REACHING A VERDICT: EMPIRICAL EVIDENCE OF THE CRUMBLING CONVENTIONAL WISDOM ON CRIMINAL VERDICT FORMAT

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Criminal jurors in American courts typically deliver their judgments through "general verdicts," which announce only their legal conclusions of "guilty" or "not guilty." An alternative format, the "special verdict," would require jurors to confirm their findings of fact regarding each element of the applicable law before reaching a conclusion. Courts have long rejected the use of special verdicts in criminal cases, under the presumption that general verdicts better protect criminal defendants and their right to trial by jury. However, this procedural status quo and its underlying rationale have never been empirically examined—until now.

This Article presents the results of an original nationwide survey on criminal verdict format that comprehensively measured the perspectives of over 1,600 stake-

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holders in the American legal system: state and federal judges, prosecutors, criminal defense attorneys, law professors, criminal science experts, civil litigators, and jury-eligible lay citizens—with former criminal defendants, victims, and jurors also included in the sample. The data reveal that criminal case law's longstanding position and presumptions on verdict format are strikingly misaligned with the views and intuitions of current legal stakeholders. The majority of stakeholder groups—including criminal defense attorneys and jury-eligible lay citizens—on average supported the use of special criminal verdicts and expected this format to benefit criminal defendants and jurors in various ways. Furthermore, even the only two stakeholder groups that on average supported the legal status quo in favor of general criminal verdicts—prosecutors and judges—did not subscribe to its rationale that special verdicts will disadvantage criminal defendants.

The survey's findings call the criminal legal system's status quo on verdict format into question by debunking the conventional wisdom on which it is based. The Article also draws upon the data to consider why the norm in favor of general criminal verdicts nonetheless persists. It concludes by identifying next empirical steps to qualitatively understand and experimentally test the legal and psychological implications of verdict format in criminal cases.

INTRODUCTION

In the recent high-profile trial of entrepreneur Elizabeth Holmes, who stood charged with eleven counts of wire fraud and conspiracy for misrepresenting her company's blood-testing technology, the criminal jurors in the case spent eighteen weeks in court.[1] Over the course of those months, they heard lengthy testimony from over thirty witnesses, and they then received nearly forty pages of "detailed and sometimes convoluted" instructions on the law.[2] Finally, the jurors were faced with the cognitive challenge of assessing all the evidence against every legal element of the charged crimes to determine their verdict, with a prison sentence of up to twenty years hanging in the balance for the defendant.[3]

After the first fourteen hours of deliberation, the *Holmes* jurors asked if they could take the legal instructions home to review them, but the judge denied this request because any consideration of the

[1] *See* Erin Woo, *What It Was Like on the Elizabeth Holmes Jury for 18 Weeks*, N.Y. TIMES (Jan. 10, 2022), https://www.nytimes.com/2022/01/10/technology/elizabeth-holmes-trial-jurors.html [https://perma.cc/2KSH-RJ4Z].

[2] Heather Somerville, *A Look at the Jury Instructions as Deliberations Continue*, WALL ST. J. (Dec. 23, 2021, 12:23 PM), https://www.wsj.com/livecoverage/elizabeth-holmes-trial-theranos/card/a-look-at-the-jury-instructions-as-deliberations-continue-ajOweFkrter7Gc9K3Fip [https://perma.cc/NMX7-22QZ]; Erin Griffith & Erin Woo, *32 Witnesses, at Least 4 Shushes: The Elizabeth Holmes Trial by the Numbers*, N.Y. TIMES (Dec. 31, 2021), https://www.nytimes.com/2021/12/31/business/elizabeth-holmes-trial-numbers.html [https://perma.cc/HY6M-ETAP].

[3] *See* Bobby Allyn, *As the Jury Deliberates Elizabeth Holmes' Fate, Experts Say 'Fraud Is Complicated*,' NPR (Dec. 29, 2021, 5:01 AM), https://www.npr.org/2021/12/29/1068639311/elizabeth-holmes-jury-theranos-fraud-case [https://perma.cc/3F9S-FDUA].

case had to "take place only in the jury deliberation room."[4] Additionally, the verdict form itself provided the jurors with no guidance on how to go about their decisionmaking task, because they were rendering a *general verdict*.

The general verdict is the American legal system's default verdict format in criminal trials.[5] It asks jurors only for their "ultimate legal conclusions" of "guilty" or "not guilty" on the criminal charges.[6] Moreover, "[d]ue in part to an effort to protect the jury's independence," jurors delivering a general verdict are "usually give[n] no directions" or "only very general instructions . . . about how to manage their deliberation."[7]

The *Holmes* jurors therefore came up with their own how-to manual on reaching a criminal verdict. They "enlisted the courtroom deputy . . . to make photocopies of one juror's handmade worksheet that listed the criteria for a conviction on each count,"[8] and they then used that checklist to reach their legal conclusions.[9] This initiative exemplifies a longstanding observation of jury researchers and legal practitioners: Jurors are typically hampered not by a lack of effort or motivation, but by "unnecessary procedural obstacles to high-quality decision making."[10]

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[4] Yasmin Khorram, *Judge in Elizabeth Holmes Trial Tells Jurors They Can't Take Home Instructions, as Deliberations Continue*, CNBC (Dec. 21, 2021, 6:48 PM), https://www.cnbc.com/2021/12/21/judge-in-holmes-trial-tells-jurors-they-cant-take-home-instructions.html [https://perma.cc/D8NC-78E6].

[5] *See infra* Section I.B.

[6] Zhang v. Am. Gem Seafoods, Inc., 339 F.3d 1020, 1031 (9th Cir. 2003) (affirming a distinction between general verdicts, which require application of law to facts, and special verdicts, which compel the jury to focus exclusively on factfinding).

[7] Kayla A. Burd & Valerie P. Hans, *Reasoned Verdicts: Oversold?*, 51 CORNELL INT'L L.J. 319, 342 (2018).

[8] Woo, *supra* note 1.

[9] *See id.* (reporting that the jury ultimately found the defendant guilty on four of the eleven criminal charges).

[10] Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCH. PUB. POL'Y & L. 788, 788 (2000); *see also* Shari Seidman Diamond, Beth Murphy & Mary R. Rose, *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537, 1605–06 (2012) (noting that "fundamental gaps between what we tell jurors to do and what we want them to do" hinder optimal jury performance); Phoebe C. Ellsworth, *Are Twelve Heads Better than One?*, 52 LAW & CONTEMP. PROBS. 205, 218–24 (1989) (arguing that jurors' misunderstanding of the law is not a function of their mental capacities); Laurence M. Hyde, *Fact Finding by Special Verdict*, 24 J. AM. JUDICATURE SOC'Y 144, 145 (1941) (discussing structural reasons for poor jury performance); Sylvia H. Walbolt & Mariko Shitama Outman, *Jurors Are Only Human: Proper Instructions Can Aid Their Good-Faith Deliberations*, LITIG., Winter 2020, at 44, 50 (noting that even the strongest judicial instructions cannot overcome obstacles to good-faith deliberations intrinsic to the jury system).

What if the verdict form itself provided jurors with step-by-step guidance on ascertaining whether or not their determinations of fact prove all the legal elements of the charged crimes? This does, in fact, occur in civil jury trials through a *special verdict*—which asks jurors "interrogatory questions on issues of fact"[11] to assess whether the evidence meets the requisite legal standards. However, criminal courts across federal and state jurisdictions have "long . . . disfavored" and "almost universally condemned" the use of special verdicts, reasoning that this format will constrain the autonomy of criminal jurors—including their power to nullify the law—and thereby compromise the criminal defendant's constitutional right to trial by jury.[12]

In focusing on the special verdict's presumed drawbacks, might criminal courts have overlooked impediments that the preferred general verdict potentially poses to the decisionmaking agency of criminal jurors and the rights of criminal defendants? Decades of empirical studies and anecdotal observations have indicated that lay decisionmakers rendering legal judgments with jury instructions as their only guide are susceptible to legal misunderstandings, misapplications of law, and biases that risk undermining not only the jury's voice but also important constitutional values of due process and equal protection.[13] Furthermore, criminal case law's conventional wisdom that special verdicts will disadvantage criminal defendants stands in stark contrast to the "[i]nherited trial lawyer wisdom" from civil litigation, where special verdicts are regularly used and understood to protect defendants by more actively enforcing the burden of proof.[14]

Adding to these disconnects, the pro-jury nullification rationale that criminal courts have put forth for disfavoring special verdicts is conspicuously at odds with judges' routine efforts to root out jury nullification in criminal trials.[15] The judiciary's unidirectional focus, in

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[11] FED. R. CIV. P. 49 (discussing two types of special verdicts).

[12] *See* United States v. Gonzales, 841 F.3d 339, 342, 347 (5th Cir. 2016); Commonwealth v. Hopkins, 117 A.3d 247, 254 (Pa. 2015); United States v. Spock, 416 F.2d 165, 180–82 (1st Cir. 1969); Table of State and Federal Caselaw/Rules on Criminal Verdict Format by Jurisdiction (on file with author) [hereinafter State-Federal Caselaw/Rules Table]; *infra* Sections I.B.–C.

[13] *See* Avani Mehta Sood, *What's So Special About General Verdicts? Questioning the Preferred Verdict Format in American Criminal Jury Trials*, 22 THEORETICAL INQUIRIES L. 55, 58, 64–78 (2021) [hereinafter Sood TIL] (examining whether the general verdict enables incomplete applications of law, misunderstandings of law, and extralegal biases, in contravention of constitutional values); *see also* U.S. CONST. amends. VI, XIV, § 1 (articulating the right to a trial by an impartial jury and the Due Process Clause); *infra* Section II.B.1(a)–(b).

[14] Elizabeth G. Thornburg, *The Power and the Process: Instructions and the Civil Jury*, 66 FORDHAM L. REV. 1837, 1885 (1998); *see also infra* Section II.A.

[15] *See infra* Sections I.C., II.B.2.

the verdict format context, on enabling nullifying acquittals is also puzzling given that jury scholars have deemed nullification a relatively rare phenomenon,[16] whereas proving every element of a charged crime beyond a reasonable doubt is constitutionally central to every case that goes to trial before a jury.[17]

The status quo in favor of general criminal verdicts is nevertheless so firmly entrenched that criminal litigators rarely request special verdicts, trial courts typically deny such requests when litigators make them, and appellate courts routinely uphold such denials.[18] In addition, legal scholars have "almost completely ignored" the subject of jury verdict format,[19] leaving it largely to law students to question the general verdict's dominance in criminal jury trials.[20]

These gaps and inconsistencies give rise to important empirical questions. Do current stakeholders in the American legal system generally share criminal case law's opposition to special verdicts and subscribe to its rationale that this format will impede criminal jury decisionmaking and the rights of criminal defendants?[21] Moreover, how do legal stakeholders think the use of special, rather than general,

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[16] *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 165 (1966) ("The jury does not often consciously and explicitly yield to sentiment in the teeth of the law."); Burd & Hans, *supra* note 7, at 349 ("By all accounts, outright jury nullification, in which jurors knowingly go against the law and the facts to reach an unsupportable verdict, is exceedingly rare."); Shari Seidman Diamond & Jason Schklar, *The Jury: How Does Law Matter?*, *in* HOW DOES LAW MATTER? 191, 204 (Bryant G. Garth & Austin Sarat eds., 1998) ("[A]lthough the jury possesses [nullification] powers, its rule departures occur relatively infrequently.").

[17] *In re* Winship, 397 U.S. 358, 363 (1970); *see infra* Section II.B.1(b).

[18] *See infra* Section I.B.

[19] Thornburg, *supra* note 14, at 1838.

[20] *See e.g.*, Michael Csere, Note, *Reasoned Criminal Verdicts in the Netherlands and Spain: Implications for Juries in the United States*, 12 CONN. PUB. INT. L.J. 415 (2013); Alice Curci, Note, *Twelve Angrier Men: Enforcing Verdict Accountability in Criminal Jury Trials*, 59 WASH. U. J.L. & POL'Y 217 (2019); Meghan A. Ferguson, Note, *Balancing Lenity, Rationality, and Finality: A Case for Special Verdict Forms in Cases Involving Overlapping Federal Criminal Offenses*, 59 DUKE L.J. 1195 (2010); Katherine L. Harvey, Note, *Criminal Law*—United States v. Canino *and the Continuing Criminal Enterprise: Do Drug Kingpins Have a Right to Specific Juror Agreement?*, 15 W. NEW ENG. L. REV. 271 (1993); Kyle B. Grigel, Note, *Credibility Interrogatories in Criminal Trials*, 71 STAN. L. REV. 461 (2019); Erika A. Khalek, Note, *Searching for a Harmless Alternative: Applying the Harmless Error Standard to Alternative Theory Jury Instructions*, 83 FORDHAM L. REV. 295 (2014); Elizabeth A. Larsen, Comment, *Specificity and Juror Agreement in Civil Cases*, 69 U. CHI. L. REV. 379 (2002); Kate H. Nepveu, Note, *Beyond "Guilty" or "Not Guilty": Giving Special Verdicts in Criminal Jury Trials*, 21 YALE L. & POL'Y REV. 262 (2003); Debra L. Weber, Note, *Reversal of a RICO Predicate Offense on Appeal: Should the RICO Count Be Vacated?*, 27 SAN DIEGO L. REV. 183, 198–207 (1990); Kevin Wright, Comment, *Misplaced Treasure: Rediscovering the Heart of the Criminal Justice System Through the Use of the Special Verdict*, 19 COOLEY L. REV. 409 (2002).

[21] *See* Sood TIL, *supra* note 13, at 79.

verdicts will affect pre-trial, trial, and appellate processes and outcomes in criminal cases?

To begin answering these long-neglected questions, this Article presents the results of an original, nationwide survey that measured the views and intuitions of over 1,600 respondents across ten groups of stakeholders in the American legal system: judges, prosecutors, public defenders, private criminal defense attorneys, criminal law professors, criminal science experts, civil litigators, civil law professors, law students, and jury-eligible lay citizens. Former criminal defendants, victims, and jurors were also represented within these stakeholder groups.

The survey's findings impugn the deep-seated status quo in favor of general criminal verdicts and its pro-defense rationale. The majority of stakeholder groups—including criminal defense attorneys and jury-eligible lay citizens—on average supported the use of special criminal verdicts and expected this format to benefit criminal jurors and defendants in various ways. However, the stakeholder groups with the most power and discretion in the criminal legal system, prosecutors and judges, strongly supported the status quo in favor of general criminal verdicts—albeit not for the defense-friendly reasons cited by the conventional wisdom of criminal case law.

Surveyed stakeholders also shared their predictions about upstream and downstream effects that the use of special verdicts in criminal jury trials might have on the criminal adjudication process more broadly, from charging decisions and plea negotiations to appeals. These intuitions reflect the conception of the jury as "the visible cap of an iceberg [that] exposes but a fraction of its true volume," because it "control[s] [not] merely the immediate case before it, but [also] the host of cases *not* before it."[22]

Thus, the format in which criminal jurors render their verdicts merits empirical attention, even though the vast majority of criminal

[22] KALVEN & ZEISEL, *supra* note 16, at 31–32 (1966) (emphasis added); *see also* SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES 18 (10th ed. 2017); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 96–97 (2003); Shawn D. Bushway, Allison D. Redlich & Robert J. Norris, *An Explicit Test of Plea Bargaining in the "Shadow of the Trial,"* 52 CRIMINOLOGY 723, 750 (2014); Diamond & Schklar, *supra* note 16, at 194; Anna Offit, *Prosecuting in the Shadow of the Jury*, 113 Nw. U. L. REV. 1071, 1072 (2019); Daniel C. Richman, Old Chief v. United States*: Stipulating Away Prosecutor Accountability?*, 83 VA. L. REV. 939, 973 (1997). *But see* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464 (2004) (highlighting impediments to efficient plea bargaining in the shadow of criminal trials); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2563 (2004) (arguing that the shadow-of-trial model applies to violent crimes but not drug crimes).

cases are resolved through pleas.[23] Moreover, estimates suggest that over a hundred thousand criminal cases go to trial before a jury annually,[24] and the majority of these trials result in convictions[25]—so, empirically informed considerations of criminal verdict format could affect a substantial number of lives. Finally, the U.S. Supreme Court has recognized criminal trial by jury as being "fundamental to the American scheme of justice."[26] The procedural integrity of this constitutional right should therefore be assessed robustly, regardless of how often it is invoked.

This Article's empirical investigation of criminal verdict format proceeds as follows: Part I describes the legal history, status quo, and

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[23] *See Table D-4—US District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending December 31, 2021*, STAT. TABLES FOR THE FED. JUDICIARY [hereinafter USDC], https://www.uscourts.gov/statistics/table/d-4/statistical-tables-federal-judiciary/2021/12/31 [https://perma.cc/Q8F7-VTUY] (reporting that 90% of federal criminal dispositions in 2021 were guilty pleas); *CSP STAT Criminal*, COURT STATISTICS PROJECT [hereinafter NCSC], https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-criminal [https://perma.cc/5SKF-U9CG] (reporting that the state court jury trial rate in 2021, for the twenty states providing data, was 0.21%); MARK MOTIVANS, BUREAU OF JUST. STATS., FEDERAL JUSTICE STATISTICS, 2020, at 10 (2020), https://bjs.ojp.gov/content/pub/pdf/fjs20.pdf [https://perma.cc/N2KG-8GCK] (noting that only 2% of defendants' cases were adjudicated through a bench or jury trial); Judicial Council of California, 2020 Court Statistics Report: Statewide Case Load Trends 55, 85 (2020) [hereinafter CA Trends], https://www.courts.ca.gov/documents/2020-Court-Statistics-Report.pdf [https://perma.cc/2LYV-4HLG] (reporting 81% disposition by plea in 2018–2019); MICH. CTS., STATEWIDE CIRCUIT COURT SUMMARY: 2019 COURT CASELOAD REPORT (2021), https://www.courts.michigan.gov/49f191/siteassets/reports/statistics/caseload/2019/2019statewide.pdf [https://perma.cc/2ZL5-GUJH] (reporting 80% disposition by plea in 2019); N.Y. DIV. CRIM. JUST. SERVS., CRIMINAL JUSTICE PROCESSING REPORT: CRIMINAL JUSTICE CASE PROCESSING, ARREST THROUGH DISPOSITION, NEW YORK STATE, JAN–DEC 2019, at 19 (2020), https://www.criminaljustice.ny.gov/crimnet/ojsa/dar/DAR-4Q-2019-NewYorkState.pdf [https://perma.cc/3WAT-8SK3] (reporting 81% disposition by plea in 2019); WIS. CT. SYS., 2019 FELONY DISPOSITION SUMMARY BY DISPOSING COURT OFFICIAL: STATEWIDE REPORT (2020), https://wicourts.gov/publications/statistics/circuit/docs/felonystate19.pdf [https://perma.cc/BY9M-GBMK] (reporting 72% disposition by plea in 2019).

[24] GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 7 (2007) (using direct survey reports, population statistics, and published data to estimate that there were 148,558 state jury trials and 5,463 federal jury trials in 2006); *see* USDC, *supra* note 23 (reporting 1,673 federal criminal jury trials pre-pandemic in 2019); NCSC, *supra* note 23 (reporting 33,955 criminal jury trials across 22 out of 50 states in 2019).

[25] *See* USDC, *supra* note 23 (reporting an 88% conviction rate pre-pandemic in 2021); CA Trends, *supra* note 23 (reporting an 84% total conviction rate in pre-pandemic fiscal year 2018–2019); TEX. OFF. OF CT. ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY: FISCAL YEAR 2018, at 70, https://www.txcourts.gov/media/1443455/2018-ar-statistical-final.pdf [https://perma.cc/2KTG-MREM] (reporting 81% conviction rate in pre-pandemic fiscal year 2018–2019); BRIAN J. OSTROM & NEAL B. KAUDER, EXAMINING THE WORK OF STATE COURTS, 1998, at 116 (1999).

[26] Duncan v. Louisiana, 391 U.S. 145, 145 (1968).

conventional wisdom on verdict format in criminal jury trials. Part II draws upon observations from civil litigation, psychology, and judicial practice to identify cracks in the conventional legal wisdom. Part III presents the quantitative results of the stakeholder survey, which reveal that current views and predictions on special criminal verdicts are strikingly misaligned with the longstanding position and presumptions of criminal courts, albeit with important exceptions. Part IV explicates how the survey debunks the conventional legal wisdom on criminal verdict format and contemplates why the status quo in favor of general criminal verdicts nonetheless persists. Finally, the Article lays out next empirical steps for expanding upon its findings: qualitative analysis of stakeholders' written explanations of their views on criminal verdict format[27] and experimental studies that put both the stakeholders' intuitions and the legal system's conventional wisdom to a test.[28]

I
Verdict Format in Jury Trials

A. How It Started: The "True" Special Verdict

Leading American casebooks on criminal law have traditionally introduced law students to theories of punishment and the defense of necessity through an 1884 English common-law case: *Regina v. Dudley & Stephens*.[29] The defendants in the case were shipwrecked sailors who survived for several weeks at sea by eating two salvaged tins of turnips, one small turtle, and, ultimately, "the body and blood" of a fellow crew member—who they killed to consume.[30]

The facts of this case are memorable, but the format in which the criminal jury rendered its verdict is often ignored or relegated to a casebook footnote.[31] The *Dudley & Stephens* jurors delivered only their determinations of the facts, "stated with the cold precision of a special verdict," and "pray[ed] the advice of the Court thereupon" to

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[27] *See* Avani Mehta Sood, *In Their Own Words: A Qualitative Analysis of Legal Stakeholders' Views and Intuitions on Special Criminal Verdicts* (unpublished manuscript) (on file with author) [hereinafter Sood, Qualitative].

[28] *See* Avani Mehta Sood, *Grudging Acquittals and Biased Lenity: Experiments on the Legal and Psychological Effects of Verdict Format in Criminal Cases* (unpublished manuscript) (on file with author) [hereinafter Sood, Experimental].

[29] R v. Dudley & Stephens (1884) 14 QBD 273 (Eng.); *see, e.g.*, Joshua Dressler, Cases and Materials on Criminal Law 48–50 (3d ed. 2003); George P. Fletcher, Rethinking Criminal Law 823 (Oxford Univ. Press 2000); Kadish et al., *supra* note 22, at 89; John Kaplan, Robert Weisberg & Guyora Binder, Criminal Law: Cases and Materials 605–15 (8th ed. 2017).

[30] *Dudley & Stephens*, 14 QBD at 273–74.

[31] *See, e.g.*, Kaplan et al., *supra* note 29, at 611 n.48.

reach a judgment.[32] In other words, the jury delivered a *true special verdict*—a format in which jurors submit "the naked facts, as they find them to be proved."[33] The trial judge then applies the relevant laws to those facts and "determine[s] the ultimate legal result."[34]

The true special verdict, which is "almost as old as the jury itself,"[35] evolved over time from being a protection "self-imposed by the jury" to "a control measure administered by the judge."[36] Common-law jurors were empowered to initiate the use of true special verdicts to "free themselves from any concern with the law of the case."[37] They typically invoked this power to guard against "attaint," a process through which jurors could be severely punished—including through imprisonment, forfeiture of their goods, destruction of their property, and banishment of their wives and children—for delivering a faulty verdict, even if their error was based on an honest misunderstanding of the law.[38] Jurors were thus keen to "avoid the danger" of rendering a general verdict.[39]

At the same time, common-law judges initially resisted true special verdicts, because "[w]hen the jurors stated the facts correctly and drew no conclusion therefrom, the entire responsibility for a proper judgment was upon the justices."[40] Verdict format in common-law jury trials was thus akin to a game of hot potato: "[T]he evidence is clear that the contest between the justices and the jurors was not one for the enlargement of jurisdiction but for the evasion of responsibility."[41]

By the late seventeenth century, however, English judges were asserting a more "dominant influence" in criminal jury trials.[42] They

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[32] *Dudley & Stephens*, 14 QB at 275, 279.

[33] GEORGE B. CLEMENTSON, A MANUAL RELATING TO SPECIAL VERDICTS AND SPECIAL FINDINGS BY JURIES 1 (1905).

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

[35] Skidmore v. Balt. & Ohio R.R. Co., 167 F.2d 54, 57 (2d Cir. 1948); *see* John W. Staton, *The Special Verdict as an Aid to the Jury in Civil Cases*, 16 A.B.A. J. 192, 192 (1930) (noting that special verdicts had "long existed" before they were codified in the thirteenth century).

[36] Ruth B. Ginsburg, *Special Findings and Jury Unanimity in the Federal Courts*, 65 COLUM. L. REV. 256, 256 (1965); *see* CLEMENTSON, *supra* note 33, at 8 (discussing limitations on the right of the jury to, by its own motion, return a special verdict).

[37] Edson R. Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253, 257 (1920).

[38] *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 403 (1768) (listing punishments for attaint); Edmund M. Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 YALE L.J. 575, 576, 582 (1923) (discussing risk of attaint); Abner Eddins Lipscomb, *Special Verdicts Under the Federal Rules*, 25 WASH. U. L.Q. 185, 187–88 (1940) (noting perils of attaint).

[39] CLEMENTSON, *supra* note 33, at 1.

[40] Morgan, *supra* note 38, at 585.

[41] *Id.* at 586.

[42] John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 291 (1978).

would probe, reject, and require redeliberation of jury verdicts with which they disagreed.[43] In addition, judges would proactively direct jurors to deliver true special verdicts when they "saw a conflict looming" between their own views and their predicted views of the jury.[44]

In *Dudley & Stephens*, for example, British officials were "determined to make a test case" of the defendants, in order to deter "a virtual crime wave of maritime cannibalism" that was occurring at the time.[45] The public, however, held Dudley and Stephens in high, heroic regard for having survived their ordeal at sea.[46] Fearing that the jury would nullify the law to acquit the defendants "unless it was headed off by careful legal contrivance," the court took the matter into its own hands by ordering a true special verdict.[47]

Such heavy-handed judicial tactics gave rise to a "heated political contest over the role and control of the jury."[48] By the end of the eighteenth century, the judiciary's "power to order special verdicts became controversial,"[49] and English jurors began to "insist upon the right to render general verdicts over the repeated commands of tyrannical judges not to do so."[50] Criminal juries in the American colonies also played an important political role in "resisting English imperial rule" by delivering general verdicts that nullified laws and prosecutions that the public perceived as unjust to defendants.[51] Even after American Independence, a Federalist Paper in support of the U.S. Constitution warned against the use of true special verdicts that "induced" criminal jurors to "act[] under the auspices of judges who had predetermined [the defendant's] guilt."[52] The special verdict format thus became synonymous with constraining the criminal jury and disadvantaging the criminal defendant.

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[43] *Id.* at 291.

[44] *Id.* at 295–96.

[45] KAPLAN ET AL., *supra* note 29, at 611.

[46] *Id.*

[47] *Id.* (noting that even the *Dudley & Stephens* jury's special verdict on the facts of the case is said to have been "actually ghostwritten by the trial judge").

[48] JESSICA K. LOWE, MURDER IN THE SHENANDOAH: MAKING LAW SOVEREIGN IN REVOLUTIONARY VIRGINIA 153 (2019) (discussing judges' use of special verdicts to control juries).

[49] Langbein, *supra* note 42, at 296.

[50] Amendments to Rules of Civil Procedure for the United States District Courts, 31 F.R.D. attach. at 617, 619 (1963) [hereinafter Statement of Justices Black & Douglas] (statement of Mr. Justice Black and Mr. Justice Douglas) (noting the contentious relationship between judges and jurors with respect to verdict format).

[51] NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 9–10, 41–47, 49, 52 (2007); *see* Barkow, *supra* note 22, at 53–59.

