is indeed rational judgment that is operating . . . [judges] will . . . find themselves unable to identify even to themselves the reasons that satisfactorily explain why they believe one witness or disbelieve another.<sup>204</sup>

In sum, empirical research and experience suggest that general, special, and reasoned verdicts have some potential strengths and weaknesses. However, we are unaware of any empirical work that has compared these three alternatives, so we cannot be sure which of the above stimulates the strongest decision-making processes in jurors and produces the most accurate verdicts. The idea that a reasoned jury verdict will be a higher quality jury verdict is intuitively attractive. But we do not yet have evidence to support this intuition, and the psychological research raises questions about the value of requiring reasons beyond those already part of the jury process.

## B. Jury Independence and Jury Transparency

Although the soundness and accuracy of jury decision processes and verdicts are key goals of those who favor reasoned and structured verdicts, two other lines of argument have emerged. One argument surrounds the independence of the jury as a fact finder and how a reasoning requirement might affect that independence. The other argument focuses on how the transparency of jury decision making, or the lack of it, might affect the legitimacy of the verdict. We will take up each of these in turn.

### 1. Jury Independence and Judicial Control: The Role of Framing

The jury is a fact finder, but also a political body.<sup>205</sup> As the Court wrote in *Duncan v. Louisiana*: “Providing an accused with the right to be tried by a jury of his peers [gives the accused] an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.”<sup>206</sup> Procedures in most classic jury systems protect jury independence by ensuring the privacy of deliberation and shielding the jury from outside influence. One critically important issue in the reasoned verdicts debate is how, if at all, requiring reasons or structuring jury decision making might affect the political role and independence of the jury.

Abramson asserts that much of the power of the jury lies in the free deliberative process that occurs outside the presence of the trial judge.<sup>207</sup> Abramson argues “the jury is an example of deliberation where impartiality and independence are enhanced by closing the jury room doors.”<sup>208</sup> General verdicts with free deliberation protect jurors from undue external

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204. Allen & Seniuk, *supra* note 161, at 77.

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

206. *Id.*

207. Abramson, *supra* note 112, at 876.

208. *Id.*

influences and allow for greater freedom in decision making.<sup>209</sup> Jurors can resist political pressures and can acquit defendants without explanation “with the exercise of [their] ‘inner conviction.’”<sup>210</sup> The privacy of general verdicts offers independence to jurors and allows them to reach unpopular decisions. Jurors are protected from what outsiders might think of their opinions and judgments. As a result, general verdicts, these scholars argue, ensure jury independence in decision making.<sup>211</sup> As Justice Alito, dissenting in *Peña-Rodríguez v. Colorado*, observed: “The jury trial right protects parties in court cases from being judged by a special class of trained professionals who do not speak the language of ordinary people and may not understand or appreciate the way ordinary people live their lives. To protect that right, the door to the jury room has been locked, and the confidentiality of jury deliberations has been closely guarded.”<sup>212</sup>

Trial judges have a great deal of power in traditional jury trials.<sup>213</sup> They preside over all aspects of the trial, starting with jury selection in which they, aided by the lawyers, determine the suitability of jurors for trial.<sup>214</sup> Judges decide procedural and other legal issues, determining what evidence the jury may hear.<sup>215</sup> In addition, in some jurisdictions judges can comment on the evidence.<sup>216</sup> Finally, judges instruct jurors in the law, educating jurors on how to apply the legal principles to case facts.<sup>217</sup>

The use of reasoned verdicts, jury responses to questions posed by the court, and special verdicts will increase the already substantial control that judges have over the jury. Of course, some may see this as a positive, and not negative, particularly if there is little trust in the ability of the jury to decide cases fairly and accurately.<sup>218</sup>

Special verdicts also weaken the power of juries by granting them less latitude in decision making.<sup>219</sup> Special verdicts limit the jury’s ability to “bring its own sense of justice, rightness, or equity to its decision.”<sup>220</sup> In addition to lessening the jury’s latitude and power, at least one scholar

209. Hans & Jolivet, *supra* note 74, at 186.

210. Thaman, *The Spanish Experience*, *supra* note 1, at 619.

211. Hans & Jolivet, *supra* note 74, at 186.

212. 137 S. Ct. 855, 875 (2017) (Alito, J., dissenting).

213. VIDMAR & HANS, *supra* note 135, at 147 (describing the extensive role of judges who preside over jury trials).

214. Judges can remove prospective jurors for cause, and lawyers can remove jurors through peremptory challenges. See, e.g., FED. R. CIV. P. 47; FED. R. CRIM. P. 24.

215. VIDMAR & HANS, *supra* note 135, at 147 (describing the extensive role of judges who preside over jury trials).

216. Neil Vidmar, *A Historical and Comparative Perspective on the Common Law Jury*, in *WORLD JURY SYSTEMS* 1, 42 (Neil Vidmar ed., 2000) (“[I]n all countries except the United States and Scotland judges have the positive duty to not only instruct the jury on the applicable law but to also impartially review the trial evidence.”).

217. Thaman, *The Spanish Experience*, *supra* note 1, at 631–32.

218. Marder & Hans, *supra* note 6, at 795.

219. Kenneth S. Klein, *Unpacking the Jury Box*, 47 *HASTINGS L.J.* 1325, 1348 (1996) (citing Amendments to Rules of Civ. Pro. for the U.S. Dist. Cts., 374 U.S. 861, 868 (1963)).

