Beyond "Guilty" or "Not Guilty": Giving Special Verdicts in Criminal Jury Trials

Kate H. Nepveu†

I. INTRODUCTION

"Special verdicts are generally disfavored in criminal trials." This statement appears so often in judicial discussions of jury verdicts, it is nearly a platitude.[1] The reason for the disfavor is quite simple: A true special verdict is one where the jury does not render a general verdict of guilty or not guilty, but simply finds certain facts and leaves the rest to the court.[2] True special verdicts are almost never used in criminal cases,[3] because by taking away the jury's power to render a verdict,[4] they violate the Sixth Amendment "right to have a jury make the ultimate determination of guilt"[5]—leading directly to the sentiment behind the opening quotation.

However, sentiment no longer matches reality. Today, juries commonly return information beyond a simple "guilty" or "not guilty" in a wide range of criminal cases.[6] Though these are often called "special verdicts," they are not true special verdicts: They provide additional information that accompanies,

---

† Yale Law School, J.D. 2002; Office of the New York State Attorney General. The author would like to thank Professor Abraham S. Goldstein and Alana Hoffman for their considerable contributions to the writing and revision, respectively, of this work.

1. *E.g.*, United States v. Reed, 147 F.3d 1178, 1180 (9th Cir. 1998); United States v. Townsend, 924 F.2d 1385, 1413 (7th Cir. 1991); United States v. Escobar-Garcia, 893 F.2d 124, 126 (6th Cir. 1990); United States v. Roman, 870 F.2d 65, 73 (2d Cir. 1989); United States v. Collamore, 868 F.2d 24, 28 (1st Cir. 1989); United States v. Desmond, 670 F.2d 414, 416 (3d Cir. 1982); People v. Ribowsky, 568 N.E.2d 1197, 1201 (N.Y. 1991); State v. Hardison, 492 A.2d 1009, 1015-16 (N.J. 1985); Watts v. United States, 362 A.2d 706, 714-15 (D.C. 1976).

2. *E.g.*, People v. Farmer, 765 P.2d 940, 960 (Cal. 1989) (citing CAL. PENAL CODE § 1152 (2001)); *cf.* FED. R. CIV. P. 49(a) (civil special verdicts).

3. North Carolina's misdemeanor of nonsupport of an illegitimate child is the lone exception. Its Supreme Court has held "that a verdict upon the issues of paternity and nonsupport[,] if resolved in favor of the State, is sufficient to support a judgment against defendant without a general verdict by the jury of guilty." State v. Ellis, 137 S.E.2d 840, 845 (N.C. 1964); *see also* State v. Hobson, 320 S.E.2d 319, 320 (N.C. Ct. App. 1984). These cases seem to rest on the assumption that the rendering of a general verdict is a mere formality after all of the elements of the statute have been found to apply to the defendant. *Id.* This view has been explicitly rejected by Indiana. Seay v. State, 698 N.E.2d 732 (Ind. 1998); *see infra* note 33 and accompanying text.

4. Commonwealth v. Licciardi, 443 N.E.2d 386, 390 (Mass. 1982) ("A 'special verdict' involves no determinative, ultimate verdict from a jury but only a statement of facts the jury have found from which the judge determines the appropriate judgment.").

5. United States v. Gaudin, 515 U.S. 506, 510 (1995); *see also* U.S. CONST. amend. VI.

6. *See generally* Part III, *infra*, for a discussion of areas of current use.

but does not replace, the general verdict.[7] This additional information can be fairly specific, such as the special designation "guilty but mentally ill"[8] or a verdict of criminal forfeiture,[9] or more general, such as expanded verdict forms that list lesser-included charges or special interrogatories about facts underlying the verdict.

Though current practice stops short of employing true special verdicts, it still raises the constitutional issue of interfering with jury deliberations. The increased use of special verdict forms and special interrogatories raises a number of questions which appear to have escaped academic attention, judging from the infrequent discussion of special verdicts in the literature.[10] Further, the judicial doctrines governing use of special verdict forms and special interrogatories have developed piecemeal and have not yet been synthesized into a general analysis. This Note's goal is thus twofold: to describe the possibly unrecognized extent and variety of current practice, and to offer practitioners and courts a more comprehensive analytic framework for deciding whether to request and give special verdicts. It begins with an overview of jury deliberation principles that are relevant to special verdicts. It then discusses current practice, to lay the foundation for the next Section, a description and critique of how courts decide whether to employ special verdicts. It concludes by summarizing the functional aspects of special verdicts and recommending that courts consider these functions, and not narrow, self-imposed categories, in evaluating whether special verdicts are appropriate in a particular case.

II. General Principles About Jury Deliberation

There are two areas in which special verdicts have particularly important implications for jury deliberations. The first is the psychological and sociological processes of deliberation, where the question is whether special verdicts aid jury deliberations and affect general verdicts. The second is jury nullification, where the question is whether special verdicts restrict the jury's power to nullify.

---

7. I will sometimes use "special verdicts" as a shorthand for "special verdict forms and special interrogatories"; true special verdicts shall be labeled accordingly.

8. *E.g.*, 725 ILL. COMP. STAT. 5/115-4 (2001); S.D. CODIFIED LAWS § 23A-25-13 (2001); People v. Furman, 404 N.W.2d 246, 256 (Mich. Ct. App. 1987); R.I. SUPER. R. CRIM. P. 31 (2000).

9. *E.g.*, N.J. STAT. ANN. § 2C:41-3(f) (2001); Russello v. United States, 464 U.S. 16, 18 (1983); State v. Hegg, 956 P.2d 754, 756 (Mont. 1998).

10. Except for a paper on a particular kind of special verdicts, Robert M. Grass, Note, *Bifurcated Jury Deliberations in RICO Trials*, 57 FORDHAM L. REV. 745 (1989), criminal special verdicts are generally mentioned only in passing in academic literature. *E.g.*, Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15 (1990) (focusing on civil special verdicts); Jennifer M. Granholm & William J. Richards, *Bifurcated Justice: How Trial-Splitting Devices Defeat the Jury's Role*, 26 U. TOL. L. REV. 505, 535-36 (1995) (including special verdicts among several other trial-splitting devices).

A. *Psychological and Sociological Research*

Social science offers some fairly well-tested and accepted observations about how juries deliberate. These observations inform the question of special verdicts. To put it simply, juries are good at facts but bad at law. Thus, mock trials find that juries make errors of fact less often than other kinds of errors, and that errors of fact are more likely to be corrected during deliberation.[11] In contrast, errors in properly recalling the judge's instructions are much more common and tend to be reinforced during deliberation.[12] A number of studies corroborate these mock trial results, "often showing correct response rates of 75% or thereabouts"[13] in recalling case facts, but showing correct recollections of judges' instructions only about half the time.[14]

Only a few studies have been done on the effects of special verdicts on jury comprehension. A survey of civil and criminal jurors found that

> [i]n trials where special verdict forms were used, the jurors reported feeling better informed, more satisfied that their verdict was correct, more confident that their verdict reflected a proper understanding of the judge's instructions, and more satisfied that the prosecutor was helpful. Furthermore . . . jurors found the use of special verdict forms to be the most helpful for dealing with large quantities of information.[15]

An experiment found that in a mock civil trial, the use of special verdicts did not affect the general verdicts.[16] The researchers hypothesized that the effect of a particular answer was obvious to the jury, allowing their overall impressions of the parties, which were highly correlated with the results,[17] to affect their answers.[18] While the jurors who were given special verdicts understood better the legal question of burden of proof, they did no better than the control group in applying that knowledge to fact patterns.[19] Though this data is scarce, it suggests an empirical basis for thinking that special verdicts can help jurors manage unfamiliar or complex information.

---

11. Elizabeth F. Loftus & Edith Greene, *Twelve Angry People: The Collective Mind of the Jury*, 84 COLUM. L. REV. 1425, 1431 (1984) (reviewing REID HASTIE ET AL., INSIDE THE JURY (1983)).

12. *Id.*

13. Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL. & L. 788, 796 (2000).

14. *Id.*

15. Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 LAW & HUM. BEHAV. 29, 50 (1994).

16. Elizabeth C. Wiggins & Steven J. Breckler, *Special Verdicts as Guides to Jury Decision Making*, 14 LAW & PSYCHOL. REV. 1, 19 (1990).

17. *Id.* at 27.

18. *Id.* at 32.

19. *Id.* at 28-29. Another study of jury confusion over instructions recommended special verdicts, though it did not study their effects. Bradley Saxton, *How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 LAND & WATER L. REV. 59, 116 (1998).

B. *Nullification*

The Sixth Amendment concern over true special verdicts, discussed in the Introduction, is related to the perennial debate over jury nullification, that is, the jury's power to ignore the law when rendering a verdict. Under well-settled Supreme Court precedent, jury nullification is merely a power of the jury, not a constitutionally permissible right.[20] However, as the highly influential case *United States v. Spock*[21] shows, nullification is inextricably linked to the jury's power to render a general verdict without explaining itself.

In *Spock*, the defendants were charged with a conspiracy to burn draft cards. Sua sponte, and over the defendants' objections, the trial judge put ten questions to the jury at the close of trial. The First Circuit gave a sample:

> Question No. 1. Does the Jury find beyond a reasonable doubt that defendants unlawfully, knowingly and wilfully conspired to counsel Selective Service registrants to knowingly and willfully refuse and evade service in the armed forces of the United States in violation of Section 12 of the Military Selective Service Act of 1967?[22]

Parallel language was used for the alternate means of violating the statute (aiding and abetting). Four of the five defendants were convicted.[23]

The court overturned the convictions, arguing that the general verdict was a necessary safeguard on the jury's independence.[24] In its analysis, the court took a tour of the history of disapproval of special verdicts; its language reflected the delicate balance courts attempt to strike between lauding the jury as a protector against arbitrary exercises of government power (which may require ignoring the law) and deploring lawless nullification[25]:

> There is no easier way to reach, and perhaps force, a verdict of guilty than to approach it step by step. . . . 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. . . .
>
> Uppermost of [our] considerations is the principle that the jury, as the conscience of the community, must be permitted to look at more than logic. . . . The constitutional guarantees of due process and trial by jury require that a criminal defendant be afforded the full protection of a jury unfettered, directly or

20. Sparf v. United States, 156 U.S. 51, 102-03 (1895) ("Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be. Under any other system, the courts . . . would for every practical purpose be eliminated . . . as instrumentalities devised for the protection equally of society and of individuals in their essential rights. When that occurs our government will cease to be a government of laws, and become a government of men.").

21. 416 F.2d 165 (1st Cir. 1969).

22. *Id.* at 180.

23. Three jurors later stated they voted guilty "only because they thought they had no choice but to follow the letter of the law." JEFFREY B. ABRAMSON, WE, THE JURY 60 (2000).

24. *Spock*, 416 F.2d at 181-82.

25. *E.g.*, United States v. Dougherty, 473 F.2d 1113, 1134 (3d Cir. 1972) ("An equilibrium has evolved—an often marvelous balance—with the jury acting as a 'safety valve' for exceptional cases, without being a wildcat or runaway institution."); United States v. Desmond, 670 F.2d 414, 417 (3d Cir. 1982) ("[C]ourts have adopted a rather ambiguous attitude toward jury nullification . . . .").

indirectly.[26]

The court reached this conclusion even though, on the one hand, the jury was directed to answer the questions after it came to a general verdict,[27] and on the other, the questions rephrased the indictment[28] and thus might have been expected to lead to an "accurate" verdict. This strongly suggests that the court was willing to subordinate accuracy to nullification, or at least the possibility of nullification. Today, *Spock* stands for the prohibition on questions that shape or lead the jury's deliberations,[29] as well as for the general disfavor of special questions in criminal cases.[30]

Most courts have adopted *Spock*'s approach of attempting to walk the line between jury independence and jury nullification, asking whether the form of the verdict impermissibly directs the course of the jury's deliberation.[31] A few courts have gone further than that and explicitly approved of jury nullification, and in doing so, have thrown the relationship between special verdicts and jury independence into even sharper relief than in *Spock*. As the Kansas Supreme Court put it:

> In view of the differences in our civil and criminal statutes relating to verdicts[,] it is apparent the legislature intended to preserve the time honored power of the jury to return a verdict in a criminal prosecution *in the teeth of the law and the facts*. Therefore we hold that special questions may not be submitted to the jury for answer in a criminal prosecution.[32]

The Indiana Supreme Court came to a similar conclusion in *Seay v. State*,[33] a case involving sentencing defendants as habitual offenders, which greatly increases the possible penalty.[34] The court looked in part to a state constitutional provision[35] to hold that:

> If the legislature had intended an automatic determination of habitual offender status upon the finding of two unrelated felonies, there would be no need for a jury trial on the status determination. In this case, what was at issue was the jury's ability to find Seay to be a habitual offender (or not to be a habitual offender) irrespective of the uncontroverted proof of prior felonies. The jury was judge of both the law and facts as to that issue and it was error to instruct the jury

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

27. *Id.* at 193.

28. *Id.* at 165, 180.

29. *E.g.*, United States v. Palmeri, 630 F.2d 192, 202-03 (3d Cir. 1980); State v. Hardison, 492 A.2d 1009, 1015 (N.J. 1985).

30. *E.g.*, United States v. Collamore, 868 F.2d 24, 28 (1st Cir. 1989); Tillman v. Cook, 25 F. Supp. 2d 1245, 1288 (D. Utah 1998).

31. See *infra* Part IV.E for a discussion.

32. State v. Osburn, 505 P.2d 742, 749 (Kan. 1973) (emphasis added).

33. 698 N.E.2d 732 (Ind. 1998).

34. IND. CODE § 35-50-2-8(g) (2001). Habitual offenders are subject to a new maximum sentence of up to three times the presumptive sentence for the underlying offense, or an additional thirty years, whichever is less. *Id.* § 35-50-2-8(h).

35. IND. CONST. art. I, § 19 ("In all criminal cases whatever, the jury shall have the right to determine the law and the facts.").

otherwise.[36]

Since "the policy of a trial by jury for habitual offender charges 'even sanctions exercise of the jury nullification power,'"[37] the court required that special verdict forms on habitual offender status permit nullification.[38] Lower courts, however, have not interpreted *Seay* as requiring that the jury be explicitly informed of its nullification power.[39]

As these cases show, special verdicts are inextricably connected with jury independence and nullification. On the one hand, for practical purposes jury nullification is irrelevant, since nullification is generally not allowed. On the other, the line between jury nullification and jury independence can be a fine one, and a court can undoubtedly constrain a jury's independence by having it explain itself in a special verdict. As a result, determining the appropriate uses for special verdicts is a problem similar to determining the amount of discretion permitted the jury. This problem, and how courts have addressed it, will be addressed further in Part IV.E.

