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Fair Questions: A Call and Proposal for Using General Verdicts with Special Interrogatories to Prevent Biased and Unjust Convictions

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Bias and other forms of logical corner-cutting are an unfortunate aspect of criminal jury deliberations. However, the preferred verdict system in the federal courts, the general verdict, does nothing to counter that. Rather, by forcing jurors into a simple binary choice — guilty or not guilty — the general verdict facilitates and encourages such flawed reasoning. Yet the federal courts continue to stick to the general verdict, ironically out of a concern that deviating from it will harm defendants by leading juries to convict.

This Essay calls for a change: expand the use of a special findings verdict, the general verdict with special interrogatories, to every case in order to guard against prejudicial reasoning and like shortcuts. Moreover, to ensure that such a change is feasible and does not run afoul of the concerns that bind courts to the general verdict, it suggests that courts require jurors to answer special interrogatories when, but only when, they have proceeded down the path towards finding the defendant guilty, using a verdict procedure designed to retain the benefits of general verdicts while

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jettisoning their flawed elements and complying with current practice. That change hopefully could vastly improve our jury system and allow the jury to truly serve — in the words of the Supreme Court — as "a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'"

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INTRODUCTION

The Supreme Court recently called upon "our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons" and emphasized the "imperative to purge racial prejudice from the administration of justice."[1] That call is undoubtedly necessary and of paramount importance, as 2020's tragic assaults on members of the Black community by police — and the protests associated with them — have yet again made plain.

The need to eliminate racial bias in our criminal justice system, however, is far from limited to law enforcement. Indeed, the Court voiced its call to action in *Peña-Rodriguez v. Colorado*, a case involving bias in a criminal jury.[2] There, it expressed that the jury is supposed to serve as "a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'"[3] But it cautioned that "[p]ermitting racial prejudice in the jury system damages 'both the fact and the perception' of the jury's role as 'a vital check against the wrongful exercise of power by the State.'"[4]

Unfortunately, however, jurors are often inclined to rely on bias and other defective reasoning. One would think, therefore, that our verdict procedures would be designed to counter that. Yet they are not. The prevailing verdict form used in the federal courts, the general verdict, amplifies prejudices and gives such cognitive fallacies free reign to infect outcomes by distilling the entire decision-making process into a simple binary choice — guilty or not guilty — rather than focusing juries on the issues that matter. Moreover, when a flawed decision occurs, the general verdict shields that decision from review by revealing no information about the jury's thinking.

The solution should be straightforward: require juries to answer questions about the key issues in the case and their reasoning. That approach would clarify, and force juries to concentrate on, the specific points necessary to support a conviction — thereby reducing the ability of extra-legal considerations to influence the outcome — and reveal the jury's decisional grounds for later review. Nevertheless, courts are averse to such a solution, due — oddly enough — to a concern that non-general verdicts would harm defendants. Thus, general verdicts remain the norm, despite their serious flaws and likelihood of producing biased and unjust decisions.

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[1] Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 867 (2017).

[2] *See id.*

[3] *Id.* at 868 (citation omitted).

[4] *Id.* (citations omitted).

The question, then, is how to create a verdict system that minimizes bias and error while avoiding out-of-hand rejection by the courts. This Essay proposes an answer: in every case, require juries to respond to special interrogatories — in addition to rendering a general verdict — when, but only when, they are proceeding towards a finding of guilt, following a verdict procedure designed to avoid the problems courts fear and comply with present practice.[5]

This Essay proceeds as follows. Part I introduces the types of verdicts used in the federal system and explains why general verdicts are the norm in criminal cases. Part II explores the problems created and amplified by general verdicts. And Part III describes my proposed solution and engages with counterarguments.[6]

I. CRIMINAL VERDICTS

The federal courts generally employ three types of verdicts: (1) the general verdict; (2) the special verdict; and (3) the general verdict with special interrogatories (the latter two I term "special findings verdicts").[7] The first simply requires the jury to "find[] in favor of one party or the other, as opposed to resolving specific fact questions"[8] — guilty or not guilty, in criminal cases. The second demands that "the jury make[] findings only on factual issues submitted

[5] I am not the first to propose the use of non-general verdicts for certain types of criminal cases or purposes. *See, e.g.*, Meghan A. Ferguson, Note, *Balancing Lenity, Rationality, and Finality: A Case for Special Verdict Forms in Cases Involving Overlapping Federal Criminal Offenses*, 59 DUKE L.J. 1195, 1197-98, 1215 (2010); Kyle B. Grigel, Note, *Credibility Interrogatories in Criminal Trials*, 71 STAN. L. REV. 461, 466 (2019). Additionally, commentators have argued that interrogatories, when employed, should only be used "after a jury has voted to convict." Eric S. Miller, *Compound-Complex Criminal Statutes and the Constitution: Demanding Unanimity as to Predicate Acts*, 104 YALE L.J. 2277, 2305-07 (1995); *accord* Grigel, *supra*, at 488. Some also suggest that jury reasoning should be consistently revealed in some manner. *See* Alice Curci, Note, *Twelve Angrier Men: Enforcing Verdict Accountability in Criminal Jury Trials*, 59 WASH. U. J.L. & POL'Y 217, 240-41 (2019). Previous scholarship has not, however, called for special interrogatories in every case and across contexts, and this Essay's proposed verdict procedure is uniquely designed to honor prevailing concerns and practices.

