

## Notes

# **12 CONFUSED MEN: USING FLOWCHART VERDICT SHEETS TO MITIGATE INCONSISTENT CIVIL VERDICTS**

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### ABSTRACT

*The finality of jury verdicts reflects an implicit societal acceptance of the soundness of the jury's decision. Regardless, jurors are not infallible, and the questions they are often tasked with deciding are unfortunately neither obvious nor clear. The length of trial, complexity of subject matter, volume of factual background, and opaqueness of law can converge in a perfect storm that may confound even the most capable juror. Although the Federal Rules of Civil Procedure provide decision rules to resolve inconsistent verdicts, the current remedies authorized by Rule 49—notably, the resubmission of the verdict to the jury and the ordering of a new trial—impose time and money costs on the jury, litigants, and judicial system. The increasing complexity of civil litigation raises the stakes by increasing the likelihood of juror error and the costs of relitigating the case.*

*This Note proposes the creation of flowchart verdict sheets as a prophylactic against juror confusion. The flowchart verdict sheet builds upon current legal reform proposals to increase juror understanding while decreasing juror confusion and incorporates principles of effective visual design. By mitigating the confusion that can result in inconsistencies before the verdict is rendered, the flowchart verdict sheet enables the judicial system to avoid the costs associated with remedying inconsistent verdicts.*

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“Oh come on, nobody can know a thing like that. This isn’t an exact science.”<sup>1</sup>

## INTRODUCTION

Imagine you are sitting on the jury for an excessive force trial.<sup>2</sup> The plaintiff has brought an excessive-force claim under 42 U.S.C. § 1983 and a state-law battery claim—among others—and seeks monetary damages for injuries sustained at the hands of two New York state correctional officers while he was held in a Suffolk County courthouse cell awaiting an appearance on an outstanding warrant.<sup>3</sup> You learn that, without provocation, the correctional officers punched the plaintiff in the face, struck the plaintiff’s head, slammed the plaintiff on the floor, and kicked him in the lower back.<sup>4</sup> You also see photographs of the plaintiff’s injuries, depicting a swollen eye, a broken nose, and multiple facial lacerations and contusions.<sup>5</sup> Perhaps you hear testimony about the hundreds of pages of medical records, diagnoses, and bills stemming from the plaintiff’s medical treatment after the incident.<sup>6</sup> You might hear the plaintiff himself testify to how he acquired a disability certificate for the resulting internal derangement of his left knee or how he needed to visit a chiropractor for the knee injury as well as for neck, lower-back, and nasal pain.<sup>7</sup>

At the close of the trial, you may feel relatively confident about the verdict you will reach. After all, you heard the judge’s instructions on the legal elements of an excessive force claim under § 1983 and on

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1. 12 ANGRY MEN (United Artists 1957).

2. The substantive facts for this illustration are drawn from *Anderson v. County of Suffolk*, No. 2:09-cv-1913 (E.D.N.Y. filed May 6, 2009). The inferences drawn from this case are rhetorical and not intended as true representations of the jurors’ actual thoughts or what they may have seen at trial.

3. First Amended Complaint at 1, 6–7, *Anderson*, No. 2:09-cv-1913 (E.D.N.Y. Feb. 11, 2011), ECF No. 15.

4. *Id.* at 1, 7.

5. Plaintiff’s Exhibits at 2a–2q, *Anderson*, No. 2:09-cv-1913 (E.D.N.Y. Mar. 8, 2013), ECF No. 62-1.

6. Plaintiff’s Exhibits at 3–5, 8, 10–11, *Anderson*, No. 2:09-cv-1913 (E.D.N.Y. Mar. 8, 2013), ECF Nos. 62, 62-2, 62-3, 62-4.

7. See Plaintiff’s Exhibit 5, *Anderson*, No. 2:09-cv-1913 (E.D.N.Y. Mar. 8, 2013), ECF No. 62-2 (presenting medical records demonstrating the plaintiff’s injuries). In the actual case, the plaintiff Perrim Anderson incurred bills in excess of \$8000 for chiropractic treatment alone, in addition to other costs for further treatment of his injuries. Plaintiff’s Exhibit 7 at 9, 13, *Anderson*, No. 2:09-cv-1913 (E.D.N.Y. May 6, 2009), ECF No. 62-3.

the applicable New York state law for battery.<sup>8</sup> The verdict sheet also directs you to determine the amount of damages if you find either officer individually liable on either the excessive force or battery claim.<sup>9</sup> As you deliberate, you send a note to the judge requesting some of the exhibits shown at trial, including the photographs of the plaintiff's injuries.<sup>10</sup> Three days later, you inform the judge that you have reached a verdict—you have found only one of the officers liable on both the excessive force claim and the battery claim and have awarded the plaintiff \$65,000 in damages.<sup>11</sup>

The plaintiff's lawyer raises a potential inconsistency in the verdict, noting the ambiguity in whether you and your fellow jurors based the damages upon the excessive force claim or the battery claim.<sup>12</sup> Consequently, the judge sends you back into the jury room to clarify your verdict.<sup>13</sup> You inform the judge that the damages pertain only to the excessive force claim and return to the jury room for further deliberations.<sup>14</sup> At this point, you might not understand what exactly the judge is looking for—you certainly agree with your fellow jurors that one of the defendant correctional officers violated the plaintiff's constitutional rights by using excessive force. But you are not sure if you are still allowed to find that the defendants *also* battered the plaintiff or if doing so would lead you back to the same ambiguity that you were requested to clarify.<sup>15</sup> At the same time, finding that the defendants did *not* batter the plaintiff makes you uneasy, and the graphic photographs of the plaintiff's injuries sitting before you in the jury room do you no favors.<sup>16</sup> You send another

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8. Under Second Circuit precedent, to establish an excessive force claim under § 1983, “a plaintiff must show that the force used by the officer was, in light of the facts and circumstances confronting [the officer], “objectively unreasonable” under Fourth Amendment standards.” *Davis v. Rodriguez*, 364 F.3d 424, 431 (2d Cir. 2004) (quoting *Finnegan v. Fountain*, 915 F.2d 817, 823 (2d Cir. 1990)). As for the state law battery claim, New York state law requires the plaintiff to show that the defendant “intentionally touch[ed] [the plaintiff], without [the plaintiff]’s consent, and cause[d] an offensive bodily contact.” N.Y. PATTERN JURY INSTR.—CIVIL 3:3 (Committee on Pattern Jury Instructions Ass’n of Supreme Court Justices 2013).

9. Order at 2–3, *Anderson*, No. 2:09-cv-1913 (E.D.N.Y. Apr. 11, 2013), ECF No. 89.

10. Court Exhibit 1, *Anderson*, No. 2:09-cv-1913 (E.D.N.Y. Mar. 25, 2013), ECF No. 82.

11. Order, *supra* note 9, at 2–3.

12. *Id.* at 3. The jury’s confusion may in part be explained by the language in the verdict sheet, which asked the jury to determine the amount of compensatory damages if it found the defendants “liable on the Section 1983 *and/or* battery claim.” *Id.* at 2 (emphasis added).

13. *Id.* at 3.

14. *Id.* at 3–4.

15. *See supra* notes 12–13.

16. Plaintiff’s Exhibits, *supra* note 5, at 2a–2q.

note to the judge, asking if the answers you have changed on the verdict sheet “fall in line with [the judge’s] request to reconsider.”<sup>17</sup> Thereafter, you return a second verdict. Although you again find the same officer liable on the excessive force claim and assign the same damages, you now find the officer not liable on the battery claim—thereby creating an inconsistent verdict.<sup>18</sup>

In cases involving inconsistencies between a general verdict and a jury’s answers to special interrogatories,<sup>19</sup> a court generally has three options: it may enter judgment based on the answers to the special interrogatories, resubmit the verdict to the jury for further consideration, or order a new trial.<sup>20</sup> In *Anderson v. County of Suffolk*,<sup>21</sup> the court sought to remedy the potential ambiguity in the first verdict by asking the jury to clarify whether the damages pertained to the excessive force claim or to the battery claim.<sup>22</sup> Although the jury addressed the original ambiguity by changing its answer for the battery claim, it inadvertently created an inconsistency within the special interrogatories by “explicitly finding [the defendant] liable on the Section 1983 claim based upon excessive force and awarding damages accordingly, but finding [the defendant] not liable on a battery claim.”<sup>23</sup> The court acknowledged that it was impossible to harmonize the jury’s answers, reasoning that although the jury could theoretically find that the defendant’s alleged “actions such as punching Plaintiff and throwing him to the ground . . . constituted a battery but did not rise to the level of a [§ 1983]

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17. Order, *supra* note 9, at 4 (quoting Court Exhibit 6, *Anderson*, No. 2:09-cv-1913 (E.D.N.Y. Mar. 25, 2013), ECF No. 82).

18. *Id.* at 4–5 (quoting Court Exhibit 8, *Anderson*, No. 2:09-cv-1913 (E.D.N.Y. Mar. 25, 2013), ECF No. 82). In short, the inconsistency arises because the excessive force claim essentially presupposes that *some* force has been applied, which would necessitate finding that a battery has occurred. See *supra* note 8.

19. Although *Anderson* may also be fairly seen as a case in which the jury was asked to render a general verdict for battery and another general verdict for excessive force, see *infra* note 90, the court analyzed the validity of the verdict under the framework for general verdicts with special interrogatories, Order, *supra* note 9, at 6–8.

20. FED. R. CIV. P. 49(b)(3).

21. *Anderson v. Cnty. of Suffolk*, No. 2:09-cv-1913 (E.D.N.Y. filed May 6, 2009).

22. Order, *supra* note 9, at 6. Because the court found the jury’s answers to the special interrogatories “consistent with one another but arguably inconsistent with the general verdict,” it proceeded under Rule 49(b)(3). *Id.* For a more in-depth discussion of the legal landscape concerning inconsistent verdicts, see *infra* Part I.

23. Order, *supra* note 9, at 7.

constitutional deprivation, the converse is not also true.”<sup>24</sup> Citing the inconsistent verdict as evidence of the jury’s confusion, the court declined to resubmit the verdict to the jury for further consideration and instead deemed a new trial necessary.<sup>25</sup>

The Federal Rules of Civil Procedure (Federal Rules) authorize an array of remedies for inconsistent jury verdicts.<sup>26</sup> Although a judge, when confronted with an inconsistent verdict, has discretion under Rule 49 to either resubmit the verdict to the jury for further deliberation or order a new trial,<sup>27</sup> these ex post remedies can be expensive for all parties in terms of both time and money.<sup>28</sup> New trials, in particular, can be financially burdensome for the judicial system given the monetary costs of trying a case<sup>29</sup>—costs which are ultimately borne by taxpayers and society as a whole.<sup>30</sup> Trials also impose time and money costs on the litigants,<sup>31</sup> which may be

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24. *Id.* at 8. Although the jury’s misunderstanding of the relationship between the battery and excessive force claims presumably can be resolved by either a visual or textual verdict sheet, this Note argues that visual formats explain context and relationships among legal claims and among elements within a claim more clearly. *See infra* Part III.B.3.

25. Order, *supra* note 9, at 7–9.

26. For a more detailed discussion on the court’s choices when confronted with an inconsistent verdict, see *infra* Part I.A.

27. FED. R. CIV. P. 49(b)(3).

28. *See Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 279 (2d Cir. 1979) (recognizing that retrials can be “laborious and expensive”).

29. *See Sylvia R. Lazos, Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations*, 84 MICH. L. REV. 308, 308 n.1 (1985) (noting that the average cost of a jury trial in federal court in 1982 ranged from \$5843 to \$12,035); Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 392–93 (1986) (“A recent study found that the average out-of-pocket cost to the federal government of certain tort cases tried by jury is \$15,028 . . .”). For a comprehensive study on the costs of civil disputes on the civil justice system and on society, see generally JAMES S. KAKALIK & ABBY EISENSHTAT ROBYN, COSTS OF THE CIVIL JUSTICE SYSTEM (1982), available at <http://www.rand.org/content/dam/rand/pubs/reports/2007/R2888.pdf>.

30. *See Scott Brister, The Decline in Jury Trials: What Would Wal-Mart Do?*, 47 S. TEX. L. REV. 191, 208–09 (2005) (discussing the costs for taxpayers of summoning jurors, protecting jurors, instructing jurors, and paying juror fees).

31. *See Samsung’s Request for Thirty Minutes to Review the Jury Verdict Form Before the Jury is Dismissed For the Purpose of Seeking Clarification of Potential Inconsistent Verdict if Necessary* at 2, *Apple Inc. v. Samsung Elecs. Co.*, 888 F. Supp. 2d 976 (No. 11-cv-1846) (N.D. Cal. 2012) [hereinafter *Samsung’s Request*] (noting that the litigants “ha[d] expended substantial time, money, and resources to bring this case to verdict”). In addition, litigants may need to pay miscellaneous fees for filing extra documents. *See, e.g.*, ADMIN. OFFICE OF THE U.S. COURTS, DISTRICT COURT MISCELLANEOUS FEE SCHEDULE (2013), available at <http://www.uscourts.gov/FormsAndFees/Fees/DistrictCourtMiscellaneousFeeSchedule.aspx> (detailing various federal filing fees). And of course, litigants might also be responsible for

especially significant if the case involves expert witnesses or voluminous discovery,<sup>32</sup> or for litigation involving highly complex subject matter.<sup>33</sup> Costs may be further shouldered by jurors, who are forced to forgo their “time, wages, and productivity” while participating in the trial.<sup>34</sup> Even if the judge avoids ordering a new trial, there may also be costs associated with resubmitting inconsistent verdicts to juries for further deliberation. For example, in addition to time costs on the judicial system, federal courts must pay jury fees for empaneling the jury for an extra day,<sup>35</sup> along with potential transportation costs<sup>36</sup> and subsistence allowances.<sup>37</sup> And of course, jurors still bear the costs of lost time, wages, and productivity while re-deliberating.<sup>38</sup>

Certainly, inconsistent jury verdicts are not inherently problematic. As discussed above, both the Federal Rules and case law provide judges with multiple options when confronted with inconsistent jury verdicts, including the option of ordering of a new trial as a backstop. If reaching the “right” answer is the only concern, then asking a jury to reconsider its verdict or ordering a new trial does not seem especially unpalatable. Rather, this Note posits that it is the *consequences* of the very actions meant to remedy inconsistent verdicts—time and money expenses—that are the problems presented by inconsistent jury verdicts. But what if one could avoid the costs associated with these ex post remedies by preventing juror confusion ex ante?

