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THE POSSIBILITY OF SPECIAL VERDICTS BY COURT-MARTIAL PANELS

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I. Introduction

This article posits that a court-martial panel, unlike the jury in a civilian criminal trial, could be required by Congress to return a special verdict rather than a general verdict. The peer jury and the court-martial panel are now superficially very similar in function, but they differ in origin and authority such that legal and historical arguments about the powers of the jury do not necessarily apply to the court-martial panel.

The article begins by noting the pre-constitutional origins of the jury and its democratic authority as the voice of the community in the administration of criminal justice. The article then describes how these origins limit the power of judges to intrude into the traditional domain of the jury, though judges attempt to guide jurors and limit their discretion by the use of instructions on the law. This section concludes by noting the very limited use of jury questions in American criminal jury trials and some recent proposals to expand their use in that realm. In criminal trials in the United States, jury questions are usually limited to questions about sentence enhancers, mental health defenses, or other special circumstances. The traditional reluctance to include questions about the core decision on guilt has quietly eroded, but such questions are asked as interrogatories *following* a vote on a general verdict.

The next section of the article notes the origins of the court-martial—mythical, historical, and constitutional—to establish that the court-martial panel does not derive its authority from the same sources as the peer jury. Both jury trials and court-martials convened by military commanders predate the Constitution, which preserved the right to jury trial but also empowered Congress to adopt the court-martial as a form of trial without a jury. Thus, because a court-martial panel is not a peer jury under the Constitution, many of the legal and historical arguments against jury questions in criminal cases do not apply to court-martial panels.

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In a final substantive section, the article considers how such a change might be implemented. In a comparativist spirit, the article considers the way verdict forms are used in American civil trials, European criminal trials, and military bench trials, to consider possible methods to implement the use of special verdicts in court-martial panel trials.

II. The Jury in American Criminal Jury Trials

A. The Peer Jury: A Democratic Institution Protected by the Constitution

"The jury is a central foundation of our justice system and our democracy," wrote Justice Kagan to begin an opinion on the importance of impartial peer jurors.[1] Trial by jury is a pre-constitutional right protected by the Constitution.[2] The Stamp Act Congress in 1765 and the First Continental Congress both cited deprivation of trial by jury as an outrage against the American colonists.[3] Most state constitutions adopted before the 1787 federal Constitutional Convention guaranteed the right to trial by jury.[4] Proponents of the federal Constitution assured readers of *The Federalist* that "the supposed abolition of the trial by jury, by the operation of this provision [vesting judicial power in the Supreme Court], is fallacious and untrue."[5] To be sure, the Constitution was quickly amended to protect expressly the right to jury trial in criminal cases.[6]

The Constitution did not have to describe and define the right to trial by jury, because the English institution had been established by colonial law and practice.[7] To the First Continental Congress, it meant "the great and inestimable privilege of being tried by their peers of the vicinage" in accordance with the common law of England.[8] The composition of a jury in the eighteenth century was not "democratic" in our more inclusive understanding of that word, but at least it was composed of the local laity, not out-of-town political appointees.[9] As American democracy, by steps large and small, accorded the status of "peers" to everyone, the law required that

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

2. *See* The Federalist Nos. 81, 83 (Alexander Hamilton) (McLean ed., 1788) on concerns whether the proposed Constitution would protect or infringe on the people's right to trial by jury under the common law.

3. Duncan v. Louisiana, 391 U.S. 145, 152 (1968).

4. John H. Langbein, Renée Lettow Lerner & Bruce P. Smith, History of the Common Law 485 (2009).

5. The Federalist No. 81, *supra* note 2.

6. U.S. Const. amend. VI.

7. The Federalist No. 83, *supra* note 2; Langbein, Lerner & Smith, *supra* note 4, at 485.

8. *Duncan*, 391 U.S. at 152.

9. *See* Langbein, Lerner & Smith, *supra* note 4, at 532–38 (discussing the gradual expansion of juror eligibility).

the jury "be truly representative of the community."[10] This inclusively democratic jury stepped into the shoes of an institution that had long wielded independent power as the voice of the community.[11]

As this article will discuss below, a central dynamic in Anglo-American law is the tension between legal specialists (principally, that is, judges) and the broader community, represented in court by the jury. Even after English juries, in the seventeenth century, were freed from the more dramatic forms of constraint,[12] English judges provided guidance in the form of "summing up" the evidence, often in a manner suggesting the patent idiocy of any contrasting interpretation of the evidence.[13] When the right to appeal jury trial convictions began, in England in 1907 and in United States federal courts in 1889, this directive summing up by judges provided grounds for appellate challenges, so judges had a powerful incentive to say less about the evidence.[14] Yet from the early Republic to this day, judges presiding over trials have asserted control by instructing jurors on the content of the law.[15] Jurors, in turn, have the final word in voting on a verdict, no matter what the presiding judge may have said about the law to be applied. This article will not attempt to trace the history of this judge-juror dynamic, but it aims to demonstrate that the prohibition against requiring special verdicts from criminal trial juries resulted from that being seen as too great an intrusion on the domain belonging to the jurors.[16]

Indeed, jurors have the power of reaching a verdict that cannot be logically reconciled with the law. This is called jury nullification: "Nullification is, by definition, a violation of a juror's oath to apply the law as instructed by the court."[17] American courts do not generally allow lawyers to argue explicitly for nullification, and judges use evidentiary rules to exclude evidence relevant only to persuading the jurors to nullify.[18] Sometimes, of course, nullification is in the eye of the beholder, and even judges agree that jurors are entitled "to look at more than logic" in deciding cases, because

10. Glasser v. United States, 315 U.S. 60, 86 (1942).

11. THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE 26 (1985) ("The jury's power to render verdicts against the evidence was perhaps the most distinctive aspect of medieval [English] criminal law."). *See also* LANGBEIN, LERNER & SMITH, *supra* note 4, at 475–85.

12. LANGBEIN, LERNER & SMITH, *supra* note 4, at 430–34 (citing *Bushel's Case*, 124 Eng. Rep. 1006 (1670)).

13. *Id.* at 431–33.

14. Renée Lettow Lerner, *How the Creation of Appellate Courts in England and the United States Limited Judicial Comment on Evidence to the Jury*, 40 J. LEGAL PROF. 215 (2016).

15. *See id*. at 478–80, 514–15, 529–32.

16. Some legal historians, for example, interpret the complicated evidentiary rules applied in Anglo-American courts as part of this "centuries old" efforts of "jury control." LANGBEIN, LERNER & SMITH, *supra* note 4, at 448–57.

17. United States v. Thomas, 116 F.3d 606, 614 (2d Cir. 1997), quoted by the California Supreme Court in California v. Williams, 21 P.3d 1209, 1221 (Cal. 2001) and often cited in recent years.

18. *See*, *e.g*., United States v. Penn, 969 F.3d 450, 458 (5th Cir. 2020).

the jury is "the conscience of the community."[19] In the next section, this article will address how judges may and may not use instructions on the law to guide or control the jurors' discretion in rendering verdicts.

B. The Role of Judges in Criminal Jury Trials

In federal criminal trials, both civilian and military, a defendant's ability to ask for findings of fact in a judge-alone trial is "an important right of the defendant in a non-jury criminal case"[20] because "the special findings enable the appellate court to determine the legal significance attributed to particular facts by the military judge, and to determine whether the judge correctly applied any presumption of law, or used appropriate legal standards."[21] After a conviction at a jury trial, appellate lawyers scour the jury instructions for misstatements of the law,[22] but in a judge-alone trial there is no public articulation of the law applied by the judge in reaching a verdict—except when there are special findings.

Judges can be required to "show their work," as math teachers say, while jurors may only be required to answer the ultimate question of guilty or not guilty. Perhaps this distinction is an accident of history, but because it has been accepted for so long, I infer a connection to the source of legitimacy of each office. Judges' decisions are worthy of respect when they accord with the law, but jurors have the ambiguous status of being subject to the law as members of the community, while holding a kind of democratic veto power over the enforcement of the law in a particular case.

Criminal defendants therefore have to choose whether to be tried by a legal specialist, who can be required to return special findings disclosing possible error on which to appeal, or to be tried by a lay jury, which has the power of nullification, but which also can convict without having to disclose its rationale. The defendant who opts for the inscrutable jury decision must hope that, to the extent any point of law benefits the defense, the jurors adhere to the judge's instructions on the elements of each charged offense.

In American law, crimes are defined by elements, and the elements of federal crimes must be established by Congress.[23] Federal civilian juries and military panels are instructed on the definitions applicable to each element, and that someone is guilty of a crime only if all the elements have been proven beyond a reasonable doubt.[24] As noted above, if jurors abide

19. United States v. Spock, 416 F.2d 165, 182 (1st Cir. 1969).
20. United States v. Girard, 11 M.J. 440, 441 (C.M.A. 1981); FED. R. CRIM. P. 23(c).
21. United States v. Hussey, 1 M.J. 804, 808–09 (A.F. Ct. Mil. Rev. 1976).
22. *Id.* at 809.
23. *See generally* Richardson v. United States, 526 U.S. 813, 817 (1999).
24. In re Winship, 397 U.S. 358, 364 (1970); 1 MODERN FEDERAL JURY INSTR. CRIM. ¶ 9.07 (2021).

by the oath to follow the law as instructed, appellate courts reviewing a conviction know what law was applied in the trial. Also, adherence to jury instructions means all defendants are tried based on legal definitions that are uniform from one courtroom to the next, and from one week to the next, in that jurisdiction. Of course, not all scholars are sanguine about the efficacy of the American model of jury instruction. Writing in praise of the German practice of having professional judges collaborate in deliberation with lay jurors, John Langbein opined, "[t]he trial judge's instructions ostensibly identify and resolve for the jurors in advance of their deliberations the legal problems that may arise, although the format of multiple contingent instructions protracts the trial and probably bewilders the jurors."[25]

Judges in American cases can also influence jury decisions by circumscribing the options available to the jury. As part of the judge's role in channeling the jurors' discretion into the legal framework established by the legislature, judges will not instruct a jury on any defense not raised by the evidence at trial, or any lesser included offense not raised by the evidence at trial. A classic case demonstrating this point, with a fact pattern worthy of Joseph Conrad,[26] is the Supreme Court's 1895 decision in *Sparf v. United States*.[27] This case illustrates the asserted point of law that sometimes the evidence in a case does not logically allow a finding of a lesser included offense. Specifically, the evidence in the case supported either murder by the defendants or perjury by the witnesses. In January 1893, the coal ship *Hesper* was en route from New South Wales to Honolulu with a crew of fourteen.[28] On the night of January 13, the starboard watch consisted of second mate Maurice Fitzgerald and three other crewmen: St. Clair, Sparf, and Hansen.[29] Upon their relief, Fitzgerald was missing, but a search of the ship found a blood smear near the mainmast, a "broom covered with blood" near the ladder, and "a narrow strip of scalp with a small piece of hair stuck together by blood" near the gangway.[30]

25. John Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 6 AM. BAR FOUND. RSCH. J. 195, 202 (1981).

26. *See Mutiny and Murder; Bloody Work on Board the Bark Hesper*, SANTA BARBARA MORNING PRESS 1 (Mar. 9, 1893) ("The plot was hatched by Thomas Leclair [sic], Herman Sparf, Hans Hansen, Thomas Green [not the legal historian of the same name] and Edward Larsen, to murder the Captain, first and second mates, cook and a Greek sailor, and then run the vessel either to China or the Chilean coast, sell the cargo and fit the bark out for a piratical cruise.").

27. 156 U.S. 51 (1895).

28. Transcript of Record at 18, *St. Clair v. United States*, 154 U.S. 134 (1894) (No. 1062) [hereinafter St. Clair Transcript of Record].