[6] Although much of this Essay is applicable to state criminal justice systems, the focus here is on the federal system. A narrower scope is more conducive to designing a verdict procedure that complies with existing law and practice and is more appropriate for the shorter essay format. Further, given that states often draw on federal practices, a federally focused proposal may have broad impact.

[7] *See, e.g.*, United States v. Gonzales, 841 F.3d 339, 346 (5th Cir. 2016); Frank C. Pollara Grp. v. Ocean View Inv. Holding, LLC, 784 F.3d 177, 190 (3d Cir. 2015); Zhang v. Am. Gen. Seafoods, Inc., 339 F.3d 1020, 1031 (9th Cir. 2003).

[8] *Verdict*, BLACK'S LAW DICTIONARY (11th ed. 2019).

to them by the judge, who then decides the legal effect of the verdict."[9] The third merges the previous two, requiring jurors to return "[a] general verdict accompanied by answers to written interrogatories on one or more issues of fact that bear on the verdict."[10]

Despite that range of options, general verdicts are the norm in criminal cases.[11] And that is so because courts view the alternatives as harmful to defendants.[12] Courts commonly observe, for example, that any alternative verdict might improperly pressure the jury to convict.[13] As an oft-cited First Circuit decision, *United States* v. *Spock*, cautioned:

> There is no easier way to reach, and perhaps force, a verdict of guilty than to approach it step by step. A juror, wishing to acquit, may be formally catechized. By a progression of questions each of which seems to require an answer unfavorable to the defendant, a reluctant juror may be led to vote for a conviction which, in the large, he would have resisted. The result may be accomplished by a majority of the jury, but the course has been initiated by the judge, and directed by him through the frame of the questions.[14]

That line of reasoning, moreover, is usually tied to the jury's power to acquit based on circumstances other than the letter of the law — whether called common sense, lenity, or nullification.[15] *Spock*, for instance, emphasized that general verdicts are desirable because of "the principle that the jury, as the conscience of the community, must

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[9] *Id.*

[10] *Id.*; *see also Frank C. Pollara Grp.*, 784 F.3d at 190.

[11] *See, e.g.*, 3 PETER J. HENNING & SARAH N. WELLING, FEDERAL PRACTICE & PROCEDURE § 512 (4th ed. 2010).

[12] *See, e.g.*, Curci, *supra* note 5, at 236.

[13] *See, e.g.*, United States v. Hedgepeth, 434 F.3d 609, 613 (3d Cir. 2006); United States v. Reed, 147 F.3d 1178, 1180 (9th Cir. 1998). Courts sometimes frame this rationale as a desire to preserve jury independence, but the core motivation is protecting defendants. *See, e.g.*, United States v. Blackwell, 459 F.3d 739, 766 (6th Cir. 2006) ("[T]he rule against special verdicts . . . . seemingly exists to protect the rights of the defendant."); *Reed*, 147 F.3d at 1180 ("Although there is no per se prohibition, '[a]s a rule, special verdicts in criminal trials are not favored.' This rule is fashioned to protect the rights of criminal defendants by preventing the court from pressuring the jury to convict." (alteration in original) (citation omitted)). *But see* Grigel, *supra* note 5, at 490 (suggesting that courts are concerned about "pierc[ing] the veil of jury deliberation").

[14] United States v. Spock, 416 F.2d 165, 182 (1st Cir. 1969).

[15] *See, e.g.*, United States v. Gonzales, 841 F.3d 339, 346-47 (5th Cir. 2016); *Blackwell*, 459 F.3d at 766; United States v. Stonefish, 402 F.3d 691, 697-98 (6th Cir. 2005); *Reed*, 147 F.3d at 1180; United States v. Desmond, 670 F.2d 414, 416-18 (3d Cir. 1982); Grigel, *supra* note 5, at 503.

be permitted to look at more than logic" in deciding whether to acquit and that "[i]f it were otherwise there would be no more reason why a verdict should not be directed against a defendant in a criminal case than in a civil one."[16] And as the Fifth Circuit explained more recently:

> Even with respect to "[s]pecial interrogatories," we have repeated the refrain that they "should not be used in criminal trials." Much of that hostility stems from a desire not to undermine jury nullification . . . . Although a controversial power that courts purportedly do not encourage, "the jury's power of lenity explains why the use of special interrogatories, which might 'catechize a jury as to its reasons,' has been met with a lack of judicial enthusiasm." A general verdict requiring only an answer of "guilty" or "not guilty" permits a jury to reach its decision "based more on external circumstances than the strict letter of the law."[17]

Finally, courts express a fear that non-general verdicts could harm defendants because they might "be more productive of confusion than of clarity."[18] For example, in *United States v. Wilson*,[19] the case most decisions rely on to support that proposition,[20] the Sixth Circuit concluded that special interrogatories had confused the jury into impermissibly shifting the burden of proof onto the defendant.[21]

In sum, although there are several types of verdicts, federal courts favor general verdicts in criminal cases, and they do so out of a desire to protect defendants from conviction.[22]

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[16] *Spock*, 416 F.2d at 182.