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attorneys’ fees. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 245 (1975) (noting that prevailing parties are not generally entitled to attorneys’ fees from the losing party).

32. Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 770 (2010). The authors found median litigation costs to be \$15,000 for plaintiffs and \$20,000 for defendants in cases involving discovery. *Id.* Other commentators have also recognized the sizeable costs that discovery can impose. See Brister, *supra* note 30, at 209 (“Given the broad scope of civil discovery, pretrial costs normally far exceed those incurred at trial . . .”).

33. See Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 NW. U. L. REV. 1495, 1502 (2001) (“[T]he median cost of patent litigation to each side is \$799,000 through the end of discovery, and \$1,503,000 through trial and appeal.”).

34. Brister, *supra* note 30, at 209.

35. 28 U.S.C. § 1871(b)(1) (2012). The statute establishes the juror attendance fee at \$40 per juror per day. *Id.*

36. *Id.* § 1871(c).

37. *Id.* § 1871(d).

38. See *supra* note 34 and accompanying text.

This Note expands on the current academic literature on jury reform and proposes the use of flowcharts in verdict sheets to minimize the risk of inconsistent jury verdicts caused by jury confusion. These “flowchart verdict sheets” can visually—and in a clear and intuitive manner—“map” the cognitive decisions a jury must make to reach a verdict. The flowchart verdict sheet thus aims to reduce juror confusion through several means: by unlocking the visual-reasoning abilities of jurors, by increasing juror comprehension and decisionmaking, and by presenting the valid decision paths leading to specific outcomes. In doing so, the flowcharts are not meant to function as a remedy that repairs inconsistent results, but as a prophylactic that enables juries to get to the “right” result the first time. Finally, this Note proposes as an introductory step toward implementation the creation of pattern flowchart verdict sheets for certain types of legal claims that a court is likely to encounter.

Both courts and academic scholars are aware of the problem of inconsistent jury verdicts and the current remedies available to address them. Rule 49 of the Federal Rules authorizes certain remedies for inconsistent verdicts,<sup>39</sup> but as Part I explains, these ex post remedies can be expensive and time consuming. Rather, given the wide discretion over the implementation of the verdict that Rule 49 vests in the trial judge, Part II argues that judges should consider using flowchart verdict sheets to prevent the juror confusion that can cause inconsistent verdicts. As Part III demonstrates, extensive academic literature supports the use of visuals and simple language to assist jurors in comprehension and decisionmaking. The flowchart verdict sheet also increases clarity and unlocks the jury’s visual-reasoning abilities by applying Professor Edward Tufte’s principles of effective visual design, as discussed in Part IV. Finally, Part V speculates that despite Rule 49’s permissive language concerning jury verdict sheets, flowchart verdict sheets—and other visual formats of verdict sheets—are not widely implemented in part because the costs of implementation may outweigh the benefits or because of judicial resistance to change. As Part V submits, however, creating pattern flowchart verdict sheets that incorporate the principles described in Parts III and IV can not only minimize the fear of appellate reversal underlying the hesitancy to implement the verdict sheets, but also represent a viable first step toward tackling the financial consequences of inconsistent jury verdicts.

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39. FED. R. CIV. P. 49.

## I. LEGAL BACKGROUND ON INCONSISTENT JURY VERDICTS

Since the colonial era, the use of juries has been an entrenched and perhaps essential part of the American legal system.<sup>40</sup> Even in modern times, civil trials have accounted for half of the ten thousand federal jury trials each year.<sup>41</sup> The jury's verdict has also been regarded as virtually untouchable,<sup>42</sup> with the jury's mental processes and reasoning shielded from the eyes of the public and the court.<sup>43</sup> Courts in both criminal and civil cases have upheld the deference that should be given to the jury's decisions and decisionmaking process.<sup>44</sup> Indeed, the policy reasons behind protecting the sanctity of jury verdicts are important;<sup>45</sup> juries, however, are far from infallible in their decisionmaking. Although juries are generally presumed to follow the court's instructions,<sup>46</sup> situations in which a jury mistakenly misunderstands the law or intentionally disregards the judge's instructions may result in a verdict inconsistent with the facts or the applicable law.<sup>47</sup>

Two preliminary factors should be considered. First, the distinction between inconsistencies caused by unintentional misunderstanding and those caused by intentional disregard is important—the proposed flowchart verdict sheets are meant primarily to address inconsistent jury verdicts that result from jury confusion, lack of comprehension, or faulty decisionmaking as opposed to erroneous verdicts caused by intentional nullification,

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40. Stephan Landsman, *The Civil Jury in America*, 62 LAW & CONTEMP. PROBS. 285, 288 (1999). For a more in-depth discussion on the historical underpinnings and development of the American jury, see *id.* at 287–89. This Note will focus on federal civil jury trials. As some legal scholars have suggested, courts may view procedural departures—such as unconventional verdict sheets—with more suspicion in criminal trials. See *infra* note 92 and accompanying text.

41. *Id.* at 289.

42. Although, for example, judgments notwithstanding the verdict allow judges to override a jury verdict, some scholars posit that those are infrequently used. See *infra* note 233 and accompanying text.

43. Landsman, *supra* note 40, at 304.

44. *E.g.*, *Tanner v. United States*, 483 U.S. 107, 118–19 (1987); *Mid-West Underground Storage, Inc. v. Porter*, 717 F.2d 493, 501 (10th Cir. 1983).

45. See *Tanner*, 483 U.S. at 119–20 (recognizing the need to protect the finality and legitimacy of verdicts and to insulate the jury from harassment).

46. *Watkins v. Sowders*, 449 U.S. 341, 347 (1981); *Chlopek v. Fed. Ins. Co.*, 499 F.3d 692, 702 (7th Cir. 2007).

47. For an extended discussion on the role of jury nullification in civil trials and reasons why juries may disregard the law, see generally Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601 (2001).



deliberate misconduct, or extraneous influences.<sup>48</sup> Flowcharts promoting clarity and comprehension would not stop a jury intent on disregarding a judge's instructions.<sup>49</sup> Second, the form of verdict submitted—whether it is a traditional general verdict, a special verdict, or a general verdict with interrogatories—may be relevant to the likelihood of inconsistencies in the verdict, which in turn may determine the applicability of the flowchart verdict sheets.<sup>50</sup>

#### A. *The Framework of Rule 49*

Rule 49 of the Federal Rules specifies the verdicts that a jury may return based on the form of verdict that the court submits to the jury. It also outlines the basic parameters for each form of verdict and delineates what the court has discretion to do for each kind of verdict.<sup>51</sup> Rule 49, however, does not cover traditional general verdicts, in which the jury need only “announce which party wins, and, if it is plaintiff, the amount that should be recovered.”<sup>52</sup> This Section examines special verdicts and general verdicts with interrogatories, as provided for by Rules 49(a) and 49(b). As will be seen, many courts have contributed to the case law interpreting the Rule 49 framework and applying the currently available remedies for inconsistent verdicts, which include resubmission of the interrogatories to the jury and the ordering of a new trial.

1. *Special Verdicts.* Rule 49(a) grants the trial court discretion to require the jury to return a special verdict, in which the jury answers only written interrogatories of fact but does not enter a general verdict declaring which party prevails.<sup>53</sup> Rather, the *judge* is the one who applies the applicable legal standard to the jury's factual

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48. See *id.* at 1604 (drawing the distinction between jury nullification and “instances where a jury may have misunderstood the facts or the law”).

49. But cf. *id.* at 1633 (suggesting that special verdicts and interrogatories may decrease the likelihood of a jury intentionally disregarding the judge's instructions).

50. See *infra* Part II.

51. FED. R. CIV. P. 49.

52. JACK H. FRIEDENTHAL, ARTHUR R. MILLER, JOHN E. SEXTON & HELEN HERSHKOFF, *CIVIL PROCEDURE: CASES AND MATERIALS* 1108 (10th ed. 2009).

53. FED. R. CIV. P. 49(a)(1); FRIEDENTHAL ET AL., *supra* note 52, at 1109; see *Selgas v. Am. Airlines, Inc.*, 858 F. Supp. 316, 320 (D.P.R. 1994), *aff'd in part and vacated in part sub nom. Kerr-Selgas v. Am. Airlines, Inc.*, 69 F.3d 1205 (1st Cir. 1995) (“The parties agree that the initial jury verdict form consisted of a special verdict, because it asked the jury for findings of fact without requesting a general finding for one of the parties. Therefore, the analysis should begin with [Rule 49(a)].”).

findings.<sup>54</sup> Although Rule 49(a) does not have explicit language referring to inconsistencies in the answers to the interrogatories, courts have recognized that “it is clear that in order for a verdict [under Rule 49(a)] to stand the answers must be consistent . . . .”<sup>55</sup> And although it follows that Rule 49(a) would thus remain silent on the appropriate remedies for any inconsistent factual findings by the jury, the Supreme Court has indicated that the trial court has a duty to harmonize inconsistent answers to the interrogatories.<sup>56</sup> In addition, courts have held that judges have discretion to submit additional interrogatories to the jury,<sup>57</sup> to make missing factual findings,<sup>58</sup> and finally, to order a new trial if the inconsistency cannot be adequately reconciled by the court.<sup>59</sup>

2. *General Verdicts With Special Interrogatories.* In contrast to Rule 49(a), Rule 49(b) allows the court to submit a general verdict to the jury in addition to the written interrogatories of fact.<sup>60</sup> A jury must both “render [the] general verdict and answer the questions in writing” under this section.<sup>61</sup> The court is then given discretion to pursue different actions based on whether and to what extent the jury’s verdict is consistent with the answers to the special interrogatories.<sup>62</sup>

If the jury’s verdict is consistent with the answers, the court’s only option is to enter judgment under Rule 58 on the verdict and answers.<sup>63</sup> If, however, courts are confronted with inconsistent jury

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54. *Babcock v. Gen. Motors Corp.*, 299 F.3d 60, 63 (1st Cir. 2002); *see Guidry v. Kem Mfg. Co.*, 598 F.2d 402, 405 (5th Cir. 1979) (recognizing the usefulness of a Rule 49(a) verdict in allowing a jury to focus on the facts without the risk of confusion as to which legal standard to apply to the facts).

55. *Morrison v. Frito-Lay, Inc.*, 546 F.2d 154, 160 (5th Cir. 1977).

56. *Gallick v. Balt. & Ohio R.R. Co.*, 372 U.S. 108, 119 (1963).

57. *Morrison*, 546 F.2d at 160–61. The court reasoned that in that specific instance, “[i]t would be anomalous to hold that, while a court pursuant to 49(a) must search for a view of the case that will make the jury’s answers consistent, it may not submit an additional interrogatory to the jury to clarify an ambiguity.” *Id.* at 161. The court did leave open the question of whether every case involving inconsistent answers permitted a judge to submit supplementary interrogatories. *Id.* However, at least one other court has submitted supplementary interrogatories to clarify an ambiguity. *Selgas*, 858 F. Supp. at 319.

58. *Blackwell v. Cities Serv. Oil Co.*, 532 F.2d 1006, 1008 n.2 (5th Cir. 1976) (per curiam).

59. *Bonin v. Tour W., Inc.* 896 F.2d 1260, 1263 (10th Cir. 1990).

60. FED. R. CIV. P. 49(b)(1).

61. *Id.*

62. FED. R. CIV. P. 49(b).

63. FED. R. CIV. P. 49(b)(2).

verdicts, subdivisions (b)(3) and (b)(4) of Rule 49 provide guidance to judges.<sup>64</sup> If the jury's answers to the special interrogatories are internally consistent but at least one answer is inconsistent with the general verdict, Rule 49(b)(3) gives the court three choices: first, it can "approve, for entry under Rule 58, an appropriate judgment according to the answers, notwithstanding the general verdict;"<sup>65</sup> second, it can "direct the jury to further consider its answers and verdict;"<sup>66</sup> and third, it can "order a new trial."<sup>67</sup> The court's discretion as to these choices must, however, be exercised in light of the circumstances creating the inconsistency.<sup>68</sup> The only limitation on the trial court's discretion is that the judge may not enter judgment based on the *verdict* if it is inconsistent with the interrogatories.<sup>69</sup> However, as with Rule 49(a), courts have held that the trial judge must first attempt to harmonize the verdict with the special interrogatories before considering the three options provided by Rule 49(b)(3) and should only resort to those options if it is not reasonably possible to "resolve the apparent inconsistency between the answers and the verdict."<sup>70</sup>

Lastly, if the answers are internally inconsistent *and* at least one is inconsistent with the general verdict, the court must choose between resubmitting the verdict to the jury for further deliberation and ordering a new trial—it may not enter judgment on either the verdict or the interrogatories.<sup>71</sup> As with Rule 49(b)(3), courts have held that under Rule 49(b)(4), the trial judge has a duty to attempt to harmonize inconsistent answers "if it is possible under a fair reading

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64. See *Jonielunas v. City of Worchester Police Dep't*, 338 F. Supp. 2d 173, 179 (D. Mass. 2004) (recognizing that the court is not obligated to disregard an inconsistent jury verdict as a matter of form).

