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Improving Jury Deliberations: A Reconsideration of Lesser Included Offense Instructions

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IMPROVING JURY DELIBERATIONS: A RECONSIDERATION OF LESSER INCLUDED OFFENSE INSTRUCTIONS

Jury deadlocks in criminal cases create numerous problems. Unless the trial judge can somehow break the deadlock, the jury will remain "hung"[1] and the judge must declare a mistrial.[2] If the state chooses to pursue a conviction after a mistrial, it must either negotiate a guilty plea with the defendant or repeat the trial process. If, however, the judge wishes to avoid a hung jury and chooses to encourage the jury to reach a verdict, the jury may be given further instructions designed to break the deadlock. Such instructions may range in tone from relatively general statements about the necessity of compromise, to more coercive instructions designed to achieve minority capitulation.[3]

In some cases, the evidence presented at trial permits the judge to instruct the jury on offenses less serious than the crime charged — so-called lesser included offenses.[4] These instructions can be presented in various

1. Professor Leo Flynn defined a hung jury as "a jury (1) which, in the judgment of the court, has deliberated for a proper period of time, and (2) which has been discharged by the court because there appears to be no reasonable probability that the jury can agree upon a verdict." Flynn, *Does Justice Fail When the Jury is Deadlocked?*, 61 JUDICATURE 129, 130 (1977). Statutes and legal dictionaries have come up with similar definitions. *See, e.g.*, CAL. PENAL CODE § 1140 (West 1970); BLACK'S LAW DICTIONARY 667 (5th ed. 1979).

2. *See generally* Schulhofer, *Jeopardy and Mistrials*, 125 U. PA. L. REV. 449, 486-90 (1977).

3. Instructions to induce compromises are commonly called *"Allen* instructions," after Allen v. United States, 164 U.S. 492 (1896), in which the Supreme Court affirmed their use. *See infra* note 49.

4. Many courts, legislatures, and commentators have defined lesser included offenses. A composite definition, sufficient for the purposes of this Note, is those offenses the elements of which are contained in the charged offense, or offenses which must be committed during the commission of the greater offense.

Professor Charles Wright provided a definition of "lesser included offense" and several useful examples:

> One offense is necessarily included in another if it is impossible to commit the greater without also having committed the lesser. Thus murder includes such lesser offenses as second-degree murder, manslaughter, and negligent homicide. Robbery necessarily includes larceny, and assault with intent to rob. Rape necessarily includes assault with intent to rape. Assault with a dangerous weapon includes simple assault. Theft of property in excess of $100 includes the lesser wrong of theft of property of value not exceeding $100. In each of these instances some of the elements of the greater crime charged are in themselves enough to constitute the lesser crime.
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> The rule also provides in terms that the jury may find the defendant guilty of an

ways, from restrictive instructions that may coerce minority jurors[5] by requiring extended deliberations on the charged offense; to more flexible instructions that promote compromise on lesser offenses but that may allow for quick decisions not based on the merits. Neither undue coercion nor unmerited compromise is a desirable outcome, but this is often the only choice when the judge wishes to avoid a hung jury. Given such a choice, this Note contends that the flexible, compromise approach is preferred, both because coercion is legally and psychologically undesirable and because juries will not abuse their power to compromise.

This Note approves of efforts to avoid hung juries by giving lesser included offense instructions but opposes those instructions that restrict juror decisions and coerce minority jurors. Rather, this Note offers a lesser included offense instruction that promotes flexibility and jury compromise without undermining the deliberative process. Part I describes the problem of hung juries and how courts have tried to prevent them with restrictive lesser included offense instructions. Part II analyzes the coercive impact of restrictive lesser included offense instructions and concludes that an instruction conditioning deliberations upon individual juror disagreement better promotes compromises on the merits while reducing hung juries and juror coercion.

I. AVOIDING HUNG JURIES WITH COERCIVE JURY INSTRUCTIONS

The American jury trial, despite a long and distinguished history,[6] has been under constant fire by members of the bench and bar.[7] One facet of jury trials is particularly vulnerable to criticism: hung juries. Attempts to resolve these jury deadlocks also cause problems because efforts to urge the jury to reach a verdict may be too heavy-handed and give the judge undue influence over jury deliberations.

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attempt to commit the offense charged — or an offense necessarily included therein — if an attempt is an offense.

3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 515, at 21-23 (1982) (citations omitted).

5. Juror coercion, for the purposes of this Note, is any implicit or explicit influence, other than the merits of the case, exerted by any individual connected with the trial, that convinces a juror in the minority to change his or her vote. The type of coercion discussed in this Note concerns supplemental judicial instructions or pleas of fellow jurors to abandon a position without regard for its basis or reasonableness. *See infra* notes 40-49 and accompanying text.

6. For a lengthy and informative history of the jury trial, see L. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY (1973). Within the last 15 years, the Supreme Court has made use of the jury's history to define the limits and requirements of the sixth amendment right to a trial by jury. *See* Apodaca v. Oregon, 406 U.S. 404, 407-10 (1972); Williams v. Florida, 399 U.S. 78, 87-99 (1970); Duncan v. Louisiana, 391 U.S. 145, 151-54 (1968).

7. *See, e.g.*, J. FRANK, COURTS ON TRIAL 108-45 (1949). *See generally* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 3-11 (1966); Forston, *Sense and Non-Sense: Jury Trial Communication*, 1975 B.Y.U. L. REV. 601, 601.

A. *The Problem With Hung Juries*

Of over 200,000 criminal jury trials for felony offenses in the United States each year,[8] between five and twelve percent end in hung juries.[9] Consequently, at least 10,000 and perhaps more than 24,000 jury trials end with the jury unable to agree on a verdict. These numerous stalemates are the source of many problems.

A hung jury produces a wholly unsatisfactory conclusion to the criminal trial for it is neither an acquittal nor a conviction. In forty percent of the cases, the state opts not to retry the defendant.[10] For the defendant who did not commit the crime, release after a hung jury and release after an acquittal should make little difference, except for the benefit acquittal provides to an injured reputation. It is more likely, however, that the defendant released following a hung jury did, in fact, commit some crime, though not necessarily the principal crime charged.[11] For these technically

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8. *See* H. ABRAHAM, THE JUDICIAL PROCESS 117 (4th ed. 1980); Friedrich, *We, the Jury, Find the. . .*, TIME, Sept. 25, 1981, at 45.

The number 200,000 is only a rough estimation. No government or private agency keeps records on the number of jury trials each year. *See* H. KALVEN & H. ZEISEL, *supra* note 7, at 501-09. Professors Kalven and Zeisel based their estimates of the annual number of jury trials on surveys of local courts, correspondence with state officials, projections, and reports from judicial conferences.

