

# What's So Special About General Verdicts? Questioning the Preferred Verdict Format in American Criminal Jury Trials

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*Criminal juries in the United States typically deliver their decisions through a “general verdict,” expressing only their ultimate conclusion of “guilty” or “not guilty,” rather than through a “special verdict” that identifies whether each element of the charged crime has been proven beyond a reasonable doubt. American courts have broadly favored the use of general verdicts in criminal cases due to concerns that the special verdict will curtail the jury’s decision-making autonomy, including its power to nullify the law in favor of the defense, potentially undermining the criminal defendant’s constitutional right to trial by jury.*

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*This Article confronts the legal status quo on verdict format and its underlying, untested assumptions. Drawing upon prior psychology findings and legal professionals' anecdotal observations, it questions whether the general verdict poses its own under-acknowledged threats to the rights of criminal defendants and the decision-making agency of jurors. While the more guided special verdict format is presumed to threaten nullifying acquittals, the unguided general verdict format might be enabling convictions that violate constitutional norms of due process, impartial adjudication, and equal protection.*

*Given the high-stakes values potentially implicated in the choice of verdict format in criminal cases, it is time to put the conventional wisdom in favor of general verdicts to an empirical test. This Article therefore proposes a methodological framework for investigating whether the legal status quo accurately reflects (1) current stakeholders' preferences and predictions, and (2) experimentally testable legal and cognitive effects of general versus special verdicts in lay determinations of criminal liability. A data-informed understanding is needed to assess whether the general verdict is optimizing the integrity, fairness, and constitutionality of criminal jury decision making.*

“It is one of the most essential features of the right of trial by jury that no jury should be compelled to find any but a general verdict in criminal cases, and the removal of this safeguard would violate its design and destroy its spirit.”

– United States v. Spock (1st Cir. 1969), quoting George B. Clementson (1905)<sup>1</sup>

“[T]he general verdict is valued for what it does, not for what it is. It serves as the great procedural opiate, which draws the curtain upon human errors and soothes us with the assurance that we have attained the unattainable.”

– Skidmore v. Balt. & Ohio R.R. (2d Cir. 1948), quoting Edson R. Sunderland (1920)<sup>2</sup>

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1 United States v. Spock, 416 F.2d 165, 181 (1st Cir. 1969) (quoting GEORGE B. CLEMENTSON, A MANUAL RELATING TO SPECIAL VERDICTS AND SPECIAL FINDINGS BY JURIES 49 (1905)).

2 Skidmore v. Balt. & Ohio R.R. Co., 167 F.2d 54, 61 (2d Cir. 1948) (quoting Edson Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253, 262 (1920)).

## INTRODUCTION

When a jury delivers its verdict in a criminal case, the stakes are high: The accused's life and liberty are pitted against the harms of the alleged crime, and the legal system's legitimacy is implicated in the adjudicatory process and its outcome. Although the vast majority of criminal cases in U.S. state and federal courts are resolved prior to reaching a jury trial, even those dispositions "are in part informed by expectations of what the jury will do. . . . The jury thus controls not only the formal resolution of controversies in the criminal case, but also the informal resolution of cases that never reach the trial stage."<sup>3</sup>

Jurors making determinations of criminal liability are typically one-time lay decision makers without legal training or experience.<sup>4</sup> The prosecutor and defense attorney present them with contested evidence and arguments, the judge instructs them on the relevant law, and the jurors are then generally left to their own devices to determine the facts, understand the law from the given instructions, apply the law to their determinations of fact, and reach a verdict.

While there is much to be said about the "general soundness" of jury adjudication,<sup>5</sup> decades of empirical work have also shown that lay decision makers acting with jury instructions as their only legal guide are susceptible to legal misunderstandings and extralegal biases that can undermine the goals and protections of the law.<sup>6</sup> Importantly, this can occur despite the best

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3 HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 31-32 (1966); *see also* SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 18 (10th ed. 2017); Shari Seidman Diamond & Jason Schklar, *The Jury: How Does Law Matter?*, in *HOW DOES LAW MATTER?* 191, 194 (Bryant G. Garth & Austin Sarat eds., 1998); Anna Offit, *Prosecuting in the Shadow of the Jury*, 113 *NW. U. L. REV.* 1071, 1072-73 (2019).

4 *See* Sunderland, *supra* note 2, at 259.

5 Kayla Burd & Valerie Hans, *Reasoned Verdicts: Oversold*, 51 *CORNELL INT'L L.J.* 319, 341 (2018); *see generally* NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* (2007); KALVEN & ZEISEL, *supra* note 3, at 55-65; Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's The American Jury*, 2 *J. EMPIRICAL LEGAL STUD.* 171 (2005).

6 *See, e.g.*, Diamond & Schklar, *supra* note 3; Phoebe C. Ellsworth, *Are Twelve Heads Better than One?*, 52 *LAW & CONTEMP. PROBS.* 205, 218-23 (1989); Amiram Elwork, Bruce D. Sales & James J. Alfani, *Juridic Decisions: In Ignorance of the Law or in Light of it?*, 1 *LAW & HUM. BEHAV.* 163, 178 (1977); Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches us About the Jury Instruction Process*, 3 *PSYCH. PUB. POL'Y & L.* 589 (1997); Avani Mehta Sood,

intentions and efforts of jurors. Social science researchers have observed that lay “failure to apply the law correctly [is] by no means a failure to take the law seriously,”<sup>7</sup> but rather, “the problem is . . . due to . . . unnecessary procedural obstacles to high-quality decision making.”<sup>8</sup>

This Article shines a spotlight on one potential procedural obstacle that has never been empirically investigated: the format in which criminal jurors render their verdicts.<sup>9</sup> The American criminal legal system broadly favors “general verdicts,” in which jurors deliver only their conclusion of “guilty” or “not guilty” in a case, because this laissez-faire format is thought to best enforce the criminal defendant’s constitutional right to trial by jury.<sup>10</sup> In contrast, criminal courts have broadly disfavored “special verdicts” in which jurors would answer interrogatory questions about each element of the charged crime before reaching their conclusion, due to concerns that this format will disadvantage criminal defendants by constraining the jury’s power to acquit notwithstanding the evidence and law at hand (i.e., jury nullification).<sup>11</sup>

Confronting this legal status quo and its underlying assumptions, this Article draws upon prior psychological findings and legal professionals’ anecdotal observations to highlight possible perils lurking beneath the preferred use of general verdicts in criminal trials. In particular, it considers whether the general verdict may be enabling (1) incomplete applications of law that undermine the due process rights of criminal defendants; (2) misunderstandings of law that undermine the decision-making agency of criminal jurors; and (3) biases

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*Attempted Justice: Misunderstanding and Bias in Psychological Constructions of Criminal Attempt*, 71 *STAN. L. REV.* 593 (2019); David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 *JUDICATURE* 478 (1976); Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 *HOFSTRA L. REV.* 37, 41-52 (1993); *infra* note 88 (cites on jury bias).

7 Ellsworth, *supra* note 6, at 223.

8 Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 *PSYCH. PUB. POL’Y & L.* 788, 788 (2000).

9 See also Burd & Hans, *supra* note 5, at 322. The only two published empirical studies located on verdict format are an experiment conducted in the context of civil litigation, Elizabeth C. Wiggins & Steven J. Breckler, *Special Verdicts as Guides to Jury Decision Making*, 14 *LAW & PSYCH. REV.* 1 (1990), and a field study that non-experimentally measured use of different verdict formats. Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 *LAW & HUM. BEHAV.* 18 (1994).

10 See *infra* Part I.

11 See *infra* note 28.

triggered by legally irrelevant factors that undermine norms of impartial adjudication and equal protection.<sup>12</sup>

There may thus be important constitutional values at stake in both verdict formats. While the more guided process of the special verdict risks stifling the jury's lay intuitions and autonomy, the unguided process of the general verdict also risks violating norms of trial by jury, as well as due process and equal protection.<sup>13</sup> However, such violations are unlikely to be successfully litigated and judicially recognized as unconstitutional,<sup>14</sup> which makes the need to examine and proactively address them all the more imperative.<sup>15</sup>

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12 See *infra* Part II.