[52] THE FEDERALIST NO. 65, at 397 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

B. How It's Going: The Procedural Status Quo

In 1968, the U.S. Supreme Court recognized trial by jury in serious criminal cases as a fundamental constitutional right under the Due Process Clause, to protect criminal defendants from "arbitrary law enforcement."[53] As a result, the jury—not the judge—must now "reach the requisite finding of 'guilty' " in a criminal trial.[54] This development rendered the true special verdict, in which the jury determines the facts but the judge determines the legal outcome, " 'suspect' as a matter of due process" in criminal law.[55]

There is, however, a constitutionally viable verdict format for criminal jury trials that combines the features of the general verdict and the true special verdict. It will hereinafter be referred to simply as the *special verdict* (as distinct from the *true* special verdict), although it is also known in criminal and civil contexts by various other terms.[56] This special verdict tasks jurors not only with answering interrogatory questions that "focus attention on the key issues"[57] in the case (like the true special verdict), but also with deciding "the ultimate issue of guilt"[58] (like the general verdict). Importantly, jurors' responses to the interrogatory questions in this format "merely serve to test and explain" their conclusions,[59] thereby serving as a guide or "a check upon the correctness" of the ultimate verdict, "rather than as the verdict itself."[60]

In most American jurisdictions, there is "no per se rule" against using the above-described special verdict in criminal jury trials.[61] Criminal courts have struck down constitutional challenges to this

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[53] Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

[54] Sullivan v. Louisiana, 508 U.S. 275, 277 (1993).

[55] WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 24.10(a) (4th ed. 2015) (quoting Heald v. Mullaney, 505 F.2d 1241, 1245 (1st Cir. 1974)).

[56] Other terms for the special verdict format include "verdict with interrogatories," "special interrogatories," "special questions to the jury," and "general verdict with answers to written questions." *See* Black v. United States, 561 U.S. 465, 472 n.9 (2010); Zhang v. Am. Gem Seafoods, Inc., 339 F.3d 1020, 1031 (9th Cir. 2003); 3 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 512 (5th ed. 2015); FED. R. CIV. P. 49(b) ("The court may submit to the jury forms for a general verdict, together with written questions on one or more issues of fact that the jury must decide.").

[57] Ginsburg, *supra* note 36, at 257.

[58] State v. Payne, 447 P.3d 515, 524 (Or. Ct. App. 2019); *see* LAFAVE ET AL., *supra* note 55, § 24.10(a) (discussing special verdicts and interrogatories).

[59] Samuel M. Driver, *A Consideration of the More Extended Use of the Special Verdict*, 25 WASH. L. REV. 43, 44 (1950).

[60] Martin A. Kotler, *Reappraising the Jury's Role as Finder of Fact*, 20 GA. L. REV. 123, 132 (1985).

[61] United States v. Desmond, 670 F.2d 414, 416 (3d Cir. 1982); *see* State-Federal Caselaw/Rules Table, *supra* note 12 (providing examples and exceptions).

format as "meritless."[62] Moreover, although the Federal Rules of Criminal Procedure and state equivalents have not codified the use of special verdicts, the U.S. Supreme Court has noted that this does "not mean . . . that special verdicts in criminal cases are never appropriate," as legislative silence "counsels caution" but "is not dispositive."[63]

Decades of case law from state and federal courts nevertheless reflect widespread resistance—ranging from a "lack of judicial enthusiasm" to outright "antipathy"—toward using special criminal verdicts.[64] At the trial level, criminal courts generally decline to permit special verdicts even when criminal defendants request them.[65] Beyond limited circumstances in which criminal jurors are statutorily or constitutionally required to answer specific factual questions (such as for a particular legal element or for sentencing purposes),[66] a criminal defendant cannot "demand special interrogatories as of right."[67]

Appellate courts, in turn, have "rather consistently denied" criminal defendants' claims that a trial judge's "refusal to honor a request

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[62] People v. Gurule, 51 P.3d 224, 275 (Cal. 2002); *see* Heald v. Mullaney, 505 F.2d 1241, 1245–46 (1st Cir. 1974) (noting that not every use of special questions violates the Due Process Clause); People v. Hardy, 418 P.3d 309, 339–40 (Cal. 2018) (upholding use of special verdict in which "[t]he jury did not merely find facts and leave the judgment to the court," but rather "stated its conclusions of law").

[63] Black v. United States, 561 U.S. 465, 472 & n.11 (2010).

[64] *Desmond*, 670 F.2d at 416–18; *see, e.g.*, United States v. Spock, 416 F.2d 165, 182–83 (1st Cir. 1969); United States v. Ogando, 968 F.2d 146, 149 (2d Cir. 1992); United States v. Gonzales, 841 F.3d 339, 342 (5th Cir. 2016); United States v. Stonefish, 402 F.3d 691, 697 (6th Cir. 2005); United States v. Reed, 147 F.3d 1178, 1180–81 (9th Cir. 1998); United States v. Kenner, 272 F. Supp. 3d 342, 414–15 (E.D.N.Y. 2017); United States v. Acosta, 149 F. Supp. 2d 1073, 1075–76 (E.D. Wis. 2001); State v. Hummel, 393 P.3d 314, 326 (Utah 2017); Commonwealth v. Hopkins, 117 A.3d 247, 260 (Pa. 2015); State v. Dilliner, 569 S.E.2d 211, 215 (W. Va. 2002); State v. Havens, 852 P.2d 1120, 1123 (Wash. Ct. App. 1993); State v. Osburn, 505 P.2d 742, 749 (Kan. 1973); Cook v. State, 506 S.W.2d 955, 959 (Tenn. Crim. App. 1973).

[65] *See, e.g.*, *Osburn*, 505 P.2d at 748 ("[T]he appellant requested that seven special questions be submitted to the jury for answer along with the verdict forms. This request for answers to special questions was properly denied."); *cf. Hopkins*, 117 A.3d at 260. *But see Stonefish*, 402 F.3d at 697.

[66] Examples include federal and state provisions calling for a special jury finding of an "overt act" in criminal treason, *e.g.*, U.S. CONST. art. III, § 3; N.D. R. CRIM. P. 31(e)(3); forfeiture proceedings, *e.g.*, Pimper v. State *ex rel.* Simpson, 555 S.E.2d 459, 463 n.6 (Ga. 2001) (Hunstein, J., dissenting); aggravating and mitigating factors in the sentencing phase of a capital case, *e.g.*, Federal Death Penalty Act of 1994, 18 U.S.C. § 3593; TEX. CODE CRIM. PROC. ANN. art. 37.071(2)(b) (West 2021); and facts relevant to criminal sentencing that must be determined by a jury rather than a judge, *e.g.*, Alleyne v. United States, 570 U.S. 99, 115–16 (2013); KAN. STAT. ANN. § 21-4718 (2006). Some states' rules of criminal procedure additionally include provisions that more broadly authorize judges to supplement general verdicts with interrogatory questions. *See* OKLA. CONST. art. 7, § 15; CAL. PENAL CODE § 1150 (West 2023); IDAHO CODE ANN. § 19-2304 (West 2023); MASS. R. CRIM. P. 27(c); WASH. R. CTS. LIMITED JURISDICTION 6.16(b).

[67] United States v. Ogando, 968 F.2d 146, 149 (2d Cir. 1992).

for special findings was error requiring a new trial."[68] Appellate judges have also "declined to delineate bright-line rules" on when and how trial courts should employ special criminal verdicts.[69] In the relatively rare criminal cases where a special verdict is used at trial and results in a conviction that is appealed, reviewing courts typically consider whether the interrogatory questions on the special verdict form "confuse[d] the jury,"[70] caused unfair prejudice to the defendant,[71] failed to enforce the correct standard of proof,[72] or were inconsistent with the ultimate outcome reached by the jury.[73] But even when upholding special criminal verdicts, appellate courts often bookend their opinions with the caveat that they generally "do not recommend the use of special interrogatories" in criminal jury trials.[74]

The judiciary's "historic aversion" to special criminal verdicts has lessened in cases involving complex criminal statutes,[75] such as the federal Continuing Criminal Enterprise Statute (CCE)[76] or the Racketeer Influenced and Corrupt Organization Act (RICO) and

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[68] LAFAVE ET AL., *supra* note 55, § 24.10(a); *see also, e.g.*, United States v. Enmon, 686 F. App'x. 769, 774 (11th Cir. 2017) (finding that use of a general verdict form was not error and did not require a new trial); United States v. Shelton, 588 F.2d 1242, 1250–51 (9th Cir. 1978) (finding that refusal to grant special verdict was not error); United States v. Sababu, 891 F.2d 1308, 1325–26 (7th Cir. 1989) (finding that failing to use a special verdict form was not error).

[69] *Ogando*, 968 F.2d at 149.

[70] United States v. Wilson, 629 F.2d 439, 443–44 (6th Cir. 1980).

[71] *See, e.g.*, United States v. Desmond, 670 F.2d 414, 418–19 (3d Cir. 1982); Harned v. United States, 508 F. App'x 848, 851 (11th Cir. 2012).

[72] *See, e.g.*, *Wilson*, 629 F.2d at 444.

[73] *See, e.g.*, United States v. Gonzales, 841 F.3d 339, 348 (5th Cir. 2016); United States v. Randolph, 794 F.3d 602, 610–12 (6th Cir. 2015).

[74] *See, e.g.*, *Desmond*, 670 F.2d at 414–15, 419 (beginning and ending the opinion with a cautionary note against special interrogatories); State-Federal Caselaw/Rules Table, *supra* note 12 (providing additional examples).

[75] *Gonzales*, 841 F.3d at 347; *see also Desmond*, 670 F.2d at 418 (noting the usefulness of special interrogatories in complex cases with multiple defendants); United States v. Melvin, 27 F.3d 710, 716 (1st Cir. 1994) (acknowledging the need for special verdicts where statutes "proscribe[] more than one type of conduct"); United States v. Ogando, 968 F.2d 146, 149 (2d Cir. 1992) (noting a preference for special interrogatories in "particularly complex criminal cases"); United States v. Stegmeier, 701 F.3d 574, 581 (8th Cir. 2012) (supporting the use of special verdicts for offenses composed of a series of acts); State v. Gauthier, 939 A.2d 77, 83 (Me. 2007) (endorsing special verdicts where there is a need to "compel individual consideration of the charges"); Nepveu, *supra* note 20, at 271–74 (noting the use of special interrogatories for federal drug and firearm offenses); Kate Stith-Cabranes, *The Criminal Jury in Our Time*, 3 VA. J. SOC. POL'Y & L. 133, 140–41 (1995) (noting the increased use of special verdicts as criminal codes have grown in complexity).

[76] 21 U.S.C. § 848; *see, e.g.*, United States v. Delgado, 4 F.3d 780, 792 n.5 (9th Cir. 1993) (Hall, J., concurring) (endorsing special verdicts in a CCE case to avoid juror confusion); *cf.* United States v. Roman, 870 F.2d 65, 73 (2d Cir. 1989) (noting that a CCE defendant could have, but did not, request a special interrogatory requiring identification of the other persons whom he supervised).

state equivalents.[77] Some courts have also encouraged the use of "special verdict forms that query jurors as to the elements" of affirmative defenses that are particularly "confusing and difficult," such as the entrapment defense.[78]

Notwithstanding these pockets of receptivity, the assertion that "[s]pecial verdicts are generally disfavored in criminal trials . . . appears so often in judicial discussions of jury verdicts . . . [that] it is nearly a platitude."[79] Moreover, even if appellate courts express a "preference for special interrogatories" in particular types of criminal cases, trial courts are not required to comply.[80] Some courts, in fact, have refused to entertain any deviations from the general criminal verdict without explicit statutory authorization, asserting that "the only proper verdicts to be submitted [in criminal cases] . . . are 'guilty' or 'not guilty' of the charges."[81] The American judiciary's overall stance on criminal verdict format is thus quite clear: "As a general rule, juries are asked to drill no deeper than a judgment of conviction or acquittal[, which] is the essence of a general verdict,"[82] whereas special criminal verdicts "remain disfavored and discouraged."[83]

C. Criminal Law's Conventional Wisdom

United States v. Spock—a 1969 federal appellate opinion issued the year after the U.S. Supreme Court recognized criminal trial by jury as a fundamental constitutional right[84]—is widely regarded and cited as the "leading authority against the use of special verdicts" in criminal cases.[85] The *Spock* defendants were highly respected figures

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[77] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968; *see, e.g.*, United States v. Cianci, 378 F.3d 71, 90 (1st Cir. 2004); United States v. Coonan, 839 F.2d 886, 891 (2d Cir. 1988); United States v. Palmeri, 630 F.2d 192, 202–03 (3d Cir. 1980); N.Y. CRIM. PROC. LAW §§ 310.5(4), 300.10(6) (McKinney 2022) (requiring the use of special verdicts in a state RICO analogue); People v. Besser, 749 N.E.2d 727, 729 (N.Y. 2001); Nepveu, *supra* note 20, at 277 (reviewing the use of special interrogatories in cases charged under RICO and its New York analogue).

[78] United States v. Poehlman, 217 F.3d 692, 698 n.7 (9th Cir. 2000) (noting that the special verdict format "[n]ot only . . . ease[s] the process of appellate review, it encourages juries to focus their deliberations on the elements of the defense").

[79] Nepveu, *supra* note 20, at 263 (citation omitted).

[80] *Ogando*, 968 F.2d at 149.

[81] State v. Osburn, 505 P.2d 742, 749 (Kan. 1973); *see* State v. Dilliner, 569 S.E.2d 211, 215 (W. Va. 2002) ("[T]he submission of special interrogatories to a jury in a criminal case when not authorized by statute constitutes reversible error.").

[82] State v. Hummel, 393 P.3d 314, 326 (Utah 2017).

[83] *Dilliner*, 569 S.E.2d at 214; *see also* WRIGHT & MILLER, *supra* note 56 § 512.

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

[85] United States v. Melvin, 27 F.3d 710, 716 (1st Cir. 1994); *see* LAFAVE ET AL., *supra* note 55, § 24.10(a) (citing *Spock* as an authoritative source on the rarity of special verdicts in criminal cases).

who the government charged with conspiring to help young men evade the controversial military draft for the widely opposed war in Vietnam,[86] which had "engendered considerable animosity and frustration" amongst the American public.[87] The case thus garnered much attention and outrage,[88] making it potentially ripe for jury nullification.[89]

The *Spock* trial court gave the criminal jury a special verdict form that included "ten special questions to be answered 'Yes' or 'No' . . . in addition to the general issue of guilty or not guilty."[90] The jury found all but one of the defendants guilty,[91] but the U.S. Court of Appeals for the First Circuit overturned the convictions.[92] The appellate court held that the use of a special verdict was "not sanctioned by general practice" and constituted prejudicial error for the following reason:

> 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.[93]

The court further asserted that "the jury, as the conscience of the community, must be permitted to look at more than logic," because "the constitutional guarantees of due process and trial by jury require that a criminal defendant be afforded the full protection of a jury unfettered . . . ."[94]

Following this logic, criminal case law has embraced the general verdict for "not lead[ing] or fetter[ing] the jury" and "allow[ing] for jury nullification"[95]—the power of criminal jurors to disregard evi-

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[86] *See* JESSICA MITFORD, THE TRIAL OF DR. SPOCK, THE REV. WILLIAM SLOANE COFFIN, JR., MICHAEL FERBER, MITCHELL GOODMAN, AND MARCUS RASKIN 3–6 (1969); John H. Fenton, *Dr. Spock Guilty with 3 Other Men in Antidraft Plot*, N.Y. TIMES, June 15, 1968, at 1–2.

[87] *Spock*, 416 F.2d at 168; *see also A Creeping Doubt: Public Support for Vietnam in 1967*, ROPER CTR. FOR PUB. OP. RSCH (Aug. 16, 2017), https://ropercenter.cornell.edu/blog/creeping-doubt-public-support-vietnam-1967 [https://perma.cc/EMW2-W2QX].

[88] MITFORD, *supra* note 86, at 59 (noting "hundreds" of letters protesting the indictment, as well as "long and thoughtful" articles in leading media outlets "characterizing [the defendants] as patriots and men of conscience rather than criminals").

[89] *See A Creeping Doubt*, *supra* note 87 (showing that many Americans supported a withdrawal from Vietnam, and nearly half believed it was a mistake to have entered in the first place); *see also Jury Nullification*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining jury nullification).

[90] *Spock*, 416 F.2d at 180.

[91] *Id.* at 168 (referring to the trial court's holding).

[92] *Id.* at 182–83.

[93] *Id*. at 182.

[94] *Id.*

[95] United States v. Acosta, 149 F. Supp. 2d 1073, 1076 (E.D. Wis. 2001).

dence and laws that conflict with their "sense of justice, morality, or fairness."[96] Commentators and courts have concluded that the power to issue a general verdict "translates into the power to nullify the law,"[97] whereas the special verdict "infringe[s]" on the criminal jury's "power to follow or not to follow the instructions of the court."[98]

Jury nullification is typically understood to benefit criminal defendants, who jurors can acquit without regard to the law if they have "no sympathy for the government's position,"[99] because the U.S. Constitution's Double Jeopardy Clause shields jury acquittals from judicial review (whereas judges can overturn jury convictions that are clearly inconsistent with evidence and law).[100] The judiciary's adoption of a pro-nullification rationale for the status quo in favor of general criminal verdicts thus unidirectionally focuses on the jury's role in "tempering [the law's] rigor" in favor of criminal defendants,[101] even though juries have historically shaped the development of substantive criminal law towards both leniency and stringency, depending on prevailing community values.[102] In sum, the criminal law eschews the use of special verdicts under the presumption that this format will "harm" criminal defendants.[103]

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96 *Jury Nullification*, *supra* note 89.

97 Barkow, *supra* note 22, at 36; *see* People v. Fernandez, 31 Cal. Rptr. 2d 677, 679 (Ct. App. 1994) (noting that the jury's power to acquit notwithstanding the law "holds as long as courts adhere to the general verdict in criminal cases").

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

99 United States v. Wilson, 629 F.2d 439, 443 (6th Cir. 1980).

100 *See* U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."); Jackson v. Virginia, 443 U.S. 307, 318–19 (1979) (discussing standard of appellate review for contested convictions); Wiercinski v. Mangia 57, Inc., 787 F.3d 106, 112–13 (2d Cir. 2015) (discussing standard for a judgment notwithstanding the verdict in the event of a jury conviction). *But see infra* notes 166–68 and accompanying text (discussing the challenges of overturning jury convictions).

101 United States *ex rel.* McCann v. Adams, 126 F.2d 774, 776 (2d Cir. 1942); *Ogull*, 149 F. Supp. at 276 (noting the jury's historical role of "tempering rules of law by common sense").

102 *See, e.g.*, MODEL PENAL CODE § 210.3 cmt. at 63 (AM. L. INST. 1980) (endorsing "a formulation that affords sufficient flexibility to differentiate in particular cases . . . [and] leaves [this] judgment to the ordinary citizen in the function of a juror"); MODEL PENAL CODE § 2.02 cmt. at 237 (AM. L. INST. 1985) ("[With regard to the legal standard for recklessness,] [t]here is no way to state this value judgment[;] . . . the point is that the jury must evaluate the actor's conduct and determine whether it should be condemned."); Jonathan Simon, *Uncommon Law: America's Excessive Criminal Law & Our Common-Law Origins*, DAEDALUS, Summer 2014, at 62, 63–67 (discussing how the American jury model has the dual effect of introducing leniency into the criminal law while also legitimizing the administration of harsh punishments).

103 United States v. Acosta, 149 F. Supp. 2d 1073, 1075–76 (E.D. Wis. 2001).

II
Cracks in the Conventional Wisdom

Despite its widespread acceptance, the criminal legal system's stance on verdict format reflects surprising incongruities. This Part considers how experience-based insights from civil litigation, psychological realities of jury decisionmaking, and judicial efforts to prevent jury nullification complicate criminal law's conventional wisdom on verdict format and suggest that the status quo in favor of general criminal verdicts rests on shaky ground.

A. Comparative Civil Insights

While condemning the use of special verdicts in criminal cases, the *Spock* court noted that such verdicts are "an everyday occurrence" in civil litigation.[104] Indeed, the Federal Rules of Civil Procedure and state analogues have codified the use of both special and true special verdicts in civil jury trials;[105] and the U.S. Supreme Court has recognized that civil courts may "require specific answers to special interrogatories."[106] In fact, some jurisdictions deem it reversible error for trial judges to refuse to submit requested interrogatory questions to civil juries.[107]

Pointing to "a wealth of written material denouncing the general verdict and advocating that it be replaced by the fact-finding special verdict" in civil trials, one federal judge observed that this view has been adopted "[w]ith unusual unanimity of opinion."[108] That is not to say that all uses of special verdict formats in civil cases have been

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104 United States v. Spock, 416 F.2d 165, 180 (1st Cir. 1969).

105 *See* Fed. R. Civ. P. 49 (permitting courts to require a general verdict with answers to written questions or special verdicts delivered "in the form of a special written finding on each issue of fact"); *see also, e.g.*, Ala. R. Civ. P. 49; Ark. R. Civ. P. 49; Cal. Civ. Proc. Code §§ 624–25 (West 2022); Mass. R. Civ. P. 49; Me. R. Civ. P. 49; Or. R. Civ. P. 61.

106 Walker v. N.M. & S. Pac. R.R. Co., 165 U.S. 593, 598 (1897).

107 Frank Cicero, Jr. & Roger L. Taylor, *Verdict Strategy*, Litig., Summer 1991, at 41, 59; *see* 735 Ill. Comp. Stat. 5/2-1108 (2022) ("Submitting or refusing to submit a question of fact to the jury may be reviewed on appeal to determine whether the trial court abused its discretion.").

108 Driver, *supra* note 59, at 45–46; *see also* Skidmore v. Balt. & Ohio R.R., 167 F.2d 54, 67, 70 (2d Cir. 1948) (noting that a special verdict is usually preferable to a general verdict in civil cases); Kotler, *supra* note 60, at 130 (noting that general verdicts have greater potential for abuse); Charles T. McCormick, *Jury Verdicts Upon Special Questions in Civil Cases*, 27 J. Am. Judicature Soc'y 84, 84–85 (1943) (discussing problems with general verdicts as compared to special verdicts in civil cases); Franklin Strier, *The Road to Reform: Judges on Juries and Attorneys*, 30 Loy. L.A. L. Rev. 1249, 1249–53, 1262–63 (1997) (proposing greater use of special verdict forms in civil cases based on survey of judges); Sunderland, *supra* note 37, at 262–66 (discussing the benefits of special verdicts while addressing some criticisms); Elizabeth A. Faulkner, *Using the Special Verdict to Manage Complex Cases and Avoid Compromise Verdicts*, 21 Ariz. St. L.J. 297, 325 (1989)

without contention,[109] but concerns in this regard have been directed largely toward the *true* special verdict.[110] Meanwhile, civil procedure scholars and practitioners have argued that special verdicts in which jurors both answer interrogatory questions and render final conclusions "can guide the jury's decision-making and provide insight into its reasoning, without stripping the jury of its normative role in applying the Constitution."[111]

Directly contrary to the conventional wisdom in criminal law, the "[i]nherited trial lawyer wisdom" based on actual use of special verdicts in civil cases "holds that general verdicts favor plaintiffs[,] while narrower question formats favor defendants."[112] Civil litigators have explained the underlying logic of this understanding as follows: "Usually a special-verdict form asks a yes-or-no question for each of the facts related to each element of the cause of action. To win, a plaintiff usually needs to get all 'yeses.' A defendant only needs one 'no.'"[113]

(discussing the benefits of special verdicts in civil cases for due process and Seventh Amendment considerations).

109 *See* Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15, 21 (1990) (describing "continuing debate" over verdict format that "pits those who would like to constrain jury decisionmaking into a more scientific, rational, and accountable model against those who would have the jury continue to 'dispense justice' without tight confines").

110 *See, e.g.*, Statement of Justices Black & Douglas, *supra* note 50, at 618–19 (sharply critiquing the true special verdict); Thornburg, *supra* note 14, at 1839 (arguing for a presumption in favor of the general verdict); Jennifer M. Granholm & William J. Richards, *Bifurcated Justice: How Trial-Splitting Devices Defeat the Jury's Role*, 26 U. TOL. L. REV. 505, 535 (1995) (arguing that "[c]onstitutional guarantees and common law tradition dictate that . . . general verdicts[] remain an integral part of our system of resolving civil and criminal disputes").

111 Catherine T. Struve, *Constitutional Decision Rules for Juries*, 37 COLUM. HUM. RTS. L. REV. 659, 702 (2006); *see, e.g.*, Robert Dudnik, Comment, *Special Verdicts: Rule 49 of the Federal Rules of Civil Procedure*, 74 YALE L.J. 483, 501 (1965) (noting that special verdicts "may achieve some of the virtues" of true special verdicts, while retaining "the jury's role of giving effect to the sense of justice of the main in the street"); Ernest Guinn, *The Jury System and Special Verdicts*, 2 SAINT MARY'S L.J. 175, 178–79 (1970) (noting that the use of a special verdict "is far more satisfactory [and] accomplishes the same purpose" as a true special verdict); Jason Iuliano, *Jury Voting Paradoxes*, 113 MICH. L. REV. 405, 410–11 (2014) (arguing that special verdicts retain the advantages of both general and true special verdicts while "avoiding many of their disadvantages"); Strier, *supra* note 108, at 1262–63 (arguing that a special verdict can provide the benefits of a true special verdict while maintaining the jury's nullification power). *But see* George Rossman, *The Judge-Jury Relationship in State Courts*, 10 L. SOC'Y J. 349, 363 (1942) (arguing for the use of true special verdicts but *not* special verdicts in which jurors respond to interrogatory questions and also deliver the final outcome).

112 Thornburg, *supra* note 14, at 1885; *see* Cicero & Taylor, *supra* note 107, at 43.

113 Norman J. Wiener, *Simple Lessons from a Complex Case*, LITIG., Spring 1986, at 14, 16.

The special verdict's interrogatory questions, in other words, require the party that bears the burden of proof—the plaintiff in civil cases, the prosecutor in criminal cases—to explicitly prevail on every single issue, whereas the defendant need only "have the jury answer 'no' to any one question" to negate liability.[114] This reasoning suggests that special verdicts could be even more protective of defendants in criminal trials, where jury convictions must be unanimous[115] and prosecutors are held to the highest "beyond a reasonable doubt" standard of proof (as opposed to the lower "preponderance of the evidence" standard for civil plaintiffs).[116]

Discussions of verdict format in the civil context have also asserted that "[t]he general verdict enhances, to the maximum, the power of appeals to the biases and prejudices of the jurors."[117] Although extra-legal jury biases can skew results in favor of either party in a trial,[118] civil commentators have suggested that "[r]elying on a general verdict is much less desirable from a defense standpoint" because "jurors who simply dislike a defendant may find for the plaintiff even though they could not honestly answer yes to every question on a special verdict."[119]

There are, of course, important substantive and procedural differences between civil and criminal cases. However, some of these differences arguably call the criminal law's default use of general verdicts into greater question, particularly if the civil logic that special verdicts better enforce the burden of proof holds true. Criminal cases are brought by the government and they place a defendant's life and liberty on the line, whereas civil cases are primarily brought by private parties seeking monetary damages.[120] Additionally, because the "rights or interests at stake in [criminal] litigation [are] much more

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114 Granholm & Richards, *supra* note 110, at 532; *see also* Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 56–57 (2005) (noting the "ordinary default rule" that plaintiffs bear the burden of proof); Thornburg, *supra* note 14, at 1886.

115 Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020) (noting that the Supreme Court has consistently commented on the Sixth Amendment's unanimity requirement in criminal cases).

116 *In re* Winship, 397 U.S. 358, 364 (1970); *id.* at 371 (Harlan, J., concurring); Concrete Pipe & Prods. of Cal., Inc., v. Constr. Laborers Pension Tr., 508 U.S. 602, 622 (1993).