9. Two different studies have attempted to determine the number of hung juries. The first study recording the number of hung juries was the "Chicago Jury Project," directed by Harry Kalven, Jr., Hans Zeisel, and Fred Strotbeck of the University of Chicago, and sponsored by the Ford Foundation. The study based its findings on court records, postdeliberation interviews, simulated cases before experimental juries, and the recording of a limited number of actual jury deliberations. Public opinion surveys were used to ascertain popular attitudes about the jury system. Jury selection was also studied. *See* D. GILLMOR, FREE PRESS AND FAIR TRIAL 201 (1966). In the process of analyzing court records, the study found hung juries occur in 5.5% of the cases. H. KALVEN & H. ZEISEL, *supra* note 7, at 57.

The second study was performed by Professor Leo Flynn at Pomona College. Flynn studied three years of results of trials in California's 10 largest metropolitan areas (8,021 jury trials in felony cases, or 81% of the felony trial litigation). He found that the jury hung 12.2% of the time (978 cases). Flynn, *supra* note 1, at 130.

Kalven and Zeisel's statistics are not inconsistent with Flynn's, though Flynn's proportion of hung juries is higher than Kalven and Zeisel's. Kalven and Zeisel sought to determine the extent and nature of disagreement between judges and juries. They mailed questionnaires to judges and suspected that some judges may not have returned reports on mistrials. H. KALVEN & H. ZEISEL, *supra* note 7, at 57.

10. *See* Flynn, *supra* note 1, at 133.

11. In Flynn's study, 62.6% of the hung juries favored conviction; in 42.1% of the hung juries, the vote favoring conviction was 9-3, 10-2, or 11-1. Flynn, *supra* note 1, at 131-32. Kalven and Zeisel reported similar findings; 63% favored conviction and 44% favored conviction by 9-3 or more. H. KALVEN & H. ZEISEL, *supra* note 7, at 460. Although the United States Constitution does not require unanimous jury verdicts in state criminal trials, *see* Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972), most states require unanimity, *see* E. PRESCOTT, FACETS OF THE JURY SYSTEM 9 (1976). Thus, verdicts of 9-3, 10-2, or 11-1 usually do not result in conviction, so researchers are cautious to mention that such vote splits do not conclusively imply a defendant's guilt. *See* Flynn, *supra* note 1, at 132; *see also* H. KALVEN

"guilty" but legally free defendants the hung jury provides an unwarranted exemption from the penal function of the criminal justice system.

Even when the state reprosecutes, a second trial exacts a heavy price from both society and defendants, regardless of the second trial's verdict. Second trials drain state treasuries of millions of dollars per year,[12] and add to the crowding of court dockets and delays in other cases.[13] The spectacle of retrials also endangers the legitimacy of the jury system. If citizens are to respect the law in their everyday lives, and uphold it as jurors, they must perceive the system as just and efficient.[14] Hung juries give citizens the impression that the system works poorly.[15] Moreover, retrials jeopardize the interests of defendants due to the emotional and financial strain of successive defenses.[16] Given these drawbacks, the best solution to hung juries would be to avoid situations in which a hung jury can result.

B. Lesser Included Offense Instructions as a Partial Solution to Hung Juries

Instructions affecting deliberations on lesser included offenses could lower the number of hung juries. Before one can understand the probable effect of different lesser included offense instructions, however, it is important to understand the general background of the lesser included

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& H. ZEISEL, *supra* note 7, at 461, 489. Nonetheless, in investigations of 64 trials in nonunanimous verdict states, Kalven and Zeisel found that juries hung only 3.1% of the time, or 45% less often. *Id.* at 461. This correlates closely with the percentage of vote splits favoring conviction by nine or more jurors in states requiring unanimous jury verdicts. Flynn also found that, following a hung jury, 34% of the defendants pled guilty and over two-thirds of the 26% retried were convicted. Flynn, *supra* note 1, at 133.

12. Flynn's study indicates that during a three-year period, hung juries cost the state of California $6.6 million. Flynn, *supra* note 1, at 134. *See also* E. PRESCOTT, *supra* note 11, at 9; M. SAKS & R. HASTIE, SOCIAL PSYCHOLOGY IN COURT 85 (1978) (both commenting on the increased deliberation time likely in cases ending in hung juries). *See generally* LAW REFORM COMM'N OF CANADA, CRIMINAL LAW — THE JURY IN CRIMINAL TRIALS, WORKING PAPER 27, at 108 (1980).

13. *See* Jacobsohn, *The Unanimous Verdict: Politics and the Jury Trial*, 1977 WASH. U.L.Q. 39, 56-57.

14. A graphic manifestation of the loss of respect for the justice system occurred in Miami, Florida, in the early summer of 1980. The acquittal of four former police officers of the beating death of a black insurance executive led to widespread violence. In several days of rioting, 16 people died and over 400 were injured. Residents and the city lost over $100 million in property damage. *See* Williams, Smith & Coppola, *Three Days of Black Rage in Miami,* NEWSWEEK, June 2, 1980, at 34. Attorney General Benjamin Civiletti attributed the unrest to "a great perception of injustice which has brought a sense of frustration and rage." N.Y. Times, May 20, 1980, at B11, col. 1. Ironically, many lawyers blamed the trial's result on the prosecution's questionable trial strategy of not trying to obtain jury compromise on a lesser offense. *See* Beck & Heckoff, *The McDuffie Case*, NEWSWEEK, June 2, 1980, at 39.

15. Jacobsohn, *supra* note 13, at 57.

16. *See* LAW REFORM COMM'N OF CANADA, *supra* note 12, at 108.

A guilty defendant does obtain some benefits from a hung jury, but these are not benefits

offense doctrine. "Lesser included offenses" are offenses composed of elements already contained in the charged offense, or that must be committed during the perpetration of the charged offense.[17] Typically, one of the parties must request the instruction before it can be given, though some states require their judges to consider the instruction regardless of a request by the parties.[18] The instruction can only be given if, considering the evidence presented at the trial, the jury could properly convict the defendant on some lesser included offense.[19] A defendant cannot be found guilty of both the lesser and greater offenses.[20]

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society is bound to protect. Free between trials, a defendant may engage in further criminal activity. Additionally, a defendant may escape conviction because witnesses die, disappear, or forget their testimony, or because the state cannot afford the time and expense of reprosecution. *See supra* notes 9 & 11.