[17] *Gonzales*, 841 F.3d at 346-47 (alteration in original) (citations omitted).

[18] *Blackwell*, 459 F.3d at 766 (quoting United States v. Wilson, 629 F.2d 439, 444 (6th Cir. 1980)); *accord, e.g.*, *Stonefish*, 402 F.3d at 697; United States v. Williams, 902 F.2d 675, 678 (8th Cir. 1990).

[19] United States v. Wilson, 629 F.2d 439 (6th Cir. 1980).

[20] *See, e.g.*, *Blackwell*, 459 F.3d at 766; *Stonefish*, 402 F.3d at 697; *Williams*, 902 F.2d at 678.

[21] *See Wilson*, 629 F.2d at 444.

[22] The Supreme Court has also noted that the Federal Rules of Civil Procedure authorize non-general verdicts, whereas the Federal Rules of Criminal Procedure contain no such authorizing provision. *See* Black v. United States, 561 U.S. 465, 472 (2010). However, it has made clear that that distinction just "counsels caution," is "not dispositive," and does not mean that non-general verdicts "are never appropriate." *Id.* at 472 & n.11. Moreover, the Court has directly tied its cautious approach to special findings verdicts to the defendant-protective reasoning highlighted above. *See id.* (clarifying that "[b]y calling for caution, we do not mean to suggest that special verdicts in criminal cases are never appropriate," and supporting that point with a case quotation stating that "[a] District Court should have the discretion to use a jury interrogatory in

II. THE PROBLEMS OF GENERAL VERDICTS

Unfortunately, however, there is a disconnect between the federal courts' motives and their preference for general verdicts. That is because general verdicts enable improper forms of reasoning — including prejudice — and then shield the flawed decisions they produce from review.

It is well established that jurors — like people in many contexts — take shortcuts in their reasoning,[23] frequently employing "scripts, schemas, stereotypes, and other cognitive mechanisms" that can run counter to rational consideration of the law and evidence.[24] Importantly, jurors are highly likely to be swayed by factors, such as race, that should be irrelevant.[25] So for instance, studies have suggested

cases where risk of prejudice to the defendant is slight and the advantage of securing particularized fact-finding is substantial" (citation omitted)). Thus, the Federal Rules rationale does little, if any, independent work and is functionally encompassed by the defendant-protective rationale.

[23] *See, e.g.*, Dennis J. Devine, Laura D. Clayton, Benjamin B. Dunford, Rasmy Seying & Jennifer Price, *Jury Decision Making*, 7 PSYCHOL. PUB. POL'Y & L. 622, 672, 699-700 (2001); James R. Dillon, *Expertise on Trial*, 19 COLUM. SCI. & TECH. L. REV. 247, 278-79 (2018); L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 298-99, 335 (2012); Christopher T. Stein & Michelle Drouin, *Cognitive Bias in the Courtroom: Combating the Anchoring Effect Through Tactical Debiasing*, 52 U.S.F. L. REV. 393, 394 (2018); Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243, 1246-75, 1249 n.37; Richard C. Waites & David A. Giles, *Are Jurors Equipped to Decide the Outcome of Complex Cases?*, 29 AM. J. TRIAL ADVOC. 19, 37-39 (2005).

[24] Devine et al., *supra* note 23, at 699; *accord, e.g.*, Jeffrey H. Kahn & John E. Lopatka, *Res Ipsa Loquitur: Reducing Confusion or Creating Bias?*, 108 KY. L.J. 239, 266-67 (2019–20); Lora M. Levett & Margaret Bull Kovera, *The Effectiveness of Opposing Expert Witnesses for Educating Jurors About Unreliable Expert Evidence*, 32 LAW & HUM. BEHAV. 363, 365 (2008); Monica K. Miller, Joseph Dimitrov, Brian H. Bornstein & Ashley Zarker-Sorensen, *Bibles in the Jury Room: Psychological Theories Question Judicial Assumptions*, 39 OHIO N.U. L. REV. 579, 599-601 (2013).

[25] *See, e.g.*, Devine et al., *supra* note 23, at 673-74, 678, 683; Francis X. Flanagan, *Race, Gender, and Juries: Evidence from North Carolina*, 61 J.L. & ECON. 189, 192 (2018); Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 189-90, 207 (2010); Richardson & Goff, *supra* note 23, at 301, 326, 335; Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 282 (2007); Natalie Salmanowitz, *Unconventional Methods for a Traditional Setting: The Use of Virtual Reality to Reduce Implicit Bias in the Courtroom*, 15 U.N.H. L. REV. 117, 126-28 (2016); Christian B. Sundquist, *Uncovering Juror Racial Bias*, 96 DENV. L. REV. 309, 345-46 (2019); Thompson, *supra* note 23, at 1246-75, 1249 n.37; Ashok Chandran, Note, *Color in the "Black Box": Addressing Racism in Juror Deliberations*, 5 COLUM. J. RACE & L. 28, 47-48 (2014); Samantha Saddler, Note, *A Defendant's Race as a Determinant of the Outcome of His Lawsuit*, 2019 U. ILL. L. REV. 1771, 1782-84.