117 Skidmore v. Balt. & Ohio R.R. Co., 167 F.2d 54, 61 (2d Cir. 1948); *see* Cicero & Taylor, *supra* note 107, at 43.

118 *See infra* Section IV.A.1(b).

119 Wiener, *supra* note 113, at 16; *see* Granholm & Richards, *supra* note 110, at 532; Thornburg, *supra* note 14, at 1885 (acknowledging the conventional wisdom that "all the plaintiff's lawyer with a general charge need do is elicit the sympathy of the jurors").

120 *See* FED. R. CRIM. P. 7(a) (defining a felony as an offense punishable by death or imprisonment of more than one year).

important to society,"[121] criminal defendants are constitutionally afforded more procedural protections than civil defendants.[122] Arguing that these protections should extend to considerations of verdict format, one law student Note asserted: "If we continue to afford a person greater protections in our courts when money is at issue than when liberty is at stake, then we are, consciously or not, making a choice about what we value in our society."[123]

Comparing criminal and civil procedure more broadly, legal scholars David Sklansky and Stephen Yeazell observed that "[c]riminal procedure appears to be in a state of arrested development . . . frozen roughly into the shape it had in 1800."[124] Likewise, in regard to criminal verdict format in particular, a law student Note observed that "[r]ather than evolving alongside our legal institutions, verdict inscrutability seems to be stuck in the eighteenth century."[125] Sklansky and Yeazell pointed out, however, that even though "it is easy to take the world defined by [one's own] knowledge as given and inevitable," civil and criminal procedure "can each learn things from the other—including a keener understanding of its own nature, and a healthy degree of skepticism about its own assumptions."[126] Verdict format presents an untapped opportunity for this endeavor.

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121 Dorothy K. Kagehiro, *Defining the Standard of Proof in Jury Instructions*, 1 PSYCH. SCI. 194, 195 (1990).

122 *See, e.g.*, U.S. CONST. amends. V–VI (providing procedural protections for criminal defendants, including the privilege against self-incrimination and the right to a jury trial); *In re* Winship, 397 U.S. 358, 371–72 (1970) (Harlan, J., concurring) (explaining the higher burden of proof in criminal as compared to civil cases); Green v. United States, 355 U.S. 184 (1957) (upholding the prohibition against double jeopardy in criminal cases); Miranda v. Arizona, 384 U.S. 436 (1966) (upholding criminal defendants' privilege against self-incrimination); Pointer v. Texas, 380 U.S. 400 (1965) (upholding criminal defendants' right to confront witnesses); Griffin v. Illinois, 351 U.S. 12 (1956) (upholding indigent criminal defendants' rights to due process and equal protection); Jonathan I. Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478, 483–91 (1974) (summarizing procedural protections for criminal defendants); Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1149–50 & n.3 (1960) (reviewing the rationale behind enhanced protections for criminal defendants).

123 Wright, *supra* note 20, at 458–59.

124 David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 737 (2006).

125 Curci, *supra* note 20, at 230; *see also* Wright, *supra* note 20, at 456–57 (noting that the special verdict "is not a radical idea" and arguing that justifications for its use in the civil context can be transferred to the criminal context).

126 Sklansky & Yeazell, *supra* note 124, at 685, 737.

B. The Nullification Rationale

Spock's rationale for why special verdicts are acceptable in civil but not criminal trials emphasized a "fundamental difference in the jury's functions in civil and criminal cases" as manifested in the criminal jury's unreviewable power to acquit defendants notwithstanding the law[127] (whereas judges can overturn legally insufficient civil jury verdicts either for or against defendants[128]). Thus, even courts and commentators arguing for greater use of special verdicts in civil cases have been reluctant to question verdict format in criminal cases, noting that special verdicts would "make it difficult, if not impossible, for the [criminal] jury to perform its historic function as the humanitarian custodian of the law."[129] But are jurors inherently inclined to deviate from the law in favor of criminal defendants? And are courts actually open to jury nullification? Psychological findings and judicial practices suggest otherwise.

1. Psychological Realities of Jury Decisionmaking

a. Jury Biases

Pursuant to *Spock*, the legal discourse on criminal verdict format is premised on the vision of a sympathetic criminal defendant who jurors want to treat with lenity. However, unlike *Spock*, criminal cases typically involve marginalized defendants of color charged with offenses that are more likely to generate feelings of public threat than empathy—which is reflected in public perceptions of crime as "a significant, increasing problem,"[130] high rates of conviction in jury trials,[131] and the U.S. legal culture of mass incarceration.[132] A former

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127 United States v. Spock, 416 F.2d 165, 180 (1st Cir. 1969).

128 FED. R. CIV. P. 50.

129 Sunderland, *supra* note 37, at 260 (noting that "there is much to be said" for defending the "political" function of the jury in criminal cases); *see* Skidmore v. Balt. & Ohio R.R. Co., 167 F.2d 54, 70 (2d Cir. 1948) (Hand, J., concurring); Granholm & Richards, *supra* note 110, at 536.

130 *See* Eli Yokley, *Most Voters See Violent Crime as a Major and Increasing Problem. But They're Split on Its Causes and How to Fix It*, MORNING CONSULT (July 14, 2021, 6:00 AM), https://morningconsult.com/2021/07/14/violent-crime-public-safety-polling [https://perma.cc/NFX4-UKJW] (finding that more than 70% of voters in 2021 said both that they thought violent crime was a "major problem" and that it was increasing); Megan Brenan, *Record-High 56% in U.S. Perceive Local Crime Has Increased*, GALLUP (Oct. 28, 2022), https://news.gallup.com/poll/404048/record-high-perceive-local-crime-increased.aspx [https://perma.cc/284Q-3PYY] (reporting, among other findings, "record-high perception of a rise in local crime" when voters were polled on the issue ahead of the 2022 midterms).

131 *See supra* note 25.

132 *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); Ruth Delaney, Ram Subramanian, Alison Shames & Nicholas Turner, *American History, Race, and Prison*, VERA INST. OF JUST.: REIMAGINING

prosecutor anecdotally observed that the judiciary's presumption that general verdicts help "humanize" and protect criminal defendants, as compared to the more "mechanical" special verdict, is doubtful because "the person before [the jurors] is accused of a crime, so they won't be oriented toward sympathy."[133]

Additionally, while the U.S. Supreme Court granted criminal defendants the right to trial by jury under the reasoning that they may prefer "the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge,"[134] the common-sense judgment of jurors may reflect individual and societal biases that generate discriminatory effects and outcomes.[135] For instance, legally irrelevant factors in criminal cases—such as demographic characteristics of defendants—can trigger *heuristics* (mental shortcuts used to simplify cognitive tasks),[136] *stereotypes* (beliefs about the characteristics and behaviors of certain groups),[137] *implicit biases* (unconscious

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PRISON WEB REP. (Oct. 2018), https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison [https://perma.cc/H5SC-9RT7].

133 Sood TIL, *supra* note 13, at 76.

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

135 *See* Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C. DAVIS L. REV. 745, 785–96 (2018) (discussing studies demonstrating participants' association of Black facial features with traits like dangerousness, criminality, and violence); Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 ANN. REV. L. & SOC. SCI. 269, 280 (2015) (noting that racially-based reactions may influence how jurors view defendants in criminal cases); Jerry Kang, Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1142–46 (2012) (reviewing research on implicit racial biases and arguing that even seemingly small effects can have drastic consequences for individual defendants); Avani Mehta Sood, *Attempted Justice: Misunderstanding and Bias in Psychological Constructions of Criminal Attempt*, 71 STAN. L. REV. 593, 627–39, 645–51, 654–55 (2019) [hereinafter Sood SLR] (demonstrating through experiment the extralegal influence of a defendant's religion in lay determinations of criminality); Robert J. MacCoun, *The Emergence of Extralegal Bias During Jury Deliberation*, 17 CRIM. JUST. & BEHAV. 303, 311 (1990) (demonstrating through experiment the extralegal influence of a defendant's attractiveness on mock jurors' judgments); Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1029–30 (2003) (noting that racial biases may be more concerning in cases where racial issues are not a focus due to implicit bias); Tisha R. A. Wiley & Bette L. Bottoms, *Effects of Defendant Sexual Orientation on Jurors' Perceptions of Child Sexual Assault*, 33 L. & HUM. BEHAV. 46, 58 (2009) (concluding that "gay defendants face significant biases in child sexual abuse cases").

136 *See* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124 (1974) (noting that heuristic principles "reduce the complex tasks of assessing probabilities and predicting values to simpler judgments operations").

137 *See* SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION: FROM BRAINS TO CULTURE 188–217, 303–64 (3d ed. 2017); Galen V. Bodenhausen, *Stereotypes as Judgmental Heuristics: Evidence of Circadian Variations in Discrimination*, 1 PSYCH. SCI. 319, 321 (1990) (characterizing stereotypes as a type of heuristic); James L. Hilton &

attitudes that affect judgments),[138] and *motivated cognition* (a tendency to reason toward desired outcomes without awareness)[139] in jury adjudication.

Studies have found that these socio-cognitive effects are amplified when decisionmakers are given unbounded discretion in assessing and applying ambiguous and challenging information under high-stakes conditions,[140] which describes jury decisionmaking under the general criminal verdict to a tee. In addition, the structural open-endedness of the general verdict, which by design gives jurors leeway to consider "external circumstances [beyond] the strict letter of the law,"[141] may inadvertently exacerbate risks of legally extrinsic considerations unfairly influencing the criminal adjudication process.[142]

William von Hippel, *Stereotypes*, 47 ANN. REV. PSYCH. 237, 240 (1996) ("[T]he standard viewpoint [is] that stereotypes are beliefs about the characteristics, attributes, and behaviors of members of certain groups.").

138 *See* Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCH. REV. 4, 4–5 (1995) (describing "an indirect, unconscious or implicit mode of operation for attitudes").

139 *See* Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCH. BULL. 480, 482–83 (1990); Avani Mehta Sood & John M. Darley, *The Plasticity of Harm in the Service of Criminalization Goals*, 100 CALIF. L. REV. 1313, 1320–21 (2012); Avani Mehta Sood, *Cognitive Cleansing: Experimental Psychology and the Exclusionary Rule*, 103 GEO. L.J. 1543, 1560–61 (2015); Charles S. Taber, Damon Cann & Simona Kucsova, *The Motivated Processing of Political Arguments*, 31 POL. BEHAV. 137, 149 (2009) (describing the process by which experimental respondents spent more time pondering and countering challenging arguments and readily accepted favorable arguments); *see generally* Avani Mehta Sood, *Motivated Cognition in Legal Judgments—An Analytic Review*, 9 ANN. REV. L. & SOC. SCI. 307 (2013) [hereinafter Sood ARLSS].

140 *See, e.g.*, Sunita Sah, David Tannenbaum, Hayley Cleary, Yuval Feldman, Jack Glaser, Amy Lerman, Robert MacCoun, Edward Maguire, Paul Slovic, Barbara Spellman, Cassia Spohn & Christopher Winship, *Combating Biased Decisionmaking & Promoting Justice & Equal Treatment*, 2 BEHAV. SCI. & POL'Y 79, 80 (2016) (discussing behavioral science literature documenting this phenomenon in, for example, police stop-and-searches); Dennis J. Devine, Laura D. Clayton, Benjamin B. Dunford, Rasmy Seying & Jennifer Pryce, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCH. PUB. POL'Y & L. 622, 700–01 (2001) (discussing empirical work documenting that jurors are most swayed by bias attributable to procedural and/or participant characteristics when the strength of evidence is moderate); Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the "Empathic Divide,"* 45 L. & SOC'Y REV. 69, 73–75 (2011) (explaining how the characteristics of capital cases, deliberative processes, and larger social and institutional structures facilitate systemic racial bias in capital jury decisionmaking).

141 United States v. Desmond, 670 F.2d 414, 418 (3d Cir. 1982).

142 *See* Skidmore v. Balt. & Ohio R.R. Co., 167 F.2d 54, 61 (2d Cir. 1948) (noting in a civil case that "[t]he general verdict enhances, to the maximum, the power of appeals to the biases and prejudices of the jurors, and usually converts into a futile ritual the use of stock phrases about dispassionateness almost always included in the judges' charges").

b. Lay Applications of Law

Beyond jury biases, decades of empirical studies[143] and first-hand observations from both the judicial bench and jury box[144] indicate that lay people deciding legal liability with jury instructions as their only guide are susceptible to misunderstandings and misapplications of the law. Studies and reforms have explored various routes to remedying these challenges of jury adjudication,[145] but the potential role of verdict format—the very vehicle through which jurors render their decisions—has been empirically neglected.[146]

Critical legal rules that criminal jurors are instructed on include the *presumption of innocence* (which holds that all criminal defen-

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143 *See, e.g.*, Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1307–08 (1979); Devine et al., *supra* note 140, at 699; Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REFORM 401, 402 (1990); Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCH. PUB. POL'Y & L. 589, 590, 637 (1997); *see generally* Alan Reifman, Spencer M. Gusick & Phoebe C. Ellsworth, *Real Jurors' Understanding of the Law in Real Cases*, 16 L. & HUM. BEHAV. 539 (1992); Sood SLR, *supra* note 135, at 614–27.

144 *See, e.g.*, Driver, *supra* note 59, at 47; Patrick E. Higginbotham, *Helping the Jury Understand*, LITIG., Summer 1980, at 5; Hyde, *supra* note 10, at 147; Christopher N. May, *"What Do We Do Now?" Helping Juries Apply the Instructions*, 28 LOY. L.A. L. REV. 869, 879 (1995); Rossman, *supra* note 111, at 355; William F. Schwarzer, *Jury Instructions: We Can Do Better*, LITIG., Winter 1982, at 5.

145 *See, e.g.*, Neil Brewer, Sophie Harvey & Carolyn Semmler, *Improving Comprehension of Jury Instructions with Audio-Visual Presentation*, 18 APPLIED COGNITIVE PSYCH. 765, 765 (2004) (examining the impact of audio-visual instruction on juror comprehension); Jane Goodman-Delahunty & Edith Greene, *The Use of Paraphrase Analysis in the Simplification of Jury Instructions*, 4 J. SOC. BEHAV. & PERSONALITY 237, 237 (1989) (assessing efficacy of post-instruction paraphrasing task); Sheri Lynn Johnson, *Black Innocence and the White Jury,* 83 MICH. L. REV. 1611, 1651–81, 1691–94 (1985) (describing the inadequacy of jury selection and screening practices to combat racial biases as well as proposing a prophylactic model for combatting juror bias); Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 475–505 (2006) (discussing myriad state efforts to reform the language, timing, and presentation of jury instructions); Kirk W. Schuler, *In the Vanguard of the American Jury: A Case Study of Jury Innovations in the Northern District of Iowa*, 28 N. ILL. U. L. REV. 453, 472–74 (2008) (describing one judge's practice of providing jury instructions at the start of trial, rather than the end); Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 HOFSTRA L. REV. 37, 73–78 (1993) (proposing reforms to the language and jury instruction procedure to increase juror comprehension).

146 Sood TIL, *supra* note 13, at 58; Burd & Hans, *supra* note 7, at 359–60; Diamond & Schklar, *supra* note 16, at 195 ("The debate about the effects of special verdicts and interrogatories has thus far been minimally informed by data."). The only two published studies on verdict format in American jury trials came out almost three decades ago. Larry Huer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 L. & HUM. BEHAV. 29, 32, 37 (1994) (measuring effects of verdict format in a field experiment on jury note-taking and question-asking); Elizabeth C. Wiggins & Steven J. Breckler, *Special Verdicts as Guides to Jury Decision Making*, 14 L. & PSYCH. REV. 1, 30, 32 (1990) (testing the effects of verdict format in a mock civil case).

dants are innocent until proven guilty)[147] and the *reasonable doubt rule* (which "provides concrete substance for the presumption of innocence" by requiring the government to prove every element of a charged crime beyond a reasonable doubt).[148] The U.S. Supreme Court has described the presumption of innocence as "the undoubted law, axiomatic and elementary, [whose] enforcement lies at the foundation of the administration of our criminal law;"[149] and the reasonable doubt rule as "indispensable to command the respect and confidence of the community in applications of the criminal law."[150]

Yet, research indicates that jurors do not always understand and abide by these fundamental tenets of criminal adjudication. For example, one survey of 116 citizens summoned for jury duty revealed that, even though they had been instructed on the presumption of innocence and the reasonable doubt rule, only 50% of the jurors "understood that the defendant did not have to present any evidence of his innocence, and that the state had to establish his guilt, with evidence, beyond any reasonable doubt."[151] Describing various forces that "put a heavy drag on the presumption of innocence," criminal law and procedure scholar Andrew Leipold argued that, "despite our best efforts, defendants often face a jury at least mildly disposed toward guilt."[152]

Criminal jurors may also adjust the requisite burden of proof to arrive at their desired legal outcomes,[153] including without conscious awareness,[154] such as when "they are reluctant to 'let go'" of a defendant charged with a crime.[155] Law and linguistics scholar Larry Solan observed that, ironically, "empirical studies and linguistic analysis strongly suggest that it is more difficult to establish proof by clear and convincing evidence than it is to establish [the criminal law's higher

147 *See* Coffin v. United States, 156 U.S. 432, 453 (1895).

148 *In re* Winship, 397 U.S. 358, 363 (1970).

149 *Coffin*, 156 U.S. 432 at 453.

150 *Winship*, 397 U.S. at 364.

151 David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478, 481 (1976); *see also* Anne W. Martin & David A. Schum, *Quantifying Burdens of Proof: A Likelihood Ratio Approach*, 27 JURIMETRICS J. 383, 398–99 (1987) ("[O]ne's initial bias toward or away from guilt determines the strength of evidence necessary to convict.").

152 Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 Nw. U. L. REV. 1297, 1351–52 (2000).

153 Michael Conklin, *Reasonable Doubt Ratcheting: How Jurors Adjust the Standard of Proof to Reach a Desired Result*, 95 N.D. L. REV. 281, 285 (2020).

154 *See generally* Sood ARLSS, *supra* note 139, at 309–10 (explaining how legal decision makers may less-than-consciously reason their way toward desired outcomes).

155 James A. Shapiro & Karl T. Muth, *Beyond a Reasonable Doubt: Juries Don't Get It*, 52 LOY. U. CHI. L.J. 1029, 1043 (2021); *see* Arnold H. Loewy, *Taking Reasonable Doubt Seriously*, 85 CHI.-KENT L. REV. 63, 63 (2010).

standard of] proof beyond a reasonable doubt."[156] Additionally, a study examining "five versions of reasonable doubt instructions that have passed constitutional muster by the U.S. Supreme Court" found that "jurors' construals of the various definitions of beyond reasonable doubt result in subjective standards that set the bar for conviction at a level significantly lower than anticipated by jurists."[157]

Empirical findings and anecdotal observations further suggest that criminal jurors may not understand *how* to go about applying legal rules and standards.[158] Law professor Christopher May, who served on two juries that delivered general verdicts, observed that his fellow jurors "did not realize that each of the claims or offenses contained in the charge consisted of a series of elements . . . [and] that in order to reach a verdict it was necessary to go through each claim or offense and determine whether each one of the elements had been satisfied."[159] Judge George Rossman, writing in his personal capacity about civil trials, similarly expressed a concern that "in many cases where the general verdict was employed principal issues received no consideration whatever from the jury."[160]

The opacity of general verdicts extends not only to the jurors who render them but also to the courts, parties, and general public who receive them, because this format makes it "impossible to tell how or whether the jury applied the law."[161] Thus, notwithstanding jury nullification's ascribed role of "safeguard[ing] the individual defendant" by sending "feedback to other branches of government about when they are overstepping their own roles,"[162] the general verdict risks conveying ambiguous messages about the jury's intentions.[163] Furthermore, jury scholars and practitioners have observed that jury departures from the law are more likely to be "the result of inadequacies in legal instruction and fundamental human information

156 Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105, 105 (1999).

157 Irwin A. Horowitz, *Reasonable Doubt Instructions: Commonsense Justice and Standard of Proof*, 3 PSYCH. PUB. POL'Y & L. 285, 294, 298 (1997); *see also* Irwin A. Horowitz & Laird C. Kirkpatrick, *A Concept in Search of a Definition: The Effects of Reasonable Doubt Instructions on Certainty of Guilt Standards and Jury Verdicts*, 20 L. & HUM. BEHAV. 655, 666–67 (1996) ("[N]one of the extant instructions do what most courts would like them to do: set the certainty of guilt in the high 80[% range].").

158 *See* Sood TIL, *supra* note 13, at 64–71; Sood SLR, *supra* note 135, at 659.

159 May, *supra* note 144, at 869–70.

160 Rossman, *supra* note 111, at 364.

161 Sunderland, *supra* note 37, at 259.

162 Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 Nw. U. L. REV. 877, 879–80 (1999); *see also* Alan Scheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51, 71 (1980).

163 *See* Sunderland, *supra* note 37, at 259–60; Sood TIL, *supra* note 13, at 72.

processing and attributional processes, rather than overt rebellion against the applicable legal standard."[164]

These socio-cognitive realities of lay adjudication suggest that, by privileging the general criminal verdict in order to enable jury *acquittals* notwithstanding the law, the procedural status quo may inadvertently be enabling jury *convictions* notwithstanding the law.[165] And, while judges can overturn jury convictions that are unambiguously unsupported by evidence and law, the inscrutability of the general verdict makes it "extremely difficult for the trial judge (or a reviewing court) to detect and correct an erroneous verdict."[166] The legal standards for overturning jury convictions at the trial and appellate levels also present very high bars to meet.[167] Moreover, post-conviction courts tend to defer to a jury's verdict and exhibit an "aversion to interfering with the fact-finding task, which together virtually guarantee the perpetuation of any errors that might be lurking in the decision."[168] The implications of criminal verdict format for unproven convictions thus merit as much attention as its oft-discussed implications for nullifying acquittals.

2. *Judicial Inconsistencies*

Beyond the issue of whether jurors are generally inclined to nullify the law in favor of criminal defendants, do judges actually want to facilitate this practice? Courts have explicitly described their "hostility" toward special criminal verdicts as "stem[ming] from a desire

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164 Diamond & Schklar, *supra* note 16, at 204; *see* May, *supra* note 144, at 872; David N. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J.L. REFORM 861, 893 (1995) (noting that a "far more frequent phenomenon" occurs when a "jury nullifies without understanding that it is doing so").

165 *See* Sood TIL, *supra* note 13, at 64–71; *In re* Winship, 397 U.S. 358, 364 (1970) (asserting that "the moral force of the criminal law" should "not be diluted by . . . doubt [as to] whether innocent [people] are being condemned").

166 Langbein, *supra* note 42, at 289; *see* Richman, *supra* note 22, at 973 (explaining that general verdicts are inscrutable); Sunderland, *supra* note 37, at 260 (same).

167 *See* Jackson v. Virginia, 443 U.S. 307, 318–19 (1979) (noting that the standard for appellate review "is whether, after viewing evidence in light most favorable to prosecution, any rational trier of fact could have found the essential element of the crime beyond a reasonable doubt"); Wiercinski v. Mangia 57, Inc., 787 F.3d 106, 113 (2d Cir. 2015) (noting that the standard for a judgment notwithstanding the verdict is whether there is "such a complete absence of evidence . . . that the jury's findings could only have been the result of sheer surmise and conjecture, or the evidence in favor of the movant is so overwhelming that reasonable and fair minded persons could not arrive at a verdict against it") (citations omitted); United States v. Rodríguez-Martinez, 778 F.3d 367, 371 (1st Cir. 2015); FED. R. CRIM. P. 29.

168 Dan Simon, *On Juror Decision Making: An Empathic Inquiry*, 15 ANN. REV. L. & SOC. SCI. 415, 428 (2019).

not to undermine jury nullification."[169] However, this stance is very much at odds with widespread judicial denunciations of nullification as "an unfortunate but unavoidable power" that "should be restricted as much as possible."[170]

Judges routinely engage in active measures to fulfill what some courts have asserted as their "'duty' to 'forestall or prevent'" jury nullification.[171] Trial courts across federal and almost all state jurisdictions do not instruct jurors on their power to nullify the law, and they constrain lawyers from doing so too.[172] Instead, "the weight of recent precedent has supported instructing the jury that it 'must' convict if it finds proof of all elements beyond a reasonable doubt."[173] Furthermore, jury oaths and instructions in some jurisdictions explicitly require jurors to render verdicts that comply with the given evidence and law.[174]

Adding to these constraints on jury nullification, trial judges can proactively dismiss potential jurors who express an unwillingness to comply with the law due to moral convictions; they tend not to admit evidence at trial that is relevant only to potential grounds for nullification, rather than to legal elements of crimes and defenses; and they

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169 United States v. Gonzales, 841 F.3d 339, 347 (5th Cir. 2016) (emphasis added); *see* United States v. Desmond, 670 F.2d 414, 414–15, 418 (3d Cir. 1982); United States v. Wilson, 629 F.2d 439, 442–43 (6th Cir. 1980); State v. Dilliner, 569 S.E.2d 211, 215 (W. Va. 2002).

170 State v. Ragland, 519 A.2d 1361, 1372 (N.J. 1986); *see Desmond*, 670 F.2d at 417 ("Jury nullification has a unique place in the law . . . [and] the courts have adopted a rather ambiguous attitude toward nullification . . . ."); *Gonzales*, 841 F.3d at 347 (describing jury nullification as a "controversial power that courts purportedly do not encourage"); People v. Fernandez, 31 Cal. Rptr. 2d 677, 679 (Ct. App. 1994) (describing jury nullification as the subject of "heated debate"); Stacey P. Eilbaum, Note, *The Dual Face of the American Jury: The Antiauthoritarian and Antimajoritarian Hero and Villain in American Law and Legal Scholarship*, 98 CORNELL L. REV. 711, 713 (2013) (detailing the contradictory perceptions of jury nullification depending on judicial characterization).

171 United States v. Christensen, 828 F.3d 763, 806–07, 813 (9th Cir. 2015) (citing Merced v. McGrath, 426 F.3d 1076, 1080 (9th Cir. 2005)); *see* United States v. Thomas, 116 F.3d 606, 614, 625 (2d Cir. 1997) ("We categorically reject the idea that, in a society committed to the rule of law, jury nullification is desirable or that courts may permit it to occur when it is within their authority to prevent."); United States v. Rushin, 844 F.3d 933, 939–40 (11th Cir. 2016); United States v. Kleinman, 880 F.3d 1020, 1031 (9th Cir. 2017).

172 United States v. Dougherty, 473 F.2d 1113, 1133 (D.C. Cir. 1972); *Rushin*, 844 F.3d at 939–40; *Fernandez*, 31 Cal. Rptr. 2d at 679–80.

173 Stith-Cabranes, *supra* note 75, at 140.

174 *See, e.g.*, *About the Trial Process: Three Main Steps of a Jury Trial*, CAL. CTS., https://www.courts.ca.gov/2240.htm [https://perma.cc/UJ65-Y5X3] (noting that jurors are required to take an oath to render "a true verdict . . . according only to the evidence presented to [them] and to the instructions of the court"); JUD. COUNCIL OF CAL., ADVISORY COMM. ON CRIM. JURY INSTRUCTIONS, JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL JURY INSTRUCTIONS 5 (LexisNexis 2022) [https://perma.cc/539T-MMPL] ("Your verdict must be based only on the evidence presented during trial in this court and the law as I provide it to you.").

can even remove a juror during the deliberation process "for an alleged refusal to follow the law as instructed."[175] In light of these measures exemplifying the broad judicial resistance to jury nullification,[176] criminal case law's concurrent perpetuation of a pro-nullification rationale for rejecting the use of special verdicts is a paradox that calls for empirical investigation.