220. Casper, *supra* note 98, at 440.

surmises that special verdicts might increase hung juries; by requiring jurors to agree on multiple factors in the special verdict questions, disagreement on such points may be more likely, which may in turn lead to costly mistrials.<sup>221</sup>

The historic case of *United States v. Spock* offers an instructive example of how requiring responses to specific questions allows the judge greater ability to shape the jury's decision-making process and influence the outcome.<sup>222</sup> During the Vietnam War, the well-respected pediatrician Dr. Benjamin Spock was charged with aiding young men in evading the draft.<sup>223</sup> At his trial, jurors were asked not only to render a general verdict but also to answer specific questions posed by the judge.<sup>224</sup> The defense argued that the special questions interfered with the jurors' ability to deliberate freely about the evidence and to come to a general verdict.<sup>225</sup> In fact, post-trial interviews with the jurors confirmed that the judicial instructions and special questions had a strong effect on their decision making.<sup>226</sup> As one juror said, "I knew they were guilty when we were charged by the judge. I did not know prior to that time—I was in full agreement with the defendants until we were charged by the judge. That was the kiss of death."<sup>227</sup> During the appeal, the court indicated its reservation about the use of such questions, mentioning that the questions could deeply influence jurors' decisions, and ultimately its verdict: "There is no easier way to reach, and perhaps force, a verdict of guilty than to approach it step by step."<sup>228</sup>

Would requiring reasons lessen the likelihood of jury nullification—the practice whereby juries reach a verdict that is inconsistent with the law and the facts because they view the alternative as unjust? The practice is controversial,<sup>229</sup> but some see it as an essential part of the political role of the jury. Supporters of jury nullification might point to historic instances in which juries bravely acquitted defendants unjustly targeted by the state,

221. Wright, *supra* note 90, at 418, 447.

222. 416 F.2d 165, 165 (1st Cir. 1969).

223. *Id.* at 168.

224. *Id.*; Valerie P. Hans, *El Veredicto General del Jurado* [*The General Verdict of the Jury*]: *United States vs. Spock*, 416 F. 2d 165 (1969), in *EL JUICIO POR JURADOS EN LA JURISPRUDENCIA NACIONAL E INTERNACIONAL SENTENCIAS COMENTADAS Y OPINIONES ACADÉMICAS DEL COMMON LAW, DEL CIVIL LAW Y DE LA CORTE EUROPEA DE DERECHOS HUMANOS* (A. M. Binder & Andrés Harfuch eds., 2016) (English version on file with authors).

225. *Spock*, 416 F.2d at 180-81.

226. Hans, *El Veredicto General del Jurado*, *supra* note 224 (citing JESSICA MITFORD, *THE TRIAL OF DR. SPOCK* 232 (1969)).

227. *Id.*

228. *Spock*, 416 F.2d at 182.

229. See, e.g., Paula L. Hannaford-Agor & Valerie P. Hans, *Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries*, 78 CHI.-KENT L. REV. 1249, 1249 (2003); VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 155 (1986). For an interesting perspective, see also Sherry F. Colb, *A More Civilized Sort of Jury Nullification*, *DORF ON LAW*, (May 24, 2017), <http://www.dorfonlaw.org/2017/05/a-more-civilized-sort-of-jury.html> [https://perma.cc/NDD6-5S3G] (advocating that jurors give reasons for their acquittals, making the process "more transparent and more rule-like."); Caisa E. Royer, Note, *Legislative Intent and Failed Attempts: Why Lawmakers Should Codify Jury Nullification*, 102 CORNELL L. REV. 1401, 1408-10, 1424 (2017).

such as abolitionists who violated the Fugitive Slave Laws in the 1800s.<sup>230</sup> Others identify darker examples of jury nullification, such as Southern juries that refused to convict those who violated civil rights laws.<sup>231</sup> By all accounts, outright jury nullification, in which juries knowingly go against the law and the facts to reach an unsupportable verdict, is exceedingly rare.<sup>232</sup> Likely more common are cases in which juries take a generous view of the law or the facts to achieve a verdict they believe is just; such an approach can be facilitated by some of the psychological phenomena like predecisional distortion and motivated reasoning that we discussed earlier.<sup>233</sup> Whether requiring reasons might disrupt one or both forms of jury nullification remains an open question.

The psychological research on framing shows one mechanism by which reason-giving, special verdicts, and general verdicts with answers to written questions enhance judicial control over the jury's decision-making process.<sup>234</sup> In the classic judgment and decision-making literature, framing occurs when people react differently to an event or outcome depending on how it is presented; thus, events or outcomes can be objectively equivalent, but we may interpret their meaning differently because of how they are framed.<sup>235</sup> For example, the outcome of a sporting event can be framed as a win or a loss. One can say that a team won a match, or one can say that the other team lost the match. These are objectively equivalent, but the subjective perceptions of losses and wins are very different.<sup>236</sup> Much of the variance between the subjective meaning of different frames comes from the emotional impact of the frames on our intuitions.<sup>237</sup>

The way in which verdict sheets are written, or framed, is likely to have significant implications for the ways in which jurors process associated information. Granholm and colleagues argue that special verdicts "are yet another insidious device which endangers fair trial results by rigidly defining and contouring the issues."<sup>238</sup> The wording of the verdict forms may be very significant, as "[l]anguage confines and molds ideas."<sup>239</sup>