that jurors treat demographically similar defendants differently than demographically distinct ones.[26] Likewise, studies have noted that "juries composed of more black men are more likely to acquit any defendant, especially black defendants, and juries composed of more white men are more likely to convict black defendants."[27] Furthermore, juries may associate "Blackness" with "guilt" or "criminality."[28] And some scholars have observed that Black defendants may be treated especially harshly "if the victim is white."[29] Finally, research has shown that white jurors may be more likely to convict a Black defendant when the issue of race is not presented, but less likely to do so when it is.[30]

It turns out, moreover, that juries seem more inclined to resort to shortcut thinking — such as bias — when they are confused or mired in complexity.[31] And they frequently are.[32] For example, jury instructions can be lengthy, opaque, and legalistic, and jurors are commonly baffled or puzzled by them.[33] As a 1948 Second Circuit decision, *Skidmore v. Baltimore & Ohio Railroad Co.*, put it well:

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[26] *See, e.g.*, Devine et al., *supra* note 23, at 673-74; Chandran, *supra* note 25, at 47-48.

[27] Flanagan, *supra* note 25, at 192; *see also* Saddler, *supra* note 25, at 1782 ("[T]here is also evidence that all-white juries convict black defendants 'significantly more often' than white defendants." (citation omitted)).

[28] *See, e.g.*, Levinson et al., *supra* note 25, at 190, 207; Sundquist, *supra* note 25, at 345-46; *see also* Richardson & Goff, *supra* note 23, at 303-04 (describing general studies reflecting this association).

[29] Roberts, *supra* note 25, at 282; *accord, e.g.*, Devine et al., *supra* note 23, at 683; Chandran, *supra* note 25, at 48.

[30] *See, e.g.*, Salmanowitz, *supra* note 25, at 128, 132; Saddler, *supra* note 25, at 1783.

[31] *See, e.g.*, Devine et al., *supra* note 23, at 699-700; Dillon, *supra* note 23, at 266-67, 278-79; Valerie P. Hans & Juliet Dee, *Whiplash: Who's to Blame?*, 68 BROOK. L. REV. 1093, 1113 (2003); Kahn & Lopatka, *supra* note 24, 266-67; Levett & Kovera, *supra* note 24, at 365; Stein & Drouin, *supra* note 23, at 394; Joseph A. Vitriol & Margaret Bull Kovera, *Exposure to Capital Voir Dire May Not Increase Convictions Despite Increasing Pretrial Presumption of Guilt*, 42 LAW & HUM. BEHAV. 472, 474 (2018); Debra L. Worthington, Merrie Jo Stallard, Joseph M. Price & Peter J. Goss, *Hindsight Bias,* Daubert*, and the Silicone Breast Implant Litigation*, 8 PSYCHOL. PUB. POL'Y & L. 154, 157 (2002); Eugene Morgulis, Note, *Juror Reactions to Scientific Testimony: Unique Challenges in Complex Mass Torts*, 15 B.U. J. SCI. & TECH. L. 252, 254, 266-69, 278 (2009); *see also* Richardson & Goff, *supra* note 23, at 301-14 (observing, outside the jury context, that difficult and complex decisions can lead to shortcut forms of thinking, such as implicit bias); Waites & Giles, *supra* note 23, at 38-39, 63 (acknowledging that complexity leads to heuristics, but concluding that evidence suggests jurors "are quite capable of making well reasoned decisions" in complex cases).

[32] *See* Michael G. Heyman, *Lost in Translation: Criminal Jury Trials in the United States*, 3 BRIT. J. AM. LEGAL STUD. 1, 4-7 (2014).

[33] *See, e.g.*, John P. Cronan, *Is Any of this Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 AM. CRIM. L. REV. 1187, 1196, 1202-11, 1258 (2002); Shari Seidman Diamond, Beth Murphy & Mary R. Rose, *The "Kettleful of Law"*

> [O]ften the judge must state th[e] rules to the jury with such niceties that many lawyers do not comprehend them, and it is impossible that the jury can. . . . "[J]uries have the disadvantage . . . of being treated like children while the testimony is going on, but then being doused with a kettleful of law during the charge that would make a third-year law-student blanch."[34]

Likewise, the substance of the case itself may be difficult or confounding, particularly where the subject matter, facts, or evidence are complex or scientific.[35] And of course, all of that is in addition to the fact that jurors in every criminal case are called upon to undertake the inherently complicated and confusing task of "mak[ing] difficult decisions about emotional issues with limited information," and doing so in an "unfamiliar setting."[36] In other words, the legal system forces