13 See generally U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . .”), amend. XIV, § 1 (“[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”); see also *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 861, 869 (2017) (holding that the Sixth Amendment jury trial guarantee requires that trial courts be permitted to consider evidence that a criminal juror relied on “explicit statements” of “overt racial bias” that are shown to be “a significant motivating factor in the juror’s vote to convict”); *id.* at 883-84 (Alito, J., dissenting) (discussing potential Sixth Amendment and equal protection arguments that could broaden the scope of constitutional review for alleged jury bias); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1682-83 (1985) (arguing that “when jurors — ordinary citizens — determine the guilt or innocence of a defendant, such determinations nevertheless constitute state action and hence compel equal protection review”); Tania Tetlow, *Discriminatory Acquittal*, 18 WM. & MARY BILL RTS. J. 75, 109 (2009) (observing that courts overturning discriminatory jury convictions on constitutional grounds “have mentioned the Equal Protection Clause but have relied more heavily on the defendant’s due process rights and Sixth Amendment right to an impartial jury”).

14 See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 291-297 (1987) (illustrating obstacles of raising an equal protection claim based on jury discrimination); Johnson, *supra* note 13, at 1691 (noting that “there can be no remedy” when rights are “covertly violated,” because if “proof that violations are occurring comes entirely from aggregate data . . . it is not possible to ascertain whether a violation has occurred in a particular case”); Tetlow, *supra* note 13, at 97-101 (noting that “courts have difficulty defining the requisite level of discriminatory motive, much less grappling with unstated or subconscious discrimination”); *United States v. Baker*, 899 F.3d 123, 133 (2d Cir. 2018) (observing that *Pena Rodriguez*, 137 S. Ct. 855 at 869, “recognized a narrow exception”).

15 See Johnson, *supra* note 13, at 1692 (suggesting that when individual remedies are lacking, “[a]ny feasible remedy must be a group remedy and any attractive

This Article proceeds as follows: Part I provides a brief introduction to the reasoning American courts have offered for favoring general verdicts over special verdicts in criminal jury trials. Part II raises countervailing questions about ways in which the general verdict may be hampering rather than facilitating goals of criminal jury adjudication. Part III proposes an empirical path forward: using survey and experimental methodologies to measure whether the status quo on verdict format in criminal cases is aligned with (1) current views of legal professionals and (2) socio-cognitive realities of lay decision making.

## I. JUSTIFYING THE STATUS QUO

A criminal jury delivering a general verdict at trial “announces only its ultimate conclusions” about the defendant’s liability for the charged offense(s): “guilty” or “not guilty.”<sup>16</sup> Alternatively, jurors could be asked to respond to specific “interrogatory” questions about whether all elements of the applicable legal standards have been proven beyond a reasonable doubt before they deliver their ultimate conclusions, which is what this Article refers to as a special verdict (also known as a “special interrogatory verdict,” a “verdict with interrogatories,” “special interrogatories,” “special findings,” or a “general verdict with answers to written questions”).<sup>17</sup>

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remedy must be prophylactic”); Tetlow, *supra* note 13, at 116-17 (highlighting importance of seeking “other methods to avoid” rights violations that “lack viable direct remedies”).

16 Zhang v. Am. Gem Seafoods, Inc., 339 F.3d 1020, 1031 (9th Cir. 2003).

17 See *id.*; WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE 1429-30, § 24.10(a) (6th ed. 2017); CHARLES ALAN WRIGHT & ARTHUR R. MILLER FEDERAL PRACTICE AND PROCEDURE § 512 (4th ed. 2020); FED. R. CIV. P. 49; Black v. United States, 561 U.S. 465, 472 (2010).

Since this form of special verdict allows for “the jury’s pronouncement on the ultimate issue of guilt or liability,” State v. Payne, 447 P.3d 515, 524 (Or. Ct. App. 2019), courts have dismissed constitutional arguments against its use in criminal cases as “meritless.” People v. Gurule, 28 Cal. 4th 557, 632 (2002); see also Heald v. Mullaney, 505 F.2d 1241, 1245-46 (1st Cir. 1974).

By contrast, in another format known as the “true special verdict,” the jury’s responses to special questions serve as its only output, and the trial judge then “determine[s] the defendant’s guilt or innocence in light of those findings.” United States v. Gonzales, 841 F.3d 339, 346 (5th Cir. 2016). True special verdicts are “‘suspect’ as a matter of due process” in criminal cases, LAFAVE ET AL., *supra*, at 1430, because the criminal defendant’s constitutional right to

The decision of which verdict format to use in a criminal trial is typically within the “broad discretion” of the trial judge.<sup>18</sup> And despite a glaring lack of empirical evidence on how different verdict formats affect criminal jury decision making, the American judiciary has largely reached a verdict on its preference: “As a general rule, [criminal] juries are asked to drill no deeper than a judgment of conviction or acquittal. This is the essence of a general verdict.”<sup>19</sup> In contrast, “[s]pecial jury questions, common in civil trials, have long been disfavored in criminal law”<sup>20</sup> and, with some exceptions,<sup>21</sup> “remain disfavored and discouraged” across state and federal courts.<sup>22</sup>

The rationale against the use of special verdicts in criminal cases stems from concerns that “supplanting or supplementing the general verdict can limit jury independence”<sup>23</sup> and the jury’s “power of lenity,”<sup>24</sup> thereby encroaching

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a jury trial includes “the right to have the jury, rather than the judge, reach the requisite finding of ‘guilty.’” *Gonzales*, 841 F.3d at 346.

- 18 *United States v. Ogando*, 968 F.2d 146, 149 (2d Cir. 1992); *see also* *United States v. Reed*, 147 F.3d 1178, 1180-81 (9th Cir. 1998); *United States v. Stonefish*, 402 F.3d 691, 697 (6th Cir. 2005); *State v. Havens*, 852 P.2d 1120, 1123 (Wash. 1993).
- 19 *State v. Hummel*, 393 P.3d 314, 326 (Utah 2017).
- 20 *Gonzales*, 841 F.3d at 342.
- 21 *See, e.g.*, *LAFAVE ET AL.*, *supra* note 17, at 1430 (noting situations in which “federal and state courts find special interrogatories as a supplement to a general verdict”); *Gonzales*, 841 F.3d at 347 (observing that the “historic aversion to special questions has lessened in recent years” partly due to the “increased complexity” of criminal laws); Kate H. Nepveu, Note, *Beyond “Guilty” or “Not Guilty”*: *Giving Special Verdicts in Criminal Jury Trials*, 21 *YALE L. & POL’Y REV.* 263, 269-80 (2003) (describing “current areas of use”).
- 22 *State v. Dilliner*, 569 S.E.2d 211, 214 (W. Va. 2002); *see also* *Mullaney*, 505 F.2d at 1245; *WRIGHT & MILLER*, *supra* note 17, at § 512; Nepveu, *supra* note 21, at 263 (“This statement appears so often in judicial discussions of jury verdicts, it is nearly a platitude.”).
- 23 *LAFAVE ET AL.*, *supra* note 17, at 1429; *see* *United States v. Spock*, 416 F.2d 165, 165-94 (1st Cir. 1969); *Gonzales*, 841 F.3d at 346-47; *Dilliner*, 569 S.E.2d at 215; Kimberly A. Mottley et al., *An Overview of the American Criminal Jury*, 21 *ST. LOUIS U. PUB. L. REV.* 99, 105 (2002).
- 24 Edmund M. Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 *YALE L.J.* 575, 592 (1923); *see* *United States v. Desmond*, 670 F.2d 414, 416-18 (3d Cir. 1982) (quoting Morgan, *supra*); *United States v. Wilson*, 629 F.2d 439, 442-43 (6th Cir. 1980); *United States v. Ogull*, 149 F. Supp. 272, 276 (S.D.N.Y. 1957).

upon the criminal defendant's Sixth Amendment right to trial by jury.<sup>25</sup> One trial court explained:

To ask the jury special questions might be said to infringe on its power to deliberate free from legal fetters; on its power to arrive at a general verdict without having to support it by reasons or by deliberation; and on its power to follow or not follow the instructions of the court. Moreover, any abridgement or modification of this institution would partly restrict its historic function, that of tempering rules of law by common sense brought to bear upon the facts of a specific case.<sup>26</sup>

Furthermore, an oft-cited appellate opinion reversing a jury conviction obtained through a special verdict asserted: "There is no easier way to reach, and perhaps force, a verdict of guilty than to approach it step by step. . . [T]he jury, as the conscience of the community, must be permitted to look at more than logic."<sup>27</sup>

Jurors have the ability to exert a tempering role that looks beyond the logic of the law through "jury nullification," which is a "knowing and deliberate rejection of the evidence or refusal to apply the law[,] to send a message about some social issue that is larger than the case itself or because the result dictated by the law is contrary to the jury's sense of justice, morality, or fairness."<sup>28</sup> The jury's power to nullify the law in favor of a criminal defendant stems from the U.S. Constitution's Double Jeopardy Clause, which shields a jury acquittal from legal challenge.<sup>29</sup> Courts have observed that the nullification power "holds as long as courts adhere to the general verdict in criminal

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25 See generally U.S. CONST. amend. VI; *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

26 *Ogull*, 149 F. Supp. at 276.

