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Special Verdicts: Rule 49 of the Federal Rules of Civil Procedure

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SPECIAL VERDICTS: RULE 49
OF THE FEDERAL RULES OF CIVIL PROCEDURE

"Rule 49 should be repealed."*

"Rule 49 [should] ... be amended to make compulsory either special verdicts or written interrogatories in civil jury cases."**

I. INTRODUCTION: THE PROBLEM OF STANDARDS IN RULE 49

Rule 49, adopted in 1938 as part of the Federal Rules of Civil Procedure, for the first time explicitly authorized a federal trial judge to order a jury to return a special verdict or a general verdict with interrogatories in lieu of the traditional general verdict. Prior to its adoption, influential commentators had argued that

[T]he general verdict is not a necessary feature of litigation in civil actions at law, and ... it confers on the jury a vast power to commit error and do mischief by loading it with technical burdens far beyond its ability to perform, by confusing it in aggregating instead of segregating the issues, and by shrouding in secrecy and mystery the actual results of its deliberations. Every one of these defects is absent from the special verdict. Why then should not the general verdict in civil cases be abolished and the special verdict take its place?

The drafters of the rule, however, seem to have recognized that each of the three alternatives might be of some value. They left the choice of which form of verdict to use in a given case to trial judges, but did not provide any standards or guides to aid in the exercise of this discretion.

Not only did the rule fail to help judges determine when to use the special verdict, or the general verdict with interrogatories, it also gave little guidance as to how these procedures were to be implemented. For example, while it seems certain that section (a), "Special Verdicts," was meant to entitle a


1. Sunderland, Verdicts, General and Special, 29 YALE L.J. 253, 261 (1920) [hereinafter cited as Sunderland].
party to have each issue of ultimate fact submitted to the jury,\(^2\) the section did not indicate who was to draft the questions, what form they should take,\(^4\) or whether the trial judge could properly submit questions of ultimate or evidentiary fact on his own motion. Section (b), "General Verdict Accompanied by Answer to Interrogatories," left unanswered many of the same questions raised by section (a), and also failed to give any substantial guidance on the additional problems raised by the possibility that the answer to an interrogatory might be inconsistent with the general verdict. In addition to its notable lack of standards and guides for trial courts, Rule 49 did not acknowledge the troublesome questions arising from appellate review of judgments based upon special verdicts and general verdicts with interrogatories.

Rule 49 authorized a substantial departure from traditional practice, which could have considerable impact upon the outcome of litigation. In this light, it is remarkable how little help the rule gives a judge in determining when and how to use a special verdict or a general verdict with interrogatories. In deciding what effect should be given to Rule 49, it is necessary to understand why the drafters probably chose to leave so much to the discretion of trial judges. In order to gain this understanding, the rule must be set against its historical background and the academic criticism current at the time it was drafted.

II. THE HISTORY OF SPECIAL VERDICTS AND GENERAL VERDICTS WITH INTERROGATORIES

The two procedures which are now known as the special verdict and the general verdict with interrogatories have their origin in devices created by juries in England to protect themselves against the dangers of attaint. A major forerunner of the modern jury trial was the inquest, introduced into English law by the Normans.\(^5\) Because the jurors selected to hear a case were chosen for their supposed knowledge of the relevant facts and legal principles in-

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2. For ease of presentation, this Comment adopts the labels "evidentiary fact" and "ultimate fact" often used by commentators on the special verdict in the 1930's. Evidentiary facts are the myriad of minor happenings which go to make up the events which give rise to a law suit — did the driver have one or two drinks? was the street dry or damp? was the pedestrian crossing with the traffic light? etc. Ultimate facts are the composite or conclusionary findings which are derived from the evidentiary facts by the application of legal norms — was the defendant negligent? was his negligence a proximate cause of plaintiff’s injury? was the plaintiff contributorily negligent? etc. See text accompanying notes 92-94 infra.

3. See "Evidentiary or ultimate questions?" at notes 69-74 infra, construing "each issue of fact" to mean only each issue of ultimate fact.

4. Though the rule specifically mentions two types of questions, it goes on to authorize "such other method of submitting the issues and requiring the written findings thereon as it [the court] deems most appropriate."

5. See Morgan, A Brief History of Special Verdicts and Special Interrogatories, 32 YALE L.J. 575 (1923) [hereinafter cited as Morgan].
volved, evidence was not presented nor were legal instructions given. The jury's decision was announced in a simple statement of result, with no explanation of what facts were found or rules applied. If the judge was convinced that the jury had erred, he could call a second and larger jury to hear the case de novo. If this second, or attainting, jury's decision differed from that of the original jury, the verdict would be reversed and the original jurors severely punished. As the choice and application of rules of law was the major source of potential error, jurors sought, as early as the end of the twelfth century, to limit their responsibility for decisions of law. Instead of stating simply what the result in a case should be, they would either supplement this announcement with a list of their factual conclusions, or in a more radical departure, give only their conclusions of fact. If they used the first innovation and the judge subsequently determined that their legal result did not mesh with their factual conclusions, the verdict would be adjusted, but the harsh sanctions of attaint might not be applied. By adopting the more radical course they could avoid completely the burden of finding and applying rules of law, and, accordingly, eliminate the danger of punishment arising from mistakes in dealing with law.

Although these two innovations offered some measure of protection to jurors, and despite the fact that judges often sought by pleas, threats, and informal sanctions to persuade juries to return special verdicts, the customary procedure, which came to be known as the general verdict, did not become obsolete. One explanation may be found in the fact that it became usual in many communities for the attainting jury to reaffirm the original verdict almost automatically. While the prime motive for avoidance of the general verdict was thus substantially diminished, the danger inherent in its use was never wholly absent until attaint became utterly obsolete at the end of the seventeenth century. The persistence of juries in returning general verdicts may be explained by a community feeling that the jury should stand as a protective

6. See Morgan, passim. See also Farley, The Functions of Instructions, 6-10 (1932) (unpublished thesis in the Yale Law School Library) [hereinafter cited as Farley].
7. Morgan, passim.
8. Id. at 576 & n.3.
9. Id. at 577-82. The right of juries to find special verdicts was declared in Statutes of Westminster, the Second, 1285, 13 Edw. I, c. 30. This statute also guaranteed the jury's right to return a general verdict.
10. See Morgan at 577-82. Morgan actually gives five variations, but they may be reduced to the alternatives stated in the text.
11. The members of the jury might, however, be prosecuted for perjury. Cf. Morgan at 582.
12. Ibid.
14. See 1 Holdsworth, A History of English Law 342 (1931). See also Smith, Com., Bk. 3, ch. 2 (1565), quoted in Holdsworth, op. cit. supra at 163, and Thayer at 139.
15. See Holdsworth, op. cit. supra note 14, 342.
barrier between the people and the King's judges, who administered laws which were frequently not in tune with the temper of the people.10 Jurors were forced to balance the dangers of attaint against the cost of capitulation to the courts of the Crown.17

With the obsolescence of attaint, the special verdict and the general verdict with special answers gradually changed from protective devices into tools by which judges could gain more control over the application of rules of law. Prominent legal theorists had written at least from the beginning of the seventeenth century that questions of fact are for the jury and questions of law for the court but it was not until the nineteenth century that judges in America were granted a power which, it was assumed, would effectuate this principle: the power to demand that the jury return a special verdict or a general verdict with interrogatories.19 Thayer explains this seeming paradox in the following manner:

While logic and neatness of legal theory have always called aloud, at least in recent centuries for special verdicts . . . considerations of policy have called louder for leaving the jury free hand . . . . That body always represented the people and came to stand as the guardians of their liberty; so that whether the court or jury should decide a point could not be settled on merely logical grounds, it was a question deeply tinged with practical considerations.20

As protection from government came to seem less important after the Revolution, and as the feeling grew that control of the jury might be as necessary to the protection of liberty as the system of trial by jury itself, the courts, rather than relying on the old protective devices which had fallen into desuetude, drew upon the traditional English practice of quizzing the jury on its verdict.22 The practice was extended to allow a judge to submit special questions to the jury before it retired to deliberate.23 The judge could not only order a

17. The belief that jurors ought to continue to use the general verdict to maintain some control over the law may have been one of the reasons why attainting juries came to encourage the choice of the general verdict by failing to bring in verdicts which would lead to punishment. See Proffatt, Trial by Jury 36, 60-62 (1880); Sooner, An Essay on the Trial by Jury 110, 112 (1852).
19. Wicker, Special Interrogatories to Juries in Civil Cases, 35 Yale L.J. 296, 297-98 (1925) [hereinafter cited as Wicker].
20. Thayer at 218.
22. Quizzing of the jury, apparently first undertaken by judges as an alternative to calling an attainting jury (Morgan at 576 n.3), and subsequently used in deciding whether to order a new trial and in discovering essential questions of fact omitted by a jury in returning a special verdict (Morgan at 591; Wicker at 297), was adopted in the nineteenth century by American courts (Morgan at 592; Wicker at 297).
23. See Morgan at 592; Wicker at 297-98.
new trial if he determined that the answers were inconsistent with the verdict, but he could also render judgment contrary to the verdict if the answers themselves would support such a judgment.\textsuperscript{24} From this development it was an easy step to allow judges to demand that the jury state only its findings of fact.\textsuperscript{25} The development of these new procedures was much faster on the eastern seaboard than elsewhere,\textsuperscript{26} but by 1925 a majority of the states had authorized use of the special verdict and the general verdict with interrogatories as alternatives to the standard general verdict.\textsuperscript{27} Several federal courts, although not bound to follow state practice in this area, had also adopted the new procedures, relying on evolution of the common law for authority.\textsuperscript{28}

Although the new procedures had been widely authorized by 1925, they had not flourished.\textsuperscript{29} Many commentators argued that the chief cause of the moribund status of the special verdict lay in the numerous pitfalls its technical requirements presented to litigants.\textsuperscript{30} A small group of states had attempted to eliminate this problem by enacting reforms designed to make the process more flexible, but these reforms do not seem to have increased the popularity of the special verdict.\textsuperscript{31} The general verdict with interrogatories never suffered from the formalism which characterized the special verdict,\textsuperscript{32} yet it also failed to gain any measure of popularity.\textsuperscript{33} Those commentators who argued that excessive rigidity was responsible for the unpopularity of the special verdict sought to explain the similar unpopularity of the general verdict with interrogatories on the ground that it could produce only the negative result of undermining the general verdict.\textsuperscript{34} They ignored the fact that a court could render final judgment, contrary to the general verdict, on the basis of the jury’s answers to the special questions. Thus the commentators’ argument seems to fall short of an adequate explanation for the negligible inroads made by the special verdict and general verdict with interrogatories upon common trial practice. The failure of the new procedures to catch on rapidly may more realistically be attributed to the continued force of the belief that the jury should be free to use the general verdict as a means of

\textsuperscript{24} See Wicker at 298.
\textsuperscript{25} Ibid. See also Sunderland at 257-58 & nn.12, 13.
\textsuperscript{26} Clementson at chs. 2 & 3; Wicker at 296.
\textsuperscript{27} Clementson at 9; Wicker at 298.
\textsuperscript{28} Grand Trunk West. Ry. v. Lindsay, 201 Fed. 836 (7th Cir. 1912), aff’d, 233 U.S. 42 (1914); Victor-American Fuel Co. v. Peccarich, 209 Fed. 568 (8th Cir. 1913), cert. denied, 232 U.S. 727 (1914). See Wicker at 300 & nn.26, 27.
\textsuperscript{29} Green, A New Development in Jury Trial, 13 A.B.A.J. 715, 716-17 (1927) [hereinafter cited as Green].
\textsuperscript{30} See, e.g., ibid.; Sunderland at 261-62.
\textsuperscript{31} Dean Green claimed that the special verdict was enthusiastically received in the states which made it a less formalistic device, but he presented no evidence in support of this claim. Green at 716.
\textsuperscript{32} See Wicker at 301.
\textsuperscript{33} See Green at 716.
\textsuperscript{34} Ibid.
neutralizing harsh laws, and, in general, dispensing "rough justice." Though few articulated this position it undoubtedly continued to color the problem as it had for several centuries before.\textsuperscript{35} Mere habit may also have played some role in preventing widespread use of special verdicts.