65. FED. R. CIV. P. 49(b)(3)(A); *Nimnicht v. Dick Evans, Inc.*, 477 F.2d 133, 135 (5th Cir. 1973).

66. FED. R. CIV. P. 49(b)(3)(B).

67. FED. R. CIV. P. 49(b)(3)(C).

68. In *Phillips Chemical Co. v. Hulbert*, 301 F.2d 747, 751 (5th Cir. 1962), the Fifth Circuit determined that it would be improper to resubmit the verdict form to the jury for consideration when the jury had already proved incapable of resolving the inconsistency. *Id.*

69. *Blackwell v. Cities Serv. Oil Co.*, 532 F.2d 1006, 1008 (5th Cir. 1976) (per curiam).

70. *Selgas v. Am. Airlines, Inc.*, 858 F. Supp. 316, 321 (D.P.R. 1994), *aff'd in part and vacated in part sub nom. Kerr-Selgas v. Am. Airlines, Inc.*, 69 F.3d 1205 (1st Cir. 1995) (quoting *Wilks v. Reyes*, 5 F.3d 412, 415 (9th Cir. 1993)) (quotation marks omitted); *Kirkendoll v. Neustrom*, 379 F.2d 694, 699 (10th Cir. 1967) (quoting *Gallick v. Balt. & Ohio R.R. Co.*, 372 U.S. 108, 119 (1963)).

71. FED. R. CIV. P. 49(b)(4).

of them[.]”<sup>72</sup> In other words, if the jury’s answers to special interrogatories can be read consistently, “they must be resolved that way.”<sup>73</sup>

### B. *The Broad Discretion of the Trial Courts*

Rule 49 contains permissive language that leaves the form of verdict to the trial judge’s discretion.<sup>74</sup> It may be possible to even infer that the trial judge’s discretion in forming verdicts under Rule 49 arises out of a desire to limit the possibility of inconsistencies in the verdict.<sup>75</sup> As a threshold matter, the court has a duty to ensure that the jury returns a verdict “capable of supporting a judgment.”<sup>76</sup> For example, ambiguous or unclear verdicts would be “insufficient to support a judgment.”<sup>77</sup> Likewise, incomplete verdicts or verdicts that otherwise leave the disposition of certain issues to the jury’s inference do not meet this standard.<sup>78</sup> Rule 49, however, grants the trial judge not only complete discretion over whether to use a special verdict or a general verdict with written interrogatories as opposed to a traditional general verdict in the first place, but also considerable latitude in determining how to implement the interrogatories.<sup>79</sup> As one commentator notes, “it is remarkable how little help [Rule 49] gives a judge in determining when and how to use a special verdict or a general verdict with interrogatories.”<sup>80</sup> Federal appellate courts

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72. Cf. *Jonielunas v. City of Worchester Police Dep’t*, 338 F. Supp. 2d 173, 179 (D. Mass. 2004) (stating the general proposition that “it is the duty of the courts to attempt to harmonize the answers” to interrogatories (quoting *Gallick*, 372 U.S. at 119) (quotation mark omitted)).

73. *Id.* (quoting *Atl. & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962)) (quotation marks omitted); see *L.A. Nut House v. Holiday Hardware Corp.*, 825 F.2d 1351, 1353–54 (9th Cir. 1987) (indicating that a verdict must be upheld unless it is impossible to harmonize the answers under a fair reading).

74. *Selgas*, 858 F. Supp. at 320; see *In re CLDC Mgmt. Corp.*, 72 F.3d 1347, 1353 (7th Cir. 1996) (“A trial court has wide discretion in submitting special verdicts to the jury in order to facilitate its comprehension of the issues.”); Robert Dudnik, Note, *Special Verdicts: Rule 49 of the Federal Rules of Civil Procedure*, 74 YALE L.J. 483, 483 (1965).

75. See *Guidry v. Kem Mfg. Co.*, 598 F.2d 402, 406 (5th Cir. 1979) (“It is critical, however, that the structure of the questions and proposed answers avoid the possibility that the answers will be conflicting.”).

76. *Cheney v. Moler*, 285 F.2d 116, 118–19 (10th Cir. 1960).

77. *Hartnett v. Brown & Bigelow*, 394 F.2d 438, 441 n.2 (10th Cir. 1968).

78. *Id.* at 441–42. The court reasoned that “these issues should be submitted in simple language with a proper form of verdict” and that they “[were] too important to be left in a nebulous condition.” *Id.* at 442.

79. Dudnik, *supra* note 74, at 483–84.

80. *Id.* at 484.

have also uniformly held that trial courts enjoy broad discretion in the style, format, substance, and language of the interrogatories under both Rules 49(a) and 49(b),<sup>81</sup> as long as the law is accurately stated.<sup>82</sup> Thus, the explicit language in the rule itself, the policies behind the rule, and the decisions applying the rule all point to the considerable latitude the trial judge has to determine and mold various aspects of the verdict sheet to suit the needs of the case.<sup>83</sup>

## II. THE FLOWCHART VERDICT SHEET

The flowchart verdict sheet is meant to be clear, simple, and intuitive.<sup>84</sup> At its core, these verdict sheets minimize the risk of inconsistent verdicts by mapping out for the jury all possible decision outcomes for the elements of a claim or among multiple claims. The basic structure of the flowchart verdict sheet begins with the premise that trials generally have two outcomes—either the plaintiff prevails or the defendant prevails. Following from this premise, the verdict sheet visually displays the different paths that lead to the two outcomes based on the jury's decisions. If an affirmative defense applies, the elements of the claim that the plaintiff needs to prove might be vertically positioned on one side,<sup>85</sup> with the elements of an affirmative defense vertically positioned on the opposite side. Based on how the jurors answer a certain question, they might be directed by arrows to the next decision point, whether it is to the next element,

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81. *Lore v. City of Syracuse*, 670 F.3d 127, 159 (2d Cir. 2012); *Romano v. Howarth*, 998 F.2d 101, 104 (2d Cir. 1993); *Lummus Indus., Inc. v. D.M. & E. Corp.*, 862 F.2d 267, 273 (Fed. Cir. 1988) (per curiam); *Worsham v. A.H. Robins Co.*, 734 F.2d 676, 690 (11th Cir. 1984); *Dreiling v. Gen. Elec. Co.*, 511 F.2d 768, 774 (5th Cir. 1975); *Perzinski v. Chevron Chem. Co.*, 503 F.2d 654, 660 (7th Cir. 1974); *Abernathy v. S. Pac. Co.*, 426 F.2d 512, 514 (5th Cir. 1970); *Tenn. Consol. Coal Co. v. United Mine Workers of Am.*, 416 F.2d 1192, 1200 (6th Cir. 1969) (citing *Erwin v. Keck*, 351 F.2d 403, 406 (6th Cir. 1965)); *R.H. Baker & Co. v. Smith-Blair, Inc.*, 331 F.2d 506, 508 (9th Cir. 1964).

82. *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1072 (11th Cir. 1996).

83. That the drafters of Rule 49 failed to provide any standards or guidance as to who would draft the special interrogatories and what form they should take, *Dudnik*, *supra* note 74, at 483–84, lends credence to the notion that trial judges were meant to have discretion with regard to verdicts.

84. See EDWARD R. TUFTE, *THE VISUAL DISPLAY OF QUANTITATIVE INFORMATION* 177 (2d ed. 2001) [hereinafter TUFTE, *VISUAL DISPLAY*] (“Graphical elegance is often found in simplicity of design and complexity of data.”); cf. EDWARD R. TUFTE, *VISUAL EXPLANATIONS* 9 (1997) [hereinafter TUFTE, *VISUAL EXPLANATIONS*] (“Many of our examples suggest that clarity and excellence in thinking is very much like clarity and excellence in the display of data.”).

85. See *infra* Figure 1.

to an element of the defendant's affirmative defense, to a question on damages, to another claim entirely, or to a finding for one party. The following is an illustrative example of a flowchart verdict sheet created for an employment discrimination case in the Eastern District of New York:

Figure 1. Flowchart Verdict Sheet Example<sup>86</sup>

**VERDICT SHEET: *Mayfield v. General Dynamics Land Systems*, CV 11-6114 (LDW)**

According to the principles of law as instructed by the Court and the facts as you find them, please answer the following questions (**CIRCLE YES or NO**):

**TITLE VII CLAIM FOR HOSTILE WORK ENVIRONMENT**

**QUESTION 1:** Has Plaintiff proven by a preponderance of the evidence that she was subject to a hostile environment?

YES ☐ **NO** ☒

**QUESTION 2:** Has Plaintiff proven by a preponderance of the evidence that her gender was a factor that motivated the harassment?

YES ☐ **NO** ☒

**QUESTION 3:** Has Plaintiff proven by a preponderance of the evidence that Defendant knew or should have known of the harassment?

YES ☐ **NO** ☒

**QUESTION 4:** Has Plaintiff proven by a preponderance of the evidence that Defendant failed to take prompt and effective remedial action?

YES ☐ **NO** ☒

**You have reached a verdict as to the Hostile Work Environment claim.**

Please proceed to the Retaliation claim. Do **not** answer the question on Damages on the third page pertaining to the Hostile Work Environment claim.

**You have reached a verdict as to the Hostile Work Environment claim.**

Please proceed to the Retaliation Claim.

**COURT EXHIBIT**  
**3**  
*11-CV-6114*

**TITLE VII CLAIM FOR RETALIATION**

**QUESTION 1:** Has Plaintiff proven by a preponderance of the evidence that she engaged in protected activity?

**YES** ☒ **NO** ☐

**QUESTION 2:** Has Plaintiff proven by a preponderance of the evidence that she was terminated because of engaging in protected activity?

YES ☐ **NO** ☒

**You have found a verdict for the Defendant as to the Retaliation claim.**

Please proceed to the Damages section. Do **not** answer the question on Damages on the third page pertaining to the Retaliation claim.

**You have found a verdict for the Plaintiff as to the Retaliation claim.**

Please proceed to the Damages section.

**You have found a verdict for the Defendant as to the Retaliation claim.**

Please proceed to the Damages section. Do **not** answer the question on Damages on the third page pertaining to the Retaliation claim.

86. Verdict Sheet, *Mayfield v. Gen. Dynamics Land Sys.*, No. 11-cv-06114, (E.D.N.Y. filed June 27, 2013), ECF No. 49. *Mayfield* involved a hostile-work-environment claim and a retaliation claim. *Id.* Although the disposition of one claim did not affect the disposition of the other as in *Anderson*, each claim did require the jury to make decisions on multiple legal elements. *Id.*

Recall that even though the Rule 49 framework incorporates discretionary remedies for inconsistencies in verdicts under 49(b),<sup>87</sup> these remedies inevitably impose time and money costs on the judicial system, litigants, and taxpayers.<sup>88</sup> The flowchart verdict sheet avoids, or at least mitigates, these costs by minimizing the juror confusion, miscomprehension, or faulty decisionmaking that can result in inconsistent verdicts. Thus, they are intended to apply primarily to two scenarios: first, to the general verdicts with special interrogatories governed by Rule 49(b),<sup>89</sup> and second, to cases like *Anderson v. County of Suffolk* in which the jury is required to render a verdict on multiple claims.<sup>90</sup>

The first rationale behind a limited application of flowchart verdict sheets is logistical. Because the use of flowcharts in verdict sheets has been largely absent not only in practice but also in the relevant academic literature,<sup>91</sup> implementation should be limited first to a narrower subset of cases so that problems that emerge can be adequately identified and resolved. Initially restricting the use of flowchart verdict sheets to civil cases can also reduce the risk of a court overturning the verdict sheet on appeal.<sup>92</sup> Furthermore, the scope should be narrowed initially to cases in federal court to avoid issues that may arise from any variations in state civil procedure rules.

Second, limiting the scope of applicability also makes sense substantively because the two scenarios that flowchart verdict sheets are meant to address are scenarios in which inconsistencies seem to be the most prevalent. For general verdicts with special interrogatories under Rule 49(b), this should seem fairly straightforward—the degree of consistency between the verdict and

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87. See *supra* Part I.B.

88. See *supra* notes 28–38 and accompanying text.

89. See *supra* Part I.A.2.

90. Although the same case may arguably be viewed as either the jury entering one general verdict involving multiple claims or as the jury entering one general verdict for each claim, this distinction seems to be purely semantic. Cf. *Babcock v. Gen. Motors Corp.*, 299 F.3d 60, 63 n.1 (1st Cir. 2002) (noting that a general verdict sheet with two interrogatories asking the jury to determine whether the plaintiff had proved a negligence claim and her product liability claim could also “be described as two general verdicts”). In any case, the choice of label does not significantly affect the application of the flowchart verdict sheet.

91. See *infra* Part III.B.3.

92. See William W. Schwarzer, *Reforming Jury Trials*, 1990 U. CHI. LEGAL F. 119, 121 (1990) (reprinted in 132 F.R.D. 575 (1991)) (suggesting that efforts to improve jury comprehension “must be approached with greater caution in criminal cases, for any departure from the norm provides grounds for appeal”).

written interrogatories is the *sole* determinant of the actions the trial judge may take.<sup>93</sup> It would not be out of the question for a jury to return inconsistent interrogatories, regardless of whether the interrogatories ask the jury to make multiple findings of fact or to determine whether the multiple elements of a certain claim have been met. In the second scenario involving *Anderson*-type cases, inconsistencies in a jury's verdict may also arise when the jury must resolve the ultimate issue of liability on multiple claims. Again, it would not be hard to imagine a scenario in which a jury finds liability on an excessive force claim but not on a battery claim,<sup>94</sup> or a scenario in which a jury simultaneously decides that a plaintiff has prevailed on its claims and that the defendant has also carried its burden on contradictory counterclaims.<sup>95</sup>

Conversely, the traditional general verdict and factual interrogatories submitted under a Rule 49(a) special verdict seem to pose a lesser risk of inconsistency, at least in theory. The traditional general verdict sheet creates virtually zero risk for an inconsistent verdict resulting from jury confusion because it requires the jury to determine the sole question of which party prevails.<sup>96</sup> It is conceivable that a jury returning a general verdict might find that a plaintiff prevails and fail to assign damages,<sup>97</sup> or for a jury to find that the defendant prevails and yet award damages to the plaintiff anyway.<sup>98</sup>

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93. FED. R. CIV. P. 49(b).