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

28 BLACK'S LAW DICTIONARY 355 (11th ed. 2019); see *United States v. Powell*, 469 U.S. 57, 65 (1984); Rachel Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 36-37 (2003) (describing jury nullification as "no accident," but rather, a "part of the constitutional design" that "introduces a critical check on the government before it can impose criminal punishment and provides a mechanism for correcting over-inclusive general criminal laws"); Nancy Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 879-80 (1999) (defining jury nullification, identifying situations in which it is likely to occur, and proposing a "process view" of nullification that highlights the interpretive and political roles of the jury).

29 See generally U.S. CONST. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .").

cases.<sup>30</sup> Thus, “much of that hostility” toward special verdicts in criminal cases “stems from a desire not to undermine jury nullification.”<sup>31</sup>

Ironically, the American judiciary concurrently has a very ambivalent and at times overtly antagonistic relationship with jury nullification,<sup>32</sup> which it generally recognizes as a power but not a right.<sup>33</sup> While some judges have asserted that “the jury’s power to acquit where the law may dictate otherwise is a fundamental necessity of a democratic system,”<sup>34</sup> others have “categorically rejected the idea that, in a society committed to the rule of law, jury nullification is desirable or that courts may permit it to occur when it is within their authority to prevent it.”<sup>35</sup> Most federal and state jurisdictions do not instruct jurors on their power to nullify the law,<sup>36</sup> and trial judges are

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30 *People v. Fernandez*, 26 Cal. App. 4th 710, 714 (1994); *see also* Barkow, *supra* note 28, at 36 (noting that the power to issue a general verdict “translates into the power to nullify the law”).

31 *United States v. Gonzales*, 841 F.3d 339, 346-47 (5th Cir. 2016); *see also* *United States v. Desmond*, 670 F.2d 414, 418 (3d Cir. 1982); *State v. Dilliner*, 569 S.E.2d 211, 215 (W. Va. 2002); *United States v. Wilson*, 629 F.2d 439, 442-43 (6th Cir. 1980); *Ogull*, 149 F. Supp. at 276.

32 *See, e.g., Desmond*, 670 F.2d at 417; *United States v. Dougherty*, 473 F.2d 1113, 1133 (1972); *Gonzales*, 841 F.3d at 347; *Fernandez*, 26 Cal. App. 4th at 714; Kenneth Duvall, *The Contradictory Stance on Jury Nullification*, 88 N.D. L. REV. 409, 414 (2012); Stacey P. Eilbaum, *The Dual Face of the American Jury: The Antiauthoritarian and Antimajoritarian Hero and Villain in American Law and Legal Scholarship*, 98 CORNELL L. REV. 711, 713 (2013).

33 *See* *U.S. v. Kleinman*, 880 F.3d 1020, 1031 (9th Cir. 2017) (“It is well established that jurors have the power to nullify,” but not “a right to nullify”) (citations omitted). *But see* *Skidmore v. Balt. & Ohio R.R. Co.*, 167 F.2d 54, 57 (2d Cir. 1948) (describing nullification as “a power which, because generally it cannot be controlled, is indistinguishable for all practical purposes from a ‘right’”).

34 *United States v. Moylan*, 417 F.2d 1002, 1005 (4th Cir. 1969).

35 *United States v. Thomas*, 116 F.3d 606, 614, 625 (2d Cir. 1997) (but holding that “[a] court must not . . . remove a juror for an alleged refusal to follow the law as instructed unless the record leaves no doubt that the juror was in fact engaged in deliberate misconduct”); *see also* *State v. Ragland*, 519 A.2d 1361, 1372 (2d Cir. 1986) (describing jury nullification as “an unfortunate but unavoidable power” that “should be restricted as much as possible”).

36 *See Dougherty*, 473 F.2d at 1113; KADISH ET AL., *supra* note 3, at 67 (“The federal courts and nearly all states follow *Dougherty* and refuse to permit instructions informing the jury of its nullification power.”).

authorized to take various steps to root out and prevent jury nullification before it occurs.<sup>37</sup>

The judiciary's expressed and exhibited mistrust of jury nullification is at odds with its repeated references to nullification as a primary rationale for rejecting the use of special verdicts in criminal cases. This inconsistency raises the question of whether the longstanding status quo in favor of general verdicts accurately reflects views and predictions about verdict format among judges and other stakeholders in the criminal legal system. Furthermore, the conventional wisdom's presumption that the general verdict better protects the rights of criminal defendants also awaits empirical validation.

## II. QUESTIONING THE STATUS QUO

My prior empirical work on lay determinations of criminal liability, additional findings and theories from the field of psychology, and anecdotal conversations with criminal law professionals have led me to question whether the deeply entrenched status quo on criminal verdict format is hampering rather than promoting the rights of defendants and the decision-making agency of jurors. Here, I consider three risks that the privileged general verdict might be enabling: (1) jurors convicting defendants without being convinced that all elements of the charged crime have been proven beyond a reasonable doubt; (2) jurors misunderstanding the law in ways that impede informed decision making (including informed jury nullification); and (3) jurors being influenced by extralegal biases that lead to discriminatory outcomes.

### A. Incomplete Application of Law

Legal standards for criminal offenses are comprised of "elements" that define criminal liability, such as the culpable mental state ("mens rea"), the culpable act ("actus reus"), and potential "attendant circumstances" ("background fact[s] that [are] crucial for determining whether that conduct is harmful").<sup>38</sup>

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37 See, e.g., *U.S. v. Christensen*, 828 F.3d 763, 806-07 (9th Cir. 2015) (asserting that courts have a "duty to forestall or prevent" nullification by "dismissal of an offending juror") (citations omitted); *U.S. v. Rushin*, 844 F.3d 933, 939-40 (11th Cir. 2016) (holding that courts can "constrain counsel from making arguments that encourage nullification") (citations omitted); *Kleinman*, 880 F.3d at 1031 (upholding trial court's instruction that "[i]t is not for [the jury] to determine whether the law is just").

38 KADISH, ET AL., *supra* note 3, at 265. For example, in a statute defining criminal destruction of property as "[1] maliciously [2] injures or breaks or destroys, or

These elements provide some degree of “security and predictability by limiting the scope of the criminal law,”<sup>39</sup> since the U.S. Constitution’s Due Process Clause requires that “*each element* of a crime be proved to the jury beyond a reasonable doubt” before a criminal defendant can be convicted.<sup>40</sup> Appellate courts have broadly upheld decisions to use general verdicts in criminal trials, even when the defendant requested a special verdict, as long as the trial court “correctly instructed” the jury on the above due process requirement.<sup>41</sup> But do jury instructions sufficiently protect criminal defendants’ rights in this regard?

Consider the offense of criminal attempt, which is generally defined by two elements: (1) the mental state requirement of intent, for which the prosecution must prove that the defendant intended to commit the allegedly attempted crime; and (2) the act requirement, for which jurisdictions apply different legal tests, such as whether the defendant came “dangerously close”<sup>42</sup> to committing the attempted crime or took a “substantial step”<sup>43</sup> toward committing it.<sup>44</sup> To convict the defendant of the charged criminal attempt, jurors must find *both* the intent and act elements proven beyond a reasonable doubt.

However, in a set of experiments that investigated lay applications of attempt law, I found that mock jurors in some cases reached determinations of guilt

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attempts to injure or break or destroy, [3] by fire or otherwise, [4] any public or private property, whether real or personal, [5] not his or her own, [6] of the value of \$1000 or more,” the first two elements define the mental state and act elements of the crime, respectively, while the remaining elements are all attendant circumstances that the prosecution must also prove beyond a reasonable doubt. D.C. CODE ANN. §22-303 (West 2016).

39 Arnold N. Enker, *Impossibility in Criminal Attempts — Legality and the Legal Process*, 53 MINN. L. REV. 665, 688 (1969).

40 *Alleyne v. United States*, 570 U.S. 99, 104 (2013) (emphasis added); *see also* *In re Winship*, 397 U.S. 358, 364 (1970); *United States v. Gaudin*, 515 U.S. 506, 510 (1995).

41 *See, e.g.*, *United States v. Enmon*, 686 Fed. Appx. 769, 774 (11th Cir. 2017) (upholding use of a general verdict because “the district court correctly instructed the jury that it could find [the defendant] guilty only if all the elements were proven beyond a reasonable doubt”); *United States v. Griffin*, 705 F.2d 434, 436-37 (11th Cir. 1983); *United States v. Thompson*, No. 99-41007, 2001 WL 498430, at \*10 (5th Cir. Apr. 9, 2001); *United States v. Lunceford*, Crim. No. 08–00393–WS, 2009 WL 2634479, at \*3-4 (S.D. Ala. Aug. 21, 2009).