C. *Implications for Special Verdicts*

Social science indicates that juries are good at facts, and law makes juries the judges of fact. Taken together, this suggests that special verdicts would be useful in playing to this strength by exploring the jury's factual determinations. Indeed, this use of special verdicts appears to have drawn little fundamental controversy.[40] Questions may be raised as to which cases and what facts, but the basic premise seems well-accepted: A jury's province is the facts, and it is good at them, so it is allowed to provide the court with the benefit of its expertise.

However, social science also indicates that juries are bad at law (or at least worse at it), and this does not so neatly lead to a clear rule. If juries have trouble understanding or remembering the judge's instructions, one logical response would be to tailor special interrogatories to track the judge's instructions and the elements of the statute.[41] After all, if the judge is going to

---

36. *Seay*, 698 N.E.2d at 736-37 (citation omitted).

37. *Id.* at 736 n.9 (quoting Weatherford v. State, 619 N.E.2d 915, 918 (Ind. 1993) (DeBruler, J., dissenting)).

38. The court stated that it was overruling three prior cases to the extent that their special verdict forms did not allow the jury to nullify. *Id.* at 736 n.7.

39. Womack v. State, 738 N.E.2d 320, 329 n.6 (Ind. Ct. App. 2000) (holding that a form that stated there were only two possible verdicts did not meet *Seay*'s requirements). See *infra* notes 82-87 and accompanying text for a discussion of other states that use special verdicts to determine habitual offender status, without mentioning nullification.

40. See *infra* Part III.A for a discussion of current fact-related uses of special verdicts.

41. Of course, other possibilities exist. Among those explored by Ellsworth and Reifman are giving the jury a written copy of the instructions, delivering the instructions in a case-specific format, providing the instructions before closing arguments, allowing judges to give clarifying answers to jury questions, and re-writing instructions. *See supra* note 13, at 798.

instruct the jury, why shouldn't the instructions be useful, step-by-step directions that the jury could have in front of it and follow? In a different system, they might be. But in the United States, such special questions would replicate the situation in *Spock*, and thus would impermissibly infringe on the jury's independence. So questions cannot be directly targeted at making sure the jury gets the law correct while deliberating; indeed, the system's acceptance of independence, and its resulting grudging tolerance of nullification, means that the jury cannot be forced to get the law right in its verdict.

Questions might, on the other hand, be targeted at determining *if* the jury got the law correct. For instance, a jury could indicate which theory of the crime it relied upon, to benefit an appellate court reviewing the sufficiency of the evidence. Courts have found a number of situations in which it is useful to know more than a general verdict and perhaps some facts;[42] special verdicts could assist in this. However, additional care should be taken when questioning a jury about more than just the bare facts, for fear of becoming entangled in the ever-contentious nullification debate.[43]

Thus, the question of jury nullification and the observations of social science lead to two hypotheses and one caveat about the constitutionality and practical use of special verdict forms and special interrogatories. First, juries should be able to make findings of fact. Second, juries may be able to specify a legal theory or finding. However, because of the constitutional right to a determination by an independent jury, juries should not be subjected to questions that could lead or otherwise influence their thinking. The rest of this Note attempts to refine the way courts should apply these principles when deciding whether and how to give special verdicts.

III. CURRENT AREAS OF USE

Special verdicts are currently used in a wide variety of areas. This Section gives a comprehensive overview of current practice, both to illustrate the prevalence of special verdicts and to provide background for the subsequent discussion of the decision to give special verdicts. The uses can be divided into two broad categories: facts alone, and facts mixed with law.

A. *Facts Alone*

Overall, factual special interrogatories are most often used in sentencing cases. This category of use has fluctuated considerably in the federal courts, a process that continues to the present. Miscellaneous non-sentencing questions make up a minority of factual special interrogatories.

42. See generally *infra* Part III.B for examples.

43. For a discussion, see *infra* Part IV.E.

The spectrum of factual cases begins with the least controversial, most firmly established uses. In treason cases, the Constitution requires that a conviction be supported by "the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."[44] Thus, interrogatories were used to determine which overt acts the defendant committed in the most recent treason conviction reviewed by the Supreme Court.[45] Similarly, the Federal Rules of Criminal Procedure allow the use of special verdicts in forfeiture cases,[46] as do at least one state court's rules.[47] Forfeiture, at least on the federal level, is considered part of sentencing,[48] and sentencing is the broadest category in which special verdicts are used.

An example of this sentencing use is death penalty cases, where statute or case law commonly require juries to use special verdict forms to specify aggravating circumstances, or mitigating circumstances, or both.[49] This is nicely illustrated by Oklahoma's practice. Its state constitution prohibits true special verdicts,[50] but its statutes require juries to write down the aggravating circumstances that underlie their recommendation of a death sentence, because sentencing issues do not touch upon the general verdict.[51] Aggravating and mitigating circumstances will sometimes become particularly important because of unusual circumstances. For instance, Washington state will permit the execution of an accomplice to first-degree murder, but because the verdict of "guilty of first-degree murder" does not capture the full extent of culpability for an accomplice, the jury must be more specific on special verdict forms

44. U.S. CONST. art. III, § 3.

45. United States v. Kawakita, 96 F. Supp. 824, 851-52 (S.D. Cal. 1950) (setting forth example of special verdict forms), *aff'd*, 343 U.S. 717 (1952).

46. FED. R. CRIM. P. 32.2(b)(4) (2001).

47. State v. Caulfield, 2001 Del. Super. LEXIS 63, at *3-4 (Feb. 16, 2001) ("[Superior Court Criminal] Rule 40(d) directs the jury to return 'a special verdict as to the extent of the interest or property subject to forfeiture, if any.' Rule 40(e) directs the Court to enter a judgment in accordance with the jury's verdict."); *see also* State v. Hegg, 1998 MT 100, ¶ 7, 956 P.2d 754, 756 (noting use of special verdict forms in forfeiture cases); State v. Hill, 635 N.E.2d 1248, 1254 (Ohio 1994) (same).

48. Libretti v. United States, 516 U.S. 29, 48-49 (1995).

49. Federal law requires a jury to unanimously specify any aggravating factors it finds, and permits any jury member to specify mitigating factors, when deciding whether to impose the death penalty. 18 U.S.C. § 3593(d) (2001). The states vary on whether mitigating factors must be specified. States that make no explicit provision for special interrogatories on mitigating factors, while requiring that aggravating factors be found, include California, CAL. PENAL CODE § 190.4 (2001); New Mexico, State v. Henderson, 789 P.2d 603, 610 (N.M. 1990) (holding that this means that harmless error analysis cannot be applied to invalid aggravating circumstances); and Oregon, OR. REV. STAT. § 163.150 (1999). Connecticut requires that both be found in special verdicts. CONN. GEN. STAT. § 53a-46a (2001). States that make the use of special verdicts optional include Delaware, Sullivan v. State, 636 A.2d 931, 945 (Del. 1994) (both mitigating and aggravating, as part of jury's advisory role); Florida, Jackson v. State, 502 So. 2d 409, 413 (Fla. 1986) (aggravating, as part of jury's advisory role); Nevada, Gallego v. State, 23 P.3d 227, 240 (Nev. 2001) (neither are required).

50. OKLA. CONST. art. 7, § 15.

51. 21 OKLA. STAT. § 701.11 (2000); Romano v. State, 847 P.2d 368, 386 (Okla. Crim. App. 1993) (upholding statute), *aff'd on unrelated grounds*, 512 U.S. 1 (1994).

before an accomplice may be executed.[52] Washington's approach to capital accomplice liability is similar to the broader use of special interrogatories in sentencing, determining a key fact about culpability that is not captured by the general verdict. Further, the use of special interrogatories in death penalty cases may be increased by the Supreme Court's recent ruling that juries, not judges, must find the aggravating circumstances necessary for imposing the death penalty.[53]

Until recently, federal narcotics cases were one of the most common examples of special interrogatory use in sentencing. A few courts initially approved of their use to find the quantity of drugs at issue,[54] but the advent of the Federal Sentencing Guidelines in late 1987 quickly had courts holding that they were not bound by the jury's determination.[55] A similar pattern appeared regarding the object of a narcotics conspiracy, such as marijuana or cocaine; courts originally held that the object had to be submitted to the jury, if the object would make a difference to the sentence.[56] After *Edwards v. United States*,[57] judges cut back on their use of special interrogatories, since they now may rely on their own determination of the object of the conspiracy unless different statutory maximums are involved.[58] In this sense, narcotics cases are a microcosm of the federal approach toward special interrogatories and

52. State v. Roberts, 14 P.3d 713, 734 n.12 (Wash. 2000) ("[W]hen jury instructions as used in this case allow for the possibility that the defendant was convicted solely as an accomplice to premeditated first degree murder, the defendant may not be executed unless the jury expressly finds (1) the defendant was a major participant in the acts that caused the death of the victim, and (2) the aggravating factors under the statute specifically apply to the defendant."). Juries are not statutorily required to return special interrogatories on aggravating or mitigating factors. WASH. REV. CODE §§ 10.95.060-.080 (2001).

53. Ring v. Arizona, 122 S. Ct. 2428, 2432 (2002); *see also* Bottoson v. Moore, No. SC02-1455 2002 Fla. LEXIS 1474, at *18 (Fla. July 8, 2002) (Pariente, J., concurring) (discussing questions raised by *Ring* as to the constitutionality of Florida's death penalty statute, and noting that "[t]he question also arises as to whether any or all of these problems could be solved by requiring the use of a special verdict").

54. *E.g.*, United States v. Buishas, 791 F.2d 1310, 1317 (7th Cir. 1986); United States v. Pforzheimer, 826 F.2d 200, 206 (2d Cir. 1987) (following *Buishas*).

55. *E.g.*, United States v. Jacobo, 934 F.2d 411, 416-17 (2d Cir. 1991) (remanding for the district court to make independent findings); United States v. Rey, 923 F.2d 1217, 1223 (6th Cir. 1991); United States v. McKenzie, 922 F.2d 1323, 1327-28 (7th Cir. 1991).

56. *E.g.*, United States v. Owens, 904 F.2d 411, 413-15 (8th Cir. 1990) (different Guidelines calculations); Newman v. United States, 817 F.2d 635, 637 (10th Cir. 1987) (different statutory maximums); United States v. Dennis, 786 F.2d 1029, 1038-39 (11th Cir. 1986) (different statutory maximums).

57. 523 U.S. 511, 514 (1998) (holding that the object of the conspiracy was a sentencing consideration like the quantity).

58. *E.g.*, United States v. Rhynes, 206 F.3d 349, 380 (4th Cir. 1999) ("With these general verdicts, it is thus impossible to determine on which statutory object or objects—sale of heroin, cocaine, cocaine base, or marijuana—the conspiracy conviction was based. Accordingly . . . *Edwards* prohibited the district court from imposing a sentence in excess of the *statutory* maximum for the least-punished object on which the conspiracy conviction could have been based") (emphasis added); United States v. Conley, 92 F.3d 157, 165 (3d Cir. 1996). However, a sentence within the statutory maximums, based on the Guidelines, does not require special verdicts. United States v. Brown, 148 F.3d 1003, 1010-11 (8th Cir. 1998) (overruling *Owens*); *Conley*, 92 F.3d at 168.

sentencing after the implementation of the Sentencing Guidelines.[59] If a fact is solely relevant to sentencing within the Guidelines, the court may give a special interrogatory, but it is not required to and does not have to heed the jury's determination even if it allows the jury to make one.[60]

Apprendi v. New Jersey,[61] recently decided by the Supreme Court, may signal a partial revival of the use of special interrogatories for federal sentencing purposes. *Apprendi* held that if any fact increases the *statutory* maximum sentence a defendant is subject to, that fact must be submitted to the jury to decide beyond a reasonable doubt.[62] Some circuits have interpreted *Apprendi* as requiring, or at least recommending, special interrogatories in specific narcotics cases.[63] Other courts have not gone so far as to recommend special verdicts, but have noted that their use helped avoid reversals for possible *Apprendi* errors.[64] A number of state courts have had similar

59. The change wrought by the Guidelines is neatly encapsulated by two cases concerning changes to the sentencing rules during a conspiracy. In *United States v. Ogull*, 149 F. Supp. 272 (S.D.N.Y. 1957), the district court judge stated that he could not "constitutionally make the factual determination [as to whether the conspiracy continued past the statute's effective date] .... The appropriate arm of the court for this purpose is the jury, and history and common sense authorize it to perform this function.... I feel justified in submitting the special questions." *Id.* at 278-79. Thirty-four years later, *United States v. Devine*, 934 F.2d 1325 (5th Cir. 1991), upheld a trial court's refusal to give a nearly-identical interrogatory on whether the conspiracy continued after the effective date of the Guidelines. Instead of a constitutional problem, the Fifth Circuit found that the question would amount to simply a "determination from the jury on a question related to sentencing, which was clearly not within the province of the jury to decide." *Id.* at 1336; *see also* United States v. Stanberry, 963 F.2d 1323, 1326 (10th Cir. 1992). Minnesota has not followed the federal trend. *See* State v. Robinson, 480 N.W.2d 644, 646 (Minn. 1992).

60. United States v. Romo, 914 F.2d 889, 895 (7th Cir. 1990); *cf.* United States v. Morgano, 39 F.3d 1358, 1369 (7th Cir. 1994) (permitting a situation in which, despite the jury's finding that the defendants did not commit certain predicate acts, the judge found they did for sentencing purposes, because of the different standards of proof).

61. Apprendi v. New Jersey, 530 U.S. 466 (2000).

62. *Id.* at 490. Facts that raise statutory minimums, however, may still be found by the judge. Harris v. United States, 122 S. Ct. 2406, 2420 (2002), *aff'g* McMillan v. Pennsylvania, 477 U.S. 79 (1986). As *Ring v. Arizona* held, *see supra* note 53, *Apprendi* applies to death penalty cases. However, *Ring* is unlikely to increase the use of interrogatories in federal court, since federal juries were already required to specify aggravating factors when imposing the death penalty. *Supra* note 49.