The framing literature pertains to juror reasoning in reasoned or special verdicts, because the way that questions are posed or framed for the

230. See, e.g., STANLEY W. CAMPBELL, *THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850-1860* 156-57 (1968).

231. See Michal R. Belkap, *The Legal Legacy of Lemuel Penn*, 25 *How. L.J.* 467, 472-74, 476 (1982).

232. Hannaford & Hans, *supra* note 229, at 1276.

233. See Carlson & Russo, *supra* note 168, at 96, 99; Sood, *Motivated Cognition*, *supra* note 175, at 317.

234. Casper, *supra* note 100, at 440. See also Granholm & Richards, *supra* note 98, at 531.

235. See Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Evaluation of Prospects*, 114 *STUD. IN LOGIC & FOUND. OF MATHEMATICS* 503, 504, 517-19 (1986).

236. See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 363 (2011).

237. *Id.*

238. Granholm & Richards, *supra* note 100, at 531.

239. *Id.* at 532.



jury is likely to shape the jurors' responses. Jurors may interpret objective equivalents differently, and framing verdict sheets in specific ways is very likely to influence jurors. One of the ideas behind reasoned verdicts is that they will require jurors to pay closer attention to the details and evidence of a case and will help them to make rational and carefully considered decisions. However, the sequencing of questions and/or improper or confusing wording can change the framing of the issues and may have unanticipated consequences on juror decision making.

In contrast, a general verdict allows jurors to structure their decision making without the influence of framing effects from external sources. Although other procedures and information presented may frame the issues for jurors (e.g., closing arguments, jury instructions), those do so more indirectly than special question lists. This additional level of framing undermines jurors' freedom to deliberate in an unstructured way.<sup>240</sup> It has implications for verdict accuracy as well. As we have discussed, the general assumption is that question lists will enhance verdict accuracy. However, poorly constructed questions may harm juror reasoning by subjectively guiding their decision-making processes while undermining their independence. What is more, repetitive questioning or the use of compound questions may lead to inconsistencies in verdicts.<sup>241</sup>

Research on the story model<sup>242</sup> also suggests the power of framing, even with a general verdict.<sup>243</sup> That research showed that the order in which evidence was presented affected jurors' views about the strength of the evidence and the persuasiveness of a story.<sup>244</sup> In one study, participants were more than twice as likely to convict a defendant when the prosecution's evidence flowed like a narrative or story.<sup>245</sup> This provides some support for the view that the ordering of questions on verdict forms matters and is likely to affect jurors' verdicts.<sup>246</sup>

Like special verdicts, reasoned verdicts undermine the independence of jurors and juries. Because judges and sometimes the court clerk review verdicts, juries using reasoned verdicts cannot make independent judgments in secret.<sup>247</sup> This undercuts their power and autonomy, making nullification improbable. In one illustrative case in Spain, jurors acquitted a defendant of aggravated murder, but the acquittal was overturned because the trial judge claimed that the jury had submitted inadequate reasoning.<sup>248</sup> This lack of independence may make juries more susceptible to

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240. Wiggins, *supra* note 98, at 27-28.

241. Wiggins & Breckler, *supra* note 126, at 4, 7.

242. See generally Pennington & Hastie, *Explaining the Evidence*, *supra* note 136.

243. See *id.* at 202.

244. Pennington & Hastie, *Explanation-based Decision Making*, *supra* note 136, at 530.

245. *Id.* at 529-30.

246. See Casper, *supra* note 98, at 44 (noting that "the ways in which verdicts are structured may affect jury decisions.").

247. See Stephen C. Thaman, *Ensuring the Factual Reliability of Criminal Convictions: Reasoned Judgments or a Return to Formal Rules of Evidence*, in *COMPARATIVE CRIMINAL PROCEDURE* 97 (Jacqueline Ross & Steven Thaman, eds., 2016) [hereinafter Thaman, *Ensuring Factual Reliability*].

248. See Thaman, *The Spanish Experience*, *supra* note 1, at 656.

judicial influences as judges are permitted to overturn verdicts that they believe are based on insufficient reasoning.<sup>249</sup> In theory, this means that judges have the power to substitute their judgment for that of the jury.

In Italy, lay judges play a lesser role in the deliberation process than the professional judge.<sup>250</sup> The reasoning requirement makes lay participation difficult, as lay judges do not have experience discussing the law.<sup>251</sup> Some professional judges argue that requiring reasons of lay judges “eliminates the credibility of the laypeople’s presence in a criminal court.”<sup>252</sup> In Spain, court clerks are often called on to help jurors articulate their reasons in ways that conform to the laws, and sometimes jurors find that their justifications do not mesh well with the legal framework and thus must be rejected.<sup>253</sup> The Spanish Constitutional Court has ruled that judges have no duty to return verdicts to jurors in order to correct insufficiencies in reasoning.<sup>254</sup> Thus, tension exists between the maintenance of jury independence and the procedural requirements of reasoned verdicts. Verdict forms give judges additional power while taking away the freedom of decision making from jurors.