17. *See supra* note 4. *See also* Sansone v. United States, 380 U.S. 343, 349 (1965); FED. R. CRIM. P. 31(c); ALA. CODE § 13A-1-9 (1975); ARK. STAT. ANN. § 43-2149 (1977); CAL. PENAL CODE § 1157 (West 1981); IDAHO CODE § 19-2311 (1979); ILL. ANN. STAT. ch. 38, § 2-9 (Smith-Hurd 1972); IND. CODE ANN. § 35-41-1-2 (West 1979); KAN. STAT. ANN. § 21-3107(3) (1981); LA. REV. STAT. ANN. § 14:5 (West 1974); ME. REV. STAT. ANN. tit. 17-A, § 13A (1983); MICH. COMP. LAWS ANN. § 768.32 (1982); MINN. STAT. ANN. § 609.04 (West 1964); MISS. CODE ANN. § 99-19-5 (1973); MONT. CODE ANN. § 46-11-501-2(a) (1981); N.Y. CRIM. PROC. LAW § 1.20.37 (McKinney 1981); OHIO REV. CODE ANN. § 2945.74 (Page 1982); OKLA. STAT. ANN. tit. 22, § 916 (West 1958); OR. REV. STAT. § 136.460 (1981); TENN. CODE ANN. § 40-18-110(c) (1982); TEX. CODE CRIM. PROC. ANN. art. 37.09 (Vernon 1981); UTAH CODE ANN. §§ 77-33-5, 77-33-6 (1978); ARIZ. R. CRIM. P. 23.3; COLO. R. CRIM. P. 31(c); FLA. R. CRIM. P. 3.510; KY. R. CRIM. P. 9.86; N.D. R. CRIM. P. 31(c); R.I. R. CRIM. P. 31(c); VT. R. CRIM. P. 31(c); MODEL PENAL CODE § 1.07(4)(a) (Proposed Official Draft 1962).

In United States v. Thompson, 492 F.2d 359, 362 (8th Cir. 1974), the Court of Appeals for the Eighth Circuit summarized the requirements entitling a defendant to a lesser included offense instruction:

> (1) a proper request is made; (2) the elements of the lesser offense are identical to part of the elements of the greater offense; (3) there is some evidence which would justify conviction of the lesser offense; (4) the proof on the element or elements differentiating the two crimes is sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense; and (5) there is mutuality, *i. e.*, a charge may be demanded by either the prosecution or the defense.

(emphasis omitted).

18. Only North Carolina, Tennessee, and Oklahoma require lesser included offense instructions sua sponte. *See* State v. Hicks, 241 N.C. 156, 84 S.E.2d 545 (1954); Strader v. State, 210 Tenn. 669, 362 S.W.2d 224 (1962); N.C. GEN. STAT. § 15-169 (1978); TENN. CODE ANN. § 40-18-110(c) (1982). *Cf.* Barnett v. State, 560 P.2d 997 (Okla. Crim. App. 1977) (establishing a court-imposed rule that request is not necessary for lesser included offense instructions when the charge is first degree murder).

19. *See* Sansone v. United States, 380 U.S. 343, 351 (1965); FED. R. CRIM. P. 31(c); 8A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 31.03 (2d ed. 1981); 4 W. TORCIA, WHARTON'S CRIMINAL PROCEDURE § 545 (12th ed. 1976); Comment, *The Lesser Included Offense Instruction — Problems With Its Use*, 3 LAND & WATER L. REV. 587 (1968). *See generally* Beck v. Alabama, 447 U.S. 625, 636 n.12 (1980) (citing state and federal cases supporting the proposition that "a defendant is entitled to a lesser included offense instruction where the evidence warrants it").

20. *See* Milanovich v. United States, 365 U.S. 551 (1961). In cases where the defendant was convicted of both the greater and lesser offenses, the conviction for the lesser offense was vacated. *See, e.g.*, United States v. Crawford, 576 F.2d 794 (9th Cir.), *cert. denied*, 439 U.S. 851 (1978); United States v. Lodwick, 410 F.2d 1202 (8th Cir. 1969).

The lesser included offense doctrine was developed as a way for the prosecution to obtain a conviction in cases where it had overcharged or was unable to prove some element of the crime.[21] Ironically, defendants began to request the instruction because it allowed the jury to "temper justice with mercy" by finding the defendant guilty of only some lesser offense.[22]

Courts presently conflict over how to present the lesser included offense instruction to juries. Generally, most courts have chosen one of two procedures: (1) the "acquittal" instruction under which the jury is required to unanimously *acquit* the defendant on the charged offense before being allowed to deliberate on any lesser included offense or (2) the "reasonable doubt" instruction under which the jury can begin to consider lesser included offenses once they have *reasonable doubt* about guilt on the charged offense.

1. The "acquittal" instruction— The acquittal instruction began as part of the traditional requirement of jury unanimity[23] and was catalyzed by pattern jury instructions used by the federal courts in the 1960's.[24] The instruction states that if jurors "should unanimously find the accused 'Not Guilty' of the crime charged in the indictment (information) then the jury must proceed to determine the guilt or innocence of the accused as to any lesser-included offense."[25] The acquittal instruction has been consistently upheld in most federal courts[26] and many state courts.[27]

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21. *See* 3 C. WRIGHT, *supra* note 4, § 514, at 20; *see also* Beck v. Alabama, 447 U.S. 625, 637-38 (1980); Keeble v. United States, 412 U.S. 205, 205 (1973); 8A J. MOORE, *supra* note 19, ¶ 31.03[1].

22. *See supra* note 21.

23. *See* State v. Wall, 9 N.C. App. 22, 175 S.E.2d 310 (1970); State v. Payne, 199 Wis. 615, 227 N.W. 258 (1929); Dillon v. State, 137 Wis. 655, 119 N.W. 352 (1909); Ballinger v. State, 437 P.2d 305 (Wyo. 1968).

24. *See* W. MATHES & E. DEVITT, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 15.10 (1st ed. 1965). *See also infra* notes 26-27.

25. E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 18.05 (3d ed. 1977).

26. *See* United States v. Boffa, No. 81-2660, slip op. (3d Cir. Aug. 25, 1982); Pharr v. Israel, 629 F.2d 1278 (7th Cir. 1980); United States v. Hanson, 618 F.2d 1261 (8th Cir. 1980); United States v. Jones, No. 77-1506, slip op. (D.C. Cir. Mar. 28, 1979); Catches v. United States, 582 F.2d 453 (8th Cir. 1978); United States v. Tsanas, 572 F.2d 340 (2d Cir. 1978); Fuller v. United States, 407 F.2d 1199 (D.C. Cir. 1968); United States v. Singleton, 447 F. Supp. 852 (S.D.N.Y. 1978).

27. *See* Nell v. State, 642 P.2d 1361 (Alaska App. 1982); Stone v. Superior Court, 31 Cal. 3d 503, 646 P.2d 809, 183 Cal. Rptr. 647 (1982); People v. Padilla, 638 P.2d 15 (Colo. 1981); Johnson v. United States, 434 A.2d 415 (D.C. App. 1981); Commonwealth v. Edgerly, 12 Mass. App. Ct. 562 (1982).