63. *E.g.*, United States v. Vazquez, 271 F.3d 93, 116 (3rd Cir. 2001) (Becker, C.J., concurring) (including as an appendix "a special interrogatory on drug quantity prepared by the Office of the United States Attorney for the Eastern District of Pennsylvania and used without incident or problem by the judges of the district court since *Jones*," *id.* at 114); United States v. Promise, 255 F.3d 150, 157 n.6 (4th Cir. 2001) (en banc) (citing state cases using special verdict forms); *see also* United States v. Neuhausser, 241 F.3d 460, 471 n.8 (6th Cir. 2001) ("While we hold that there was no ambiguity ... in this case, we do not wish to discourage the Government or the trial court from using separate counts, special verdict forms, or more specific instructions in future cases involving multiple-object conspiracies."). *But cf.* Derman v. United States, 298 F.3d 34, 42 n.4 (1st Cir. 2002) ("This does not mean that a jury need return a special verdict .... It is enough that the jury supportably determines, beyond a reasonable doubt, that the conspiracy involves a drug quantity that surpasses the threshold amount needed to trigger the relevant (higher) statutory maximum. See, e.g., United States v. Patterson, 292 F.3d 615, 623 (9th Cir. 2002) (finding no *Apprendi* error when jury returned a guilty verdict after being instructed on only a threshold quantity).").

64. *E.g.*, United States v. Trennell, 290 F.3d 881, 890 (7th Cir. 2002) (holding that a special verdict and proper jury instructions made any *Apprendi* error in the indictment harmless); United States v. Flaharty, 295 F.3d 182, 196 (2nd Cir. 2002) (same); United States v. Borders, 270 F.3d 1180, 1184-85

reactions.[65]

Some courts consider it a truism that drugs and guns go together;[66] whether or not they do, guns are also often the subjects of special interrogatories. In the federal courts, they are treated as drugs generally are, as part of the sentencing procedure, and therefore special interrogatories about them are discretionary.[67] Again, as with drugs, the states vary in their treatment of firearms interrogatories. Florida's Supreme Court requires that a sentence enhancement based on firearms be supported either by a special finding or a reference to a firearm in the charging instrument,[68] and Hawaii's has imposed a similar requirement.[69] An Iowa rulerequires that any minimum sentence for use of a firearm be supported by a special interrogatory;[70] a West Virginia statute has a similar requirement for the ruling out of probation.[71] However, New Jersey's Supreme Court explicitly stated that interrogatories are not required because firearms are only relevant to sentencing.[72] In addition, courts in Colorado,[73] Missouri,[74] Texas,[75] Washington,[76] Wisconsin,[77] and Wyoming[78] have all

(2001) (noting that use of a special verdict contributed to *Apprendi*'s requirements being satisfied); *see also* United States v. Strickland, 245 F.3d 368, 376 (4th Cir. 2001) (failure to request special interrogatories on drug quantity limits review to plain error); United States v. Swatzie, 228 F.3d 1278, 1281 (11th Cir. 2000) (same).

65. Poole v. State, No. CR-99-1200, 2001 Ala. Crim. App. LEXIS 173, at *50 (Aug. 31, 2001) ("To comply with the Supreme Court's holding in *Apprendi*, the trial court should submit [a special interrogatory] . . . that addresses whether the sale occurred within a three-mile radius of a school and/or a housing project."); Keels v. United States, 785 A.2d 672, 686 n.10 (D.C. 2001) (noting that "[i]n some instances, [*Apprendi*] may cause the trial judge to utilize special interrogatories or a special verdict form" in life without parole cases); *see also* State v. Watson, 788 A.2d 812, 820 (N.J. Super. Ct. App. Div. 2002) ("However, until [*Apprendi*'s application to the Graves Act, which provides for mandatory parole ineligibility for firearms use, is decided], we urge trial judges to try Graves Act cases as if [the jury was required to find the factors relating to the parole disqualifier]. In other words, if use or possession of a firearm is not an element of the offense, a special verdict should be presented to the jury on that issue.").

66. *E.g.*, United States v. Howard, 106 F.3d 70, 75 (5th Cir. 1997) (quoting a line of cases indicating the Circuit's "frequent acknowledgment of this more and more obvious fact[:] firearms are 'tools of the trade' of those engaged in illegal drug activities").

67. The leading case is *United States v. Sims*, 975 F.2d 1225, 1235-36 (6th Cir. 1992). 18 U.S.C. § 924(c) imposes minimum sentences for the use of firearms in a variety of federal crimes; the sentences vary by type of firearm. The court held that a district judge must make sure that "no defendant will be convicted on more than one gun count relative to the one drug trafficking offense," and that special interrogatories were a permissible, though not mandatory, way of accomplishing this. *Id.* at 1235. Subsequent cases have emphasized the district court's discretion. *E.g.*, United States v. Peña-Lora, 225 F.3d 17, 30 (1st Cir. 2000); United States v. Smith, 938 F.2d 69, 70 (7th Cir. 1991).

68. State v. Estevez, 753 So. 2d 1, 5, 7 (Fla. 1999); *see also id.* at 5 ("[T]he clearest way for the jury to make the necessary finding that a firearm was used is to have a specific question or special verdict form.").

69. Garringer v. State, 909 P.2d 1142, 1150 (Haw. 1996).

70. IOWA R. CRIM. P. 2(6).

71. W. VA. CODE § 62-12-2(c)(1)(iii) (2001); *see also* State v. Pannell, 330 S.E.2d 844, 848 (W. Va. 1985) (vacating a sentence under § 62-12-2(c)(1) that was imposed by a trial court that made its own finding of fact).

72. State v. Camacho, 707 A.2d 455, 464 (N.J. 1998).

73. Montanez v. People, 966 P.2d 1035, 1036 n.1 (Colo. 1998).

74. State v. Hayes, 518 S.W.2d 40, 47-48 (Mo. 1975) (noting that this is not a true special verdict).

75. Medrano v. State, 701 S.W.2d 337, 341 (Tex. App. 1985).

mentioned that lower courts used interrogatories to determine if weapons were used in particular crimes.

Another common sentencing enhancement is based on the defendant's prior felony convictions. The federal courts have not used special interrogatories for this purpose, since even prior to the Supreme Court's specific blessing of prior felonies as a sentencing factor,[79] they had "almost uniformly" interpreted it as such.[80] However, state courts have often used interrogatories for their habitual offender sentencing determinations. For instance, as discussed previously, Indiana's Supreme Court used a habitual offender statute to emphasize that jury nullification plays a role in evaluating special interrogatories.[81] Other state courts that have mentioned using special verdict forms include Arkansas,[82] Colorado,[83] Iowa,[84] North Carolina,[85] Ohio,[86] and Washington.[87]

Special verdicts have also been used in sentencing for a number of miscellaneous culpability questions. For instance, juries have been asked, or should have been asked, to determine the amount of a theft,[88] the proximate cause of a death,[89] whether a crime was one "of violence,"[90] which of several potential offenses the verdict reflected,[91] the dangerousness[92] or mental retardation[93] of the offender, the heinousness of a murder,[94] whether serious bodily injury resulted from a carjacking,[95] and on what theory a murder

---

76. State v. Lucky, 912 P.2d 483, 484-85 (Wash. 1996).

77. State v. Peete, 517 N.W.2d 149, 156 (Wis. 1994).

78. Whiteley v. State, 418 P.2d 164, 165 (Wyo. 1966).

79. Jones v. United States, 526 U.S. 227, 243 n.6 (1999).

80. Almendarez-Torres v. United States, 523 U.S. 224, 230 (1998).

81. *Supra* note 33 and accompanying text.

82. Drewry v. State, No. CA CR 86-17, 1986 Ark. App. LEXIS 2318, at *7 (Sept. 10, 1986).

83. People v. Garcia, 752 P.2d 570, 587 (Colo. 1988).

84. State v. Draper, 457 N.W.2d 606, 609 (Iowa 1990). Iowa was a pioneer in this area, using special interrogatories since 1924. State v. Merkin, 200 N.W. 437, 437 (Iowa 1924).

85. State v. Sullivan, 431 S.E.2d 502, 502 (N.C. Ct. App. 1993).

86. State v. Brandon, 543 N.E.2d 501, 503 (Ohio 1989).

87. State v. Johnson, 483 P.2d 1261, 1265 (Wash. 1971).

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

89. United States v. Gullett, 75 F.3d 941, 943 (4th Cir. 1996) (where defendant was charged with malicious destruction of property, the jury used a special interrogatory to find that the defendant's conduct was the proximate cause of a victim's death).

90. COLO. REV. STAT. § 16-11-309(5), (7) (2001) (special interrogatories required for mandatory sentence).

91. United States v. Pickens, No. 91-7092, 1993 U.S. App. LEXIS 9787, at *9 (10th Cir. 1993) ("When sentencing choices are made to rest upon conviction of specific crimes, incertitude about the conviction militates against choosing the severest of the available penalties. The doubt easily can be avoided by submitting special verdicts to the jury, but when that is not done, the sentencing judge may not speculate on which of the several offenses underlies the verdict.").

92. State v. Sammons, 749 P.2d 1372, 1376 (Ariz. 1988).

93. ARK. CODE ANN. § 5-4-618 (2001).

94. State v. Peralto, 18 P.3d 203, 206 (2001 Haw. 2001).

95. United States v. Jackson, 214 F.3d 687, 689 (6th Cir. 2000).

conviction relied.[96] More generally, they have been asked to find aggravating factors for crimes other than murder.[97]

A variety of facts unrelated to sentencing have also been the subject of special interrogatories. For instance, the Ninth Circuit requires special verdicts "when a court permits facts which pose a genuine possibility of juror confusion to go to the jury."[98] Occasionally, special verdicts have addressed defenses that turn on a specific fact,[99] or on a confession's voluntariness.[100] And there are some facts that simply cannot be described as other than "miscellaneous": age,[101] alien status,[102] how far from a school a drug sale took place,[103] whether

96. This falls into two categories. The first is felony-murder. State v. Phillips, 46 P.3d 1048, 1054 (Ariz. 2002) (noting that the jury found both felony and premeditated murder in response to a special interrogatory); Commonwealth v. Raymond, 676 N.E.2d 824, 834 (Mass. 1997) (holding that special interrogatories avoid the imposition of a sentence for an underlying felony that merged with a felony-murder conviction); State v. Colvin, 548 A.2d 506, 514 (Md. 1988) (same); *cf.* Schad v. Arizona, 501 U.S. 624, 645 (1991) ("We do not, of course, suggest that jury instructions requiring increased verdict specificity are not desirable, and in fact the Supreme Court of Arizona has itself recognized that separate verdict forms are useful in cases submitted to a jury on alternative theories of premeditated and felony murder. We hold only that the Constitution did not command such a practice on the facts of this case.") (citation omitted). The second is where killing is considered first-degree murder if the victim is a law enforcement officer, where the defendant knew or reasonably should have known the officer was performing her duties. State v. Hoffman, 804 P.2d 577, 602 (Wash. 1991); *see also* Chandler v. State, 421 S.E.2d 288, 293 (Ga. Ct. App. 1992) (finding special verdict forms deficient in an assault case, because they did not inquire as to defendant's knowledge regarding the victim).

97. People v. Whitaker, 32 P.3d 511, 518-19 (Colo. Ct. App. 2000) (holding that special interrogatories were permissible, but not mandatory, under special offender sentencing enhancement statute for drug crimes, COLO. REV. STAT. § 18-18-407); Garringer v. State, 909 P.2d 1142, 1150 (Haw. 1996). Though *Garringer* was a firearms case, the court spoke broadly of the need for special interrogatories, stating, "the circuit court should instruct the jury, by special verdict interrogatories, to make any and all findings relevant to the imposition of enhanced sentences where the requisite aggravating circumstances are intrinsic to the commission of the crime charged." *See also* Pope v. State, 737 N.E.2d 374, 379-80 (Ind. 2000) (rejecting a requirement of written findings, but finding no fundamental error in the provision of forms for the jury's recommendation in life without parole case); State v. Harrington, 608 N.W.2d 440, 440 (Iowa 2000) (noting use for a sexually predatory offense).

98. United States v. Delgado, 4 F.3d 780, 792 n.5 (9th Cir. 1993).

99. United States v. Hughes, 191 F.3d 1317, 1320 (10th Cir. 1999) (date of withdrawal from conspiracy); People v. McKnight, 617 P.2d 1178, 1182 (Colo. 1980) (noting without comment the use of a special interrogatory to determine whether defendant drove in an emergency with a revoked driver's license, which is a statutory ground for suspending a mandatory sentence). *Cf.* State v. Mendibles, 613 P.2d 1274, 1275 (Ariz. Ct. App. 1980) (holding that it was not error to refuse to submit a special interrogatory on the defense of voluntary release to the charge of unlawful imprisonment, where there was no evidence to support the defense). Defenses that involve more legal judgments are discussed *infra* at notes 132-137 and accompanying text.

100. State v. Williams, 62 N.W.2d 742, 745 (Iowa 1954) (noting use of a special interrogatory on a confession's voluntariness); State v. Aiken, 434 P.2d 10, 35-36 (Wash. 1967) (indicating that special interrogatories supported a finding that the instructions on voluntariness were correct). *Contra* McKenzie v. State, 292 S.E.2d 692, 694 (Ga. 1982) (holding that the jury's finding of voluntariness does not have to be via special verdict); Bosket v. State, 143 N.W.2d 553, 554 (Wis. 1966) (noting that special interrogatories were not used).

101. United States v. Pressler, 256 F.3d 144, 148 (3d Cir. 2001) (noting without comment the use of a special interrogatory to determine that the defendants were over 18 and conspired to distribute heroin to people under 21, tracking the language of the statute).

102. United States v. Escobar-Garcia, 893 F.2d 124, 126 (6th Cir. 1990).

103. United States v. Noble, No. 92-5286, 1993 U.S. App. LEXIS 27062, at *2 (4th Cir. Oct. 18, 1993) (involving drug offenses within 1,000 feet of a school).

property was rented in an arson case,[104] whether minors were depicted as engaging in sexually explicit conduct,[105] and whether a fire marshal's orders were followed.[106] Undoubtedly there are more that appear in unreported cases.