Another explanation for the failure of either of the new procedures to gain wide acceptance can be found in Sunderland's much-quoted article, \textit{Verdicts, General and Special}.\textsuperscript{36} He argued that,

\begin{quote}
The real objection to the special verdict is that it is an honest portrayal of the truth . . . . \[T\]he great technical merit of the general verdict . . . [is that it] covers up all the shortcomings which frail human nature is unable to eliminate from the trial of a case. In the abysmal abstraction of the general verdict concrete details are swallowed up, and the eye of the law, searching anxiously for the realization of logical perfection, is satisfied. In short, the general verdict is valued for what it does, not for what it is. It serves as the great procedural opiate, which draws the curtain upon human errors and soothes us with the assurance that we have attained the unattainable.\textsuperscript{37}
\end{quote}

Sunderland claimed that the use of the special verdict or general verdict with interrogatories would point out the weaknesses of the process of trial by jury, undermine the popular myth that the jury is the perfect fact-finder, and destroy the prevailing public confidence in trial by jury. But Sunderland's own observation as to the underlying basis for the general verdict's popularity suggests that judges and lawyers who were themselves bound by the myth of the jury could not have been enthusiastic about procedural innovations which came as thinly disguised attacks on the system of trial by jury as they knew it. As Judge Frank has pointed out, members of the legal profession are staunch defenders of legal myths.\textsuperscript{38} While we cannot picture the advocate in the heat of trial consciously sacrificing a tactical advantage in order to preserve the jury myth, we can visualize him as a person whose attitude is shaped by the popular myth — one who has confidence that things should be left to the jury's wisdom. Thus it would not have been a question of sacrificing a recognized advantage, but rather an inability to see beyond the general verdict and a comfortable familiarity with that procedure, which caused lawyers to ignore the alleged potential of the new procedures.

\section*{III. The Commentators}

During the 1920's and 30's, while the public and the legal profession seemed content with the traditional role of the jury, a prominent group of commentators launched an open attack on the process of trial by jury as it then stood. They envisioned an ideal system in which rules of law would be intelligently

\begin{footnotesize}
\begin{enumerate}
\item See \textsc{Thayer} at 218-19; 5 \textsc{Moore, Federal Practice} \S 49.05, at 2217 (2d ed. 1951).
\item 29 \textsc{Yale L.J.} 253 (1920).
\item \textit{Id.} at 262.
\item \textsc{Law and the Modern Mind} ch. 1 \textit{et passim} (1949).
\end{enumerate}
\end{footnotesize}
and carefully applied to factual determinations made by a rational and conscientious finder of facts. The system would produce results as good as the applicable substantive law, with a minimum of delay and expense. Against this ideal they held up the traditional process of trial by jury, and found it sorely wanting. The failure of reality to approach any of the attributes of the ideal, they argued, was not inherent in the process of trial by jury, but rather could be attributed to a single cause — the use of the general verdict.

A. The Case Presented by the Commentators

The commentators asserted that use of the general verdict was an invitation to the jurors to act irresponsibly, to ignore the judge’s instructions, and to render a verdict in accord with their feelings rather than with the law and the facts of the case. The merger of fact and law in the general verdict also made it impossible for courts to exercise control over irresponsible jurors because there was no way to tell what facts had been found nor what law had been applied; indeed, it was impossible to know whether a jury even bothered with facts or law. Lawyers, aware of the potential irresponsibility of jurors, concentrated more on building up sympathy for their clients and creating favorable images for themselves than on presenting evidence for a factual inquiry. Further, the general verdict and the trial practices it fostered made it difficult for even the conscientious juror to perform his role responsibly. Evidence was presented in a jumbled fashion, and there was no effective device for focusing the jury’s inquiry on the critical issues in a case. The charge, which was supposed to provide such focus, was in fact often rambling and incomprehensible to the average juror. The inability of jurors to understand the law as stated in the instructions often drove them, out of frustration, to vote for the party they liked best, or to resort to decision by the “flip of a coin.” In summary, the commentators urged that the use of the general verdict poisoned the process of trial by jury because factual issues were not clearly framed, the charge produced confusion, the process courted bias and emotion, and the secrecy of the jury room precluded judicial enforcement of jury responsibility. But the commentators adduced no proof in support of these charges.

The commentators also directed their attention to the practical difficulties attending trial by jury. It was perfectly obvious that the traditional process was slow and expensive. They claimed that the complex general charge was the source of a tremendous amount of appellate litigation and the cause of

39. See Sunderland; Green; Wicher; Coleman, Advantages of Social Verdict, 13 J. Am. Jud. Soc’y 122 (1929) [hereinafter cited as Coleman]. See also, for similar comment following the adoption of Rule 49, Frank, Courts on Trial 127-40 (1949); Lipscomb, Special Verdicts under the Federal Rules, 25 Wash. U.L.Q. 185 (1940) [hereinafter cited as Lipscomb]; Ilsen & Hone, Federal Appellate Practice as Affected by the New Rules of Civil Procedure, 24 Minn. L. Rev. 1 (1939) [hereinafter cited as Ilsen & Hone]; Note, 34 Ill. L. Rev. 96 (1939); Wicker, Trials and New Trials under the New Federal Rules, 15 Tenn. L. Rev. 570 (1939).
frequent new trials. Because of the merger of fact and law, error could not be localized and corrected by any partial measures. An incorrect instruction, the improper removal of one issue of fact from the jury, or the failure to withdraw an issue on which reasonable men could not differ would vitiate the entire verdict, and the only remedy would be a new trial.

The commentators apparently felt that the argument that there is need for an institution which can mitigate harsh laws and dispense rough justice was without merit, and gave it little consideration. They probably shared the views of Judge Frank in Courts on Trial. Frank, who was very much in the commentator tradition, argued that at least in the civil sphere there were no longer rules of law so harsh or inequitable that a protective barrier between government and the people was warranted, and that even if there still were some such rules, it would be unrealistic to view the jury as a body which attempts to determine whether a law is "just" or "good." He claimed that in rendering a general verdict jurors do not act on rules, but rather on impulse, and that they neutralize excellent as well as harsh rules in a capricious fashion. Finally, he urged that even if juries do manage to inject a sort of equity into the decision process, they are not the proper institution to make such adjustments. A jury is not a representative of all the public, and it acts in an ad hoc fashion. Jury "legislation" runs counter to the principles of representative government and equal treatment for all before the law. Further, by correcting laws in individual cases, juries take the pressure off the proper institutions to bring the rules into line with public sentiment. When a jury neutralizes a law, it acts as a buffer, and conceals the unjust law from the public. Thus Frank concluded that the "lay legislature," at least in civil cases, is unnecessary, and in the long run may be harmful to society.

Having indicted the general verdict, the commentators went on to advocate the special verdict as a corrective which would bring the process of trial by jury into line with their model. First, they claimed that the jury would be confined to its proper role as an impartial, rational finder of fact. The use of special factual questions would have a strong psychological effect on jurors, serving as an explicit reminder that their duty as citizens was to act as fact-finders. Similarly, desire to avoid public humiliation would cause jurors to sift the evidence dispassionately in search of the facts:

Jurors are ashamed to find a specific fact against the weight of the evidence, for the vice of the finding is generally so obvious that they cannot justify their action before their neighbors and friends. The questions would also give a focus to the presentation of evidence and to the jury's deliberations. Finally, lawyers, realizing that jurors would have


41. Coleman at 122.
to answer questions relating only to the facts, would concentrate on informing the jurors, not on arousing their passions.

The commentators went on to argue that the use of the special verdict would relieve the jury of the difficult task of understanding and applying rules of law. The judge, trained in the law, would select and apply rules to the jury's fact determinations. As a result, jurors would no longer be able to take law into their own hands and give decisions on the basis of their own ideas of justice; nor could they negate law by deciding solely on the basis of preference for a party or his lawyer. Nor would jurors be motivated to resort to coin flipping by the frustration which arises from the incomprehensibility of the general charge. Legal instructions, when needed, would be simple, short and enlightening. Since jurors would no longer be confused, nor able to control results directly, they would concentrate on their real job --- fact finding.

Finally, the commentators claimed that use of the special verdict would speed up jury trials and decrease the expense of litigation. Elimination of the general charge would remove the largest source of appellate litigation and of new trials. Errors could be localized on appeal and corrected with far less expense and delay. When an appellate court determined that the trial judge had erred in his choice or application of a rule of law, the court could either remand to the trial judge for reconsideration, or correct the error itself. If the trial court took a question of fact from the jury improperly, or misinstructed on one question, there would have to be retrial on that single factual question alone. If the trial judge improperly failed to withdraw one question from the jury no new trial would be necessary; at most all that would be needed would be a remand to the trial judge so that he could apply the law to the facts as corrected. In all these situations the delay and expense of a new trial could either wholly or partially be eliminated.

On the basis of the reasons they advanced, the commentators argued that the special verdict should be used in every case; they generally rejected the general verdict with interrogatories as a half-way compromise not worthy of consideration. Although Rule 49 did authorize the use of the special verdict by the federal courts, it also authorized the general verdict with interrogatories; furthermore, it made neither of the new procedures mandatory. Thus it is apparent that the drafters of the rule were not so convinced by the commentators' case as to be willing to take the radical step proposed. In retrospect, the wisdom of the drafters' decision is apparent, since analysis reveals substantial weaknesses in the commentators' case.

Psychological impact of the use of special questions. The commentators claimed that use of special questions would strongly affect the reasoning pro-

42. See Green at 716. Sunderland contains no mention of interrogatories and Judge Frank, in his discussion of special verdicts in Skidmore v. Baltimore & O.R.R., 167 F.2d 54, 66 (2d Cir.), cert. denied, 335 U.S. 816 (1948), said only: "Rule 49(a) also authorizes the judge to call for a general verdict accompanied by written interrogatories." But cf. Wicker.
cess of jurors, by eliminating irrational approaches to their role. The commentators' case was based on a priori assumptions concerning the human psyche. But even on the same level of a priori speculation it seems doubtful that use of special questions alone would have the predicted impact of neutralizing the emotions and prejudices of jurors and of restraining the apathetic or impatient juror from the temptation to compromise or flip coins. One wonders whether the mere use of special questions would have any more effect on a juror inclined to ignore his duty than the cautionary exhortation commonly included in the charge given when a general verdict is used. Similarly, it is not clear how much weight should be given the contention that jurors would be influenced to answer special questions in a conscientious, deliberate, and rational fashion by desire to avoid public humiliation. Although it is perhaps true that jurors would feel more susceptible to public criticism when giving answers to special questions, it is probably also true that jurors are not usually motivated primarily by a desire to appear rational to the public. Furthermore, it is not obvious that in attempting to avoid public criticism jurors will act more responsibly. To the contrary, if jurors try to tailor their answers to fit their prediction of what the public will deem appropriate, a new element of irrationality is injected into the process. A juror who thinks primarily of his community image can hardly be considered responsible — at best he can be called responsive.

Special verdicts as aids to conscientious jurors. The commentators' assertion that special questions would give a focus to the deliberations of the jury, by highlighting the relevant issues in a case is probably true. Likewise, any confusion arising from the jury's responsibility to apply the rules of law given in the general charge would be eliminated by the use of the special verdict. However, while the commentators argued that jurors are unable to understand the legal part of a general charge, they ignored the probability that far more of the confusion engendered by the general charge is due to the legal

43. If a question of fact is so one-sided that any answer but one would be ridiculous it should be taken from the jury by the trial judge. But it is probable that jurors do not realize that any question submitted to them can reasonably be answered in more than one way since the judge has the power to withdraw certain questions from their consideration.