Many state courts have accepted the acquittal instruction implicitly. *See, e.g.*, State v. Dippre, 121 Ariz. 596, 592 P.2d 1252 (1979) (holding that it was not erroneous for the judge to submit a verdict form to the jury consisting of "guilty/not guilty" for each offense); Price v. State, 114 Ark. 398, 170 S.W. 235 (1914) (holding that a lesser included offense instruction is not reversible if it conveys the idea that if the jury has reasonable doubt about guilt on any degree,

The acquittal instruction promotes several important goals. By limiting jury discretion, it requires conclusive deliberations on the charged offense. All jurors must agree on one charge before proceeding to the next; consequently, attention will be paid to the opinions of minority as well as majority jurors during the decision-making process. Permitting less than unanimous agreement on the charge could discount the views of dissenters, for their dissent might not alter the will of the majority.[28] Moreover, the requirement of unanimous acquittal guards against compromise verdicts that may be unrelated to the merits of the case.

Although courts recognize the jury's right to reach compromise verdicts,[29] judges do not encourage such verdicts. In denying judges the authority to give lesser included offense instructions without request, the Court of Appeals for the District of Columbia held that "[t]o do so 'serves only to encourage the jury to exceed its historical function of factfinding' and 'exercise its mercy dispensing power' by convicting on the lesser rather than on the greater charge."[30] The fear of jury compromise has prompted many courts and legislatures to restrict the scope of the lesser included offense doctrine by demanding that a party request the instruction before it can be used.[31]

Limiting jury deliberations to one charge can impede the jury's ability to reach a verdict. By indiscriminately preventing compromise the acquittal instruction stops not only undesirable compromise, but desirable

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they should acquit of that degree and find guilt of a lower degree about which there is no reasonable doubt); People v. Dixon, 24 Cal. 3d 43, 592 P.2d 752, 154 Cal. Rptr. 236 (1979) (narrowly construing situations in which statutory provisions requiring conviction of only the lesser offense apply); State v. Troynack, 174 Conn. 89, 384 A.2d 326 (1977) (approving, in consideration of a different issue, an instruction to the jury to consider the lesser offense if it did not find the defendant guilty of the charged offense); State v. Leinweber, 303 Minn. 414, 228 N.W.2d 120 (1975) (signaling lower courts to give lesser included offense instructions when the evidence supports conviction of the lesser crime and the defendant is not guilty of the charged offense).

The language of lesser included offense statutes in many states suggests that courts in those states might uphold the "acquittal" instruction. These statutes use the terms "acquittal" and "not guilty" in a way suggesting that they are prerequisites to guilt on a lesser included offense. *See, e.g.*, OHIO REV. CODE ANN. § 2945.74 (Baldwin 1982); TENN. CODE ANN. § 40-2520 (1975); VA. CODE § 19.2-285 (1975). Other state rules of criminal procedure convey a similar impression. *See, e.g.*, LA. CODE CRIM. P. art. 804; TEX. CODE CRIM. PROC. ANN. art. 37.08 (Vernon 1981).

The Federal lesser included offense doctrine is the result of judicial interpretation of Rule 31(c) of the Federal Rules of Criminal Procedure. *See* United States v. Tsanas, 572 F.2d 340, 344 (2d Cir. 1978). Many state rules of criminal procedure parallel the wording of Rule 31(c). *See, e.g.*, ARIZ. R. CRIM. P. 23.3; FLA. R. CRIM. P. 3.510; MASS. R. CRIM. P. 27(b); N.D. R. CRIM. P. 31(c); R.I. R. CRIM. P. 31; VT. R. CRIM. P. 31(c).

28. Studies of nonunanimous final jury verdicts indicate that the majority neglects the views of the minority because unanimity is not necessary for the verdict. *See infra* notes 56 & 58. Once the requisite majority is reached, few attempts are made to persuade dissenting jurors. *See infra* notes 66-67 and accompanying text.

29. *See* Dunn v. United States, 284 U.S. 390 (1932).

30. Lightfoot v. United States, 378 A.2d 670, 673 (D.C. App. 1977). *See also* United States v. Harary, 457 F.2d 471, 478-79 (2d Cir. 1972).

31. *See supra* note 18 and accompanying text.

compromise as well.[32] Limiting deliberations to one offense can impede the jury's ability to reach a verdict. Because the jury cannot discuss lesser included offenses until agreeing to acquit on the charged offense, jurors cannot rectify substantial disagreement by compromising on a lesser offense composed of elements not disputed by the defendant or by the jurors.[33] These restraints on compromise discussions thus fail to ameliorate the hung jury problem.

Some courts have been pleased with the results of the acquittal instruction but reluctant to use such restrictive procedures on the jury. Because the instruction sets out the specific deliberation agenda, jurors are left with no discretion or room for compromise. To soften the impact of their involvement in jury procedures, some judges have developed alternative instructions that are similar in effect but arguably less rigid.

2. *The "reasonable doubt" instruction*— Some courts have attemp-

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32. Desirable and undesirable compromises are difficult to define and the distinction, to some degree, is subjective. Generally, however, desirable compromises are motivated by the merits of the case or a desire to seek justice through the proper channels. *See infra* notes 85-91 and accompanying text. A compromise verdict resulting from the jury's concern that the prosecutor overcharged is desirable. If the only alternatives are a hung jury, conviction of an offense more serious than the defendant committed, or acquitting a guilty defendant, compromise should be encouraged. On the other hand, compromise should not be facilitated when the compromise does not serve a desirable purpose. For examples of unmerited compromise, see *infra* note 70.

33. This scenario assumes that jurors understand and follow the instructions that place them in this predicament. For jurors to follow instructions, two things must happen: they must understand the instructions when delivered, and choose to apply them when relevant to deliberations.

Many studies question the ability of jurors to understand common instructions as currently written. *See* Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979); Elwork, Sales & Alfini, *Juridic Decisions: In Ignorance of the Law or In Light of It?*, 1 LAW & HUM. BEHAV. 163 (1977); Strawn & Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478 (1976). A problem with these studies is that they do not take account of the jury's collective education and memory. They did not, for example, allow deliberation on the meaning of the instructions, and therefore neglected to mention that, on a 12-person jury, eight or nine jurors would have understood the instruction correctly. If general psychological characteristics about jury deliberations apply, the majority will convince the minority of the correct interpretation. *See infra* note 40.

Even if the studies generally are valid, their conclusions do not apply to lesser included offense instructions. The reasons given in the studies for lack of juror comprehension — unfamiliar terms, abstract terms, use of negative language, ambiguous homonyms, and complex sentence structure — do not exist in lesser included offense instructions. The only problem of incomprehensibility might be with the "reasonable doubt" instruction. *See infra* notes 34-39 and accompanying text.