in Real Jury Deliberations: Successes, Failures, and Next Steps, 106 NW. U. L. REV. 1537, 1555-60, 1564-66, 1569-70, 1574-75 (2012); Bethany K. Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 TENN. L. REV. 701, 701-02 (2000); Sara Gordon, *Through the Eyes of Jurors: The Use of Schemas in the Application of "Plain-Language" Jury Instructions*, 64 HASTINGS L.J. 643, 644-45 (2013); Vida B. Johnson, *Presumed Fair? Voir Dire on the Fundamentals of Our Criminal Justice System*, 45 SETON HALL L. REV. 545, 552 (2015); Kahn & Lopatka, *supra* note 24, at 267; Stein & Drouin, *supra* note 23, at 394; Franklin Strier, *The Educated Jury: A Proposal for Complex Litigation*, 47 DEPAUL L. REV. 49, 51-54 (1997); Molly Armour, Comment, *Dazed and Confused: The Need for a Legislative Solution to the Constitutional Problem of Juror Incomprehension*, 17 TEMP. POL. & CIV. R. L. REV. 641, 652, 655 (2008); Kate H. Nepveu, Note, *Beyond "Guilty" or "Not Guilty": Giving Special Verdicts in Criminal Jury Trials*, 21 YALE L. & POL'Y REV. 263, 265 (2003).

[34] Skidmore v. Balt. & Ohio R.R. Co., 167 F.2d 54, 64 (2d Cir. 1948) (citation omitted).

[35] *See, e.g.*, Dillon, *supra* note 23, at 276-79; Valerie P. Hans, David H. Kaye, B. Michael Dann, Erin J. Farley & Stephanie Albertson, *Science in the Jury Box: Jurors' Comprehension of Mitochondrial DNA Evidence*, 35 LAW & HUM. BEHAV. 60, 60-61 (2011); Levett & Kovera, *supra* note 24, at 365; James R. Steiner-Dillon, *Epistemic Exceptionalism*, 52 IND. L. REV. 207, 240-41 (2019); Strier, *supra* note 33, at 54-56; Vitriol & Kovera, *supra* note 31, at 474; Worthington et al., *supra* note 31, at 157; Meha Goyal, Note, *An Exception to Trial by Jury in Complex White-Collar Crime Cases*, 31 GEO. J. LEGAL ETHICS 621, 621, 624 (2018); Morgulis, *supra* note 31, at 254, 266-69, 278; Karen Butler Reisinger, Note, *Court-Appointed Expert Panels: A Comparison of Two Models*, 32 IND. L. REV. 225, 241 (1998).

[36] Heyman, *supra* note 32, at 4-5; Stein & Drouin, *supra* note 23, at 394; *see also* J. Alexander Tanford & Sarah Tanford, *Better Trials Through Science: A Defense of Psychologist-Lawyer Collaboration*, 66 N.C. L. REV. 741, 749 (1988); *cf.* Sarah Thimsen, Brian H. Bornstein & Monica K. Miller, *The Dynamite Charge: Too Explosive for Its Own Good?*, 44 VAL. U. L. REV. 93, 115 (2009) ("Finally, people often use heuristics in situations of uncertainty. Jurors are often in situations of uncertainty; indeed, it is their verdict that is intended to provide certainty for the court and society by giving a final

jurors to contend with complexity and can render them confused, which, in turn, makes them likely to employ problematic shortcuts.

General verdicts, however, facilitate such reasoning by channeling jurors into a simple binary choice: guilty or not guilty. By requiring an outcome-focused decision, rather than guiding the jury's reasoning through the issues necessary for a conviction, general verdicts do nothing to prevent jurors from jumping to conclusions or to trigger more deliberate forms of thinking.[37] And by the same token, they do not meaningfully restrict the jury to considering only the details or elements of the crime charged. Indeed, that is largely their point; general verdicts are valued precisely because they permit decisions on extra-legal grounds, such as sympathy.[38] But that same feature necessarily also supports convictions based on bias. Finally, by offering no direction, general verdicts fan the flames of whatever complexity or juror confusion might exist and therefore amplify the likelihood that jurors will rely on prejudices and shortcuts. To quote the Second Circuit again, "[t]he general verdict enhances, to the maximum, the power of appeals to the biases and prejudices of the jurors" and "confers on the jury a vast power to commit error and do mischief by loading it with technical burdens far beyond its ability to perform [and] confusing it in aggregating instead of segregating the issues."[39]

What is more, general verdicts also shield the poor reasoning they facilitate from scrutiny. Most fundamentally, general verdicts reveal nothing about the jury's thinking, rendering any challenge that a jury

judgment about a dispute."); Vitriol & Kovera, *supra* note 31, at 474 ("Ambiguous situations involving the processing of complex information, such as capital trials, may trigger this availability heuristic during social judgments."). *But cf.* David S. Rubenstein, *Immigration Blame*, 87 FORDHAM L. REV. 125, 150 (2018) (noting that uncertainty "tends to trigger deliberative and effortful . . . thinking").

[37] *Cf., e.g.*, DANIEL KAHNEMAN, THINKING, FAST AND SLOW 417 (2011) (explaining that "[t]he way to block errors" borne of intuitive thinking is to "recognize the signs that you are in a cognitive minefield, slow down, and ask for reinforcement from" more deliberative mental processes); Richardson & Goff, *supra* note 23, at 307 (noting that, although not a "silver bullet," "using guidelines, such as 'stop and think' or 'use a checklist,' to safeguard against predictable [heuristic-related] errors does tend to reduce those errors, and encouraging introspection also curbs important and predictable [heuristic-related] biases"); Elizabeth Thornburg, *Cognitive Bias, the "Band of Experts," and the Anti-Litigation Narrative*, 65 DEPAUL L. REV. 755, 791 (2016) (observing that "'checklists' that force issues to be considered" can "avoid a rush to judgment" (citation omitted)).