44. It is difficult to believe that the course of jury discussion in the average lawsuit will be strongly influenced by the jurors' predictions of public reaction. It is only in the extraordinarily sensational case that the public has any awareness of the evidence presented or the issues raised in the litigation. In a typical case, the informed public amounts to five or ten courtroom spectators, and the average juror is not likely to be swayed by his appraisal of their reactions. The jurors' neighbors will know little more about his jury service than what he tells them. Even in the sensational case which does get front page coverage, it is too easy to assume that jurors will act differently in an attempt to avoid public criticism. There will still be some whose sole goal will be to get home as fast as possible, others who wish only to be mentioned in the papers, and some who will believe that the reaction of the public to the answers of the jury is not something to be considered by the jurors.
definitions given than to the rules of law stated by the judge. The commentators intended that questions of ultimate fact — negligence, proximate cause, last clear chance — would be for the jury; they did not question the traditional theory that the jury should apply these legal norms, formulated by the court, to individual fact situations in deciding whether relevant legal standards of conduct were met by the parties involved in the litigation. But since a finding of ultimate fact necessarily involves the application of a legal definition to evidentiary facts, the need for complicated legal instructions would not be eliminated by use of the special verdict procedure. To be sure, some of the confusion produced by the general charge might be ameliorated by including the legal definitions in the written questions submitted; nevertheless, the heart of the problem created by the legal definitions is their complexity and subtlety — accentuated for the average juror by the esoteric legal language in which they are cast.

Enforcement of the law-fact dichotomy by use of special verdicts. The commentators' contention that use of the special verdict procedure would preclude juries from usurping the function of the judge by taking the law into their own hands seems necessarily based on the premise that jurors will not know what judgment will follow from their answers. This premise assumes, first, that the average juror will have no common knowledge of the relationship between the ultimate facts he is called upon to find and the result which should follow from them. One wonders whether, in many cases, even the least sophisticated juror would not know which side a given answer would favor: the average man does not need a lawyer to tell him that if he thinks the defendant should win in a negligence case he should answer "no" to the question, "was the defendant negligent?" Second, the premise assumes that trials can and will be run so as to insulate jurors from knowledge of the connection between their answers and the judgment in the case. It seems unlikely that trials could be so antiseptically organized. A jury, which in some way acquires knowledge of the effect its answers will have, can take the law into its own hands merely by checking off the answers which will lead to the result it favors.

Even if jurors had no common knowledge, and if the insulation of the jury during the trial could be assured, there is a further difficulty with the commentators' argument. Ignorance of the applicable rules of law may not

45. Legal definitions are the statements of the norms which give content to a legal rule. When the judge states: "If you find A, B, and C to be so, then you must return verdict X," he is giving a legal rule to the jury. When he tells the jury how to determine what A, B, and C are, he is giving the legal definitions. Thus, the legal definitions are the norms which must be applied to the evidentiary facts in order to derive the ultimate facts which, once a legal rule is applied, will provide a result. Most of the difficulty in charging a jury consists in giving content to the legal definitions (e.g., negligence).

46. This was suggested in Lipscomb at 205, and would involve a radical departure from the traditional practice of giving only oral instructions.

47. Even a single sophisticated juror could "contaminate" the whole panel.

48. See "Impact of use of the special verdict on the advocate," at note 49 infra.
necessarily cause jurors to refrain from attempting to control results and keep them strictly confined to their role as fact-finders. It may mean only that they will have to resort to guesswork once they get past the questions whose import they understand. By such guesswork the jury may negate rules of law, by chance if not by choice. Thus, although a result-oriented jury's direct control may be cut back by use of the special verdict, to do so may actually lead to the multiplication of irrationality, by injecting guesswork into the jury's attempt to dispense equity justice or to give effect to its passions and prejudices.

Finally, the commentators again failed to reckon with the fact that even under the special verdict procedure they envisioned, the jury would continue to have control of a large proportion of the "law" involved in a case. For as long as the jury must decide questions of ultimate fact, it has power over the application of legal definitions, and can ignore or distort the formulation of ultimate questions (e.g., the elements of negligence) given by the court. Only if the radical step of putting only evidentiary questions to the jury were taken, could the jury be totally removed — even in theory — from the "law" half of a suit.

**Impact of use of the special verdict on the advocate.** The commentators argued that counsel, aware of the effect that use of the special verdict procedure would have on the jury, would concentrate upon informing jurors rather than on awakening their prejudices and stirring up their emotions. The commentators seem to have assumed that trial lawyers would accept at full value the case for the special verdict. It seems more likely that lawyers would not be convinced that the mere use of special questions precludes the possibility of preying on the passions and prejudices of jurors. If counsel felt the jurors already understood, or could be made to appreciate, what answers to a particular question would favor his client, he might still try to "sell" himself, "damn" his opponent, bolster his client's image, and evoke all possible sympathy and bias. It might be argued that the judge should prevent lawyers from communicating the requisite information to the jury (though he clearly could not eliminate the jury's prior knowledge). In order for the court to be able to prevent lawyers from indicating to the jury what findings would favor their clients, a radical break with our tradition of adversary advocacy would be required.49 Not only would forensic argument have to be strictly controlled, but even the tone in which questions are asked during direct or cross-examination would be subject to a new objection — "informing" the jury.

**Impact of the use of special verdicts on the problem of expense and delay.** The commentators argued that elimination of the general charge — unnecessary when a special verdict is used — would remove the greatest source of appellate litigation from the trial process. Once again, they overlooked the fact that instructions on legal definitions would still be necessary unless the jury was to return only evidentiary answers. One wonders whether the major portion of appellate litigation may not arise from instructions on legal defini-

49. See note 115 **infra.** See also text at notes 76-77 **infra.**
SPECIAL VERDICTS

The commentators also argued that use of the special verdict would be of great aid in eliminating the expense and delay of new trials. While this claim is undoubtedly true when an appellate court determines that the trial court erred in the rule of law it applied or in submitting a particular question to the jury, since these errors can be corrected without any retrial, there may be some drawbacks to this procedure. In either case, rendering judgment without a new trial may serve to turn on its head the attempt of a result-oriented jury to dispense rough justice. When an incorrect rule of law is applied — and if the jurors were not kept in ignorance of the court's intent to apply that rule — their answers may be result-oriented and predicated upon the rule which they thought would be applicable. If an issue was improperly submitted to the jury, and if judgment is subsequently rendered on the basis of a reversal of the jury's answer to that question taken together with its answers to other questions, a perverse inversion of the jury's intent may result in a case in which the answers it gave were interrelated. Finally, the commentators claimed that when an appellate court determines that an issue was improperly withheld from the jury, or that an incorrect legal definition was given, only a partial retrial on the single question involved would be required, and substantial savings of time and expense could be effected. The problem of the possible interrelation of the first jury's set of answers may arise in this context also. Furthermore, even the claim that savings of time and expense will be effected may be exaggerated. Once it is recognized that facts are often not easily separated in neat bunches, but are usually inextricably interconnected, it becomes doubtful whether a separate trial on a single question might not cause more confusion and delay than an entire new trial; for example, it is difficult to visualize a new trial on just the element of proximate cause or last clear chance in a negligence case.

Special verdicts and the role of the jury. Underlying the commentators' case was a deep-seated distrust of the jury; indeed, they seem to have considered the evils of trial by jury so obvious as not to require argument — not until Judge Frank wrote his Courts on Trial in 1949 was the case against the jury made explicit and articulate. Without attempting to discover the underlying causes of the waning esteem for the jury nor to give the various views of the proper role of the jury in the trial process the careful treatment they deserve, it is important to note that there are powerful arguments in support

50. For example, in a negligence case a jury which felt that the defendant should not be held liable, realizing that a finding of contributory negligence would insure such a result, might believe that once such a finding was entered it had done enough, and might, therefore, pay no attention to the remainder of the answers or attempt to answer them in a manner favorable to the plaintiff so that the judge would not become suspicious of its motives. If the appellate court determines that the defendant did not produce enough evidence of contributory negligence for the question to be properly submitted to the jury, and the jury answered all the other questions in a manner favorable to the plaintiff, the court would have to enter judgment for the plaintiff.

of the jury's role in rendering a general verdict to which the commentators gave little attention.

To begin with, the jury rendering a general verdict must be seen as in part a political, not a merely legal, institution. This fact has ramifications of enormous importance which deserve to be thoroughly explored before any decision can be properly made on the desirability of retaining the general verdict; indeed, the ramifications are so large that abolition of the central role of the jury in the legal process should perhaps be accomplished only by a constitutional amendment. The lack of sophistication of the common man imposes upon lawmakers the restraint of having to make the law they prescribe for individual behavior understandable to the people who will be on juries: understandable both in its import and in its justice — or at least in its absence of patent injustice. Whether such a tethering of the law to the limits of the ordinary man is important or desirable is surely a critical question in deciding whether to retain the general verdict. Similarly, direct participation by the people in the process of governing may be significantly responsible for maintaining the people's sense of identification with their government, hence in maintaining what may be the *sine qua non* of democracy. The jury also stands as a potential obstacle to the imposition of harsh or tyrannical laws, and thus as a potential safeguard of individual liberty. Though we might agree with Judge Frank that at this point in our history there seems to be little need for this function of the jury, it does not follow that the institution should not be preserved intact for a day when its protection may be needed again.

Most supporters of the general verdict have, however, stressed its importance as a legal institution. To the generality and logical rigor of rules of law must be added the flexibility of justice in the particular case. As Wigmore observed:

> Law and justice are from time to time inevitably in conflict. That is because law is a general rule (even the stated exceptions to the rules are general exceptions); while justice is the fairness of this precise case under all its circumstances. And as a rule of law only takes account of broadly typical conditions, and is aimed on average results, law and justice every so often do not coincide.

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52. See generally 5 Moore, *Federal Practice* ¶ 49.05 (2d ed. 1951). See also Green, *Jury Trial and Mr. Justice Black*, 65 *Yale L.J.* 482, 485 (1956).


Everybody knows this, and can supply instances. But the trouble is that Law cannot concede it. Law — the rule — must be enforced — the exact terms of the rule, justice or no justice . . . .

* * *

Now this is where the jury comes in. The jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case. Thus the odium of inflexible rules of law is avoided, and popular satisfaction is preserved.55 Thus not only is it desirable to have provision for justice as well as law built into our judicial institutions, it may well be necessary in order to preserve popular confidence in the legal system.56

Finally, as Professor Moore has pointed out, the case against the jury rests largely upon exaggerations and generalizations drawn from unique individual experiences.57 The law is by no means as complicated as the commentators seemed to assume (and, as we have seen, to the extent that the law is being nullified by juries because of its complexity, the jury may well be performing a valuable function). Nor is there convincing evidence to support the conclusion that jurors are generally fickle, emotional, irresponsible pawns easily manipulated by skilled advocates. Much of the criticism leveled at the jury could be more properly directed at the bench and trial bar. If the general charge is incomprehensible this may well be the fault of trial judges who treat it as a formality to be dispensed with quickly and without much preparation. If jurors are moved by prejudice this may be the fault of advocates more concerned with immediate victory than with their professional responsibility, and of the system which encourages them to exploit the weaknesses of jurors. Lawyers need not be allowed to play upon the emotions of jurors. We have seen that, if the special verdict is to perform as the commentators intended it should, strict control over a lawyer’s communication to the jury would have to be imposed;58 theoretically, there is no reason why such control could not be imposed in the general verdict context.

55. Wigmore, supra note 54, at 170.
56. Sunderland argues that the general verdict is valued for what it does — conceal the imperfections of the process and give the public a sense of security. “[The general verdict] serves as a great procedural opiate, which draws the curtain upon human errors and soothes us with the assurance that we have attained the unattainable.” Sunderland at 262. But it may be precisely this Delphic quality of the general verdict which is its greatest virtue. Sunderland assumes that a logical process is the ultimate goal; if so, the public’s confidence in the process may be immaterial. However, because a generally accepted method of settling disputes effectively and peacefully is essential to the smooth functioning of a complex society, public confidence in the legal process is critical. The acceptability of the process may be far more important than its rationality. Thus, perhaps the “soothing” effects of the “opiate” called the general verdict should not be dismissed as easily as Sunderland does, since they may be partly responsible for public confidence in trial by jury, and since there is no assurance that the special verdict procedure would produce equal confidence.
57. Moore, op. cit. supra note 52, at ¶ 49.05.
58. See text at note 48 supra, and text at notes 76-77 infra.
B. Aspects of the Special Verdict Not Treated by the Commentators.