29. *Id*. at 18–20. Another crew member (Larsen) was on duty at the wheel. *Id*. Ultimately, St. Clair and Hansen would be hanged, and Sparf would go free, though he was shunned by other sailors. *Would Not Sail with Sparf*, SAN FRANCISCO CHRONICLE 7 (Dec. 24, 1895).

30. St. Clair Transcript of Record, *supra* note 28, at 20–21; Transcript of Record at 29–30, *Sparf v. United States*, 156 U.S. 51 (1895) (No. 613) [hereinafter Sparf Transcript of Record]. **R**

Sparf, who had a spot of blood on his cheek, told the captain that he had seen Fitzgerald climb up the fore rigging and had not seen him come down.[31] The three conspirators of the starboard watch were soon in irons, and two other conspirators made an unsuccessful attempt to free them as the captain diverted the ship to French Polynesia for the protection of the United States consul on Tahiti.[32]

Many of these facts are in the Transcripts of Record or the case reporter (or press accounts) but not in the *Sparf* opinion itself, which simply tells the reader that the "evidence tended strongly to show that Fitzgerald was murdered pursuant to a plan formed between St. Clair, Sparf, and Hansen; that all three actively participated in the murder; and that the crime was committed under the most revolting circumstances."[33] More specifically, witnesses testified at trial that St. Clair ambushed Fitzgerald in the dark and beat him with an axe after he had already been rendered helpless, and then St. Clair and Sparf threw the dead or dying man overboard, as part of a plot with Sparf and Hansen to take control of the vessel.[34]

The indictment did not specify the murder weapon or which of the three wielded it, but alleged that they "piratically, willfully, feloniously, and with malice aforethought" struck and beat Fitzgerald, inflicting "grievous, dangerous, and mortal wounds" before casting him from the vessel into the sea to drown.[35] The indictment also did not attempt to distinguish whether Fitzgerald died from the blunt force trauma or from drowning, but alleged that some combination of the "said mortal wounds, casting, throwing, plunging, sinking, and drowning the said Maurice Fitzgerald in and upon the high seas aforesaid, out of the jurisdiction of any particular State of the United States of America," caused his death.[36]

The sailors were prosecuted under a statute prescribing death for murder committed "within the admiralty and maritime jurisdiction of the United States, and not within the jurisdiction of any particular state."[37] At that time, "[t]here [was] no definition of 'murder' by any United States statute."[38] Prevailing instead was the common law of murder and manslaughter, which the trial judge explained to the jury.[39] There was, however, a federal statute to the effect that a jury could find a defendant guilty of a

31. Sparf Transcript of Record, *supra* note 30, at 20. **R**
32. *Mutiny and Murder*, *supra* note 26.
33. Sparf v. United States, 156 U.S. 51, 53 (1895).
34. Sparf Transcript of Record, *supra* note 30, at 43–50.
35. *Id.* at 1 (the indictment included Sparf, Hansen, and St. Clair).
36. *Id*. at 1–2.
37. St. Clair v. United States, 154 U.S. 134, 145 (1894).
38. *Sparf*, 156 U.S. at 59.
39. *Id*.

lesser included offense, if justified by the evidence.[40] When a juror during deliberation asked the judge for further instructions about liability for aiding and abetting, and whether manslaughter was an option, the judge reminded the jurors of his instruction that homicide with malice was murder.[41]

The lengthy exchange included in pertinent part:

> JUROR. A crime committed on the high seas must have been murder, or can it be manslaughter?
>
> COURT. In a proper case, it may be murder, or it may be manslaughter; but in this case it cannot be properly manslaughter.[42]

Thomas St. Clair's motion to be tried separately had been granted, with the consequence that his capital appeal reached the United States Supreme Court in 1894, two years before the High Court appeal of Sparf and Hansen, who were tried together.[43] On appeal, St. Clair argued that the trial judge had erred in refusing to give a requested instruction on the lesser included offense of manslaughter, but his defense counsel at trial had not "taken exception" to that ruling, so the issue had not been preserved.[44] In *Sparf* the issue at trial was preserved, so at the Supreme Court it became the landmark case on this aspect of jury control.[45]

The Supreme Court held that the trial judge had been correct in finding that the evidence in the case did not logically permit a finding of manslaughter:

> The court below assumed, and correctly, that section 1035 of the Revised Statutes did not authorize a jury in a criminal case to find the defendant guilty of a less offence than the one charged, unless the evidence justified them in so doing. Congress did not intend to invest juries in criminal cases with power arbitrarily to disregard the evidence and the principles of law applicable to the case on trial.[46]

At a glance, the trial judge's refusal to sanction the lesser included offense may appear to be severe, but it would be better described as not countenancing conviction on an offense unsupported by competent evidence—albeit a lesser offense than the one charged in the indictment. Jury nullification allows acquittal, not conviction on an offense for which there

40. *St. Clair*, 154 U.S. at 154; *Sparf*, 156 U.S. at 63. This distinction has been elided by at least one published commentary, which erroneously wrote, "The murder statute under which the defendants were charged provided for the lesser included offense of manslaughter." Lawrence W. Crispo, Jill M. Slansky & Geanene M. Yriarte, *Jury Nullification: Law versus Anarchy*, 31 Loy. L.A. L. Rev. 1, 11 (1997).

41. *Sparf*, 156 U.S. at 61 n.1.

42. *Id.*; Sparf Transcript of Record, *supra* note 30, at 67.

43. St. Clair Transcript of Record, *supra* note 28, at 6.

44. *St. Clair*, 154 U.S. at 153–54.

45. Sparf Transcript of Record, *supra* note 30, at 74.

46. *Sparf*, 156 U.S. at 63.

was not competent evidence. As the Supreme Court stated, the jury would have had to "disregard the evidence" that allowed two interpretations: mutinous murder or falsely accused defendants.

While the *Sparf* decision shows that judges can instruct jurors in a way that circumscribes their discretion, we must now examine a limitation on judges' authority to dictate legal conclusions to jurors. The Supreme Court precedents discussed in this passage protect the jury's right to decide whether the evidence on an element of a charged offense is sufficient for conviction, proscribing jury instructions purporting to bind the jurors to the judge's finding. Such instructions contradict the presumption of innocence and intrude on the domain of the finder of fact, which is the jury in a jury trial.

In *Sandstrom v. Montana*[47] in 1979, the United States Supreme Court reviewed a jury instruction stating that "the law presumes that a person intends the ordinary consequences of his voluntary acts,"[48] and held that the instruction violated the due process rights of a murder defendant because it could be understood as a conclusive presumption of the defendant's mens rea.[49] *Sandstrom* made a general rule from the Court's more particular ruling from the year before in *United States v. U.S. Gypsum Co*.,[50] which had disallowed an instruction in a Sherman Act prosecution that if the defendants' act affected prices, it was "presumed, as a matter of law, to have intended that result."[51] Such instructions that an element of the offense (in these cases, the mens rea of the defendant) was *presumed*, without the jurors' independent evaluation, violated due process because "the decision on the issue of intent must be left to the trier of fact alone," and "[t]he instruction given invaded this factfinding function."[52]

In *United States v. Gaudin*,[53] the Supreme Court considered a jury instruction given in a trial on the charge of making a false statement to a federal agency, an offense which has as an element that the false statement was material.[54] In the instruction challenged on appeal, the trial judge had instructed the jurors that the materiality of the statement, if made, was "the decision of the court."[55] While noting there was some precedent for judicial ruling on materiality in fraud cases, Justice Scalia's opinion for a unani-

47. 442 U.S. 512 (1979).
48. *Id.* at 513.
49. *Id.* at 519.
50. 438 U.S. 422 (1978).
51. *Id.* at 430.
52. *Sandstrom*, 442 U.S. at 523 (quoting *Gypsum*, 438 U.S. at 446).
53. 515 U.S. 506 (1995).
54. 18 U.S.C. § 1001.
55. 515 U.S. at 508.

mous Court found the practice dubiously historical and inconsistent with the broader principle that the trier of fact must decide such questions.[56]

Today's federal criminal juries are instructed that they may infer criminal intent from circumstantial evidence, among other permissible inferences, but the language of the instruction must make clear that the inference is permissive, not required. This trial practice creates a terminological discontinuity: "Many of the inferences recognized by common law were and are still called 'presumptions.' However, if used in an instruction, these 'presumptions' *must* be phrased in terms of a permissive inference."[57]

Sandstrom, *Gypsum*, and *Gaudin* describe a limitation on the power of judges to intrude into the domain of the jury. In the next section, we see another important point of judicial deference to the authority of jurors: the general prohibition against requiring special verdicts from juries in criminal cases.

C. Special Verdicts in Criminal Jury Trials

In American criminal practice, the general verdict has long been the rule in jury trials, and it remains the norm. As the Eighth Circuit wrote in 1949, in criminal jury trials "the practice has been settled time out of mind to charge but one crime in one count, to accept but one general plea to it and to call upon the jury to make but one general response, guilty or not guilty."[58] A law review note in 2003 observed that "[t]rue special verdicts are almost never used in criminal cases."[59] In 1969, the First Circuit in *United States v. Spock*[60] held that "[s]pecial verdicts as to a single count are improper and in and of themselves erroneous."[61] The *Spock* court found that the general verdict in criminal cases was a necessary part of protecting the independence of the jury, which should not be ensnared by a judge's manipulations:

> There is no easier way to reach, and perhaps force, a verdict of guilty than to approach it step by step. A juror, wishing to acquit, may be formally cat-

56. *Id.* at 518–19.

57. 1A KEVIN F. O'MALLEY ET AL., FED. JURY PRAC. & INSTR. § 12.05 (6th ed. 2006) (citing *Sandstrom*, 442 U.S. at 514–19).

58. Gray v. United States, 174 F.2d 919, 923 (8th Cir. 1949). The court in *Gray* described the use of a special verdict form with a criminal trial jury as an "innovation." *Id.* at 924.

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

60. 416 F.2d 165 (1st Cir. 1969).

61. United States v. Adcock, 447 F.2d 1337, 1339 (2d Cir. 1971) (citing and encapsulating *Spock*, 416 F.2d at 182–83). The *Spock* decision noted the use of special findings for sentence aggravators and in treason cases with regard to overt acts. *Spock*, 416 F.2d at 182 n.41. In one such case, the Court held that "[s]ince the jury returned special verdicts and findings as to each of the eight overt acts, we could not upset the judgment of conviction, unless all eight were insufficient." Kawakita v. United States, 343 U.S. 717, 737 (1952).

> echized. By a progression of questions each of which seems to require an answer unfavorable to the defendant, a reluctant juror may be led to vote for a conviction which, in the large, he would have resisted. The result may be accomplished by a majority of the jury, but the course has been initiated by the judge, and directed by him through the frame of the questions.[62]

Today, the common phrase is that special verdicts in criminal jury trials are "disfavored," but general verdicts with interrogatories (sometimes using "special verdict" forms) are no longer rare, and the distinction between special verdicts and general verdicts with interrogatories is not always clearly stated.[63]

The 2003 law review note by Kate H. Nepveu described several practices in American courts that are at least closely akin to special verdicts or special interrogatories in criminal cases, especially as part of sentencing procedure, or defenses such as insanity.[64] Nepveu cataloged state court uses of jury questions to find extenuating or mitigating factors, or in effect to distinguish greater and lesser offenses.[65] Whether some of these instances should be considered a true special verdict—an independently valid vote on an element of the offense itself—is a matter of interpretation. Consider, for example, the requirement that a jury find a suitable aggravating circumstance for a murder to be a capital offense: the mechanism for such a finding may be conceived as an element that distinguishes one offense from another, or an aggravating factor submitted to the jury as an interrogatory in connection with a general verdict.[66]

The boldest use of jury questions in the findings of criminal trial juries that Ms. Nepveu cited was the use of interrogatories to identify the predi-

62. *Spock*, 416 F.2d at 182. This "oft-cited" passage was quoted by Charles Hintz in a law review article which called for the adoption of a universal requirement for general verdicts with special interrogatories in all criminal cases as a way to ensure that jurors have assessed each element of an offense. Charles Eric Hintz, *Fair Questions: A Call and Proposal for Using General Verdicts with Special Interrogatories to Prevent Biases and Unjust Convictions*, 54 U.C. DAVIS L. REV. ONLINE 43, 47 (2021).