Once the jurors understand the instruction, they will apply it when deliberating. The jury studies draw a distinction between instructions advising the jury to disregard certain information (usually a prior criminal record) and instructions outlining the jury's task (defining offenses, explaining deliberation procedures). Juries tend to follow task instructions but often do not follow instructions to disregard evidence. *See* Lind, *The Psychology of Courtroom Procedure*, in THE PSYCHOLOGY OF THE COURTROOM 30 (N. Kerr & R. Bray eds. 1982) Researchers have taken instructions explaining difficult legal concepts, such as the definition of "insanity" and, by varying them slightly, found that jurors responded by varying their likelihood of conviction. *See, e.g.*, R. SIMON, THE JURY AND THE DEFENSE OF INSANITY 66-77 (1967). Lesser included offense instructions seem to fit in the "task" category because they outline the procedures by which the jury determines the verdict and do not require the jury to disregard something used during the trial.

ted to soften the restrictive acquittal instruction by instructing jurors to consider lesser included offenses only after a reasonable doubt exists about the defendant's guilt on the charged offense. This "reasonable doubt" approach instructs jurors that, "[i]f you are not satisfied beyond a reasonable doubt that the defendant is guilty of an offense charged, or you entertain a reasonable doubt of the defendant's guilt, you may consider [lesser included offenses]."[34]

Courts adopting this "reasonable doubt" instruction contend that it merely sets out a sequence of offenses for the jury to consider and does not require agreement on the charged offense.[35] In practice, however, the instruction is practically indistinguishable from the acquittal instruction. For instance, Michigan courts first accepted the reasonable doubt instruction as an acceptable alternative to the "coercive" and "unduly restrictive" acquittal instruction.[36] After eight years of use, however, the Michigan Supreme Court held that the effect of the reasonable doubt instruction on the jury was the same as that of the acquittal instruction.[37]

Even if some courts fail to recognize the similarities between the two instructions, juries probably do. The likely effect of the reasonable doubt instruction is to encourage jurors to consider lesser included offenses only after acquittal on the charged offense. The subtle legal distinctions between the two standards are difficult to grasp. The concept of reasonable doubt is technical, especially in the lesser included offense context, and has been given a whole spectrum of meanings, some quite counterintuitive. In addition, courts often confuse the two standards in

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34. People v. McGregor, 635 P.2d 912, 914 (Colo. Ct. App. 1981). This instruction has been accepted in Georgia, Hawaii, and Wisconsin. *See* Evans v. State, 148 Ga. App. 422, 251 S.E.2d 325 (1978); State v. Santiago, 55 Hawaii 162, 516 P.2d 1256 (1973); State v. McNeal, 95 Wis. 2d 63, 288 N.W.2d 874 (Ct. App. 1980).

35. *See* Fuller v. United States, 407 F.2d 1199 (D.C. Cir. 1967), *cert. denied*, 393 U.S. 1120 (1969); People v. McGregor, 635 P.2d 912 (Colo. App. 1981); Franey v. United States, 382 A.2d 1019 (D.C. 1978); Brownlee v. State, 155 Ga. App. 875, 273 S.E.2d 636 (1980); Evans v. State, 148 Ga. App. 422, 251 S.E.2d 325 (1978); State v. McNeal, 95 Wis. 2d 63, 288 N.W.2d 874 (Ct. App. 1980).

36. People v. Ray, 43 Mich. App. 45, 50, 204 N.W.2d 38, 41 (1972).

37. People v. Mays, 407 Mich. 619, 623, 288 N.W.2d 207, 208 (1980).

Other courts, however, disagree. Many post-*Mays* decisions in other states have chosen to uphold similar instructions despite recognizing the *Mays* decision. *See* Nell v. State, 642 P.2d 1361 (Alaska Ct. App. 1982); People v. Padilla, 638 P.2d 15 (Colo. 1981); People v. McGregor, 635 P.2d 912 (Colo. Ct. App. 1981). Even the Michigan appellate courts have been divided in their response to *Mays*, limiting its scope to cases where the language of the trial judge's instruction copied the instruction rejected by the Michigan Supreme Court. *Compare* People v. Henderson, 113 Mich. App. 505, 317 N.W.2d 340 (1982) *and* People v. Handley, 101 Mich. App. 130, 300 N.W.2d 502 (overturning convictions following lesser included offense instructions) *with* People v. Leverette, 112 Mich. App. 142, 315 N.W.2d 876 (1982) (holding that the instruction did not explicitly state that a verdict had to be reached on the greater offense before consideration of the lesser offenses) *and* People v. Barker, 101 Mich. App. 599, 300 N.W.2d 648 (1980) (holding that the instruction did not explicitly preclude the jury from considering the lesser included offense before considering the charged offense).

practice, thus making the jury's task even more difficult.[38] The reasonable doubt instruction also affects jury behavior in the same way as an acquittal instruction. Juries may view this instruction as requiring that the entire jury have reasonable doubt of the defendant's guilt of the charged offense — a standard requiring acquittal — before proceeding to the lesser offense.[39]

Despite the original intentions of judges first recommending it, in practice the reasonable doubt instruction is difficult to distinguish from the acquittal instruction. Because of the confusion inherent in the reasonable doubt instruction, jurors will not consider lesser included offenses until they have decided to acquit the defendant on the charged offense. Consequently, the problems that plague acquittal instructions — coercion and an inability to pursue reasonable compromise — also plague reasonable doubt instructions.

Many courts are attempting to minimize the hung jury problem with restrictive instructions that force juries to deliberate on the charged offense until reaching a conclusion. This approach admittedly produces verdicts but at the loss of the free will of minority jurors, who are often forced to go along with the decision because of judicial barriers to consideration of lesser offenses.

II. AVOIDING COERCIVE LESSER INCLUDED OFFENSE INSTRUCTIONS

Both the acquittal instruction and the reasonable doubt instruction have a coercive effect on jurors. Although some coercion may be tolerable — and even necessary where a juror is unreasonably stubborn — as a matter of principle it should be the exception, not the rule.

A. The Problem With Coercive Instructions

Restrictive lesser included offense instructions may help avoid hung juries, but only at the risk of another threat to the deliberation process:

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38. Many courts upholding the reasonable doubt instruction cite acquittal instruction cases for support. *See, e.g.*, Fuller v. United States, 407 F.2d 1199 (D.C. Cir. 1967), *cert. denied*, 393 U.S. 1120 (1969); People v. Padilla, 638 P.2d 15 (Colo. 1981); Evans v. State, 148 Ga. App. 422, 251 S.E.2d 325 (1978); State v. McNeal, 95 Wis. 2d 63, 288 N.W.2d 874 (Ct. App. 1980).

Some courts have denied that acquittal instructions ever require acquittal on the charged offense before consideration of lesser included offenses. *See* Pinson v. State, 251 S.W. 1092 (Tex. Crim. App. 1923); *see also* People v. Walker, 58 Mich. App. 519, 228 N.W.2d 443 (1975).