The arguments advanced in favor of the use of special verdicts seem, on reflection, not nearly as persuasive as the commentators made them out. Further, there are a number of aspects of special verdict procedure which the commentators failed to discuss.

Use of testing questions. The commentators never argued that when a special verdict was used the jury should be required to answer questions directed at every issue of fact raised by the evidence. As we have seen, they apparently envisioned that questions would be directed primarily at ultimate facts. Yet it is also possible, when using a special verdict, to require the jury to answer not only questions of ultimate fact, but also questions directed at evidentiary facts, or questions which probe the jury's understanding of the legal definitions involved in its findings of ultimate fact. For example, in a negligence case one of the ultimate fact questions submitted to the jury would be, "Was the defendant negligent?" The jury's answer to this question could be tested in two ways. If an issue of evidentiary fact were critical, a testing question could be directed specifically at that issue ("Did the defendant go through a red light?"). A testing question could also be directed at one of the defining elements of negligence ("Could a reasonable man have foreseen any danger arising from his conduct?"). It seems likely from the commentators' arguments in favor of special verdicts that they would have favored such questions; testing questions tend to narrow the focus of the jury's deliberations even further, serve as a means of checking the rationality of those deliberations, and increase the likelihood that a result-oriented jury will reveal itself.

When testing questions are used, a court must be prepared to deal with the problem of inconsistent answers. To begin with, the very difficult problem of what constitutes material inconsistency will provide a substantial source of appellate litigation with its attendant expense and delay. When inconsistency between the answers to an ultimate and a testing question is manifest, the trial judge can follow one of three courses. In theory, he could render judgment against the party with the burden of proof on the ultimate question; but it would be so patently unfair to penalize a party for the jury's mistake that it is hard to envision this possibility—though quick and cheap—being seriously entertained. Second, the judge could order the jury to return to the jury room to reconsider the question, but this course may raise some new problems. If the jurors were conscientious in their original deliberations, the realization that they had done something wrong might cause them to shift focus and concentrate on returning answers which they think will win


60. To be precise, of course, "burden of persuasion" is what would be involved. McCormick, Evidence § 303 (1954). According to Mooney, Evidence: Common Sense and Common Law 175-76 (1947), it would be even more accurate to say "risk of non-persuasion of fact."
the favor of the court. For example, if the jury had originally found the defendant negligent, but had answered “no” to the testing question, “Could the defendant have foreseen any danger?” the jury might be tempted not to reconsider but simply to change its answer to the testing question. This possibility is, of course, heightened if the jury is impatient, and made almost certain if the jury was result-oriented from the beginning. Further, if this course is followed, the judge must determine what to do if the jury returns a second time with the same or other inconsistent answers. The third, and perhaps best means of dealing with inconsistency is to order a new trial either on the single ultimate fact involved or on the whole case. When material inconsistency is discovered on appeal, this is the only course open to the appellate court. Yet such retrial involves precisely the sort of delay and expense that use of the special verdict was supposed to eliminate.

Impact of the use of special questions on the difficulty of achieving jury unanimity. By multiplying the number of points at which formal agreement must be reached, special verdict procedure increases the probability of hung juries. Even in a simple negligence case, in which testing questions are not used, the jury might have to reach formal agreement on negligence, contributory negligence, proximate cause, assumption of risk and last clear chance. Although the theory of the general verdict requires that the jury reach unanimity on all issues in a case,\(^6\) in reality the jury is only compelled to reach formal consensus once. “[J]ury verdicts often represent compromises, and it is not so easy to reach separate compromise agreements on several fact findings of a special verdict as it is to agree on one all-inclusive general verdict.”\(^6\) Thus even if special verdict procedure were to add to the rationality of the process, it would do so at the expense of increasing the danger of hung juries — an obvious source of cost and delay. Similarly, the multiplication of points for formal agreement, by adding to the length and arduousness of the jury’s task, may lead to precisely the kind of frustration and impatience that use of the special verdict was designed to avoid.

Omnibus questions. The twin dangers of hung juries and of jury frustration will lead to a considerable impetus to reduce the number of questions to be put to the jury. In a case in which plaintiff alleges five items of negligence, and defendant alleges five items of contributory negligence, should the judge submit ten separate ultimate questions,\(^6\) or should he put only two omnibus questions — one concerning negligence, the other contributory negligence? If the trial judge lumps the ten questions into two, he must add instructions which may confuse the jurors, serve as a source of error and appeal, and be the cause of a new trial. The use of the omnibus question also increases the

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61. See 6 Moore, Federal Practice ¶ 59.08[4], at 3793-94 (1953).
63. Suppose there are a separate proximate cause issues in regard to the various questions. The imaginative reader can easily multiply for himself the number of possible ultimate questions.
possibility of jury compromise, and thus runs counter to the ideal which leads to the desire for special verdicts. If a defendant is not guilty of negligence on four of the items, but is on one, a jury might find the defendant not negligent, since he is four-fifths “innocent.” Another danger is that three jurors might agree on negligence on the first item, three on the second, three on the third, and three on the fourth. The result may be a unanimous finding of negligence in response to the omnibus question though there was not even a majority on a single item. The judge may try to prevent this by instructing that each item should be separately considered, but this increases the complexity of the charge, and there remains the possibility that the jury will ignore the instruction. The use of omnibus questions thus pushes the special verdict into the realm of the general verdict by decreasing the alleged rationality of the procedure. On the other hand, if separate questions are given, let alone if testing questions are used, efficiency is sacrificed for the sake of alleged rationality. In this respect the two ends that the special verdict is supposed to secure seem in irreconcilable conflict.

The special questions themselves as a source of delay and expense. The special questions themselves may be the source of new problems. If the questions are misleading, incomplete, or prejudicially worded they may distort the deliberations of the jury. Since the wording and form of the questions will be significant, they will constitute a new source of appeal and retrial, and substantial time and effort will have to be expended by the bar and bench in drawing up the questions. In a system which required clear, careful, and specific pleading Professor Sunderland’s suggestion that the questions be taken from the pleadings \(^\text{64}\) would be worthy of consideration. But in our age of loose and general pleadings, the suggestion is almost ludicrous.\(^\text{65}\)

In summary, it would seem that the case for the special verdict was not as strong as it was made to appear. Many of the promises of gain were exaggerated, while most of the potential costs were overlooked. Further, the commentators failed to acknowledge that the effects of the use of the special verdict would depend on how it was administered. The controls placed on counsel by the court, the form and nature of the questions put to the jury, the methods of dealing with inconsistency, and the techniques of dealing with trial error discovered on appeal would all influence the net effect that use of special verdicts would have on the process of trial by jury. In retrospect it would appear that the commentators both overstated and oversimplified in presenting their case.

C. The General Verdict with Interrogatories

Enthusiasm for the special verdict not only led the commentators to overlook the weaknesses in their case, it also caused them to dismiss lightly

\(^\text{64}\) Sunderland at 263.

\(^\text{65}\) Sunderland argues at 264, that this would have a good effect on the pleadings — they would be framed with the jury in mind.
the general verdict with interrogatories as a half-way compromise of no substantial value.66

The general verdict with interrogatories raises no essentially new problems; rather it affects the weight to be given to the factors which were considered in relation to the special verdict. Such shifting may be important, since it may well determine the ultimate judgment of when and whether interrogatories are desirable. For example, to the extent that the general verdict with interrogatories may achieve some of the virtues that the special verdict procedure is designed to realize, consistent with retention of the jury's role of giving effect to the sense of justice of the man in the street, it is a procedure worth considering on its own merits.

On the one hand, interrogatories may serve a number of useful functions. The conscientious jury may be helped by the focus which the interrogatories give to the evidence. Similarly, special questions used together with a general verdict may have the same psychological impact that those used with special verdicts are said to have. The interrogatories are also a means of testing the general verdict, and thus of exercising some control over result-oriented juries. On the other hand, many of the problems associated with the special verdict may arise. The general charge will give a result-oriented jury sufficient information to make its answers consistent with its general verdict. The problems of confusion and delay arising from the general instruction will not be diminished. The courts will have to determine in each case whether the answers are materially inconsistent with the general verdict, and what course should be followed if such inconsistency exists; the judge may sometimes be able to vacate the general verdict and enter judgment on the answers but often the answers will not be sufficient to support a judgment and the only remedy in that case is a complete new trial. The use of separate questions will multiply the occasions for formal agreement and may, therefore, lead to jury frustration and impatience, and increase the possibility of a hung jury. Finally, the questions will require careful drafting, and may themselves serve as a new source of appellate litigation and retrials.67

IV. RULE 49

A. Analysis of the Rule

Having examined the historical development of the special verdict and the general verdict with interrogatories, and having analyzed the case for the special verdict put forth by the commentators in the years immediately preceding the adoption of Rule 49, we will now turn to read the rule itself against this background. There are two basic perspectives from which to analyze the rule: (1) how does it attempt to cope with the formalisms and technicalities which made the common law procedures full of pitfalls for the litigant?

66. See note 42 supra.

67. In addition to the difficulties raised in the text, use of interrogatories might — by highlighting the "irrationality" of the general verdict — serve to undermine popular confidence in the process of trial by jury. See note 56 supra.
and (2) how does it respond to the difficulties inherent in the commentators' case?

Waiver. The main thrust of section (a) "Special Verdicts," is directed toward the elimination of the major hazard which had made the use of the common law special verdict dangerous: the requirement that the jury, often without help or directions from the court, return a finding on every essential element of the cause of action whether or not at issue in the case. Many courts had deemed a failure to return a finding equivalent to a finding against the party having the burden of proof on that issue.\(^6\) Rule 49(a) seeks to eliminate this hazard by making use of the doctrine of waiver. The opening sentence of section (a) indicates that when a special verdict is used the court should request the jury to return a finding on "each issue of the fact." But the rule goes on to provide that the omission of a finding on "any issue of fact" is not necessarily fatal to a judgment entered on a special verdict. Unless a party objected to the omission of an issue from the questions submitted, he is deemed to have waived jury trial on that issue. If an issue was omitted without objection, the trial judge is authorized to make the necessary factual finding explicitly; and if the trial court fails to make such a finding an appellate court is to assume that the required finding was made in accordance with the judgment rendered by the trial court.

Evidentiary or ultimate questions? The only indication given by Rule 49(a) concerning the nature of the questions to be put to the jury is that they be directed to "issue[s] of fact." Although the rule is not explicit as to whether it contemplates juries making formal findings on every issue raised by the evidence, or only on all the issues of ultimate fact, it must be construed to require only the latter. The third sentence of section (a) indicates that a trial judge will have to give some legal instructions to the jury when a special verdict is employed.\(^9\) This can be read as a recognition that jurors will be charged with deciding issues of ultimate fact by applying legal definitions formulated by the court to their conclusions drawn from the evidence. Moreover, since the common-law tradition of the special verdict required that the jury answer all questions of ultimate fact,\(^7\) since the advocates of the special verdict had never argued that the jury should not continue to perform the function of applying legal definitions to the evidence; since any other construction would render the provision for waiver mere surplusage;\(^7\) and

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6. See Green at 715-16; Ilsen & Hone at 7; Note, 34 Ill. L. Rev. 96, 98-99 (1939).

9. "The Court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue." This sentence seems to contemplate more than general instructions on burdens of proof, etc.