63. Nepveu, *supra* note 59, at 263 ("'Special verdicts are generally disfavored in criminal trials.' This statement appears so often in judicial discussions of jury verdicts, it is nearly a platitude.").

64. *Id.* at 269–80. In military practice, a finding of insanity is construed as one of the options of what is labeled as a general verdict (guilty; not guilty; not guilty of the charged offense but guilty of a lesser included offense; guilty of the charge with specified exceptions and substitutions within a permissible variance; or not guilty by lack of mental responsibility). *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, Rule for Courts-Martial [R.C.M.] 918(a) (2019).

65. The note was so exhaustive in its survey that some of the cases cited only tangentially implicated the question of special findings, as opposed to the form of jury instructions. Certainly, juror confusion or uncertainty as to unanimity in findings is always somewhat relevant to the issue of special findings or jury questions, which could potentially remedy such problems more decisively than simply giving the jury further instructions.

66. Ring v. Arizona, 536 U.S. 584 (2002); Apprendi v. New Jersey, 530 U.S. 466 (2000). The *Manual for Courts-Martial* excludes these questions as a matter of definition: "Special findings do not include, for example, the members' deliberation and voting on aggravating factors in a capital case . . . or on the defense of mental responsibility. . . ." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 918(b).

cate acts relied upon in convictions in Racketeer Influenced and Corrupt Organizations (RICO) and Continuing Criminal Enterprise (CCE) cases.[67] These also seem to be general verdicts with interrogatories rather than "true" special verdicts but examining all the verdict forms would be necessary to confirm that.

As a more recent example, in 2012 a federal district court in South Dakota employed a general verdict with special interrogatories, over defense objection, for a charge of disposing of a firearm to a prohibited person.[68] The federal statute has four classes of prohibited persons, and the defendant (Stegmeier) had allegedly given a firearm to someone (Kelley) whom the evidence indicated was in two of those four classes.

> The district court sought to ensure that the jury reached unanimity that Stegmeier knew Kelley was a felon, and/or unanimity that Stegmeier knew he was a fugitive. In addition to so instructing the jury, the district court required the jury to answer special interrogatories:
>
> Did you unanimously agree that the defendant knew or had reasonable cause to believe that Thomas R. Kelley had been convicted of a crime punishable by imprisonment for a term exceeding one year?
> _ YES _ NO
>
> Did you unanimously agree that the defendant knew or had reasonable cause to believe that Thomas R. Kelley was a fugitive from justice?
> _ YES _ NO[69]

The district court insisted that the procedure benefitted Stegmeier by ensuring that there was jury unanimity on at least one of the two ways the offense could be committed.[70] Notably, when the defendant moved for a judgment of acquittal, the district court's denial of the motion stressed the distinction between a true special verdict and a general verdict with interrogatories: "There was no special verdict for the crime . . . charged in Count One of the Indictment."[71] The circuit court reviewed for an abuse of discretion and affirmed, repeatedly using the term "special verdict form," but

67. Nepveu, *supra* note 59, at 276–79. *See also* Eric S. Miller, *Compound-Complex Criminal Statutes and the Constitution: Demanding Unanimity as to Predicate Acts*, 104 YALE L.J. 2277, 2305–07 (1995).

68. United States v. Stegmeier, 701 F.3d 574 (8th Cir. 2012), *cert. denied*, 571 U.S. 881 (2013).

69. *Stegmeier*, 701 F.3d at 580–81.

70. *Id.*

71. United States v. Stegmeier, No. CR 11-40038, 2011 U.S. Dist. LEXIS 138744, at *2–3 (Dec. 2, 2011). This use of the terms "special verdict" or "special verdict forms," not only for general verdicts with interrogatories but also for findings on matters other than the elements or a defense, can give a misleading impression that actual special verdicts are being employed. *See*, *e.g.*, United States v. Lamoreaux, 422 F.3d 750, 755 (8th Cir. 2005) ("[T]he district court submitted two special verdict forms, asking the jury to find, in the event it reached a guilty verdict, (1) whether Lamoreaux abused a position of trust at NuCare 'in order to facilitate the commission and concealment of mail fraud,' and (2) the amount of Lamoreaux's 'monetary gain . . . as a result of the crimes of mail fraud.'").

opining that the procedure used by the trial court did not implicate any of the reasons special verdicts or interrogatories are disfavored:

> The judge did not infringe upon the jury's power to freely deliberate, did not require the jury to justify its actions, and did not ask "why" the jury arrived at its decision. Nor did the court challenge the jury's power to ignore the court's instructions if it so desired, require the jury to set aside its most valuable asset as fact finder (collective common sense), or direct the jury, intentionally or unintentionally, to follow a course initiated by the court.[72]

Nota bene the court's abjuration of having asked *why* the jury arrived at its decision. Those calling for the "reasoned verdict" portion of a civil law form of verdict in American criminal cases may be choosing the tougher bullet to chew.[73] In the time since jury independence was established in *Bushel's Case*[74] and the trial of Peter Zenger,[75] the United States has developed a strong tradition that a jury's deliberation is all but inviolable. The Supreme Court's 2017 decision in *Peña-Rodriguez v. Colorado*[76] represented the exception demonstrating the rule, allowing impeachment of a jury verdict by evidence of racial bias, as a distinct category, while retaining the general rule that jury deliberations must not be scrutinized.[77] Justice Kennedy reassured the reader that "careful voir dire," jury instructions, and "thoughtful deliberation" could "help ensure that the exception is limited to rare cases."[78] The decision was hardly an encouragement to make windows into jurors' deliberations.

A University of Pennsylvania research fellow recently invoked *Peña-Rodriguez*, specifically its call for countermeasures against racial bias in criminal justice, in the opening of an online law review article calling for special interrogatories—*after* any vote to convict—in *all* criminal cases.[79] Implementing such a rule would be a dramatic innovation, but it would retain the general verdict and employ jury questions "when, but only when, [the jurors] are proceeding towards a finding of guilt[.]"[80] The article cited research on the weaknesses of jury decision making, refuting every Law

72. *Stegmeier*, 701 F.3d at 581–82 (quoting United States v. Ryan, 9 F.3d 660, 671 (8th Cir. 1993)). *Ryan* had a general verdict with interrogatories, only to be answered following a vote to convict. Inconveniently, Lexis omits the decision appendix containing the questions, but they can be seen at https://perma.cc/XV8Q-T55C.

73. *See infra* text accompanying note 215. For further discussion of practices in civil law, as opposed to common law, countries, *see infra* Part IV(B).

74. 124 Eng. Rep. 1006 (C.P. 1670). For the history and importance of *Bushel's Case* in establishing jurors' independence from juridical control, *see* GREEN, *supra* note 11, at 236–49.

75. 17 Howell's State Trials 675 (1735). For the history and importance of Zenger's 1735 libel case in New York, *see* LANGBEIN, LERNER & SMITH, *supra* note 4, at 475–80.

76. 137 S. Ct. 855 (2017).

77. *Id.* at 869.

78. *Id.* at 860, 871.

79. Hintz, *supra* note 62, at 45.

80. *Id.* at 46.

Day speech on the glory of juries,[81] and argued that if interrogatories on the elements were a second step after a vote on a general verdict, they could only benefit the defendant as a check on the jurors' grasp of the elements.[82] Although the author did not mention affirmative defenses, it would be consistent with his theme to include questions about affirmative defenses in addition to questions about the elements of the charged offenses.

The author proposed an elaborate procedure, which I will summarize but cannot endorse: "When jurors retire to deliberate, they should receive three verdict forms, each in a separate sealed folder."[83] The first folder would contain a general verdict form, instructing the jurors to open the second sealed folder if they vote to convict.[84] The second folder would contain a special verdict form with questions on the elements, instructing them that they could reconsider the general verdict after completing the second form—shredding the special verdict form if the general verdict were reconsidered.[85] The third sealed folder would be opened if the jury confirmed its conviction in the special verdict vote and would contain sentencing and collateral questions.[86] Having been a trial judge, and having practiced in front of many trial judges, who uniformly feared confusing the jurors, I feel confident in saying that judges would prefer to use a special verdict form or a general verdict form with interrogatories, rather than a series of sealed folders. More workable approaches to special verdicts may be found in American civil cases or European courts, as will be discussed in Section IV. Before addressing method, however, this article will now address the question of whether the reasons special verdicts cannot be required in criminal jury trials also apply to trials by court-martial panel.

III. The Panel in American Court-Martial Trials

A. The Court-Martial Panel: A Military Institution Allowed by the Constitution

In noting some key points in the evolution of American military law, this section will focus on change rather than continuity. Indeed, it will accuse others, including serious scholars, of exaggerating the continuity in military law. The purpose of this provocation is to advance my theory that today's court-martial is legitimated by adherence to law, not by the traditional rationale of military discipline at any cost. The court-martial, I will

81. *Id.* at 49–54.
82. *Id.* at 44–48, 55–57.
83. *Id.* at 56.
84. *Id.*
85. *Id.* at 56–57.
86. *Id.* at 56.

argue, began as an instrument of military discipline subject to the power of the commander, but it has evolved into a court of law that accounts for the needs of military discipline but also provides due process.

The Constitution provides that the President is commander-in-chief of the armed forces,[87] but empowers Congress to make rules for the government and regulation of the land and naval forces.[88] The latter constitutional provision, the Supreme Court has said, "is a power to provide for trial and punishment by military courts without a jury."[89] In 1789, Congress acted on this power by adopting the Articles of War then in force by authority of the Continental Congress.[90] The pre-constitutional Articles of War, in turn, had been adopted largely from the British Articles of War,[91] which provided for courts-martial, meaning evidentiary hearings by panels of officers.[92]

Colonel William Winthrop and other authors cited below seem to savor such points of continuity, and no less a scholar than John Adams also believed that the British Articles of War were "a literal translation of the Roman" military law.[93] Query how President Adams' romantic belief in a literal translation of this classical antecedent can be reconciled with Colonel Winthrop's acknowledgement that "no written military codes remain from the times of the Greeks or Romans."[94] Notwithstanding this concession to unromantic fact, Winthrop's 1895 treatise on *Military Law and Precedents*, which has been called the "Blackstone of Military Law,"[95] asserts vaguely that the British Articles of War had "their inception in remote antiquity."[96] I submit that the alleged continuity with ancient or medieval military practices is merely the disciplinary function necessary in war, which we may distinguish from codes and procedures, which if we are being frank, limit rather than enhance the power of the military commander.[97]

The Roman military commander had powers untrammeled by codes and lawyers, and a brief review of that law throws cold water on romantic notions of continuity, or the desirability of continuity. For military offenses,

87. U.S. CONST. art. II, § 2.

88. *Id.* art. I, § 8, cl. 14.

89. Ex parte Milligan, 71 U.S. 2, 137 (1866).

90. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 47–48 (2d ed. 1920).

91. *Id.*

92. *Id.* at app'x VII, British Articles of War in force at the beginning of our Revolutionary War.

93. Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169, 169 (1953).