III
Surveying the Stakeholders

A nationwide survey was conducted to measure the extent to which current legal stakeholders' views and intuitions align with the criminal legal system's status quo in favor of general verdicts and its underlying presumption that special verdicts disadvantage criminal defendants. Part III presents the methodology and key results of the study.[177] Further methodological details and statistical analyses for the reported results are available in the Article's accompanying online Appendix.[178]

A. Methodology

1. Participants

a. Demographics

A total of 1,622 stakeholders in the American legal system participated in the survey. The participants ranged in age from nineteen to eighty-seven years, with a mean and median age of fifty.[i] They lived and worked across all fifty states and Washington, D.C.,[ii] with the heaviest geographic representation from states with relatively large populations: California, Texas, Florida, and New York.[179]

According to the survey respondents' self-identifications, the sample was 60% male and 40% female;[iii] 85% white and 15% people of color (hereinafter "POC").[iv] Self-reported political views spanned the entire range of a seven-point scale from "very liberal" (1) to "very conservative" (7), with a mean and median of 3.[v] The vast majority of

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175 *Thomas*, 116 F.3d at 614, 625; *see Fernandez*, 31 Cal. Rptr. 2d at 679–80; Fed. R. Evid. 401.

176 *See supra* notes 172–75.

177 In reporting results, percentages are rounded up/down to whole numbers, so the total percentage for a group may at times add up to 99% or 101% instead of 100%.

178 *See infra* Appendix, https://www.nyulawreview.org/issues/volume-98-number-4/appendix-to-reaching-a-verdict. Roman numerals accompanying the results reported in Part III correspond to the underlying statistical analyses contained in the Appendix.

179 *See Apportionment Population and Number of Representatives by State: 2020 Census*, U.S. Census Bureau (2020), https://www.census.gov/data/tables/2020/dec/2020-apportionment-data.html [https://perma.cc/FW6V-UZ4B].

participants (82%) had graduated from law school (between 1957 and 2020) with a juris doctorate degree (hereinafter the "legal professionals").[vi] Within this group, the majority of active litigators and judges were currently practicing criminal law,[vii] at the trial level,[viii] in state courts[ix]—where the bulk of criminal jury trials occur.[180]

b. Stakeholder Groups

The stakeholder survey used a purposive sampling method[181] to recruit participants from ten legal stakeholder groups through systematic outreach to state and federal courts, judicial education programs, prosecutor and public defender offices, law firms, law school faculties, student-edited law journals, and professional listservs, associations, and networks across the country.[182] Table 1 lists the number of survey respondents successfully recruited from each stakeholder group and subgroup.

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[180] *See, e.g.*, Mize et al., *supra* note 24, at 7 (noting that there were 148,558 state jury trials, as compared to 5,463 federal jury trials, in 2006).

[181] *See* Michael P. Battaglia, *Purposive Sample*, *in* ENCYCLOPEDIA OF SURVEY RESEARCH METHODS 645 (Paul J. Lavrakas ed., 2008) (describing purposive sampling as a nonprobability technique that aims "to produce a sample that can be logically assumed to be representative of the population" by "select[ing] in a nonrandom manner a sample of elements that represents a cross-section of the population"); PAUL C. COZBY & SCOTT BATES, METHODS IN BEHAVIORAL RESEARCH 145–52 (11th ed. 2012) (discussing sampling techniques and reasons for employing nonprobability samples).

[182] Jury-eligible lay citizens were recruited through Amazon Mechanical Turk, an online platform for human intelligence tasks that offers diverse samples of primarily non-lawyers. AMAZON MECHANICAL TURK, https://www.mturk.com [https://perma.cc/TS9Y-HYWT]. For more information on the use of Mechanical Turk as a source of research respondents, see generally Logan S. Casey, Jesse Chandler, Adam Seth Levine, Andrew Proctor & Dara Z. Strolovitch, *Intertemporal Differences Among MTurk Workers: Time-Based Sample Variations and Implications for Online Data Collection*, SAGE OPEN, Apr.–June 2017, https://journals.sagepub.com/doi/10.1177/2158244017712774 [https://perma.cc/8J5V-LDNB]; Krin Irvine, David A. Hoffman & Tess Wilkinson-Ryan, *Law and Psychology Grows Up, Goes Online, and Replicates*, 15 J. EMPIRICAL LEGAL STUD. 320, 326 (2018); Kevin E. Levay, Jeremy Freese & James N. Druckman, *The Demographic and Political Composition of Mechanical Turk Samples*, SAGE OPEN, Jan.–Mar. 2016, https://journals.sagepub.com/doi/full/10.1177/2158244016636433 [https://perma.cc/X6ZY-V9AU].

TABLE 1. RESPONDENTS IN THE TEN STAKEHOLDER GROUPS

Stakeholder Groups	***n***
Judges (trial: 261, appellate: 32)	293
Prosecutors	259
Public defenders	214
Private criminal defense attorneys	260
Criminal law professors	122
Criminal science experts	114
Civil law professors	90
Civil litigators (plaintiff: 33, defense: 38)	71
Law students	63
Jury-eligible lay citizens	136

The survey sample drew most heavily from populations of repeat legal actors who engage with criminal verdicts: judges, prosecutors, public defenders, and private criminal defense attorneys. The sample included substantially more trial than appellate judges because trial judges are more numerous, and appellate courts typically defer to trial courts on determinations of criminal verdict format.[183] Repeat legal actors who work specifically at the trial level—i.e., trial judges, prosecutors, and criminal defense attorneys, but not appellate judges—will hereinafter be referred to as the "repeat criminal trial actors."

Public and private criminal defense counsel were sampled as separate stakeholder groups due to general differences in the client populations they serve[184] and the types of cases they litigate.[185] On average, the surveyed private criminal defense attorneys were also significantly less politically liberal,[x] and more likely to have not only criminal but

[183] *See supra* note 68 and accompanying text.

[184] Public defenders represent only indigent clients, while private attorneys typically have paying clients but may also represent indigent clients by panel or appointment. *See, e.g.*, *Defender Services*, U.S. CTS., https://www.uscourts.gov/services-forms/defender-services [https://perma.cc/9C7H-A84T] (explaining the federal public defense system, including the federal panel attorney program); *Assigned Counsel Plan (18B)*, N.Y. STATE UNIFIED CT. SYS., https://www.nycourts.gov/courts/ad1/committees&programs/18b/index.shtml [https://perma.cc/V7MP-FMGY] (describing New York's panel system for appointing private criminal defense lawyers to represent indigent clients).

[185] For example, private criminal defense attorneys are more likely to litigate white collar crimes. *See* CAROLINE WOLF HARLOW, U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES 3 (Nov. 2000), https://bjs.ojp.gov/content/pub/pdf/dccc.pdf [https://perma.cc/B8P8-DWN5] (finding that defendants charged with a white collar offense were most likely to have private attorneys). In addition, private criminal defense attorneys are more likely to take on civil defense cases than are public defenders. *See* Shaun Ossei-Owusu, *Civil vs. Criminal Legal Aid*, 94 S. CAL. L. REV. 1561, 1575–78 (2021) (explaining the divide between public attorneys who engage in criminal and civil practice).

also civil litigation experience,[xi] as compared to the public defenders in the sample.

For academic and scientific perspectives on criminal adjudication, the survey sampled criminal law professors (teachers and scholars of substantive criminal law and/or criminal procedure), as well as criminal science experts (criminologists, forensic scientists, law-and-psychology scholars, jury consultants, litigation data analysts, and clinical psychologists whose work relates to the criminal legal system—all of whom had advanced degrees in fields relating to science and/or criminal law[xii]). In addition, since special verdicts are employed more commonly in civil as compared to criminal trials,[186] the survey sampled civil litigators (both plaintiff-side and defense-side), as well as civil law professors (the majority of whom were teachers and scholars of civil litigation/procedure).[187] Finally, the sample included two stakeholder groups that are generally underrepresented in legal discourse: jury-eligible lay citizens (non-lawyers, who are more likely to be seated on criminal juries than legal professionals[188]) and law students (who have authored most of the limited legal scholarship questioning the dominant use of general verdicts in criminal jury trials[189]).

c. Personally Involved Respondents

Stakeholders who have been personally involved in criminal cases—as defendants, victims, or jurors—were not directly recruited for the study as independent stakeholder groups due to access constraints. However, the survey asked all participants about their involvement with the criminal legal system in these capacities. Table 2 summarizes the sizeable presence of these personally involved populations in the sample.[xiii]

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186 *Supra* Section II.A.

187 Law professors who taught and/or conducted research on both criminal and civil law subjects were counted in the criminal law professor group.

188 *See* N.Y. JUD. LAW § 512(3) (repealed 1995) (exempting practicing attorneys from jury service); WIS. STAT. § 756.02(1) (repealed 1991) (same); OKLA. STAT. tit. 38, § 28(c)(4) (2021) (deeming practicing attorneys "not qualified to serve as jurors"); Rawlins v. Georgia, 201 U.S. 638, 640 (1906) ("The exemption of lawyers, ministers of the gospel, doctors, and engineers of railroad trains [from jury service] . . . is of old standing and not uncommon in the United States."); *see also* Colleen McMahon & Larry D. Sharp, *A Jury of Your Peers*: *Is It in the Best Interests of Justice to Have Lawyers Serve on Juries?*, 81 A.B.A. J. 40, 40 (1995).

189 *See supra* note 20.

TABLE 2. PERSONAL INVOLVEMENT IN THE LEGAL SYSTEM

Respondent's Role	***n***
Defendant (in criminal case)	54
Victim (in criminal case)	169
Juror (in criminal case: 102, in civil case: 64, unspecified: 15)	181

d. Special Verdict Experience

Consistent with the differing status quos on verdict format in criminal and civil trials,[190] surveyed litigators, judges, and former jurors reported having encountered special verdicts far more in civil cases than in criminal cases. About half of the civil litigators (46%), two-thirds of the trial judges (68%), and three-quarters of the appellate judges (75%) said they encountered special verdicts "sometimes" or "mostly/always" in their civil cases. In contrast, the vast majority of criminal litigators (85%), trial judges (80%), and appellate judges (86%) said they "never" or "rarely" encountered special verdicts in their criminal cases.[191] Former jurors who reported having employed special verdict forms were also much more likely to have encountered them in civil trials (47%) than in criminal trials (4%).

e. Sampling Limitations

The results of the stakeholder survey should be considered alongside some methodological caveats. The study's non-random sampling method could not guarantee that every individual in the ten stakeholder populations of interest had an equal chance of participating in the survey.[192] Additionally, participation in the survey was voluntary, which inherently carries risks of non-response and self-selection effects.[193] Not all stakeholders who received the survey chose to participate in it, so there is a possibility that those who did participate differed in some systematic way from those who did not.

There is also no guarantee that the survey respondents were representative of their stakeholder groups at large.[194] On measurable

190 *See supra* Sections I.B., II.A.

191 Criminal law practitioners who said they had experience using special verdict forms noted that such forms were typically used to determine facts relevant to criminal defendants' sentences, rather than for confirming proof of each legal element beyond a reasonable doubt, and were thus typically used only after the jury found a defendant guilty.

192 *See* HERBERT M. KRITZER, ADVANCED INTRODUCTION TO EMPIRICAL LEGAL RESEARCH 53 (2021) (discussing random and non-random sampling).

193 *See* Nathan Berg, *Non-Response Bias*, *in* ENCYCLOPEDIA OF SOCIAL MEASUREMENT 865, 865 (Kimberly Kempf-Leonard ed., 2005); Luciana Dalla Valle, *The Use of Official Statistics in Self-Selection Bias Modeling*, 32 J. OFF. STAT. 887, 888 (2016).

194 *Cf.* Battaglia, *supra* note 181, at 645.

demographic dimensions of gender and race, however, the composition of surveyed legal professionals—who comprised the vast majority of the sample and were 63% male and 37% female, 87% white and 13% POC—closely reflected the American Bar Association's demographic data on U.S. lawyers (63% male and 37% female, 86% white and 14% POC).[195] On the other hand, the former criminal defendants, victims, and jurors in the sample were less likely to be representative of these populations at large because the majority of them were legal professionals.

Finally, the sample as a whole contained a larger proportion of criminal defense attorneys (because public defenders and private defense attorneys were sampled as separate stakeholder groups) as compared to prosecutors (who do not have a private counterpart). To ensure that all stakeholder groups' perspectives are clearly conveyed, regardless of their proportion in the sample, the survey data are analyzed not only by respondents as a whole but also by stakeholder group. Public and private criminal defense attorneys, however, are combined into one group in some analyses and figures when there are no statistically significant differences between their responses.

2. Survey Measures

The stakeholder survey was administered anonymously and online, between April 2019 and August 2020.[196] After obtaining informed consent and giving non-legal professionals a brief overview of the criminal trial process, the survey instrument presented all participants with the following definitions of general and special verdicts:

> "General Verdict"—At the end of a criminal trial, jurors deliver only their final verdict on whether the defendant is "guilty" or "not guilty" of the charged crime(s), without responding to any specific questions about whether each element of the charged crime(s) has been proven beyond a reasonable doubt. (General verdicts are currently the norm in criminal trials.)
>
> "Special Verdict"—At the end of a criminal trial, before delivering their final verdict on whether the defendant is "guilty" or "not guilty" of the charged crime(s), jurors first respond to specific "interrogatory" questions about whether each element of the charged crime(s) has been proven beyond a reasonable doubt, and these responses determine the final verdict. (Special verdicts as

[195] *See ABA National Lawyer Population Survey*, A.B.A. (2022), https://www.americanbar.org/content/dam/aba/administrative/market_research/2022-national-lawyer-population-survey.pdf [https://perma.cc/B74P-4VUJ].

[196] The full survey instrument is on file with the author.

defined above are rarely used in criminal trials, but they are used in civil trials.)

A comprehension check was administered to confirm that the survey participants understood the difference between general and special verdicts as defined above. No further details were offered about the potential structure and logistics of the special verdict format.[197]

The survey then measured stakeholders' views and intuitions about verdict format through eight blocks of quantitative questions with continuous scales and categorical choices. In addition, open-ended text boxes in every block enabled respondents to qualitatively explain, clarify, or elaborate on their quantitative answers. The survey's quantitative findings are discussed below; the qualitative data will be analyzed in future work.[198]

B. Views on Verdict Format

The survey assessed stakeholders' overall views about the use of general and special verdicts in criminal jury trials, as well as their views on using special instead of general verdicts across different types of criminal cases. In addition, stakeholders rated how they expected key criminal law actors at large to feel about the use of special verdicts in criminal jury trials. All these measures were on 5-point scales, ranging from "1: strongly oppose" to "5: strongly support."

1. Overall Views

The first substantive set of questions asked respondents how they felt, as a matter of justice, about "courts using the *general verdict* format in criminal jury trials, as is currently the norm," and about "courts instead using the *special verdict* format in criminal jury trials." Figure 1 illustrates the distributions of results on both these measures.

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[197] Toward the end of the survey, however, respondents were asked how rigid or flexible they thought the special verdict format should be if it were to be used in criminal jury trials. *See infra* Section III.F.1.

[198] Sood, Qualitative, *supra* note 27.

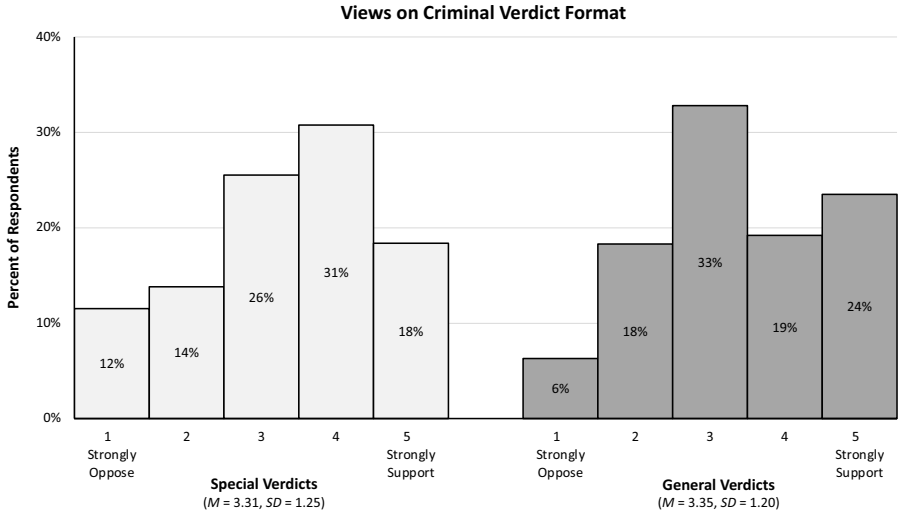

Figure 1. Stakeholders' views on using special verdicts (left) and general verdicts (right) in criminal jury trials.

Despite the disfavored status of special verdicts in criminal case law, legal stakeholders' mean view on this verdict format was supportive[xiv] and not significantly different from their mean view on general criminal verdicts. About half the survey respondents (49%) supported the use of special verdicts in criminal jury trials, while only about a quarter (26%) expressed opposition. Likewise, respondents were more likely to support (43%) than oppose (24%) the use of general criminal verdicts.

This parallel notwithstanding, there was a strong negative correlation between stakeholders' views on the two criminal verdict formats: higher support for special verdicts was associated with lower support for general verdicts (and vice versa).[xv] The distributions of respondent views on the two verdict formats were also significantly different from each other.[xvi] The mode (most commonly expressed) view was higher for special criminal verdicts (4) than for general criminal verdicts (3). Yet, more respondents expressed *strong* opposition (1) to using special (12%) as compared to general (6%) verdicts, and *strong* support (5) for using general (24%) as compared to special (18%) verdicts, in criminal jury trials.

The survey also asked stakeholders about their views toward using special verdicts in civil jury trials. On average, respondents as a whole and in every stakeholder group expressed support for special civil verdicts.[xvii] Furthermore, support for using special verdicts in civil cases was positively correlated with support for using special verdicts

in criminal cases,[xviii] and negatively correlated with support for using general verdicts in criminal cases.[xix]

2. *Views by Stakeholder Group*

Stakeholder group identity exerted significant and large main effects on survey respondents' views toward both special and general criminal verdicts, as shown in Figure 2 and detailed in the discussion below.[xx] Figure 2 also illustrates a significant interaction between respondents' mean views on special as compared to general verdicts, by stakeholder group.[xxi] On average, prosecutors and judges expressed significantly more support for using general criminal verdicts than special criminal verdicts.[xxii] In contrast, law students, public defenders, private criminal defense attorneys, criminal science experts, jury-eligible lay citizens, and civil law professors expressed significantly more mean support for using special as compared to general verdicts in criminal cases.[xxiii]

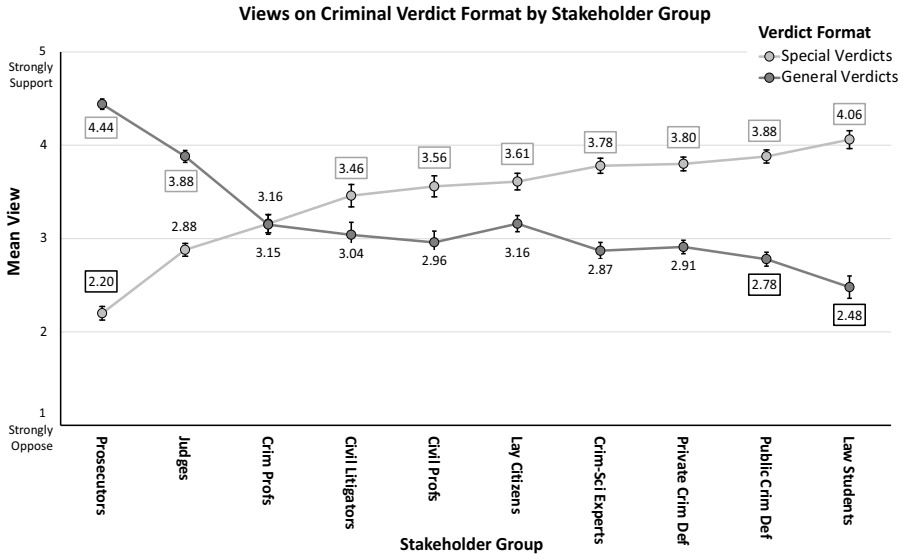

Figure 2. Stakeholder groups' mean views on special and general criminal verdicts. Error bars represent one standard error from the mean. Light gray boxes around the means indicate supportive views and black boxes indicate opposing views (i.e., two standard errors from the mean falling above or below the neutral midpoint of 3, respectively). The lines between data points serve only to illustrate the pattern of responses.

a. Special Criminal Verdicts

Counter to criminal case law's disfavoring of special verdicts, seven out of the ten surveyed stakeholder groups on average supported the use of this verdict format in criminal jury trials. Moreover, the majority of respondents in these seven groups expressed support: 81% of law students, 68% of public defenders, 68% of criminal science experts, 65% of private criminal defense attorneys, 60% of jury-eligible lay citizens, 54% of civil law professors, and 51% of civil litigators. There were no significant differences between public and private criminal defense attorneys, or between plaintiff-side and defense-side civil litigators, on this measure.

Judges and criminal law professors expressed neutral mean views toward special criminal verdicts, thereby also diverging from the antagonistic stance of criminal case law. Judicial views were more evenly dispersed (38% opposed, 31% neutral, 31% supportive, with a mode of 3) than those of criminal law professors, who leaned toward supporting special criminal verdicts (29% opposed, 21% neutral, 50% supportive, with a mode of 4). The mean view of trial judges was slightly below neutral, and the mean view of appellate judges was slightly above neutral, but this difference did not reach statistical significance.[xxiv]

Prosecutors were the only stakeholder group that on average opposed the use of special verdicts in criminal cases. The majority (60%) of prosecutors expressed opposition, while only half as many (30%) expressed support. Furthermore, prosecutors' mean view on special criminal verdicts was significantly lower than the mean views of all the other nine stakeholder groups.[xxv]

b. General Criminal Verdicts

Prosecutors and judges were the only two stakeholder groups to express mean support for the status quo in favor of using general criminal verdicts (with no significant difference between trial and appellate judges on this measure[xxvi]). On average, prosecutors supported general criminal verdicts significantly more than judges did, and both these groups expressed significantly more support than all the other eight stakeholder groups did.[xxvii] Prosecutors' views were particularly concentrated in this regard: 83% of them supported general criminal verdicts (with 65% expressing strong support), while only 2% expressed any opposition. In comparison, 65% of judges expressed support for general criminal verdicts, 25% expressed relatively neutral views, and 10% expressed opposition.

Law students and public defenders were the only two groups that on average opposed the use of general verdicts in criminal jury trials.[xxviii] A greater proportion of law students (54%) than public defenders (38%) expressed opposition to this procedural status quo. Meanwhile, both private and public criminal defense attorneys were about as likely to oppose (38% public, 36% private) as to express neutral views (40% public, 39% private) toward general criminal verdicts. Thus, prosecutors' support for the status quo in favor of general verdicts in criminal cases was stronger and more uniform than criminal defense attorneys' opposition to it.

c. Judges' Prior Litigation Experience

The past litigation experience of surveyed judges[xxix] significantly affected their views on criminal verdict format. Judges with only prosecution experience, or both prosecution and civil litigation experience, on average opposed the use of special criminal verdicts—and significantly more so than judges with all other types of litigation experience.[xxx] In contrast, judges with only civil litigation experience, only criminal defense experience, or a combination of all three types of experience (civil, criminal defense, and prosecution) on average supported the use of special verdicts in criminal jury trials.[xxxi]

Judicial views on general criminal verdicts by prior litigation experience exhibited a largely inverse pattern of results. Judges with only prosecution experience expressed the most mean support for general criminal verdicts—and significantly more so than judges with all other types of litigation experience except both prosecution and civil.[xxxii] Meanwhile, judges with a combination of all three types of litigation experience (civil, criminal defense, and prosecution) were the only subgroup to on average oppose the norm in favor of general criminal verdicts, with a significantly lower mean view than all other subgroups except judges with only criminal defense experience.[xxxiii]

3. Views by Personal Involvement

Figure 3 illustrates how survey respondents' personal involvement in criminal cases—as either defendants or victims, regardless of other stakeholder group membership—affected their views on criminal verdict format. On average, former criminal defendants supported the use of special verdicts, but opposed the use of general verdicts, in criminal jury trials. The defendants' mean view toward general criminal verdicts was thus significantly lower than their mean view toward special criminal verdicts.[xxxiv] Victims in criminal cases expressed comparably supportive mean views toward both criminal

verdict formats. Therefore, on average, victims supported general criminal verdicts significantly more than defendants did, but there was no significant difference in victims' and defendants' views toward special criminal verdicts.[xxxv]

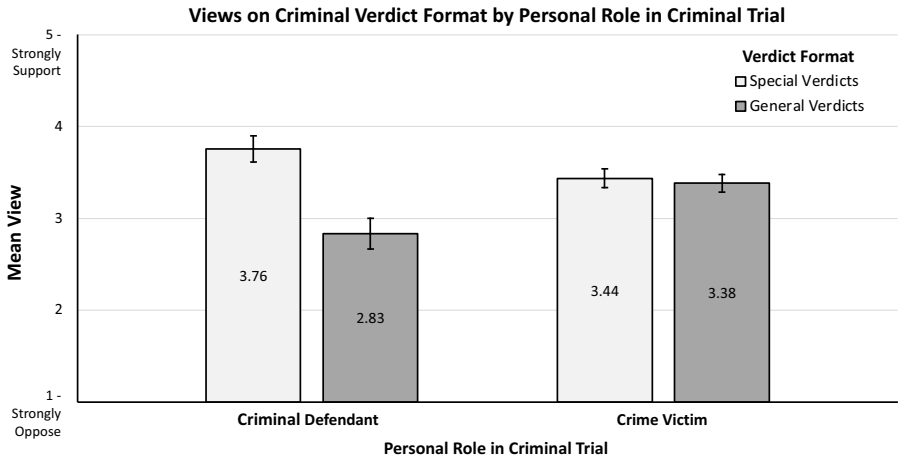

Figure 3. Former criminal defendants' and victims' mean views on special and general criminal verdicts. Error bars represent one standard error from the mean.

On average, respondents who had served as criminal jurors supported the use of special verdicts in criminal jury trials, and significantly more so than respondents who had served as civil jurors.[xxxvi] Former criminal jurors' mean view on general criminal verdicts was neutral, negatively correlated with their mean view on special criminal verdicts, and not significantly different from civil jurors' mean view on general criminal verdicts.[xxxvii] The difference between former criminal jurors' mean views on special and general verdicts did not, however, reach statistical significance.

4. Views by Case Type

To assess whether stakeholders' views toward criminal verdict format differ based on the type of criminal case being adjudicated, the survey asked participants how they felt about courts using special instead of general verdicts in jury trials involving *low severity* crimes, *high severity* crimes, *complex* crimes, *sex* crimes, and *affirmative defenses*—all on 5-point scales ranging from "1: strongly oppose" to "5: strongly support." Table 3 presents the mean, median, and mode results.

TABLE 3. SPECIAL VERDICT VIEWS BY TYPE OF CRIMINAL CASE

Type of Criminal Case	Special Verdict View (1: strongly oppose – 5: strongly support)
Low severity crimes (such as illegal possession of marijuana for personal use)	*M*: 3.03 (*SD*: 1.32) Mdn: 3, Mode: 3
High severity crimes (such as a public bombing that causes many deaths)	*M*: 3.48 (*SD*: 1.36) Mdn: 4, Mode: 5
Complex crimes (with many elements that the prosecution must prove)	*M*: 3.75 (*SD*: 1.31) Mdn: 4, Mode: 5
Sex crimes (such as rape)	*M*: 3.34 (*SD*: 1.36) Mdn: 3, Mode: 5
Affirmative defenses (that might reduce or eliminate the defendant's liability, such as self-defense or the insanity defense)	*M*: 3.50 (*SD*: 1.26) Mdn: 4, Mode: 4

Stakeholders on average supported the use of special verdicts across all these types of cases except low severity crimes. Mean, median, and mode views for using special verdicts in trials involving low severity offenses were at the neutral midpoint of the scale, and the average view on this measure was significantly lower than for all the other case types.[xxxviii]

Respondents expressed the most mean support for using special verdicts in complex criminal cases, and significantly more so than for all the other case types.[xxxix] Law students provided the highest mean rating on this measure, and they expressed significantly more support for using special verdicts in complex criminal cases than in all the other types of cases.[xl] Furthermore, stakeholders' mode views were at the highest rating of "strongly support" (5) for using special verdicts in cases involving complex crimes, as well as high severity crimes (for which public defenders and private criminal defense attorneys expressed the most mean support[xli]) and sex crimes (for which public defenders expressed the most mean support[xlii]).