94. *Anderson v. Cnty. of Suffolk*, No. 2:09-cv-1913 (E.D.N.Y. filed May 6, 2009); *see supra* notes 23–24 and accompanying text.

95. *ABM Marking, Inc. v. Zanasi Fratelli, S.R.L.*, 353 F.3d 541, 544 (7th Cir. 2003). According to the court, the inconsistency arose when the jury found both that the plaintiff “substantially performed all obligations required of it under the contract” and—for the counterclaim—that the plaintiff had breached the contract. *Id.* (quoting *ABM Marking, Inc. v. Zanasi Fratelli, S.R.L.*, No. 97-cv-0863, slip op. at 6 (S.D. Ill. Nov. 9, 2000)) (quotation marks omitted).

96. *See supra* note 52 and accompanying text.

97. *See Jones v. SouthPeak Interactive Corp.*, No. 3:12-cv-443, 2013 WL 5837756, at \*8 (E.D. Va. Oct. 29, 2013) (recognizing that cases in which the jury “finds liability but nonetheless awards zero damages,” although not common, are also “not a rarity either” (quoting *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1036 (9th Cir. 2003))).

98. For example, a jury may find that a defendant should prevail because the plaintiff was contributorily negligent but award the plaintiff damages anyway out of sympathy. In *Barnett v. Love*, 294 F.2d 585 (4th Cir. 1961), after a head-on automobile collision, the plaintiff charged the defendant with negligence, to which the defendant counterclaimed, alleging negligence on the plaintiff's part. *Id.* at 586. Even though the jury foreman indicated to the trial court that the evidence seemed to be insufficient to find *either* party negligent, he also admitted that the jury was “very much in sympathy with the plaintiff” due to the severity of his injury. *Id.* at 586 n.1,



Nonetheless, the above situations seem to be more the result of intentional jury nullification than inconsistencies created by juror confusion.<sup>99</sup> In any case, the underlying intent may be irrelevant because the jury's reasoning as to a general verdict would be shielded.<sup>100</sup>

Special verdicts submitted to the jury under Rule 49(a) may also pose a minimal risk of inconsistency in the verdict because the jury is constrained solely to making findings of fact whereas the trial judge is the one who applies the law to the jury's factual findings.<sup>101</sup> This idea is bolstered by the absence of explicit language in Rule 49(a) pertaining to inconsistencies and how they should be resolved, in stark contrast to Rule 49(b).<sup>102</sup> In addition, even if inconsistencies arise in the jury's factual findings under Rule 49(a), the trial court seems to have greater flexibility and latitude to engage in an ad hoc judicial resolution of the inconsistent findings without being mandated by the Federal Rules to impose the time-consuming and costly remedies of resubmission to the jury or ordering a new trial.<sup>103</sup>

Nonetheless, even if flowchart verdict sheets may be more effective in addressing inconsistencies in cases involving multiple claims or Rule 49(b) verdicts, they should not necessarily be discounted in situations involving a traditional one-claim general verdict or a special verdict under Rule 49(a). For instance, the same rationales underlying the usefulness of these proposed verdict sheets in mitigating inconsistencies for general verdicts submitted with written interrogatories under Rule 49(b) may still apply to special verdicts under Rule 49(a). Indeed, some courts have exhibited confusion between verdicts under Rules 49(a) and Rule 49(b) that may underscore the structural similarities between the two.<sup>104</sup> In

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587. The jury ended up assigning compensatory as well as punitive damages in favor of the plaintiff. *Id.* at 587.

99. See *supra* notes 47–48 and accompanying text.

100. See *supra* notes 43–44 and accompanying text.

101. See *supra* notes 53–54 and accompanying text.

102. See *supra* notes 55–59 and accompanying text.

103. See *Blackwell v. Cities Serv. Oil Co.*, 532 F.2d 1006, 1008 n.2 (5th Cir. 1976) (per curiam) (observing that under Rule 49(a), when faced with inconsistent factual findings by the jury, the court not only is allowed to make any missing factual findings, but also is *presumed* to “have made whatever findings are necessary to support the judgment that he enters”).

104. See Samuel M. Driver, *A More Extended Use of the Special Verdict*, 9 F.R.D. 495, 495 (1950) (noting that “the cases reveal a surprising amount of confusion regarding [subdivisions 49(a) and 49(b)]”).

*Babcock v. General Motors Corp.*,<sup>105</sup> the First Circuit reasoned that a verdict sheet titled as “Special Verdict Form” was not a true special verdict under Rule 49(a), but rather, a verdict under 49(b) because it required the jury to “answer[] specific interrogatories designed to channel its deliberation . . . in order to decide which party should prevail.”<sup>106</sup> As another example, the Fifth Circuit in *Dreiling v. General Electric Co.*<sup>107</sup> alluded that special interrogatories were submitted to the jury under Rule 49(a)<sup>108</sup>—and yet in a footnote, implied that the jury seemed to be deciding the case “according to . . . principles of law,”<sup>109</sup> referencing a Rule 49(b) verdict. Thus, the confusion between Rules 49(a) and Rule 49(b) verdicts seems to indicate that they are not wholly dissimilar. Rather, verdicts under Rule 49(b) can be fairly seen as Rule 49(a) special verdicts that *also* require the jury to determine the ultimate issue of which party prevails.<sup>110</sup> In any case, flowchart verdict sheets may assist juries in making internally consistent findings of fact.

As for traditional general verdicts, the principles underlying the flowchart verdict sheet may still be applicable in those situations in which the jury must decide only the issue of which party prevails, even if the verdict sheet itself does not use a flowchart. Although the likelihood of an inconsistent *verdict* is intuitively nonexistent, jurors may still be confused about the underlying law,<sup>111</sup> potentially resulting in a “consistent” but incorrect verdict. In this situation, a jury might use a flowchart detailing the elements of a claim as nothing more than a resource while deliberating.<sup>112</sup> Thus, flowchart verdict sheets may

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105. *Babcock v. Gen. Motors Corp.*, 299 F.3d 60 (1st Cir. 2002).

106. *Id.* at 63.

107. *Dreiling v. Gen. Elec. Co.*, 511 F.2d 768 (5th Cir. 1975).

108. *Id.* at 773.

109. *Id.* at 774 n.7.

110. Courts have repeatedly implied that written interrogatories under Rules 49(a) and 49(b) should be treated similarly. For example, some lower courts have quoted language from *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108 (1963)—a Supreme Court case concerning a verdict under Rule 49(a)—in declaring that it is the trial judge’s duty to harmonize inconsistent interrogatories under Rule 49(b). *See, e.g.*, *Kirkendoll v. Neustrom*, 379 F.2d 694, 699 (10th Cir. 1967) (“[I]t is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them: ‘Where there is a view of the case that makes the jury’s answers to special interrogatories consistent, they must be resolved that way.’” (quoting *Gallick*, 372 U.S. at 119)); *Jonielunas v. City of Worchester Police Dep’t*, 338 F. Supp. 2d 173, 179 (D. Mass. 2004) (same).

111. *See infra* Part III.A.

112. *Cf.* Carolyn Semmler & Neil Brewer, *Using a Flow-Chart to Improve Comprehension of Jury Instructions*, 9 PSYCHIATRY, PSYCHOL. & L. 262, 266 (2002) (finding increased

prove useful for bolstering juror understanding—even in situations where the likelihood of inconsistent verdicts is nonexistent.

### III. PRINCIPLES OF JURY COMPREHENSION AND DECISIONMAKING

This Part highlights some basic principles of jury cognition identified by the academic literature and discusses how they can be applied to the flowchart verdict sheet. At the outset, two important considerations should be recognized. First, the majority of the academic literature on jury decisionmaking and comprehension focuses on jury instructions. Second, the flowchart verdict sheet addresses inconsistent verdicts based on juror confusion resulting from the verdict sheet itself, as opposed to confusion from the jury instructions.

With these considerations in mind, understanding how and to what extent juries understand the judge's instructions may be worthwhile for a few reasons. First, as discussed below, the language of the flowchart verdict sheets is intended to track the language of the judge's jury instructions.<sup>113</sup> Thus, the reasons behind a jury's understanding or misunderstanding of the jury instructions may be correlated with a jury's understanding of the verdict sheets. Second, many of the remedies proposed by current legal reform literature deal with bolstering the jury's comprehension of various aspects of the trial, especially with the jury instructions.<sup>114</sup> Exploring the reasons why scholars have suggested these different remedies may thus provide valuable insights into why a flowchart verdict sheet may also assist juries.

#### A. Jury Miscomprehension

Whether juries are capable of understanding jury instructions sufficiently to render an adequate verdict is relevant given the increasing complexity and length of modern civil litigation, which is often extremely information intensive and features armies of expert witnesses.<sup>115</sup> Numerous academics have consistently observed that

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comprehension when mock jurors used flowcharts to supplement jury instructions during deliberations). For a more detailed discussion on how flowcharts and other visual aids can improve comprehension, see *infra* Part III.B.3.

113. See *infra* notes 161–64 and accompanying text.

114. See *infra* Part III.B.1–2.

115. See Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 190 (1990) (observing that for one particular civil commercial

juries do not completely understand the judge's instructions.<sup>116</sup> One prime culprit of faulty comprehension is the jury's general lack of familiarity with complex legal doctrines and standards.<sup>117</sup> Juror confusion may be further caused by the amount of legal jargon—or "legalese"—and the complex wording and sentence structures prevalent in jury instructions.<sup>118</sup> Psycholinguistic researchers have categorized these causes of juror miscomprehension as those relating to the vocabulary used and those relating to the grammar or sentence structure—in other words, how the "particular words are arranged into phrases, clauses and entire sentences."<sup>119</sup>

Other factors may affect comprehension of jury instructions in addition to these psycholinguistic barriers, such as the complexity of the trial or the education levels of the jurors.<sup>120</sup> The complex and sometimes technical nature of modern litigation also raises the related question of whether juries can even comprehend the case itself, much less the instructions.<sup>121</sup> Incomplete jury comprehension of the case as a whole, apart from the jury instructions, may also result from prohibitions against the jury taking notes, being allowed to ask questions, or discussing the case before deliberating.<sup>122</sup> Regardless of the reason, flaws in jury comprehension can have unwanted consequences—for instance, juries may be confused about what they are allowed to find, they may not adequately understand the legal

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matter, the pretrial discovery involved over one-hundred-thousand pages in depositions and that the trial was slated to last one year); Landsman, *supra* note 40, at 295.

116. See Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL'Y & L. 589, 596–97 (1997) ("It is common to find over half the instructions misunderstood, and even the most optimistic results indicate that roughly 30% of the instructions are not understood."); Dylan Lager Murray, *Plain English or Plain Confusing?*, 62 MO. L. REV. 345, 347 (1997) (citing studies identifying widespread "juror miscomprehension of pattern instructions" from different states); Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 78 (1988) ("Recent social science research has demonstrated empirically that juror comprehension of instructions is appallingly low.").

117. Lieberman et al., *supra* note 116, at 589.

118. *Id.* at 597. The abstruse language in pattern jury instructions is attributed to the drafters' intent to "precisely state the law, rather than with the aim of clarity and comprehensibility." *Id.* at 623.

119. Murray, *supra* note 116, at 351.

120. See Lieberman et al., *supra* note 116, at 616–20 (describing how trial complexity, socio-demographic variables, personality factors, and preexisting mental representations affect juror comprehension).

121. Schwarzer, *supra* note 92, at 119.

122. *Id.* at 120.

issues and how they fit together, and they may not even remember all the legal issues presented.

### *B. Current Legal Reform Remedies*

Current legal reform literature offers an impressive array of solutions aimed toward assisting juries in reaching an intelligent verdict. Many of these solutions deal with improving juror comprehension within the context of jury instructions. A number of solutions, however, also focus on improving juror comprehension, retention, recall, and decisionmaking throughout the different stages of the trial. This Note categorizes the different solutions into three broad approaches: solutions that affect the words the jury encounters (“psycholinguistic approaches”), solutions that affect the jury’s involvement in trial (“participatory approaches”), and solutions that affect the jury’s visual-reasoning abilities (“visual approaches”). In doing so, this Note does not argue that any of these solutions necessarily should be implemented, but seeks to add to the existing legal reform literature on juror comprehension and decisionmaking by mining useful principles from other proposed reforms.

1. *Psycholinguistic Approaches.* The psycholinguistic approaches seek to decrease juror confusion and increase juror comprehension of their instructions by rewriting pattern jury instructions based on “psycholinguistic principles of ‘simple English.’”<sup>123</sup> In the same way that miscomprehension may result both from the language used and how the words are organized, psycholinguistic approaches focus on both simplifying the words used and structuring them clearly.<sup>124</sup>

Simplifying the language of jury instructions can be achieved through several means. One straightforward method is simply to eliminate legal jargon.<sup>125</sup> Psycholinguistic research has suggested that jurors “understand and remember familiar terms more easily than uncommon words and phrases.”<sup>126</sup> The research shows, perhaps

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123. Murray, *supra* note 116, at 348. Although the psycholinguistic approaches mentioned in this Section are geared toward rewriting jury instructions, the principles may also be applicable to other phases of the trial, such as how evidence is presented to the jury. Schwarzer, *supra* note 92, at 132; see also Samuel H. Solomon, *How Jurors Make Decisions: A Practical & Systematic Approach to Understanding Jury Behavior*, 4 SEDONA CONF. J. 175, 182 (2003) (discussing the barriers to juror comprehension of technical, industry-specific words).