94. WINTHROP, *supra* note 90, at 17.

95. Reid v. Covert, 354 U.S. 1, 19 n.38 (1957).

96. WINTHROP, *supra* note 90, at 17, 18 n.1.

97. *See generally* David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 74 (2013) ("The thrust of the Code—as of the Articles of War—is to recognize the commander's authority to exercise good order and discipline. Provisions in the Code, the Manual for Courts-Martial, service regulations, and case law provide checks on the commander's exercise of that authority.").

the summary authority of the Roman commander was vast, ranging from extra duty for minor offenses to "individual or collective death penalties in extreme cases to punish deserters or cowards."[98] Tellingly, every Roman legion camp had a *tribunal*, but the word at that time meant the raised platform from which the commander would oversee and lecture the troops.[99] The soldiers' oath of obedience was personal to the commander, not to any constitution or law, and a new oath was required if a new commander was appointed.[100] As for juridical institutions, modern authors interpret the sources as indicating that an officer of the day supervised the *stator* (meaning here and in a civilian context a "supporter," not to say an "enforcer"), the soldier assigned to maintain discipline.[101] Query what part of this sounds like an antecedent to military justice, as opposed to merely military discipline.

The romantic notion also persists that something recognizable as a court-martial precursor can be found in the early Middle Ages, brought to England by the Norman Conquest. Colonel Winthrop's inclusion of William the Conqueror and the medieval Court of Chivalry[102] in the lineage of the modern court-martial is confusing and probably inaccurate. More recent scholarship shows that some past authors apparently confused the origin of the offices of Lord High Constable and Earl Marshal—who did later preside in the Court of Chivalry—with the origin of the civil law court called by that name, which was established in 1348 by Edward III.[103] Writing in the *Military Law Review* in 1980, now-Professor David Schlueter relayed some of this dubious lore, in language that I fear suggests a legal sophistication that did not exist:

> The Duke of Normandy (William the Conqueror) vested the power and authority of his court of chivalry in his high officials; the particulars of this court will be discussed later. It was this system of military justice which he carried to England in the 11th century.[104]
>
> In the preceding discussion on the early European court-martial model, we noted the rise of the courts of honor, the court of chivalry, *curia militaris.* With his armies, William the Conqueror carried that system of justice to England and established it as his forum for administering military justice.[105]

98. YANN LE BOHEC, THE IMPERIAL ROMAN ARMY 61 (trans. Raphael Bate, 2000).

99. *Id.* at 159.

100. LAWRENCE KEPPIE, THE MAKING OF THE ROMAN ARMY 78 (1998).

101. LE BOHEC, *supra* note 98, at 56 (citing TACITUS, HISTORIES 1.28.1).

102. WINTHROP, *supra* note 90, at 46.

103. William H. Dunham, Jr., *Review: The High Court of Chivalry: A Study of the Civil Law in England*, 65 AM. HIST. REV. 106 (1959). *Cf.* WINTHROP, *supra* note 90, at 47.

104. David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129, 132 (1980).

105. *Id.* at 136.

Although Professor Schlueter cited barrister and historian G.D. Squibb's authoritative history of the Court of Chivalry,[106] he contradicted, without acknowledgment or explanation, a rather important passage from it:

> The name "Curia Militaris" has been the cause of misconception concerning the antiquity as well as the nature of the Court of Chivalry. It would be unnecessary even to mention the myth that the Court of Chivalry dates from the reign of William the Conqueror were it not that it received judicial authority in the charge of Cockburn C.J. to the grand jury in *R. v. Nelson and Brand* [1867]. As will be seen below, the Conqueror had been dead for two and a half centuries before the Court of Chivalry appeared on the English scene. We owe the story of its Norman origin to an attempt by Edward IV to enlarge its jurisdiction.[107]

Moreover, "the records of the Court of Chivalry do not include a single case relating to the 'offences and miscarriages of soldiers contrary to the laws and rules of the army'" such as "desertion or mutiny or any other offence within the jurisdiction of the modern court-martial."[108] We may wish to include the glamorously named Court of Chivalry in our legal ancestry, but the connection is tenuous.

Colonel Winthrop and Professor Schlueter gain stronger footing in the historical record when they move on to Gustavus Adolphus and British military law emerging from the Glorious Revolution.[109] The military code promulgated by Gustavus Adolphus indeed looks like something to be called early modern, and "it is readily concluded that not a few of the articles of the English codes of a later date were shaped after this model or suggested by its provisions."[110]

The seventeenth century, perhaps not coincidentally the century of the English Civil Wars and the Glorious Revolution, provided the models of the British Articles of War that were transmitted to the first independent Americans. At that time, however, these military codes were still rough justice. William Blackstone, writing about British military law in 1765, called it "entirely arbitrary in its decisions" and "built upon no settled principles."[111] Such protections as were provided by the Articles of War did not make it, in his view, a respectable system of law: "The necessity of order and disci-

106. *Id.* at 131, 136, 138.

107. GEORGE DREWRY SQUIBB, THE HIGH COURT OF CHIVALRY: A STUDY IN THE CIVIL LAW IN ENGLAND 10 (1959) (internal citation omitted). Included in this remarkable book is Squibb's account of his own successful 1954 representation of the Manchester Corporation in a claim against a Manchester theater for its unlicensed use of the Corporation's heraldic devices—the first sitting of the Court of Chivalry since 1737. *Id.* at 123–27. Understandably, the hereditary Earl Marshal (the Duke of Norfolk) issued a warrant for the Chief Justice to hear the case as his surrogate. *Id.*

108. *Id.* at 8.

109. WINTHROP, *supra* note 90, at 19–20, 46–47; Schlueter, *supra* note 104, at 132–35, 141–44. **R**

110. WINTHROP, *supra* note 90, at 19. *See id*. app. III, Articles of War of Gustavus Adolphus of 1621.

111. WILLIAM BLACKSTONE, 1 COMMENTARIES 413 (1765).

pline in an army is the only thing which can give it countenance."[112] Again stressing discontinuity in this history, we now shift to the twentieth century changes that created today's military justice system.

The watershed event in making American military justice less an arm of command and more a system of law was enactment of the Uniform Code of Military Justice (UCMJ) in 1950.[113] As Professor David Schlueter has summarized:

> In enacting the UCMJ, Congress struggled to balance the need for the commander to maintain discipline within the ranks against the belief that the military justice system could be made fairer, to protect the rights of servicemembers against the arbitrary actions of commanders. The final product could be considered a compromise.[114]

This "compromise" criminal law system forms part of what constitutional scholar Jonathan Turley has called a "military pocket republic."[115] In response to the American Civil War and World War II, the political branches (Congress and the President) created a powerful military establishment,[116] and the third branch of government, the Supreme Court, has historically shown remarkable deference to the military,[117] accepting its arguments about national security or the uniqueness of military culture to allow divergence from legal norms in many areas.[118] An important example of such a divergence is that Congress continues to allow, and the Supreme Court continues to sanction, "trial and punishment by military courts without a jury."[119] As Professor Turley has noted, the constitutional provisions enabling a separate military justice system are permissive with regard to congressional power, and may not justify the deference historically shown by the Supreme Court.[120] We may therefore say that the court-martial panel

112. *Id.* at 413.

113. Act of May 5, 1950, Pub. L. No. 81-506, 64 Stat. 108.

114. Schlueter, *The Military Justice Conundrum*, *supra* note 104, at 4.

115. Jonathan Turley, *The Military Pocket Republic*, 97 Nw. U. L. REV. 1, 7 (2002).

116. *Id.* at 44 ("[T]he significant expansion of the military into conventional civilian areas did not occur until after the Civil War and experienced its greatest expansion after the Second World War.")

117. *See id.* at 37–48.

118. *Id.* at 47–48 ("The Court has stressed that judges lack the competence to review military decisions, which are the products of a unique society and specialized training."). Professor Turley's work in this area largely addresses civil-military relations and sovereign immunity. *See* Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1 (2003).

119. Ex parte Milligan, 71 U.S. 2, 137 (1866).

120. Turley, *Military Pocket Republic*, *supra* note 115, at 40. As for the exemption from grand jury indictment, Winthrop opined, "In the view of the author, the [Fifth] Amendment, in the particular indicated [grand jury indictment], is rather a *declaratory recognition and sanction* of an existing military jurisdiction than an original provision initiating such a jurisdiction." WINTHROP, *supra* note 90, at 48 (emphasis in original).

is a statutory creature allowed by the Constitution, in contrast to the peer jury, which is an institution guaranteed by the Constitution.[121]

While a jury of one's peers is part of democratic government,[122] the members of a court-martial panel are selected by the military commander with statutory authority to convene the court.[123] Commanders select panel members, on an individual basis, who are senior to the accused in military rank or grade,[124] and whom the commanders deem "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[125] As Justice Kagan wrote in *Ortiz v. United States*,[126] a court-martial remains "an officer-led tribunal convened to determine guilt or innocence and levy appropriate punishment, up to lifetime imprisonment or execution."[127] The *Ortiz* Court held that the military courts at each level are judicial bodies deciding criminal cases "in strict accordance with a body of federal law (of course including the Constitution)."[128] This judicial character led the Court to conclude that Supreme Court review of military cases was an exercise of appellate, not original, jurisdiction.[129] I submit that the legitimacy of the court-martial panel depends on this adherence to law, because unlike a jury it has no independent standing as a democratic body.[130]

B. The Role of Judges in Court-Martial Panel Trials

Over time, court-martial procedure has shifted such that the court-martial panel now resembles a civilian jury. Until 1969, an American court-martial had no judge.[131] The presiding officer at a trial was the panel president, being the "senior in rank among the members appointed to a general or special court-martial."[132] An important innovation of the post-World War II enactment of the Uniform Code of Military Justice was its creation

121. U.S. CONST. amend. VI.
122. *See supra* Section II(A).
123. *See* Articles 22–25a, UCMJ (10 U.S.C. §§ 822–825a).
124. Article 25(e)(1), UCMJ (10 U.S.C. § 825(e)(1)).
125. Article 25(e)(2), UCMJ (10 U.S.C. § 825(e)(2)).
126. 138 S. Ct. 2165 (2018).
127. *Id.* at 2171.
128. *Id.* at 2174.
129. *Id.* at 2174–75.
130. Note that the commander's selection of the panel members means that a court-martial panel is not even composed of the accused's peers within the military community.
131. The Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335, which created the office, took effect on August 1, 1969. *See also* Exec. Order No. 11,476, 34 Fed. Reg. 10,502 (June 19, 1969) (implementing a manual for courts-martial).
132. Manual for Courts-Martial, Exec. Order No. 10,214, 16 Fed. Reg. 1303, 1319 (Feb. 10, 1951). In American military law before 1828, a court-martial president was separately appointed, but from that date the senior appointed panel member served as president of the court-martial. WINTHROP, *supra* note 90, at 170.

of a "law officer" to rule on interlocutory matters,[133] but the services baulked at the idea of having a lawyer preside over a court-martial as judge.[134] Although a military judge now presides over most court-martial functions,[135] the office of panel president remains part of court-martial procedure, with the panel's most senior officer presiding over the panel's closed deliberations and speaking for the panel in announcing its decisions or requesting instructions from the judge.[136]

General William T. Sherman, we may infer, would have hated this shift of power from the president and the members to a military judge. Professor Turley, in an article on the tension between military culture and our Madisonian republic, quoted an 1880 diatribe by General Sherman that recalls Jack Nicholson's courtroom speech in the movie *A Few Good Men*:

> It will be a grave error if, by negligence, we permit the military law to become emasculated by allowing lawyers to inject into it principles derived from their practice in the civil courts, which belong to a totally different system of Jurisprudence. The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation . . . An army is a collection of armed men obliged to obey one man. Every enactment, every change of rule which impairs the principle weakens the army, impairs its value, and defeats the very object of its existence.[137]

An argument unavailable to General Sherman would have been that Congress had no power to make such changes. The armed forces may be a practical necessity, but the political branches of government may craft them as they see fit. As noted above, the constitutional carveouts for military justice create no obligation on Congress. This section will suggest that imposing order in the armed forces, which includes enforcing civilian control over the armed forces, may sometimes be served by conveying power away from court-martial panel members and giving it to the military judges. To make the discussion more concrete, it describes a point of law where I see an *unacknowledged* shift of the line between the power of the civilian jury and the power of the military panel.