The courts already have considerable control over juries through the use of judicial instructions, evidence decisions, and more. General verdicts, therefore, are arguably simpler compared to other verdict options. Additionally, one can track the logic of the verdicts by analyzing the evidentiary record and judicial instructions.<sup>255</sup> In *Taxquet*, the Grand Chamber discussed several “sufficient safeguards” which might be used in place of reasoned verdicts.<sup>256</sup> In cases in which jurors are not required to give reasons, “directions or guidance” from the judge and “precise, unequivocal questions” might suffice to replace extensive reasoning.<sup>257</sup>

Jimeno-Bulnes writes, “A quintessential element of the classic Anglo-Saxon jury system is precisely the absence of any kind of explanation; the verdict is by nature spontaneous.”<sup>258</sup> Criminal juries are thought to reflect the “conscience of the community” and thus possess “inherent legitimacy.”<sup>259</sup> The verdict is thought to reflect the truth and therefore requires

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249. See Hans & Jolivet, *supra* note 74, at 192 (noting that in Italy, the joint deliberation process between the lay and professional judges can also be difficult at times); *Id.* at 196-99 (noting that professional and lay judges reportedly agree that professional judges have more power and impact over the deliberation and decision-making processes than do the lay judge).

250. *Id.* at 196.

251. *Id.* at 199.

252. *Id.*

253. See Jimeno-Bulnes & Hans, *Legal Interpreter for the Jury*, *supra* note 6, at 202-03.

254. See Thaman, *The Spanish Experience*, *supra* note 1, at 650.

255. See Lempert, *supra* note 114, at 487-88. Lempert argues that jurors’ reasons are already clear: If jurors acquit, it indicates that the burden of proof has not been met, whereas if they convict, it means the prosecutor has met this burden. Thus, additional reasons are unnecessary.

256. See Thaman, *The Spanish Experience*, *supra* note 1, at 625.

257. *Id.*

258. Jimeno-Bulnes, *A Different Story Line*, *supra* note 11, at 769.

259. Thaman, *The Spanish Experience*, *supra* note 1, at 613.

no justification or explanation.<sup>260</sup> Several jurisdictions once supported classic juries and classic jury procedures. For instance, judges in Spain, like in France, were allowed to “appreciate the evidence admitted at trial according to their conscience”<sup>261</sup> and courts in Germany allowed fact-finders to make decisions on the basis of “free conviction derived from the content of the trial.”<sup>262</sup> Ultimately, if judges require jurors to give reasons for their verdicts which the judge must accept as legitimate, such jurors are not as free to reflect the conscience of the community.

## 2. Transparency and Legitimacy of Jury Verdicts

Justifications for reasoned and special verdicts often include their supposed benefits for greater transparency, more effective appellate review, and enhanced legitimacy.<sup>263</sup> Scholars who discuss the potential benefits of reasoned verdicts maintain that requiring reasons helps defendants and the courts understand jurors’ verdicts, a key justification in the *Taxquet* case discussed earlier.<sup>264</sup> One of the most compelling arguments made in favor of reasoned verdicts is the ability for judges to review the basis for the jury’s decision making. Thus, reasoned verdicts could help to ensure more effective appellate review.<sup>265</sup> For example, in one Spanish case, a woman was convicted of murder, but the judgment was overturned due to the judicial assessment that there were insufficiencies in the jurors’ reasoning.<sup>266</sup> Analyzing the case, Thaman concluded that a directed verdict should have been entered to acquit the defendant.<sup>267</sup> Even without that, however, the review of the jury’s reasons revealed their inadequacy and the conviction was overturned.<sup>268</sup>

Generally, jurors’ reasons can be reviewed to “isolate correct and

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260. *Id.*

261. *Id.* at 632.

262. *Id.*

263. *Id.* See, e.g., Menashe, *supra* note 111, at 229-30. Menashe argues that a reasoning requirement for judges aids in transparency and appellate review. Further, the reasoning requirement for judges may “encourage[] judges to make well-founded decisions.” *Id.* at 230. See also Allen & Seniuk, *supra* note 161, at 76 (indicating that proponents of the reasoning requirement believe that the requirement will aid appellate courts in the review of trial judges’ fact finding, including their beliefs about witnesses).

264. Thaman, *Ensuring Factual Reliability*, *supra* note 247, at 82.

265. Michael Csere, *Reasoned Criminal Verdicts in the Netherlands and Spain: Implications for Juries in the United States*, 12 CONN. PUB. INT. L.J. 416 (2013). See also Thaman, *The Spanish Experience*, *supra* note 1, at 620-21 (arguing that reasoned verdicts might “minimize the amount of completely innocent persons who have been sentenced to death or other long prison sentences based on flawed evidence.”). See also Thaman, *Ensuring the Factual Reliability*, *supra* note 247, at 92 (stating that in the U.S. context, appellate courts have access to full transcripts of the trial that they can review to evaluate a claim of evidentiary insufficiency); *Id.* at 99 (noting that Thaman does not call for jurors to give reasons for acquittals); *Id.* at 108 (noting that higher courts have on occasion overturned convictions based on “unconvincing judgment reason”).

266. Thaman, *The Spanish Experience*, *supra* note 1, at 639-42.

267. *Id.* at 645.

268. *Id.* at 660.

incorrect outcomes at the trial level.”<sup>269</sup> In France’s mixed court, the questions posed to the court can be seen as complementing the free evaluation of evidence. The responses allow professional judges to understand the logic of how lay jurors decide cases.<sup>270</sup> Seeing the logic of jurors’ verdicts enables judges to draft the written portions of judgments based, importantly, on the factual responses of jurors.<sup>271</sup> Asking specific questions of jurors and requiring answers and reasons for these answers would greatly contribute to the reviewability of such judgments and could be helpful on appeal.