42 N.Y. State Unified Court Sys., *Criminal Jury Instructions and Model Colloquies: Attempt to Commit A Crime*; Penal Law § 110.00, at 1.

43 MODEL PENAL CODE § 5.01(1)-(2) (AM. L. INST., Official Draft and Explanatory Notes 1985).

44 Sood, *supra* note 6, at 602-05 (discussing legal standards for incomplete criminal attempts).

based on just one rather than both elements of the charged crime.<sup>45</sup> Furthermore, some participants' written comments revealed that they misperceived the act element of the offense as an alternative to the intent element, or they treated proof of intent as sufficient for conviction regardless of whether the requisite act had been proven.<sup>46</sup> In other words, these "lay decisionmakers operationalized the intent and act requirements as either-or options, despite having been instructed that both elements had to be proven beyond a reasonable doubt to impose criminal liability."<sup>47</sup>

The difficulties that legally instructed mock jurors exhibited in applying the two-element legal standard for criminal attempt could mean that more elementally complex crimes are at even greater risk of unconstitutional jury applications. Take for instance the high-stakes offense of felony murder: an unintentional killing that occurs in the perpetration of a felony (the "predicate" felony) and is eligible for the death penalty in a number of jurisdictions.<sup>48</sup> Jurors adjudicating a charge of felony murder may need to make various sub-determinations to reach their ultimate conclusion, including whether: (1) all elements of the *predicate felony* have been proven, (2) the death occurred *in the course or furtherance* of the predicate felony, (3) the felony was *inherently dangerous*, (4) the death was a *causal result* of the felony, and potentially whether (5) the defendant bears liability even if the killing was committed by a *third party*, such as a co-felon or bystander (for which there are then further legal tests to consider).<sup>49</sup> The judge's instructions on this complex legal doctrine, followed by a general verdict form that asks the jury simply to render its ultimate finding of "guilty" or "not guilty," may not go far enough toward ensuring that the jurors fully consider each component of the felony murder standard before convicting a defendant of this serious homicide.

Anecdotal observations by legal professionals raise similar concerns about whether jurors issuing a general verdict understand how to apply the given legal instructions, even when the judge's instructions are entirely accurate. For example, law professor Christopher May, who served on both a civil jury and a criminal jury that delivered general verdicts, observed that in both cases

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45 *Id.* at 634, 659.

46 *Id.* at 652-53, 659.

47 *Id.* at 659.

48 *See, e.g.*, CAL. PENAL § 190.2 (2019); FLA. STAT. ANN. § 782.04 (West 2019); TEX. PENAL CODE ANN. §§ 12.31, 19.02 (West 2013).

49 *See* KADISH ET AL., *supra* note 3, at 520-22, 528, 536, 544-52 (discussing the basic doctrine of felony murder and noting that "the great majority [of American legislatures] have retained some version of the felony murder rule").

his fellow jurors “did not know how to apply the law, as distinct from what the law meant.”<sup>50</sup> He recounted:

Neither jury I sat on was sure of how to use or access the instructions. . . . It was not obvious to them that in order to reach a verdict it was necessary to go through each claim or offense and determine whether each one of the elements had been satisfied. Moreover, there were times when the jury was unable to relate the facts to the law in the sense of knowing which evidence was to be matched to which legal element.<sup>51</sup>

May pointed to the difficulty law students have in “learning to apply the law to the facts,” and questioned: “[W]hy should it be any easier for jurors, whose total legal education consists of a brief lecture from the judge? Even the most simply written instructions are of no use to a jury that does not know what to do with them.”<sup>52</sup>

Another law professor (and former prosecutor) recalled serving as the foreperson of a criminal jury in a case that involved severe neglect of a young child, which triggered a high degree of emotional outrage among the jurors.<sup>53</sup> The defendant was a first-time offender and therefore eligible for probation, but the majority of jurors initially wanted to find her guilty of a first-degree felony, for which she could be sentenced to life in prison. The foreperson took the initiative to lead his fellow jurors through each element of the criminal charges one by one, essentially providing them with a de facto special verdict process, after which the jurors collectively concluded that the evidence could only support conviction on a lesser felony.

To be sure, jurors are not intended to be law professors or criminal law practitioners. Much of the criminal jury’s value is seen as coming from its lay commonsense and communal morality that looks beyond the formal, legalistic terms of the law.<sup>54</sup> But when the legal formalities at issue serve to protect the due process rights of the criminal defendant, concerns about special verdicts curtailing nullifying acquittals must be balanced against potential risks of general verdicts enabling erroneous convictions.

The legal system has safeguards in place through which judges can overturn patently erroneous jury convictions, but the standards of review for these

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50 Christopher N. May, “*What Do We Do Now?*” *Helping Juries Apply the Instructions*, 28 LOY. L.A. L. REV. 869, 879 (1995).

51 *Id.* at 869-70, 878-79.

52 *Id.* at 900.

53 Author’s Notes from Anecdotal Conversations with Criminal Law Professionals (2018-2020) (on file with the author) (hereinafter “Author’s Notes”).

54 *See supra* Part I.

mechanisms are high and difficult to meet after the fact,<sup>55</sup> especially under the general verdict.

Cases may arise where the verdict shows on its face a failure to properly apply the law . . . but in the vast majority of cases, the [general] verdict is a complete mystery, throwing a mantle of impenetrable darkness over the operations of the jury. Whether the jurors deliberately and openly threw the law into the discard and rendered a verdict out of their own heads, or whether they applied the law correctly as instructed by the court, or whether they tried to apply it properly but failed for lack of understanding, — these are questions respecting which the verdict discloses nothing.<sup>56</sup>

Furthermore, while jury deliberation provides a potential internal mechanism for “expos[ing] weakly supported judgments,”<sup>57</sup> some empirical research indicates that “the deliberation process works well in correcting errors of fact but not in correcting errors of law.”<sup>58</sup>

Might the special verdict format better protect criminal defendants by ensuring more comprehensive jury applications of requisite legal standards? Some studies of group decision making have shown that small groups perform better when they are provided with “an organizational pattern beforehand, breaking the problem into steps,” as compared to when they engage in free discussion.<sup>59</sup> Extrapolating such findings to the context of jury decision making,

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55 *See, e.g.*, *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979) (“The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . is whether, 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.”); *Wiercinski v. Mangia 57, Inc.*, 787 F.3d 106, 113 (2d Cir. 2015) (“A judgment notwithstanding the verdict may only be granted if there exists such a complete absence of evidence supporting the verdict that the jury’s findings could only have been the result of sheer surmise and conjecture, or the evidence in favor of the movant is so overwhelming that reasonably and fair minded persons could not arrive at a verdict against it.”) (internal quotations and citations omitted).

56 *Skidmore v. Balt. & Ohio R.R.*, 167 F.2d 54, 61 (2d Cir. 1948) (quoting *Sunderland*, *supra* note 2, at 260).

57 *Burd & Hans*, *supra* note 5, at 339.

58 *Ellsworth*, *supra* note 6, at 218.

59 David U. Strawn et al., *Reaching a Verdict, Step by Step*, 60 *JUDICATURE* 383, 385-86 (1977); *see also* David A. Schum & Anne W. Martin, *Formal and Empirical Research on Cascaded Inference in Jurisprudence*, 17 *LAW & SOC. REV.* 105, 105 (1982) (empirical work on “the process of assessing the probative value

researchers have recommended that judges “break down the legal issues of the case into their smallest components” when instructing the jury<sup>60</sup> or give the jury “special instruction[s] . . . to consider each claim or offense in a step-by-step fashion, asking whether or not based on the evidence introduced at trial, each element was established by the requisite burden of proof.”<sup>61</sup> Arguably, this could be achieved more concretely and efficiently through the verdict form itself, especially given the difficulties jurors exhibit in understanding and applying judicial instructions.<sup>62</sup>

Experience from the arena of civil litigation, in which special verdicts are routinely used,<sup>63</sup> could also be instructive. Civil procedure scholar Elizabeth Thornburg observed:

Inherited [civil] trial lawyer wisdom holds that general verdicts favor plaintiffs while narrower question formats favor defendants. . . . Empirical research, too, supports the theory that splitting claims into multiple questions tends to favor defendants while unitary treatment favors plaintiffs. . . . The difference between general and special verdicts might easily follow the same pattern.<sup>64</sup>

Civil plaintiffs are the parties who bring the legal action and typically bear the burden of proof<sup>65</sup> — akin to prosecutors in criminal cases. Civil litigators have suggested that the special verdict format is thus more onerous for plaintiffs because its interrogatory questions “make it necessary for the plaintiff to explicitly win every single issue, whereas the defendant simply must have the jury answer ‘no’ to any one question.”<sup>66</sup>

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of evidence in the . . . inference tasks commonly performed by fact finders in court trials” showing that “when required to mentally combine a large amount of probabilistic evidence, [people] exhibit certain inconsistencies . . . However, when people are asked to make assessments about the fine-grained logical details of the same evidence, these inconsistencies do not occur.”).