Among the repeat criminal trial actors, trial judges expressed significantly less mean support than criminal defense attorneys, and significantly more mean support than prosecutors, for using special verdicts across all five types of criminal cases.[xliii] Prosecutors on average opposed the use of special criminal verdicts across all five case types, with significantly lower mean views than all the other nine stakeholder groups.[xliv]

Prosecutors were significantly less opposed, however, to using special verdicts for affirmative defenses (which the defense may bear the burden of proving[199]) as compared to criminal offenses (which the prosecution must prove beyond a reasonable doubt[200]).[xlv] Inversely, criminal defense attorneys—who on average supported the use of special criminal verdicts across all five case types—were significantly less supportive of using special verdicts for affirmative defenses as compared to complex, high severity, and sex crimes.[xlvi] Criminal defense attorneys also expressed significantly less mean support for using special verdicts in low severity criminal cases as compared to all other types of cases.[xlvii] There were no significant differences between private and public criminal defense attorneys' mean views on these measures.

5. Demographic Effects

Stakeholders across all demographic subgroups expressed positive or neutral mean views toward using both special and general verdicts in criminal jury trials. However, respondents' gender, race, education, age, geographic region, and political ideology exerted small but significant effects on the extent of their support for the different verdict formats.

Stakeholders on average expressed more support for special criminal verdicts, and less support for general criminal verdicts, if they were female (as compared to male),[xlviii] POC (as compared to white),[xlix] did not have a law degree (as compared to legal professionals),[l] were under forty years old (as compared to over the age of forty),[li] and were residing in the West or Northeast regions of the United States (as opposed to in the Midwest or South).[lii] Self-reported political ideology also significantly predicted respondents' views on criminal verdict format but accounted for only a small proportion of the variance.[liii] The more politically liberal (as compared to conservative) the stakeholders were, the more they supported special criminal verdicts and the less they supported general criminal verdicts.

Respondent race exerted notable effects on the verdict format views of prosecutors and judges—the two stakeholder groups who, on average, least supported the use of special verdicts and most supported the use of general verdicts in criminal cases. Prosecutors and judges of color expressed significantly less mean support for the status

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199 *See* Patterson v. New York, 432 U.S. 197, 210–11 (1977); Martin v. Ohio, 480 U.S. 228 (1987); Elisabeth M. Osenbaugh, *The Constitutionality of Affirmative Defenses to Criminal Charges*, 29 ARK. L. REV. 429, 429 (1976).

200 *In re* Winship, 397 U.S. 358, 364 (1970).

quo in favor of general criminal verdicts than their white counterparts.[liv] Judges of color additionally expressed significantly more mean support for special criminal verdicts than their white colleagues on the bench.[lv] Figure 4 illustrates these results.

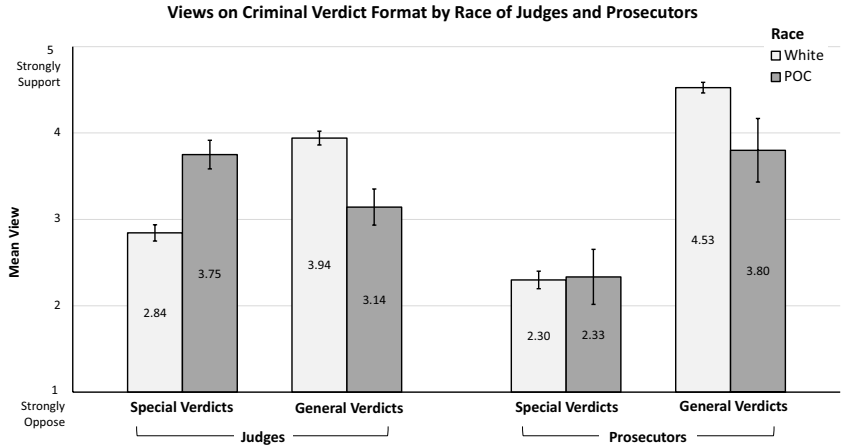

Figure 4. Judges' and prosecutors' mean views on special and general criminal verdicts, by self-reported race. Error bars represent one standard error from the mean.

Judges of color also expressed significantly more mean support than white judges did for using special verdicts across all types of criminal cases—with the largest effect sizes emerging for high severity crimes and sex crimes, which tend to carry severe penalties.[lvi] In addition, there was a small but significant effect of public defenders of color expressing more support than white public defenders for using special verdicts in complex criminal jury trials.[lvii]

6. Predicted Views of Others

After asking legal stakeholders about their own views on criminal verdict format, the survey asked them how they thought key actors in the criminal legal system at large—prosecutors, defense attorneys, trial judges, appellate judges, and jurors—would feel about the use of special instead of general verdicts in criminal trials. Respondents' predictions, when assessed against the views expressed by surveyed stakeholders from the groups in question, were accurate on some measures and missed the mark on others.

Respondents on average correctly predicted that prosecutors at large would most oppose special criminal verdicts (and significantly more so than the other key actors they were asked about),[lviii] while criminal defense attorneys would most support them (also signifi-

cantly more so than the other key actors).[lix] Stakeholders as a whole,[lx] as well as trial and appellate judges themselves,[lxi] on average also expected trial judges to be significantly less supportive of using special verdicts in criminal cases than appellate judges. However, as noted earlier, the actual difference between surveyed trial and appellate judges' views on special criminal verdicts did not reach statistical significance.

Stakeholders inaccurately predicted lay views on special criminal verdicts. On average, respondents expected criminal jurors to oppose special criminal verdicts,[lxii] whereas jury-eligible lay citizens actually supported this format, and significantly more so than they supported general criminal verdicts.[lxiii] Furthermore, not a single stakeholder group on average expected criminal jurors to support the use of special verdicts in criminal cases. Prosecutors and judges—who themselves opposed or felt neutral toward special criminal verdicts, respectively—on average expected criminal jurors to oppose this verdict format.[lxiv] All the remaining groups on average expected criminal jurors to feel neutral about using special verdicts. Thus, even jury-eligible lay citizens themselves significantly underestimated the extent to which potential criminal jurors would support special criminal verdicts, as illustrated in Figure 5.[lxv]

Figure 5 further reveals that judges', prosecutors', and criminal defense attorneys' personal views on criminal verdict format differed significantly from their predictions regarding their own stakeholder group's view. On average, surveyed trial judges[lxvi] and prosecutors[lxvii] expected judges and prosecutors at large to be significantly more opposed to special criminal verdicts than they themselves were. A significant but smaller effect in the opposite direction was seen for surveyed criminal defense attorneys, who on average expected the criminal defense bar at large to support special criminal verdicts more than they themselves did.[lxviii] These findings suggest a potential "pluralistic ignorance" effect—a mistaken sense of personal deviance from one's group norm, which will be discussed further in Section IV.B.3.[201]

201 *See infra* notes 255–58 and accompanying text.

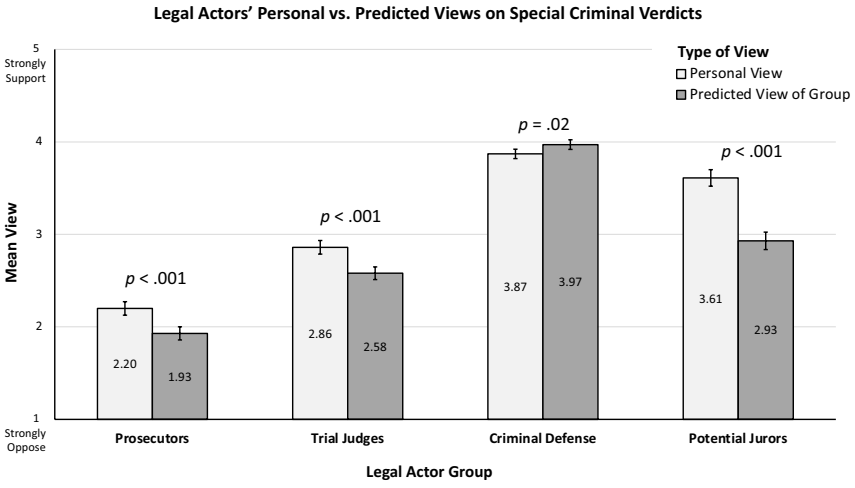

Figure 5. Criminal legal actors' mean personal views on special criminal verdicts and their mean predicted views of their own stakeholder group (public and private defense combined). Error bars represent one standard error from the mean.

Finally, although criminal law professors on average correctly predicted that prosecutors would be significantly less supportive of special criminal verdicts than criminal defense attorneys,[lxix] their predictions on criminal litigators' views differed significantly from those of criminal litigators and judges. Figure 6 shows that the professors on average expected criminal defense attorneys to support special verdicts significantly less, and prosecutors to oppose special verdicts significantly less, than the practitioners expected.[lxx]

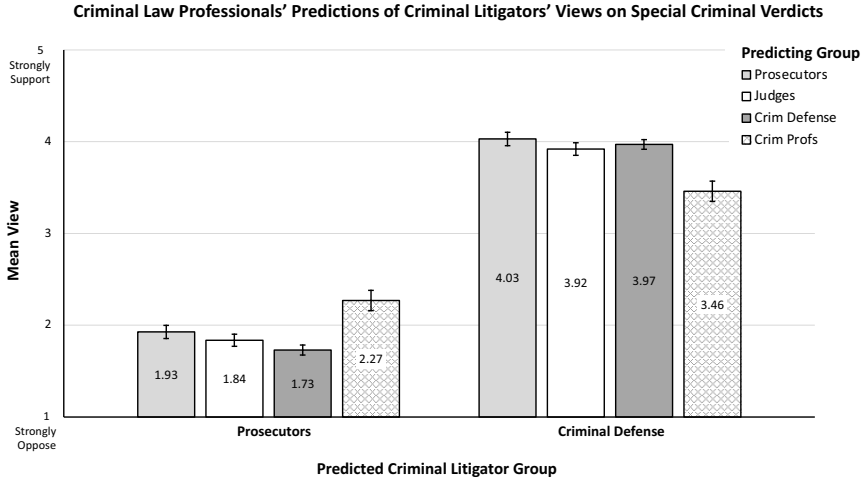

Figure 6. Criminal law professionals' predicted special verdict views of prosecutors and criminal defense attorneys at large (public and private defense combined). Error bars represent one standard error from the mean.

C. Predicted Effects of Special Verdicts

After gathering stakeholders' views on criminal verdict format, the survey asked them if they thought using special instead of general verdicts in criminal jury trials would, on the whole, operate more in favor of the prosecution, the defense, neither, or whether it would depend on the facts and charges in each criminal case. Subsequent questions then inquired more specifically into whether and how respondents expected special verdicts to affect various aspects of criminal adjudication: jury decisionmaking, litigator dynamics, trial outcomes, jury deviations from the law, pre-trial processes, and criminal appeals.

1. Adversarial Advantage

a. Criminal Trials

Stakeholders' intuitions about the overall adversarial effect of verdict format in criminal jury trials reflected a stark deviation from the conventional legal wisdom that special verdicts disadvantage criminal defendants.[202] Table 4 reveals that 45% of all respondents said the use of special criminal verdicts would, on the whole, operate in favor of criminal defendants, followed by 39% who said the overall effect would depend on the facts and charges in criminal cases. Only 7% of

202 *See supra* Section I.C.

stakeholders said special verdicts would, on the whole, operate in favor of the prosecution.

Respondents within every stakeholder group were also more likely to expect the use of special criminal verdicts to, on the whole, operate in favor of the defense (36–61%) than the prosecution (0–12%). In fact, the majority of respondents in four groups—prosecutors (who on average opposed special criminal verdicts), law students (who on average most supported special criminal verdicts), civil litigators (who were more likely to have had practice experience with special verdicts), and lay citizens (who were eligible to serve as jurors)—predicted an overall benefit to the criminal defendant. The majority of criminal-science experts, however, said the overall adversarial effect of special verdicts would depend on the facts and charges in criminal cases.

TABLE 4. PREDICTED FAVORING EFFECT OF SPECIAL CRIMINAL VERDICTS

	Prosec (%)	**Defense** (%)	**Depends** (%)	**Neither** (%)
All	*7*	***45***	***39***	*9*
Prosecutors	3	**51**	32	14
Judges	3	**43**	**35**	19
Crim Professors	9	**38**	**45**	8
Civil Litigators	5	**61**	33	2
Civil Professors	10	**48**	**36**	5
Lay Citizens	12	**53**	27	8
Crim Sci Experts	3	**38**	**57**	2
Priv Crim Def	9	**46**	**41**	4
Pub Crim Def	9	**36**	**49**	6
Law Students	0	**52**	**46**	2

NOTE: Views expressed by **over one-third** of a group are in bold; views expressed by the **majority** of a group are additionally shaded in gray.

b. Civil Trials

Stakeholders were also asked which adversarial party, if any, the use of special verdicts on the whole favors in civil jury trials, where both general and special verdicts are employed. The majority of stakeholders (57%) said this depends on the facts and claims in civil cases. Beyond that, respondents as a whole (and in every stakeholder group) were more likely to say that special verdicts ultimately operate in

favor of civil defendants (20%) than plaintiffs (6%), as per the reported wisdom of civil litigation.[203]

Plaintiff-side and defense-side civil attorneys exhibited agreement on this measure. Like the respondents as a whole, the majority of both types of civil litigators (65% plaintiff, 59% defense) said the overall adversarial effect of special civil verdicts depends on the case at hand. Beyond that, plaintiffs' attorneys were far more likely to say that special verdicts on the whole favor civil defendants (26%) as compared to their own clients (4%). Meanwhile, 38% of civil defense attorneys said special verdicts favor their clients, and not a single one (0%) said this format favors their opponents.

Figure 7 compares stakeholders' predictions in criminal versus civil cases, revealing a notable difference in the distribution of views.[lxxi] Respondents were even more likely to predict that the use of special verdicts would on the whole favor defendants in criminal cases (45%) than in civil cases (20%). Meanwhile, respondents were equivalently unlikely to expect the special verdict format to benefit the prosecution in criminal cases (7%) and plaintiffs in civil cases (6%).

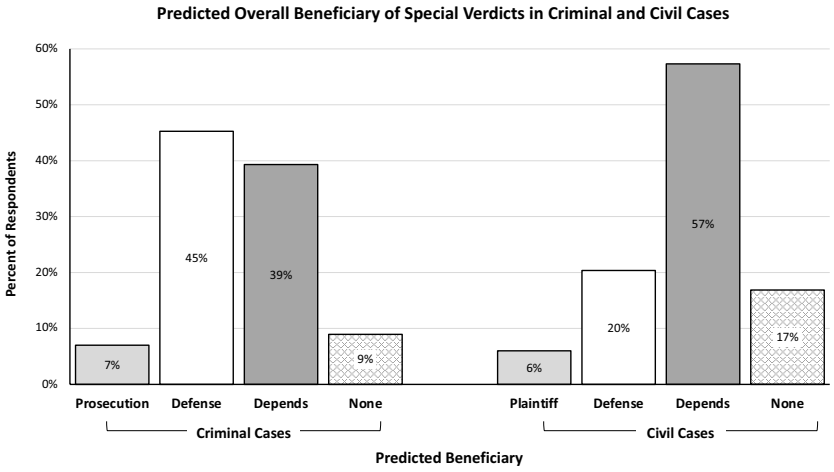

Figure 7. Stakeholders' intuitions on which adversarial side special verdicts would/do on the whole favor in criminal cases (left) and civil cases (right).

2. *Effects on Criminal Jurors*

To measure expected effects of verdict format on socio-cognitive aspects of criminal jury decisionmaking, the survey asked stakeholders whether they thought using special instead of general verdicts would

203 *See supra* Section II.A.

hinder, help, or have no overall effect on jurors (1) fully *understanding* all elements of the given law, (2) accurately *applying* the law as lawmakers intended, (3) thoroughly *thinking* through the facts and law in a case, (4) thoroughly *discussing* the case with other jurors before reaching a decision, and (5) making *unbiased* decisions that are not influenced by legally irrelevant factors, such as the race of the defendant or victim.

a. Socio-Cognitive Processing

Table 5 reveals that the majority of all respondents said special verdicts would help jurors better understand (65%) and apply (62%) criminal law, as well as individually think through (69%) and collectively discuss (64%) criminal cases. Stakeholders were least likely (6–14%) to expect special verdicts to hinder criminal jurors in all these regards.

Majorities of every stakeholder group except prosecutors (and only 50% of judges on the "apply" measure) said special verdicts would help jurors understand (53–97%), apply (64–93%), think through (58–95%), and discuss (52–88%) criminal cases. Law students were the most likely (88–97%) to predict helping effects on all these measures, and disproportionately more so than stakeholders overall (62–69%).[lxxii]

Prosecutors, in contrast, were disproportionately less likely than stakeholders overall to expect special verdicts to help (20–30%)—and disproportionately more likely to expect them to hinder or have no effect on—criminal jurors' understanding and application of law, as well as their ability to think through and discuss cases.[lxxiii] Judges were also disproporionately less likely to predict helping effects on these measures (50–58%),[lxxiv] albeit to a lesser extent than prosecutors. In addition, judges were disproportionately more likely to expect special criminal verdicts to exert no effect (34–42%) on these socio-cognitive aspects of jury decisionmaking, as compared to stakeholders overall (23–29%).[lxxv]

TABLE 5. PREDICTED EFFECTS OF SPECIAL VERDICTS ON CRIMINAL JURY DECISIONMAKING

	Understand (%)	**Apply** (%)	**Think** (%)	**Discuss** (%)
All	*Hinder: 12* *None: 23* ***Help: 65***	*Hinder: 14* *None: 25* ***Help: 62***	*Hinder: 6* *None: 25* ***Help: 69***	*Hinder: 8* *None: 29* ***Help: 64***
Prosecutors	**Hinder: 37** **None: 42** Help: 22	**Hinder: 42** **None: 38** Help: 20	Hinder: 21 **None: 50** Help: 30	Hinder: 23 **None: 49** Help: 28
Judges	Hinder: 13 **None: 34** **Help: 53**	Hinder: 15 **None: 35** **Help: 50**	Hinder: 5 **None: 36** **Help: 58**	Hinder: 6 **None: 42** **Help: 52**
Crim Law Professors	Hinder: 6 None: 28 **Help: 66**	Hinder: 5 None: 31 **Help: 64**	Hinder: 2 None: 33 **Help: 65**	Hinder: 9 None: 29 **Help: 63**
Civil Litigators	Hinder: 3 None: 21 **Help: 76**	Hinder: 11 None: 21 **Help: 68**	Hinder: 3 None: 17 **Help: 80**	Hinder: 5 None: 20 **Help: 75**
Civil Law Professors	Hinder: 4 None: 11 **Help: 86**	Hinder: 4 None: 19 **Help: 78**	Hinder: 0 None: 15 **Help: 85**	Hinder: 1 None: 23 **Help: 76**
Jury-Eligible Lay Citizens	Hinder: 13 None: 17 **Help: 69**	Hinder: 11 None: 16 **Help: 73**	Hinder: 6 None: 17 **Help: 78**	Hinder: 7 None: 18 **Help: 75**
Crim Science Experts	Hinder: 10 No Effect: 12 **Help: 78**	Hinder: 7 No Effect: 23 **Help: 70**	Hinder: 3 No Effect: 8 **Help: 89**	Hinder: 2 No Effect: 17 **Help: 81**
Private Crim Defense	Hinder: 6 No Effect: 12 **Help: 82**	Hinder: 8 No Effect: 14 **Help: 79**	Hinder: 3 No Effect: 15 **Help: 83**	Hinder: 4 No Effect: 19 **Help: 77**
Public Crim Defense	Hinder: 4 No Effect: 16 **Help: 81**	Hinder: 4 No Effect: 23 **Help: 73**	Hinder: 3 No Effect: 17 **Help: 80**	Hinder: 5 No Effect: 21 **Help: 74**
Law Students	Hinder: 3 No Effect: 0 **Help: 97**	Hinder: 2 No Effect: 5 **Help: 93**	Hinder: 0 No Effect: 5 **Help: 95**	Hinder: 0 No Effect: 12 **Help: 88**

NOTE: Views expressed by **over one-third** of a group are in bold; views expressed by the **majority** of a group are additionally shaded in gray.

b. Avoiding Bias

Regarding effects of verdict format on curtailing jury biases triggered by legally irrelevant information: over half the survey respondents (53%) expected no effect, 40% expected special verdicts to help criminal jurors render unbiased decisions, and only 7% of stakeholders predicted a hindering effect. Figure 8 compares the stakeholder groups' responses on this measure.[lxxvi]

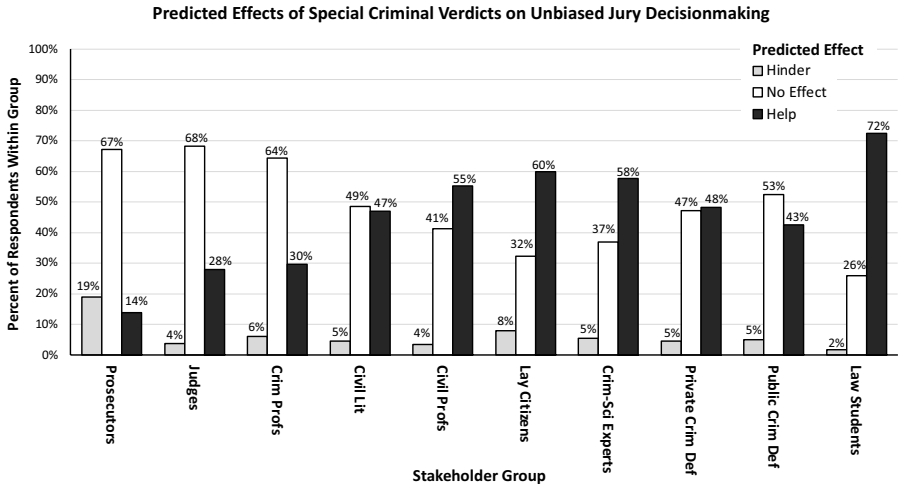

Figure 8. Predicted effects of special verdicts, by stakeholder group, on criminal jurors making unbiased decisions.

Substantial proportions (43–72%) of the seven stakeholder groups that on average supported special criminal verdicts—including the majority of law students (72%), jury-eligible lay citizens (60%), criminal science experts (58%), and civil law professors (55%)—expected special verdicts to help jurors resist the biasing influence of legally irrelevant factors. Furthermore, all the stakeholder groups except prosecutors were far more likely to expect special verdicts to help (28–72%) than to hinder (2–8%) unbiased jury decisionmaking in criminal cases.

The majority of judges (68%), prosecutors (67%), and criminal law professors (64%)—the three stakeholder groups that on average opposed or expressed neutral views toward special criminal verdicts—expected this format to exert no effect on criminal jury biases. Prosecutors particularly diverged from stakeholders overall in being disproportionately more likely to expect the use of special verdicts to hinder unbiased criminal jury adjudication (19% as compared to 7% of stakeholders overall), and disproportionately less likely to predict a helping effect in this regard (14% as compared to 40% of stakeholders overall).[lxxvii]

3. Effects on Litigators

To gauge intuitions about effects of verdict format on courtroom lawyering, the survey asked current litigators (civil and criminal) how special verdicts have affected or would affect their ability to *convince* juries of their cases at trial, with three response options: hinder, help,

or no effect. In addition, all stakeholders were asked what effect they expected the use of special verdicts to have on the ability of criminal litigators (prosecutors and defense attorneys) to inappropriately *sway* jurors with legally irrelevant information or arguments at trial: decrease, increase, or no effect.

a. Convincing Jurors

The type of legal practice that litigators were engaged in had a significant effect on how they expected special verdicts to impact their ability to convince jurors, as summarized in Table 6.[lxxviii] Contrary to the conventional wisdom of criminal courts, but consistent with experiential wisdom from civil litigation, the majority of defense attorneys—criminal (71% private, 65% public) and civil (72%)—expected special verdicts to help their cases at trial. Less than 10% of these groups predicted a hindering effect. A slim majority of plaintiff-side attorneys (52%) also expected special verdicts to help them at trial, while 22% of this group predicted a hindering effect instead.

The majority of prosecutors (56%) expected special verdicts to have no effect on their ability to convince jurors of their cases, while over a quarter (26%) of them predicted a hindering effect. In addition, prosecutors were disproportionately less likely (17%) than litigators overall to predict that special criminal verdicts would help their cases.[lxxix]

TABLE 6. PREDICTED EFFECTS OF SPECIAL VERDICTS ON LITIGATORS' ABILITY TO CONVINCE JURORS OF THEIR CASES

	Hinder (%)	**No Effect** (%)	**Help** (%)
Prosecutors	26	**56**	17
Priv Crim Defense	8	22	**71**
Pub Crim Defense	8	27	**65**
Civil Plaintiff	22	26	**52**
Civil Defense	9	19	**72**

NOTE: Views expressed by **over one-third** of a group are in bold; views expressed by the **majority** of a group are additionally shaded in gray.

b. Swaying Jurors

In regard to how special verdicts might affect the ability of criminal litigators at large to sway jurors with legally irrelevant information or arguments, Table 7 shows that stakeholders were largely divided between predicting a decrease (41%) or no effect (40%), with less than half as many predicting an increase (19%).

The majority of respondents in five stakeholder groups (all of whom on average supported special criminal verdicts)—civil law professors (64%), law students (63%), criminal science experts (57%), jury-eligible lay citizens (52%), and public defenders (52%)—said special verdicts would decrease criminal litigators' ability to sway jurors with legally irrelevant information. In contrast, prosecutors (19%) and judges (29%)—who on average opposed or felt neutral toward special criminal verdicts, respectively—were disproportionately less likely than stakeholders overall (41%) to expect a decrease.[lxxx] Furthermore, prosecutors were disproportionately more likely (40%) as compared to stakeholders overall (19%) to expect special criminal verdicts to increase litigators' ability to sway jurors with legally irrelevant information.[lxxxi]

TABLE 7. PREDICTED EFFECTS OF SPECIAL VERDICTS ON CRIMINAL LITIGATORS' ABILITY TO SWAY JURORS WITH LEGALLY IRRELEVANT INFORMATION

	Decrease (%)	**No Effect** (%)	**Increase** (%)
All	***41***	***40***	*19*
Prosecutors	19	**40**	**40**
Judges	29	**48**	23
Crim Professors	**43**	**45**	11
Civil Litigators	**40**	**42**	19
Civil Professors	**64**	32	4
Lay Citizens	**52**	27	21
Crim Sci Experts	**57**	**35**	8
Priv Crim Defense	**39**	**44**	17
Pub Crim Defense	**52**	**35**	13
Law Students	**63**	23	15

NOTE: Views expressed by **over one-third** of a group are in bold; views expressed by the **majority** of a group are additionally shaded in gray.