71. The provision for waiver must be read to contemplate waiver of ultimate fact questions. See note 73 infra and accompanying text. If explicit provision for waiving ultimate questions is made, it must be because, in the absence of waiver, one would have a right to such questions; that is, if one had no right there would be no need for a provision that one could be held to have waived it.
since very serious constitutional questions should be raised if Rule 49 were thought to deprive a party of the right to a jury determination of questions of ultimate fact;\textsuperscript{72} it seems safe to assume — in the absence of any indication to the contrary in the rule — that this right was meant to be preserved. Most convincing, however, is the fact that it would be impossible to read the rule as granting a right to have every issue of evidentiary fact submitted. Such a right would enable a party to render the special verdict procedure completely unworkable.\textsuperscript{73} Thus, it is ultimate, not evidentiary, facts which a party is entitled to have put to the jury. The question remains whether Rule 49 permits a trial judge to use testing questions, either going to issues of evidentiary fact or to the jury’s understanding of the legal definitions given by the judge. There is nothing in the cryptic phrase “issue of fact” which denies to the trial judge the discretion to submit such questions, whether on his own motion or on that of one of the parties. Assuming that section (a) leaves such discretion in the trial judge, problems associated with inconsistent answers will arise; unlike section (b), dealing with general verdicts with interrogatories, section (a) gives no guidance as to how such problems should be met.\textsuperscript{74}

\textsuperscript{72} Although the Court, in Walker v. New Mexico & S.P.R.R., 165 U.S. 593, 596 (1897), said that the seventh amendment guarantees jury trial only on issues of fact, it probably meant issues of ultimate fact.

\textsuperscript{73} Even the simplest case involves a virtually unlimited number of “evidentiary” fact issues. What look like simple fact questions can easily be broken down into components. For example, the question whether defendant ran a red light could be reduced to a series of questions such as: was the light red? did the car go against it? was defendant driving? In turn, these questions could be subdivided: was there a light? was it red?

\textsuperscript{74} If testing questions may properly be used within the context of the special verdict procedure, the problems of dealing with inconsistency will necessarily arise, since the very purpose of such questions is the discovery of inconsistency. One might argue from the provision for dealing with inconsistency in section (b) and the absence of any similar provision in section (a) that testing questions were not to be used with the special verdict procedure. This is probably a too sophisticated reading of the rule; it would seem more likely that the drafters never specifically considered the problems and possibilities of using testing questions with special verdicts. When testing questions are used and the answers are, at least on their face, inconsistent, the court must then determine whether or not to try to harmonize the answers and thereby save the verdict, or either to dismiss the jurors or to re-submit the questions. When inconsistencies arise in a general verdict with interrogatories, the courts have been directed to attempt to harmonize the interrogatories with the general verdict. See cases cited in note 135 infra. When a special verdict is used, the situation is somewhat different. Superficially, all of the answers are of the same weight, and therefore it can be argued that it is impossible to attempt to harmonize inconsistent answers as the process of reconciliation must involve answers of different relative weights. If both A and B are accorded the same weight, the court will not know whether to attempt to read A to conform to B, or B to conform to A. See the dissent of Justice Stewart in Gallick v. Baltimore & O.R.R., 372 U.S. 108, 124-27 (1963). But there is no need to view all special questions as equals. Testing questions may be viewed as the equivalent of the interrogatories used with a general verdict with interrogatories, and the questions directed at ultimate fact as the equivalent of the general verdict itself when 49(b) is employed. This being so, the court may then attempt to make the answers to the testing questions conform to the answers to the ultimate fact questions. See “General verdicts with interrogatories: the problem of inconsistency,” at notes 79-81 infra.
Furthermore, it is surprising in light of Rule 49(a)'s implicit guarantee of the right to have each issue of ultimate fact submitted to the jury, that no provision is made for the eventuality that the jury fails to answer one of the questions submitted.

Form of the questions. Another major hazard encountered with the common-law special verdict arose from the apparent practice on the part of judges of submitting only a general request for factual findings, rather than a set of specific questions. Since the jurors were expected to return answers on all necessary issues of ultimate fact, and since untrained jurors were often unable to distinguish between matters of evidentiary fact, matters of ultimate fact, and matters of law, the practice of leaving these difficult matters to the jury "cramped the life out of the special verdict." Although Rule 49(a) does not explicitly proscribe this practice, it does seem to contemplate that questions in some form would be put to the jury — at least if a party specifically requested them. The rule provides that questions "susceptible of categorical or other brief answer," or multiple-choice questions, may be used by the trial court to elicit the necessary information. If all the jurors need do is answer "yes" or "no" or tick off an answer from a multiple-choice selection, their failure to grasp the difference between an ultimate fact, an evidentiary fact, and a legal conclusion will not be harmful. In such cases the form of the answers is the responsibility of the lawyers and the judge. But the rule does not make these two modes of inquiry exclusive. Section (a) goes on to authorize the trial judge to use "such other method of submitting the issues" as he deems appropriate to obtain the necessary written findings. This grant of broad discretion regarding the form and type of question to be used was the result of yet another attempt to avoid a pitfall associated with the use of the common-law special verdict. In some states the form which questions were required to take had become so rigid that lawsuits were often determined on procedural niceties. The rule seeks to avoid rigid requirements concerning the form of questions, but does so at the expense of failing to give guides with respect to the problems of inadequate, confusing, and prejudicial questions. The rule does not indicate whether the questions are to be drawn from the pleadings, nor by whom they are to be framed — the discretion of the trial judge seems to be unfettered in both respects; nor does the rule indicate when in the trial process the questions are to be framed, apparently leaving to the trial judge's discretion such matters as whether they are to be decided upon at the outset and the trial organized around them, and whether counsel are to be informed of their content before final argument and allowed to use them in summation. The rule is also silent on the question whether instructions on legal definitions may or should be given in writing and appended to the relevant questions. Finally, section (a) fails to give any indication whether omnibus questions may be used.

75. Green at 716.
76. Id. at 717-18.
Preserving the jury's integrity. Since the special verdict was conceived, in part, as a device to enforce the law-fact dichotomy of function between judge and jury, it is notable that Rule 49(a) does not deal with the question whether the trial judge is to attempt to control the jury's knowledge of the effect its answers will have on the outcome of the case and, if so, to what lengths he is authorized to go. It seems to leave to his discretion whether he will instruct the jury on the rules of law that will be applied to its findings or indicate which party a given answer would favor. There is no basis in the rule for a broad discretion in the trial judge to regulate the forensic conduct of counsel in order to preserve the jury's ignorance of the relationship between its answers and the result in the case.

Appellate review. Rule 49 does not attempt to deal with any of the questions arising from appellate review of judgments entered on a special verdict. Rule 59, New Trials: Amendment of Judgments, states that new trials "may be granted ... on all or part of the issues in an action in which there has been a trial by jury" and thereby seems to authorize the use of the partial retrial of a single question of fact in the context of the special verdict. No indication is given by Rule 49 as to whether and when an appellate court, reversing a single special finding as improperly submitted to the jury, should remand for a new trial rather than enter judgment directly on the basis of the other findings.

General verdicts with interrogatories: the problem of inconsistency. Section (b), authorizing the use of the general verdict with interrogatories, raises most of the problems discussed in connection with section (a). However, section (b) is unique in making explicit provision for the problem of inconsistency. No indication is given as to the extent to which the trial judge should attempt to harmonize answers which are only prima facie inconsistent with each other or with the general verdict — that is, when an inconsistency is to be deemed "material." But the rule authorizes the following procedures in the case of material inconsistency: when the jury's answers are consistent with each other but inconsistent with the general verdict, the court may enter
judgment on the answers, or return the jury for further consideration of its answers and general verdict, or order a new trial; when the jury's answers are inconsistent with each other and one or more is inconsistent with the general verdict, the court may return the jury or order a new trial. The rule does not attempt to give any guide as to which of the authorized procedures is preferable, nor does it indicate the considerations which should influence the trial judge's choice. Since testing questions used with a special verdict perform the same function as interrogatories with a general verdict, the procedures of section (b) for dealing with interrogatories inconsistent with the general verdict would presumably also hold for a testing question inconsistent with the ultimate fact question it is designed to test.

When the new procedures should be used. The preceding analysis of Rule 49 discloses that in almost every particular of implementation a virtually unfettered discretion is left in the trial judge. Indeed, with respect to many of the problems it poses, the rule does not even recognize the occasions which will call for the exercise of the trial judge's discretion. But even more remarkable than the rule's lack of guides and standards on questions of how to use the new procedures is the complete lack of any hints on the question when they should be used.

B. The Intent of the Drafters

It would seem that the almost complete lack of standards which characterizes Rule 49 can be explained by the confluence of two intentions held by the drafters of the rule. Flexibility is a theme which pervades the Federal Rules; in the case of special verdicts, the technical pitfalls which had hamstrung the special verdict at common law emphasized the need for a flexible rule. Second, the drafters seem to have intended to do no more than authorize the new procedures, leaving the details of their implementation — in particular the development of standards — to grow out of practical experience. The drafters probably recognized that the commentators had built their case largely on unproven assumptions and that many of the procedural difficulties which would arise from use of the new procedures had never been adequately considered; they must have felt that far more knowledge was needed both

80. The rule does not deal with the possibility that the answers are inconsistent with each other, but all are consistent with the general verdict.

81. See "Use of testing questions," at notes 59-60 supra, for discussion of the problems inherent in returning the jury for further consideration.

82. The structure of Rule 49, with its omission of any reference to the general verdict, seems to imply that the new procedures are exceptions which may be used, but that the standard practice of general verdicts is to remain the normal procedure.

83. One of those primarily responsible for the drafting of the Federal Rules observed: [P]rocedural rules are but means to an end, means to the enforcement of substantive justice, and therefore there should be no finality in procedural rules themselves except as they attain that objective.

of the problems that would be posed by the new procedures and of the impact that special verdicts and general verdicts with interrogatories, and the various ways they might be used, would have on the process of trial by jury. Until experience had provided such knowledge, the drafters must have been unwilling to commit the federal courts to a set of concrete practices. The failure of Rule 49 to provide any standards to guide the exercise of discretion can thus be read as implicitly authorizing trial court experimentation with the three procedures on the theory that the craftsmen who use a tool can best appreciate its nature and gain the information and insight necessary for its rational utilization. As such knowledge began to accumulate, it was probably hoped that the appellate courts would gradually be able to develop broad standards to limit the unfettered discretion initially given out of necessity to the trial courts.

Nor would the development of such standards be inconsistent with the basic philosophy of the Federal Rules of Civil Procedure — the attainment and preservation of flexibility in the administration of procedural rules. The drafters certainly did not envisage an elimination of all discretion from Rule 49 practice through the creation of rigid rules and the review of all trial court decisions. Rather the likely concern of the drafters was two-fold: that the appellate courts establish the range of discretion under Rule 49 by distinguishing between decisions that should be left to trial court discretion and those that should be subject to review, and that they place substantive limits on the exercise of discretion by distinguishing between permissible and impermissible reasons for reaching decisions within trial court discretion. For example, one would suppose that a trial court's discretion in deciding whether to use testing questions would be limited in that in some cases a use of such questions would be abusive, either because outside the range of permissible discretion (e.g., putting a vast number of testing questions to the jury) or because some kinds of reasons for using testing questions would be patently unacceptable (e.g., a desire to discourage special verdict procedure by putting as many questions to the jury as possible).

84. See, for an attempt to deal with the problem of the range of discretion, Phillips Chem. Co. v. Hulbert, 301 F.2d 747 (5th Cir. 1962). There, the jury returned a general verdict for plaintiff, but did not consider in doing so an interrogatory on the crucial issue of malice, because, by an oversight, the interrogatory had not been sent with them. Sent back to consider the interrogatory, the jury found no malice, a finding inconsistent with its general verdict. The judge sent the jury back to reconsider both its general verdict and its answer to the interrogatory and the jury changed the latter. The court of appeals reversed. Judge Tuttle, writing for the court, said:

ID. at 751.