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133. Manual for Courts-Martial, Exec. Order No. 10,214, 16 Fed. Reg. at 1319. Before enactment of the UCMJ, an Army court-martial included a "law member" who advised the court and voted with it, but whose opinions were not binding, while a Navy court-martial was advised on the law by the prosecuting attorney. Andrew S. Effron, United States v. DuBay *and the Evolution of Military Law*, 207 Mil. L. Rev. 1, 8 (2011).

134. Effron, *supra* note 133, at 8–11.

135. Manual for Courts-Martial, United States, R.C.M. 801(a).

136. *Id.* 502(b).

137. Jonathan Turley, *Trials and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 Geo. Wash. L. Rev. 649, 651–52 (2002).

This issue in question is whether the court-martial panel or the military judge should decide, in the case of someone charged with disobeying a lawful order, whether the order was lawful. Judges are meant to be experts on what is and is not lawful, but might not the lawfulness of an order depend on the factual circumstances? And recall the discussion above of the Supreme Court holdings in *Sandstrom*, *Gypsum*, and *Gaudin*.[138] In *Gaudin*, a trial judge could not instruct the jurors that a false statement, if made, was material as a matter of law. The military courts, however, have insisted that military judges must decide whether a disobeyed order was lawful.

Under Articles 90, 91, and 92 of the UCMJ,[139] a junior servicemember is liable for prosecution for failing to obey, *inter alia*, off-the-cuff oral instructions uttered by a superior commissioned or noncommissioned officer.[140] The lawfulness of the order announces itself boldly as a question of law, but it also looks like an element of the offense, or perhaps an affirmative defense, which ought therefore to be a matter for the trier of fact.

Winthrop's treatise expressed the classical view that "lawful order" was redundant (like "enforceable contract") because an unlawful order was no true order.[141] The lawfulness of an order was to be presumed, and to overcome the presumption of lawfulness, an order must be "clearly repugnant to some specific statute, to the law or usage of the military service, or to the general law of the land."[142] Modern sensibilities on this point do not hew as closely to the side of presumptive obedience to orders, and as a more contemporary judge observed in a case discussed below, "[t]here has always been an uneasy tension between the concept of 'instinctive obedience' and the expectation that servicemembers will not obey unlawful orders."[143]

Winthrop's description of the burden on the defense to show illegality of a disobeyed order sounds to me like an affirmative defense:

> The unlawfulness of the command must thus be a *fact*, and, in view of the general presumption of law in favor of the authority of military orders emanating from official superiors, the *onus* of establishing this fact will, in all cases—except where the order is palpably illegal upon its face—devolve upon the defence [sic], and clear and convincing evidence will be required to rebut the presumption.[144]

In 1952, the United States Court of Military Appeals cited this language with approval, and reinforced the construal of an order's illegality as

138. *See supra* Section II(B).
139. 10 U.S.C. §§ 890–892.
140. *Id.*
141. WINTHROP, *supra* note 90, at 575.
142. *Id.*
143. United States v. New, 55 M.J. 95, 111 (C.A.A.F. 2001) (Effron, J., concurring).
144. WINTHROP, *supra* note 90, at 575–76 (emphasis in original).

an affirmative defense by upholding a conviction because the order had "not been shown affirmatively to be illegal."[145] If the illegality of a disobeyed order is an affirmative defense (or an element of the offense in the first place), the decision would normally be submitted to the trier of fact.[146] In 1965, however, the United States Court of Military Appeals in *United States v. Carson*[147] wrote that the legality of an order was a question of law, not a matter to be submitted to the panel members:

> Whether an act comports with law, that is, whether it is legal or illegal, is a question of law, not an issue of fact for determination by the triers of fact. For example, in a prosecution for disobedience of an order . . . the court-martial must determine whether the order was given to the accused, but it may not consider whether the order was legal or illegal in relation to a constitutional or statutory right of the accused.[148]

In this context, the term "court-martial" in the last sentence refers to the court-martial panel, as opposed to the "law officer" who advised the court but did not preside.[149]

The opposite conclusion was announced by the United States Court of Military Appeals in 1989 in *Unger v. Ziemniak*.[150] The *Unger* court wrote in the context of an interlocutory appeal that "[i]n a prosecution for disobedience, lawfulness of the command is an element of the offense."[151] A Navy lieutenant had refused an order to urinate under direct supervision for purposes of a drug test "because of her claimed constitutional rights to privacy and to freedom from unreasonable searches and seizures and also because, in her view, the direct observation by an enlisted person constituted fraternization and demeaned her status as an officer."[152] The trial judge denied a motion to dismiss the charge on the grounds that the order was not lawful, and in answering the interlocutory appeal, the highest military court opined that the lawfulness of the command was an element of the offense subject to a rebuttable presumption.[153] In fact, the court advised the trial judge to dismiss the charge if he "determines from *undisputed* facts that the order was illegal."[154] While this could be construed as simply applying the

145. United States v. Trani, 3 C.M.R. 27, 30–31 (C.M.A. 1952).

146. *See*, *e.g.*, Matthews v. United States, 485 U.S. 58 (1988).

147. 35 C.M.R. 379 (C.M.A. 1965).

148. *Id.* at 380.

149. In 1969, Congress amended Article 51 (10 U.S.C. § 851) to create the position of military judge, with greater authority than the predecessor position of law officer. The law officer, unlike the "law member" position it replaced, was not a member of the court-martial.

150. 27 M.J. 349, 358 (C.M.A. 1989).

151. *Id.*

152. *Id.* at 351.

153. *Id.* at 359.

154. *Id.* (emphasis added). Note that this was in effect an advisory opinion. The United States Court of Military Appeals and, at least until recently, its successor the United States Court of Appeals for the Armed Forces often issued tutelary opinions.

standard for a motion for a finding of not guilty under Rule for Courts-Martial 917 on the grounds that a conviction could not be sustained by competent evidence, such a reading would mean treating the lawfulness of the order as an element of the offense, not as a question of law.[155]

More curiously, the *Unger* court said that whether the panel members should decide the lawfulness of the order depended on whether the evidence raised the question, which would be more consistent with construing the question as an affirmative defense, not as an element necessary in the prosecution's prima facie case:

> If, in a trial by members, the military judge determines that no evidence has been offered to rebut the presumed legality of the order to provide a urine specimen, he need not advise the members as to what facts might rebut the presumption. If, however, he concludes from all the evidence that an issue exists as to whether the servicemember had been ordered to provide the specimen under unreasonable conditions, he should submit the issue to the court members for their consideration.[156]

Under this schema, the trial judge would determine whether an affirmative defense had been raised by some evidence and submit the question to the panel if it had been.

This bewildering welter of different interpretations of the issue came to a head in a high-profile political case decided by the United States Court of Appeals for the Armed Forces in 2001: *United States v. New*.[157] In 1995, Army medic Michael New's unit had been ordered to prepare for deployment to the Former Yugoslav Republic of Macedonia as part of a United Nations Preventive Deployment Force, which would wear U.N. accoutrements including a pale blue beret.[158] Specialist New refused to obey the order to add the U.N. beret and insignia to his uniform, and was court-martialed for disobeying a lawful order.[159] At trial, Specialist New argued that the legality of the order was an element of the charged offense and thus had to be submitted to the military panel, not decided by the trial judge.[160]

At the time of Specialist New's trial, the Military Judges' Benchbook, which provides pattern jury instructions for courts-martial in all the armed forces, provided the military judge with the three options set out in *Unger v. Ziemniak*.[161] If the legality of the order was "clear as a matter of law," the judge could so rule and instruct the panel that the question was settled.[162] If

155. Manual for Courts-Martial, United States, R.C.M. 917 (2019).
156. *Unger*, 27 M.J. at 359.
157. 55 M.J. 95 (C.A.A.F. 2001), *cert. denied*, 534 U.S. 955 (2001).
158. *Id.* at 97–98.
159. *Id.* at 98.
160. *Id.* at 100.
161. Military Judges' Benchbook, Dep't of the Army Pamphlet 27-9, ¶¶ 3–59 (Oct. 1986).
162. *Id.*

the judge determined "as a matter of law" that the order was not lawful, the judge should dismiss the specification.[163] "If there is a factual dispute as to whether or not the order was lawful, that dispute must be resolved by the members in connection with their determination of guilt or innocence."[164] This last option anticipated the possibility that the legality of an order might be contingent on disputed facts, such as whether a target had been adequately identified.[165]

The trial judge in Specialist New's case decided "as a matter of law" that the order to don the U.N. blue beret had been a lawful order.[166] On appeal, the United States Court of Appeals for the Armed Forces upheld the trial judge's decision on the basis that the lawfulness of the order was a question of law and not a "discrete element."[167] The rationale of the decision sounds less like legal reasoning and more like a policy argument specific to the military sphere:

> By contrast, if the issue of lawfulness were treated as an element that must be proved in each case beyond a reasonable doubt, the validity of regulations and orders of critical import to the national security would be subject to unreviewable and potentially inconsistent treatment by different court-martial panels.[168]

Further, Judge Andrew Effron concurred in the result in *New* but wrote separately to opine that the particular case should have been decided as a political question: "There is nothing in the more than two centuries of our history as a Nation that suggests courts-martial should be empowered to rule on the propriety of deployment orders as a matter of either constitutional or military law."[169] Judge Eugene Sullivan also wrote separately to express the view that the order's lawfulness was an element, relying in part on *Gaudin*—though he concurred in the result.[170]

Specialist New's direct appeal was followed by collateral attack in the civilian courts on petition for habeas corpus.[171] The United States Court of Appeals for the District of Columbia Circuit found "no fundamental defect" in the military court's decision that "distinguished lawfulness from 'wrong-

163. *Id.*

164. *Id.*

165. Judge Sullivan's concurrence defended this view, but with little clear authority for it, citing at a stretch United States v. Robinson, 20 C.M.R. 63 (C.M.A. 1955), a case about whether enlisted soldiers could be required to serve in the officers' mess at Fort McNair. *New*, 55 M.J. at 115 (Sullivan, J., concurring). That case had approved submission to the court-martial of a factual question requisite to finding the order to have been lawful.

166. *New*, 55 M.J. at 106–07.

167. *Id.* at 105.

168. *Id.*

169. *Id.* at 110 (Effron, J., concurring).

170. *Id.* at 115 (Sullivan, J., concurring).

171. United States ex rel. New v. Rumsfeld, 448 F.3d 403 (D.C. Cir. 2006).

fulness' and 'materiality' " in other offenses.[172] The Circuit Court discussed the "tangled" question of what standard of review actually applied in habeas corpus review by a civilian court, settling on the test of whether there had been "fair consideration" of the issues by the military courts.[173] Noting that under Article 51, UCMJ,[174] an element must be submitted to the military jury, the habeas corpus decision rather obtusely stated, "Other than the idea that lawfulness must be an element of the offense (coupled with § 851's requirement), *New* appears to offer no legal reason why the lawfulness issue should have gone to the military jury."[175] One might rejoin that the Circuit Court decision provided no legal reason why the lawfulness issue should not have gone to the jury other than the *ipse dixit* that lawfulness was not an element of the offense.

More recently, the United States Court of Appeals for the Armed Forces reaffirmed its position that the legality of an order is within the bailiwick of the trial judge and not the finder of fact in *United States v. Deisher*[176] in 2005. In *Deisher*, the court actually overturned a conviction because an Air Force trial judge had submitted the question to the court-martial panel, rather than deciding the issue by making his own findings and conclusions.[177]

Query whether a disinterested legal reasoner would agree that *New* accords with *Gaudin*. Given the potential importance of contested facts in deciding the *materiality* of a false statement or the *lawfulness* of a military order, these would seem to be elements of the offense in question, to be submitted to the trier of fact. The United States Court of Appeals for the Armed Forces has elsewhere acknowledged that even in the context of military offenses, "the elements of an offense cannot be established by a conclusive presumption."[178]

Under the current edition of the Military Judges' Benchbook, the trial judge decides whether the command was lawful, dismissing the specification if it was not, and otherwise instructs the panel that "[a]s a matter of law, the command in this case, as described in the specification, if in fact there was such a command, was a lawful command."[179] This construction submits to the laity only the question "if in fact there was such a com-

172. *Id.* at 408.