60 Strawn et al., *supra* note 59, at 387.

61 May, *supra* note 50, at 884.

62 See *supra* notes 6-8, 50-52.

63 See FED. R. CIV. P. 49; *Spock*, 416 F.2d at 180 (describing the use of special verdicts in civil cases as “an everyday occurrence”).

64 Elizabeth G. Thornburg, *The Power and the Process: Instructions and the Civil Jury*, 66 *FORDHAM L. REV.* 1837, 1885 (1998).

65 See *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005) (noting the “ordinary default rule” in civil cases is that “plaintiffs bear the burden of persuasion regarding the essential aspect of their claims”).

66 Jennifer M. Granholm & William J. Richards, *Bifurcated Justice: How Trial-Splitting Devices Defeat the Jury's Role*, 26 *U. TOL. L. REV.* 505, 532 (1995).

There is no clear reason to assume this effect of a more specified verdict format will be different in jury determinations of criminal as opposed to civil liability. In fact, the burden of proof on prosecutors is even higher for each element of an offense charged in a criminal case (beyond a reasonable doubt), as compared to the lower burden that civil plaintiffs bear (preponderance of the evidence).<sup>67</sup> Consistent with the civil plaintiff–criminal prosecutor analogy — and counter to the conventional wisdom that general verdicts better protect criminal defendants — one state prosecutor anecdotally predicted that using special verdicts in criminal trials would “raise the bar” for the government and make it more difficult to secure convictions, because the jury would need to “check more boxes” before finding a defendant guilty.<sup>68</sup>

Nonetheless, even courts and commentators supporting the use of special verdicts in civil trials have been wary of rocking the general verdict boat in criminal trials, due to “the fundamental difference in the jury’s function in civil and criminal cases,”<sup>69</sup> and the assumption that special verdicts “make it difficult, if not impossible, for the [criminal] jury to perform its historic function as the humanitarian custodian of the law.”<sup>70</sup> One trial judge expressed concerns that the “formulaic” special verdict risks “mechanizing” the process of criminal jury decision making and prioritizing “technical legal requirements,” which is not fitting for cases where jurors are making decisions about a defendant’s

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67 *See* *In re Winship*, 397 U.S. 358, 364 (1970); *Concrete Pipe & Prods. of Cal., Inc., v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993) (noting that “[t]he burden of showing something by a preponderance of the evidence, the most common standard in the civil law, simply requires the trier of fact to believe that the existence is more probable than its nonexistence”) (internal quotations omitted); Dorothy K. Kagehiro, *Defining the Standards of Proof in Jury Instructions*, 1 PSYCH. SCI. 194, 195 (1990) (noting that “the highest or most stringent standard of proof” imposed on criminal prosecutors “reflects a determination that the protection of defendants’ rights or interests at stake in litigation is much more important to society than plaintiffs’ interests”).

68 Author’s Notes, *supra* note 53.

69 *United States v. Spock*, 416 F.2d 165, 180 (1st Cir. 1969); *see* *Skidmore v. Balt. & Ohio R.R.*, 167 F.2d 54, 70 (2d Cir. 1948) (Hand, J., concurring) (agreeing “that it would be desirable to take special verdicts more often” in civil cases, but “[i]n criminal prosecutions there may be, and in my judgment there are, other considerations which intervene to make such an attempt undesirable”); Sunderland, *supra* note 2, at 260 (advocating for use of special verdicts in civil cases but noting that the “political” function of the jury “has been defended in criminal cases, and there is much to be said for it there”).

70 Granholm & Richards, *supra* note 66, at 536.

life and liberty.<sup>71</sup> However, if special verdicts can better enforce the due process rights of criminal defendants by ensuring that jurors check every constitutionally required box before delivering a conviction, this procedural mechanism might on the whole serve to promote rather than impede the jury's custodial role in the criminal legal system.

## **B. Lay Misunderstanding of Law**

Beyond balancing potential risks of impeding nullifying acquittals versus enabling erroneous convictions, there is reason to question the conventional belief that general verdicts facilitate jury nullification, as this may not reflect the cognitive realities of lay adjudication. “The theory of the general verdict involves the assumption that the jury fully comprehends the judge’s instructions concerning the applicable substantive legal rules,” one court observed, dismissing this assumption as “patently fictitious.”<sup>72</sup> Such observations, echoed by other judges and legal scholars,<sup>73</sup> are consistent with the large body of empirical studies showing the difficulties lay decision makers have in understanding jury instructions on the law.<sup>74</sup>

These difficulties bear implications for jury nullification, because jurors who do not understand the laws they are tasked with applying are not cognitively equipped to assess and signal whether said laws are aligned with the “conscience of the community.”<sup>75</sup> Comprehension deficits could hinder the ability of jurors not only to adhere to given legal standards but also to make informed decisions about nullifying them. Researchers have observed that “although the jury possesses [nullification] powers, its rule departures occur relatively infrequently” and “are often the result of inadequacies in legal instruction and fundamental

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71 Author’s Notes, *supra* note 53.

72 *Skidmore*, 167 F.2d at 64 (arguing, in dicta, for the use of special verdicts in civil cases); *see also* JEROME FRANK, COURTS ON TRIAL: MYTHS AND REALITY IN AMERICAN JUSTICE 116 (1949) (“The jurors usually are as unlikely to get the meaning of those words [of jury instructions] as if they were spoken in Chinese, Sanskrit, or Choctow.”).

73 *See, e.g.*, Samuel M. Driver, *A Consideration of the More Extended Use of the Special Verdict*, 25 WASH. L. REV. & ST. B.J. 43, 47 (1950) (“I find it difficult to escape the feeling that I am merely following a meaningless, childish ritual.”); May, *supra* note 50, at 870; Sunderland, *supra* note 2, at 259 (“[C]an anything be more fatuous than the expectation that the law, which the judge so carefully, learnedly and laboriously expounds to the laymen in the jury box will become operative in their minds in its true form?”).

74 *See supra* notes 6-8.

75 *United States v. Spock*, 416 F.2d 165, 182 (1st Cir. 1969).

human information processing and attributional processes, rather than overt rebellion against the applicable legal standard.”<sup>76</sup> But the difference between nullification of the law based on conscience versus confusion is likely to be indistinguishable under the “inscrutable and essentially mysterious” general verdict,<sup>77</sup> which risks sending muddled messages in terms of “feedback to other branches of government about when they are overstepping their own roles.”<sup>78</sup>

Lay misunderstandings of the law could even lead nullifying jurors to send messages that are contrary to their actual preferences. For example, previous research by legal scholar Paul Robinson and social psychologist John Darley<sup>79</sup> demonstrated that lay people’s intuitions about when to impose liability for criminal attempt are better aligned with the common law’s doctrinally more defense-friendly “proximity” test<sup>80</sup> than the Model Penal Code’s more widely adopted “substantial step” test,<sup>81</sup> which “criminalize[s] behavior much earlier in the chain of actions leading up to an offense.”<sup>82</sup> Robinson and Darley argued that such “discrepancies between the criminal code and the community tend to undercut the law’s moral credibility,” which can lead to laws being “subverted and ignored,” including through jury nullification.<sup>83</sup> This suggests that jurors should be more likely to nullify the substantial step test for criminal attempt, because it is harsher than typical lay intuitions of justice.<sup>84</sup>

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76 Diamond & Schklar, *supra* note 3, at 204; *see also* May, *supra* note 50, at 872 (differentiating between “jury misunderstanding of the law [that] may lead to arbitrary and literally lawless verdicts” and “jury nullification . . . based on a jury’s knowing and deliberate refusal to apply the law because it is contrary to the community’s sense of justice, morality, or fairness”).

77 Skidmore, 167 F.2d at 60 (quoting Sunderland, *supra* note 2, at 258).

78 Marder, *supra* note 28, at 880.

79 PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 14-28 (1995).

80 *See, e.g.*, N.Y. State Unified Court Sys., *Criminal Jury Instructions and Model Colloquies: Attempt to Commit A Crime*; Penal Law § 110.00, at 1; *People v. Rizzo*, 158 N.E. 888, 889 (N.Y. 1927).