39. The Michigan courts have realized that confusion, as well as coercion, can endanger jury deliberations. In People v. Mays, 407 Mich. 619, 288 N.W.2d 207 (1980), the Michigan Supreme Court reversed a conviction following the reasonable doubt instruction and ruled that instructions "convey[ing] the impression" that acquittal must precede lesser included offense deliberations are erroneous. 407 Mich. at 623, 288 N.W.2d at 208. *See also* People v. Embry, 68 Mich. App. 667, 673, 243 N.W.2d 711, 714 (1976). *See generally supra* note 33.

juror coercion. Minority jurors have three options once the jury appears deadlocked: persuade the majority to reverse its views, hold out for a hung jury, or change their own minds. It is rare that a minority can change the majority's mind.[40] The jury either "hangs" or the minority changes its mind. The shift in the minority vote may come from the majority persuading the dissenters on the merits of the case, perhaps by pointing out inconsistencies in testimony or attacking evidence.[41] Nevertheless, many minority shifts stem from the majority engendering a feeling of inferiority or unreasonableness in the minority.[42]

Mindful of the trouble and expense of a second trial, judges sometimes maximize this coercive effect. They may try to obtain a jury verdict even after a long deadlock by refusing to declare mistrials or by giving supplemental instructions to compel a jury verdict.[43] They may make statements to the jury emphasizing the need to reach a decision, the burden the minority must undertake to convince the majority, the lack of options, and the burden that dissent places on the majority jurors and on the smooth functioning of the courts.[44] Judges intensify this coercive effect by giving the acquittal instruction supplementally, or by repeating it after the jury reaches an impasse.[45]

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40. Studies indicate that the initial minority on the jury usually loses out to the numbers or the reasoning of the majority. The Chicago Jury Project found that 90% of the first-ballot majorities determined the outcome. *See* H. KALVEN & H. ZEISEL, *supra* note 7, at 488. *See also* M. SAKS & R. HASTIE, *supra* note 12, at 94-97 (reviewing the literature on group interaction on juries and concluding that "[w]hether one is studying risk taking, ethical decisionmaking, attitudes, negotiation and conflict, or jury decisionmaking, if the members initially lean in one direction, the group interaction process draws them further in that same direction").

In many cases, appellate courts have held that the acquittal instruction had coercive effects on verdicts. *See* People v. West, 408 Mich. 332, 291 N.W.2d 6 (1976); People v. Hurst, 395 Mich. 1, 238 N.W.2d 6 (1976); People v. Summers, 73 Mich. App. 411, 251 N.W.2d 311 (1977); People v. Harmon, 54 Mich. App. 393, 221 N.W.2d 176 (1974); State v. Ogden, 35 Or. App. 91, 580 P.2d 1049 (1978).

When the case ends in a hung jury, it is likely that deliberations began with a large minority. "It requires a massive minority of four or five jurors at the first vote to develop the likelihood of a hung jury." H. KALVEN & H. ZEISEL, *supra* note 7, at 462.

41. *See* M. SAKS & R. HASTIE, *supra* note 12, at 96-98 (explaining deliberative processes after the jury becomes divided).

42. Although it is difficult to determine the precise content of jury deliberations, it is possible to infer that many verdicts are the result of the minority accepting the majority's results for reasons other than a true belief in that position. For anecdotal evidence, see *supra* note 70. For evidence of that belief by legal commentators, see *infra* note 49. Appellate courts also feel that illegitimate coercion could account for trial results. *See infra* notes 45-49.

43. *See* H. ABRAHAM, *supra* note 8, at 129.

44. *See infra* notes 46-49 and accompanying text.

45. Although the Devitt and Blackmar instruction, *see supra* note 25, is written for the judge to give before jury deliberations begin, judges often give the acquittal instruction supplementally. The acquittal instruction has been given supplementally in many cases during jury deadlocks. *See, e.g.*, People v. Harmon, 54 Mich. App. 393, 221 N.W.2d 176 (1974); People v. Ray, 43 Mich. App. 45, 204 N.W.2d 38 (1972); State v. Ogden, 35 Or. App. 91, 580 P.2d 1049 (1978); Ballinger v. State, 437 P.2d 305 (Wyo. 1968). In each case, the jury returned a verdict of "guilty" on the charged offense after receiving the instruction. With the exception of *Ballinger*, each court

Such supplemental instructions create pressure on the jury.[46] Appellate courts have responded to this situation by occasionally reversing convictions obtained with the aid of such instructions. For instance, the judge cannot demand a decision from the jury,[47] or inquire into the numerical division of the jury,[48] or ask minority jurors to reconsider the

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ruled that the instruction was prejudicial. *See supra* note 40.

The coercion implied by the supplemental acquittal instruction led the court in *State v. Ogden* to consider the instruction a "modified *Allen* charge." 35 Or. App. at 94, 580 P.2d at 1051. *See infra* note 49.

Regardless of when judges give the instruction, its coercive qualities are unaltered. Although it is theoretically possible, if the judge gives the acquittal instruction before deliberations, for the majority on the jury to change its conviction votes for acquittal to obtain a compromise verdict on a lesser charge, this does not happen in practice. Current research on jury behavior indicates that, once the majority has the advantage, it can and will use the instructions to get its verdict.

46. Deliberations are a tense time. Jurors must make difficult decisions that are of vital importance to the parties involved. In addition, minority jurors feel pressured by their need to defend their position against a larger number of adversaries, and by the erosion of support for their position. *See* Stasser, Kerr & Bray, *The Social Psychology of Jury Deliberations: Structure, Process, and Product,* in THE PSYCHOLOGY OF THE COURTROOM 241-47 (N. Kerr & R. Bray eds. 1982). Under these circumstances, jurors are likely to feel coerced by judges calling them out of the jury room to remind them of their duties and obligations. *See* LAW REFORM COMM'N OF CANADA, *supra* note 12, at 108-09; 8A J. MOORE, *supra* note 19, ¶ 31.04[3]; Schulhofer, *supra* note 2, at 487.

In People v. Gainer, 19 Cal. 3d 835, 566 P.2d 997, 139 Cal. Rptr. 861 (1977), the California Supreme Court, in an extensive review of the *Allen* instruction, found certain supplemental instructions prejudicial. The court said that during a jury deadlock, the jurors are most susceptible to judicial influence and concluded, "[i]t is hard to conceive of circumstances in which error is more capable of producing prejudicial consequences." *Id.* at 855, 566 P.2d at 1008, 139 Cal. Rptr. at 872.

47. Jenkins v. United States, 380 U.S. 445 (1965) (reversing, "under all the circumstances," a verdict that was prompted by the trial judge's supplemental exhortation, "[y]ou have got to reach a decision in this case"); *cf.* United States v. United States Gypsum Co., 438 U.S. 422, 461 (1978) (upholding the reversal of convictions based on the jury foreman's understanding of an ex parte comment by the trial judge that the case must be decided "one way or another"). *But see* United States *ex rel.* Latimore v. Sielaff, 561 F.2d 691 (7th Cir. 1977) (using the "under all the circumstances" test in *Jenkins* to deny habeas corpus claim where trial judge ignored juror requests to suspend deliberations during the evening and the jury delivered a verdict at 3:22 a.m.), *cert. denied,* 434 U.S. 1076 (1978); United States *ex rel.* Anthony v Sielaff, 552 F.2d 588 (7th Cir. 1977) (using "under all the circumstances" language to find a lack of coercive effect in polling the jury to determine prospects of agreement on a verdict despite circumstantial evidence of coercion).