The cases dealing with non-sentencing factual interrogatories spend little time discussing why a special interrogatory was given, making it difficult to discern any underlying theory or pattern. However, in most of the "miscellaneous" cases, the specific fact is built into the statute as an extra condition—in other words, not just arson, but rental property arson; not just selling drugs, but selling drugs near a school. Special interrogatories might thus be seen as a way of making sure that the jury considered this additional and unusual requirement. This rationale might also cover cases with special verdicts about defenses, since defenses are another item for juries to consider.

B. *Facts and Law*

There are some uses of special verdicts that combine facts and law. The most common and widely recognized such use is in RICO and continuing criminal enterprise (CCE) prosecutions, collectively known as "compound-complex cases." They are also used when there are alternate grounds for conviction before the jury, to assess defenses with legal components, and for a few underlying legal questions.

In RICO and CCE cases, special verdicts are often used to specify which predicate acts the defendant committed in furtherance of her criminal course of conduct. The determination of predicate acts straddles the line between facts and law because it is, in some sense, a mini-verdict. The jury must ask if the act happened and if the act is chargeable or indictable, as required by the RICO statute,[107] or a felony, as required by the CCE statute.[108]

This use garnered notice with *United States v. Coonan*,[109] in which the Second Circuit approved the use of special interrogatories as to RICO predicate acts, over the prosecution's petition for a writ of mandamus. Initially, the district judge suggested employing a true special verdict.[110] However, at oral argument, the Second Circuit panel recommended instead that the jury return a bifurcated verdict; first, the jury would determine whether the defendants had

104. United States v. Parsons, 993 F.2d 38, 40-41 (4th Cir. 1993) (using special interrogatories to determine whether property was rented, which would bring it within interstate commerce for purposes of the federal arson statute).

105. United States v. Villard, 885 F.2d 117, 120 (3d Cir. 1989) (discussing use of special interrogatories in a trial for transporting child pornography, as to whether the items depicted minors engaged in sexually explicit conduct and whether the items were transported across state lines).

106. People v. Koushiafes, 248 N.E.2d 81, 84 (Ill. 1969).

107. 18 U.S.C. § 1961(1) (2000).

108. 21 U.S.C. § 848(c) (2000).

109. 839 F.2d 886 (2d Cir. 1988); *see generally* Grass, *supra* note 10 (discussing *Coonan* at length).

110. *Coonan*, 839 F.2d at 888.

committed any RICO predicate acts, and second, the jury would consider the general RICO violation, after being instructed that two predicate acts were necessary to sustain a RICO conviction.[111] The prosecution objected, arguing that the jury should be told how many predicate acts are required for a conviction *before* it considered the predicate acts.[112] The Second Circuit took an extremely dim view of this argument, characterizing the government as "seek[ing] to protect . . . the possibility of its obtaining guilty verdicts through prejudicial spillover from the numerous violent and otherwise criminal acts before" the jury and claiming to have "a right, enforceable by mandamus, to prevent any and all use of special interrogatories separately from a general verdict no matter how necessary they may be to the protection of a defendant's rights."[113] The court argued that the "traditional distaste for special interrogatories" existed to protect the defendant, a concern not present here; accordingly, the court refused to issue the writ.[114] The trial court eventually used the Second Circuit's procedure instead of a true special verdict.[115]

Both before and after *Coonan*, courts used special interrogatories in RICO and CCE cases to determine upon which predicate acts juries relied. Several federal circuits do so,[116] as does at least one state, New York.[117] The use of special interrogatories in compound-complex criminal statutes was given a potential boost by the Supreme Court's decision in *Richardson v. United States*.[118] The CCE statute (sometimes called the "drug kingpin" statute) requires that a defendant be engaged in a "continuing series of violations" of the drug laws;[119] the Court required that juries be unanimous in their determination of which violations support the CCE conviction, since each violation was an element of the offense.[120] The Court did not address the potential use of special verdicts in these cases, but it seems likely that some

111. *Id.* at 889-90. The opinion did not give the text of the proposed instructions, but the court stated that the jury would be told "how many such acts were necessary to a RICO conviction . . . [and] would then be instructed as to the definition of a RICO pattern." *Id.* at 889. This seems unlikely to fall afoul of the mandatory language problem. *See infra* note 259 and accompanying text.

112. *Id.* at 890.

113. *Id.*

114. *Id.* at 891.

115. Grass, *supra* note 10, at 750 & n.38.

116. United States v. Ham, 58 F.3d 78, 85 (4th Cir. 1995); United States v. Korando, 29 F.3d 1114, 1115 (7th Cir. 1994); United States v. Torres Lopez, 851 F.2d 520, 523 (1st Cir. 1988); United States v. Palmeri, 630 F.2d 192, 202-03 (3d Cir. 1980); United States v. Salvatore, No. 94-158, 2001 U.S. Dist. LEXIS 3035, at *7 (E.D. La. Mar. 15, 2001).

117. People v. Besser, 749 N.E.2d 727, 729 (N.Y. 2000); *see also* State v. Bell, 770 P.2d 100, 109 (Utah 1988) ("However, we note for future reference that the RICE statute lends itself to confusion, particularly in cases such as this, in which the State presents multiple theories as to what constitutes the enterprise, the pattern of racketeering activity, and the relationship between these elements. Appellate review of such cases would be greatly enhanced by a form of verdict which would allow the appellate court to determine on which of the various theories the jury based its decision.").

118. Richardson v. United States, 526 U.S. 813 (1999).

119. 21 U.S.C. § 848(c) (2000).

120. *Richardson*, 526 U.S. at 824.

courts will turn to this tool of ensuring unanimity.[121] In addition, similar predicate act questions are raised by statutes that implicate ongoing sexual abuse.[122]

Special verdicts are also used to determine on which of available alternative grounds the jury convicted. This might anticipate a potential appellate review for insufficient evidence, as Justice Blackmun once suggested,[123] or for legal error, such as where part of a statute might be challenged.[124] Unlike the compound-complex cases, these juries are not giving an intermediate step in their reasoning, but are simply being more precise about their general verdict. The most common situation is where alternate theories of murder are charged, and the jury is asked to determine whether the defendant is guilty of felony murder or premeditated murder.[125] Similarly, lesser included offenses sometimes prompt the use of a special verdict form.[126] As discussed previously, courts had once inquired as to the objects of narcotics conspiracies, before the

121. *See infra* Part IV.B; *see also* Benevento v. United States, 81 F. Supp. 2d 490, 493-94 (S.D.N.Y. 2000) (relying on use of special verdict form to find that error in *Richardson*'s retroactive application was harmless).

122. R.A.S. v. State, 718 So. 2d 117, 122-23 (Ala. 1998); *see also* Cooksey v. State, 752 A.2d 606, 610 (Md. 2000) ("The double jeopardy and jury unanimity concerns [with regard to duplicitous pleading, in a continuing course of conduct sexual abuse case] arise because a court cannot always be certain that a verdict rendered on a duplicitous count truly represents the unanimous agreement of the jury as to each offense charged in the count.").

123. Griffin v. United States, 502 U.S. 46, 61 (1991) (Blackmun, J., concurring) ("[T]he Government had two other means of avoiding the possibility, however remote, that petitioner was convicted on a theory for which there was insufficient evidence: The Government either could have charged the two objectives in separate counts, or agreed to petitioner's request for special interrogatories.... I would... commend these techniques to the Government for use in complex conspiracy prosecutions.").

124. *Cf.* State v. Pilcher, 242 N.W.2d 348, 355 (Iowa 1976) (holding a sodomy statute unconstitutional as applied to consenting adults of the opposite sex, and reversing a conviction where, because there were no special interrogatories, it was "impossible to ascertain whether the jury convicted defendant of forced sodomy or sodomy with consent").

125. *E.g.*, United States v. Sides, 944 F.2d 1554, 1558 n.3 (10th Cir. 1991); Bendle v. State, 583 P.2d 840, 843-44 (Alaska 1978); Commonwealth v. Troy, 540 N.E.2d 162, 166 (Mass. 1989); State v. Colvin, 548 A.2d 506, 514 (Md. 1988); State v. Lewis, 361 S.E.2d 728, 733 (N.C. 1987). *But see* Beck v. State, 326 S.E.2d 465, 468 (Ga. 1985) (finding no error in the trial court's refusal to submit a special interrogatory, where the jury was correctly charged).

In *Schad v. Arizona*, 501 U.S. 624, 627 (1991), the Supreme Court held that juries do not have to be unanimous on this point. However, courts continue to use interrogatories to distinguish between premeditated and felony murder, often for purposes such as sentencing and merger. *E.g.*, *Bendle*, 583 P.2d at 843-44 (reviewing sufficiency of the evidence); State v. Hoskins, 14 P.3d 997, 1016 (Ariz. 2000) (demonstrating unanimity); Kight v. State, 784 So.2d 396, 401-02 (Fla. 2001) (mentioning use of interrogatories without explanation); Commonwealth v. Raymond, 676 N.E.2d 824, 834 (Mass. 1997) (merger of underlying felony with murder and sentencing); *Colvin*, 548 A.2d at 514 (same); State v. Lewis, 361 S.E.2d 728, 733 (N.C. 1987) (merger). *See also* State v. Burns, No. 02C01-9605-CR-00170, 1997 Tenn. Crim. App. LEXIS 713, at *28, *34-35 (July 25, 1997) (finding retrial permissible on theories that jury did not consider under special verdict). *But see* State v. Nissen, 560 N.W.2d 157, 176 (Neb. 1997) (holding that it was not error to refuse to give special verdicts on murder theories, where unanimity among the jury was not required).

126. *E.g.*, Pullins v. State, 501 S.E.2d 612, 613 (Ga. Ct. App. 1998); State v. Myers, 544 S.E.2d 851, 852 n.1 (S.C. Ct. App. 2001); State v. Thomason, No. 02C01-9903-CC-00086, 2000 Tenn. Crim. App. LEXIS 229, at *45-46 (Mar. 7, 2000); *Burns*, 1997 Tenn. Crim. App. LEXIS 713, at *30; State v. Cyr, 726 A.2d 488, 490 (Vt. 1999).

Supreme Court held that unnecessary.[127] There have been a handful of other cases in which alternative means of committing a crime were alleged and special verdicts were used or recommended, such as driving under the influence,[128] assault,[129] sexual assault,[130] and perjury.[131] Courts do not always give reasons for the use in these cases, but when they do, they use common justifications such as unanimity, jury confusion, and appellate review.

Defenses are perhaps the major category of law-related special verdicts that do not come within those previously discussed. Insanity is the most prominent of these,[132] and entails judgments about a person's mental state and whether it can bear moral culpability[133]—surely one of the fundamental questions of the legal system.[134] To a lesser extent, other defenses, such as entrapment, have been the subject of special interrogatories, where there was evidence to support the theory.[135] Georgia uses special verdicts to provide for a potential future

---

127. *Supra* note 57 and accompanying text.

128. Dean v. State, 501 S.E.2d 895, 897 (Ga. Ct. App. 1998) (used "to ensure that the jury members understood they could find Dean either 'guilty' or 'not guilty' as to each of the alternatives"); Commonwealth v. McCurdy, 735 A.2d 681, 683, 686 n.6 (Pa. 1999) (use mentioned); Commonwealth v. Price, 610 A.2d 488, 490 (Pa. Super. Ct. 1992) (use mentioned).

129. State v. Weldy, 902 P.2d 1, 7 (Mont. 1995) (recommended to preserve right to unanimous verdict); *Cyr*, 726 A.2d at 490 (use mentioned).

130. People v. Kiczenski, 324 N.W.2d 614, 615 (Mich. Ct. App. 1982) (use mentioned); State v. Raines, 324 S.E.2d 279, 282 (N.C. Ct. App. 1985) (used for novel theory).

131. People v. Ribowsky, 568 N.E.2d 1197, 1200-01 (N.Y. 1991) (used as to individual false statements, to ensure unanimity).

132. A number of states require juries to return special verdicts on insanity. COLO. REV. STAT. § 18-1-803 (2001); GA. CODE ANN. § 17-7-131 (2002); 725 ILL. COMP. STAT. 5/115-4 (2001); S.D. CODIFIED LAWS § 23A-25-13 (2002); N.D. R. CRIM. P. 31(e)(1) (2002); R.I. SUPER. R. CRIM. P. 31 (2002); State v. Jensen, 251 N.W.2d 182, 187 (N.D. 1977); *see also* State v. Noble, 563 P.2d 1153, 1156 (N.M. 1977) (competency to stand trial); *cf.* United States v. Wilson, 629 F.2d 439, 441-42 (6th Cir. 1980) (holding that the wording of a special interrogatory could have prevented a hung jury on the verdict of insanity, thereby improbably shifting the burden of proof to the defendant). *But see* United States v. Jackson, 542 F.2d 403, 412 (7th Cir. 1976) (holding that it was not error to refuse to give a special interrogatory on insanity, where insanity was the sole issue in the case and the proposed interrogatory "would have served no useful purpose").

133. *Cf.* State v. Kelly, 144 N.W. 993, 995 (Iowa 1914) (holding that, where the defendant was convicted of manslaughter yet a special interrogatory found that he was insane, a new trial should be ordered).

134. In contrast, Arkansas's statute prohibiting execution of the mentally retarded, which requires special verdicts, implies a more factual question, as the status of mental retardation is not transient in the way that insanity can be. ARK. CODE ANN. § 5-4-618 (2001). Increased use of special verdicts on mental retardation seems quite probable in light of the Supreme Court's recent decision that executing the mentally retarded is unconstitutional. Atkins v. Virginia, 122 S. Ct. 2242, 2252 (2002).