81 MODEL PENAL CODE § 5.01(1)(c) (AM. L. INST., *Official Draft and Explanatory Notes* 1985); *see* Sood, *supra* note 6, at 604 n. 40 (noting that the substantial step test is “currently the standard for attempt among a majority of states and in the federal system”).

82 John M. Darley, Catherine A. Sanderson, & Peter S. LaMantia, *Community Standards for Defining Attempt: Inconsistencies with the Model Penal Code*, 39 AM. BEHAV. SCI. 405, 406 (1996).

83 ROBINSON & DARLEY, *supra* note 79, at 201-03.

84 *See id.* at 27 (“if the community’s view were to be the guiding principle in the definition of the offense, criminal codes should revert to the common law’s dangerous proximity test”).

However, jurors can only counter lay-legal disconnects that they perceive. And in my experiments on criminal attempt, I found that the majority of lay decision makers presented with real jury instructions on the laws misconstrued the substantial step test — which is legislatively intended to be more “prosecution-friendly”<sup>85</sup> — as setting the bar for criminal liability *higher* than (47% of respondents) or equal to (26% of respondents) the proximity test.<sup>86</sup> My studies further revealed that mock jurors exhibited a more doctrinally accurate understanding of the legal standards for criminal attempt when they considered the act element independently of the mental state element.<sup>87</sup> If the special verdict format could likewise help clarify lay understandings of the law by guiding jurors one by one through each element of a charged crime, it might enable jurors to make more informed decisions about whether or not a given legal standard is compatible with their own sense of justice, thereby empowering rather than curtailing their decision-making agency.

### C. Influence of Biasing Factors

In addition to the challenges that jurors encounter in understanding and applying the law, empirical studies have demonstrated that jury decision making is susceptible to biases triggered by legally irrelevant factors, such as the race, religion, or even physical appearance of a criminal defendant.<sup>88</sup> Such

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85 Sood, *supra* note 6, at 605; see 1 MODEL PENAL CODE & COMMENTARIES, art. 5 intro. at 295 (AM. L. INST., Official Draft and Revised Comments 1985) (proposing the substantial step test to “extend the criminality of attempts”).

86 Sood, *supra* note 6, at 640-42.

87 *Id.* at 653, 659-60 (finding that “the participants most accurately identified where the substantial step and proximity tests for the act element of attempt draw their respective lines of liability when they were told that the intent element of the crime had already been proven”).

88 See, e.g., Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 UC DAVIS L. REV. 745, 793-96 (2018); Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCH. SCI. 383 (2006); Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 ANN. REV. L. SOC. SCI. 269 (2015); Johnson, *supra* note 13, at 1615-51; Robert J. MacCoun, *The Emergence of Extralegal Bias During Jury Deliberation*, 17 CRIM. JUST. & BEHAV. 303, 311 (1990); Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know about Race and Juries — A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997 (2003); Sood, *supra* note 6, at 628-39, 645-55.

biases can be bidirectional, operating either in favor or against the defendant in a disparate manner.<sup>89</sup> Courts and commentators have further observed that jury biases triggered by legally irrelevant characteristics of the crime *victim* can result in discriminatory outcomes,<sup>90</sup> including nullification “based upon bigotry and racism.”<sup>91</sup>

In my above-discussed experiments on lay adjudication of criminal attempt, the participants were randomly assigned to judge a case in which the defendant was described as a churchgoing man named Michael (implied to be Christian), a mosque-going man named Mohamed (implied to be Muslim), or an unnamed man with no stated religious affiliation (the “control” defendant) — while all other case facts were held constant.<sup>92</sup> The defendant’s implied religion was legally irrelevant to the case at hand, yet this variable interacted with the given law and type of attempted crime to trigger biases that operated against the Muslim defendant but in favor of the Christian defendant.<sup>93</sup> For instance, lay decision makers applying the proximity test for criminal attempt were significantly more likely to construe the defendant as having the requisite intent to commit a highly threatening crime if he was implied to be Muslim (as compared to a Christian or control defendant in the same scenario); and they were more likely to give the defendant the benefit of the doubt in regard to criminal intent for a minor crime if he was implied to be Christian.<sup>94</sup>

Biases can infiltrate jury decision making in conscious forms, such as “blatant racial prejudice,”<sup>95</sup> or in non-conscious forms that “involve a lack of awareness and are unintentionally activated,”<sup>96</sup> such as heuristics, stereotypes, and implicit biases.<sup>97</sup> Non-conscious cognitions tend to be “amplified” when

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89 See *infra* notes 92-94 and accompanying text.

90 See, e.g., Tetlow, *supra* note 13, at 81-96 (highlighting “a long history of juries acquitting white defendants charged with violence against black victims” and “us[ing] acquittals to punish female victims of rape and domestic violence for failing to meet gender norms”).

91 *People v. Williams*, 21 P.3d 1209 (2001); see also *United States v. Thomas*, 116 F.3d 606, 614, 616 (2d Cir. 1997) (noting that history “presents . . . shameful examples of how nullification has been used to sanction murder and lynching”).

92 Sood, *supra* note 6, at 628-29.

93 *Id.* at 630-39, 645-55.

94 *Id.*

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

96 John D. Dovidio & Samuel L. Gaertner, *Intergroup Bias*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 1086 (Susan T. Fiske et al. eds., 2010).

97 See generally, e.g., THE SAGE HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION (John F. Dovidio et al., eds. 2013); SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION: FROM BRAINS TO CULTURE 303-64 (3d ed. 2017);

decision makers are given broad discretion, assigned tasks that are “highly demanding of cognitive resources,”<sup>98</sup> put “in situations of uncertainty or ambiguity [to] weigh and assess information,”<sup>99</sup> when their ability to “process information systematically is diminished,”<sup>100</sup> or when they perceive the world as “dangerous and threatening.”<sup>101</sup> All of these circumstances are potentially applicable to jury decision making in a criminal trial, and especially so under the open-ended general verdict.

Although judges favor the general verdict in criminal cases because it enables jurors to “get a feel” for the right outcome in a “gestalt manner”<sup>102</sup> (referring to the gestalt psychology approach of responding to situations as a whole that “is greater than, and different from, the sum of . . . its parts”<sup>103</sup>), this feature of the general verdict risks creating more openings for biases that lead jurors to feel their way toward discriminatory outcomes. To this point, a court advocating for the use of special verdicts in civil cases observed: “The general verdict enhances, to the maximum, the power of appeals to the biases and prejudices of jurors, and usually converts into a futile ritual the use of stock phrases about dispassionateness almost always included in judges’ charges.”<sup>104</sup>

One group of criminal defense attorneys noted that while the jury’s “fuzzy lay thinking” under the general verdict can help criminal defendants because the government typically has a strong case going into trial, the defense might nevertheless prefer the greater legal precision and objectivity of a

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Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCH. REV. 4 (1995); Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCH. 36, 52-53 (2007); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012); L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. (2012); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristic and Biases*, 185 SCIENCE 1124 (1974).

98 Katherine B. Spencer et al., *Implicit Bias and Policing*, 10 SOC. & PERSONALITY PSYCH. COMPASS 50, 52, 59 (2016).

99 Sunita Sah et al., *Combating Biased Decisionmaking and Promoting Justice and Equal Treatment*, 2 BEHAV. SCI. & POL’Y 79, 80 (2016).

100 Galen V. Bodenhausen, *Stereotypes as Judgmental Heuristics: Evidence of Circadian Variations in Discrimination*, 1 PSYCH. SCI. 319, 319 (1990).

101 FISKE & TAYLOR, *supra* note 97, at 311, 333.

102 Author’s Notes, *supra* note 53.

103 Jerome Frank, *Say it with Music*, 61 HARV. L. REV. 921, 928-29 (1948) (citations omitted).

104 *Skidmore v. Balt. & Ohio R.R.*, 167 F.2d 54, 61 (2d Cir. 1948).

special verdict for “egregious crimes, like sex offenses, [that] have an ‘ew’ factor.”<sup>105</sup> One of these attorneys further explained that the interrogatory questions on a special verdict form could facilitate a more “analytic, cerebral, compartmentalized state” of decision making by “holding jurors’ feet to the fire on legal requirements,” thereby curbing the “the gestalt ‘ew’ feeling” and “knee-jerk aversive emotion” that might otherwise drive conclusions under the unbounded general verdict.<sup>106</sup>

Similarly, a former prosecutor observed: “The [general verdict] argument that it helps humanize the defendant to not have jury deliberation be too mechanical and automated may be wrong, because that could actually open jurors up to more biases. Keep in mind that the person before them is accused of a crime, so they won’t be oriented toward sympathy.”<sup>107</sup> Indeed, empirical research suggests that many jurors do not even grant criminal defendants the fundamental presumption that they are innocent until proven guilty,<sup>108</sup> which the U.S. Supreme Court has recognized as “the undoubted law, axiomatic and elementary, [whose] enforcement lies at the foundation of the administration of our criminal law.”<sup>109</sup>

The special verdict process of responding to interrogatory questions before reaching a conclusion might help curtail conscious jury biases by proving a mechanism of accountability, including during the group deliberation process. Psychology theory also points to a potential route through which special verdicts might help curtail non-conscious biases, based on a “two-systems approach to judgment and choice” — “System 1” fast, automatic, nonconscious, associative thinking and “System 2” slow, deliberate, conscious, rule-based thinking.<sup>110</sup> These two cognitive paths can operate independently or contemporaneously, and can mutually influence or overtake each other.<sup>111</sup> Psychologist Daniel Kahneman observed:

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105 Author’s Notes, *supra* note 53.