4. Effects on Trial Outcomes

Turning to potential outcomes of criminal jury trials, the survey asked stakeholders what overall effect, if any, they expected the use of special instead of general verdicts to exert on rates of *acquittal versus conviction*: more acquittals, more convictions, or no effect. In addition, the stakeholder survey measured anticipated effects of special verdicts on *hung juries* and *compromise verdicts* in criminal trials: less likely, more likely, or no effect.

a. Convictions and Acquittals

Table 8 reveals that, contrary to criminal case law's conventional wisdom that a special verdict is the "easiest" way to "reach, and perhaps force" a criminal conviction,[204] the majority of respondents as a whole (59%)—and in every stakeholder group (51–84%) except judges—said the use of special criminal verdicts would lead to more jury acquittals. Also counter to the conventional legal wisdom, the majority of judges expected special verdicts to exert no effect (52%) in this regard, and they were far more likely to predict an increase in acquittals (43%) than convictions (5%) under a special verdict regime.

Furthermore, respondents as a whole (8%) and in every stakeholder group—including the repeat legal actors in criminal trials (5–9%)—were least likely to expect special criminal verdicts to result in more jury convictions. Criminal law professors, however, were disproportionately likely (19%), as compared to stakeholders overall (8%), to subscribe to this conventional wisdom of criminal case law.[lxxxii]

TABLE 8. PREDICTED EFFECTS OF SPECIAL CRIMINAL VERDICTS ON JURY OUTCOMES

	More Acquit (%)	**No Effect** (%)	**More Convict** (%)
All	***59***	*33*	*8*
Prosecutors	**54**	**38**	8
Judges	**43**	**52**	5
Crim Professors	**51**	30	19
Civil Litigators	**68**	27	5
Civil Professors	**54**	**35**	11
Lay Citizens	**68**	19	13
Crim Sci Experts	**66**	32	2
Priv Crim Defense	**66**	27	8
Pub Crim Defense	**65**	26	9
Law Students	**84**	9	7

NOTE: Views expressed by **over one-third** of a group are in bold; views expressed by the **majority** of a group are additionally shaded in gray.

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

b. Hung Juries

A "hung jury" occurs when criminal jurors are unable to reach unanimous agreement on a verdict, leading to a mistrial.[205] Table 9 reveals that the majority of all survey respondents (54%), and seven of the ten stakeholder groups (51–66%), expected the use of special verdicts in criminal trials to culminate in more hung juries. But notably, over one-third of jury-eligible lay citizens (39%) predicted fewer hung juries under a special verdict regime, and over one-third of judges (39%) predicted no effect in this regard.[lxxxiii]

TABLE 9. PREDICTED EFFECTS OF SPECIAL CRIMINAL VERDICTS ON OCCURRENCE OF HUNG JURIES

	Fewer (%)	**No Effect** (%)	**More** (%)
All	*19*	*28*	***54***
Prosecutors	9	26	**66**
Judges	10	**39**	**51**
Crim Professors	17	30	**53**
Civil Litigators	23	31	**46**
Civil Professors	10	26	**64**
Lay Citizens	**39**	19	**42**
Crim Sci Experts	33	24	**43**
Priv Crim Defense	19	25	**56**
Pub Crim Defense	18	26	**56**
Law Students	28	15	**58**

NOTE: Views expressed by **over one-third** of a group are in bold; views expressed by the **majority** of a group are additionally shaded in gray.

c. Compromise Verdicts

When criminal jurors have difficulty reaching unanimity on an outcome, they may avoid becoming a hung jury by delivering a compromise verdict: a "middling position between the two verdicts in which one faction or the other did believe."[206] For example, a jury could agree to convict a criminal defendant on a lower charge as a

[205] FED. R. CRIM. P. 31(a), 31(b)(3) (specifying that the jury verdict "must be unanimous" and "[i]f the jury cannot agree on a verdict on one or more counts, the court may declare a mistrial on those counts"); Oregon v. Kennedy, 456 U.S. 667, 672 (1982) (referring to a "mistrial declared by the judge following the jury's declaration that it was unable to reach a verdict" as a hung jury); *Mistrial*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining mistrial as "a trial that ends inconclusively because the jury cannot agree on a verdict").

[206] *Compromise Verdict*, *in* THE WOLTERS KLUWER BOUVIER LAW DICTIONARY: DESK EDITION (Stephen Michael Sheppard ed., 2012), LexisNexis; *see Compromise Verdict*, CORNELL L. SCH. LEGAL INFO. INST., WEX, https://www.law.cornell.edu/wex/

compromise between jurors who want to convict on a higher charge and jurors who want to acquit.

Table 10 reveals that respondents as a whole did not reach a majority consensus on how special verdicts would affect the occurrence of compromise verdicts in criminal jury trials. However, the majority of civil law professors (71%) expected fewer compromise verdicts under a special verdict regime, while smaller majorities of jury-eligible lay citizens (56%) and criminal science experts (59%) predicted an increase in compromise verdicts.[lxxxiv]

TABLE 10. PREDICTED EFFECTS OF SPECIAL CRIMINAL VERDICTS ON OCCURRENCE OF COMPROMISE VERDICTS

	Fewer (%)	**No Effect** (%)	**More** (%)
All	*33*	*29*	***37***
Prosecutors	18	**39**	**43**
Judges	30	**38**	32
Crim Professors	**47**	20	33
Civil Litigators	**40**	32	28
Civil Professors	**71**	15	14
Lay Citizens	25	19	**56**
Crim Sci Experts	21	21	**59**
Priv Crim Defense	**37**	27	**36**
Pub Crim Defense	**36**	**34**	31
Law Students	**43**	18	**40**

NOTE: Views expressed by **over one-third** of a group are in bold; views expressed by the **majority** of a group are additionally shaded in gray.

D. Jury Deviations from the Law

As discussed in Parts I and II, the status quo in favor of general criminal verdicts is rooted heavily in the judicial presumption that the structure and transparency of special verdicts will impede the ability of criminal jurors to acquit defendants notwithstanding the law (*nullifying acquittals*). At the same time, the general verdict's lack of structure and transparency could be enabling jurors to convict defendants without confirming that the prosecution has proven all elements of the requisite law beyond a reasonable doubt (*unproven convictions*). The survey measured legal stakeholders' views and intuitions about these jury deviations from the law and, more broadly, about criminal jurors "delivering verdicts that feel *morally right* regardless of the law."[lxxxv]

compromise_verdict [https://perma.cc/G7XG-Z5MZ] ("A jury may choose to utilize a compromise verdict because it limits the possibility of a mistrial.").

1. Nullifying Acquittals

Survey respondents' views on nullifying acquittals spanned the full range of a 5-point scale ranging from "1: strongly oppose" to "5: strongly support," with mean and median views at or near the neutral midpoint. However, half the responses were at the extremes of the scale, reflecting either strong opposition (27%) or strong support (23%). The mode view on nullifying acquittals was strongly opposed.

Table 11 includes all the stakeholder groups' mean views on nullifying acquittals, between which there were significant and large differences.[lxxxvi] Prosecutors (93%), judges (70%), criminal science experts (52%), and jury-eligible lay citizens (44%) on average opposed nullifying acquittals. Prosecutors expressed the most mean opposition, significantly more so than all the other nine stakeholder groups.[lxxxvii] Trial judges expressed significantly more mean opposition than appellate judges did to nullifying acquittals.[lxxxviii]

At the other end of the scale, public defenders (82%), private criminal defense attorneys (70%), law students (58%), and criminal law professors (53%) on average supported nullifying acquittals. Public defenders expressed the most mean support, marginally more so than private criminal defense attorneys and significantly more so than the other eight stakeholder groups.[lxxxix] Former criminal defendants on average also supported nullifying acquittals, and significantly more so than crime victims did.[xc] Civil law professors and civil litigators expressed neutral mean views toward nullifying acquittals, as did former criminal jurors, civil jurors, and victims in criminal cases.[xci]

TABLE 11. MEAN VIEWS ON NULLIFYING ACQUITTALS AND UNPROVEN CONVICTIONS

	Nullifying Acquittals *(1: strongly oppose – 5: strongly support)*	**Unproven Convictions** *(1: strongly oppose – 5: strongly support)*
All	*M: 2.94 (SD: 1.52) Mdn: 3, Mode: 1*	*M: 1.30 (SD: 0.70) Mdn: 1, Mode: 1*
Prosecutors	1.33 (0.79)	1.24 (0.67)
Judges	1.98 (1.13)	1.25 (0.58)
Crim Professors	**3.49 (1.21)**	1.17 (0.50)
Civil Litigators	2.84 (1.34)	1.43 (0.71)
Civil Professors	3.04 (1.14)	1.33 (0.66)
Lay Citizens	2.70 (1.34)	1.64 (0.91)
Crim Sci Experts	2.56 (1.24)	1.51 (0.82)
Priv Crim Defense	**4.05 (1.14)**	1.16 (0.61)
Pub Crim Defense	**4.39 (0.92)**	1.20 (0.72)
Law Students	**3.64 (1.30)**	1.45 (0.80)

NOTE: Mean views are rated on 5-point scales and standard deviations from the mean are presented in parentheses. Stakeholder groups' mean views are in bold if **supportive** and shaded in gray if opposed (i.e., two standard errors from the mean falling above or below the neutral midpoint of 3, respectively).

Stakeholders' views on nullifying acquittals were correlated with their views on criminal verdict format, but in a manner directly contrary to the conventional wisdom of courts. Although criminal case law has disfavored special verdicts under the rationale that they will impede pro-defense nullification, stakeholders who supported nullifying acquittals were more likely to support special criminal verdicts and less likely to support general criminal verdicts.[xcii] Mediation analysis indicated that pro-nullification respondents' support for the use of special verdicts in criminal jury trials was driven by their concern about the frequency of unproven convictions[xciii]—a measure discussed next.

2. Unproven Convictions

In keeping with constitutional norms, the vast majority of survey respondents (91%) opposed unproven convictions, with 81% expressing strong opposition. Mean, median, and mode views on this measure were all at or near strongly opposed (1). Thus, respondents on average expressed significantly more opposition to unproven convictions than nullifying acquittals.[xciv]

Every stakeholder group also expressed mean opposition to unproven convictions, as shown in Table 11 above. The repeat crim-

inal trial actors were generally aligned on this measure, but trial judges and criminal defense attorneys expressed significantly more mean opposition to unproven convictions than nullifying acquittals, whereas prosecutors were equivalently opposed to both phenomena.[xcv] Jury-eligible lay citizens expressed significantly less mean opposition to unproven convictions than criminal law professionals (judges, prosecutors, criminal defense attorneys, and criminal law professors) did.[xcvi] There were no significant differences between the mean views of trial and appellate judges, former criminal and civil jurors, or former criminal defendants and victims on unproven convictions (they were all opposed).

3. Frequency Estimates

The survey next asked stakeholders how commonly they think nullifying acquittals and unproven convictions occur in criminal jury trials, on 5-point scales ranging from "1: very rarely" to "5: very often." Stakeholders on average said nullifying acquittals are significantly more rare than unproven convictions.[xcvii] About three-quarters of the respondents (74%) said nullifying acquittals occur "rarely" or "very rarely," whereas only about half (49%) said unproven convictions occur "rarely" or "very rarely." At the other end of the scale, only 8% of stakeholders said nullifying acquittals occur "often" or "very often," while over a quarter (28%) said unproven convictions occur "often" or "very often." The median rating for the frequency of nullifying acquittals (2) was also lower than that of unproven convictions (3). However, the mode frequency ratings for both measures were at the "very rarely" end (1) of the scale.

Figure 9 illustrates the stakeholder groups' mean responses on the frequency of nullifying acquittals and unproven convictions.[xcviii] On average, all groups except prosecutors said nullifying acquittals occur significantly more rarely than unproven convictions—with criminal defense attorneys exhibiting the largest effect and judges exhibiting the smallest effect in this regard.[xcix] Former criminal jurors also said nullifying acquittals are significantly more rare than unproven convictions.[c] In contrast, prosecutors said unproven convictions are significantly more rare than nullifying acquittals.[ci]

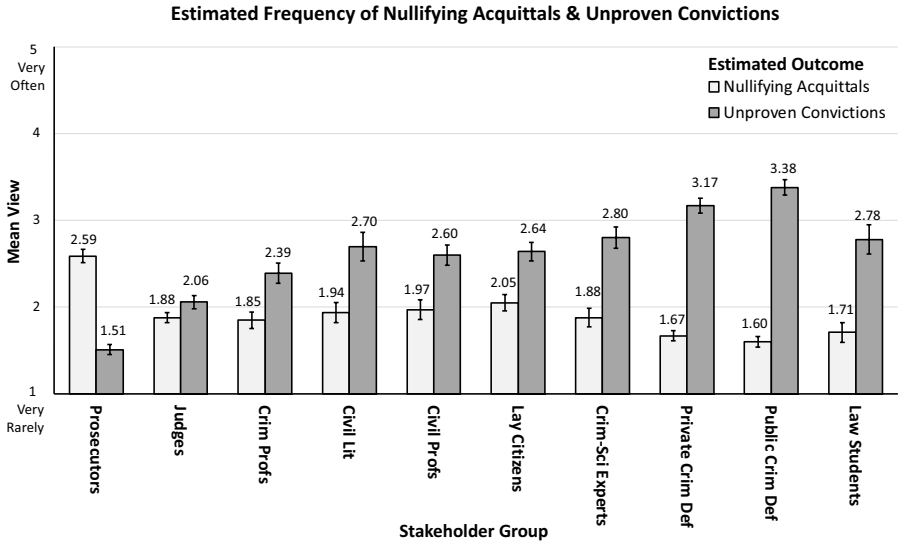

Figure 9. Estimated frequency of nullifying acquittals and unproven convictions, by stakeholder group.

Further analyses taking stakeholders' race into account revealed that judges and public defenders of color said unproven convictions occur significantly more often than their white counterparts did.[cii] Meanwhile, white law students said unproven convictions occur significantly more often than law students of color did. Race did not exert significant effects on stakeholder groups' ratings on the frequency of nullifying acquittals.

4. Role of Verdict Format

a. Effect on Nullifying Acquittals

Table 12 reveals that survey respondents as a whole were largely divided between expecting the use of special verdicts in criminal jury trials to decrease (42%) or have no effect (44%) on nullifying acquittals. They were least likely (14%) to predict an increase in nullifying acquittals.

Among the stakeholder groups, the majority of law students (60%), criminal science experts (58%), and civil law professors (58%) were aligned with the conventional wisdom of criminal case law that expects special criminal verdicts to decrease nullifying acquittals. The majority of judges and prosecutors (53% each), however, said special verdicts would have no effect on nullifying acquittals. Prosecutors (20%) and judges (32%) were thus disproportionately less likely, compared to stakeholders overall (42%), to subscribe to the conven-

tional legal wisdom that special criminal verdicts will decrease nullifying acquittals.[ciii] In addition, prosecutors were disproportionately more likely (26%), compared to stakeholders overall (14%), to predict an increase in nullifying acquittals under a special verdict regime—which is directly contrary to the rationale underlying criminal law's status quo in favor of general verdicts.[civ]

TABLE 12. PREDICTED EFFECTS OF SPECIAL CRIMINAL VERDICTS ON NULLIFYING ACQUITTALS

	Decrease (%)	**No Effect** (%)	**Increase** (%)
All	***42***	***44***	*14*
Prosecutors	20	**53**	26
Judges	32	**53**	15
Crim Professors	**48**	**40**	12
Civil Litigators	**50**	**38**	12
Civil Professors	**58**	**40**	1
Lay Citizens	**46**	**35**	20
Crim Sci Experts	**58**	32	10
Priv Crim Defense	**40**	**48**	12
Pub Crim Defense	**49**	**44**	7
Law Students	**60**	27	13

NOTE: Views expressed by **over one-third** of a group are in bold; views expressed by the **majority** of a group are additionally shaded in gray.

b. Effect on Unproven Convictions

Table 13 reveals that half the survey respondents (50%)—and majorities within seven of the ten stakeholder groups (53–78%)—expected the use of special verdicts in criminal jury trials to decrease unproven convictions. Notably, while the majority of jury-eligible lay citizens predicted a decreasing effect, this group was disproportionately more likely to predict an increase in unproven convictions (11%), as compared to stakeholders overall (5%).[cv]

On this measure, too, the majority of prosecutors (71%) and judges (58%) expected special verdicts to exert no effect, and disproportionately so as compared to stakeholders overall (45%).[cvi] In addition, prosecutors (25%) and judges (36%) were disproportionately less likely, as compared to stakeholders overall (50%), to predict a decrease in unproven convictions under a special verdict regime.[cvii]

TABLE 13. PREDICTED EFFECTS OF SPECIAL CRIMINAL VERDICTS ON UNPROVEN CONVICTIONS

	Decrease (%)	**No Effect** (%)	**Increase** (%)
All	***50***	***45***	*5*
Prosecutors	25	**71**	5
Judges	**36**	**58**	6
Crim Professors	**53**	**46**	1
Civil Litigators	**49**	**44**	6
Civil Professors	**57**	**37**	6
Lay Citizens	**57**	32	11
Crim Sci Experts	**78**	20	2
Priv Crim Defense	**61**	**34**	5
Pub Crim Defense	**54**	**43**	2
Law Students	**76**	18	5

NOTE: Views expressed by **over one-third** of a group are in bold; views expressed by the **majority** of a group are additionally shaded in gray.

Comparing the data of all respondents in Tables 12 and 13 indicates that a larger proportion of stakeholders as a whole expected special verdicts to *decrease* unproven convictions (50%) as compared to nullifying acquittals (42%). Inversely, stakeholders were more likely to expect the use of special verdicts to *increase* nullifying acquittals (14%) as compared to unproven convictions (5%).[cviii]

5. *Morally Right Outcomes*

On the broader survey measure of whether and how special verdicts would affect criminal jury outcomes that "feel morally right regardless of the law," Table 14 reveals that respondents were largely divided between predicting no effect (45%) or a hindering effect (40%). Only 15% of stakeholders predicted a helping effect on this measure.

Consistent with criminal case law, the majority of civil law professors (60%) and law students (59%) expected special criminal verdicts to hinder jury outcomes that feel morally right regardless of the law.[cix] However, as with the measures on nullifying acquittals and unproven convictions, the majority of judges (60%) and prosecutors (52%) predicted no effect in this regard, and disproportionately so as compared to stakeholders overall (45%).[cx] In addition, judges were disproportionately less likely (30%), as compared to stakeholders overall (40%), to predict that special verdicts would hinder criminal jurors in delivering outcomes that feel morally right notwithstanding the law.[cxi] Even further counter to the conventional wisdom of courts, jury-

eligible lay citizens were disproportionately more likely (35%), as compared to stakeholders overall (15%), to predict that special verdicts would help criminal jurors follow their own moral compass.[cxii]

TABLE 14. PREDICTED EFFECTS OF SPECIAL CRIMINAL VERDICTS ON OUTCOMES THAT FEEL MORALLY RIGHT REGARDLESS OF THE LAW

	Hinder (%)	**No Effect** (%)	**Help** (%)
All	***40***	***45***	*15*
Prosecutors	**40**	**52**	8
Judges	30	**60**	10
Crim Professors	**47**	**41**	12
Civil Litigators	**42**	**42**	15
Civil Professors	**60**	32	8
Lay Citizens	**37**	28	**35**
Crim Sci Experts	**47**	**34**	19
Priv Crim Defense	33	**46**	21
Pub Crim Defense	**41**	**44**	16
Law Students	**59**	33	9

NOTE: Views expressed by **over one-third** of a group are in bold; views expressed by the **majority** of a group are additionally shaded in gray.

E. Upstream and Downstream Implications

Given that expectations of how juries will decide cases at trial influence the majority of criminal cases that never make it to trial,[207] the stakeholder survey measured intuitions on whether the anticipated use of special criminal verdicts at trial would exert upstream effects on two critical pretrial processes: *prosecutorial charging* and *plea bargaining*. Furthermore, the survey measured stakeholders' predictions on whether special verdict information from criminal jury trials would exert downstream effects on two important aspects of post-trial *appeals*: the *quality* of appellate decisions and the *reversal rates* of jury convictions.

1. Prosecutorial Charging

The survey asked respondents what effect, if any, they thought the widespread use of special verdicts in criminal jury trials would have on prosecutors' decisions to charge *minor* crimes, *serious* crimes, and *multiple* crimes/counts against a single defendant. The majority of stakeholders predicted no effect of special verdicts on charging of

207 *See supra* note 22 and accompanying text.

minor (53%) and severe (60%) crimes. Those who predicted a directional effect were more likely to expect prosecutors to bring fewer (33%) as opposed to more (14%) minor criminal charges under a special verdict regime. Survey respondents did not reach a majority consensus in regard to how verdict format would affect multi-count charging: 45% of stakeholders predicted no effect, 34% predicted a decrease in this practice, and 21% expected multi-count charging to increase under a special verdict regime.

The majority of prosecutors themselves said special verdicts would exert no effect on their decisions to charge minor (81%), severe (82%), and multiple (67%) crimes. The majority of trial judges also predicted no effect across all three categories (71% minor, 82% severe, 63% multiple). In contrast, the majority of jury-eligible lay citizens (75%), criminal science experts (62%) and law students (59%) expected the use of special verdicts at trial to result in decreased charging of minor crimes. The majority of criminal science experts (58%) and law students (52%) additionally predicted a decrease in multi-count indictments under a special verdict regime. Furthermore, noteworthy proportions of criminal defense attorneys said the use of special verdicts in criminal cases would decrease prosecutorial charging of minor (39% public, 31% private), severe (31% public, 21% private), and multiple (44% public, 39% private) crimes.

2. Plea Negotiations

The vast majority of criminal cases that have final dispositions in the American legal system are resolved through plea negotiations.[208] The survey asked stakeholders which adversarial side, if any, they thought would benefit more during the plea-bargaining process from the expectation that jurors would deliver a special criminal verdict if the case were to go to trial: the prosecution, the defense, neither, or depends (i.e., the prosecution would benefit more in some cases, the defense in others).

A slim majority of stakeholders (52%) said the upstream effect of verdict format on plea negotiations would depend on the facts and charges in the case at hand. Respondents who picked one adversarial side, however, were substantially more likely to predict a benefit to the defense (23%) than to the prosecution (5%). The remaining 21% of respondents expected the use of special verdicts at trial to benefit neither party in plea bargaining.

Figure 10 illustrates the responses of repeat criminal trial actors directly involved in the plea process: prosecutors and criminal defense

[208] *See supra* note 23.

attorneys (who negotiate criminal pleas) and trial judges (who accept or reject criminal pleas). Like the stakeholders as a whole, these groups were most likely to expect effects of special criminal verdicts on plea bargaining to depend on the particulars of the criminal case at hand (dark gray bars: 44%–57%).[cxiii] Beyond that, prosecutors, criminal defense attorneys, and trial judges were all more likely to predict an upstream benefit in plea negotiations to the defense (white bars: 19%–22%) than to the prosecution (light gray bars: 2%–5%).

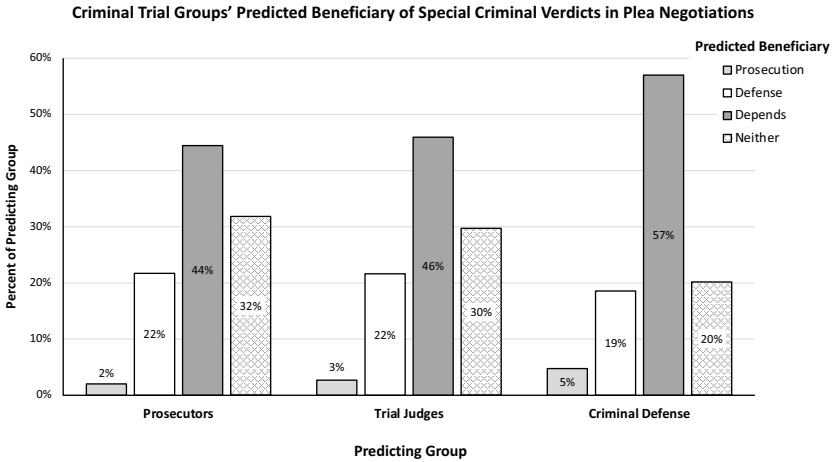

Figure 10. Repeat criminal trial actors' predicted upstream beneficiary of special criminal verdicts in plea negotiations (public and private defense combined).

3. Appellate Effects

To gauge predicted appellate implications of criminal verdict format, the survey asked participants what overall effect, if any, they expected the availability of special verdict information from criminal trials to exert on the *quality* (reasoning and accuracy) of decisions made by judges who review jury convictions on appeal (lower-quality decisions, higher-quality decisions, or no effect). In addition, the survey measures respondents' expectations about the effects of verdict format on rates of appellate *reversal* (fewer reversals, more reversals, or no effect). The responses of trial and appellate judges are presented separately on these measures.

a. Quality of Appeals

Table 15 reveals that the majority of stakeholders (55%) said special verdict information from criminal trials would lead to higher-quality appellate decisions, but 40% of respondents predicted no

effect on this measure. Only a small minority of respondents expected the use of special criminal verdicts to lower the quality of appellate decisions (5%).

The majority (62%–83%) of all stakeholder groups, except prosecutors and judges, also predicted higher-quality criminal appellate decisions under a special verdict regime. In contrast, the majority of prosecutors (59%) and trial judges (55%) said the use of special criminal verdicts would have no effect on the quality of appellate decisions, and disproportionately so as compared to stakeholders overall (40%).[cxiv] Prosecutors (25%) and trial judges (41%) were also disproportionately less likely to expect higher-quality appellate decisions, as compared to stakeholders overall (55%).[cxv] In addition, prosecutors were disproportionately more likely (16%) to predict that special verdicts would lower the quality of appellate decisions, as compared to stakeholders overall (5%).[cxvi] Appellate judges themselves were equally divided between expecting information from special criminal verdicts to help them render higher-quality decisions (48%) or exert no effect on their decisions (48%).

TABLE 15. PREDICTED EFFECTS OF SPECIAL CRIMINAL VERDICTS ON QUALITY OF APPELLATE DECISIONS

	Lower (%)	**No Effect** (%)	**Higher** (%)
All	*5*	***40***	***55***
Prosecutors	16	**59**	25
Trial Judges	3	**55**	**41**
Appellate Judges	4	**48**	**48**
Crim Professors	2	**36**	**62**
Civil Litigators	2	**37**	**62**
Civil Professors	4	26	**70**
Lay Citizens	5	19	**76**
Crim Sci Experts	1	31	**68**
Priv Crim Defense	3	**35**	**63**
Pub Crim Defense	4	**35**	**62**
Law Students	3	15	**83**

NOTE: Views expressed by **over one-third** of a group are in bold; views expressed by the **majority** of a group are additionally shaded in gray.

b. Rates of Reversal

Stakeholders as a whole did not reach a majority view on how information from special verdicts in criminal trials would affect the rates at which appellate courts overturn jury convictions, but Table 16 reveals that they were most likely to predict no effect (42%) in this

regard. Respondents who did expect an effect were roughly divided between predicting fewer (31%) and more (28%) appellate reversals under a special verdict regime.

Among the stakeholder groups, the majority of trial judges (51%)—and almost half of the prosecutors (48%), appellate judges (48%), and criminal law professors (46%)—expected special verdicts to have no effect on rates of appellate reversal in criminal cases. Furthermore, trial judges were disproportionately less likely (18%) to expect fewer appellate reversals under a special verdict regime, as compared to stakeholders overall (31%).[cxvii] In contrast, the majority (53%) of law students expected appellate courts to reverse fewer jury convictions under a special verdict regime.[cxviii]

TABLE 16. PREDICTED EFFECTS OF SPECIAL CRIMINAL VERDICTS ON OCCURRENCE OF APPELLATE REVERSALS

	Fewer (%)	**No Effect** (%)	**More** (%)
All	*31*	***42***	*28*
Prosecutors	24	**48**	28
Trial Judges	18	**51**	31
Appellate Judges	32	**48**	20
Crim Law Profs	15	**46**	**39**
Civil Litigators	28	26	**46**
Civil Law Profs	18	**38**	**44**
Lay Citizens	**41**	31	28
Crim Sci Experts	**43**	**43**	13
Private Crim Def	**39**	**36**	25
Public Crim Def	**39**	**43**	18
Law Students	**53**	**35**	13

NOTE: Views expressed by **over one-third** of a group are in bold; views expressed by the **majority** of a group are additionally shaded in gray.