135. United States v. Lew, 980 F.2d 855, 856 (2d Cir. 1992) (entrapment); People v. Brighi, 755 P.2d 1218, 1220 & n.1 (Colo. 1988) (heat of passion); *cf.* State v. Mendibles, 613 P.2d 1274, 1275 (Ariz. Ct. App. 1980) (finding that since there was no evidence to support defense to kidnapping raised by proposed special interrogatory, the interrogatory did not have to be given); State v. Hwa Cha Kim, 785 P.2d 941, 943 (Haw. 1990) (rejecting interrogatory on unavailable defense of being a procuring agent to drug sale charge); *cf.* United States v. Ryan, 289 F.3d 1339, 1345 (11th Cir. 2002) (citing interrogatories, along with other opportunities for the jury to consider the entrapment defense, in holding that the failure to instruct the jury specifically on entrapment was not reversible error). *But see* State v. Henderson, 268 N.W.2d 173, 181 (Iowa 1978) (finding no due process or equal protection violation from the trial court's refusal to submit a verdict of "Not guilty by reason of self defense," where it was not authorized by statute and where the jury was instructed on self-defense).

defense in non-support cases: If the defendant is acquitted on grounds of non-paternity or maternity, as stated in the special verdict, then all further support proceedings are barred.[136] In a somewhat related area, North Dakota requires special verdicts in cases where the defendant raises double jeopardy as a defense.[137]

Special interrogatories are sometimes had on legal matters that underlie the verdict. In Texas, defendants have the right to special interrogatories on whether evidence was legally acquired, if the facts are in dispute.[138] Whether a witness is an accomplice[139] or whether the crime occurred within the jurisdiction[140] are both factual questions in part, yet are also legal prerequisites independent of the elements of the crime. These may be analogous to special interrogatories on miscellaneous facts, being additional conditions that might be overlooked by jurors as they discuss the meat of the crime. Finally and uniquely, North Carolina allows special verdicts as a sort of hypothetical for juries, where a defendant challenges a statute's constitutionality on grounds not in the record.[141]

In summary, special verdict forms and special interrogatories have been used in all these varied circumstances, by all of the Circuits, and by forty-six of the states.[142] Yet courts do not merely determine the category they find themselves in—RICO case or gun case or what-have-you—and mechanically approve or disapprove of the use of a special verdict. Instead, the current jurisprudence shows that courts use a number of guidelines in their decision-making. The next Part catalogs and analyzes these themes.

136. GA. CODE ANN. § 19-10-1 (2000).

137. N.D. R. CRIM. P. 31(e)(2).

138. McGlothlin v. State, 854 S.W.2d 190, 192 (Tex. App. 1993).

139. IOWA R. CR. P. 2.22(2) ("[The jury] must also return with a general verdict answers to special interrogatories submitted by the court . . . at the request of the defendant in prosecutions where . . . it is claimed any witness is an accomplice . . ."); *see also* State v. Patterson, No. 01C01-9501-CC-00023, 1996 Tenn. Crim. App. LEXIS 322, at *21 (May 24, 1996) ("At trial, however, the appellants failed to request a special verdict as to whether Ms. Bondurant was found to be an accomplice. We are therefore, unable to determine how the issue was resolved."). *But see* People v. Velasquez, 151 A.D.2d 159, 165 (N.Y. App. Div. 1989) (holding that a defendant's conviction must be reversed where a witness's testimony was uncorroborated and the reviewing court "cannot presume" that the jury found that witness a non-accomplice); *id.* at 163 n.2 ("The Criminal Procedure Law does not provide for special verdicts.").

140. State v. Dial, 470 S.E.2d 84, 89 (N.C. Ct. App. 1996) (holding that, where a jury returned a special verdict that North Carolina had jurisdiction over the crime, but could not agree on the defendant's culpability, leading to a mistrial, res judicata and collateral estoppel precluded relitigation of jurisdiction at the defendant's second trial); *cf.* Cynthia L. Randall, Comment, *Acquittals in Jeopardy: Criminal Collateral Estoppel and the Use of Acquitted Act Evidence*, 141 U. PA. L. REV. 283 (1992) (arguing that defendants should be able to request special interrogatories upon acquittal to avoid Double Jeopardy and collateral estoppel questions).

141. State v. Underwood, 195 S.E.2d 489, 494-95 (N.C. 1973).

142. The only states which have not used, permitted, or recommended special verdicts are Kansas, Louisiana, Nebraska, and Virginia. *Infra* notes 151-154 and accompanying text.

IV. GIVING SPECIAL VERDICTS: FUNCTIONS AND RULES

A review of the case law indicates that courts currently consider a number of questions when deciding whether to put a special verdict form or special interrogatory to the jury. Courts look inward, toward the law, and consider if the requested special verdict is mandatory or discretionary, and if the subject of the special verdict must be unanimous. They look outward, toward the jury, and consider if the jury might be confused or swayed by a special verdict's presence or absence. Finally, they look upward, toward reviewing courts, and consider whether the special verdict would facilitate appellate review. This is a useful framework of analysis, but courts too often look only in one of these directions. Put another way, although courts may not mechanically approve or disapprove of special verdicts based on the type of case, they often appear to fall into a similar trap by mechanically applying rules derived from a particular perspective, ignoring the relevance of others. This Part will document and evaluate these perspectives and the functions they serve.

A. *Mandatory or Discretionary*

The first question for a court when faced with a procedural request is whether there is a decision to make at all: Is the procedure mandated, discretionary, or forbidden? This question is generally settled by statute or rule, if it is addressed at all—there are very few cases mandating or forbidding the use of special verdicts in criminal cases.

As noted earlier, on the federal level, special verdicts are required in treason and criminal forfeiture cases.[143] They are also required by many states in death penalty[144] and insanity[145] cases. North Dakota, in its Rules of Criminal Procedure, requires special verdicts in treason, insanity, and double jeopardy cases, and "[w]hen a defendant interposes any other defense which cannot be reflected in a general verdict, and evidence of the defense is given at trial[; in such a case,] the jury, if it so finds, shall declare that fact in its verdict."[146] Iowa is the state with the most extensive use of special interrogatories; it requires that the jury determine whether a defendant used a firearm, in cases where the firearm use would subject the defendant to a mandatory minimum sentence.[147] A few other states have similar firearms requirements.[148] New York requires courts to separately submit predicate acts to the jury under its enterprise

143. *Supra* notes 44-47 and accompanying text.

144. *Supra* note 49 and accompanying text.

145. *Supra* note 132 and accompanying text.

146. N.D. R. CRIM. P. 31(e)(4) (2000).

147. IOWA R. CRIM. P. 2.6(6); *see also* State v. Luckett, 387 N.W.2d 298, 301 (Iowa 1986) (vacating mandatory sentence where rule was not complied with).

148. *Supra* notes 68-71 and accompanying text.

corruption statute.[149] A few courts have mentioned in passing that special verdicts should be given for sentencing, without elaboration.[150]

On the other end of the spectrum, Kansas's Supreme Court has prohibited having the jury answer any special questions because of concerns about jury power and nullification, as discussed previously.[151] Louisiana's Supreme Court has expressed similar concerns.[152] Nebraska's Supreme Court has simply noted that there is no authority that authorizes special verdicts.[153] Virginia's courts appear to have not confronted the question.[154]

The trend is to leave the matter to the judge's discretion. Oklahoma enshrined this principle in its Constitution.[155] The First and Fourth Circuits implicitly embraced it in their adoption of abuse of discretion standards of review.[156] Iowa, despite its extensive use of special verdicts and the apparently mandatory language of the Rule in question, also vests discretion in judges in non-firearms cases.[157] As seen earlier, special interrogatories in the federal sentencing context are subject to an uneasy form of discretion: Judges are allowed to give special interrogatories, but if they rely too much on them, the

---

149. N.Y. CRIM. PROC. LAW § 300.10(6) (McKinney 2001).

150. Garringer v. State, 909 P.2d 1142, 1150 (Haw. 1996) ("[T]he circuit court should instruct the jury, by special verdict interrogatories, to make any and all findings relevant to the imposition of enhanced sentences where the requisite aggravating circumstances are intrinsic to the commission of the crime charged."); State v. Robinson, 480 N.W.2d 644, 646 (Minn. 1992) ("In our view defendant had a right to let the jury authoritatively decide the issue of whether the abuse occurred before or after the effective date of the repeat offender statute. The jury made a determination in this case which would be authoritative had the jury been properly instructed.").

151. *See supra* note 32.

152. State v. Beavers, 364 So. 2d 1004, 1009 (La. 1978) ("Although special verdicts may guide a jury toward a logical result, there is grave danger that special verdicts in criminal cases would prevent the jury from performing its most important, uniquely human function, of providing the defendant with a safeguard against arbitrary, unchecked governmental power through community participation in the determination of guilt or innocence."). It is not clear to what extent the court continues to adopt this rationale. *See* State v. Miller, No. 99-0192, 2000 La. LEXIS 2288, at *70 (stating only that "[t]here is no authority for special verdicts in criminal cases. *See* State v. Beavers, 364 So. 2d 1004, 1009 (La. 1978); La. Code Crim. Proc. art. 810.").

153. State v. Bradley, 317 N.W.2d 99, 102 (Neb. 1982) ("The defendant's request that a form of special verdict be submitted to the jury was properly refused. Neb. Rev. Stat. § 25-1121 [the civil special verdict statute] has no application to criminal prosecutions.").

154. A LEXIS search of Virginia cases for "("special verdict" or "special interrogatory" or "special interrogatories") & (convict! or criminal!)" turned up just eight cases since 1900, none of them criminal.

155. OKLA. CONST. art. 7, § 15 ("In all jury trials the jury shall return a general verdict, and no law in force nor any law hereafter enacted, shall require the court to direct the jury to make findings of particular questions of fact, but the court may, in its discretion, direct such special findings.").

156. United States v. Ellis, 168 F.3d 558, 562 (1st Cir. 1999); United States v. Mancuso, 42 F.3d 836, 843 (4th Cir. 1994); *see also* United States v. Madkour, 930 F.2d 234, 237 (2d Cir. 1991) ("The decision to use interrogatories . . . in general, lies in the discretion of the district judge.")

157. IOWA R. CRIM. P. § 2.22(2) (2002) states, "[The jury] must also return with the general verdict answers to special interrogatories submitted by the court upon its own motion, or at the request of the defendant in prosecutions where the defense is an affirmative one, or it is claimed any witness is an accomplice, or there has been a failure to corroborate where corroboration is required." However, *State v. Harris*, 589 N.W.2d 239, 242 (Iowa 1999), interpreted the rule to place the submission of interrogatories at the court's discretion: "There is no language in the rule mandating the submission of interrogatories in all instances in which the conditions described in the rule exist."

sentence may be overturned on appeal.[158]

Courts sometimes draw on the analogy of jury instructions when deciding whether a special verdict is required.[159] This is a reasonable analogy, as a special verdict is certainly an instruction to the jury, and both can raise concerns about clarity and invading the jury's province.[160] However, the information provided by a special verdict runs both ways: to the jury, to direct them in their deliberations (at the least, to tell them how to fill out the form), and from the jury, in the form of their answers. Jury instructions can only run one way, to the jury. Thus, courts should be wary of placing too much emphasis on the jury instruction analogy. The information received from the jury may make special verdicts desirable, but it is not considered in jury instruction precedents.

B. *Unanimity*

Special verdicts are useful in ensuring that juries are unanimous on relevant components of the verdict.[161] Indeed, this is one of the justifications most frequently offered for their use. By requiring that the jury clearly address a particular issue, special interrogatories can ensure that the issue did not get lost in the shuffle during deliberations and can explicitly require that the jury's answer be unanimous.[162] The miscellaneous fact interrogatories may be an example of this effort.[163] Interrogatories may contribute to judicial economy by confirming the jury's unanimity and thus avoiding a retrial.[164] Indeed, one court held that the use of special interrogatories was not an error—despite their being

158. *Supra* note 60 and accompanying text; United States v. Jacobo, 934 F.2d 411, 416-17 (2d Cir. 1991) ("The view that the court was bound by the jury's findings as to quantity was erroneous.").

159. *E.g.*, *Mancuso*, 42 F.3d at 843 (noting that, like other jury instructions, failure to give a special interrogatory is reviewed for abuse of discretion); State v. Gilroy, 313 N.W.2d 513, 520 (Iowa 1981) (taking principles regarding when jury instructions must be given and extending them to special interrogatories to hold that it was proper to refuse to give a defendant's proposed interrogatory where there was no evidence at trial to support the interrogatory's theory).

160. For a discussion of clarity and confusion in special verdicts, see *infra* Part IV.C. For a discussion of invading the jury's province, see *infra* Part IV.E.

161. I speak of unanimity here, but the same principles apply to jurisdictions with majority verdicts; instead of ensuring that the entire jury agreed on a particular item, the special verdict would simply ensure that the necessary majority agreed. Accordingly, the use of special verdicts to ensure agreement need not be affected by the general debate of unanimity versus majority general verdicts. The opinions in the key Supreme Court cases give a concise overview of the debate. *See* Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972).

162. *E.g.*, United States v. Ham, 58 F.3d 78, 85 (4th Cir. 1995); State v. Myers, 544 S.E.2d 851, 852 n.1 (S.C. Ct. App. 2001).

163. *Supra* text accompanying notes 101-106.

164. *Cf.* State v. Weldy, 902 P.2d 1, 7 (Mont. 1995) (reversing and remanding, because it was "impossible to determine from the jury verdict form whether all 12 members of the jury, or fewer than 12, found appellant guilty of felony assault under subsection (a), subsection (b), or both"; the court therefore "conclude[d] that appellant's constitutional right to a unanimous verdict was not protected by either the jury instructions or the jury verdict form").

generally disfavored—in part *because* they ensured jury unanimity.[165]

The unanimity requirement is generally thought to protect defendants.[166] For instance, where the state offers numerous potential bad acts to support a conviction, special interrogatories can force the jury to focus on specific acts, mitigating prejudice from other bad acts introduced at trial[167] or reducing the chance that some jurors might agree on one act but not on another.[168] Crimes that involve a continuing course of conduct, such as sexual abuse[169] or criminal enterprise,[170] are particularly vulnerable to this problem. The law of when juries must be given specific unanimity instructions is complex and evolving, and appellate courts have been willing to let individual judges decide whether special interrogatories should accompany specific unanimity instructions.[171] However, courts should consider the ability of special interrogatories to clarify the record for review, as will be discussed shortly.[172]

Unanimity does not necessarily protect defendants, however, and courts should also be sensitive to the risks of using special interrogatories to explore the jury's position on defenses. The Supreme Court recognized this danger in *Mills v. Maryland*[173] and *McKoy v. North Carolina*,[174] in which it held that the jury's consideration of mitigating circumstances in a death penalty case could not be constrained. As a result, it overturned death sentences that resulted from special interrogatories that either implied[175] or required[176] unanimity as to mitigating circumstances.[177] A similar problem arose in *United States v.*

---

165. People v. Ribowsky, 568 N.E.2d 1197, 1201 (N.Y. 1991).

166. *E.g.*, Johnson v. Louisiana, 406 U.S. 356, 390 (1972); R.A.S. v. State, 718 So. 2d 117, 122-23 & n.4 (Ala. 1998); ABRAMSON, *supra* note 23, at 198. Jury unanimity came briefly to the forefront of the news during the Arthur Andersen obstruction-of-justice trial. After nine days of deliberations, jurors were told that they need not agree on which specific employee acted with criminal intent to reach a guilty verdict; the ruling was initially seen as allowing the jury to avoid a deadlock. Kurt Eichenwald, *Judge's Ruling on Andersen Hurts Defense: Jurors Are Not Required to Focus on One Person*, N.Y. TIMES, June 15, 2002, at C1. However, the jury eventually did agree on a specific individual. Kurt Eichenwald, *Andersen Guilty in Effort to Block Inquiry on Enron*, N.Y. TIMES, June 16, 2002, at A1.