85. See United States v. Wiley, 267 F.2d 453, 456 (7th Cir. 1959), on appeal after remand, 278 F.2d 500 (7th Cir. 1960), for an example (in a different context — i.e., sentencing discretion) of an "abuse" of discretion by use of an illegitimate reason.
An alternative hypothesis is of course conceivable. The drafters of Rule 49 may have intended that trial court discretion under it be absolute: unguided substantively and unlimited in the range over which it might operate. Merely to state this alternative is to refute it as a serious possibility. Under this view all trial court decisions under Rule 49 would be unreviewable no matter how arbitrary the reason or how undesirable the result. This theory would ignore both the general principle that there may always be an abuse of discretion and the heretofore unquestioned assumption of appellate courts that they might properly review at least some decisions under Rule 49. Such absolute discretion is not to be found in the other Federal Rules. One would expect it least of all in Rule 49 where the issues at stake—the conduct, nature and scope of jury trial—are more important than in most of the other rules. Finally, Rule 49, except for the word "may," does not speak in terms of discretion. If absolute discretion is to be found in the rule, it must be found in the fact that most of the problems of special verdict and interrogatory procedure are not dealt with at all. Rather than attribute these numerous hiatuses to an intention to provide for absolute discretion, it seems far more plausible—for all the reasons given above—to attribute them to a simple incapacity to formulate the appropriate “good reasons” and limitations of range which should govern discretion in the use of the new procedures.

If absolute discretion is abandoned as an untenable hypothesis of the drafters' expectations, as it seems it must be, determination of the proper range of discretion, and of the amount of guidance appellate courts should give for its exercise, depends upon resolution of the question why, in a particular situation, a discretionary decision—one that is unreviewable except for “abuse”—is desirable. In the context of the Federal Rules, flexibility is the guiding principle. The flexibility of the Rules lies in their vast expansion of the range of discretionary decisions, based upon a desire to enable trial courts to take individual circumstances into account and to apply expertise and intuition to the resolution of problems arising during the course of litigation. Clearly this flexibility could not have been achieved had parties been entitled to particular decisions—that is, entitled to demand a statement of the reasons for

86. Most of the Rules addressed to trial courts are, although flexible, quite specific. Those which refer explicitly to “discretion” include specification of a number of factors relevant to its exercise (“good reasons”) (e.g., Rules 16 and 24; cf. Rules 37(c) and 60). Others provide that the judge may do something (e.g., enlarge the time for a party to fulfill a requirement) “for cause shown” (e.g., Rules 6(b), 30, 31(d), 33, 35(a)). Others refer to decisions “on such terms as are just” (e.g., Rules 34, 12(e)) or “as justice may require” (e.g., Rule 33; cf. Rules 12, 15(a), 16, 30). Finally, a number of the rules limit and qualify the extent of the discretion they grant (e.g., Rules 15, 17, 19, 20, 43, 53). Two themes may be derived from these other rules: first, the concept of discretion they reflect is one in which a decision must be based upon good reasons, and in which the rules themselves frequently indicate, implicitly or by the principle of eiusdem generis, the limitations upon the kind of reasons which are to be considered “good”; and second, that the range of “discretion” should be limited to circumstances in which sound judicial administration demands that the parties not be entitled to appellate review of a particular decision.
every decision, and to challenge all decisions on appeal. Only abusive decisions — those patently based upon no “good reason” or outside the proper range of discretion — could be appealable, if the new flexibility was not to be inconsistent with the administration of justice. It is in the light of this underlying policy in favor of flexibility that questions concerning appellate guidance of trial court discretion under Rule 49 must be resolved. Flexibility may be inappropriate with respect to some decisions, or it may not require discretion; in other circumstances, the need for flexibility may preclude the appellate courts from proscribing any but the most patently “bad” reasons (e.g., desire to favor a party). But with respect to most decisions, the appropriate discretion will probably be one whose range is clearly defined, and which is guided by more or less specific standards for deciding what reasons are good.

V. Judicial Exegesis of Rule 49

The case law of the past twenty-five years has added some flesh to the skeletal provisions of Rule 49, but, on the whole, very few guides or stand-

87. The relationships between the concepts of “discretion,” “entitlement,” “abuse,” “good reasons,” and their respective roles in the judicial process are complex. A court’s decision, properly rendered, is never “free” in the sense that it is based upon whim or the personal preferences of the judge. A judge is expected to decide the issues before him on the basis of reasons which are acceptable in the legal system of which he is a part; he must approach every decision with the intention of reaching the right result, though in many cases this result will not be dictated by the syllogistic application of a rule, but will have to be determined after the consideration, weighing and comparison of a number of policies, principles and standards, some of which may conflict. A “discretionary” decision in the legal context is not one in which the judge is absolved from this general duty, but rather is one in which — for reasons of expediency, economy, or other considerations — a judge is not expected to articulate his reasons. We express this by saying that no party is entitled to any particular decision, meaning not that the judge need not have reasons (this would be an “abuse” of discretion) but only that he is not called upon to give them — to justify his decision. Only if a party can affirmatively show that it was based upon no application of legitimate reasons — that it was arbitrary and “abusive” of the trust implicit in the grant of discretion — can he attack such a discretionary decision.

The concept of discretion implicit in the hypothesis that Rule 49 was drafted to leave unfettered discretion in the hands of trial judges is quite different; it is, in effect, a concept of free choice. The hypothesis is that the drafters thought trial judges can and should exercise such “discretion,” subject neither to generally accepted good “reasons” nor to reversal for “abuse” (How can one abuse a choice?) except for gross impropropriety. There seems to be no area of the law in which judges are, in theory, given such freedom to choose. The objections to allowing judges such freedom are overwhelming. They range from the problems of forum-shopping, unpredictability of decisions, and inequality before the law, through the various values associated with the rule of law, to the most important consideration of all: in a democratic society, it would be anomalous to allow a non-representative branch of government freedom to prescribe new law — law not derivable from established principles and policies. We establish a judicial branch and give judges enormous power not because we want to be bound by the personal preferences of the judiciary (let alone in individual cases), but because we need the judicial function — the application of existing law to particular cases. The hypothesis would thus assume that the drafters held an untenable conception of the role of a judge. See, for a general discussion of judicial “discretion,” Dworkin, Judicial Discretion, 60 J. Philos. 624 (1963).
ards have developed. From the beginning, the courts distinguished between issues of evidentiary fact and issues of ultimate fact, holding that Rule 49 guarantees only the right to have questions directed to the latter.88 The courts have also enforced the waiver doctrine strictly, leaving it to the parties to protect their right to have all questions of ultimate fact submitted to the jury.89 But if a party's timely demand for submission of such an issue is denied, the mere fact that the trial judge makes an explicit finding on the issue will not cure the error.90 The judge can, of course, submit questions to the jury on his own motion.01

One might have anticipated considerable problems of distinguishing between questions of ultimate fact on the one hand, and questions of law and questions of evidentiary fact on the other. From an analytic perspective, "ultimate fact" seems merely a deceptively simple name for what is no more than the zone of transition between questions of evidentiary fact and questions of law. Negligence, for example, may be seen as a question of ultimate fact when considered as an element in a legal rule (in order to be liable, defendant's negligence must have been the proximate cause of plaintiff's injury); it may also be seen as a question of law when considered as a composite of

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89. Ribeiro v. United Fruit Co., 284 F.2d 317, 319 (2d Cir. 1960), cert. denied, 365 U.S. 872 (1961); L'Urbaine et la Seine v. Rodriguez, 268 F.2d 1, 4 (5th Cir. 1959); Merrill v. Beaute Vues Corp., 235 F.2d 893, 896-97 (10th Cir. 1956); Union Pac. R.R. v. Bridal Veil Lumber Co., 219 F.2d 825, 831 (9th Cir. 1955), cert. denied, 350 U.S. 981 (1956). The courts have required more than a demand for the submission of an issue: a timely objection to the denial of a demand must also be made. See 2b BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1053, at 334 (Rules ed. 1961) [hereinafter cited as BARRON & HOLTZOFF]. This is an exception to the general rule of federal trial practice that once a party has made his position known to the court it is not necessary that he repeat it or take formal exception when the court takes contrary action. See Fed. R. Civ. P. 46; 2b BARRON & HOLTZOFF § 1021, at 309-12. One commentator suggests that this "hars" requirement gives the trial judge an opportunity to correct any inadvertent failure to submit an issue. 2b BARRON & HOLTZOFF § 1053, at 334. But although the rule may limit the number of new trials caused by the failure of the judge to submit an issue demanded, one wonders if the price paid by the litigants is not too high. Inexperienced counsel, not aware that there lurks an exception to the general practice, may waive their clients' right to jury trial on an issue without even realizing that they have sacrificed the fundamental right. Since special verdicts are rarely used, many counsel must be unfamiliar with the special requirement. The rule would seem to create a real trap for the unwary or unskilled, and it is certainly doubtful whether the benefit of a double warning to the trial judge is worth such a price.

See Palmiero v. Spada Distrib. Co., 217 F.2d 561 (9th Cir. 1954), a case in which the court relaxed the general rule when the trial judge had led counsel to believe that interrogatories on all facts would be submitted.


91. 2b BARRON & HOLTZOFF § 1054, at 336-41. Query whether the judge would submit a question over the objection of both parties.
more limited factual elements (negligence is conduct causing a foreseeable danger the risk of which outweighs the cost of avoidance); finally, it may be seen as a question of evidentiary fact when considered as a category with which we organize experience92 ("Was the defendant negligent or wasn't he?" when asked in the same sense as "Did the defendant have red hair?"). But notwithstanding these apparent theoretical difficulties, there is no indication that courts have experienced great practical difficulty in making the distinctions.93 Because the problem is not unique to the special verdict context, the courts have been able to draw on centuries of experience in characterizing questions as "law" or "fact."94

Although testing questions have apparently been used,95 no judgment has been vacated because of their submission to the jury in addition to questions of ultimate fact. Therefore, no court has addressed itself to the problem of the use of testing questions: the case law has failed to limit the range of trial court discretion — e.g., whether a court must await a party's motion before using testing questions — and has given no guides for the exercise of this discretion within its proper range.96

While the use of testing questions is not discussed in the cases, the problem of inconsistency — a product of the use of testing questions97 — has been dealt with expressly.98 Jury findings which are materially inconsistent will not support a judgment.99 When a jury returns what appear to be conflicting findings, the trial court must attempt to harmonize them if it is possible to do so on a "fair and reasonable" reading.100 The opinions do not

92. See Lewis, Mind and the World Order (1929).
94. Courts operating within the context of the traditional general verdict have always had to draw the distinction between fact and law for the purposes of instructions, directed verdicts, and appeals.
95. But see supra note 98.
96. But see Truitt v. Travelers Ins. Co., 175 F. Supp. 67, 72 (S.D. Tex. 1959), aff'd, 280 F.2d 784 (5th Cir. 1960): "only ultimate questions of fact raised by the pleadings and evidence, which are important to the judgment, may be submitted to the jury for determination by special verdict."
97. It must be noted that inconsistency in the answers to the special interrogatories may not necessarily indicate that testing questions were consciously used. Sloppily drafted ultimate fact questions might overlap, and hence leave room for inconsistency, or a court, confused by the ultimate-evidentiary distinction, might arrive at a set of testing questions by accident.
98. Safeway Stores, Inc. v. Dial, 311 F.2d 595 (5th Cir. 1963); R.B. Co. v. Aetna Ins. Co., 299 F.2d 753 (10th Cir. 1962); McVey v. Phillips Petroleum Co., 288 F.2d 53 (5th Cir. 1961); Missouri Pac. R.R. v. Salazar, 254 F.2d 847 (5th Cir. 1958); Rorem v. Halliburton Oil Well Cementing Co., 246 F.2d 427 (5th Cir. 1957); Neff v. Western Co-op. Hatcheries, 241 F.2d 357 (10th Cir. 1957). See Mounger v. Wells, 30 F.2d 521 (5th Cir. 1929), for a pre-Rule 49 treatment of the problem.
go beyond this in articulating a test for determining when the inconsistency is such that no judgment can be entered. If a conflict cannot be reconciled, the trial judge may either dismiss the jury and set the case for retrial or resubmit the questions to the jury. The case law provides no guides for distinguishing the situations in which one or the other of the alternatives is preferable, and no indication of what type of instruction the court should give the jury when the latter alternative is chosen.