F. Structure and Attitudes

Toward the end of the survey, respondents were asked whether the special verdict format, if it were to be broadly implemented in criminal jury trials, should have a rigid or flexible *structure*. Stakeholders also responded to a series of *attitudinal measures* that assessed their opinions on jury decisionmaking and the American legal system generally.

1. Special Verdict Structure

The survey presented stakeholders with the following descriptions of two potential special verdict structures to choose between:

> (1) A "rigid" special verdict, in which jurors would answer interrogatory questions about whether all the specific elements of the charged crime(s) have been proven beyond a reasonable doubt, and their responses to the interrogatory questions would then automatically dictate their final verdict (i.e., "guilty" or "not guilty"); or
>
> (2) A "flexible" special verdict, in which jurors would answer interrogatory questions about whether all the specific elements of the charged crime(s) have been proven beyond a reasonable doubt, but could choose their final verdict (i.e., "guilty" or "not guilty") without being bound by their responses to the interrogatory questions.

The majority of respondents as a whole (62%), and within every stakeholder group (54%–73%) except lay citizens, expressed a preference for the rigid special verdict format. Prosecutors (73%) and judges (68%) were disproportionately more likely to select the rigid format, and thereby disproportionately less likely to select the flexible format, as compared to stakeholders overall.[cxix] In contrast, jury-eligible lay citizens were disproportionately more likely (50%), as compared to stakeholders overall (38%), to select the flexible format—which would give criminal jurors more leeway to diverge from the legal conclusions dictated by their answers to the interrogatory questions.[cxx]

2. *Attitudinal Measures*

Finally, stakeholders completed a set of measures that assessed how they felt about: (1) the American legal system letting *lay jurors*, who generally do not have legal training/experience, decide outcomes in (a) criminal cases—where prison, probation, or death may be at stake, and (b) civil cases—where money damages are at stake; (2) the *competence* of criminal jurors in applying evidence and law to decide whether a criminal defendant is guilty as charged; (3) whether criminal jurors comply with the instructed *presumption of innocence* (that a criminal defendant is innocent until proven guilty); and (4) the American legal system's *punishment* of people who are convicted of committing crimes. Table 17 summarizes the responses of stakeholders as a whole and by group.

TABLE 17. MEAN VIEWS ON ATTITUDINAL MEASURES

	Crim Jury *(1: strongly oppose – 5: strongly support)*	**Civil Jury** *(1: strongly oppose – 5: strongly support)*	**Competence** *(1: very incompetent – 5: very competent)*	**Innocence** *(1: never presumed – 5: always presumed)*	**Criminal Punishment** *(1: too lenient – 5: too harsh)*
All	*M: 3.94 (SD: 1.09) Mdn: 4 Mode: 5*	*M: 3.93 (SD: 1.05) Mdn: 4 Mode: 5*	*M: 3.07 (SD: 0.99) Mdn: 3 Mode: 3*	*M: 3.08 (SD: 0.94) Mdn: 3 Mode: 4*	*M: 3.92 (SD: 1.02) Mdn: 4 Mode: 5*
Prosec	4.13 (1.04)	4.01 (1.08)	3.20 (1.01)	**3.81 (0.71)**	***2.68 (0.92)***
Judges	**4.60 (0.77)**	**4.36 (0.86)**	**3.55 (1.02)**	3.74 (0.79)	3.47 (0.80)
Crim Profs	3.96 (0.91)	3.88 (0.93)	3.23 (0.93)	2.88 (0.79)	4.62 (0.69)
Civil Litig	4.03 (1.27)	4.00 (1.31)	3.13 (1.05)	2.92 (0.91)	3.97 (0.84)
Civil Profs	3.94 (0.87)	3.89 (0.94)	3.11 (0.81)	3.23 (0.69)	4.31 (0.82)
Lay	3.21 (1.13)	***3.39 (1.16)***	2.92 (0.97)	2.97 (0.75)	3.78 (0.87)
Crim Sci	3.31 (1.01)	3.55 (0.95)	2.77 (0.78)	2.74 (0.69)	4.06 (0.80)
Priv Crim D	4.12 (1.00)	4.06 (1.01)	2.94 (0.97)	2.61 (0.81)	4.29 (0.80)
Pub Crim D	3.83 (1.09)	3.84 (0.10)	2.75 (0.89)	***2.45 (0.82)***	**4.64 (0.63)**
Law Stu	***3.07 (0.93)***	3.57 (1.01)	***2.43 (0.90)***	2.62 (0.79)	4.31 (0.84)

NOTE: Stakeholder groups' mean views are shaded in light gray if positive and in dark gray if negative (i.e., two standard errors from the mean falling above or below the neutral midpoint of 3, respectively). The **highest** group mean for each measure is in bold and the ***lowest*** group mean is in bolded italics.

Stakeholders on average supported the use of lay juries in both criminal and civil cases, with median ratings of 4 and modes of 5 on both measures. Respondents were less positive, however, about the competence of criminal jurors (median and mode of 3) and their adherence to the presumption of innocence (median of 3 and mode of 4). Furthermore, stakeholders leaned toward regarding criminal punishment in the American legal system as more harsh than lenient, with the most common rating being at the "too harsh" extreme of the scale (5). Respondents' political ideology and geographic region exerted small but significant effects on these attitudinal measures, as described in the Appendix.[cxxi]

Every stakeholder group also on average supported jury adjudication in both criminal and civil cases, except for law students—who expressed a neutral mean attitude toward criminal juries.[cxxii] Judges on average expressed the most support for criminal juries, and significantly more so than all the other stakeholder groups.[cxxiii] Judges also gave criminal jurors the highest mean competence rating,[cxxiv] while law students gave them the lowest.[cxxv] Jury-eligible lay citizens themselves expressed a neutral mean view on the competence of criminal jurors.

Judges and prosecutors on average said criminal jurors follow the presumption of innocence significantly more (close to "mostly") than did all the other stakeholder groups, with prosecutors giving jurors the highest mean rating on this measure.[cxxvi] Judges of color, however, said criminal jurors follow the presumption of innocence significantly less than white judges did;[cxxvii] and appellate judges said criminal jurors follow the presumption of innocence significantly less than trial judges did.[cxxviii] Public defenders expressed the least faith in criminal jurors following the presumption of innocence (between "rarely" and "sometimes"), with a mean rating that was significantly lower than all but three other groups (private criminal defense attorneys, law students, and criminal science experts).[cxxix]

Prosecutors on average rated criminal punishment in the American legal system as significantly more lenient than did all the other nine stakeholder groups.[cxxx] Public defenders and criminal law professors on average said criminal punishment was significantly harsher than did other groups except civil law professors and law students.[cxxxi] Appellate judges on average rated criminal punishment in the American legal system as being harsher than trial judges did.[cxxxii]

Finally, correlation analyses revealed, inter alia, that stakeholders who expressed more support for the status quo in favor of general criminal verdicts tended to rate criminal punishment in the American legal system as less harsh, expressed more support for criminal jury adjudication, and expressed more confidence in criminal jurors' competence and compliance with the presumption of innocence.[cxxxiii] In contrast, stakeholders who expressed more support for using special instead of general criminal verdicts tended to rate criminal punishment as more harsh, expressed less support for criminal jury adjudication as it currently stands, and had less faith in criminal jurors' competence and compliance with the presumption of innocence.[cxxxiv]

IV
Discussion of Findings

This Article's survey study reveals that the views and intuitions of current stakeholders in the American legal system diverge quite dramatically from the status quo in favor of general criminal verdicts and its defense-friendly rationale. On average, survey respondents as a whole and in seven of the ten stakeholder groups supported the use of special verdicts in criminal jury trials, as did former criminal defendants and former criminal jurors. The neutral mean views that judges and criminal law professors expressed toward special criminal verdicts also reflect departures from the law's explicit disfavoring of this

format. Prosecutors were the only stakeholder group whose mean view opposing special criminal verdicts affirmed the legal status quo. However, prosecutors did not appear to support the conventional legal wisdom's pro-nullification rationale or its presumption that special verdicts will "harm" the criminal defendant.[209] Part IV draws upon the survey findings to explicate the criminal law's shortcomings on verdict format, to examine why the procedural status quo nonetheless persists, and to identify next steps for qualitatively and experimentally investigating the legal and psychological implications of verdict format in criminal cases.

A. The Crumbling Conventional Wisdom

Criminal courts have justified their privileging of general verdicts under the reasoning that special verdicts will impede the autonomy of jurors, thereby compromising the criminal defendant's right to trial by jury.[210] The views and intuitions of surveyed legal stakeholders, however, conveyed a different story in regard to how criminal verdict format might impact both jurors and defendants.

1. Criminal Jurors: Fettering or Empowering?

Although conventional legal wisdom equates the use of special verdicts with placing "legal fetters" upon the criminal jury,[211] surveyed stakeholders' predictions suggest that the special verdict's structure and transparency need not be pitted against the jury's autonomy and agency. The majority of survey respondents as a whole and in almost every stakeholder group expected special verdicts to help jurors better understand, apply, think through, and discuss law and evidence in criminal cases. A substantial proportion of stakeholders also suggested that special criminal verdicts would help jurors resist biasing influences of legally irrelevant factors and extend the jury's impact on critical pre-trial and appellate processes. If these intuitions are accurate, the use of special verdicts could empower, rather than impede, criminal jury adjudication—as explained below. On the other hand, some stakeholders' predictions held more ambiguous implications for the criminal jury or were more consistent with the conventional concerns of criminal case law.

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209 United States v. Acosta, 149 F. Supp. 2d 1073, 1075–76 (E.D. Wis. 2001).

210 *See supra* Section I.C.

211 *See, e.g.*, United States v. Ogull, 149 F. Supp. 272, 276 (S.D.N.Y. 1957); United States v. Wilson, 629 F.2d 439, 443 (6th Cir. 1980); United States v. Spock, 416 F.2d 165, 182 (1st Cir. 1969); United States v. Acosta, 149 F. Supp. 2d 1073, 1076 (E.D. Wis. 2001); Morgan, *supra* note 38, at 591; *supra* Section I.C.

a. Lessons from Law School

A striking 88–97% of surveyed law students—who are themselves currently immersed in learning, analyzing, discussing, and applying law—asserted that special verdicts would help criminal jurors with these socio-cognitive aspects of legal decisionmaking. Additionally, of all the stakeholder groups, law students expressed the most mean support for special criminal verdicts, the most mean opposition to general criminal verdicts, and the least mean confidence in how competent jurors are at applying evidence and law to determine criminal guilt.

These findings are consistent with the fact that law students have authored the bulk of scholarship questioning the default use of general verdicts in criminal jury trials.[212] Empathizing with the cognitive challenges that criminal jurors face, one student Note criticized the general verdict for "ask[ing] the criminal jury to hear the law explained to it once and then to apply it with the skill of a seasoned lawyer."[213] Judges have similarly observed that jurors are "doused with a kettleful of law during the charge that would make a third-year law-student blanch."[214]

Comparing twenty years of law school teaching with first-hand experiences of serving on two juries, Professor Christopher May noted that the challenge his fellow jurors faced in delivering general verdicts was "identical to that which confounds most law students," because "there were times when the jury was unable to relate the facts to the law in the sense of knowing which evidence was to be matched with which legal element."[215] Indeed, courtroom and communications researchers have observed that the complex decisionmaking of jury adjudication calls for rendering "a number of sub-decisions . . . in a logical systematic order," much like "[a] law student must carefully dissect an exam question."[216]

Unlike jurors, however, law students are taught to deconstruct elements of legal standards and apply relevant facts to them, one at a time, with the assistance of pedagogical tools like "IRAC" (an acronym used to break down legal analysis by "Issue, Rule,

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212 *See supra* note 20.

213 Wright, *supra* note 20, at 455–56.

214 Skidmore v. Balt. & Ohio R.R., 167 F.2d 54, 64 (2d Cir. 1948) (quoting CURTIS BOK, I TOO, NICODEMUS (1946)); *see* Driver, *supra* note 59, at 47 ("I have found that in all but the simplest cases . . . lay jurors are incapable of understanding and applying the court's instructions as to the law.").

215 May, *supra* note 144, at 869–70.

216 David U. Strawn, Raymond W. Buchanan, Bert Pryor & K. Phillip Taylor, *Reaching a Verdict, Step by Step*, 60 JUDICATURE 383, 385 (1977).

Application, and Conclusion").[217] Psychologists have noted that jurors would also be well served by "structures that guide them in using an unfamiliar recipe, rather than simply tossing a set of ingredients in a pot;" and that it would be "profoundly unfair to criticize juries for failing to perform well at a task that, by all the usual educational criteria, has been stacked against them."[218]

Other surveyed stakeholders who have experienced or may experience difficulties navigating the complexities of legal decisionmaking expressed views similar to those of law students. On average, former criminal jurors and jury-eligible lay citizens supported the use of special verdicts in criminal cases, and lay citizens supported special criminal verdicts significantly more than general criminal verdicts. Furthermore, stakeholders without a law degree—including those with advanced degrees in subjects other than law—on average supported the use of special criminal verdicts significantly more than legal professionals did. As Professor May noted, it may be "all too easy for those of us who are lawyers or judges to forget what the world looked like before we entered law school," but providing more legal guidance to lay decisionmakers could help "make the jury's task a meaningful one."[219]

Pointing further to verdict format's potential for facilitating criminal jury adjudication, surveyed stakeholders as a whole, and law students most of all, expressed the highest mean support for using special verdicts in cases involving complex crimes with many legal elements. This result is consistent with the increased receptivity criminal courts have shown to employing special verdicts in complex criminal trials, under the reasoning that this format could "decrease the likelihood of jury confusion."[220]

b. Breaking Bias

Another challenge of criminal jury adjudication, as discussed in Part II, is the risk of legally irrelevant factors triggering biases that lead to discriminatory outcomes.[221] Such biases can operate spontaneously, without decisionmakers' awareness and against their best inten-

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[217] *See* Tracy Turner, *Finding Consensus in Legal Writing Discourse Regarding Organizational Structure: A Review and Analysis of the Use of IRAC and Its Progenies*, 9 LEGAL COMMC'N & RHETORIC 351, 352–53 n.7 (2012) (outlining support for the use of IRAC, a legal writing structure commonly taught to law students).

[218] Diamond et al., *supra* note 10, at 1606; Ellsworth, *supra* note 10, at 218–24.

[219] May, *supra* note 144, at 870.

[220] United States v. Palmeri, 630 F.2d 192, 202–03 (3d Cir. 1980); *see supra* notes 75–78 and accompanying text.

[221] *See supra* Section II.B; *supra* notes 135–140.

tions.[222] Furthermore, courts and scholars have voiced concerns about litigators strategically employing "trial tactics . . . to arouse the juries' emotions,"[223] "heuristic forms of persuasion designed to inform, sway, woo, cajole, or even manipulate jurors," and "courtroom presentation[s] with all sorts of affective matter that . . . have little to do with the facts of the case."[224] Helping criminal jurors guard against such influences could bolster their decisionmaking consciousness and agency.

While a slim majority of surveyed stakeholders expected special criminal verdicts to exert no effect on jury biases, 40% of respondents said special criminal verdicts would help jurors make unbiased decisions. In fact, the majority of four stakeholder groups—including criminal science experts (who are most likely to have professional expertise on psychological biases) and jury-eligible lay citizens (who themselves could be susceptible to biases as jurors)—expected special verdicts to help keep jury biases in check. Furthermore, the majority of five stakeholder groups—including public defenders, criminal science experts, and jury-eligible lay citizens—said the use of special verdicts would decrease the ability of criminal litigators to sway jurors with legally irrelevant information.

The criminal legal system's particular structural challenges with racial bias,[225] the disproportionate impact of criminal law on commu-

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[222] *See, e.g.*, Greenwald & Banaji, *supra* note 138, at 4–5 ("The signature of implicit cognition is that traces of past experience affect some performance, even though the influential earlier experience is not remembered in the usual sense."); Adam R. Pearson, John F. Dovidio & Samuel L. Gaertner, *The Nature of Contemporary Prejudice: Insights from Aversive Racism*, 3 SOC. & PERSONALITY PSYCH. COMPASS 314 (2009) (reviewing research on "aversive racism," which "demonstrates how the actions of even well-intentioned and ostensibly non-prejudiced individuals can inadvertently contribute to . . . disparities through subtle biases in decision making"); Sood ARLSS, *supra* note 139, at 309–10 (explaining how motivated cognition operates under an "illusion of objectivity").

[223] Skidmore v. Balt. & Ohio R.R., 167 F.2d 54, 61 (2d Cir. 1948).

[224] Simon, *supra* note 168, at 423–24; *see* Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1751 (1993) (noting how, in summations, some prosecutors use the "image of African Americans as more violent and more criminal than whites").

[225] *See* Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017) (asserting that "there is a sound basis to treat racial bias with added precaution"); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1136–43 (2012) (arguing implicit bias exists among all actors in the criminal justice system); Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 YALE L.J.F. 406, 407 (2017) ("[A] comprehensive understanding of implicit bias in the criminal justice system requires acknowledging that the theoretical underpinnings of the entire system may now be culturally and cognitively inseparable from implicit bias."); Mona Lynch, *Institutionalizing Bias: The Death Penalty, Federal Drug Prosecutions, and Mechanisms of Disparate Punishment*, 41 AM. J. CRIM. L. 91, 108 (2013) (arguing that "racial stratification and inequality [is] inherent in criminal justice operations"); Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System*, 35 SEATTLE U. L. REV. 623, 661 (2012)

nities of color,[226] and the relative whiteness of the bench and bar[227] make the survey's race-related findings worth highlighting. Judges and prosecutors of color on average expressed significantly less support for the legal status quo in favor of general criminal verdicts than their white counterparts. In addition, judges of color expressed significantly more mean support than white judges did for using special criminal verdicts, generally and across different types of cases—particularly for high severity crimes and sex crimes that carry high penalties. Judges of color also expressed significantly less confidence than their white colleagues in criminal jurors following the presumption of innocence. Finally, judges and public defenders of color said unproven convictions occur significantly more often than their white counterparts did; and public defenders of color expressed more mean support than white defenders did for using special verdicts in complex criminal trials.

Given the dearth of mechanisms for effectively combatting both macro- and micro-level biases in the criminal legal system,[228] a procedural tool that a substantial number of surveyed legal stakeholders predicted could help in this regard merits additional investigation. To this end, future work will (1) compare survey respondents' written explanations for *why* they expected special verdicts to help curtail jury biases against psychological understandings of bias reduction;[229] and (2) experimentally test *whether* and *how* legally irrelevant and potentially biasing factors interact with verdict format in lay determinations of criminal liability.[230]

(observing that "structural racism can and does affect outcomes"); CAL. CIV. PROC. CODE § 231.7, subd. (d)(2) (West 2020) (noting that unconscious bias "includes implicit and institutional biases").

226 *See* Elizabeth Hinton, LeShae Henderson & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. OF JUST. (May 2018), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf [https://perma.cc/3GKS-4GNS] (discussing ways in which the criminal justice system disproportionately affects people of color); MARC MAUER & RYAN S. KING, SENT'G PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY (2007) (documenting large differences in incarceration rates of Black and white populations).

227 *See* CTR. FOR AM. PROGRESS, EXAMINING THE DEMOGRAPHIC COMPOSITIONS OF U.S. CIRCUIT AND DISTRICT COURTS (2020) (analyzing and criticizing the lack of demographic diversity on the federal bench); REFLECTIVE DEMOCRACY CAMPAIGN, JUSTICE FOR ALL: WHO PROSECUTES IN AMERICA? (2015) (finding that, in 2014, 95% of elected prosecutors in the United States were white).

228 *See* Johnson, *supra* note 224, at 1766–94; Kang et al., *supra* note 225, at 1142–46.

229 Sood, Qualitative, *supra* note 27.

230 *See infra* Section IV.C; Sood, Experimental, *supra* note 28.

c. The Jury's Voice

Beyond predicting direct effects of verdict format on jury decisionmaking, surveyed stakeholders shed light on how the use of special criminal verdicts at trial could carry the jury's voice into pre-trial and post-trial processes. In regard to upstream effects, for example, legal scholar and former federal prosecutor Daniel Richman has observed that "if citizens have any voice in the fine-grained decisions that prosecutors make about resource allocations, they have it . . . because prosecutors make charging—and plea bargaining—decisions in the shadow of jury verdicts, or at least projected verdicts."[231]

Strikingly, 80% of surveyed stakeholders—including majorities of the repeat legal actors directly involved in negotiating and approving criminal pleas (prosecutors, criminal defense attorneys, and trial judges)—expected the use of special verdicts at trial to affect plea bargains, and more so in favor of the defense than the prosecution. Predicted effects of verdict format on charging decisions were more mixed, with more than half the respondents—including the majority of prosecutors themselves—predicting no effect. However, the majority of criminal science experts, jury-eligible lay citizens, and law students—as well as noteworthy proportions of public defenders—predicted reductions in some categories of criminal charging under a special verdict regime.

With regard to downstream effects of verdict format on criminal appeals, the majority of respondents as a whole and in eight of the ten stakeholder groups—as well as almost half the surveyed appellate judges themselves—expected special verdict information from jury trials to improve the quality of appellate decisions. The implications of higher-quality appellate decisions for the voice of criminal jurors would depend, however, on the extent to which those decisions affirm as opposed to overturn jury convictions. Stakeholders were largely divided between expecting the use of special verdicts in criminal cases to generate fewer, more, or have no effect on appellate reversals.

The expectation that the use of special criminal verdicts would result in more hung juries—as the majority of respondents as a whole and seven of the ten stakeholder groups predicted—could also indicate either a strengthening or weakening of jury agency. For instance, special verdicts could lead to more hung juries either by confusing jurors (an impeding effect) or by bringing a genuine lack of unanimous jury consensus beyond a reasonable doubt to light (a facilitating effect). Analyzing stakeholders' written explanations for *why* they

231 Richman, *supra* note 22, at 941 (also noting the influence of evidence rules).

expected special verdicts to lead to more hung criminal juries will thus be important for understanding the implications of this prediction.[232]

Finally, in regard to the legal system's concern about special verdicts fettering criminal jurors: About 40% of the stakeholders agreed that this format would hinder criminal jurors from delivering nullifying acquittals and outcomes that feel morally right regardless of the law, although an equivalent proportion of respondents expected special verdicts to have no effect in these regards. These findings partially support case law's longstanding concern about special verdicts curbing the very lay intuitions and community values that the jury system seeks to bring into the criminal legal process.[233] But other findings relating to lay deviations from the law complicate the picture, as detailed in Section IV.A.3. below.

2. Criminal Defendants: Harming or Protecting?

a. Upending Criminal Wisdom

While courts have noted that "the criminal law's historical preference for general verdicts, much like its traditional distaste for special interrogatories, stems from the unique rights of the criminal defendant,"[234] surveyed stakeholders did not appear to subscribe to the underlying presumption that general verdicts better protect criminal defendants. The finding that criminal defense attorneys and former criminal defendants on average supported special criminal verdicts, while prosecutors on average supported general criminal verdicts and opposed special verdicts, provides prima facie grounds for questioning the conventional wisdom of criminal case law. The survey further revealed that this finding is an open secret: Stakeholders on average correctly predicted that prosecutors would most oppose, and that criminal defense attorneys would most support, the use of special verdicts in criminal jury trials. In fact, surveyed prosecutors and criminal defense attorneys themselves expected their colleagues at large to subscribe even less than they did personally to the conventional wisdom that special verdicts are more prosecution-friendly than general verdicts.

Moreover, directly contrary to *Spock's* oft-cited assertion that "there is no easier way to reach, and perhaps force, a verdict of guilty

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232 *See infra* Section IV.C; Sood, Qualitative, *supra* note 27.

233 *See* United States v. Spock, 416 F.2d 165, 165–94 (1st Cir. 1969); Stith-Cabranes, *supra* note 75, at 145 (noting that "[t]he jury's greatest contribution may be precisely that it tempers" modern legal values of "equality, rationality, and accountability" with "the competing values of intuition, common-sense, lay judgment, anonymity, and secrecy").

234 United States v. Coonan, 839 F.2d 886, 891 (2d Cir. 1988); *see supra* Section I.C.

than to approach it step by step,"[235] the majority of stakeholders as a whole—and in every group including prosecutors and criminal defense attorneys, but not judges—expected the use of special criminal verdicts to generate more acquittals, and much more so than generating more convictions. Also counter to *Spock* and the assertions of criminal case law generally, the majority of judges expected verdict format to exert no effect in this regard, and judges who did predict a directional effect were far more likely to predict an increase in acquittals than convictions under a special verdict regime. More broadly, respondents across the sample and within every stakeholder group—including majorities in the two groups that on average most opposed (prosecutors) and most supported (law students) special criminal verdicts—were more likely to predict that, on the whole, the use of special verdicts in criminal cases would favor the defense as compared to the prosecution.

Stakeholders' predictions regarding potential pro-defendant effects of special criminal verdicts on pre-trial determinations are particularly noteworthy, as the vast majority of criminal cases are resolved through plea bargains,[236] and prosecutors' charging decisions set the tone for a host of subsequent legal decisions (such as on bail, plea offers, and sentencing).[237] Given the broad power and discretion that prosecutors currently hold in these pre-trial processes,[238] even moderate upstream effects of special verdicts in the defense-friendly directions that stakeholders predicted[239] could substantially impact legal outcomes for criminal defendants.

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235 416 F.2d at 182; *see supra* Section I.C.

236 *See supra* note 23.

237 *See* FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 3 (Frank J. Remington ed., 1969) (describing "serious implications" of charging decisions for the criminal defendant); Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 272 (2001) (stating that prosecutors' charging decisions influence sentencing as well as plea bargaining).

238 *See* Conrad G. Brunk, *The Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 LAW & SOC'Y REV. 527, 528–30 (1979) (summarizing arguments that the plea-bargaining system is inherently coercive); Robert L. Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 316–19 (1960) (analyzing the bargaining dynamics at play in plea negotiations); Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L.Q. 67, 74–79 (2005) (analyzing the historical development of plea bargaining as a prosecutorial tool); Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System—And What Can Be Done About It*, 111 NW. U. L. REV. 1429, 1430 (2017); *infra* note 246.

239 Stakeholders as a whole and within all the criminal trial groups involved in criminal pleas were most likely to expect the effect of special criminal verdicts on plea negotiations to depend on the case at hand, but those who predicted a directional effect were more likely to predict a benefit to the defense than to the prosecution. Likewise, while the majority of stakeholders said verdict format would not affect prosecutors' charging

b. Affirming Civil Wisdom

While diverging from the untested conventional wisdom of criminal case law, the survey findings are consistent with the experience-based "trial wisdom" of civil litigators who regard special verdicts as beneficial to defendants.[240] In fact, surveyed stakeholders were even more likely to expect the use of special verdicts to favor defendants in criminal cases than in civil cases.

Stakeholders' views and intuitions were also consistent with the civil logic that special verdicts protect defendants by more explicitly enforcing the burden of proof. The majority of criminal defense attorneys, both private and public, said the use of special verdicts would help them convince jurors of their cases. In contrast, prosecutors—who bear the highest burden of legal proof beyond a reasonable doubt—were disproportionately less likely than the other criminal and civil litigator groups to predict that special verdicts would facilitate their cases at trial.