124. Murray, *supra* note 116, at 351.

125. Lieberman et al., *supra* note 116, at 623.

126. Murray, *supra* note 116, at 354.

intuitively, that jurors who read and hear words that appear more frequently in the English language can process those words more quickly, allowing them to concentrate on the remaining instructions.<sup>127</sup> Using verbs instead of nouns derived from verbs can also prevent jury instructions from being overly abstract and increase jury comprehension.<sup>128</sup> Along similar lines, using the actual names of parties as opposed to the abstract “Plaintiff” or “Defendant” may reduce confusion.<sup>129</sup> Some commentators have also suggested minimizing the use of negative words such as “no,” “not,” or “never” as well as words containing negative prefixes such as “mis-,” “dis-,” or “un-.”<sup>130</sup> Because negative words or prefixes force jurors to first comprehend the word’s positive meaning before flipping the meaning of the word to the negative, they add an unnecessary extra step to comprehension.<sup>131</sup>

However, merely using simple words in jury instructions does not guarantee juror comprehension “if drafters put those words together in an incomprehensible fashion.”<sup>132</sup> Other methods focus on forming the words into a comprehensible structure. Because the complexity and comprehensibility of a sentence are inversely related, decreasing the complexity of a sentence—by minimizing the number of dependent clauses in a sentence for example—often increases the jury’s understanding of the sentence.<sup>133</sup> The location of the dependent clauses may also be significant—placing dependent clauses *after* the independent clause allows the juror to understand the central idea of the sentence before needing to consider the supplemental thoughts in the dependent clause.<sup>134</sup> In addition to reducing structural complexity, limiting the use of the passive voice by removing extraneous words and clearly indicating the “doer” of the action also assists jurors in

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127. *Id.* at 354–55.

128. *Id.* at 355–56. Compare “the *collision* of the cars occurred last Friday” with “the cars *collided* last Friday.”

129. Lieberman et al., *supra* note 116, at 623.

130. Murray, *supra* note 116, at 356–57.

131. *Id.* at 357.

132. *Id.* at 358.

133. *Id.* at 359; see Lieberman et al., *supra* note 116, at 623–24 (discussing the improved comprehension resulting from removing embedded phrases as well as prepositional phrases starting with “as to”).

134. Murray, *supra* note 116, at 360. For example, compare a sentence in which the dependent clause appears first, “While he fed his pet ostrich, Chad hummed to himself,” with a sentence in which the independent clause appears first, “Chad hummed to himself while he fed his pet ostrich.”

understanding and retaining the jury instructions.<sup>135</sup> Just as empirical studies confirm that rewriting jury instructions to conform to these psycholinguistic principles has proven effective in increasing jury comprehension,<sup>136</sup> so too may conforming the language of the flowchart verdict sheets to these principles prove effective in doing the same.

2. *Participatory Approaches.* The participatory approaches seek to minimize faulty decisionmaking and increase jury comprehension by decreasing or increasing the jury's role in different stages of the trial.<sup>137</sup> One solution, recognizing the complexity of modern civil litigation,<sup>138</sup> proposes that juries should be completely excluded from deciding certain kinds of complex cases, thus preventing faulty decisionmaking caused by the complexity of the trial.<sup>139</sup> Other proposed options for improving comprehension that stop short of completely eliminating the jury's role in certain cases include eliminating undisputed or irrelevant issues, reducing the amount of cumulative evidence, and imposing time limits on the trial itself or on examination of witnesses by the parties.<sup>140</sup>

On the other end of the spectrum are approaches that give juries a more active trial role, with the reasoning that increasing the jury's participation will allow the jury to be more effective in carrying out its responsibility to decide cases and will express confidence to the public that the jury can do so competently.<sup>141</sup> Similar to the approaches that limit the cases or issues that juries can decide, the approaches that increase juror participation in the trial process are prophylactic in nature—by preventing inaccurate decisionmaking, they prevent the

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135. *Id.* at 361. Some scholars have further traced diminished comprehension to the passive voice specifically within the context of dependent clauses. Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1326 (1979). Professor Charrow offers the following example, taken from an actual jury instruction: "You must never speculate to be true any insinuation suggested by a question asked a witness." *Id.* at 1326 n.53.

136. See Lieberman et al., *supra* note 116, at 623–25 (summarizing the results of studies measuring the effectiveness of psycholinguistic approaches to improving jury comprehension).

137. Friedland, *supra* note 115, at 191–92.

138. See *supra* note 115 and accompanying text.

139. Friedland, *supra* note 115, at 191–92; cf. *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1079, 1089–90 (3d Cir. 1980) (holding that entrusting a jury with deciding complex cases may violate due process if the jury would be "unable to understand the case and decide it rationally").

140. Schwarzer, *supra* note 92, at 122–25.

141. Friedland, *supra* note 115, at 192.

need for ex post alteration or overturning of the verdict.<sup>142</sup> These approaches have also garnered considerable support by legal reform scholars and include allowing the jury to take notes during the trial process, to submit questions to witnesses or the judge, and to discuss the trial with other jurors prior to deliberating.<sup>143</sup> And still other options have been suggested for increasing comprehension and retention, including providing instructions and education to the jury before the trial begins as well as at the close of the trial,<sup>144</sup> or providing the jury with a written copy of the jury instructions.<sup>145</sup> Many of these proposed approaches, such as preliminary orientations, juror note taking, and juror questioning, are also embodied in the American Bar Association's (ABA) Principles for Juries and Jury Trials.<sup>146</sup>

3. *Visual Approaches.* Commentators have also proposed visual approaches to improving juror comprehension, retention, and decisionmaking. Some have suggested the use of visual aids such as maps, charts, graphics, timelines, diagrams, video presentations, and demonstratives to help jurors better understand the evidence

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142. *Id.* at 199.

143. See, e.g., Lynne ForsterLee & Irwin A. Horowitz, *The Effects of Jury-Aid Innovations on Juror Performance in Complex Civil Trials*, 86 JUDICATURE 184, 187–89 (2003) (exploring the effectiveness of juror note taking on comprehension and recall); Friedland, *supra* note 115, at 209–15 (summarizing studies finding positive effects of note taking and juror questioning in federal trials); Lieberman et al., *supra* note 116, at 635–36 (noting that “structured predeliberation discussions may appreciably aid the decision-making process”); Steven D. Penrod & Larry Heuer, *Tweaking Commonsense: Assessing Aids to Jury Decision Making*, 3 PSYCHOL. PUB. POL’Y & L. 259, 271, 280–82 (1997) (concluding that although note taking and juror questioning may only have marginal benefits, they should still be considered); Schwarzer, *supra* note 92, at 137–43 (offering suggestions as to what the implementation of juror note taking, questioning, and discussions should look like).

144. Keith Broyles, Note, *Taking the Courtroom into the Classroom: A Proposal for Educating the Lay Juror in Complex Litigation Cases*, 64 GEO. WASH. L. REV. 714, 731–32 (1996); Schwarzer, *supra* note 92, at 129–32; see Lieberman et al., *supra* note 116, at 632 (concluding that jury preinstruction and postinstruction presented together can improve juror comprehension).

145. Schwarzer, *supra* note 92, at 131; see Geoffrey P. Kramer & Doreen M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REFORM 401, 428 (1990) (concluding that the increase in comprehension levels as a result of written instructions was statistically significant); Lieberman et al., *supra* note 116, at 626–28 (summarizing the results of studies concerning the effect on comprehension of providing written jury instructions and suggesting that they at least should be considered because they increase juror satisfaction with the trial process).

146. AM. BAR ASS’N, AMERICAN JURY PROJECT, PRINCIPLES FOR JURIES AND JURY TRIALS *passim* (2005).



presented in the case,<sup>147</sup> to facilitate comprehension and retention of the judge's instructions on the law,<sup>148</sup> and to assist jurors during deliberation if the visuals are admitted into evidence.<sup>149</sup> In addition, lawyers may use visual aids as advocacy tools with the end goal of having the jury complete the verdict form in their client's favor.<sup>150</sup> When combined with an oral presentation, electronic media in particular have been identified as an effective method of communicating information to juries given society's increasing familiarity with technology.<sup>151</sup>

Commentators, however, have argued that even visuals and graphics that do not involve video screens may be effective in improving comprehension and decisionmaking for several reasons. Visuals, for example, may provide a "visceral, directly subconscious connection" to the jury that allows jurors to visualize the relationships between different legal claims, and among the elements within claims.<sup>152</sup> Some authors also cite physiological literature to support the notion that humans may indeed be innately predisposed to use pictures and other images because visuals provide advantages over words alone in terms of processing, remembering, and recalling information.<sup>153</sup> Jury comprehension, retention, and recall seem to be maximized by combining visual and verbal presentations of information, as is true with electronic media.<sup>154</sup> Finally, the visual presentation of some types of information may simply be more accurate, straightforward, and effortless.<sup>155</sup>

Although many scholars have extolled the virtues of visual aids such as diagrams and charts in the courtroom, surprisingly few have

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147. Schwarzer, *supra* note 92, at 136. For a more detailed analysis on strategies and considerations in implementing different types of visual aids, see generally Ronald J. Rychlak, *The Graphic Explanation: Why Less is More*, 36 AM. J. TRIAL ADVOC. 111 (2012).

148. Solomon, *supra* note 123, at 183; see generally Firoz Dattu, *Illustrated Jury Instructions: A Proposal*, 22 LAW & PSYCHOL. REV. 67 (1998) (proposing the use of diagrams and other illustrations as a supplement to jury instructions to aid jury comprehension).

149. Daniel W. Dugan, *A Picture is Worth 999 Words: The Importance and Effectiveness of Courtroom Visual Presentations*, 1 REYNOLDS CT. & MEDIA L.J. 503, 521 (2011).

150. Solomon, *supra* note 123, at 184.

151. Dugan, *supra* note 149, at 504. Dugan argues that the technologically savvy generation of potential jurors is used to receiving information from "televisions, computer screens, and personal computing devices, which all employ an active mix of pictures and words." *Id.* at 505.

152. Solomon, *supra* note 123, at 189.

153. Dugan, *supra* note 149, at 506-07.

154. *Id.* at 509-10; Dattu, *supra* note 148, at 81-83, 89-90.

155. Rychlak, *supra* note 147, at 111.

engaged in extended discussions specifically on the merits of flowcharts. One study, however, has addressed how flowcharts could be used to bolster understanding of jury instructions.<sup>156</sup> The study sought to measure the effect of a flowchart that detailed the elements of a self-defense claim on a jury's ability to later describe the elements and apply them to a particular case.<sup>157</sup> The researchers concluded that having access to a flowchart that complemented the jury instructions and, more importantly, being able to refer to the flowchart during deliberations did indeed assist the jury's comprehension of the instructions.<sup>158</sup> In addition to providing the same advantages in recall and retention as other visual approaches, the organizational nature of flowcharts may provide an extra measure of recall.<sup>159</sup> Lastly, flowcharts may be especially helpful in learning and recall processes by visually mapping the underlying relationships between legal concepts, standards, and claims.<sup>160</sup>

*C. Incorporating Principles of Jury Comprehension and Decisionmaking in Flowchart Verdict Sheets*

The flowchart verdict sheet essentially consists of language from the jury instructions situated within a visually-presented decision tree. Although the primary focus of this Note is on the *visual* dimension and presentation of the flowchart verdict sheets, the substantive language contained within the sheets should, in any case, track the language of the jury instructions and be worded in a way that "avoids the potential for confusing or misleading the jury."<sup>161</sup> Because the increases in visual reasoning and clarity provided by flowcharts cannot fully address the problems caused by unclear language or faulty logic, the language contained in flowchart verdict sheets should follow the psycholinguistic principles discussed above to minimize

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156. Semmler et al., *supra* note 112.

157. *Id.* at 262.

158. *Id.* at 266. The researchers also suggested that a "closer integration of the flow-chart material and the judge's verbal instructions" could amplify the effectiveness of the flowchart. *Id.* at 267.

159. *See id.* at 263 ("Several studies of text comprehension indicate that material is better recalled if it has an obvious underlying structure." (citation omitted)).

160. *See id.* (commenting that "[v]arious researchers have suggested that diagrams would more easily hold jurors' attention and aid in the comprehension and retention of complicated legal concepts" (citations omitted)).

161. *Worsham v. A.H. Robins Co.*, 734 F.2d 676, 690 (11th Cir. 1984) (quoting *Petes v. Hayes*, 664 F.2d 523, 525 (5th Cir. 1981) (quotation marks omitted)); *see also supra* note 158.

juror confusion and maximize juror comprehension.<sup>162</sup> As one legal scholar has noted, “the jury’s capacity to deliberate and reach sound results also may be compromised by instructions that are written in abstruse terms . . . .”<sup>163</sup> And as another commentator writing on the importance of clear language in jury instructions—and presumably by extension, the verdict form—stressed, “even in relatively simple cases what the jurors hear is little more than legal mumbo jumbo to them.”<sup>164</sup>

Although the same psycholinguistic principles for simplifying the language in jury instructions can also be applied to text-only verdict sheets, the flowchart verdict sheet confers additional structural advantages over its text-only brethren. At a glance, the proposed verdict sheet visually contextualizes how one discrete element of a claim or affirmative defense connects to another, as well as how *all* of the elements of a claim, an affirmative defense to a claim, or multiple claims, may fit together from a “big picture” perspective.<sup>165</sup> Conversely, because the meaning and information of a text-only verdict sheet is contained solely within the words used, the text-only sheet overlooks an entire dimension of presenting information. Furthermore, because the jury would use the flowchart as the verdict sheet itself, jurors would benefit from the recall and retention advantages associated with accessing the flowchart while deliberating.<sup>166</sup>

In addition to the gains in comprehension and decisionmaking that can be realized by mapping the relationships between the questions posed to the jurors, the formal if-then statements that convey the consequences of the jurors’ decisions may be represented with greater ease and simplicity in a visual manner through the use of arrows.<sup>167</sup> For example, consider the following:

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162. See *supra* notes 123–36 and accompanying text.