Similarly, the case law generally has left the discretion of the trial judge with respect to the form and nature of questions unguided. Although there are hortatory statements in appellate opinions that a question should be clear, concise, non-prejudicial, and directed toward a single issue of fact, there are very few cases which hold that the trial judge abused his discretion in relation to the form or nature of the questions he submitted. Most of the opinions which do find an abuse are based on the submission of a question going to an issue on which the appellate court concludes reasonable men could not differ. There is no requirement that the questions should relate to, or come out of, the pleadings, nor any indication of when or by whom the questions should be drawn. When a court submits a question directed to an ultimate fact, it must provide an instruction which explains the legal definition the jury is to apply. The cases do not indicate whether such definitions should be appended directly to questions or whether the court may combine them into a general instruction. Nor are there opinions which discuss the form instructions should take. While the courts early recognized that the omnibus question would be a useful and sometimes necessary device,
no standards have developed as to when and with respect to what kinds of allegations omnibus treatment is appropriate.\textsuperscript{108}

The courts have not given a firm answer to the question of what results should follow the failure of a jury to answer a question. Although there is almost no case law on the problem, there is some indication that the judge may request the jury to reconsider the question.\textsuperscript{100} But no guides have emerged as to when this course should be resorted to in lieu of ordering a new trial, nor how the judge should instruct the jury on directing it to reconsider; and the courts which have suggested that new trial is a proper course\textsuperscript{110} have not indicated whether and when a partial retrial is appropriate. Other cases have suggested that a failure to answer may be taken as an answer against the party having the burden of proof.\textsuperscript{111} Such a practice is questionable, based as it is on a fiction that is patently contrary to fact. A hung jury when a general verdict is used results in a new trial, not a directed verdict against the party with the burden of proof; there is no apparent reason why the practice under the special verdict should vary.

The courts have dealt extensively with the problem of what instructions and information the trial judge should give, or allow to be given, to the jury concerning the effects that particular answers will have on the outcome of the litigation. Although in some states there are rulings that the judge is in error if he frames the questions so as to suggest to the jurors the legal effect of their answers,\textsuperscript{112} there is no rigid rule in the federal courts on this point or on the related issue of whether a general charge should be given. Informing Roach the question "(1) Do you or not find as a matter of fact that the Insurance Company waived the breach of the policy?" (id. at 852) was used. This was criticized in Lipscomb at 198-99 as too broad. The case involved an attempted disclaimer of liability by an insurance company on a policy in the procuring of which some false information had been given. There had been a breach as a matter of law, but the company might have been held to have waived the breach at any of a number of times. The judge found it necessary to accompany the question with an oral explanation of the law of waiver.\textsuperscript{108} The factors involved include: the relation between questions to be grouped (i.e., whether they merely reflect different aspects of a single transaction, or are unrelated), the number of issues in a trial, the independent importance of the questions, etc.


110. Id. at 831-32.


112. See, e.g., McCourtie v. United States Steel Corp., 253 Minn. 501, 515-18, 518-19, 93 N.W.2d 552, 562-64, 564-65 (1958); Anderson v. Seelow, 224 Wis. 230, 233, 271 N.W. 844, 845 (1937) ("This court has frequently held that it is error for the court to inform the jury of the effect of their answer to a question upon the rights of the parties, and have not infrequently held that so to inform the jury was reversible error."); Bench v. Gehl, 204 Wis. 367, 371, 235 N.W. 778, 780 (1931).

113. L'Urbaine et la Seine v. Rodriguez, 268 F.2d 1, 5 (5th Cir. 1959); Ward v. Cochran, 71 Fed. 127, 134 (8th Cir. 1893) (held to be error but harmless error). But see Cate v. Good Bros., 181 F.2d 146, 149 (3d Cir.), cert. denied, 340 U.S. 826 (1950); Thedorf v. Lipsey, 237 F.2d 190, 193 (7th Cir. 1956).
the jury, either directly or indirectly, as to whom an answer will favor violates the theory of the special verdict, but the deviation from the theory may be considered valuable if it keeps jurors from indulging in guesswork. This justification assumes that jurors operating in the context of the special verdict will not always limit themselves to fact finding, an assumption that courts are not anxious to articulate. Thus opinions holding that it is not error for the judge to give a general charge or to indicate the effects of the answers in his instructions tend to give no reason beyond stating that because the trial judge has untrammeled discretion in choosing between the general verdict, special verdict, and general verdict with interrogatories, there is no good reason why he should not be allowed to devise any intermediate type of process which has some of the characteristics of all three. However, it is clear that the parties have no right that the judge inform the jury, either directly or indirectly, as to the effects of its answers. Finally, no rules have emerged concerning the power of the trial judge to prevent counsel from informing the jury.

No requirement has developed that the trial judge state explicitly what rule of law he has applied to the jury’s findings in rendering judgment. Rule 49, moreover, indicates that it is not mandatory for the trial judge to make explicit findings of fact on all material issues not submitted to the jury. The combination of an unstated rule of law and an unstated finding of fact may render appellate review of some elements of a judgment impossible. Suppose, for example, a negligence action where the defendant fails to request a question on assumption of risk although there is some evidence to support such a question; the jury answers the questions submitted favorably to the plaintiff; and the trial court renders judgment for the plaintiff, believing that the defense of assumption of risk does not lie in the kind of action involved. No review could be had of the trial court’s implicit holding on this latter point, since even if the appellate court believed that assumption of risk was a defense in the action, it would have to assume that a factual finding against the defendant on that point had been made by the trial court. In truth, however, the trial court would have made no factual finding on the issue at all. When a party fails to object to the omission of a question he may waive jury trial


115. Minnesota, which limits the power of the court to inform the jury, has held that it is error for counsel expressly or impliedly to inform the jurors of the effects of their answers. Johnson v. O’Brien, 258 Minn. 502, 508-09, 105 N.W.2d 244, 248 (1960) (held not prejudicial in this case). See also 29 BARRON & HOLZOFF § 1056.1 & n.52.9, at 349. But the Fifth Circuit has suggested that the parties have a right to timely notice that the judge intends to submit the case to the jury with a special verdict, so that counsel may, among other things, “plan an effective argument whose objective is to translate persuasion into specific decisive action by the jury.” Clegg v. Hardware Mut. Cas. Co., 264 F.2d 152, 157 (5th Cir. 1959).

116. “As to an issue omitted without such demand [by a party] the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.” Fed. R. Civ. P. 49(a).
on the issue, but he certainly should not be held to have waived his right to have the issue tried. This problem could be dealt with in any of three ways: (1) Rule 49 could be amended to require the judge to make his factual findings explicit; (2) appellate courts could require trial judges to make explicit the rule of law they apply; (3) appellate courts could scrutinize with particular care the evidentiary basis for implicit factual findings by trial judges. The third alternative is clearly only a partial corrective. There seems no reason why both the first and second alternatives should not be followed in order to facilitate review of special verdict cases. When the whole case is tried to a judge, Rule 52 requires him to make explicit findings on all issues of material fact.\(^7\) No good reason appears for a different practice under Rule 49. In the absence of such an amendment to Rule 49, however, appellate courts should at least require trial courts to make explicit what law they have applied.

Other vexing problems arising out of appellate review of special verdict cases are whether and under what circumstances a partial retrial is an appropriate remedy if the judgment is vitiated by improper instructions on one of the questions or by improper direction of verdict on an issue; and whether and under what circumstances an appellate court, reversing the submission of a question to the jury, should enter judgment on the basis of other factual findings,\(^8\) in lieu of having the entire case retried because of the possibility of interrelated answers. No standards seem to have developed on either issue.

Finally, and most important, the case law on Rule 49 has developed almost no standards to guide the discretion of the trial judge in deciding whether to order a special verdict on his own motion\(^9\) or on that of a party. Judge Jerome Frank, a staunch supporter of mandatory use of the special verdict, articulated the general rule that the trial judge has unlimited discretion:

> [T]he federal district judge, under the Rule, has full, uncontrolled discretion in the matter. He may still require merely the old fashioned general verdict.

Accordingly, we cannot hold that a district judge errs when, as here, for any reason or no reason whatever, he refuses to demand a special verdict, although we deem such a verdict usually preferable to the opaque general verdict.\(^9\)

Though there is a small group of opinions which discuss the question of when special verdicts should be used, most of them are couched in very broad and general language, and communicate only attitudes, not standards.\(^9\) There

\(^{117}\) See 5 Moore, Federal Practice ¶ 52.03, at 2609-36 (2d ed. 1951).

\(^{118}\) See “Impact of the use of special verdicts on the problem of expense and delay,” at note 50 supra.

\(^{119}\) It is clear that a court can order a special verdict on its own motion. Cf. note 91 supra.


\(^{121}\) See, e.g., Hand, J., concurring in Skidmore v. Baltimore & O.R.R., supra note 120, at 70. See also Nordbye, Comments on Selected Provisions of the New Minnesota Rules, 36 Minn. L. Rev. 672, 682-86 (1952).
have been a few partial exceptions to this rule. The Seventh Circuit has suggested that the procedure is not useful where the pleadings raise but a single issue.\footnote{122} Apparently the court felt that the chief value of the special verdict lies in its potential for bringing some focus to the issues of fact and for localizing error. The First and Third Circuits have given some indication that the special verdict is of the greatest value in the complex case,\footnote{123} but a Ninth Circuit district judge has stated that, from his experience, the special verdict is of the least value in a complex case.\footnote{124} Judge Charles Clark has written that the special verdict should not be used only as a check on the jury, but rather should be used to localize error and to save sound portions of a verdict when the "issues can be clearly and simply differentiated."\footnote{125} Beyond these mere beginnings, the appellate courts have been able to give no guidance to trial judges.\footnote{126} It appears that the appellate courts, aware of their own lack of information as to the effects of the various practices, have decided that the various choices ought to be left to trial judges, in the hope that through their experience they will have enough of a "feel" in the area to act in an intelligent fashion.

The almost total failure of the courts to develop standards to guide the discretion of trial judges under section (a) is also characteristic of section (b). There have been almost no attempts to create guides to aid in the exercise of the trial court's discretion whether and when to use the interrogatories. Although there are some cases which suggest that it is error to submit questions which require the application of a legal definition,\footnote{127} the general rule is that the trial judge may submit questions going to evidentiary or ultimate fact.\footnote{128} The opinions generally indicate that the number and form of the questions is in the sole discretion of the trial courts.\footnote{129} However, there are some cases which suggest that it is improper to submit a question going

\footnote{122} See Cohen v. Travelers Ins. Co., 134 F.2d 378, 384 (7th Cir. 1943).
\footnote{125} Morris v. Pennsylvania R.R., 187 F.2d 837, 841 (2d Cir. 1951).
\footnote{126} Recently the Fifth Circuit has stated that either 49(a) or (b) should be used when the trial court is sitting on a diversity case and the state law is uncertain or in flux. Smoot v. State Farm Mut. Auto Ins. Co., 299 F.2d 525, 533 (5th Cir. 1962).
to an issue which the jury need not resolve in reaching its general verdict; but it is not clear whether the submission of such a question always, sometimes, or never, constitutes reversible error. When an answer against the victorious party would have been inconsistent with the general verdict, there is some authority for the proposition that the failure to answer shall be taken as a finding against the party with the burden of proof. The better view is that failure to answer should be corrected either by a new trial, or by having the jury reconsider the question. The case law does not indicate in what circumstances either of these is appropriate, nor what instructions should accompany an order to reconsider.

It is not clear whether a trial judge should attempt to construct the process so that some questions will serve to test answers to others; since section (b) provides for the situation in which answers are inconsistent with each other — and there are cases which deal with the problem of inconsistency between answers — it seems that one interrogatory can be used to test another. When the answers appear prima facie inconsistent with each other the opinions do not indicate whether the trial court should try to harmonize the answers, nor which of the two courses authorized by the rule to meet this problem should be followed. The problem raised when there is no inconsistency among the answers, but one or more is inconsistent with the general verdict, has received a great deal of consideration. Appellate opinions indicate that the trial judge has a duty to make the answers harmonious with the general verdict, if it is reasonably possible to do so. But the extent of the judge's duty and the test of what constitutes irreconcilable disharmony are nowhere clearly articulated. When the court cannot harmonize the answers with the general verdict, the case law gives absolutely no guidance as to which of the three courses authorized by the rule should be followed.