173. *Id.* at 406, 408.

174. 10 U.S.C. § 851(c).

175. *Rumsfeld*, 448 F.3d at 408.

176. 61 M.J. 313, 314 (C.A.A.F. 2005).

177. *Id.* at 314.

178. United States v. Phillips, 70 M.J. 161, 167 (C.A.A.F. 2011) (employing the "general article" (10 U.S.C. § 934) to prosecute conduct of a nature to bring discredit upon the armed forces).

179. MILITARY JUDGES' BENCHBOOK, DEP'T OF THE ARMY PAM. 27-9, 1094 (2020) [hereinafter "BENCHBOOK"].

mand," and excludes from the laity's consideration whether the order was lawful, even if the lawfulness of the order depends on contested facts.

As I said at the outset, I see in this issue an *unacknowledged* shift of the line between the power of the civilian jury and the power of the military panel. The policy reasons cited by Judge Effron regarding this vexed question, and the decision of military courts to draw the line in *New* differently than in *Gaudin*, could be interpreted to mean that a court-martial panel does not have the same authority as a peer jury, and its discretion can be more narrowly circumscribed. A court-martial is, please recall, a criminal trial "without a jury."[180] If power to decide the lawfulness of orders may be taken from the court-martial panel, could it also be required to return a special verdict?

C. Special Verdicts by Judges in Court-Martial Trials

Article 51 of the UCMJ governs the findings of a court-martial, which may be composed of panel members or a military judge sitting alone.[181] Only in a judge-alone trial are special findings allowed: "The military judge of such a court-martial shall make a general finding and shall in addition on request find the facts specially."[182]

This statute is implemented at the Executive Order level in the Rules for Courts-Martial, which provide in pertinent part, "[s]pecial findings may be requested only as to matters of fact reasonably in issue as to an offense and need be made only as to offenses of which the accused was found guilty."[183] The comment on this Rule provided by the *Manual for Courts-Martial*, a Department of Defense publication in which comments labeled "discussion" are only persuasive authority, notes that special findings "ordinarily include" findings as to the elements of the offense and any relevant affirmative defense.[184] This discussion also states conclusively that "[m]embers may not make special findings."[185] Of course, that is the question under examination, so this article will now look at the procedures for special findings by judges to see how they might be adapted to use by panels.

The Military Judges' Benchbook, an Army publication used by all the services as the source of pattern panel instructions and trial forms, provides

180. Ex parte Milligan, 71 U.S. 2, 137 (1866).

181. 10 U.S.C. § 851 (2021).

182. *Id.* § 851(d).

183. Manual for Courts-Martial, United States, R.C.M. 918(b) (2019).

184. *Id.*

185. *Id.*

in an appendix a model for special findings in judge-alone trials.[186] The first example given for special findings as to guilt on an offense shows a definitive statement for each element of the offense, including the predicate fact:

> MJ: In view of the (request) (need) for special findings in this case, I shall now announce them. The court finds beyond a reasonable doubt as follows:
>
> a. That, on 3 September 2020, at Fort Blank, Missouri, the accused absented himself from his unit, namely: Company B, 20th Signal Battalion, 20th Infantry Division, Fort Blank, Missouri;
>
> b. That such absence was without proper authority from anyone competent to give him leave; and
>
> c. That he remained so absent until 25 September 2020.[187]

A second example suggests a definitive statement for each element, including the predicate facts, and a narrative explanation for an affirmative defense:

> MJ: In view of the (request) (need) for special findings in this case, I shall now announce them.
>
> a. The court finds beyond a reasonable doubt as follows:
>
> (1) That, on 2 September 2020, at the Service Club, Fort Blank, Missouri, the accused did bodily harm to PFC John Smith by striking him on the head;
>
> (2) That the accused did so with a certain means, namely: a beer bottle;
>
> (3) That the bodily harm was done with unlawful force and violence;
>
> (4) That such means was used in a manner likely to produce grievous bodily harm.
>
> b. With respect to the accused's claim of self-defense, the court finds that, under the circumstances, there were no reasonable grounds for the accused to apprehend that PFC Smith was about to inflict death or grievous bodily harm upon the accused. The evidence clearly demonstrates that the accused, without provocation, used profane and abusive language toward PFC Smith and struck him as PFC Smith attempted to leave the premises in order to avoid an altercation with the accused. While the court finds that before he was struck by the accused, PFC Smith did shove the accused's arm away from him when the accused attempted to block Smith's departure, such an act, under all the circumstances, could not have caused a reasonable, careful person to apprehend death or grievous bodily harm.

186. BENCHBOOK, *supra* note 179, at app. F. In three years as a court-martial judge, I routinely made findings of fact and conclusions of law in motions practice, but I was never asked for special findings as to guilt.

187. *Id.* at 1964.

> Consequently, the court finds beyond a reasonable doubt, that the accused did not act in self-defense and that the force used by the accused was without justification or excuse.[188]

This level of articulation seems appropriate, and this article suggests a single question for each element, except when an element contains more than one material fact. The narrative form of the special finding on the affirmative defense, however, would less easily translate into a special verdict form for a jury.

IV. How Special Verdicts by Panels Might Be Implemented

A. Civil Jury Trials in the United States

A civil jury trial in the United States is a vanishing phenomenon, but when it does occur, findings by special verdict seems to be more common than a general verdict. Academic writing suggests that this was not always so, and that American judges in the middle of the twentieth century were reluctant to employ special verdicts in civil cases.[189] Rule 49 of the Federal Rules of Civil Procedure remains substantially unchanged, apart from the 2007 "stylistic" revision.[190] As alternatives to a general verdict in a civil case, the trial judge may ask the jury to return a special verdict, or a general verdict accompanied by answers to "written questions on one or more issues of fact that the jury must decide."[191] The portion of the rule on special verdicts provides, "[t]he court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact."[192]

An interesting example of a special verdict form comes from a cigarette manufacturer liability case tried in 1988.[193] After five years of discovery and four months of trial, a federal district court jury in New Jersey was presented with the following twenty questions:

> 1. Has plaintiff proven all of the elements necessary to establish fraudulent misrepresentation or concealment by defendant Liggett, prior to 1966, of

188. *Id.* at 1964–65.

189. Samuel M. Driver, *A Consideration of the More Extended Use of the Special Verdict*, 25 Wash. L. Rev. 43, 44 (1950) ("[N]o direct statistics are available, but there are what appear to me to be plain indications that, in most jurisdictions, its use has been very limited."). Driver was a federal district court judge, and his article cited a journal article by Circuit Court Judge Jerome Frank that encouraged more use of special verdicts and a federal circuit court decision that rued a district court judge's refusal to use a special verdict in a railroad employee injury case, Skidmore v. Baltimore & Ohio R.R. Co., 167 F.2d 54 (2d Cir. 1948). Perhaps in a couple generations, military practitioners will be so accustomed to special verdicts in criminal cases that most will be unaware that it was "disfavored" in the not-too-distant past.

190. *See* Mfr. Cas. Ins. Co. v. Roach, 25 F. Supp. 852, 853 (D. Md. 1939).

191. Fed. R. Civ. P. 49(b)(1).

192. *Id.* 49(a)(1).

193. Cipollone v. Liggett Group, Inc., 893 F.2d 541 (3d Cir. 1990).

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material facts concerning significant health risks associated with cigarette smoking?
Yes ___ No_X_

2. Has plaintiff proven all of the elements necessary to establish fraudulent misrepresentation by defendant Philip Morris, prior to 1966, of material facts concerning significant health risks associated with cigarette smoking?
Yes ___ No_X_

3. Has plaintiff proven all of the elements necessary to establish fraudulent misrepresentation by defendant Lorillard, prior to 1966, of material facts concerning significant health risks associated with cigarette smoking?
Yes ___ No_X_

4. Was there a conspiracy prior to 1966 to fraudulently misrepresent and/or conceal material facts concerning significant health risks associated with cigarette smoking?
Yes ___ No_X_

5. If you answered "yes" to question #4, were any of the defendants members of that conspiracy?

Liggett Group, Inc.	Yes	No
Philip Morris Incorporated	Yes	No
Lorillard, Inc.	Yes	

6. If you answered "yes" to question number 5, has plaintiff proven all of the elements necessary to establish fraudulent misrepresentation or concealment, prior to 1966, by any member of the conspiracy?
Yes ___ No ___

7. Should Liggett, prior to 1966, have warned consumers regarding health risks of smoking?
Yes _X_ No ___

8. If you answered "yes" to question 7, was that failure to warn prior to 1966 a proximate cause of all or some of Mrs. Cipollone's smoking?
Yes _X_ No ___

9. If you answered "yes" to question 8, was such smoking a proximate cause of Mrs. Cipollone's lung cancer and death?
Yes _X_ No ___

10. If you answered "yes" to question 9, did Mrs. Cipollone voluntarily and unreasonably encounter a known danger by smoking cigarettes?
Yes _X_ No ___

11. If you answered "yes" to question 10, was this conduct by Mrs. Cipollone a proximate cause of her lung cancer and death?
Yes _X_ No ___

12. If you answered "yes" to question 11, what is the percentage of responsibility for Mrs. Cipollone's injuries attributable to each of the following parties:

Mrs. Cipollone	80%
Liggett Group, Inc.	20%

[NOTE: The sum of these percentages must equal 100%].

13. Did Liggett make express warranties to consumers regarding the health aspects of its cigarettes?
Yes _*X*_ No ___

14. If you answered "yes" to question 13, did any Liggett products used by Mrs. Cipollone breach that warranty?
Yes _X Â No ___

15. If you answered "yes" to question 14, was Mrs. Cipollone's use of these products a proximate cause of her lung cancer and death?
Yes _X Â No ___

16. If you answered "yes" to any of the following questions: 1, 2, 3, 6, 9 or 15, what damages did Mrs. Cipollone sustain?
$ none

17. If you answered "yes" to any of the following questions: 1, 2, 3, 6, 9, or 15, what damages did Mr. Cipollone sustain?
$ 400,000

18. If you answered "yes" to any of the following questions: 1, 2, 3, 6 or 9, is plaintiff entitled to punitive damages against one or more of the defendants?
Yes ___ Â Â Â Â Â Â Â Â No_X

19. If you answered "yes" to question 18, to what amount is plaintiff entitled?

_____

20. If you awarded a sum under question 19, what amount of this total is attributable to each of the following parties?

Liggett Group, Inc.	$_____
Philip Morris Incorporated	$_____
Lorillard, Inc.	$_____

[NOTE: these amounts should add up to the total awarded under question 19.][194]

The first three questions are compound, asking if *all* the elements of a claim had been established. Note also that other questions are skipped, as moot, as part of the decision tree scheme of the questionnaire. Americans are somewhat accustomed to, if not fond of, decision tree questions and instructions from the annual ritual of preparing income taxes. The tax forms

194. *Id.* at 553–54.

promulgated by the IRS take the statutes passed by Congress and the regulations published by agencies and translate them into step-by-step forms. In the same way, a well-designed set of jury questions can guide a jury through the elements of an offense, indicating which questions are in the alternative, and how to proceed after answering each question.

While many aspects of the tobacco liability decision can be discerned from the questions and answers alone, others depend on interaction with applicable law. For example, in Questions 7 through 12, the jury found that the cigarette company had a duty to warn consumers and that its failure in that regard contributed to the death of Mrs. Cipollone, but under New Jersey law, a plaintiff more than 50% responsible for injury cannot recover any damages.[195]

In the same way, questions could be asked of a criminal jury without providing on the form a complete explanation of their legal consequence. Questions discriminating between greater and lesser offenses, for example, could be asked of the jury and the answers interpreted by the trial judge upon examination of the form.