Appellate courts can use jurors’ reasons potentially to “pin-point” and “correct” error.<sup>272</sup> Furthermore, defendants may in theory review these reasons and could refer to them on appeal.<sup>273</sup> One former federal judge has added to the debate by making the controversial recommendation to videotape jurors’ deliberations as a way to increase transparency—even if juries continue to deliver only general verdicts.<sup>274</sup>

But whether judicial review can play this positive role depends in large measure on getting the “real” reasons from the jurors. The psychological research on post hoc reasoning and on the impact of narratives, predecisional distortion, and framing leads us to be cautious about assuming that the reasons provided by the jury are the actual underpinnings and determinants of the jury’s decision. There is a good chance that the reasons may have been generated post hoc and affected by framing and sequencing.

Transparency may be linked to legitimacy. Writing about the fact that professional judges must provide reasons for their judgments, Doron Menashe observes that “[t]he right to appeal judicial decisions in one of great importance, for this right reinforces the foundations of fairness and reasonableness of the judicial procedure. . . . [T]he right to appeal is worthless if the appellate court cannot examine the considerations and reasoning of the trial court.”<sup>275</sup> General verdicts hide the decision-making process of jurors, and this lack of transparency could undermine society’s confidence in juries.<sup>276</sup> For instance, when a jury makes a decision by general verdict

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269. See Cohen, *supra* note 76, at 435. However, when discussing a reasoning requirement for judges, Allen & Seniuk argue, “For there to be “reasons” there must be some sort of standard that makes the reasons effective. In the absence of such standards, any articulated “reason” merely calls for yet another level of “reasons” to be given to justify the first, and so on *ad infinitum*.” Allen & Seniuk, *supra* note 161, at 75.

270. Thaman, *The Spanish Experience*, *supra* note 1, at 615–16.

271. *Id.* at 616.

272. Cohen, *supra* note 76, at 435.

273. Thaman, *The Spanish Experience*, *supra* note 1, at 620.

274. Alex Kozinski, *Criminal Law 2.0*, 44 *Geo. L.J. Ann. Rev. Crim. Proc.* iii, xx (2015); Alex Kozinski & John Major, *Jurors on Film: Why Putting Cameras in the Jury Room Is Not as Crazy as You Think*, 99 *JUDICATURE* 7, 10–11 (2015) (arguing that juror deliberations should be videotaped as the knowledge of being videotaped might improve juror behavior, reveal juror misconduct, help researchers understand what aspects of the trial could be improved upon, give lawyers performance feedback, help judges determine whether trial error was prejudicial or harmless, and help judges to understand the effect of prosecutorial misconduct on jurors’ decision making).

275. Doron Menashe, *supra* note 111, at 231–32.

276. Wright, *supra* note 90, at 422–34.

that the public does not support,<sup>277</sup> and the public cannot follow its reasoning, the public may not trust that the decision making was sound.<sup>278</sup>

### C. Administrative and Procedural Considerations

In addition to the substantive costs and benefits of reasoned and special verdicts, there are also administrative considerations. Commentators on the use of reasoned verdicts in Spain point to their potential for efficiency.<sup>279</sup> Thaman argues, "A properly constructed question list will shed considerable light on how the jury decided the case because it reveals, at least, which facts have been proved to its satisfaction."<sup>280</sup> One need not guess at the reasoning in convoluted appeals. Of course, this benefit of reasoned verdicts is highly reliant on *properly* constructed question lists, and question lists are not standardized. The quality of the question lists and verdict sheets vary widely. Such questions might contain weaknesses, may be too long, and may be too complex.<sup>281</sup> As Thaman acknowledges, "Even the most astutely drafted question list will not necessarily reveal *why* the jurors found the particular facts proved."<sup>282</sup> Differentiating between good and bad question lists might be possible only in hindsight.

Practical experience with reasoned verdicts has been mixed. Problems have included insufficiency of jury reason-giving, wide discretion in the review of reasons by judges, and the undermining of jury indepen-

277. See, e.g., Mikaela Conley, *Public Irate Over Casey Anthony Verdict; Social Media Sites Explode With Opinions*, ABC NEWS (July 5, 2011), <http://abcnews.go.com/Health/casey-anthony-verdict-outrage-spills-online/story?id=14002257> [<https://perma.cc/P8DZ-G8LH>] (describing public reaction to Casey Anthony jury verdict); *Leaders, Community React to Jury's Acquittal in Yanez Case*, CBS MINNESOTA (June 16, 2017), <http://minnesota.cbslocal.com/2017/06/16/community-reaction-castile-yanez/> [<https://perma.cc/8VX9-P24H>] (describing public reaction to acquittal in police killing of Philando Castile); *Reaction Pours in to Zimmerman Verdict*, CNN (July 16, 2013), <http://www.cnn.com/interactive/2013/07/us/zimmerman-verdict-reax/> [<https://perma.cc/A9C7-JM4T>] (providing public reaction to George Zimmerman's acquittal on charges relating to his killing of Trayvon Martin).