VI. CONCLUSION

A. The Evils of the Current Status of Rule 49

Practice under Rule 49 in the quarter-century since its adoption has fulfilled the intention of its drafters in one important respect; the pitfalls of common-law practice have been successfully abolished, and with one minor

130. See California West. States Life Ins. Co. v. Vaughn, 165 F.2d 945, 954 (9th Cir. 1948).


133. See text accompanying notes 109-11 supra for consideration of this issue.

134. The fact that the rule provides for inconsistent answers seems to indicate that it envisions testing questions — unless it only has poorly drafted questions in mind.

exception, no new traps have developed. There seems to be little danger that the outcome of a case will be determined solely because of a procedural blunder in the use of Rule 49. But, as we have argued, the drafters probably also expected that with time and experience knowledge about the effects of the procedures would accumulate, enabling the courts to develop standards so that trial judges would not have to rely on intuition, whim, and guesswork in making the decisions of when and how to use 49(a) and (b). The ensuing case law has fulfilled this expectation in very few respects. On almost every issue that has arisen, the appellate courts have told their colleagues of the trial bench only that the decision rests in their sole discretion.

This utter failure of the case law to live up to the drafters' probable expectations calls for some explanation. The prime cause seems to lie in the fact that experience with the use of Rule 49 has not led to an accumulation of knowledge of the effects that the new procedures, and the various possibilities in their implementation, have on the trial process. It is not at all clear that even those trial judges who frequently make use of Rule 49 have been able to learn anything by doing so; if there are trial judges who have acquired such knowledge, they have not communicated it to appellate courts through their opinions. There has been no empirical research on the effects of the new procedures, even on those questions which would be relatively susceptible to quantitative answers — for example, whether use of Rule 49 increases the chance of a hung jury. One suspects that the fact that there are many competing values at stake, and the fact that there has emerged no consensus as to which are paramount, may have tended to discourage empirical research by depriving the area of any inherent focus.

Lack of knowledge, in turn, may be deemed largely responsible for the retreat of the appellate courts into the language of absolute discretion. Some appellate judges, self-conscious in their lack of relevant information, may have decided that decisions on the use of Rule 49 should be left to trial courts, on the theory that the latter are at least closer to the situation in which the procedures are used. Other appellate judges, without making a principled division of institutional competence, may have taken the tack of discretion out of frustration in their attempts to discuss and reach agreement on the proper use of the various procedures and to articulate workable standards to guide the discretion of trial judges — a frustration caused by their conscious ignorance of the effects any given procedure would have on the values at stake.

The monotonous regularity with which appellate courts invoke the "sole discretion of the trial judge" on questions of Rule 49 practice comes to have

136. The unique requirement that a party must take exception to the failure of the court to submit a question demanded to preserve his right of appeal, see note 89 supra, may be troublesome but it is not as serious as the pitfalls in the common-law practice.

137. The contrast between setting out to research cancer and setting out to research "poverty" will illustrate this difficulty. In the former case, unanimity concerning the values at stake provides the research with inherent focus. In the latter case, the welter of inconsistent values at stake would make the initiation of research terribly difficult: one would not know what to look for, nor what its significance was if he found it.
the flavor of a litany pronounced in lieu of a consideration of the issues involved in an appeal. In reading appellate opinions in this area, one develops the feeling that although lack of sufficient knowledge to make decisions on the proper exercise of discretion under Rule 49 is the basic cause, it is not the only explanation for the current appellate treatment of Rule 49 questions. It seems that the phrase is now often used out of mere habit, rather than out of an ongoing appraisal of the actual possibilities for the creation of standards.

The fact that few standards for the proper use of Rule 49 have developed leaves the rule a potential source of serious problems for federal judicial administration. The frustration which must mark appellate consideration of the problems surrounding Rule 49 is probably even more prevalent at the district court level. A trial judge, realizing that decisions on Rule 49 questions may affect the outcome of litigation, may feel incapacitated by his lack of knowledge and guidance from making intelligent choices on whether and how to use the rule. Such a judge, who probably represents the majority of federal district judges, is faced with the unsettling reality of having to make such decisions “in his sole discretion”: that is, on the basis of mere assumptions as to the effects the possibilities open to him will have, and with the knowledge that his decisions will be virtually final. Even the judge who believes himself capable of making such empirical predictions is hardly in a better position; he must still make broad value judgments concerning the status and nature of the jury in civil trials without any guidance from the appellate courts. Although some judges may relish the opportunity, the majority probably feel that this is not a task appropriately left to their virtually unlimited discretion. This delegation of responsibility to trial judges not only puts them in an uncomfortable predicament; it also runs counter to the principle that the duty to make decisions involving broad questions of social policy should rest ultimately with appellate courts. The result of this misallocation leaves each judge to enforce his own notions of social policy, often without the benefit of knowledge of the actual effects his decision will have on the relevant policies. But the idiosyncracies of a particular trial judge should not be a crucial factor in determining the legal rights of the parties, nor should a legal system which subscribes to the principle of equal justice under law tolerate a situation in which critical decisions in a lawsuit turn on the fortunacy of the forum where it is heard.

If the current state of uninformed speculation appeared inevitable, it might be best to follow the suggestion of Justices Black and Douglas and to abolish Rule 49, not because the two procedures serve no function but because the present situation of unguided discretion is entirely unsatisfactory to the courts and to litigants and because the general verdict is the most familiar mode of procedure. But the past twenty-five years notwithstanding, it is not clear that the knowledge necessary to begin a realistic evaluation of the pro-

The first prerequisite to any constructive development is a change in attitude on the part of those appellate judges whose positions on the proper use of Rule 49 are based entirely upon unchallenged assumptions, and on the part of those who have come to repeat almost automatically the litany that all questions under Rule 49 are in the sole discretion of the trial courts.

There are a number of ways in which the information necessary for meaningful appellate consideration of Rule 49 can be obtained. The most obvious method of determining the varying effects upon the deliberations of jurors of general verdicts, special verdicts, and interrogatories, and the possible alternative practices under each form of verdict, is to listen to those deliberations in real cases without the knowledge of the jurors. Because of the serious objections to this mode of inquiry,139 other means of obtaining equivalent information, such as questioning jurors after the termination of the case and studying mock jury trials might be used.140 But the results of such alternative means will require careful evaluation for their reliability as reflections of what actually transpires during actual jury deliberations.

Information of a different sort may be gathered by carefully controlled comparative statistical surveys. The questions to be answered are numerous. For example, how often is appeal taken on the basis of the form or content of the questions used with the special verdict and the general verdict with interrogatories? How often is a new trial granted under each of the three procedures? Is partial new trial, when used, appreciably faster than the full new trial which follows the reversal of a general verdict? What are the comparative percentages of hung juries? What impact does the use of each of the

139. Galston, Civil Jury Trials and Tribulations, 29 A.B.A.J. 195, 198 (1943), suggests that a transcription of the jury-room deliberations be made and filed with the verdict. (This may be the logical extension of special interrogatories.) He posits that "there is no good reason why verdicts should be shrouded in secrecy anymore than are the findings by the court sitting without a jury." Ibid. He further suggests that the name of the juror making a specific remark need not be recorded. Judge Frank, in Courts on Trial 144 (1949), endorsed the proposal to the extent of saying that it "deserves consideration."

There was, however, a good deal of controversy stirred when the jury project of the University of Chicago attempted to record jury deliberations. Hearings on S. Res. 58 Before the Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Senate Committee on the Judiciary ("Recording of Jury Deliberations"), 84th Cong., 1st Sess. 1, 5-7, 8, 44-46, 57-62, 186-90 (1955). These hearings led to the addition of a section of the criminal code making it punishable by fine and/or imprisonment to record or attempt to record the proceedings of any grand or petit jury in any court of the United States while such jury is deliberating. 70 Stat. 935 (1956), 18 U.S.C. § 1508 (1958). Although the enactment applies only to the federal courts, the public reaction to the Chicago project has undoubtedly foreclosed any similar attempt in the near future.

three procedures have on results? The methodological difficulties involved in collecting significant statistics are complicated by the large number of variables involved. There would be little if any value in comparing, for example, the special verdict and the general verdict, without taking into account such factors as the way in which each is implemented (e.g., use of omnibus questions, instructions on the law to be applied), the type of law suit involved, the complexity of the issues, and so forth.

Trial judges are another potential source of the information necessary to begin an evaluation of the procedures. If trial judges, by observation or by intuition, can gather any reliable information they should be encouraged to communicate their findings to the appellate courts. Those judges who were members of the trial bar before they took the bench may be able to give valuable insight into the process of jury deliberations. Communication from trial judges to appellate courts can be accomplished informally during judicial conferences and by appellate encouragement of opinion-writing on the subject by trial judges. In those cases in which a trial court's decisions on whether and how to use Rule 49 are challenged by a party, appellate courts might reasonably require the trial judge to write an opinion justifying his decisions.\(^1\)

The danger that such a requirement might lead only to boiler-plate opinions because of the pressures of congested trial dockets could be overcome by a spirit of cooperation on the part of trial judges.

Because it is impossible to make an *a priori* judgment that one or another of the three procedures is of no value, it is essential that all of them be used in order to furnish the informational basis necessary for rational development of standards for their use. Otherwise decisions would have to be made on the basis of the inadequate information heretofore gathered and upon mock cases. Additionally, if only one of the procedures were used until sensible standards could be developed — and the procedure retained would inevitably be the traditional and firmly entrenched general verdict — interest in gathering information on the others would probably wane and the legal profession would lapse into the complacent acceptance of the general verdict from which the commentators jarred it loose.

The two immediate objectives of retaining all three procedures are to collect and evaluate information on their effects and to initiate the development of and experimentation with standards to govern their use. The first objective requires that each type of verdict, and all of the possible practices under each, receive sufficient use in all kinds of cases to afford a substantial basis for comparison and analysis. Since a mechanical system which would guarantee the accomplishment of an equal allocation would be nearly impossible to devise and would tend to frustrate the implementation of experimental stand-

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141. Of course, such justificatory opinions should not be required with respect to decisions which the appellate court decides are within the range of proper trial court discretion. On the other hand, until that range is itself delimited, one of the functions of trial court opinions would be to suggest where non-reviewability is appropriate.
ards, trial judges can only be encouraged to use all the practices in all types of cases, subject to such standards as the appellate courts have been able to formulate. It is the appellate bench which must accomplish the second objective. Even if there is not enough information at present to reach firm conclusions, the appellate courts should begin to devise tentative guides and standards. These experimental standards must be constantly re-evaluated by the courts; they must not be allowed to become rigid, and should be treated only as tentative attempts based on incomplete information.

As the data becomes more complete, the appellate courts should undertake to create more permanent and comprehensive guides for trial courts. This may be the most difficult job of all. The values at stake are many — among them are reduction of expense to litigants and of delay in the trial and appellate dockets, public confidence in trial by jury and in the legal process, rationality of the trial process, accuracy in fact-finding, sophistication in the application of law to facts, mitigation of harsh laws by a group of laymen, and dispensation of equity justice. There is not, and probably never can be, any agreement in the abstract as to how much importance should be attributed to each of the various values. But it does seem possible that when faced with concrete practical questions some consensus could be reached. For example, all would agree that a procedure which greatly increased the speed and decreased the cost of litigation and which had no effect on the role of the jury would be an improvement in the system. Should time prove the assumptions of the commentators true, then the basic choice between the traditional central role of the jury and the drastically limited role advocated by the commentators will have to be faced. As long as there are men like Moore and Wigmore on one side and Frank and Sunderland on the other, consensus on this issue will never be reached. At that point, the courts charged with the responsibility for supervising federal procedure will simply have to make a very basic choice.

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Rule 49. Special Verdicts and Interrogatories.

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied By Answer To Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial. [Fed. R. Civ. P. 49 (as amended, 1963).]