[38] *See supra* notes 15–17 and accompanying text.

[39] *Skidmore*, 167 F.2d at 61 (citation omitted).

employed improper reasoning nearly impossible to mount.[40] To invoke the eloquent articulation of *Skidmore* a third time, the general verdict "shroud[s] in secrecy and mystery the actual results of [the jury's] deliberations," "covers up all the shortcomings which frail human nature is unable to eliminate from the trial of a case," and "draws the curtain upon human errors."[41]

In line with that, the standards governing challenges to general verdicts are exceedingly deferential, focusing only on what a hypothetical jury could have found, rather than on what the actual jury did find. For example, a sufficiency of the evidence challenge to a general verdict will fail if "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[42] Likewise, where multiple theories of liability could support a general verdict, the verdict will typically be upheld "as long as there was sufficient evidence to support one of the theories presented."[43]

These problems, moreover, can appear in just about any case. Cognitive shortcuts and heuristics, while potentially augmented by complexity and confusion, are used even in simple decisions. For example, "a shopper might have a heuristic to help her find the mustard in an unfamiliar grocery store," such as "mustard is usually in the salad dressing aisle."[44] Additionally, case complexity and juror confusion are likely quite common — particularly given that the federal criminal law has become increasingly complicated over time.[45] And general verdicts always and inherently preclude meaningful review of jury reasoning.[46] In short, the problems of general verdicts are systemic and widespread.

In sum, general verdicts are problematic. They encourage biased and shortcut reasoning, and they shield that reasoning from scrutiny. Thus, although general verdicts may protect defendants in some

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[40] *See, e.g.*, Martin A. Kotler, *Reappraising the Jury's Role as Finder of Fact*, 20 GA. L. REV. 123, 130 (1985); Ferguson, *supra* note 5, at 1210.

[41] *Skidmore*, 167 F.2d at 61 (citation omitted).

[42] Jackson v. Virginia, 443 U.S. 307, 319 (1979).

[43] *E.g.*, United States v. Bouchard, 828 F.3d 116, 128 (2d Cir. 2016).

[44] Miller et al., *supra* note 24, at 599.

[45] *See, e.g.*, United States v. Gonzales, 841 F.3d 339, 347 (5th Cir. 2016); United States v. Graham, 622 F.3d 445, 467 (6th Cir. 2010) (Merritt, J., dissenting); *see also* Nepveu, *supra* note 33, at 287-88 (explaining that limiting complexity and confusion is a reason for non-general verdicts "with potentially wide application" because "confusion and complexity are not limited to [cases involving complex-compound criminal statutes]").

[46] *See supra* notes 40–43 and accompanying text.

circumstances, they are likely to generate unjust convictions in many others. We should find a better way.

III. THE WAY FORWARD

So what is that better way? The answer, in the abstract, would seem to be to require juries, in every case, to answer specific questions about the points relevant to a conviction and their thinking (i.e., to use special findings verdicts). That would appear to cut against bias or other flawed reasoning by guiding jurors through, and demanding particularized consideration of, the specific issues necessary for a conviction, rather than allowing them to make one judgment about the whole case.[47] Furthermore, by clearly articulating, and directing jurors' attention to, the salient aspects of the case, such a solution could help to resolve complexity and confusion, and thereby mitigate any shortcuts or errors that could be generated by those issues.[48] And it could facilitate verdict challenges by revealing impermissible decisional grounds and eliminating the need for deferential legal standards.[49]

The problem with that solution, of course, is the hesitancy of courts to utilize special findings verdicts based on fears that doing so could

[47] *See* Skidmore v. Balt. & Ohio R.R. Co., 167 F.2d 54, 66 (2d Cir. 1948) ("'[B]y requiring the jury to return the naked facts only we may fairly expect to escape the results of sympathy, prejudice and passion.' That may be too sanguine a hope; but the fact verdict may often reduce the more undesirable sway of emotions." (citation omitted)); Avani Mehta Sood, *Attempted Justice: Misunderstanding and Bias in Psychological Constructions of Criminal Attempt*, 71 STAN. L. REV. 593, 660 (2019) ("[T]o the extent that the step-by-step structure of special verdicts creates a more guided adjudication process, this format might help close entry points for biased decisionmaking."); *see also* sources cited *supra* note 37; *cf.* Harry L. Munsinger & Donald R. Philbin, *Why Can't They Settle? The Psychology of Relational Disputes*, 18 CARDOZO J. CONFLICT RESOL. 311, 316 (2017) ("By stopping, thinking, and applying . . . deliberative analysis to the problem rather than relying on unconscious . . . intuitive heuristics, with their inherent biases, the individual is more likely to reach a reasoned perspective on the dispute.").