278. It is good to be mindful of the fact that the general public often gets information from the media, and not the courts. Jurors hear lengthy testimony, and are exposed to evidence that may not be accessible to the media, and jurors' deliberations are private. Thus, the public may disagree with a verdict because they are making an assessment about guilt without all of the information. Email from Nancy S. Marder, Professor of Law, Chicago-Kent College of Law, to Kayla A. Burd, Human Development, Cornell University & Valerie P. Hans, Professor of Law, Cornell Law School (Sept. 26, 2017) (on file with authors).

279. Thaman, *The Spanish Experience*, *supra* note 1, at 660-65.

280. *Id.* at 646.

281. Thaman describes variability in the drafting of the question lists for the verdict forms in Spain. Some questions and verdict forms are concise and include fewer than ten questions. Other forms have included complex, multi-part questions and have contained up to ninety-six questions. Thaman, *Spain Returns*, *supra* note 13, at 352. Judges sometimes construct long narratives containing multiple elements, but it could be difficult to answer such questions with a simple yes or no as jurors may agree only with some of the elements presented but are asked to make a global decision about them. See Thaman, *Spain Returns*, *supra* note 13, at 370.

282. Thaman, *The Spanish Experience*, *supra* note 1, at 646.

dence.<sup>283</sup> In a field study of Italian mixed courts, both professional and lay judges voiced the view that the reasoning requirements negatively affected lay participation and made it harder for laypersons to contribute in a meaningful way.<sup>284</sup> Lay judges, who typically have no legal training, often have difficulty expressing their views in terms of the legal concepts, and therefore, such arguments are often rejected.<sup>285</sup>

At one time, early in the introduction of the Spanish jury, more than fifty percent of all reasoned jury verdicts in Spain were deemed to be inadequately reasoned.<sup>286</sup> In early Spanish jury trials which required reasoned verdicts, judges lacked experience and had difficulty drafting verdict sheets and explaining procedures to jurors.<sup>287</sup> In one case, that difficulty resulted in an acquittal as the jury was asked ninety-eight questions, and many of the questions contained multiple premises that the jury was asked to consider.<sup>288</sup> However, the acquittal was eventually reversed as the court found that the jurors provided insufficient reasons.<sup>289</sup> Here, the court reviewed the jurors' reasoning and concluded that they had not fully explained their decision in the case in spite of responding to ninety-eight questions.<sup>290</sup>

In Austria, where jurors receive no assistance in drafting their reasons, the reasons they provide are not thought to be very strong or "enlightening" typically.<sup>291</sup> Greg Taylor concluded that in regard to the reasoning requirement in Austria, "a lack of full reasons for a verdict is an immanent feature of trial by jury."<sup>292</sup> The reasons jurors provide are often "confined to a few words (such as 'the evidence and the responses of the accused') or even a single word ('evidence')."<sup>293</sup> This example also illustrates that the process of drafting verdict questions may cause additional difficulties compared to a general verdict. Clearly, the ability of juries to make sound and binding decisions hinges on both proper questions posed to the jury and reasonable judicial expectations of jury reasoning.

In a parallel context, several procedural and administrative considerations accompany special verdict forms. As with European reasoned jury verdicts, cases involving special verdicts or general verdicts with written questions pose practical problems. Kimberly Moore argues that in her review of special verdicts in patent cases, the majority of questions posed

283. *Id.* at 630-32.

284. Hans & Jolivet, *supra* note 74, at 198 (summarizing field research finding that both lay and professional judges agree that legal requirements in reasoning make it more difficult for lay judges to meaningfully contribute).

285. *Id.* at 198-200.

286. Jimeno-Bulnes, *A Different Story Line*, *supra* note 11, at 773.

287. Thaman, *The Spanish Experience*, *supra* note 1, at 631.

288. *Id.* at 636-39.

289. See *id.*; Thaman, *The Spanish Experience*, *supra* note 1, at 639; Thaman, *Spain Returns*, *supra* note 13, at 372.

290. See Thaman, *The Spanish Experience*, *supra* note 1, at 636-39; see Thaman, *Spain Returns*, *supra* note 13, at 372-73.

291. See Taylor, *supra* note 56, at 305-06.

292. *Id.* at 305.

293. *Id.* at 306.

to jurors were “not meaningfully drafted.”<sup>294</sup> Moore found that many special verdict forms “actually denoted . . . how to answer questions so as to result in a win for a particular party” rather than emphasizing an understanding of the facts at hand.<sup>295</sup> This could be positive because jurors would understand the implications of what they are deciding, but it might also draw their attention away from a determination of the specific facts. In some death penalty cases in which juries were asked to respond to written questions about aggravating and mitigating circumstances, the sentences were overturned on the grounds that the wording of the verdict forms was misleading.<sup>296</sup>

As another example of problematic issues with form construction, in *Taxquet*, the Grand Chamber determined that “neither the indictment nor the questions to the jury contained sufficient information as to the applicant’s involvement. . . .”<sup>297</sup> This illustrates that the framing of questions—and not just juror responses and reasoning—is procedurally important. Furthermore, as noted above, the Grand Chamber argued that the questions posed to jurors in *Taxquet* did not allow the defendant a clear understanding of what evidence and case facts led jurors to their verdicts.<sup>298</sup> Judges seem to be given little guidance in the way of drafting special verdict sheets and in helping facilitate juror understanding of these complex materials.