106 *Id.*

107 *Id.*

108 See Strawn & Buchanan, *supra* note 6, at 478 (finding that fifty percent of surveyed jurors “thought it was up to the defendant to prove his innocence”); Andrew D. Leipold, *The Problem of the Innocent Acquitted Defendant*, 94 Nw. U. L. REV. 1297, 1351-52 (2000) (discussing reasons why “despite our best efforts, defendants often face a jury at least mildly disposed toward guilt”).

109 Coffin v. United States, 156 U.S. 432, 453 (1895).

110 DANIEL KAHNEMAN, THINKING, FAST AND SLOW 13 (2011); see also Thomas D. Gilovich & Dale W. Griffin, *Judgment and Decision Making*, in 1 HANDBOOK OF SOCIAL PSYCHOLOGY 542, 566-68 (5th ed. 2010).

111 Gilovich & Griffin, *supra* note 110, at 568.

The way to block errors that originate in System 1 is simple in principle: recognize the signs that you are in a cognitive minefield, slow down, and ask for reinforcement from System 2. Unfortunately, this sensible procedure is least likely to be applied when it is needed most. . . . The voice of reason may be much fainter than the loud and clear voice of an erroneous intuition, and questioning your intuitions is unpleasant when you face the stress of a big decision.<sup>112</sup>

The general verdict, which encourages lay “common sense”<sup>113</sup> and “more than logic,”<sup>114</sup> tends to embrace a more intuitive System 1 approach to decision making, which is more susceptible to heuristics, stereotypes, and biases.<sup>115</sup> In contrast, special verdict interrogatory questions that require criminal jurors to explicitly confirm their determinations of fact for each element of the given law could serve as speed bumps that provide System 2 reinforcement in the adjudicative process. Although “not a ‘silver bullet,’” research suggests that “using guidelines, such as ‘stop and think’ or ‘use a checklist,’ to safeguard against predictable System 1 errors does tend to reduce those errors.”<sup>116</sup>

On the other hand, if jurors are strongly motivated to convict or acquit a defendant due to extralegal biases operating below the level of consciousness, their desired outcomes may covertly motivate their step-by-step judgments about each requisite element of the crime on a special verdict form.<sup>117</sup> Moreover, jury scholars have noted that while “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,” empirical work is needed to ascertain “whether requiring reasoned

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112 KAHNEMAN, *supra* note 110, at 417.

113 *United States v. Ogull*, 149 F. Supp. 272, 276 (S.D.N.Y. 1957).

114 *United States v. Spock*, 416 F.2d 165, 182 (1st Cir. 1969).

115 See Tversky & Kahneman, *supra* note 97, at 1130; *cf.* Burd & Hans, *supra* note 5, at 332 (noting contentions 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,” but also noting “several counterarguments about the quality of general verdicts”).

116 Richardson & Goff, *supra* note 97, at 307.

117 See generally Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCH. BULL. 480, 487 (1990) (noting that “accuracy goals, when paired with directional goals, will often enhance rather than reduce bias . . . because the more extensive processing caused by accuracy goals may facilitate the construction of justifications for desired conclusions”); Avani Mehta Sood, *Motivated Cognition in Legal Judgments — An Analytic Review*, 9 ANN. REV. L. & SOC. SCI. 307 (2013); Avani Mehta Sood, *Cognitive Cleansing: Experimental Psychology and the Exclusionary Rule*, 103 GEO. L.J. 1543, 1560-62 (2015).

verdicts produces more deliberative System II thinking when compared to a situation in which jurors deliberate when deciding a general verdict.<sup>118</sup> Studies of group decision making are additionally needed to investigate whether (and if so, how) verdict format affects collective psychological phenomena, such as groupthink<sup>119</sup> or group polarization,<sup>120</sup> which can also lead to skewed and biased jury outcomes.

### III. TESTING THE STATUS QUO

Given the potentially weighty implications of verdict format in criminal jury trials, the conventional wisdom in favor of general verdicts merits empirical investigation. One judicial dissent from a criminal appellate opinion affirming the use of special interrogatories at trial asserted:

I now say “Basta!” [“Enough!”] on the question of special verdicts in criminal cases. . . . My view is that there has been sufficient experimentation by district courts with this discredited practice, and we now have the solid experience. We are now in a position to enunciate a controlling principle severely restricting the use of special verdicts and special interrogatories in criminal cases.<sup>121</sup>

In contrast, this Article suggests that a broader and more rigorous examination of legal stakeholders’ views, as well as a more scientific form of experimentation, is needed to inform the criminal legal system’s verdict on verdict format.

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118 Burd & Hans, *supra* note 5, at 335-36. *But see* MacCoun, *supra* note 6, at 311 (finding “an extralegal bias that only emerged during the deliberation process”).

119 *See generally* Irving L. Janice, *Groupthink*, *PSYCHOL. TODAY* 84, 84 (1971) (defining groupthink as “the mode of thinking that persons engage in when concurrence-seeking becomes so dominant in a cohesive ingroup that it tends to override realistic appraisal of alternative courses of action”); James K. Esser, *Alive and Well After 25 Years: A Review of Groupthink Research*, 73 *ORG. BEHAV. & HUM. DECISION PROCESSES* 116 (1998).

120 *See generally* David G. Meyers & Helmut Lamm, *The Group Polarization Phenomenon*, 83 *PSYCH. BULL.* 602, 603 (1976); Cass Sunstein, *The Law of Group Polarization*, 10 *J. POL. PHILOS.* 175, 175 (2002) (“In striking empirical regularity, deliberation tends to move groups, and the individuals who compose them, toward a more extreme point in the direction indicated by their own predeliberation judgments.”).

121 *United States v. Desmond*, 670 F.2d 414, 420-21 (3d Cir. 1982) (Aldisert, J., dissenting).

While this Article has questioned the special status accorded to general verdicts in criminal cases, it bears noting that other law and psychology scholars, Kayla Burd and Valerie Hans, have also considered jury verdict format and expressed the preliminary view that “requiring lay fact-finders to provide reasons for their decisions may have little or no positive impact on the quality of decision making” and may even “paradoxically lead to negative effects, by unnecessarily complicating jurors’ and judges’ duties and undermining the jury’s independence.”<sup>122</sup> However, they too observed that “special[] and general verdicts offer their own sets of potential strengths and weaknesses,” and that ultimately “[t]hese alternatives should be studied empirically in order to explore which type of verdict yields the best juror decision making and reasoning.”<sup>123</sup> Below, I propose a methodological framework for embarking on this pursuit.

### **A. Surveying Stakeholders**

The legal norm favoring general verdicts in criminal cases is clear, but do relevant legal actors personally subscribe to this status quo and its underlying assumption that special verdicts will disadvantage criminal defendants? Anecdotal observations of criminal law professionals suggest that views about verdict format are more varied and nuanced than the conventional wisdom projects.<sup>124</sup> I therefore propose — and have embarked upon<sup>125</sup> — a nationwide survey to comprehensively measure stakeholders’ preferences, perceptions, and predictions in this regard.

The stakeholder survey will gather views on verdict format in criminal cases from a wide range of participants across U.S. state and federal jurisdictions. It will focus most heavily on criminal law professionals: trial and appellate judges, prosecutors, public defenders, private criminal defense attorneys, and criminal law professors. However, the survey will also sample from other relevant populations, including civil litigators (who are more likely than criminal litigators to have had experience with special verdict cases<sup>126</sup>), law students (particularly since law student-authored Notes and Comments constitute the bulk of recent scholarship proposing departures from the general

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122 Burd & Hans, *supra* note 5, at 322.

123 *Id.* at 357-58.

124 *See, e.g., supra* notes 53, 68, 105-107.