48. Brasfield v. United States, 272 U.S. 448 (1946) (reversing a conviction that followed the judicial inquiry into the numerical division of the jury). State courts have differed in their application of the *Brasfield* rule because of doubts about its basis. Some state courts have followed it based on federal constitutional grounds. *See, e.g.,* Taylor v. State, 17 Md. App. 41, 299 A.2d 841 (1973); People v. Wilson, 390 Mich. 689, 213 N.W.2d 193 (1973); State v. Aragon, 89 N.M. 91, 547 P.2d 574 (1976). Others have denied that *Brasfield* is binding on state proceedings, either because the decision was based on the Supreme Court's advisory power over the federal courts, *see, e.g.,* Cornell v. Iowa, 628 F.2d 1044 (8th Cir. 1980), *cert. denied,* 449 U.S. 1126 (1981); Ellis v. Reed, 596 F.2d 1195 (4th Cir.), *cert. denied,* 444 U.S. 973 (1979); Sharplin v. State, 330 So. 2d 591 (Miss. 1976); State v. Morris, 476 S.W.2d 485 (Mo. 1971), or because the courts decided that a factual inquiry into the coercive effect on the jury was more appropriate, *see, e.g.,* People v. Carter, 68 Cal. 2d 810, 442 P.2d 553, 69 Cal. Rptr. 297 (1968); Lowe v. State,

reasonableness of their views.[49] Although acquittal and reasonable doubt instructions have not typically been found to be excessively coercive, the absence of legal coercive sanctions should not commend them to widespread use. Indeed, judges overseeing jury trials should eschew even the potential for active coercion.

Nevertheless, a different form of lesser included offense instruction may help prevent the disagreements that lead to hung juries and coercion. Rather than awaiting a deadlock and attacking it by forcing all jurors to agree on one offense, modified lesser included offense instructions could be used to prevent deadlocks from occurring by promoting discussion on a mutually agreeable compromise. Moreover, if properly given, these instructions should not lead to unchecked jury discretion or unmerited compromise.

B. The "Disagreement" Instruction as a Solution to Coercion

Courts in Michigan and Oregon have attempted to avoid coercive deliberations by adopting instructions that do not require any form of

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175 Colo. 491, 488 P.2d 559 (1971); Huffaker v. State, 119 Ga. App. 742, 168 S.E.2d 895 (1969); Joyner v. State, 484 P.2d 560 (Okla. Crim. App. 1971).

49. The controversy about this instruction, called the "*Allen* instruction" or the "dynamite charge," originated in Allen v. United States, 164 U.S. 492 (1896). The Supreme Court, in upholding the conviction, summarized the trial court's instruction:

> [I]f much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

Id. at 501. Because the instruction was effective at producing verdicts, it was rapidly accepted.

Although the United States Supreme Court has not reconsidered its position on the instruction, the modern trend is for courts to limit or abandon the *Allen* instruction. The Third, Seventh, and District of Columbia Circuits have held that the instruction is coercive for almost all purposes. *See* United States v. Silvern, 484 F.2d 879 (7th Cir. 1973); United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971); United States v. Fioravanti, 412 F.2d 407 (3d Cir.), *cert. denied sub nom.* Panaccione v. United States, 396 U.S. 837 (1969). Other federal circuits have limited the instruction by preventing judges from giving it too early in deliberations, *see* United States v. Contreras, 463 F.2d 773 (9th Cir. 1972), by requiring an additional instruction that tells jurors not to surrender honest, conscientious beliefs, *see* United States v. Mason, 658 F.2d 1263 (9th Cir. 1981), or by not permitting judges to give it more than once, *see* United States v. Bailey, 480 F.2d 518 (5th Cir. 1973). *But see* United States v. Robinson, 560 F.2d 507 (2d Cir. 1977) (affirming a conviction after the *Allen* instruction had been given twice, stating that coercive impact increased with each appeal by the court to the jury, but each instance should be evaluated in its circumstances), *cert. denied,* 435 U.S. 905 (1978).

At least 23 states have disapproved *Allen*-type instructions, in whole or in part. *See* People v. Gainer, 19 Cal. 3d 835, 566 P.2d 997, 139 Cal. Rptr. 861 (1977), (citing cases from 22 other states and analyzing the debate over the *Allen* instruction). *See generally* 8A J. MOORE, *supra* note 19, ¶ 31.04[2]; Marcus, *The* Allen *Instruction in Criminal Cases: Is the Dynamite Charge About to be Permanently Defused?*, 43 Mo. L. REV. 613 (1977); Comment, *An Argument for the Abandonment of the Allen Charge in California*, 15 SANTA CLARA LAW. 939 (1975).

agreement on the charged offense before allowing discussion of lesser included offenses.[50] This "disagreement" instruction directs the jurors to consider the charged offense first, but unless they agree to convict, they may consider any lesser included offense.[51] Although only two states recommend disagreement instructions, some federal courts have implicitly accepted the standard.[52]

The disagreement instruction can improve jury deliberations and reduce the number of hung juries. It does this by offering the jury more decision alternatives, earlier in deliberations, on which the jury can arrive at a mutually agreed-upon verdict. Critics contend that easing coercion by promoting compromise is not likely to reduce hung juries. Alternatively, they argue that if it does, it will do so by causing the early abandonment of deliberations to reach a quick verdict upon a mutually agreeable, but greatly reduced, offense,[53] thus allowing some defendants to avoid proper punishment. Nevertheless, social science studies and close analysis of the procedural setting demonstrate that increasing jury options will reduce the number of hung juries without necessarily leading to excessive unmerited compromise.

1. Social science research and reducing hung juries— The social sciences provide insight into jury deliberations that aids in understanding the effects of different jury instructions. Research in two areas — increasing the number of options open to jurors, and allowing juries to return nonunanimous decisions — lend support to the proposition that disagreement instructions can aid juries in reaching a verdict.

Several experimental jury studies have determined the effect of increasing the jury's verdict options. Although the studies could not replicate the hung jury situation, they concluded that lesser included offense deliberation leads to compromise on a lesser offense.[54] From this con-

50. *See* People v. Mays, 407 Mich. 619, 288 N.W.2d 207 (1980); State v. Ogden, 35 Or. App. 91, 580 P.2d 1049 (1978).