167. United States v. Coonan, 839 F.2d 886, 890 (2d Cir. 1988).

168. *E.g.*, *R.A.S.*, 718 So. 2d at 122-23.

169. *Id.*; *cf.* Cooksey v. State, 752 A.2d 606, 610 (Md. 2000) (noting the double jeopardy and jury unanimity concerns raised by duplicitous pleading in a sexual abuse case where a continuing course of conduct was charged).

170. *E.g.*, *Coonan*, 839 F.2d at 887; Eric S. Miller, Note, *Compound-Complex Criminal Statutes and the Constitution: Demanding Unanimity as to Predicate Acts*, 104 YALE L.J. 2277, 2305 (1995) ("Special interrogatories guard well the defendant's right to a unanimous verdict without compromising the defendant's right to a general verdict [in complex criminal cases].").

171. *E.g.*, Hoover v. Johnson, 193 F.3d 366, 370 (5th Cir. 1999); United States v. Russell, 134 F.3d 171, 177 n.2 (3d Cir. 1998).

172. *Infra* Part IV.D.

173. 486 U.S. 367 (1988).

174. 494 U.S. 433 (1990).

175. *Mills*, 486 U.S. at 379-80.

176. *McKoy*, 494 U.S. at 439.

177. The federal death penalty statute now explicitly states that an individual juror may consider a mitigating factor to be established when weighing a death sentence, no matter how many other jurors agree. 18 U.S.C. § 3593(d) (2000). Similarly, Arkansas provides that if a jury unanimously agrees that a

Wilson,[178] in which the defendant offered an insanity defense. The following interrogatories were given:

> Question No. 1. Do you *unanimously* find that the defendant Joyce Wilson suffered from a mental illness on May 29, 1979? . . . If you have answered Question No. 1 yes . . . then you must answer Questions 2 and 3. Question No. 2. Do you *unanimously* find that the mental illness of the defendant Joyce Wilson on May 29th, 1979 was such as to prevent her from knowing the wrongfulness of her act? Question No. 3. Do you *unanimously* find that the mental illness of the Defendant Joyce Wilson on May 29th, 1979, was such as to render her substantially incapable of conforming her conduct to the requirements of the law she is charged with violating? If you have answered both Question No. 2 and Question No. 3 no, you should disregard the defense of insanity and limit your consideration to the other issues described in these instructions.
>
> If you have answered either Question No. 2 or Question No. 3 yes, you should render a verdict of not guilty because of the defendant's lack of criminal responsibility.[179]

The court held that the wording of these questions could have precluded a hung jury on insanity, since "the word 'unanimous' could easily mislead the jury into believing that unless all twelve found that defendant was insane, no one could so find."[180] This shifted the burden of proof to the defendant to prove that she was insane, instead of the government having to prove sanity to rebut her prima facie case.[181] While one is not entitled to a unanimous jury,[182] one is entitled to a jury that has not had its opinions unduly influenced, perhaps away from a defense.[183] The line to be walked on special interrogatories and unanimity is a delicate one, but well within the capacity of courts.

Of course, juries need not be unanimous on everything when arriving at a verdict. The usual formulation is that juries do not have to agree on the means of a crime's commission—even up to and including whether a person died as a result of the commission of a felony or because she was intentionally killed.[184] Juries do, however, have to be unanimous on the elements of a crime, even though determining which parts of a statute are elements can be a difficult

capital defendant was mentally retarded at the time of the crime, the defendant is automatically sentenced to life without parole; however, it explicitly provides that "this section shall not be deemed to require unanimity for consideration of any mitigating circumstance" currently in the law. ARK. CODE ANN. § 5-4-618(e) (2001).

178. 629 F.2d 439 (6th Cir. 1980).

179. *Id.* at 441.

180. *Id.*

181. *Id.* at 442.

182. Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972).

183. *Cf.* United States v. Thomas, 116 F.3d 606, 608-09 (2d Cir. 1997) ("[T]he district court erred in dismissing a juror, based largely on its finding that the juror was purposefully disregarding the court's instructions on the law, where the record evidence raised the possibility that the juror's view on the merits of the case was motivated by doubts about the defendants' guilt, rather than by an intent to nullify the law."); Huffman v. United States, 297 F.2d 754, 759 (5th Cir. 1962) (Brown, J., concurring in part and dissenting in part) ("I think a mistrial from a hung jury is a safeguard to liberty. . . . In the final analysis the *Allen* charge itself does not make sense. . . . If it says . . . there is a duty to *decide*, it is legally incorrect as an interference with [the jury's] rightful independence.").

184. Schad v. Arizona, 501 U.S. 624, 627 (1991).

business for courts.[185] Courts have tended to see the sets of "unanimity not required" and "special interrogatory not required" as fully congruent. In other words, a court's analysis can often be reduced to this line of reasoning: This particular portion does not need to be unanimous, therefore no special interrogatory needs to be given.[186] Indeed, one court has described special verdicts as the "logical progression" of a broad specific unanimity requirement.[187] And yet these syllogisms are overly pat and may lead courts to ignore other functions of special interrogatories.

For example, a CCE defendant must be proved to have supervised five or more people in the course of her narcotics enterprise.[188] The Supreme Court's interpretation of the CCE statute in *Richardson* left open the question of whether the jury must agree on which five people were supervised.[189] Lower courts have come to differing resolutions of the question, and accordingly have given or not given special interrogatories.[190] Yet the sufficiency of the evidence as to a person may be challenged, just as the sufficiency of a predicate act may be. Indeed, the Ninth Circuit reversed a CCE conviction for just this reason. In *United States v. Delgado*,[191] the sufficiency of the evidence on three people was uncontested. However, the rest of the people offered by the prosecution as supervisees—two named people, and their unnamed customers—were challenged by the defendant on appeal. The court noted that since

> no unanimity instruction regarding the five people was given . . . different jurors could count different people as among the five, and the jurors were allowed to count Fernandez and Fajardo and their customers toward the five persons managed by Delgado. [T]he conviction . . . can stand only if Fernandez, Fajardo, *and* their customers could properly be counted.[192]

The court held that the additional people could not be counted, and reversed the conviction.

In *Delgado*, the court found that all of the challenged people were

185. *E.g.*, Richardson v. United States, 526 U.S. 813 (1999) (splitting 6-3 on the elements of the CCE statute).

186. *E.g.*, United States v. Verrecchia, 196 F.3d 294, 301 (1st Cir. 1999); Hoover v. Johnson, 193 F.3d 366, 370-71 (5th Cir. 1999); United States v. Linn, 889 F.2d 1369, 1374 (5th Cir. 1989); State v. Nissen, 560 N.W.2d 157, 176 (Neb. 1997).

187. United States v. Jackson, 879 F.2d 85, 88 (3d Cir. 1989).

188. 21 U.S.C. § 848(c)(2)(A) (2000).

189. *Richardson*, 526 U.S. at 824.

190. *Compare* United States v. Ogando, 968 F.2d 146, 148-49 (2d Cir. 1992) (using special interrogatories), *and Linn*, 889 F.2d at 1374 (no unanimity requirement, therefore no special interrogatories), *with* United States v. Jackson, 879 F.2d 85, 88 (3d Cir. 1989) (using disfavor of special verdicts as a *reason* to reject unanimity for persons supervised in CCE trial), *and* United States v. Fearon, No. 91-3246, 1991 U.S. App. LEXIS 28980, at *14-15 (6th Cir. Dec. 3, 1991) (unanimity requirement but no special interrogatories). In *Ogando*, the court did not explicitly state that unanimity was required; however, three years earlier the same court had required it, United States v. Roman, 870 F.2d 65, 72-73 (2d Cir. 1989), and it did not state until several years later that the five persons did not have to be specifically identified, United States v. Polanco, 145 F.3d 536, 542 (2d Cir. 1998).

191. 4 F.3d 780 (9th Cir. 1993).

192. *Id.* at 784 (emphasis added).

ineligible, and therefore there was no way that the magic number of five could be reached. However, since the court did not know on which persons the jury relied, if even one of the persons was ineligible, the same result would follow: The entire verdict would have to be overturned.[193] If a special interrogatory had indicated that none of the jurors relied on the ineligible person, however, the reversal and potential retrial could have been avoided.[194] Further, the dangers of confusion and prejudicial spillover may be as serious for the persons allegedly supervised as for the claimed predicate acts. The question of whether the jury has to be unanimous on the people supervised fails to recognize these other interests, any one of which might well lead a judge to give a special interrogatory.[195] As with the jury instruction analogy, courts should resist the temptation to blindly follow self-imposed rules.

C. *Confusion and Complexity*

Another factor sometimes weighed by courts is that facts are the jury's special province and expertise.[196] As a result, when a case becomes very complex or confusing, courts will sometimes turn to special interrogatories as a way to clarify to juries what questions are before them. Indeed, one circuit requires them "when a court permits facts which pose a genuine possibility of juror confusion to go to the jury."[197] This is one of the best-known arguments for special verdicts, which arose in the complex-compound criminal statutes context;[198] however, confusion and complexity are not limited to these cases,

---

193. "[A] verdict [must] be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." Yates v. United States, 354 U.S. 298, 312 (1957) (citing Stromberg v. California, 283 U.S. 359, 367-368 (1931)). As one circuit has pointed out, "[s]pecial verdicts obviate [the *Yates*] problem by allowing a court to determine upon what factual and legal basis the jury decided a given question." United States v. Najjar, 300 F.3d 466, 480 (4th Cir. 2002) (affirming mail fraud convictions where multiple objectives were addressed in special verdicts).

194. United States v. Ruggiero, 726 F.2d 913, 922-23 (2d Cir. 1984) ("We take this opportunity to alert bench and bar that in a complex RICO trial such as this one, it can be extremely useful for a trial judge to request the jury to record their specific dispositions of the separate predicate acts charged, in addition to their verdict of guilt or innocence on the RICO charge. Then if, as here, a defect affecting a single predicate act is discovered, an automatic retrial [may] be avoided . . . ."); Bendle v. State, 583 P.2d 840, 844 n.4 (Alaska 1978) (holding that, "when a jury returns a special interrogatory indicating its belief that a defendant is guilty of a crime on more than one theory, . . . then even though error may be found as to one theory, the general verdict will be upheld if an alternative theory of conviction is sound").

195. *See also* United States v. Jelinek, 57 F.3d 655, 659 (8th Cir. 1995) ("Although use of an interrogatory in a complex case such as this would be wise practice, as it confirms the jury's conclusion that five persons were supervised, use of such an interrogatory is not required, and failure to use it is not clear error."); United States v. Fearon, No. 91-3246, 1991 U.S. App. LEXIS 28980, at *15 (6th Cir. Dec. 3, 1991) ("Defendant does make a sound argument that it would be good practice to require a jury to list those five or more persons that a conspirator supervised, but this is not required by statute or judicial precedent.").

196. *See supra* Part II.

197. United States v. Delgado, 4 F.3d 780, 792 n.5 (9th Cir. 1993).

198. *E.g.*, Grass, *supra* note 10.

making this a reason with potentially wide application.

There is no clear line on how big a trial has to be before special interrogatories should be given. In *United States v. Palmeri*, the Third Circuit upheld special interrogatories in a case where "five defendants were tried on a twenty-three count indictment alleging forty-six acts of racketeering and numerous other violations of federal law."[199] The court specifically cited the possibility of jury confusion, as well as prejudicial spillover, in permitting the interrogatories.[200] Special interrogatories also have been given in less complex cases. In *United States v. Korando*, the defendant was charged with the following: 1) a RICO violation, based on seven predicate acts; 2) conspiracy to violate RICO; and 3) committing a violent crime in aid of racketeering (a murder that was one of the predicate acts).[201] Though the court did not discuss why the interrogatories were given, and there were considerably fewer predicate acts at issue in *Korando* than *Palmeri*, the interrelationship of the charges still made special interrogatories prudent.[202]

United States v. Ogando[203] is an interesting example of the potential for jury confusion in complex cases. This was a CCE case in which the defendants requested special interrogatories on the predicate offenses and persons supervised, but insisted that the jury should be given just a blank form to write in their findings. The judge refused, "conclud[ing] that the case was too complex to give the jury blank-form interrogatories without accompanying instructions as to who or what could be inserted as answers."[204] The judge offered two variants,[205] both of which were rejected by the defendants; as a result, the jury was asked to return only a general verdict. The Third Circuit approved of the trial judge's actions, noting that the six-week trial included twenty-five prosecution witnesses, that the jurors were not allowed to take notes, and that the jury was never told, "This is an alleged series act."[206] Since the blank-form interrogatories would have required "a recall of Homeric proportions" on the jury's part, the proposed interrogatories were perfectly proper.[207] This rejection of the blank-form interrogatories is an excellent—though perhaps inadvertent, given the stress put on the trial court's

199. 630 F.2d 192, 202 (3d Cir. 1980).

200. *Id.*

201. 29 F.3d 1114, 1115-16 (7th Cir. 1994).

202. This interrelationship can be seen in the outcome of the case: The jury found that the defendant had committed only one of the predicate acts, an arson, thus leading to acquittals on the first count (the RICO violation, requiring two predicate acts) and the third (the murder). However, since the jury also found that he agreed to commit another of the predicate acts, he was convicted of conspiring to commit a RICO violation, the second count. *Id.*

203. 968 F.2d 146 (2d Cir. 1992).

204. *Id.* at 148.

205. The first was a multiple-choice form; the second was a blank form accompanied by a summary chart. *Id.*

206. *Id.* at 149 (quoting the trial judge).

207. *Id.*; *see also id.* (citing similar cases).

discretion[208]—example of the argument for using well-drafted special interrogatories in complex cases.