B. European Criminal Trials

Other examples and experiences of using jury questions can be sought in the European countries which following the French Revolution introduced the jury as a democratic check on the aristocratic civil law tradition.[196] The European experimentation with juries did not overcome the great cultural momentum of the civil law tradition.[197] Whereas the Anglo-American legal system developed in its peculiar fashion largely to accommodate jury trials, the European systems compelled the jury to conform to the norms of the pre-existing legal culture.[198] In France, this took the form of a migration back to professional control of legal decisions.[199]

Having experimented with various court compositions, the French ultimately landed on a system whose appeal to judges should be obvious. A

195. *Cipollone*, 893 F.2d at 554.

196. STEPHEN THAMAN, COMPARATIVE CRIMINAL PROCEDURE 198–99 (2d ed. 2008). *See also* JAMES DONOVAN, JURIES AND THE TRANSFORMATION OF CRIMINAL JUSTICE IN FRANCE IN THE NINETEENTH AND TWENTIETH CENTURIES 29 (2010) ("The jury would be the spokesman of the general will in the judicial realm, and the judge would be strictly confined to the role of servant of the law. This was in part a reaction against the power of the old *parlements* (royal appeals courts), whose judges had been independent by virtue of the purchase and inheritance of their offices and whose ability to refuse to register decrees and to protest against them had blocked reforms in the decades before the Revolution.").

197. DONOVAN, *supra* note 196, at 158–83.

198. *Id.*; *see also* Renée Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour d'Assises*, 2001 U. ILL. L. REV. 791, 813–14 (2001).

199. Professor Donovan described this process and result as part of the broader "triumph of *fonctionnaires* over democracy by the mid-twentieth century" and the "rise of government by experts—by trained, professional administrators." DONOVAN, *supra* note 196, at 158.

description of criminal courts should begin by noting their substantive jurisdiction. While in the United States offenses are taxonomized as felonies, misdemeanors, and violations, French law has "*crimes*, *délits*, and *contraventions*," which largely overlay with their American equivalents except for the dividing line between the two more serious categories.[200] In the United States, felonies are generally offenses for which the accused faces more than one year of imprisonment, and commonly in a state system, misdemeanors are tried in a lower court (albeit with a right to jury trial), often called "district court," while felonies are referred to a higher court, often called the "circuit court," even when the two courts have entirely congruent geographic jurisdiction.[201] In contrast, in French law the highest category of offenses (called, unfortunately for translation, *crimes*) includes a narrower upper range of offenses, generally carrying penal exposure of more than ten years, tried by the higher criminal court (the *cour d'assises*).[202] This division of offenses means that many offenses that would constitute lower-level felonies in the United States, together with misdemeanor offenses, are tried in the lower *tribunal correctionnel*, which does not employ juries at all.[203] The referral of a case from an investigating magistrate to the *cour d'assises* is via a charging document that is valid only if it includes an explanation of the facts and their legal significance.[204]

The *cour d'assises*, unlike the lower *tribunal correctionnel*, is a mixed court composed of a presiding judge and two other professional judges[205] who hear evidence, deliberate, and vote in conjunction with nine lay jurors, who must be French citizens, at least twenty-three years old, and literate in French.[206] This arrangement, as intimated above, provides judges with a splendid confluence: control in the courtroom, influence in the deliberation, and deflection from ultimate responsibility for the verdict.

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200. Richard S. Frase, *Comparative Criminal Justice As A Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CALIF. L. REV. 539, 569 n.132 (1990).

201. WAYNE R. LEFAVE ET AL., CRIMINAL PROCEDURE § 1.6(a) (6th ed. 2017).

202. CODE DE PROCÉDURE PÉNALE [CPP] art. 181 («Si le juge d'instruction estime que les faits retenus à la charge des personnes mises en examen constituent une infraction qualifiée crime par la loi, il ordonne leur mise en accusation devant la cour d'assises.«). Note that referral of the case to the cour d'assises requires a charging document ("ordonnance") called the "ordonnance de mise en accusation."

203. CPP art. 179 («Si le juge estime que les faits constituent un délit, il prononce, par ordonnance, le renvoi de l'affaire devant le tribunal correctionnel.». For mere *contraventions*, *see* art. 178 («Si le juge estime que les faits constituent une contravention, il prononce, par ordonnance, le renvoi de l'affaire devant le tribunal de police.»).

204. CPP art. 181 («L'ordonnance de mise en accusation contient, à peine de nullité, l'exposé et la qualification légale des fait, objet de l'accusation, et précise l'identité de l'accusé.»).

205. The presiding judge and the two *assessurs* constitute the court "strictly speaking." CPP art. 243.

206. The court *proprement dite* ("strictly speaking") and the jury together comprise the *cour d'assises*. CPP art. 240; regarding jurors' qualifications, *see* arts. 254–258.

The written, reviewable verdict in the *cour d'assises* must address "each act specified in the reasoning of the charging document" created by the investigating magistrate below.[207] In other words, the trial court must consider as a distinct question whether each material fact has been proved. The same provision requires the trial court to consider as distinct questions each aggravating circumstance and each possible defense or reason for a lesser degree of culpability.[208]

One peril of using special findings is that the jurors' answers to a set of specific questions about the case may indicate unsound reasoning—in the view of the public or the legal profession. The French *cour d'assises* greatly mitigates this risk by having three professional judges in the deliberation room.[209] Special verdicts rendered by jurors not acting in collaboration with juridical guidance are more perilous, and such is the practice in Spain.

Unlike France, Spain has evolved over decades into a more accusatorial system, and its juries consist of lay jurors rather than a combination of lay jurors sitting with professional judges, bringing its practice closer to that of the United States.[210] In an interesting point of connection between civil law practice and jury trial, the Spanish jury not only answers specific questions, but must also provide a "reasoned verdict" indicating the evidence the jury found decisive in its decision.[211] Some dangers of this system were illustrated in the 1997 murder trial of Basque separatist Mikel Otegi.[212] In the context of Spanish law, the case was important for a reason that simply does not translate into a common law system: the Spanish Supreme Court found that the jury verdict was insufficiently explained.[213] Some American comparatists have suggested that American criminal courts adopt reasoned verdicts, but not special verdicts in the sense of interrogatories:

> Allowing, or requiring, a U.S. jury to issue a written justification for its verdict in the fashion of Dutch criminal judges or Spanish jurors may raise fewer constitutional issues about a defendant's right to a jury trial than would special verdict forms and interrogatories; the jury would have more

207. CPP art. 349 («Chaque question principale est posée ainsi qu'il suit : «L'accusé est-il coupable d'avoir commis tel fait ?» Une question est posée sur chaque fait spécifié dans le dispositif de la décision de mise en accusation.»). Here the word *dispositif* is in danger of being a false cognate with the English word "disposition," but refers to the reasoning of the decision of the magistrate below. On the creation of the *ordonnance de mise en accusation* by the *juge d'instruction*, *see* art. 181.

208. CPP art. 349 («Chaque circonstance aggravante fait l'objet d'une question distincte. Il en est de même, lorsqu'elle est invoquée, de chaque cause légale d'exemption ou de diminution de la peine.»).

209. CPP art. 240.

210. 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, 421 (2013).

211. *Id.* at 422.

212. THAMAN, *supra* note 196, at 195–201. **R**

213. *Id.* at 199 (citing LA LEY (5.12.98), No. 4226, 6, 12–13).

> freedom as it would not be restricted to specific interrogatories as to its reasoning.[214]

I agree that this mechanism would be more akin to an open-ended question rather than the leading questions of interrogatories on a special verdict form, and in that sense would preserve the jury's autonomy. That said, and appreciating the creativity of the idea, I see immediately a possible objection that *because* the reasoned verdict is an open-ended question to the jury, it constitutes a greater invasion into the jury's province, while a special verdict form limited to questions on the elements and defenses would merely formalize the questions already required of any jury that returns a general verdict. This article takes the contrary view, proposing consideration of a requirement for interrogatories, but not any rule requiring panels to explain their decisions beyond answering a question specific to each element.[215]

The *Otegi* crime and trial are intriguing for many reasons–– this discussion will address certain aspects of the verdict form that can be used to provide a decision tree. Spain's 1995 law on trial by jury required the presiding judge to "submit to the jury in writing a verdict form" calling for special findings:

> In separate, numbered paragraphs, it shall narrate the acts alleged by the parties which the jury shall declare to be proved or not, differentiating between those which are contrary to the accused and those which would yield favorable results. It shall not include in one paragraph acts, some of which could be susceptible to being proved and others not.[216]

The *Otegi* special verdict form thus required a recorded vote to affirm or deny ninety-eight facts about the shooting and the accused's mental state, postulated by both the prosecution and defense. "Principal facts of the prosecution" included:

> 1. UNFAVORABLE FACT: [The accused, Mikel Otegi] on December 10, 1995, around 10:30 a.m. at the farmhouse Oteizabal, voluntarily and with intent to kill, shot [police officer Ignacio Mendiluce] with a [12 gauge] shot-

214. Csere, *supra* note 210, at 425. *See also* Alice Curci, Note, *Twelve Angrier Men: Enforcing Verdict Accountability in Criminal Jury Trials*, 59 WASH. U. J.L. & POL'Y 217, 219 (2019) ("This Note argues that justice would be better served if criminal juries were required to return not only a verdict, but also the underlying rationale.").

215. Thaman provides the 1988 Spanish Supreme Court decision overturning the *Otegi* findings on the basis that "[i]f the court has doubts about the actual occurrence of the acts it should acquit—and this is obvious—but not erect the expression of this doubt as a basis for acquittal." THAMAN, *supra* note 196, at 200. The requirement to justify uncertainty, which may not be uniform among the jurors, seems to undermine American conceptions of the presumption of innocence (by placing a burden, if not on the accused, on the juror who is not persuaded by the evidence) and the standard of proof beyond a reasonable doubt (as elusive as that standard may be).