163. FRIEDENTHAL, ET AL., *supra* note 52, at 1099.

164. William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CALIF. L. REV. 731, 732 (1981); see *supra* Part III.A; cf. *Chlopek v. Fed. Ins. Co.*, 499 F.3d 692, 701 (7th Cir. 2007) (recognizing that a “verdict form must ‘. . . clearly state the relevant issues,’ and ‘[a]mbiguous, biased, misleading, or confusing questions may warrant reversal’” (alteration in original) (quoting *Mattson v. Schultz*, 145 F.3d 937, 939 (7th Cir. 1998))).

165. See *supra* notes 159–60 and accompanying text.

166. See *supra* note 158 and accompanying text.

167. See *supra* note 155 and accompanying text.

*Figure 2. Using Text to Make Decisions*

Question 4: Did the plaintiff Ms. Palsgraf prove, by a preponderance of the evidence, that the Long Island Railroad Company's actions proximately caused her injuries?

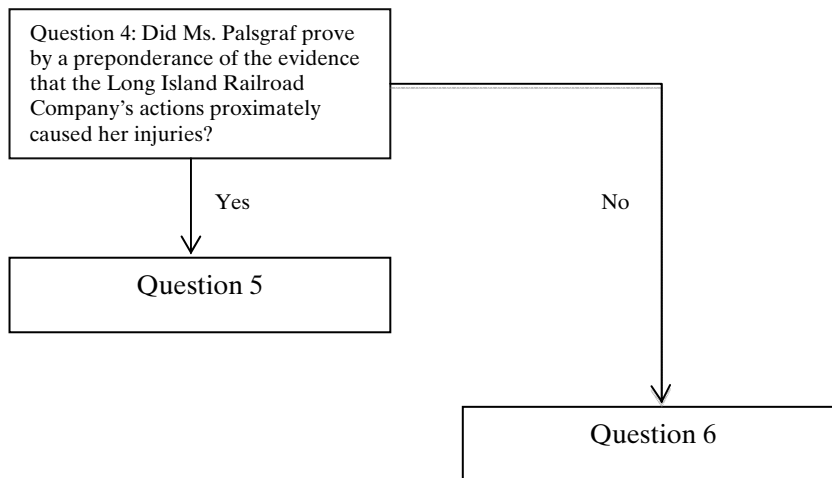
YES: \_\_\_\_\_

NO: \_\_\_\_\_

If you answered YES to Question 4, please proceed to Question 5.

If you answered NO to Question 4, please proceed to Question 6.

With this text-only example, the formal if-then statements force the reader to take the additional steps of reading the text, processing the meaning of the words, visualizing the relationship between the answer to Question 4 and the next question, *and* retaining the abstract decision tree in the reader's memory. Instead of *showing* the juror how the different elements fit together, the text-only verdict sheet merely *tells* the juror how they fit together in the abstract. By comparison, the same question and paths following from each answer can be represented visually as follows:

*Figure 3. Using Arrows to Make Decisions*

Here, the information is conveyed by the substantive language of the questions *and* by the structure of the flowchart. As this example shows, the flowchart verdict sheet visualizes the relationship between the different pieces of the verdict sheet, freeing the juror's memory

and cognitive capacities for decisionmaking. In addition, very little explanation of the structure is necessary. Because the average layperson intuitively understands the meaning of arrows—for example, on road signs—the risk of misinterpreting the symbol is lessened. Staying with the road analogy, it is not hard to imagine an increase in traffic or accidents if arrows in turn lanes were replaced with textual directions: “Only if you are turning LEFT, use this lane. If you are turning LEFT or continuing FORWARD, use this lane.” For a jury, the arrows combined with the “Yes” and “No” labels clearly and instantaneously direct it to the next appropriate decision based on its answer without introducing extra steps into the jury’s thought process, such as reading the textual directions, processing their meaning, and synthesizing them into the larger context.

In summary, flowchart verdict sheets may help minimize juror confusion and improve juror decisionmaking, comprehension, and retention. By explicitly communicating to the jury the decision paths they may or may not take, the flowchart verdict sheets prevent nonsensical decisionmaking and impossible results. They may also be more efficient in helping juries understand how the elements of a claim or different legal claims fit together.<sup>168</sup> Finally, by integrating the language of jury instructions with the visual dimension afforded by flowcharts, flowchart verdict sheets may assist jurors in understanding and recalling the legal concepts while they deliberate.<sup>169</sup>

#### IV. PRINCIPLES OF VISUAL DESIGN

A basic understanding of visual design principles is essential to designing verdict sheets that effectively use graphics. Although the fields of information design and data visualization are indeed broad, this Part focuses on the work of one prominent pioneer to exemplify how visual design principles may be applied to flowchart verdict sheets. Edward Tufte, professor emeritus of political science, computer science, and statistics at Yale University, has written and published extensively in the fields of data visualization and information design, and how to present that content in a clear, simple,

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168. See Dugan, *supra* note 149, at 507 (“Not only do images get stored more quickly and directly into the brain than words, but . . . visual images can be retrieved (and are, thus, available for use) more quickly than words.”).

169. See *supra* note 158.

and intuitive manner.<sup>170</sup> Although Tufte's books on visual design and information presentation do not specifically address how flowcharts can be used to increase clarity and decrease confusion, his useful examples, insights, and basic principles on visual design and presentation may prove useful in guiding the design of flowchart verdict sheets and support their use as a viable solution to inconsistent verdicts.

#### A. *Escaping the Linear Dimension*

By opening up the visual dimension and providing context for the relationship between legal claims or among the elements of a claim, flowcharts can augment a jury's comprehension by overcoming the linear presentation of information prevalent in traditional verdict sheets. Perhaps the most appropriate and accessible example of a linear stream of information that can decrease comprehension and reasoning—not to mention consciousness in some cases—is the oft-maligned Microsoft PowerPoint.<sup>171</sup> As Tufte explains, the culprit is the cognitive style of PowerPoint—a “deeply hierarchical single-path structure” that ends up removing useful context and stifling spatial analysis.<sup>172</sup> This temporal sequencing of information, or as Tufte puts it, “one damn slide after another,” makes it “difficult to understand context and evaluate relationships.”<sup>173</sup> Rather, Tufte contrasts this linear stacking of information with the display of information within space where “[v]isual reasoning usually works more effectively.”<sup>174</sup> In the PowerPoint context, an effective visual display might entail showing multiple slides simultaneously.<sup>175</sup> Thus, whether in a PowerPoint presentation or in a verdict sheet, “[s]patial parallelism

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170. See generally EDWARD R. TUFTE, *THE COGNITIVE STYLE OF POWERPOINT* (2003) [hereinafter TUFTE, *POWERPOINT*]; EDWARD R. TUFTE, *ENVISIONING INFORMATION* (1990) [hereinafter TUFTE, *ENVISIONING INFORMATION*]; TUFTE, *VISUAL DISPLAY*, *supra* note 84; TUFTE, *VISUAL EXPLANATIONS*, *supra* note 84.

171. See Elisabeth Bumiller, *We Have Met the Enemy and He Is PowerPoint*, N.Y. TIMES, Apr. 27, 2010, at A1 (noting military commanders' concerns that PowerPoint can “create the illusion of understanding . . . stifle[] discussion, critical thinking and thoughtful decision-making”); Angela R. Garber, *Death By Powerpoint*, SMALLBUSINESSCOMPUTING (Apr. 1, 2001), <http://www.smallbusinesscomputing.com/biztools/article.php/684871/Death-By-Powerpoint.htm> (discussing the confusion, boredom, and lack of retention that often accompany PowerPoint presentations).

172. TUFTE, *POWERPOINT*, *supra* note 170, at 4.

173. *Id.*

174. *Id.*

175. *Id.* at 23.

takes advantage of our notable capacity to reason about multiple images that appear simultaneously within our eyespan.”<sup>176</sup>

Tufte also provides an example of a chart used in a mob trial detailing the criminal activity of government informants, with the informants’ names on one axis, a list of crimes on the other, and a bold black “X” occupying each intersection of informant and crime:

Figure 4. Two-Dimensional Informant Chart<sup>177</sup>

CRIME	CARDINALE	LOFARO	MALONEY	POLISI	SENATORE	FORONJY	CURRO
MURDER	X	X					
ATTEMPTED MURDER		X	X				
HEROIN POSSESSION AND SALE	X	X		X			X
COCAINE POSSESSION AND SALE	X		X	X			
MARIJUANA POSSESSION AND SALE							X
GAMBLING BUSINESS		X		X		X	
ARMED ROBBERIES	X		X	X	X		X
LOANSHARKING		X		X			
KIDNAPPING			X	X			
EXTORTION			X	X			
ASSAULT	X		X	X			X
POSSESSION OF DANGEROUS WEAPONS	X	X	X	X	X		X
PERJURY		X				X	
COUNTERFEITING					X	X	
BANK ROBBERY			X	X	X		
ARMED HIJACKING				X	X		
STOLEN FINANCIAL DOCUMENTS			X	X	X		
TAX EVASION				X		X	
BURGLARIES	X	X		X	X		
BRIBERY		X		X			
THEFT: AUTO, MONEY, OTHER			X	X	X	X	X
BAIL JUMPING AND ESCAPE			X	X			
INSURANCE FRAUDS					X	X	
FORGERIES				X	X		
PISTOL WHIPPING A PRIEST	X						
SEXUAL ASSAULT ON MINOR							X
RECKLESS ENDANGERMENT							X

One can easily imagine how this visual display is a more useful medium for comparisons, pattern recognition, and the dissemination of information as opposed to a mere one-dimensional stream of informants and their respective crimes. Indeed, Tufte recognizes that these graphics could be useful in trials, in which the information often consists of “linear, nonreversible, one-dimensional sequencing of talk talk.”<sup>178</sup>

In contrast, the strict “linearly organized flow of words” in sentences overlooks a useful way to make sense of the information within them by removing the visual dimension.<sup>179</sup> In short, escaping the linear dimension by placing information within a context—or

176. *Id.*

177. TUFTE, ENVISIONING INFORMATION, *supra* note 170, at 31.

178. *Id.*

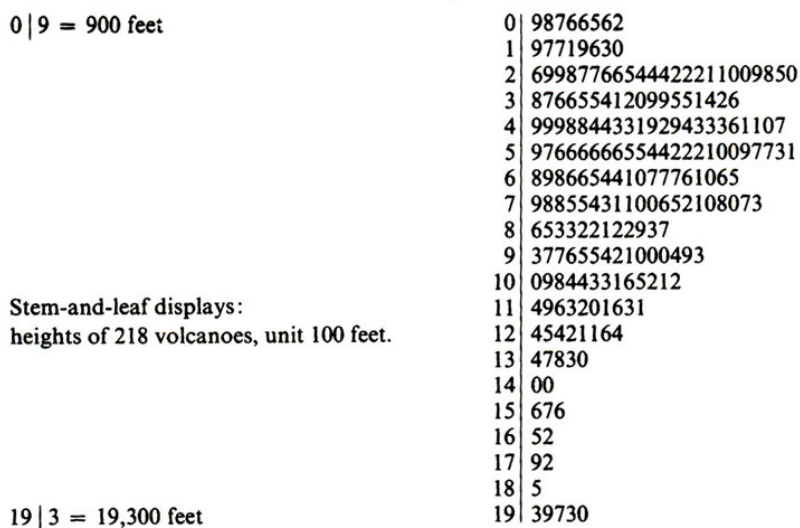
179. TUFTE, VISUAL DISPLAY, *supra* note 84, at 178.

otherwise displaying it in two-dimensional space—increases the viewer's ability to understand how different pieces of information fit together, and more effectively taps into the viewer's visual-reasoning capabilities.

*B. Multifunctioning Elements and Micro-Macro Designs*

A micro-macro design provides not only specific, detailed information on a micro-level, but also simultaneously provides contextual information when the viewer looks at the design from a bird's-eye view.<sup>180</sup> An example of a micro-macro design is a stem-and-leaf plot, in which each data point itself contains information and also aggregates with other data points to form a frequency distribution. The following figure demonstrates how such a graphic can be used to display two layers of information about the heights of volcanoes:

*Figure 5. Volcano Height Stem-and-Leaf Plot*<sup>181</sup>



In this stem-and-leaf plot, the digits to the left of the vertical line indicate the height in thousands of feet, while the digits to the right indicate the same in hundreds of feet. Each digit to the right, however, also corresponds to the height of one volcano. Thus, the

180. TUFTE, ENVISIONING INFORMATION, *supra* note 170, at 37–38.

181. *Id.* at 46.



stem-and-leaf plot relays information about the heights of individual volcanoes *and* the number of volcanoes that fall within each height range. As opposed to a purely typographical listing of information,<sup>182</sup> a stem-and-leaf plot confers the advantages of comparison and context by creating an extra visual dimension.<sup>183</sup> In that sense, micro-macro designs may also contain multifunctioning elements in which the “same ink serves more than one informational purpose.”<sup>184</sup>

Tufte expands on this idea in *The Visual Display of Quantitative Information*, illustrating how multifunctioning graphical elements may “carry data information and also perform a design function usually left to non-data-ink” or “show several different pieces of data.”<sup>185</sup> For example, a single blot on a blot map may reveal the physical location of the blot in space, with the potential for storing and communicating even more information based on its color, tone, or shape.<sup>186</sup> Similarly, coordinates in a two-dimensional graph can not only store information about the variables measured by the two axes, but can also—if represented by digits—communicate value or time order.<sup>187</sup> And of course, like a stem-and-leaf plot,<sup>188</sup> a scatterplot’s coordinates in the aggregate may also act as a micro-macro design that allows viewers to visualize the data and patterns contained within.