Special verdict forms can also be useful when there are multiple charges or several lesser included offenses for the jury to consider. As the New Jersey Supreme Court recognized,

> Most of the risks inherent in the use of special interrogatories are not present in special verdict sheets that have been properly prepared and submitted to the jury with appropriate instructions. Special verdict sheets that list only the charges and lesser-included offenses under an indictment, and do not list the elements of the offenses, are unlikely to be confusing or have any coercive effect on the jury. When multiple offenses are submitted to a jury, special verdicts are often helpful to an orderly deliberative process. . . . If, as in the present case, a charge . . . is submitted to a jury on multiple theories of liability under a single indictment or count thereof, a special verdict greatly facilitates merger determinations.[209]

While there currently appears to be little case law discussing the application of these principles, this does point out that special verdict forms can assist the jury even in the absence of predicate acts or complex conspiracies.

D. *Appellate Review*

As the previous sections have suggested, one of the broadest justifications for special verdicts is to facilitate appellate review. Indeed, the current use of special verdicts to determine on which of alternate grounds a jury relied,[210] or which predicate acts[211] or persons[212] underlie a RICO or CCE conviction, speaks directly to this rationale. Their use for miscellaneous items seems to be implicitly motivated, at least in part, by the needs of appellate review.[213] Once again, it has potentially wider application.

Special verdicts can be a useful tool when parties are attempting to test the law. For example, *State v. Wassil*,[214] a Connecticut case, considered whether someone could be guilty of manslaughter by "delivery of narcotics" or by "assisting in administering the narcotics."[215] The defendant was convicted of manslaughter via delivery, but acquitted of administering the narcotics; he used

---

208. *Id.*

209. State v. Diaz, 677 A.2d 1120,1127-28 (N.J. 1996); *see also* State v. Lambert, 612 N.W.2d 810, 816 (Iowa 2000) (finding merger of offenses because "no special interrogatories were submitted and we therefore have no way of knowing [which of] the alternative [theories of conviction] the jury based its decision" upon).

210. *Supra* notes 123-131 and accompanying text.

211. *Supra* notes 109-117 and accompanying text.

212. *Supra* notes 188-195 and accompanying text.

213. *Supra* notes 101-106 and accompanying text.

214. 658 A.2d 548 (Conn. 1995).

215. *Id.* at 551. The victim was a friend of the defendant's. While the victim was visibly inebriated, the defendant bought heroin for the victim, who injected it and collapsed fifteen seconds later. The defendant prevented another person from calling 911, and only called 911 himself after the victim stopped breathing, an hour later. The medical examiner testified that the victim would not have died but for the heroin; this testimony was uncontroverted. *Id.* at 550-51.

these results to argue that, as a matter of law, his conviction should be overturned because the jury found that the victim administered the narcotics to himself.[216] His argument was rejected.[217] In *State v. Stratton*,[218] the jury was asked to determine whether the defendant was guilty of operating a motor vehicle under the influence of intoxicating liquor (OUI) as either a principal or an accomplice. In upholding the conviction, Maine's Supreme Court noted that the question of whether one could be an accomplice to OUI was one of first impression in the jurisdiction.[219] These cases are in part alternate-theory cases, but more significantly, the special verdicts make it clear that the jury convicted on a novel theory, allowing the courts to give definitive answers on the acceptability of these theories.[220]

Other special interrogatories even more clearly allow the appellate courts to pass judgment on novel theories of law. To take a simple example, a jury in Idaho found in response to an interrogatory that a boot, not a firearm, was the deadly weapon; the conviction was affirmed over the defendant's argument that a boot could not be a deadly weapon under the instructions given to the jury.[221] A more complex problem arose in a New Jersey case, where the defendant was charged as both a principal and an accomplice in employing a juvenile to distribute a controlled dangerous substance. The parties disagreed over whether, under the accomplice theory, the age of the co-defendant had to be proved; as a result, "the judge decided to 'change the verdict sheet and break it down as accomplice or principal in case this becomes an issue on the appeal.'"[222] The verdict form allowed the reviewing court to reverse the conviction on the narrow basis of the sufficiency of the evidence, rather than deciding the statutory question, which was "not without difficulty of resolution."[223] Statutory interpretation was also at issue in a North Carolina case, where special interrogatories were used to overturn a sexual offense conviction; the court stated that

> On the peculiar facts of this case in which the jury found defendant not guilty of rape and not guilty of second-degree sexual offense on a person who was "physically helpless" [by special interrogatory], and in which there is no evidence of actual physical force or of constructive force which could reasonably and understandably generate fear in the prosecuting witness, we have determined that

216. *Id.* at 551.

217. *Id.* at 555-56.

218. 591 A.2d 246 (Me. 1991).

219. *Id.* at 246.

220. *Cf.* Crawford v. United States, 278 A.2d 125, 127 (D.C. 1971) ("We conclude upon the record before us that there existed sufficient independent circumstantial evidence of appellant's intent above and beyond his mere possession of a single needle and syringe to support his conviction of possession of implements of a crime. Therefore, we are not met with the issue posed by appellant that possession of the needle and syringe, standing alone, would not violate the statute.").

221. State v. Huston, 828 P.2d 301, 303, 304 (Idaho 1992).

222. State v. Lassiter, 791 A.2d 1012, 1018 (N.J. Super. Ct. App. Div. 2002)

223. *Id.* at 1019.

the trial court erred in denying the defendant's motion for nonsuit.[224]

This special interrogatory was used to probe the subtler question of whether a particular set of facts, at first glance covered by the concept of sexual offense, fit within the statute's language and the legislature's intent.

The use of special verdicts to facilitate appellate review might raise eyebrows among those worried that this is just another way to make it harder for defendants to win on appeal, instead of having a conviction reversed because its basis could not be determined. Although a thorough empirical study is outside the scope of this Note, an examination of the cases collected during this research suggests that the appellate outcomes of special verdict cases are not one-sided.

The cases can be divided into four categories: upheld because of a special verdict's result; upheld even without a special verdict; overturned because of a special verdict's result; and overturned because of the lack of a special verdict. Of the cases that could be catalogued, the smallest category is "upheld even without a special verdict" (16%); no category had a majority. More specifically, just over one-third of lower court decisions were upheld because of a special verdict's result; about one-fifth were overturned because of a special verdict's result; and just over one-quarter were overturned because a special verdict was not given.[225] Again, this is not a scientific or comprehensive survey; it is merely a categorization of cases already being examined for this Note.

The concern that special verdicts might further stack the deck against defendants deserves to be taken seriously. However, the lack of special verdicts can also have negative effects for defendants. The ultimate disposition of the above cases cannot be determined; it seems likely, however, that at least some of the cases that were overturned because of the lack of special interrogatories were retried instead of dismissed, putting the defendant through the burden of another trial and prolonging the time that a non-bailed defendant spends in jail. Some defendants may also value certainty more than others. Further, these special verdicts should make the criminal justice system more efficient, perhaps freeing up resources for other defendants. Thus, the cost-benefit analysis to defendants is not overwhelmingly against special verdicts. Combined with the potential benefits to the system's other participants, the ability of special verdicts to facilitate appellate review should be a plus, not a minus, in the decision to give them in appropriate cases.

224. State v. Raines, 324 S.E.2d 279, 283 (N.C. Ct. App. 1985).

225. Forty-three cases fell into these four categories: sixteen fell into the first category (37%), seven into the second (16%), eight into the third (19%), and twelve into the fourth (28%). Data on file with author.

E. *Interfering with Jury Deliberations*

Defendants should be concerned about the potential for special verdicts to confuse, mislead, or otherwise interfere with the jury's independent deliberation. *Spock* still casts a long shadow over the field, and *United States v. Wilson*[226] suggested one way that a court might continue to fall afoul of its principle. Unlike the prior considerations, this one reflects mostly on how to give a special verdict, though it could affect the decision to give one, if for instance the court felt that it could not give a suitably neutral interrogatory in the particular case.

Spock's overall concern, that special verdicts could inexorably lead a jury into convicting,[227] shows itself most clearly in cases that also involve a progression of questions. Thus, in *State v. Surette*,[228] the jury was given a set of special interrogatories that (much like those in *Spock*) broke down the elements of the charged crime of burglary. The jury was directed to answer each of four questions "yes" or "no," and was told that "If any question is unanimously answered 'No,' you must find the defendant not guilty of burglary."[229] The court overturned the conviction, holding that "[t]he special findings form . . . set the tone of the deliberations by directing the jury down a path towards a guilty verdict."[230] Since the charged crime was hardly so complicated as to require more aid than jury instructions,[231] the court's interrogatories were overly intrusive and fell afoul of the same problem as those in *Spock*.

Isom v. State[232] was a particularly obvious example of interrogatories improperly setting the tone of deliberations. There, the jury told the judge at

---

226. *Supra* notes 178-181 and accompanying text.

227. *Supra* notes 21-26 and accompanying text.

228. 544 A.2d 823 (N.H. 1988).

229. *Id.* at 824. The full text of the interrogatories is as follows:

Does the jury unanimously find beyond a reasonable doubt that:

1. John Surrette [sic] did, on or about March 7, 1986, purposely enter the dwelling occupied by Donald and Margaret Squires in Bedford in the nighttime?
   Answer: ___ (Yes or No)
2. John Surrette was not licensed or privileged to enter the Squires dwelling at the time?
   Answer: ___ (Yes or No)
3. The Squires dwelling was not open to the public at the time?
   Answer: ___ (Yes or No)
4. John Surrette entered the Squires dwelling at the time with the purpose to exercise unauthorized control over property i.e. possessions belonging to the Squires with the purpose to deprive them of it?
   Answer: ___ (Yes or No)

If any question is unanimously answered 'No,' you must find the defendant not guilty of burglary.

The jury finds the defendant John Surrette ___ (Guilty or Not Guilty) of burglary.

230. *Id.* at 825.

231. *Cf.* United States v. Desmond, 670 F.2d 414, 419 (3d Cir. 1982) (holding that "although we do not recommend the use of special interrogatories in a relatively uncomplicated case" of failing to report taxable income, it was not plain error where the defendant's counsel did not object).

232. 481 So. 2d 820 (Miss. 1985).

eleven o'clock at night that it was deadlocked. The judge read them this special question:

> Do you unanimously agree that the defendant is guilty of either murder or manslaughter according to the instructions given and that the killing of Frankie Shaw was not in necessary self-defense according to the instructions? If your answer is "yes," then you are authorized to return a verdict of guilty of manslaughter.[233]

Unsurprisingly, given the blatant hint conveyed by the tone of the question and the timing, the judge's actions were held to be reversible error; they "[i]n effect . . . peremptorily directed the jury to return a manslaughter conviction without regard to their personal conviction[,] and to this extent interfered with the deliberative process of the jury."[234] If *Allen* charges are criticized as potentially encouraging jurors to abandon their principled positions,[235] this should be even more so.

Spock, *Surette*, and *Isom* are fairly rare specimens, in that most cases do not involve such blatant attempts to push the jury's deliberations down a predetermined path. Subtler situations, all the same, have also been found objectionable. For instance, New Jersey's Supreme Court described the "singular vice" of special interrogatories as the "subtly coercive effect [they] can have upon the course of a jury's deliberations. They can constitute a form of mental conditioning which is antithetical to the untrammeled functioning of the jury."[236] The court was provoked to this strong language by the use of special interrogatories to determine whether a defendant's alleged acts took place within the statute of limitations. However, the interrogatories were given in a bifurcated trial; they thus asked the jury to assume, at the very start, that the offenses had been committed[237]—before going on to decide if the defendant was guilty in a general verdict. The court noted that special interrogatories are usually upheld when they "relate the special interrogatories to the jury's overall

233. *Id.* at 821.
234. *Id.* at 823.
235. *Supra* note 183.
236. State v. Simon, 398 A.2d 861, 865 (N.J. 1979).
237. The interrogatories were:

> I. Do you find unanimously and beyond a reasonable doubt
> (a) that a distribution of money was made to any or all of the defendants . . . in or around December, 1969 . . .
> (b) that a distribution of money was made to any co-conspirators . . . in or around December, 1969 . . .
>
> II. Do you find unanimously and beyond a reasonable doubt that the . . . partnership was a separate and distinct transaction rather than part of the overall alleged conspiracies charging the defendants . . . with illegal receipt of money and misconduct in office, assuming for the purpose of this determination that such conspiracies were in fact committed.
>
> III. Do you find unanimously and beyond a reasonable doubt that a distribution of money was made to any or all of the defendants . . . or to any or all of the alleged co-conspirators . . . in or around December, 1969, with regard to the Swagger-Heinige transaction.

Id. at 863-64.

deliberations and its general verdict."[238] Since these focused on a particular issue, even before deliberations on the general verdict, and used highly prejudicial phrasing, the conviction had to be overturned.[239]

In contrast to its prior case of *Spock* and the other cases above, the First Circuit offered an example of special interrogatories that did not require reversal. In *United States v. Southard*,[240] the jury was given only two questions. The verdict sheet asked whether the defendant was guilty of a particular crime; the instructions on the sheet were to consider the second question, whether the defendant was guilty of aiding and abetting, only if the answer to the first question was "no."[241] The court found that the number of questions minimized their leading potential;[242] each question was also directed at a different offense, though the court did not cite this as a reason.[243] In addition, the timing of the questions—answerable only after the jury had reached at least one general verdict—may have contributed to this decision. Similarly, in *State v. Sheldon*, the North Dakota Supreme Court found that a special interrogatory was "not designed to coerce the jurors into rendering a guilty verdict" because it was "necessary to distinguish whether Sheldon was guilty of a felony or a misdemeanor";[244] again, the court did not refer to the timing of the instruction, but it seems implicit in its reasoning.

Other courts have explicitly stated that the timing of a special verdict can be critical to its propriety. Judge Jon O. Newman, in his thorough and much-cited concurrence in the influential case of *United States v. Ruggiero*, noted:

> It may be worth considering an instruction to the jury . . . that the interrogatory . . . is to be answered only in the event that the jury has agreed upon a general verdict of guilty. This approach enables the jury to perform its generalized task first, responding to the interrogatory thereafter only if a guilty verdict reflects that the jury has found all the elements of an offense established.[245]

The New Jersey Supreme Court later agreed with Judge Newman, specifically noting that the "step-by-step" problem could be "much minimized" by using this order;[246] California's highest court has suggested a similar rationale.[247]

238. *Id.* at 866.

239. *Id.* at 869.