Generally, special and reasoned verdicts require courts to write questions for every case. This process is time consuming, and it is not standardized. While in theory it may be possible to write strong, clear questions for special and reasoned verdicts, their adequacy—or inadequacy—may only be apparent in hindsight. In addition, differences exist between the approaches that judges use when considering jurors’ reasons. As noted earlier, some judges in Spain utilize the maximalist approach and require much from jurors in terms of reasons, while other judges utilize the minimalist approach and expect very little from jurors.<sup>299</sup> These approaches, too, are not standardized and thus leave much room for variability in judges’ interpretations and acceptance or rejection of jurors’ reasoning. In determining the sufficiency of reasons given for verdicts, Spain’s judges must handle such issues on a case-by-case basis through

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294. Kimberly A. Moore, *Essay: Juries, Patent Cases, & A Lack of Transparency*, 39 Hous. L. Rev. 779, 783 (2002) (citing *Union Oil Co. v. Atl. Richfield Co.*, 208 F.3d 989, 994 (Fed. Cir. 2000)).

295. *Id.* at 785. The special verdict form in one case included the parties’ names next to “yes” and “no” such that jurors did not need to, in Moore’s view, understand or analyze the facts to determine the answer to the questions; instead, jurors could just pick the party they wanted to win.

296. *Nepveu*, *supra* note 18, at 284 (citing *Mills v. Maryland*, 486 U.S. 367 (1988); *McKoy v. North Carolina*, 494 U.S. 433 (1990)). In these cases, the Supreme Court “overturned death sentences that resulted from special interrogatories that either implied or required unanimity as to mitigating circumstances.”

297. Thaman, *The Spanish Experience*, *supra* note 1, at 626, (quoting *Taxquet v. Belgium*, App. No. 926/05, 2010-VI Eur. Ct. H.R. 145, 148).

298. *Id.*

299. *Id.* at 634.

appeal procedures in the Supreme Court.<sup>300</sup>

#### D. Summary of the Implications of Psychological Research for the Reasoned Verdicts Debate

Current legal theory assumes that reasoned verdicts promote sound juror and jury decision making, and empirical research can help us evaluate these claims. Determining whether reasoned or general verdicts are stronger is both an empirical and normative question.<sup>301</sup> Overall, despite some potential benefits, scholars argue that there are costs to requiring jurors to provide reasons for their verdicts. Thaman points out that “American courts have, by and large, rejected special verdicts because they allow the judge too much control over how the jury logically assesses the facts and the law in the case.”<sup>302</sup> Similarly, requiring reasons undermines jury independence, opens the door to external influences over juror decision making, can be impractical and/or procedurally difficult to enact, and may simply cause jurors to struggle with the burden of providing reasons for their judgments.

The psychological research explored in this Article offers some insight into the strengths and limitations of these verdict options. Requiring reasons may not provide us with the actual reasons that drove juror decision making. When these reasons are drafted post hoc, jurors may not be aware of what factors actually guided their decision making, but when prompted to provide reasons, they may create ones that seem to fit. Jurors may distort incoming information to match a preexisting belief. Research also suggests that deep moral and emotional intuitions often drive individuals’ judgments. These factors may not be accurately reflected in their reasons.

We also know that the framing of questions is critically important. Even when two options are objectively equivalent, the way they are written can change the way they are interpreted. As such, objectively equivalent statements might be processed differently because they are subjectively perceived to be different. In this context, the framing of questions for jurors to answer may substantially shift jurors’ processing of information and decision making, but not necessarily in a better direction. Question order in verdict sheets really matters. Poorly sequenced questions may

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300. Jimeno-Bulnes, *A Different Story Line*, *supra* note 11, at 767–70.

301. Even if empirical research suggests that one verdict form leads to better decision-making than another, we must still balance decision accuracy with other important values (e.g., jury independence). See E-mail from Zachary Clopton, Assistant Professor of Law, Cornell Law School, to Kayla A. Burd, Human Development, Cornell University & Valerie P. Hans, Professor of Law, Cornell Law School (Sept. 29, 2017) (on file with authors). Furthermore, if empirical research suggested that there is no difference in decision accuracy amongst these different verdict procedures, perhaps the procedures would remain unchanged in the U.S. as a means of preserving jury independence. See *id.* Further, because each of these values requires a trade-off, even if empirical evidence suggests that one form is better than another, we might still resist procedural changes in favor of another value. See E-mail from Nancy S. Marder, Professor of Law, Chicago-Kent College of Law, to Kayla A. Burd, Human Development, Cornell University & Valerie P. Hans, Professor of Law, Cornell Law School (Sept. 26, 2017) (on file with authors).

302. Thaman, *The Spanish Experience*, *supra* note 1, at 616.



lead to worse outcomes. We must identify which questions are important to ask and how the sequence and framing of questions affects jurors' decisions.

Psychological research also suggests that general verdicts with unstructured deliberation are already conducive to careful jury decision making.<sup>303</sup> First, the research shows there is strength in juror decisions made following global versus item-by-item analysis of case facts.<sup>304</sup> Allowing jurors to freely construct narratives of trial evidence leads to stronger decisions more in line with the evidence than asking jurors to make decisions after evidence has been provided by legal issue. This suggests that structuring jurors' decision-making process may not be helpful. Second, even when asked to follow a structured process of decision making, such as occurs with special verdict forms, jurors are apt to make holistic decisions about the case first and then to generate reasoning post hoc.