[48] *See* United States v. Palmeri, 630 F.2d 192, 202 (3d Cir. 1980) ("We think special interrogatories were properly employed to decrease the likelihood of juror confusion and to aid the jury in concentrating on each specific defendant, and the charges against him, rather than incriminating one potentially innocent defendant solely on the basis of his association with the others."); Nepveu, *supra* note 33, at 297 ("In complex or confusing cases, special verdicts can help the jury remember the case, keeping any number of things — charges, acts, even defendants — straight.").

[49] *See Gonzales*, 841 F.3d at 348 ("Courts consistently vacate convictions when the answers to special interrogatories undermine a finding of guilt the jury made on the general question."); *Skidmore*, 167 F.2d at 65 ("But above all [the special verdict] enables the public, the parties and the court to see what the jury has really done." (citations omitted)).

harm defendants by pressuring juries to convict, depriving juries of the power to acquit on extra-legal grounds, and creating confusion.[50] Nevertheless, it seems possible to expand their use to create a fairer justice system.

Although courts are often hesitant to use special findings verdicts, that hesitancy is far from a wholesale bar. Rather, courts permit them in certain circumstances, subject to broad discretion.[51] For example, courts will often allow such verdicts to ensure that juries have reached a unanimous decision on each necessary element;[52] in complex cases to reduce the risk of juror confusion;[53] and to address issues other than guilt, such as sentencing or criminal forfeiture.[54] Moreover, courts are far more open to general verdicts with special interrogatories than special verdicts, given that, in the words of the Supreme Court, "the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and *draw the ultimate conclusion of guilt or innocence*."[55] Finally, they often require special interrogatories to be answered after the jury has reached a verdict, in light of many of the defendant-protective concerns highlighted above.[56]

To synthesize that for our purposes, courts will permit special findings verdicts to ensure that the jury has rendered a permissible conviction, at least where they do not prevent the jury from making the final decision or infringe upon its ability to protect defendants through acquittal. Using special findings verdicts to prevent improper reasoning — like bias — would therefore seem eminently appropriate, at least if the verdict system were designed to avoid the pitfalls of deviating from general verdicts and fit the foregoing standards. There would also be little reason to decline to employ such a system regularly,

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[50] *See supra* Part I.

[51] *See, e.g.*, United States v. Applins, 637 F.3d 59, 82-83 (2d Cir. 2011).

[52] *See, e.g.*, United States v. Stegmeier, 701 F.3d 574, 581 (8th Cir. 2012).

[53] *See, e.g.*, United States v. Edelkind, 467 F.3d 791, 794 (1st Cir. 2006).

[54] *See, e.g.*, United States v. Reed, 147 F.3d 1178, 1180 (9th Cir. 1998).

[55] *E.g.*, United States v. Ramirez-Castillo, 748 F.3d 205, 214-15, 214 n.6 (4th Cir. 2014) (quoting United States v. Gaudin, 515 U.S. 506, 514 (1995)). The Supreme Court's language on this point is also geared towards protecting defendants. *See* United States v. Gaudin, 515 U.S. 506, 510-13 (1995) (noting "the historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue," and explaining that "[t]his right was designed 'to guard against a spirit of oppression and tyranny on the part of rulers,' and 'was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties'" (citations omitted)); *supra* note 22.

[56] *See, e.g.*, United States v. Udeozor, 515 F.3d 260, 271 (4th Cir. 2008); United States v. Hedgepeth, 434 F.3d 609, 613 (3d Cir. 2006); United States v. Spock, 416 F.2d 165, 183 & n.42 (1st Cir. 1969).

given the ever-present likelihood of bias, complexity, confusion, and flawed reasoning, as well as the fact that such a system should provide little cause for judicial concern.[57]

Accordingly, I propose this: that in every case, courts use their discretion to employ general verdicts with special interrogatories when, but only when, the jury has already begun proceeding down the path to finding the defendant guilty. And I suggest that courts implement that proposal as follows:

When jurors retire to deliberate, they should receive three verdict forms, each in a separate sealed folder. The first verdict form would simply ask whether the defendant is guilty or not guilty, and a direction on the form would tell the jury to open the second folder only if they find the defendant guilty.

To open the second folder, the jurors would be required to sign a statement printed on it that they have completed the first verdict form and unanimously agree the defendant is guilty. Within that folder would be another verdict form, which would contain special interrogatories tied to the elements of the offense and designed to ensure that the jury found the minimum necessary to convict. A direction would also appear on that form, this time saying that the jurors: (1) may reconsider the general verdict after answering the questions on the second verdict form — and if they do reach a different decision, the second verdict form will be shredded; (2) should open the third folder if, and only if, the general verdict remains the same; and (3) may not reconsider the general verdict after opening the third folder.

The same process for opening the second folder would then apply to the third folder. Within that folder would be a verdict form designed to include any remaining questions that might be helpful for later proceedings. For example, it could include questions about impermissible reasoning, such as bias; the grounds for the conviction, such as theories of liability; and matters unrelated to guilt, such as criminal forfeiture and sentencing. The completion of that verdict form would end the deliberation process.

This verdict system would do much to address the problems of general verdicts.[58] By guiding jurors through the points necessary for a

[57] As noted above, the Supreme Court has suggested that special findings verdicts could be appropriate "where risk of prejudice to the defendant is slight and the advantage of securing particularized fact-finding is substantial." Black v. United States, 561 U.S. 465, 472 n.11 (2010) (citation omitted); *see supra* note 22. Any verdict system designed to reduce bias and flawed convictions that avoids harming defendants would seem to satisfy that test.