125 Avani Mehta Sood, *Reaching A Verdict: Survey and Experimental Insights on Verdict Format in Criminal Cases* (manuscript in preparation).

126 *See supra* note 63.

verdict in criminal cases<sup>127</sup>), and jury-eligible lay citizens (who would be the ones actually using the given verdict format if called to serve on a jury).<sup>128</sup>

The survey will measure the extent to which the respondents' opinions and intuitions about verdict format in criminal cases align with the legal status quo. In addition, it will assess whether the personal views of criminal law professionals differ from their beliefs about the views held by their respective professional groups at large. Social norms can trigger a "pluralistic ignorance" effect, whereby a majority of individuals do not personally subscribe to a norm while believing that the majority of their peer group does.<sup>129</sup> The survey will test for this effect in regard to the legal norm favoring the use of general verdicts in criminal jury trials.

Given that assumptions about jury nullification are central to the conventional wisdom against special verdicts in criminal cases,<sup>130</sup> the survey will measure respondents' views and their predicted effects of verdict format on jurors acquitting defendants when all elements of the charged crime *have* been proven, as well as jurors convicting defendants when all elements have *not* been proven. Furthermore, the survey will measure expected effects of special verdicts on various socio-cognitive components of jury decision making, including lay understanding and application of law, biasing influences of extralegal factors, and jury deliberation.

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127 See, e.g., Michael Csere, Note, *Reasoned Criminal Verdicts in the Netherlands and Spain: Implications for Juries in the United States*, 12 CONN. PUB. INT. L.J. 415 (2013); Alice Curci, Note, *Twelve Angrier Men: Enforcing Verdict Accountability in Criminal Jury Trials*, 59 WASH. U. J.L. & POL'Y 217 (2019); 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 (2010); Kyle B. Grigel, Note, *Credibility Interrogatories in Criminal Trials*, 71 STAN. L. REV. 461 (2019); Erika A. Khalek, Note, *Searching for a Harmless Alternative: Applying the Harmless Error Standard to Alternative Theory Jury Instructions*, 83 FORDHAM L. REV. 295 (2014); Elizabeth A. Larsen, Comment, *Specificity and Juror Agreement in Civil Cases*, 69 U. CHI. L. REV. 379 (2002); Nepveu, *supra* note 21; J. Kevin Wright, Comment, *Misplaced Treasure: Rediscovering the Heart of the Criminal Justice System Through the Use of the Special Verdict*, 19 COOLEY L. REV. 409 (2002).

128 The biggest stakeholders in the criminal legal system are criminal defendants and victims, but these groups are methodologically challenging to access. The survey will, however, measure and analyze views based on whether any of the respondents have had experience as a defendant and/or victim in a criminal case.

129 See Deborah A. Prentice & Dale T. Miller, *Pluralistic Ignorance and the Perpetuation of Social Norms by Unwitting Actors*, 28 ADVANCES EXPERIMENTAL SOC. PSYCH. 161 (1996).

130 See *supra* Part I.

Respondents will additionally be asked what effects, if any, they think special verdicts are likely to exert on various outcomes of the criminal legal process, including plea bargaining, acquittal and conviction rates, compromise verdicts, hung juries, and criminal appeals. Finally, the survey will gather demographic information about the participants themselves — including their educational and professional background, age, gender, race/ethnicity, political ideology, and geographic metrics — to test for potential effects of these variables on views and predictions about criminal verdict format.

## **B. Experimental Investigations**

As a critical next step, experiments are needed — and are now in progress<sup>131</sup> — to directly test the presumed and predicted effects of verdict format in criminal cases. Like all empirical approaches, the experimental method has its strengths and limitations,<sup>132</sup> but it is well suited to investigating how general versus special verdicts affect the decision-making processes and legal outcomes of lay adjudication. Experimental studies with mock jurors can explore whether — and if so, how, when, and why — verdict format affects lay determinations of criminality and the influence of extralegal factors therein.

The effects of verdict format in criminal cases, if any, could depend on various testable factual, doctrinal, psychological, and procedural variables, such as the nature of the crime charged, the complexity of the legal standard defining it, the types of extralegal biases that might influence jurors, and the types of special verdict forms employed. Furthermore, following up on experiments conducted at individual cognition level, group studies are needed to explore the effects of verdict format on the socio-cognitive dynamics of collective deliberation and decision making, since twelve individual jurors ultimately deliver their verdict as one jury.

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131 Sood, *supra* note 125.

132 See, e.g., Avani Mehta Sood, *Applying Empirical Psychology to Inform Courtroom Adjudication — Potential Contributions and Challenges*, 130 HARV. L. REV. F. 301, 308-12 (2017) (discussing internal, external, and ecological validity in experimental research); Jeffrey A. Segal, Avani Mehta Sood & Benjamin Woodson, *The “Murder Scene Exception” — Myth or Reality? Empirically Testing the Influence of Crime Severity in Federal Search-and-Seizure Cases*, 105 VA. L. REV. 543, 556-57 (2019) (discussing tradeoffs in using the experimental method to study legal decision making).

## CONCLUSION

This Article is not advocating for the use of special instead of general verdicts in criminal jury trials; there is not enough empirical basis for doing so. It is, however, questioning the existing legal status quo, because there is not enough empirical basis for privileging the general criminal verdict either. Furthermore, it is calling for and proposing empirical studies that measure views and effects of verdict format in criminal cases — which are now underway.<sup>133</sup>

Findings from such research might support the status quo in favor of general verdicts,<sup>134</sup> might provide empirical grounds for more broadly considering the use of special verdicts in criminal cases, or might point toward altogether different verdict formats to consider. Additionally, other methodologies, such as ethnographic interviews or statistical modeling of real case outcomes, could be employed to pursue questions that are less amenable to survey and experimental investigation, such as the potential downstream effects of verdict format on plea bargaining, trial lawyering, and appeals. Empirical methods could also be used to study different alternatives or supplements to the general verdict that other scholars have suggested<sup>135</sup> because leaving this important aspect of criminal adjudication “shrouded in mystery can hardly be the right outcome for a system that prizes fair and equal treatment under the law.”<sup>136</sup>

The debate about verdict format in criminal jury trials might ultimately boil down to the normative question of which values to prioritize: protecting the defendant’s right to trial by an unfettered jury, or protecting against an unfettered jury’s potential violations of the defendant’s rights. Put another way, which risk is the legal system more willing to bear? An evidence-based

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133 Sood, *supra* note 125.

134 See Burd & Hans, *supra* note 122 and accompanying text.

135 See, e.g., Grigel, *supra* note 127 (proposing post-conviction special questions for appellate purposes); Lorraine Hope et al., *A Third Verdict Option: Exploring the Impact of the Not Proven Verdict on Mock Juror Decision Making*, 32 LAW & HUM. BEHAV. 241 (2008) (proposing the addition of a third “not proven” option on the general verdict); Leipold, *supra* note 108, at 1300 (proposing special questions to the jury regarding innocence of defendants acquitted under a general verdict); May, *supra* note 50, at 884-88 (proposing “special instruction” to jurors on how to “apply the law to the facts”); Richard E. Myers II, *Requiring A Jury Vote of Censure to Convict*, 88 N.C. L. REV. 137 (2009) (proposing that jurors make a separate, explicit finding of “censure . . . that the facts proven in the case at trial are worthy of the moral condemnation of the community”); Strawn et al., *supra* note 59, at 386 (proposing “specific procedural instructions” to give jurors an “‘issue by issue’ analysis of the problems they must resolve”).

136 Leipold, *supra* note 108, at 1356.

understanding of verdict format in criminal cases could help inform this balancing.

Data cannot promise easy solutions, but it can move conversations forward in an empirically informed manner. Any identified effects of verdict format on decision-making processes and outcomes will undoubtedly give rise to a host of additional questions about which effects are normatively desirable, what procedural reforms should be pursued, and how to address the costs, risks, and resistance that will inevitably accompany any attempted redesign within the criminal legal system, let alone one that questions a deeply entrenched status quo. Nonetheless, as judge and social scientist collaborators David Strawn and Raymond Buchanan noted almost five decades ago,

[H]umanity has . . . been satisfied in centuries preceding with comfortable beliefs in a flattened planet, surrounded by and at the center of the universe. Just as these beliefs were toppled in the rush of new information, so also some of our cherished but simplistic assumptions about our juries may give way before modern communication and behavioral knowledge.<sup>137</sup>

Applying current tools and theories of social science to generate empirical insights into the legal, psychological, and normative implications of verdict format in criminal cases is long overdue.

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137 Strawn & Buchanan, *supra* note 6, at 479.