### C. Escaping the Information Prison

Tufte writes that “[c]onfusion and clutter are failures of design, not attributes of information.”<sup>189</sup> One way to highlight content and reduce visual noise and clutter is to layer the information, or establish

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182. A typographical presentation of information merely lists the information in a linear stream of numbers and letters. The typographical listing of the volcano-height information for the first two rows in Figure 5 would thus look like this: 900, 800, 700, 600, 600, 500, 600, 200, 1900, 1700, 1700, 1100, 1900, 1600, 1300, 1000. In contrast to a visual diagram, it would be difficult to visualize the frequency of volcanoes falling within a specific height range.

183. TUFTE, ENVISIONING INFORMATION, *supra* note 170, at 47.

184. *Id.* For another example illustrating the same concepts of dual micro-macro designs and multifunctioning elements, see *id.* at 24–26.

185. TUFTE, VISUAL DISPLAY, *supra* note 84, at 139.

186. *Id.*; e.g., TUFTE, ENVISIONING INFORMATION, *supra* note 170, at 40 (presenting a population-density map that uses dots of varying size to illustrate a population’s location and concentration).

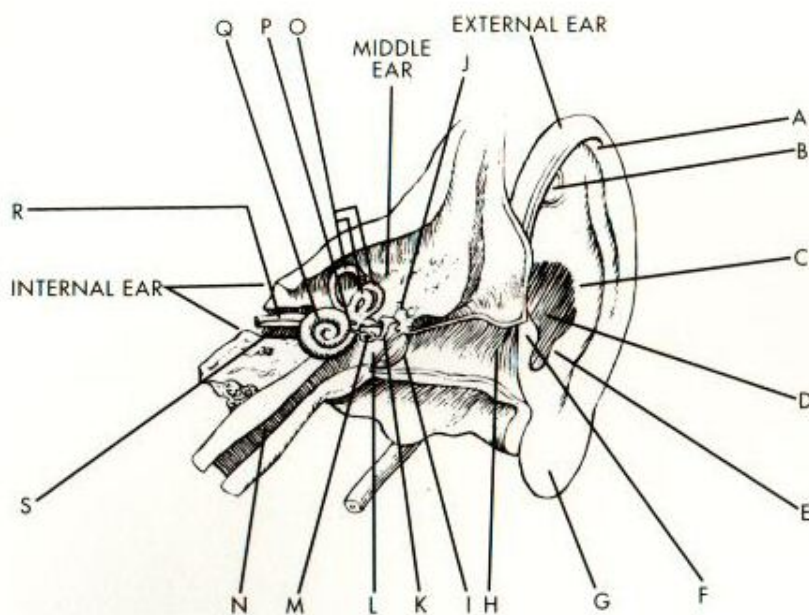
187. TUFTE, VISUAL DISPLAY, *supra* note 84, at 149–50. For an example of such a “double-functioning maneuver,” see *id.* at 151.

188. See *supra* notes 181–83 and accompanying text.

189. TUFTE, ENVISIONING INFORMATION, *supra* note 170, at 53.

a visual hierarchy of different types of information based on their importance.<sup>190</sup> To illustrate, Tufte points to a depiction of the anatomy of the human ear:

Figure 6. The “Pierced” Ear<sup>191</sup>



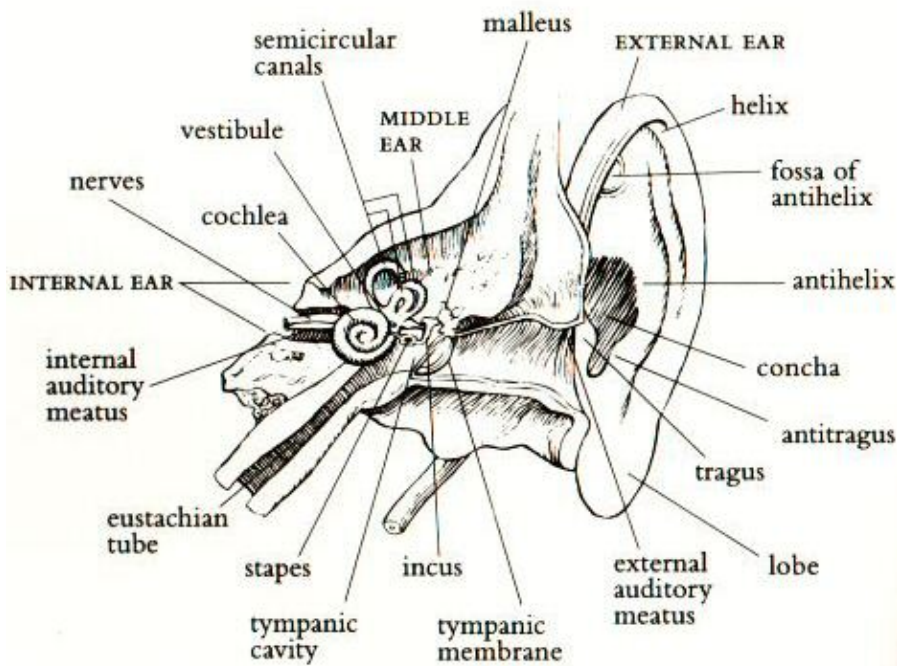
The labels of the different parts of the ear are connected to their respective parts by lines so thick as to practically “penetrate this human ear”—in fact, Tufte notes the lines are “[h]eavier than the linework for the ear itself.”<sup>192</sup> Muting secondary or structural elements—objects such as arrows, pointers, boxes, or grids—by simply making them lighter in tone may, however, increase the clarity of the primary content while also reducing the visual clutter caused by the background, content, and structure competing for the viewer’s attention:

190. *Id.*; TUFTE, VISUAL EXPLANATIONS, *supra* note 84, at 74.

191. TUFTE, VISUAL EXPLANATIONS, *supra* note 84, at 73. From THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, copyright © 1971, 1983, 1987 Random House. Used with permission of Random House LLC.

192. *Id.*; see TUFTE, VISUAL DISPLAY, *supra* note 84, at 186 (“The contrast in line weight represents contrast in meaning. The greater meaning is given to the greater line weight . . .”).

Figure 7. The “Unpierced” Ear<sup>193</sup>



Tufte stresses that “when *everything* (background, structure, content) is emphasized, *nothing* is emphasized; the design will often be noisy, cluttered, and informationally flat.”<sup>194</sup> Muting secondary elements thus allows the viewer to concentrate on the content instead of unnecessarily focusing on the container of the content.<sup>195</sup>

Another technique for layering information is the use of color.<sup>196</sup> Tufte provides a powerful example from an IBM copier-machine-parts manual that displays “300 small parts and their identifying numbers.”<sup>197</sup> Despite the intricacy of the diagram, one can still easily differentiate between the part and the identifying number because

193. TUFTE, VISUAL EXPLANATIONS, *supra* note 84, at 74.

194. *Id.* Tufte refers to one particular offender as an “information prison,” in which content displayed in a grid of the same color and greater thickness ended up being upstaged by the less important structure. TUFTE, ENVISIONING INFORMATION, *supra* note 170, at 63.

195. For such a demonstration, see TUFTE, ENVISIONING INFORMATION, *supra* note 170, at 64.

196. *Id.* at 53–54.

197. *Id.* at 54.

the parts are printed in black, whereas the secondary labels are printed in thinner red ink.<sup>198</sup>

In addition to creating distinct layers through the use of tone and color,<sup>199</sup> Tufte provides examples of layering through different shapes and sizes,<sup>200</sup> as well as the intentional use of negative areas of white space.<sup>201</sup> Perhaps Tufte sums this lesson up best by stating: “Failure to differentiate among layers of reading leads to cluttered and incoherent displays filled with disinformation . . . .”<sup>202</sup>

#### *D. Integrating Text with Graphics*

A final principle of aesthetics derived from Tufte’s work on graphic design is the integration of words and graphics.<sup>203</sup> One underlying rationale of information integration is the idea that words, pictures, graphics, and tables all accomplish the same purpose of disseminating information, albeit in different ways.<sup>204</sup> In essence, segregating the information based on whether it is “packaged” as text or graphic is tantamount to physically interrupting the flow of information simply for the sake of formalistic convention and is as irrational as replacing graphics with paragraphs of words and scattering them “out of sequence with the rest of the text.”<sup>205</sup>

A second rationale is that such segregation of textual and graphic information may force the viewer’s attention to switch from one place to another, even though the textual and graphic information may be substantively related.<sup>206</sup> A familiar example from academic literature and scientific journals is the “clumsy and diverting” use of references such as “See Fig. 2,” in which the figure referred to by the text is located on an entirely different page.<sup>207</sup> In these cases, the arbitrary

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198. *Id.*; see Dugan, *supra* note 149, at 507–08 (“[R]esearch shows that color is perceived first by the eye and brain, followed by pictures, then symbols, and lastly, words.”).

199. Although not all courthouses may currently be equipped to print materials in fine gradations of tones and colors, the use of colors is just one example of how courts may in the future create visual layers.

200. TUFTE, ENVISIONING INFORMATION, *supra* note 170, at 58.

201. *Id.* at 60–61.

202. *Id.* at 65.

203. See TUFTE, VISUAL DISPLAY, *supra* note 84, at 181 (describing the “principle of text/graphic/table integration”).

204. *Id.*

205. *Id.*

206. *Id.* at 180; see Dugan, *supra* note 149, at 517–18 (describing techniques for integrating visual and verbal presentations).

207. TUFTE, VISUAL DISPLAY, *supra* note 84, at 181.

segregation of information based on whether it is textual or graphic should yield to clarity and understanding. Tufte himself quite effectively vouches for the fusion of text and graphics by consistently integrating graphics seamlessly throughout his own text. Most ingeniously (and quite literally), Tufte takes a page from polymath Leonardo da Vinci's book, nesting a picture of a page from da Vinci's journal—which itself contains da Vinci's own sketches embedded within da Vinci's written text—within *Tufte's* own discussion of the merits of text-graphic integration.<sup>208</sup>

*E. Incorporating Principles of Visual Design in Flowchart Verdict Sheets*

Ultimately, the principles mentioned in this Part are not to be applied rigidly or mathematically.<sup>209</sup> To the contrary, their purpose is to promote clarity in presentation, and in doing so, to “give visual access to the subtle and the difficult.”<sup>210</sup> Flowchart verdict sheets designed in conformity with Tufte's principles of visual design and presentation can maximize understanding and clarity while minimizing confusion. The two-dimensional structure of the flowchart allows the jury to escape the linear stacking of information and the concomitant decreases in comprehension and reasoning that result from the use of a conventional text-only verdict sheet.<sup>211</sup> As opposed to a linear stream of words, the flowchart verdict sheet enhances the jury's spatial-analysis capabilities and provides context for how the different ideas, elements, defenses, or claims in the verdict sheet fit together.<sup>212</sup>

The proposed verdict sheets also serve as an example of a macro-micro design.<sup>213</sup> For example, consider a verdict sheet that asks the jury to decide whether the plaintiff has proven the elements of the claim. Imagine there is also an affirmative defense to that claim, the elements of which are displayed on the side opposite to the elements of the claim. Although each individual box contains substantive information about the element, the boxes in the aggregate also visually communicate information on the number of elements each

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208. *Id.* at 182.

209. *Id.* at 191.

210. *Id.*

211. *See supra* Part IV.A.

212. *See supra* notes 171–79 and accompanying text.

213. *See supra* note 180 and accompanying text.

party has to prove and which party must prove them,<sup>214</sup> information that is more readily processed through the visual dimension.

The flowcharts can also decrease any attention switching that can result from following a text-only verdict sheet.<sup>215</sup> Using the example of *Ms. Palsgraf*, a jury's attention may initially be focused on the substantive question of whether the Long Island Railroad Company's actions proximately caused her injuries.<sup>216</sup> Upon answering that question, the jury must then switch its attention to processing the textual instructions indicating which question to answer next. The text of the next question may also be physically segregated from the textual instructions directing the jury to answer that question.<sup>217</sup> On the other hand, by allowing the jury to rely on the flowchart to correctly determine the next question based on its answer to a previous question, the flowchart verdict sheet allows the jury to focus solely on decisionmaking.

In addition to the visual design principles already incorporated into the flowchart verdict sheet, some final design recommendations may be useful. For example, color may be used to distinguish the plaintiff's claims from the defendant's affirmative defenses, or even to highlight the two outcomes of which party prevails. The use of color adds an additional visual dimension that conveys information without the need to use words and creates layers to help the jurors quickly distinguish between the plaintiff and the defendant.<sup>218</sup> Flowchart designers can also experiment with color and line width to mute or soften secondary elements.<sup>219</sup> For example, the structural boxes in which the elements or claims are situated could be drawn with a thinner line or in a muted tone to focus the jury's attention on the substantive language content within the boxes.<sup>220</sup> On the other hand, the arrows may be drawn with bolder lines, or even in different colors, to illuminate the various decision paths. By creating a visual hierarchy of language content, structure, and decision paths through the use of color, line width, and the like, flowchart designers can reduce potential clutter and noise.<sup>221</sup>

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214. *See supra* note 183 and accompanying text.

215. *See supra* notes 206–07 and accompanying text.

216. *See supra* Figure 2.

217. *See supra* note 205 and accompanying text.

218. *See supra* note 186 and notes 196–98 and accompanying text.

219. *See supra* notes 190–95 and accompanying text.

220. *See supra* note 195 and accompanying text.

221. *See supra* note 194 and accompanying text.