We conclude that general verdicts appear to be the best choice when we take into account the strength of jurors' decisions and accuracy, jury independence, and procedural efficiency and standardization. Research shows that jurors are already thoughtful and reason deeply about the evidence during their deliberations, making stronger decisions when allowed to create narratives of the evidence spontaneously.<sup>305</sup> Further, juries can maintain the most power and independence, and remain the most immune to external influence with less interference from the courts. Lastly, general verdicts are efficient and standardized across courts.

However, reasoned verdicts have their attractions, considering how the provision of reasons assists judicial review and could potentially enhance perceptions of the verdict's legitimacy. Making juries' reasoning known to the courts could improve transparency in the justice system. Litigants who have information about the reasons underlying their verdicts would have a better understanding of the grounds for the decision.<sup>306</sup> Lastly, reviewability could make more apparent situations where jurors did not vote in line with the evidence, and judges might be able to rectify these mistakes.

At this current point, it is difficult to know whether and under what circumstances requiring reasons is helpful to jurors. Psychological research suggests that decisions are often a mix of intuition and deliberative reasoning.<sup>307</sup> Intuition often precedes deliberative processing, and we cannot be sure that requiring reasons of jurors will increase deliberative processing in jurors. Reasoned, special, and general verdicts offer their own sets of potential strengths and weaknesses. These alternatives should be studied empirically in order to explore which type of verdict yields the best juror decision making and reasoning.

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303. Pennington & Hastie, *Explaining the Evidence*, *supra* note 136, at 203.

304. See *id.* at 197, 202-03.

305. See *id.* at 195, 202.

306. Kozinski, *supra* note 274, at xviii, xx.

307. See Robin M. Hogarth, *Intuition: A Challenge for Psychological Research on Decision Making*, 21 *PSYCHOL. INQUIRY* 338, 346 (2010).

## Conclusion

In theory, reasoned verdicts could make the trial process more transparent, increasing confidence in and perceptions of legitimacy in the jury system. However, based on the psychological literature discussed above, it is prudent to be cautious about the introduction of reasoned verdicts, as requiring reasons may disrupt juror decision making in unanticipated ways.

Jurors are lay fact-finders, untrained in the complexities of law and legal rules, and yet reasoned verdicts require that their reasons conform precisely to the law. This difficulty is the impetus for additional interaction with the court, as jurors must often call on legal assistance when drafting their verdicts. This necessity undermines the independence and power of jurors and opens the door for external pressures and biases to encroach on jurors' decisions. When judges overturn jury verdicts that they consider insufficiently reasoned, judges substitute their judgments for those of the jurors. In addition, reasoned verdicts may lead to post hoc rationalizing rather than predecisional reasoning, and can be subject to poor framing and question construction.

The procedural difficulties associated with reasoned verdicts may outweigh the potential benefits. We described the experience in Spain, for example, where substantial numbers of cases have been overturned as the courts found jurors' written documentation of their reasoning to be inconsistent or insufficient.<sup>308</sup> Too little attention has been given to the construction of the verdict forms provided to jurors. Verdict forms used in these situations are not standardized, leaving room for variability in their quality. Furthermore, because the way that verdict forms are structured may deeply impact juror decision making as discussed above, this lack of standardization means that jurors might reach different decisions depending on the construction of the verdict forms. Requiring reasons in the manner described above may cause administrative headaches or procedural inconsistencies. Although the need to provide reasons for verdicts is assumed to improve juror decision making, it may have no discernible effect or could even undermine decision quality. At the very least, much attention should be given to the construction of the verdict sheets given to jurors.

Psychological research casts some doubt on the necessity and wisdom of requiring juries to provide reasons for their verdicts. Based on the psychological research mentioned above, reasoned and general verdicts may differ substantially in *process* but may not always differ in *outcome*. However, evidence from Pennington and Hastie suggest that allowing jurors to deliberate freely produces the strongest decisions and increases juror confidence.<sup>309</sup> Because no empirical studies have examined differences between jurors' decisions when rendering general versus reasoned verdicts, we cannot be sure which verdict approach produces the strongest deci-

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308. See Thaman, *The Spanish Experience*, *supra* note 1, at 631.

309. See Pennington & Hastie, *supra* note 136, at 202.

sions. For these reasons, we do not advocate for the expansion of reasoned verdicts.

This is an area ripe for empirical research. Research comparing the cognitive processes and verdict consequences of reasoned and general verdicts is sorely needed. Research could also help legal professionals draft optimal sets of questions. If empirical research reveals that the outcomes of general and reasoned verdicts are similar, the independence and strength of general verdicts should be preserved.

Casper argues that as we consider structuring decision making, we must strike a balance between competing goals:

The drive toward rationality and predictability is certainly understandable, but it cannot govern our choices totally, for it is an unattainable goal, whether the decisionmaker is a judge, a jury, or some other institution. Moreover, as normative propositions, rationality and predictability are not the only goals. . . .<sup>310</sup>

Ultimately, it seems a worthy goal to maximize jurors' decision making while insulating such decisions from external influences. Requiring reasons of jurors may well change how jurors make decisions, but without empirical research, we cannot know if these changes are for the better. Requiring reasons of jurors may not be the panacea we desire, but it seems clear that it will undermine the independence of jurors and juries.

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310. Casper, *supra* note 98, at 450-51.