240. 700 F.2d 1 (1st Cir. 1983). The court held that while it was an error to give the interrogatories, the error was not plain and the conviction stood since the defendant's counsel had approved of the questions. *Id.* at 16.

241. *Id.* at 15-16.

242. *Id.* at 16.

243. *Cf.* People v. Ribowsky, 568 N.E.2d 1197, 1201 (N.Y. 1991) ("The special procedure used here did not prejudice the defendant and it assisted the court because it allowed the court to verify that the jury had followed its instructions to reach a separate, unanimous decision as to defendant's guilt on each specification.").

244. State v. Sheldon, 301 N.W.2d 604, 614 (N.D. 1980).

245. 726 F.2d 913, 928 (2d Cir. 1984) (Newman, J., concurring in part and dissenting in part).

246. State v. Hardison, 492 A.2d 1009, 1015 (N.J. 1985) (considering the problem of merger of a conspiracy and a completed offense).

247. People v. Farmer, 765 P.2d 940, 961 (Cal. 1989) (distinguishing *People v. Perry*, 499 P.2d

However, *Spock* specifically rejected the idea that this instruction made any difference to the coerciveness of its interrogatories,[248] indicating that the order of the consideration is not a cure-all solution for overly intrusive interrogatories. The most extreme solution would be to actually bifurcate deliberations by only handing the jury the form after they state that they have come to a verdict, thus forcing the jury to follow the court's wishes as to the order they do things.[249] However, this would lose any benefit of reminding jurors not to overlook miscellaneous factual predicates, for instance.[250] This is simply another example of how special verdicts must walk a fine line between clarifying and assisting deliberations, on the one hand, and compromising the jury's independence, on the other. An instruction that the jury should only fill out the verdict form after a general verdict is reached may be appropriate, but should be expected to play only a minor part in keeping a special verdict from overly influencing jury deliberations.

Special verdicts can break up jury deliberations in ways besides their timing. A general concern about special verdicts is that they can artificially fragment a trial, causing the jury to give too much weight to certain portions of the case.[251] The Fifth Circuit noted this problem in *United States v. Bosch*, stating that "allowing a conviction to flow from a jury's verdict which has been limited by judicially fashioned blinders to a single specified fact issue" is "fraught with danger for the defendant in particular and for the system in general."[252] In that case, there was another unresolved fact issue, and the verdict was reversed.[253]

As already discussed, the jury's deliberations can be tainted if the special verdict shifts the burden of proof to the defendant. The Sixth Circuit, which decided *Wilson*,[254] later confronted a similar issue in an unpublished opinion. In *United States v. Stone*,[255] the trial court gave the jury a special interrogatory on

---

129 (Cal. 1972), in which "the disapproved question required that the jury make a written finding regarding the sufficiency of the evidence before it could consider the issue of guilt").

248. *Supra* note 26 and accompanying text.

249. This procedure is often seen in sentencing cases. *E.g.*, *supra* note 49 and accompanying text; State v. Sullivan, 431 S.E.2d 502, 502 (N.C. Ct. App. 1993) (involving a habitual felon). However, it appears only infrequently in other contexts, for example, People v. Roybal, 617 P.2d 800, 802 (Colo. 1980) (involving bifurcation regarding defense), and bifurcation is mostly used in the reverse direction, as in *Coonan*, *supra* note 111 and accompanying text. *Contra* United States v. Collamore, 868 F.2d 24, 28 (1st Cir. 1989) (reversing district court's order to bifurcate a trial for being a felon in possession of a firearm, in part because special verdicts are disfavored in criminal trials).

250. *Supra* text accompanying notes 101-106.

251. *See generally* Granholm & Richards, *supra* note 10.

252. United States v. Bosch, 505 F.2d 78, 82 (5th Cir. 1974).

253. The special interrogatory limited the jury's deliberation to the single question of whether the defendant had been promised immunity for the charged drug offense, on the premise that the defendant had confessed on the stand. *Id.* at 80. However, the defendant's testimony was ambiguous. *Id.* at 79, 81 n.3.

254. *Supra* notes 178-181 and accompanying text.

255. No. 91-5561, 1992 U.S. App. LEXIS 15945 (6th Cir. June 29, 1992).

drug quantity, and then withdrew it when the jury stated that it was having a hard time answering the question.[256] The Sixth Circuit reversed the conviction, because it feared that the withdrawal suggested to the jury that it could convict on a lower level of proof.[257] In its way, this seems as disruptive as the additional special interrogatory in *Isom*.[258] Once the jury begins deliberating, the judge should avoid altering the information before the jury.

Courts must consider the fine details of proposed special interrogatories, such as the wording, as well as the structural aspects of the questions. For instance, in *Surette*, the court also objected to the special verdict form's direction that "If any question is unanimously answered 'No,' you must find the defendant not guilty of burglary."[259] It stated that this "suggest[ed] that if all answers were "yes," the defendant was guilty and the verdict must follow accordingly."[260] In *Leonard v. State*,[261] the jury was given a verdict form that was alleged to be suggestively worded; unlike the above forms, this one was parsed more generously by the Nebraska Supreme Court. The form read, in part:

> The mitigating circumstances we have found above:
>
> ____ Are sufficient to outweigh the aggravating circumstances found.
>
> Yes Are not sufficient to outweigh the aggravating circumstances found.
>
> Yes We therefore unanimously set the penalty at death.
>
> ____ We decline to impose the death penalty.[262]

The defendant argued that because the "therefore" followed the option that the mitigating circumstances were insufficient, the form took away the jury's chance to avoid the death penalty, regardless of the balance of aggravating and mitigating factors.[263] The court rejected this argument, saying that the position of the "decline to impose the death penalty" option, together with the jury instructions, indicated to the jury that they still had a final option—life. If the decline option had been placed second, the defendant's argument would have had more logical force.[264] The court's reasoning seems sound, and the entire question could have been avoided if the verdict form had excluded the "therefore" or included the jury instructions on discretion.

In another case considering the wording of a verdict form, the issue was again whether the form precluded the jury from reaching a particular verdict. In *State v. Myers*,[265] the form consisted of several questions, going down the scale

256. *Id.* at *11.
257. *Id.*
258. *Supra* note 232 and accompanying text.
259. State v. Surette, 544 A.2d 823 (N.H. 1988).
260. *Id.*
261. 958 P.2d 1220 (Nev. 1998).
262. *Id.* at 1235.
263. *Id.*
264. *Id.* at 1236.
265. 544 S.E.2d 851 (S.C. Ct. App. 2001).

of lesser-included offenses as to the alleged assault of two people. The jury was asked to answer "yes" or "no" to each question.[266] The defendant objected, as the form did not give "not guilty" as an option. The court agreed that it was the "preferred practice" to submit "not guilty" as a possible verdict, but held that any prejudice was negated by the fact that "guilty" did not appear on the form, either.[267] It is possible that the trial judge was attempting to simplify the form by using "yes" and "no" instead of "guilty" and "not guilty"; however, the difference seems so small as to make the more formal, and arguably more accurate, choice the wiser one. Kentucky's Supreme Court recently came to a similar conclusion.[268]

There are a number of potential pitfalls that special verdicts may fall into, resulting in interference with the jury's deliberations. If special verdicts are short or have only a few questions directed at each offense, are answered after the jury comes to a general verdict, and are carefully worded, then they are likely to avoid these pitfalls. Jurisdictions that commonly use special interrogatories should consider creating pattern ones, similar to pattern jury instructions.[269]

V. CONCLUSION

As this examination has shown, special verdict forms and special interrogatories are presently being used for a number of different purposes in a wide variety of criminal cases. However, the jurisprudence of special verdicts has not been developed with a depth that matches the breadth of current use; although courts consider a number of factors in deciding whether and how to give special verdicts in different cases, they do not usually consider more than one factor in any given case. However, when special verdicts are used properly, they can play several functions in the criminal justice system. These functions, and not narrow judicial categories, should provide the framework for courts to analyze whether to give special verdicts.

First, special verdicts can assist the jury. In complex or confusing cases, special verdicts can help the jury remember the case, keeping any number of things—charges, acts, even defendants—straight. They can also remind the jury not to overlook an important piece of the case, such as an unusual factual requirement or a legal prerequisite like jurisdiction. Second, special verdicts

266. *Id.* at 852 n.1.

267. *Id.* at 853.

268. Commonwealth v. Durham, 57 S.W.3d 829, 837 (Ky. 2001) ("We recognize that there are cases and circumstances in which eliciting particularized information from the jury is necessary and permissible . . . . Because a jury in a criminal case has the right to return a general verdict, however, we believe that all jury instructions in criminal cases must provide a verdict form which permits the jury to return a general verdict of either guilty or not guilty.") (citation omitted).

269. At least one state, Washington, currently has pattern special verdict forms. State v. Oster, 52 P.3d 26, 27 (Wash. 2002).

can assist other participants in the system, sometimes more than one at a time. For instance, a special verdict can ensure unanimity on an element of the crime, protecting the defendant; it would also ease appellate review, as do special verdicts on novel theories of law and alternate grounds of conviction. A special verdict can also provide information for the judge to consider in setting the grade of the offense or in sentencing the defendant. Obviously, a special verdict can serve many functions at once; a special interrogatory asking whether the defendant committed various predicate acts makes the case less confusing for the jury, protects the defendant by ensuring unanimity and lessening prejudicial spillover from various bad acts alleged at trial, may provide the judge with information relevant to sentencing, and clarifies the record for appellate review.

Because special verdict forms and special interrogatories serve more than one function, courts should not limit themselves to only one consideration when deciding whether to give a special verdict in a case, or when reviewing a lower court's decision. Instead of a formalist approach of forcing cases into categories (i.e., unanimous or not, complex or not, jury sentencing or not), courts should adopt a functional approach: Would using a special verdict provide a significant benefit in this case? Special verdicts are obviously neither necessary nor desirable in every case, so courts should consider the default to be a general verdict, only using special verdicts where there is a clear and articulable benefit to be gained from changing procedure.

Courts must then ask what detriment, if any, the defendant will experience if the special verdict is used. In many cases, the special verdict will be to the defendant's benefit, if not at her request, but the legacy of *Spock* should not be dismissed lightly. If there would be serious harm to the defendant, harm that could not be allayed by carefully wording the verdict form and the jury instructions, then the court should not give the special verdict, even if the benefit would be great. In other words, the test should not be a simple balancing; because of the presumptions of innocence and in favor of the general verdict, any harm to the defendant should be given more weight. On the other hand, this does not mean that any benefit to the defendant should outweigh harm to another actor; *United States v. Ogando* is an excellent example of the absurdities to which that could lead.[270] Throughout this entire analysis, courts should use the considerations they currently do, but as tools to focus on the functions of special verdicts. Hopefully, attorneys will use a similar functional analysis in deciding whether to seek or oppose special verdicts.

The following list of questions is an example of this functional analysis that may be of use to practitioners.

The analysis should begin by determining whether a special verdict would be useful.

270. *See supra* notes 203-208 and accompanying text.

1. Would a special verdict form or special interrogatories assist the jury in its deliberations?
   a. Is the case complex or confusing with regard to defendants, charges, or acts?
      Comment: Not all forms of complexity lend themselves to special verdicts. In order to avoid potentially leading the jury towards a guilty verdict, special verdicts should only be used when the potentially confusing elements are separable charges, defendants, or acts.
   b. Does the case involve an important legal prerequisite or factual requirement that might be overlooked by the jury?
      Comment: This might include jurisdiction (if the location of the crime is at issue), whether the statute of limitations has expired, or whether a witness is an accomplice.
2. Would a special verdict form or special interrogatories help protect the defendant?
   a. Do unusual circumstances make the unanimity requirement of particular concern?
      Comment: This inquiry is related to the complexity inquiry, since complexity is one reason why unanimity could be a problem for the jury. However, jurors must be unanimous on all of the elements of a crime, not simply the confusing ones. As a result, unanimity poses additional considerations such as the sufficiency of the evidence and ease of appellate review.
   b. Could the defendant be exposed to prejudicial spillover from evidence of other bad acts, whether alleged to have been committed by the defendant or by other people?
      Comment: This is also closely related to, but not congruent with, the complexity inquiry.
   c. Does the jury play a role in sentencing?
      Comment: Death penalty cases are the most obvious example of this, since the jury must find the aggravating factors necessary to impose the death penalty. However, special verdicts should be considered strongly in any situation where the jury finds facts that are directly relevant to the defendant's sentence.
3. Would a special verdict form or special interrogatories facilitate appellate review?
   a. Are any of the parties advancing a novel or contested theory or interpretation of the law?
      Comment: A special verdict could ease appellate review by revealing whether or not the jury relied on the controversial theory.

b. Could the jury reach a verdict on alternate theories?

Comment: This raises problems of determining both the sufficiency of the evidence and jury unanimity.

4. Are there any other circumstances that would make a special verdict form or special interrogatories useful?

If there is no significant benefit to using a special verdict form or special interrogatories, then the inquiry should be at an end because of the general preference for general verdicts. If there is a significant benefit, then a further question must be asked:

5. Would a special verdict form or special interrogatories be unfairly prejudicial to the defendant?

a. Could the special verdict improperly focus the jury's attention on one area, causing it to give less weight to other considerations?

Comment: Special verdicts separating out charges, defendants, or acts should generally not pose a problem in this regard. However, special interrogatories that claim to involve factual or legal prerequisites should receive close scrutiny.

b. Could the special verdict have the effect of improperly shifting the burden of proof to the defendant?

Comment: Defenses are the most obvious area where this might be a problem, since the interrogatories could imply that the jury has to be unanimous on the defense.

c. Do the proposed questions contain language that is confusing or could be perceived as coercive or restricting the jury's deliberations?

Comment: This inquiry will generally not prevent a special verdict from being used, since it will likely be rare that a special verdict could not be worded in a way that does not invade the jury's province. Instead, it may result in offered questions being reworded.

d. Are there any other circumstances that would make use of a special verdict prejudicial to the defendant?

If the special verdict would be unfairly prejudicial to the defendant, then it should not be given.

Special verdict forms and special interrogatories are a growing part of the criminal jury trial. This Note has attempted to illuminate some of their benefits and their risks. If courts and attorneys keep in mind that the basic functions behind jury deliberation are fact-finding and applying the independent conscience of the community, then they should be able to balance the benefits and risks of special verdicts to improve the jury system to everyone's benefit.