[58] *See supra* Part II.

conviction before they could finalize a guilty verdict, the questions on the second verdict form would help to prevent convictions infected by shortcuts, biases, or confusion. Additionally, those questions, along with the questions on the third verdict form, would serve to reveal impermissible reasoning for later review and tie that review to the jury's actual findings.

The procedure would also honor prevailing judicial concerns and practice. First of all, it would ensure that jurors are never pressured to convict by the interrogatories — even informally by viewing them before reaching a verdict[59] — because, to review them, they must adjudge the defendant guilty and unanimously attest to that fact. In other words, defendants could not be harmed by the questions because, at most, they would cause the jury to reconsider a finding of guilt. Additionally, jurors would retain full independence to acquit, and to do so without giving reasons,[60] because they would never reach the interrogatories if they acquitted initially and the second verdict form would be shredded if they acquitted after completing it. Moreover, the procedure would eliminate concerns that interrogatories could harm defendants by confusing the jury because jurors could only access them after voting to convict. Thus, any confusion would either not affect the outcome or benefit the defendant. Furthermore, jurors could not be encouraged to maintain a conviction or be confused into doing so by the non-elements questions (on the third verdict form) because those questions could not be considered unless the verdict was irreversibly decided.[61] Lastly, because juries would always return general verdicts, and the special interrogatories would always be answered after the jury had decided to convict, this procedure fits neatly within the existing framework for non-general verdicts.[62]

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[59] *See Udeozor*, 515 F.3d at 271 (explaining that "it is better practice to submit the general verdict and special verdict forms separately," rather than together, to prevent jurors from "look[ing] down the page at the special findings before rendering a guilty verdict" (citations omitted)); *Spock*, 416 F.2d at 183 (concluding that jurors might be swayed by interrogatories even if they were instructed only to answer them "if a general verdict of guilty had been reached").

[60] *See* United States v. Reed, 147 F.3d 1178, 1180 (9th Cir. 1998) ("To ask the jury special questions might be said to infringe . . . on its power to arrive at a general verdict without having to support it by reasons or by a report of its deliberations." (citation omitted)).

[61] *Cf. Hedgepeth*, 434 F.3d at 613-14 (indicating that even sentencing interrogatories would need to be submitted "to the jury after a guilty verdict has been returned" to avoid conviction pressure (citation omitted)).

[62] *See supra* notes 51–57 and accompanying text.

Of course, there are counterarguments. First, some might find my approach cumbersome. However, it is not much more cumbersome than what jurors are presently called upon to do, i.e., decide whether the elements of a crime have been proved and potentially answer interrogatories, and it is certainly not as extreme as some possible approaches, such as bifurcating proceedings or requiring jury opinions drafted by a court officer.[63] Additionally, reducing bias or like deficiencies in convictions is worth more procedures and could avert lengthy review proceedings. Second, prosecutors might believe my approach tilts the scales in defendants' favor. But prosecutors already possess a slew of advantages;[64] judicial concerns regarding non-general verdicts reflect a desire to protect defendants, not prosecutors;[65] and given that "[t]he role of a prosecutor is to see that justice is done,"[66] prosecutors should welcome methods of ensuring the validity of convictions. Third, some may note that "empirical data on the effects of special versus general verdicts are limited, and the results are mixed."[67] That criticism is fair, and full testing of my proposal would certainly be beneficial. However, it is hard to imagine how my proposal could make things worse. It simply requires juries to explicitly answer questions that they are generally already tasked with resolving, and it would, at minimum, improve the process by enabling meaningful review.

CONCLUSION

Juries can be biased and logically imperfect. And unfortunately, our verdict system facilitates those shortcomings. We must, therefore, do more.

One solution is to use special findings verdicts in every case, which could reduce shortcut thinking, reduce complexity and confusion, and permit judicial review. Although courts are reluctant to adopt such a solution, judicial concerns can be navigated without succumbing to the problems of general verdicts. And the verdict system proposed here, which would require interrogatories only when the jury is proceeding towards a conviction, would do just that.

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[63] *See Hedgepeth*, 434 F.3d at 613 n.2; Curci, *supra* note 5, at 240.

[64] *See, e.g.*, Ion Meyn, *The Unbearable Lightness of Criminal Procedure*, 42 AM. J. CRIM. L. 39, 87 (2014).

[65] *See supra* Part I.

[66] Connick v. Thompson, 563 U.S. 51, 71 (2011).

[67] Kayla A. Burd & Valerie P. Hans, *Reasoned Verdicts: Oversold?*, 51 CORNELL INT'L L.J. 319, 345 (2018); *accord* Nepveu, *supra* note 33, at 265.

Of course, this solution is not a cure-all to bias in the courtroom or the criminal justice system. That insidious problem will require much more work. But every protection counts. Rethinking verdicts could do much to improve our jury system and help ensure that the jury truly serves as the "criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'"[68]

[68] Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 868 (2017) (citation omitted).