Furthermore, while criminal defense attorneys on average supported special criminal verdicts—generally and across different types of criminal cases—they expressed significantly less mean support for using special verdicts in cases involving affirmative defenses, which the defense may bear the burden of proving.[241] Prosecutors, in contrast, were significantly less opposed to using special verdicts for affirmative defenses than for offenses that they bear the burden of proving.

Notwithstanding the above-described findings, some of the stakeholders' predictions also point to ways in which special verdicts could either cut both ways or work against criminal defendants, as per the conventional wisdom of criminal courts. For example, the majority of criminal science experts and jury-eligible lay citizens predicted more compromise verdicts under a special verdict regime, which could undermine a criminal defendant's constitutional right to a truly unanimous conviction.[242] In addition, if special verdicts help curtail jury biases, as many stakeholders predicted, they would curb not only discriminatory punitiveness but also discriminatory leniency (which might stem, for example, from jury biases against victims in criminal

decisions, those who predicted an effect were more likely to predict decreases as opposed to increases in prosecutorial charging under a special verdict regime.

240 Thornburg, *supra* note 14, at 1885; *see supra* Section II.A.

241 *See supra* note 199.

242 Ball v. United States, 470 U.S. 856, 868 (1985) (Stevens, J., concurring) (explaining that an innocent defendant "may be found guilty on one or more charges as a result of a compromise verdict"). The majority of civil law professors, on the other hand, predicted fewer compromise verdicts under a special verdict regime.

cases[243]). Finally, as discussed next, stakeholders' views and predictions regarding nullifying acquittals to some extent support the criminal law's conventional wisdom on verdict format, while also deflating it.

3. Nullifying Acquittals and Unproven Convictions

The findings that a substantial proportion of survey respondents expected special criminal verdicts to curtail nullifying acquittals and hinder jury outcomes that feel morally right regardless of the law support criminal case law's concerns about this verdict format. In addition, stakeholders as a whole, and criminal defense attorneys in particular, were significantly less supportive of using special verdicts in cases involving low severity offenses, which jurors may be more likely to nullify.[244]

Nevertheless, a number of other survey findings challenge the legal system's focus on nullifying acquittals, rather than unproven convictions, in formulating the status quo on criminal verdict format. First, the above-described stakeholder intuitions that special criminal verdicts would impede nullifying acquittals and jury outcomes that feel morally right were by no means uniform. As many, if not more, respondents—including the majority of prosecutors and judges—expected special verdicts to exert no effect in either of these regards. Furthermore, as compared to stakeholders overall, judges were disproportionately *less* likely to predict that special verdicts would hinder jurors in reaching outcomes that feel morally right regardless of the law. Even more counter to the conventional wisdom of criminal case law, jury-eligible lay citizens were disproportionately likely to predict that special verdicts would *help* criminal jurors follow their own moral compass, and prosecutors were disproportionately likely to predict an *increase* in nullifying acquittals under a special verdict regime.

Second, a larger proportion of survey respondents expected the use of special verdicts to curtail unproven convictions than nullifying acquittals. Stakeholders as a whole, and in all groups except prosecutors, also said nullifying acquittals are significantly more rare than unproven convictions. Moreover, the stakeholder groups were robustly united in opposing unproven convictions, whereas they had very divergent views on nullifying acquittals. Ironically, prosecutors—the only stakeholder group whose mean opposition to special criminal

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243 *See, e.g.*, Tania Tetlow, *Discriminatory Acquittal*, 18 WM. & MARY BILL RTS. J. 75, 77 (2009) (noting disparities in convictions and sentencing when cases involve Black victims or female victims who do not comply with traditional gender roles).

244 *See* KALVEN & ZEISEL, *supra* note 16, at 258–85 (noting that jurors may be more resistant to enforcing "de minimis crimes").

verdicts was consistent with case laws' rejection of this format—were least aligned with the procedural status quo's stated aim of enabling jury nullification (which prosecutors strongly opposed).

Importantly, support for nullifying acquittals predicted support for special criminal verdicts, and the perceived frequency of unproven convictions drove this relationship. For pro-nullification stakeholders, the potential benefit of special verdicts curtailing unproven convictions appeared to outweigh the potential cost of this format also curtailing nullifying acquittals.

Finally, the survey results call case law's bluff on its pro-nullification rationale for favoring general criminal verdicts by revealing that 70% of surveyed judges opposed nullifying acquittals (and trial judges significantly more so than appellate judges). This finding is consistent with the various practices trial courts routinely engage in to prevent criminal jurors from nullifying the law.[245] In addition, like the surveyed stakeholders as a whole and every group except jury-eligible lay citizens, the majority of judges expressed a preference for a rigid (rather than a flexible) special verdict format—which would further constrain the ability of jurors to nullify the law.

B. The Sticky Status Quo

If the majority of surveyed legal stakeholders did not oppose the use of special criminal verdicts, did not subscribe to the conventional legal wisdom that this format disadvantages criminal defendants, and were more likely to expect special verdicts to help than hinder various aspects of criminal jury decisionmaking, why does the criminal legal system still so strongly favor the general verdict? This Section speculates on potential legal and psychological dynamics that could be contributing to the stickiness of the procedural status quo.

1. Positional Dynamics

One explanation for criminal law's continued preference for general verdicts may lie in which stakeholders endorse this status quo. The two groups that on average most supported general criminal verdicts, and least supported special criminal verdicts, happen to be the most powerful stakeholders in the criminal legal system: prosecutors[246] and judges.[247]

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[245] *See supra* Section II.B.2.

[246] *See* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 960 (2009) ("No government official in America has as much unreviewable power and discretion as the prosecutor."); Nora V. Demleitner, *Revisiting the Role of Federal Prosecutors in Times of Mass Imprisonment*, 30 FED. SENT'G REP. 165, 169 (2018) ("Technically prosecutors have almost unlimited discretion."); Erik Luna &

Meanwhile, the two groups that on average opposed the default use of general criminal verdicts, and most supported the use of special criminal verdicts instead, were law students (who are still training to enter the legal profession) and public defenders (who hold relatively less power in the legal system than prosecutors[248]). Taking broader demographics into consideration, survey respondents from identity groups that have historically had less say in formulating legal conventions—stakeholders who are female, people of color, under the age of forty, or do not have a law degree—also expressed higher mean opposition to the status quo in favor of general criminal verdicts and higher mean support for using special criminal verdicts instead.

The relative intensity of stakeholder groups' differing views on criminal verdict format may also help explain the enduring legal norm. Although survey respondents' mean view toward special criminal verdicts was supportive and not significantly different from their mean view toward general criminal verdicts, and their mode view was actually higher for special as compared to general verdicts, more stakeholders expressed *strong* support for general verdicts and *strong* opposition to special verdicts than vice versa. Additionally, the vast majority of prosecutors supported the status quo in favor of general criminal verdicts, and this stakeholder group was twice as likely to oppose than support special criminal verdicts. Criminal defense attor-

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Marianne Wade, *Introduction to Prosecutorial Power: A Transnational Symposium*, 67 WASH. & LEE L. REV. 1285, 1285 (2010) ("For all intents and purposes, prosecutors *are* the criminal justice system through their awesome, deeply problematic powers."); Michael Pinard, *Limitations on Judicial Activism in Criminal Trials*, 33 CONN. L. REV. 243, 276 (2000) ("[T]he prosecutor is arguably the most influential figure in the criminal justice system . . . ."); Rakoff, *supra* note 238, at 1430 (describing prosecutors as "increasingly being thrust into the role, not of advocates, but of rulers").

247 *See* Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 198 (2019) ("Judicial decisions set the boundaries for other criminal justice actors, including prosecutors and the judges themselves."); Michael Gentithes, *Justice Begins Before Trial: How to Nudge Inaccurate Pretrial Rulings Using Behavioral Law and Economic Theory and Uniform Commercial Laws*, 60 WM. & MARY L. REV. 2185, 2206 (2019) ("[J]udges . . . are placed in powerful positions that reinforce false confidence in their own intuitions."); Pinard, *supra* note 246, at 271 (noting few limits over the "power, authority, and influence that the judge wields over the jury").

248 *See* Heather P. Baxter, Gideon*'s Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis*, 2010 MICH. ST. L. REV. 341, 362–63 (noting that while prosecutors benefit from relationships with police investigators, defense attorneys—who lack such relationships and may not have investigators on staff—take on the additional burden of investigating cases themselves); Andrew Howard, Note, *The Public's Defender: Analyzing the Impact of Electing Public Defenders*, 4 COLUM. HUM. RTS. L. REV. ONLINE 173, 200 (2020) ("Prosecutors tend to have higher salaries, lower caseloads, and more support services than their public defender counterparts."); *cf.* Irene Oritseweyinmi Joe, *Structuring the Public Defender*, 106 IOWA L. REV. 113 (2020) (demonstrating how different modes of structuring public defenders' offices within state governments affect their capacities).

neys, on the other hand, were about as likely to feel neutral toward the status quo as they were to oppose it.

2. *"If It Ain't Broke . . ."*

Although surveyed prosecutors and judges did not appear to subscribe to the legal system's pro-defense rationale for favoring general criminal verdicts, these stakeholders' intuitions on other survey measures shed light on some factors that might be motivating their preference for the procedural status quo. Prosecutors' responses pointed to a number of ways in which special verdicts could impede jury adjudication in criminal cases, and judges' responses suggested there might not be enough upside to warrant departing from the status quo in favor of general verdicts. In fact, a striking number of stakeholders from these groups, particularly trial judges, used the phrase, "If it ain't broke, don't fix it," to caution against rocking the deeply anchored procedural boat of general verdicts in criminal jury trials.

Prosecutors, the only group that on average opposed the use of special verdicts in criminal trials, were also the only group in which more respondents expected special verdicts to hinder rather than help jurors' understanding and application of criminal law. In addition, compared to stakeholders overall, prosecutors were disproportionately more likely to predict that special verdicts would increase the ability of criminal litigators to sway jurors with legally irrelevant information; hinder criminal jurors in thinking through cases, deliberating with each other, and making unbiased decisions; and lower the quality of appellate decisions.

Consistent with their neutral mean view on special criminal verdicts, the majority of surveyed judges predicted that this verdict format would exert no effect on jury biases, on jury convictions and acquittals—including unproven convictions, nullifying acquittals, and outcomes that feel morally right regardless of the law—and on the quality of appellate decisions. In addition, as compared to stakeholders overall, judges were disproportionately less likely to predict that special verdicts would help criminal jurors understand, apply, think through, and discuss cases—and disproportionately more likely to predict no effect on these measures. Judges were also disproportionately less likely to expect special verdicts to decrease the ability of criminal litigators to sway jurors with legally irrelevant information. Furthermore, trial judges, in particular, were disproportionately less likely to expect special verdicts to improve the quality of appellate reversals or lead to fewer appellate reversals, as compared to stakeholders overall.

The expectation of stakeholders—including prosecutors and judges—that the use of special criminal verdicts at trial would be more likely to empower the defense than the prosecution in plea negotiations could also help explain the lack of prosecutorial and judicial enthusiasm for this verdict format. In the context of studying resistance to procedural reform in another arena of criminal jury decision-making—non-capital jury sentencing—legal scholar Nancy King observed that "unfettered jury discretion" makes jury trials more risky and unpredictable for criminal defendants, which "helps to funnel defendants to guilty pleas and bench trials."[249] King further argued that "[p]rosecutors, judges, and legislators have few reasons to disturb this set-up, which helps them dispose of cases quickly and cheaply."[250] The U.S. Supreme Court has acknowledged that the resolution of most criminal cases through plea bargaining "is an essential component of the administration of justice[,]" because "[i]f every criminal charged were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities."[251] Furthermore, the majority of both prosecutors and judges predicted that the use of special criminal verdicts would result in more hung juries, which would also pose a significant drain on governmental resources.

Responses on the survey's attitudinal measures may further help explain judges' and prosecutors' robust support for the more laissez-faire general verdict format. Judges expressed significantly more support for jury adjudication than all the other stakeholder groups did, and they gave criminal jurors the highest mean competence rating. In addition, both judges and prosecutors expressed significantly more confidence than other groups did in criminal jurors' compliance with the presumption of innocence, and prosecutors gave jurors the highest mean rating on this measure. Prosecutors also rated the severity of criminal punishment in the American legal system as being significantly more lenient than all the other stakeholder groups did.

The congruence of judicial and prosecutorial views on a number of survey measures, including their mean support for the status quo in favor of general criminal verdicts, may in part be attributable to the fact that "judges are disproportionately drawn from the ranks of former prosecutors" (as compared to former criminal defense attor-

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249 Nancy J. King, *How Different is Death? Jury Sentencing in Capital and Non-Capital Cases Compared*, 2 OHIO ST. J. CRIM. L. 195, 198 (2004).

250 *Id.*

251 Santobello v. New York, 404 U.S. 257, 260 (1971).

neys).[252] Indeed, surveyed judges' past litigation experiences significantly affected their views on verdict format in criminal cases. On average, former prosecutors on the bench not only expressed the highest mean support for general criminal verdicts (as compared to judges with other or mixed litigation backgrounds), they also opposed the use of special criminal verdicts (in contrast to the neutral mean view of judges as a whole).

Finally, even though surveyed stakeholders (including trial judges themselves) on average expected trial courts to be significantly more opposed to special criminal verdicts than appellate courts, the difference between surveyed trial and appellate judges' views on criminal verdict format did not reach statistical significance. This finding is consistent with the fact that appellate courts have largely upheld the status quo in favor of general criminal verdicts and expressed a reluctance to interfere with trial courts' broad discretion in this arena.[253]

On a practical level, appellate courts may also have limited legal grounds to question the conventional legal wisdom that special verdicts disadvantage criminal defendants, because they typically rule on verdict format only in criminal cases where the use of a special verdict did *not* work to the defendant's advantage. In other words, appellate courts do not review special jury verdicts that lead to acquittals. More broadly, the common-law tradition of jurors expressing their judgments holistically and without judicial interference is deeply entrenched in the American legal system, with precedent-based case law inculcating an atavistic adherence to "how things are done."[254]

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[252] KADISH ET AL., *supra* note 22, at 134; *see* Clark Neily, *Are a Disproportionate Number of Federal Judges Former Government Advocates?*, CATO INST. (May 27, 2021), https://www.cato.org/study/are-disproportionate-number-federal-judges-former-government-advocates [https://perma.cc/6NT2-X9QA] (finding that "the ratio of prosecutors to defense attorneys on the [federal] bench today is almost exactly four to one"); JENNIFER HUNTER, ALLIANCE FOR JUSTICE, ECONOMIC JUSTICE, JUDGES, AND THE LAW 26 (2022), https://www.afj.org/wp-content/uploads/2022/08/LaborJudgesReport_Final.pdf [https://perma.cc/DT84-4P9M] (finding that 28% of active federal court of appeals judges have prosecutorial backgrounds and 16% had spent most of their pre-judicial careers as prosecutors, whereas only 4% had spent most of their pre-judicial careers as public defenders); Amanda Powers & Alicia Bannon, *State Supreme Court Diversity—May 2022 Update*, BRENNAN CTR. FOR JUST. (May 25, 2022), https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-may-2022-update [https://perma.cc/XQ2J-PKN9] (finding that 39% of current state supreme court justices are former prosecutors, while only 7% are former public defenders).

[253] *Supra* Section I.B.

[254] *See, e.g.*, CLEMENTSON, *supra* note 33, at 49 (explaining that "one of the most essential features" of the right to trial by jury is that "no jury should be compelled to find any but a general verdict in criminal cases, and the removal of this safeguard would violate its design and destroy its spirit"); *supra* Section I.C.

3. Socio-Psychological Disconnects

Adding to the above-described legal dynamics, the survey results point to potential socio-psychological effects that could be operating amongst key criminal law stakeholders to reinforce the status quo on verdict format in criminal cases. The stakeholder survey was not, however, designed to test these theoretical mechanisms; they are proposed below as considerations for future research.

a. Personal-Group Discrepancies

As reported in Part III, surveyed legal actors in criminal trials exhibited a mistaken sense of personal deviance in regard to their views on criminal verdict format. On average, surveyed trial judges and prosecutors expected their colleagues at large to be significantly more opposed to special criminal verdicts than they themselves were. Additionally, jury-eligible lay citizens on average expected criminal jurors to feel neutral toward using special verdicts, whereas they themselves supported the use of special criminal verdicts and significantly more so than general criminal verdicts.

These findings are consistent with the psychological phenomenon of *pluralistic ignorance*, whereby individuals mistakenly believe that their own views diverge from the majority perspective of their peer group.[255] Pluralistic ignorance leads people to "adopt public behaviors that align with the perceived norms," which then "reinforces those norms even though most members of the group do not privately endorse the norms."[256] Over time, individuals may internalize the presumed group norm, thereby further cementing it.[257] The personal-group discrepancies that trial judges, prosecutors, and jury-eligible lay citizens conveyed could thus help explain the endurance of the legal norm in favor of general criminal verdicts.[258]

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[255] Joshua Levine, Sara Etchison & Daniel M. Oppenheimer, *Pluralistic Ignorance Among Student-Athlete Populations: A Factor in Academic Underperformance*, 68 HIGHER EDU. 525, 527 (2014); *see* Dale T. Miller & Cathy McFarland, *When Social Comparison Goes Awry: The Case of Pluralistic Ignorance*, *in* SOCIAL COMPARISON: CONTEMPORARY THEORY AND RESEARCH 287 (Jerry Suls & Thomas Ashby Wills eds., 1991) (predicting that "for a norm to be perpetuated, it is not necessary for the majority to support it, only for the majority to believe that the majority supports it"). Alternatively, these findings may reflect a self-selection effect, whereby stakeholders who chose to participate in the survey really did systematically differ from their stakeholder peers and knew that they did. However, the variety of stakeholder groups that exhibited the effect makes this alternative explanation less likely.

[256] Levine et al., *supra* note 255, at 527.

[257] Miller & McFarland, *supra* note 255, at 305.

[258] *See id.* at 298.

Beyond jury-eligible lay citizens themselves, every other stakeholder group also underestimated lay support for special criminal verdicts, which could further explain why this verdict format remains disfavored in criminal jury trials. Prosecutors and judges, who on average expected criminal jurors to oppose special verdicts, were particularly off the mark in this regard. Given that prosecutors themselves also expressed mean opposition to special criminal verdicts, their prediction in regard to jurors may reflect a *false consensus effect*—whereby people who hold a particular viewpoint "estimate [it] to be more common" than do others who do not hold the same viewpoint.[259]

b. Defense Dilemmas

Both public and private criminal defense attorneys on average supported the use of special verdicts and expected this format to help their clients on multiple dimensions. So, why don't defense counsel routinely request special verdicts in their cases that go to trial?

Like the judges, prosecutors, and jury-eligible lay citizens discussed above, criminal defense attorneys also appeared to exhibit a pluralistic ignorance effect—albeit to a lesser extent and in an opposite direction. Surveyed criminal defense litigators expected the criminal defense bar at large to be even more supportive of special criminal verdicts than they themselves were. Perhaps believing that their defense colleagues feel more strongly in favor of special criminal verdicts diffuses personal responsibility and the impetus to take the lead on challenging the legal status quo that favors general criminal verdicts.

Defense resistance to the status quo may also be dampened by *system justification*, a psychological process through which "existing social arrangements are legitimized even at the expense of personal and group interest."[260] Drawing upon a decade of research on system justification, social psychologist John Jost and colleagues suggested that people in disadvantaged groups may have "generally adaptive capacities to accommodate, internalize, and even rationalize key features of their socially constructed environments, especially those fea-

[259] *See* Brian Mullen, Jennifer L. Atkins, Debbie S. Champion, Cecelia Edwards, Dana Hardy, John E. Story & Mary Vanderklok, *The "False Consensus Effect": A Meta-Analysis of 115 Hypothesis Tests*, 21 J. EXPERIMENTAL SOC. PSYCH. 262, 262 (1985); Lee Ross, David Greene & Pamela House, *The False Consensus Effect: An Egocentric Bias in Social Perception and Attribution Processes*, 13 J. EXPERIMENTAL SOC. PSYCH. 279, 294, 297–300 (1977) (demonstrating and proposing mechanisms to explain the false consensus effect).

[260] John T. Jost & Mahzarin R. Banaji, *The Role of Stereotyping in System-Justification and the Production of False Consciousness*, 33 BRIT. J. SOC. PSYCH. 1, 1–2 (1994).

tures that are difficult or impossible to change."[261] Indeed, the status quo in favor of general verdicts does not at present allow for much challenge or change, given that trial courts typically reject criminal defendants' requests for special verdicts and appellate courts tend to uphold those denials, as discussed in Section I.B above.

On a more practical level, criminal case law's longstanding warnings about the negative consequences of special verdicts for criminal defendants, whether empirically founded or not, may pose too high a risk for defendants to bear. Going before a jury is already considered to be "little better than a roll of dice,"[262] so criminal defense attorneys whose clients have much at stake may be reluctant to experiment with deviating from the established norm on verdict format in jury trials.

c. Academic-Practitioner Divide

Surveyed criminal law professors on average expressed pro-defense sympathies: they were the only other stakeholder group to join criminal defense attorneys and law students in supporting nullifying acquittals, and they joined public defenders in rating criminal punishment in the American legal system as being significantly harsher than all other groups did. What, then, explains these academics' lack of support for special criminal verdicts, as revealed through the survey and reflected in the dearth of non-student scholarship challenging the status quo in favor of general criminal verdicts?

One answer might lie in the extent to which surveyed criminal law professors' intuitions about verdict format differed from those of criminal law practitioners. Professors expected defense attorneys to be significantly less supportive, and prosecutors to be significantly less opposed, to special criminal verdicts than trial judges and criminal litigators themselves expected. Additionally, while a slim majority of criminal law professors predicted that special criminal verdicts would lead to more acquittals, this group was at the same time disproportionately likely to predict more convictions under a special verdict regime as compared to stakeholders overall. In contrast, the predictions of law students (who have authored much of the legal scholarship challenging the status quo on criminal verdict format[263]) and criminal science experts (many of whom work more directly in trial settings as compared to professors) were more aligned with the intuitions of criminal law practitioners on these measures.

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261 John T. Jost, Mahzarin R. Banaji & Brian A. Nosek, *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 POL. PSYCH. 881, 912 (2004).

262 Duncan v. Louisiana, 391 U.S. 145, 157 (1968).

263 *See supra* note 20.

C. Next Empirical Questions

The results of the stakeholder survey offer a critical starting point for investigating uncharted implications of verdict format in criminal jury trials. They illustrate why the default use of general criminal verdicts warrants rigorous examination rather than presumptive application. In addition, the findings provide preliminary grounds for reconsidering criminal case law's stance against special criminal verdicts and pave the way for further empirical inquiries in this regard. This final Section describes some next steps for better understanding the surveyed stakeholders' intuitions on criminal verdict format and experimentally testing them against the conventional wisdom of courts.

1. Qualitative Investigations

As noted in Section IV.A, the implications of some of the stakeholders' predictions about criminal verdict format cannot be discerned without knowing the reasoning behind them. However, quantitative survey questions have inherent structural and substantive limitations in this regard. Respondents who are asked to rate their views and intuitions on a scale, or choose between categorical responses, can generally convey *what* they think but not *why* they think it. In addition, quantitative measures do not enable respondents to qualify their answers, expand upon them, or provide information that they were not directly asked about.

To counter these limitations, the stakeholder survey included open-ended text boxes in every block of quantitative questions and invited participants to add comments or clarifications. The stakeholders broadly availed themselves of these opportunities, generating a treasure trove of written data that follow-up work will explore.[264] While the quantitative analyses presented in this Article identified overall trends and "relationships between variables . . . with the aim of generalizing the findings," the upcoming qualitative analyses will dig into underlying motivations as well as "difference and divergence" between and within stakeholder groups.[265]

2. Experimental Testing

Analysis of both the quantitative and qualitative data from the stakeholder survey will still leave open questions of cause and effect. For instance, will the use of special instead of general criminal verdicts

[264] Sood, Qualitative, *supra* note 27.

[265] Virginia Braun & Victoria Clarke, Successful Qualitative Research: A Practical Guide for Beginners 4 (2013).

lead to more convictions as case law anticipates, more acquittals as the majority of surveyed stakeholders predicted, or will the two verdict formats "differ substantially in *process* but . . . not always differ in *outcome*," as jury scholars Kayla Burd and Valerie Hans have contemplated?[266] Furthermore, will the effects of criminal verdict format depend on legally irrelevant variables of the case at hand—such as whether the defendant is sympathetic enough to trigger nullification of the law, or unsympathetic enough to trigger punitive biases?

These, too, are empirically testable questions, and the experimental method can help answer them. Randomized, controlled experiments offer an opportunity to identify causal effects and interactions between different verdict formats and across different types of criminal cases, with systematically controlled and manipulated variables. To this end, experimental studies that test the legal and psychological effects of verdict format on lay determinations of criminal liability are forthcoming.[267]

Conclusion

This Article's findings highlight the potential for special verdicts to facilitate more informed criminal jury adjudication, which ties into broader conversations about democratizing criminal law by equipping jurors to better understand their decisions.[268] However, the informational transparency of special verdicts would cut in both directions, potentially providing not only clarity for criminal jurors but also glimpses into the black box of their decisionmaking—which has "[f]or centuries . . . been shrouded in secrecy,"[269] "closely guarded"[270] and deliberately "shield[ed] from public scrutiny."[271]

An early twentieth-century legal scholar, who cynically described the general verdict as "the great procedural opiate" that "draws the curtain upon human errors and soothes us with the assurance that we have attained the inevitable," concurrently cautioned:

> It is quite probable that the law is wise in not permitting jurors to testify as to how they compounded their verdict, for all stability would disappear if such inquiries were open. But it does not follow

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266 Burd & Hans, *supra* note 7, at 359.

267 Sood, Experimental, *supra* note 28.

268 *See, e.g.*, Daniel Epps & William Ortman, *The Informed Jury*, 75 Vand. L. Rev. 823, 823 (2022) (arguing that criminal jurors should be told the sentencing consequences of their verdicts, because "[i]nformed juries would change the dynamics of criminal justice for the better" and "there are powerful arguments that informed juries deserve to be recognized as part of the constitutional jury-trial right").

269 Burd & Hans, *supra* note 7, at 320.

270 Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 875 (2017) (Alito, J., dissenting).

271 Tanner v. United States, 483 U.S. 107, 119 (1987).

> that there is not some better way of deciding controversies than by means of this mysterious agency.[272]

By empirically questioning the longstanding reign of the general verdict in criminal jury trials, this Article has arguably opened a procedural Pandora's jar.[273] Like the turmoil that allegorical jar unleashed upon humankind, disrupting the deeply entrenched status quo in favor of general criminal verdicts could cause upheaval to the criminal legal system's "cherished but simplistic assumptions about our juries."[274]

Yet, after Pandora released the contents of the jar, a crucial element remained inside: hope.[275] One explanation that antiquity scholars have put forth for "why hope remained" in Pandora's jar is for it to serve as "a stimulus" that "rous[es]" human action.[276] Likewise, empirical insights into the effects and implications of verdict format in criminal cases could serve as a hopeful impetus for improving the fairness and transparency of criminal adjudication.

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272 Sunderland, *supra* note 37, at 258, 262.

273 *See* HESIOD, *Works and Days*, *in* THE POEMS OF HESIOD 109, 112 (Barry B. Powell trans., Univ. Calif. Press 2017) (narrating a Greek myth in which Pandora, the first woman on earth, opens a sealed jar out of curiosity and unwittingly unleashes evils upon humankind).

274 Strawn & Buchanan, *supra* note 151, at 479.

275 HESIOD, *supra* note 273.

276 W.J. Verdenius, *A 'Hopeless' Line in Hesiod: Works and Days*, 24 MNEMOSYNE 225 (1971) (also noting an alternative explanation in which hope represents an "idle hope in which the lazy man indulges").