216. Ley Orgánica del Tribunal del Jurado § 52(1) (May 22, 1995), as translated in THAMAN, *supra* note 196, at 262, excerpted from JULIO MUERZA ESPARAZA, LEY DE ENJUICIAMIENTO CRIMINAL Y OTRAS NORMAS PROCESALES 209 (10th ed. 2005).

gun, hitting him in the lower right clavicular region and killing him instantly. **Not proved. Majority**

2. UNFAVORABLE FACT: Otegi, on the same day and at the same time and place, and voluntarily, with intent to kill, shot [police officer José González], hitting him in the left scapular region and killing him instantly. **Not proved. Majority**

3. UNFAVORABLE FACT: Otegi shot [police officer Mendiluce] without there having been any provocation on the part of the latter. **Not proved. Majority**

4. [same as "3" in relation to González]

5. UNFAVORABLE FACT: Otegi shot Mendiluce from a distance of approximately 1.5 meters. **Proved. Unanimously**

6. UNFAVORABLE FACT: Otegi shot González from a distance of approximately 2.5 meters. PROVED. UNANIMOUSLY

7. UNFAVORABLE FACT: Otegi shot Mendiluce in a sudden and unexpected fashion. **Not proved. Majority**

8. UNFAVORABLE FACT: Otegi shot Mendiluce before he had a chance of defending himself. **Not proved. Majority**

9. UNFAVORABLE FACT: Otegi shot González in the back. **Not proved. Majority**

Like an American court-martial panel, the Spanish jury decision could decide specific questions and the ultimate verdict by a non-unanimous vote.[217]

"Facts Which Are Object of the Defense" included:

48. FAVORABLE FACT: At [Otegi's home] the argument with the Basque Police officers resumed, Otegi now armed with the loaded shotgun. **Proved. Unanimously**

49. FAVORABLE FACT: In the course of the argument, the Basque Police officer González pointed his weapon at **Otegi. Proved. Majority**

50. FAVORABLE FACT: In the course of the argument, Otegi felt that the weapon of the Basque Police officer González was pointed at him. **Proved. Majority**

51. FAVORABLE FACT: Then Otegi completely lost control of his actions. **Proved. Majority**

52. FAVORABLE FACT: (only if the preceding fact "51" has not been proved): Then Otegi partially lost control of his actions. (No answer)

217. THAMAN, *supra* note 196, at 195–96.

53. UNFAVORABLE FACT: In this situation, Otegi fired the shotgun. **Proved. Unanimously**

54. FAVORABLE FACT: Otegi fired two shots without intending to kill. **Proved. Majority**

55. FAVORABLE FACT: Otegi fired two shots without consciousness of killing. **Proved. Majority**[218]

Query whether the first question posed to the jurors accorded with the statute's instruction not to pose compound questions. Question 1 asked not only whether Otegi shot police officer Ignacio Mendiluce—a physical act—but also whether Otegi did so "voluntarily and with intent to kill"—the mens rea that distinguishes homicide offenses by degree.[219] A decision tree model of special verdict forms could begin with the question of whether the evidence proved the act of the accused having shot the victim, with subsequent questions asking whether the accused did the act with the intent element defining the homicide offense of that jurisdiction, in descending order. For example, if the jurors found the accused had shot the victim, the next questions might sequentially ask if the evidence proved the accused acted with intent to kill, with intent to inflict grievous bodily harm, with reckless indifference, or with simple negligence. An affirmative vote on any degree of intent would stop the voting, and a negative vote on all the degrees of criminal culpability would be a finding that the accused had committed the physical act, but without any guilty mind. In the *Otegi* verdict form, Questions 78–91 asked "various favorable and unfavorable facts which could aggravate or mitigate criminal responsibility," but these questions were in addition to compound questions that would seem to have gone to the ultimate question of each charge. In other words, this kind of verdict form represents a surfeit of questions inviting confusion of the decisive issues.

Also dubious is the value of labeling questions as favorable or unfavorable to the accused. The likely impact of a question on the trial outcome will often be obvious, but to the extent the import of a question is not clear—and always in principle—the jurors' decision should be based on the law and the evidence rather than a desire to support the prosecution or the defense.

Note as well that Question 52 (partial loss of "control" by the accused) was bypassed as mooted by the affirmative answer to Question 51 (com-

218. *Id.* at 196–97.

219. In the civil law tradition, this concept of intent is called the moral element; an act is punishable only if the law proves the legal element (textual proscription), the physical element (the actus reus), and the moral element (the mens rea). *See*, *e.g.*, in France, CODE PÉNAL arts. 111-3 («Nul ne peut être puni pour un crime ou pour un délit dont les éléments ne sont pas définis par la loi, ou pour une contravention dont les éléments ne sont pas définis par le règlement.») and 121-3 («Il n'y a point de crime ou de délit sans intention de le commettre.»).

plete loss of "control" by the accused). The vote on Question 51 having been by a majority, a *unanimous* vote on Question 53 then found that "[i]n this situation, Otegi fired the shotgun." This result implies that even the jurors who did not vote on Question 51 for a finding that Otegi had lost his ability to act willfully nevertheless accepted the premise of Question 53 as having been established by the earlier majority vote. Logically, a juror who did not accept the premise of Question 53 should have felt entitled to vote no on the question.

C. Hypothetical Special Verdict Panel Questions

Having examined jury questions in a number of forms and fora, this article will now consider how courts-martial could use jury questions to obtain special verdicts, using examples from commonly-tried offenses. The UCMJ defines several sexual offenses against adult victims, including rape, sexual assault, aggravated sexual contact, and abusive sexual contact.[220] These offenses distinguish offenses of bodily penetration (without regard to gender) from offenses of external contact, and distinguish the degree of actual or constructive force used to commit the offense.[221] The offense of sexual assault can be charged using alternate theories of criminal liability, such as placing someone in fear to gain acquiescence to a sexual act or committing a sexual act upon someone incapable of consenting due to impairment.[222]

Military panels are instructed that the elements of the offense of "sexual assault when the victim is incapable of consenting" are as follows:

> (1) That (state the time and place alleged), the accused committed (a) sexual act(s) upon (state the name of the alleged victim) by (state the alleged sexual act);
>
> (2) That the accused did so when (state the name of the alleged victim) was incapable of consenting to the sexual act(s) due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability); and
>
> (3) That the accused knew or reasonably should have known (state the name of the alleged victim) was incapable of consenting to the sexual act(s) due to (impairment by drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability).[223]

The parentheses indicate places where the military judge tailors the instructions for each case based on the charging instrument, which in mili-

220. 10 U.S.C. § 920 (2021).
221. *Id.*
222. 10 U.S.C. § 920(b)(1)(A), (b)(3)(A).
223. BENCHBOOK, *supra* note 179, at 1377.

tary practice is called simply the "charge sheet."[224] In these cases, and similarly in the other varieties of sexual assault, the existing jury instruction format suggests the form of the questions panel members might be asked if they were to record a vote on each element.

The questions in a hypothetical case under this provision might be:

> (1) Did Adam Accusatus, at or near Fort Hood, Texas, on or about 20 February 2022, commit a sexual act upon Valerie Victima by penetrating her vulva with his penis?
> [If three quarters voted yes, proceed to question 2.]
>
> (2) Did Adam Accusatus do so when Valerie Victima was incapable of consenting to the sexual act due to impairment by alcohol?
> [If three quarters voted yes, proceed to question 3.]
>
> (3) Did Adam Accusatus know, or should he have known that Valerie Victima was incapable of consenting to the sexual act due to impairment by alcohol?

In this example, the decision tree includes simply sequential questions. The procedure becomes more complex—more akin to tax preparation perhaps—when there are lesser included offenses raised by the evidence. The Military Judges' Benchbook currently provides that lesser included offenses will be explained in descending order, and distinguished from the greater offense:

> The offense charged,_____, and the lesser included offense of _____ differ (in that the offense charged requires as (an) element(s) that you be convinced beyond a reasonable doubt that (*state the element(s) applicable only to the greater offense*), whereas the lesser offense of _____ does not include such (an) element(s).
>
> (When an LIO involves lesser specific intent)
> However, the lesser offense of _____ does require that you be satisfied beyond a reasonable doubt that the accused's act(s) (was) (were) done (recklessly) (negligently) (with the specific intent to _____).
>
> (When attempt is an LIO)
> However, the lesser offense of attempted _____ does require that you be satisfied beyond a reasonable doubt that the accused's act(s) (was) (were) done with the specific intent to commit the offense of _____, that the act(s) amounted to more than mere preparation and that the act(s) apparently tended to bring about the commission of the offense of _____.[225]

If the verdict form were transformed into a decision tree of questions, the distinction between the offenses could be integrated into the question series. The distinction between larceny and wrongful appropriation, familiar

224. Department of Defense Form 458 (May 2000). For an example, see the redacted charge sheet for Chelsea Manning, then known as Bradley Manning, at https://perma.cc/U6FD-3CJQ.

225. BENCHBOOK, *supra* note 179, at 65.

to any American lawyer, provides a ready example.[226] The following questions attempt to account for the distinction between larceny and wrongful appropriation, and also the military statute's increased potential sentence for property worth more than $500:

> (1) Did Adam Accusatus, at or near Fort Hood, Texas, on or about 20 February 2022, wrongfully take certain property, that is, an Apple MacBook Pro, from the possession of Valerie Victima?
> [If three quarters voted yes, continue to question 2.]
>
> (2) Did the property belong to Valerie Victima?
> [If three quarters voted yes, continue to question 3.]
>
> (3) Was the property of a value of $950?
> [If three quarters voted yes, continue to question 5;
> if not, go to question 4.]
>
> (4) Was the property of some lesser value, but more than $500?
> [If three quarters voted yes, continue to question 6;
> if not, go to question 5.]
>
> (5) Was the property of some value, but less than $500?
> [If three quarters voted yes, continue to question 6.]
>
> (6) Was the taking by Adam Accusatus with the intent permanently to deprive Valerie Victima of the use and benefit of the property or permanently to appropriate the property to Adam Accusatus's own use or the use of someone other than Valerie Victima?
> [If three quarters voted yes, the voting has concluded;
> if not, go to question 7.]
>
> (7) Was the taking by Adam Accusatus with the intent temporarily to deprive Valerie Victima of the use and benefit of the property or temporarily to appropriate the property to Adam Accusatus's own use or the use of someone other than Valerie Victima?[227]

These questions, in conjunction with the necessary definitions, would distinguish between the two offenses, and implicitly include a determination that there was a wrongful intent at least to commit the lesser offense. They also would determine whether the amount of the taking was more than $500, or at least the taking of an article "of some value," as required to constitute either of the two offenses.

One question—in the realm of policy—is whether an anonymous three-quarters vote of the members on each element really equates to a three-quarters vote of guilty, since the majority on each element might not

226. For the military offense, which has certain peculiarities, *see* 10 U.S.C. § 921.

227. Questions 1–6 are derived from BENCHBOOK, *supra* note 179, at 660, and Questions 1–5 and 7 are derived from BENCHBOOK, *supra* note 179, at 672.

overlap. Consider an example of larceny, simplified slightly by focusing on only the elements of ownership and value, given eight jurors A through H. On the element of ownership of the property, jurors A, B, C, D, E, and F vote yes, and jurors G and H vote no. On the element of the property having some value, jurors A and B vote no, while jurors C, D, E, F, G, and H vote yes. In an anonymous vote, it would be established only that the required three quarters of the members voted that the element had been proved, and it would not be disclosed that only jurors C, D, E, and F voted for guilt on both elements. Arguably, this would not be acceptable as a "general verdict," because it would not mean that three-quarters voted for guilt on every element.

If it must be confirmed that the necessary majority voted for guilt on each element, while preserving anonymity, the jurors could be provided with numbered voting tickets, so that the panel member charged with tallying the vote (in military practice, the junior member)[228] could use a provided worksheet—separate from the questions and instructions—to record each vote, with a column for each member and a row for each question. Admittedly, this would require more complicated instructions about whether a certain vote eliminated the need for further voting. A properly recorded vote, however, would allow the worksheet to be reviewed by the trial judge and the parties to assure a three-quarters vote of the same members.

If court-martial panels were allowed or required to use special findings, an appropriate level of articulation might be to ask a single question for each element of an offense or affirmative defense, or a single question for each material fact in an element that contains more than one material fact. This would reduce the likelihood of confusion or inconsistent findings, which has happened in European systems with extensive jury questionnaires, and also constitutes a greater invasion into the deliberation of the panel. Also, questions tracking closely with the elements could aid panel members in adhering to their oath to decide the case based on the law and evidence, without eliminating their authority to decide the case as conscience dictates. While some American commentators have suggested borrowing the civil law practice of requiring a reasoned verdict, that would constitute a greater intrusion into the province of the trier of fact and would be an innovation inconsistent with American legal culture even in the context of the court-martial panel.

228. BENCHBOOK, *supra* note 179, at 69–72.

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V. Conclusion

This article asked the reader to consider the origins and powers of the peer jury, and how those origins and powers created a domain into which judges cannot intrude. These are the substantive reasons the jury in a criminal case cannot be required to return a special verdict. Next the article described the origins and powers of the court-martial panel and posited that the arguments against special verdicts by juries cannot be transferred to the court-martial panel, which is not simply a jury by another name. Whether the use of special verdicts would more often favor the prosecution or the defense I cannot say, but it might "nudge" panel members to a more particularized examination of the elements of each offense, which would contribute to consistency and uniformity in verdicts.