Flowchart verdict sheets aim to communicate information to the jury through language as well as structure. The language of the written interrogatories communicates the immediate question the jury must answer. The interrogatories may, for example, ask the jury to determine some fact in the case, determine liability for a claim, or determine whether an element of a claim or an affirmative defense has been met. The structure of the verdict sheet complements the language by informing the jury what it should do next after answering a particular interrogatory. By illustrating the relationships between different interrogatories based on the jury's answers, the flowchart also illustrates the valid decision paths the jury may take. The arrangement of the interrogatories also serves as a visual reminder to the jury of what the plaintiff needs to show to prevail and which party bears the burden of proof if an affirmative defense is involved. Thus, the proposed verdict sheets allow jurors to focus on intelligent decisionmaking without requiring jurors to retain a mental decision tree in their heads or to commit the legal concepts from the jury instructions to memory, thereby facilitating "visual access to the subtle and the difficult."<sup>222</sup>

## V. OBJECTIONS AND RECOMMENDATIONS

Despite the trial court's wide discretion in forming the verdict and academic support for the use of visual aids in promoting comprehension and decisionmaking,<sup>223</sup> flowchart verdict sheets have not been implemented on any significant level, if at all. This Part first identifies and addresses two possible rationales for why judges and lawyers have not given serious consideration to the use of flowchart verdict sheets. This Part then offers some preliminary recommendations that may alleviate some of the hesitancy toward adopting these or other sorts of graphic verdict sheets.

### A. *What's the Big Deal?*

The first rationale is that even if flowchart verdict sheets do in fact mitigate the risk of inconsistent verdicts by minimizing confusion and improving comprehension and decisionmaking abilities, the range of situations in which they are helpful may be so limited that the costs of implementation would be greater than the costs of inconsistent jury

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222. TUFTE, *VISUAL DISPLAY*, *supra* note 84, at 191.

223. *See supra* Parts I.B & III.B.

verdicts caused by juror confusion. One study estimates that there were around ten thousand federal jury trials in 1990, about half of which were civil.<sup>224</sup> Even if a case survives the dispositive motion stage to reach the verdict stage, legal scholars have remarked that the traditional general verdict is “used almost exclusively in the great majority of courts.”<sup>225</sup> Although the trial court has complete discretion to use verdicts under Rule 49,<sup>226</sup> this same discretion means that judges may simply opt to use the traditional verdict sheet to sidestep the problem of inconsistencies in the interrogatories. And even if the trial court agrees to use a Rule 49 verdict, it is likely that not every verdict will contain an inconsistency in the interrogatories. Furthermore, for those verdicts that *do* contain inconsistencies, many procedural safeguards exist that prevent the time and money costs of a new trial.<sup>227</sup> As discussed above, the Rule 49 framework itself imposes a duty on the judge to harmonize inconsistent interrogatories and also gives the judge the options of entering judgment on the answers or resubmitting the verdict to the jury for further consideration.<sup>228</sup> In addition, there are tools that exist outside of Rule 49 that allow the judge to remedy inconsistent civil verdicts, such as entering judgment notwithstanding the verdict.<sup>229</sup>

So then, what *is* the big deal? If the applicability of the flowchart verdict sheet is to be limited in so many ways as to essentially remove its teeth, why should the flowchart verdict sheet even merit consideration? Even if the majority of federal civil cases do not involve potential inconsistencies that could be mitigated by flowchart verdict sheets, using flowcharts in some appreciable number of cases in which they may act is still better than using flowcharts in none. As exemplified by *Anderson v. County of Suffolk*, inconsistent verdicts do not simply exist in an abstract vacuum.<sup>230</sup> The time and money costs associated with a new trial or with retaining the jury for an extra day to reconsider an inconsistent verdict, as rare as they may be, are

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224. Landsman, *supra* note 40, at 289.

225. FRIEDENTHAL, ET AL., *supra* note 52, at 1108; see Driver, *supra* note 104, at 496 (discussing why special verdicts under Rule 49(a) have seen such limited use in federal court). The overuse of traditional general verdicts might actually result in an underestimation of juror confusion by masking the jury's thought processes and decisionmaking.

226. See *supra* note 74 and accompanying text.

227. See *supra* Part I.A.

228. See *supra* Part I.A.2.

229. Landsman, *supra* note 40, at 304.

230. See *supra* note 25 and accompanying text.



still real.<sup>231</sup> And any potential rarity of inconsistent verdicts caused by juror confusion does not necessarily undermine the flowchart verdict sheet's efficacy as a prophylactic against juror confusion generally.<sup>232</sup> In addition, although judges in civil cases have discretion to enter judgment notwithstanding the jury's verdict, some commentators have suggested that judicial hesitation toward altering or overturning a verdict may in part exist because "the jury is expected to be the fact finder and not merely an advisory body."<sup>233</sup> In contrast to flowchart verdict sheets, these postverdict "fixes" correct some unwanted result only after the fact as opposed to *preventing* the faulty decisionmaking.<sup>234</sup>

A related objection is that the scope of cases in which the flowchart verdict sheet would be helpful may be further limited by the complexity of the case. In other words, the flowchart verdict sheet may be less helpful for extremely simple or extremely complex cases.<sup>235</sup> For example, the benefit from using a flowchart verdict sheet as opposed to a conventional verdict sheet for the simplest cases would be marginal because the risk of confusion would be low.<sup>236</sup> On the other hand, flowchart verdict sheets may decrease in effectiveness if the case is too complex. Some cases, such as *Apple Inc. v. Samsung Electronics Co.*,<sup>237</sup> were complex due to their highly technical subject matter. The verdict form for the patent case spanned twenty pages and required the jury to answer "more than 500 discrete questions

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231. See *supra* notes 28–38 and accompanying text. In one complex patent case, a litigant—recognizing that "[t]he likelihood of an inconsistent verdict is a possibility despite the jury's best efforts"—requested time to review the verdict form to "conserve the resources of the Court and the parties." Samsung's Request, *supra* note 31, at 1. Ultimately, Samsung's fear of an inconsistent verdict never materialized. Regardless, *Apple v. Samsung* illustrates the concrete costs imposed on courts and litigant alike. See Samsung's Request, *supra* note 31, at 2 ("The parties and the Court here have expended substantial time, money, and resources to bring this case to verdict."). Although some may see the costs of inconsistent verdicts as merely the costs of doing "judicial business" that the court system should be willing to pay, whether this is sound policy is beyond the scope of this Note.

232. See Driver, *supra* note 104, at 497 (noting the "unusual unanimity of opinion" among lawyers, judges, and legal commentators who "have joined in condemning the general verdict").

233. Friedland, *supra* note 115, at 199.

234. *Id.* at 200.

235. Indeed, the usefulness of *any* verdict sheet—much less a flowchart verdict sheet—would be extinguished should the court decline to send the case to the jury on the basis of complexity. See *supra* note 139 and accompanying text.

236. Similarly, using flowchart verdict sheets for traditional general verdicts may not be as beneficial because the risk of inconsistency is virtually nonexistent. See *supra* text accompanying note 96.

237. *Apple Inc. v. Samsung Elecs. Co.*, 888 F. Supp. 2d 976 (N.D. Cal. 2012).

across 5 different legal disciplines.”<sup>238</sup> The case, and by extension the verdict form, was so complex that Samsung, recognizing the possibility of an inconsistent verdict “despite the jury’s best efforts,” requested thirty minutes to review the verdict form.<sup>239</sup> For cases of this level of complexity, flowcharts alone may not be able to significantly decrease the possibility of an inconsistency. Although not every case may be as complex as *Apple v. Samsung*, cases featuring multiple parties and multiple claims, counterclaims, and cross-claims may also test the bounds of the flowchart verdict sheet’s effectiveness.

Nevertheless, the complexity argument does not imply that the flowchart verdict sheet must be thrown out completely. To the contrary, flowcharts may assist in juror comprehension and decisionmaking even in simple cases, and at worst would have a neutral effect on the case.<sup>240</sup> Although very complex cases can indeed test the bounds of the flowchart’s effectiveness, flowchart verdict sheets may still assist jurors in reaching a valid verdict, especially when combined with other approaches to improving juror comprehension.<sup>241</sup> Furthermore, because highly complex cases are the ones that can cause confusion and inconsistent verdicts, those cases are precisely the ones that would benefit most from flowchart verdict sheets.<sup>242</sup> To argue that flowchart verdict sheets should not be used at all simply because they may not be completely effective on their own ignores the benefits that they may provide—especially in these complex cases.

*B. “If It Ain’t Broke, Don’t Fix It.”*

Flowchart verdict sheets may be not widely implemented for the same reason that other proposed jury innovations have not been

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238. Samsung’s Request, *supra* note 31, at 1; Verdict Form, *Apple*, 888 F. Supp. 2d 976 (No. 11-cv-1846).

239. Samsung’s Request, *supra* note 31, at 1. Although parties do certainly review verdict forms, the extra step of filing a motion requesting time to review the verdict form seems much more unusual, as does Samsung’s explicit acknowledgment of the possibility of inconsistency in the verdict. *See id.* (“The likelihood of an inconsistent verdict is a possibility despite the jury’s best efforts.”).

240. *See supra* note 164 and accompanying text.

241. *See supra* Part III.B.

242. For a case as complex as *Apple Inc. v. Samsung Electronics Co.*, *supra* notes 237–39, a court may benefit from using multiple strategies in conjunction with flowchart verdict sheets, such as bifurcating the trial. *See Schwarzer*, *supra* note 92, at 122–23 (suggesting that judges identify and define which issues need to be tried to improve juror comprehension in complex cases).

adopted—as one judge writes, “[a]ttempts at innovation in the trial process have traditionally been met with ritual cries of, ‘If it ain’t broke, don’t fix it.’”<sup>243</sup> Legal commentators have also recognized the judicial inertia that results from longstanding legal traditions.<sup>244</sup> A similar argument is that flowchart verdict sheets have not been implemented because of a fear of reversal on appeal. In other words, despite the trial court’s discretion over the various aspects of the verdict, flowchart verdict sheets may be regarded by courts of appeals as too radical a departure from conventional verdict sheets to justify their implementation at the trial level.<sup>245</sup>

It is true that the use of flowchart verdict sheets raises unavoidable questions related to their implementation, including who should design the flowcharts, what they should look like, and as described above, the boundaries of the flowchart verdict sheet’s applicability.<sup>246</sup> Although the exact contours of implementation have yet to be worked out, several preliminary recommendations may guide future discussions on implementation. The primary recommendation of this Note is the creation of pattern flowchart verdict sheets by the federal judiciary itself. These models may assuage the fear of reversal on appeal that may hinder trial judges from implementing flowchart verdict sheets.<sup>247</sup> Like the creation of pattern jury instructions, the creation of pattern flowchart verdict sheets by appellate courts may have additional benefits such as (1) obviating the need for judges and lawyers to spend time creating new verdict sheets for each trial;<sup>248</sup> (2) saving the time of appellate courts on appeal; and (3) minimizing potential prejudice in the verdict sheets against any particular litigant—all the while maintaining the legal accuracy of the language and “uniformity in the treatment of cases.”<sup>249</sup>

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243. Mark A. Frankel, *A Trial Judge’s Perspective on Providing Tools for Rational Jury Decisionmaking*, 85 NW. U. L. REV. 221, 222 (1990).

244. *Id.*; see, e.g., Driver, *supra* note 104, at 495 (recognizing the inertia that “tends to hold courts and judges in the procedural grooves to which they are accustomed”).

245. Cf. Lieberman et al., *supra* note 116, at 591 (citing literature finding that one reason judges may not elaborate on or clarify jury instructions is fear of reversal).

246. See *supra* Part V.A.

247. See Lieberman et al., *supra* note 116, at 590–91 (asserting that pattern jury instructions are popular in part because they limit the number of appeals due to incorrect instructions); Steele, et al., *supra* note 116, at 105 (suggesting that there may be a risk of reversal in using jury-instruction language not already approved by the appellate court).

248. See Lieberman et al., *supra* note 116, at 590 (noting the benefits of pattern jury instructions).

249. Dattu, *supra* note 148, at 98.

The language contained within the flowchart verdict sheet should still, as much as possible, reflect the language of the judge's verbal instructions.<sup>250</sup> To start, pattern flowchart verdict sheets could be created for common types of claims, such as employment claims,<sup>251</sup> or for types of claims for which there are already widely used pattern jury instructions. If the verdict sheets prove to be helpful, the appellate courts could then create pattern verdict sheets for other types of cases—including more complex types of cases—or different forms of verdicts. Lastly, after finalizing the language and structure of the pattern flowchart verdict sheet, the courts could enlist for the actual design of the verdict sheets the help of “typographers, calligraphers, graphic designers, illustrators, [and] artists,” all of whom surely have been using these concepts of layering for a long time.<sup>252</sup>

### CONCLUSION

The growing complexity of modern civil litigation implicates several relevant concerns. Increases in the complexity of civil cases may result in a higher number of inconsistent verdicts due to jury error. Although courts have the discretion under Rule 49 to resubmit an inconsistent verdict to the jury for further consideration or to order a new trial, these *ex post* remedies may be expensive and time consuming. At the same time, the general costs associated with a new trial may be further exacerbated by complex cases, which often involve voluminous discovery and multitudes of expert witnesses. Furthermore, these remedies do not prevent the confusion and faulty decisionmaking that may result in these inconsistent verdicts in the first place.

The use of flowchart verdict sheets may, however, avoid these costs by decreasing jury confusion and augmenting the decisionmaking abilities of jurors. By leveraging psychological and visual design principles to increase juror comprehension, decisionmaking abilities, and spatial-analysis abilities, this Note proposes preliminary steps in the implementation of these verdict sheets, starting with the creation of pattern flowcharts. Although flowchart verdict sheets may not completely resolve the problems

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250. See *supra* note 158 and accompanying text.

251. See *supra* Figure 1.

252. TUFTE, ENVISIONING INFORMATION, *supra* note 170, at 65.

presented by inconsistent verdicts, this Note aims to canvass several issues raised by inconsistent verdicts and guide the academic discourse on the judicial development of visual verdict sheets in the right direction.