51. *Mays*, 407 Mich. at 623 n.1, 288 N.W.2d at 208 n.1. Oregon's instruction is similar: "First consider the charge in the accusatory instrument and if [you] cannot agree on a verdict on this charge, [you] should then consider the lesser included offenses." State v. Ogden, 36 Or. App. at 98, 580 P.2d at 1053.

52. In cases where federal judges were motivated more by desperation than by specific judicial rules, they instructed long-deadlocked juries to try to reach an agreement on any instructed offense, regardless of their lack of agreement on the charged offense. *See, e.g.*, United States v. Dixon, 507 F.2d 683 (8th Cir. 1974), *cert. denied*, 424 U.S. 976 (1976); United States v. Smoot, 463 F.2d 1221 (D.C. Cir. 1972); United States v. Singleton, 447 F. Supp. 852 (S.D.N.Y. 1978). The more common federal policy is use of the "aquittal" instruction. *See supra* notes 25-26.

53. *See infra* notes 60-70 and accompanying text.

54. *See* Vidmar, *Effects of Decision Alternatives on the Verdicts and Social Perceptions of Simulated Jurors*, 22 J. PERSONALITY & SOC. PSYCHOLOGY 211 (1972) (In 54% of the mock trials, the jury acquitted when the choice in a homicide trial was guilty of first-degree murder or not guilty. When the jury had four options, they returned verdicts of first-degree murder in 8% of the cases, second-degree murder in 63%, manslaughter in 21%, and not guilty in 8%). Many researchers have replicated aspects of Professor Vidmar's study and found analogous results. *See* Hamilton, *Obedience and Responsibility: A Jury Simulation*, 36 PERSONALITY & SOC.

clusion one can infer that the disagreement instruction can reduce hung juries. If mock jurors are choosing from a range of verdicts and reaching agreement, this indicates that more options change the substance of deliberations and that new discussion on the lesser offense can lead to an otherwise unobtainable unanimity.

Following the 1972 Supreme Court decisions holding that jury verdicts in state criminal cases need not be unanimous,[55] many researchers sought to determine the effect a nonunanimous verdict has on deliberations.[56] These studies concluded that changing the decision rule to nonunanimous final verdicts reduced the number of hung juries.[57] A disagreement instruction, like a jury that need not be unanimous, can alter the decision rule by promoting discussion on more ways to reach a verdict and by giving the jury the option of agreeing on an offense with fewer elements.[58] Investigations of jury decision making in civil

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PSYCHOLOGY 126 (1978); Kaplan & Simon, *Latitude and Severity of Sentencing Option, Race of the Victim and Decisions of Simulated Jurors: Some Issues Arising From the "Algiers Motel" Trial*, 7 LAW & SOC'Y REV. 87 (1972); Roberts, Hoffman & Johnson, *Effects of Jury Deliberation on the Verdicts and Social Perceptions of Simulated Jurors:* Vidmar *Revisited*, 47 PERCEPTUAL & MOTOR SKILLS 119 (1978).

55. These decisions were Johnson v. Louisiana, 406 U.S. 365 (1972), and Apodaca v. Oregon, 406 U.S. 404 (1972). Although unanimity is not a constitutional requirement, only six states allow less-than-unanimous final jury verdicts in criminal cases. *See* IDAHO CONST. art. 1, § 7; LA. CONST. art. I, § 17; MONT. CONST. art. III, § 23; OKLA. CONST. art. II, § 19; OR. CONST. art. I, § 11, TEX. CONST. art. V, § 13. With the exception of Louisiana and Oregon, nonunanimous verdicts are allowed only in certain circumstances, usually for minor offenses. *See generally* Israel, *On Recognizing Variations in State Criminal Procedure*, 15 U. MICH. J.L. REF. 465, 467 (1982).

56. *See, e.g.*, Davis, Kerr, Atkin, Holt & Meek, *The Decision Processes of 6- and 12-Person Mock Juries Assigned Unanimous and 2/3 Majority Rules*, 32 J. PERSONALITY & SOC. PSYCHOLOGY 1 (1975); Foss, *Structural Effects in Simulated Jury Decision Making*, 40 J. PERSONALITY & SOC. PSYCHOLOGY 1055 (1981); Nemeth, *Interactions Between Jurors as a Function of Majority vs. Unanimous Decision Rules*, 7 J. APPLIED SOC. PSYCHOLOGY 38 (1977); Saks & Ostrum, *Jury Size and Consensus Requirements: The Laws of Probability v. the Laws of the Land*, 1 J. CONTEMP. L. 163 (1975).

57. On the basis of Kalven and Zeisel's limited observations, they predict that nonunanimous jury verdicts reduce hung juries by 45%. H. KALVEN & H. ZEISEL, *supra* note 7, at 461; *see also supra* note 11. Professor Saks, in his review of the unanimous-nonunanimous jury verdict studies, concluded that "[u]nanimous juries, in comparison to quorum juries, deliberate longer, [and] are more likely to hang." M. SAKS, JURY VERDICTS 105 (1977). *See also* Foss, *supra* note 56 (using simulated jurors, this study found that juries rendering 10-2 verdicts made decisions twice as quickly and were much less likely to hang than juries with a unanimity requirement); Kerr, Atkin, Strasser, Meek, Holt & Davis, *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors*, 34 J. PERSONALITY & SOC. PSYCHOLOGY 282 (1976) (study of 101 six-person mock juries composed of undergraduate students, with a 30-minute limit on deliberations, found that the requirement of unanimity resulted in almost four times as many hung juries; when hung juries were eliminated from the analysis, the decision rule did not have a significant effect on verdicts).

Professor Michael Saks summarized the research findings: "As a consequence of reduced [social decision rules], fewer hung juries are anticipated not only by the mathematical model, but also by the litigants, all members of the [Supreme] Court, and every other commentator I have encountered on the unanimity-nonunanimity debate." M. SAKS, *supra*, at 29.

58. *See supra* notes 23-27, 30-31 & 54 and accompanying text.

Some commentators have suggested that "lowering the barriers" to consensus infringes on

litigation indicate that more discussion options may help juries reach decisions in more cases.[59]

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protections of the accused, either by effectively lowering the standard for guilt beyond a reasonable doubt or by providing prosecutors with a conviction when they did not meet their burdens. Professors Saks and Hastie explained the effects of reducing the social decision rule from unanimity to quorum:

> Quorum juries are more likely to produce verdicts as opposed to hanging; this is accomplished by reaching decisions on the basis of weaker evidence; and this means that more errors of both types will occur: convictions when the correct decision is acquittal; acquittals when the correct decision is conviction. Increased efficiency is purchased at some cost in accuracy. In practice, then, a relaxation in the decision rule should be expected to produce a *reduction* in the rate of convictions, since most trials currently result in convictions. The decrease, however, is a result of increased error.

M. SAKS & R. HASTIE, *supra* note 12, at 84-85 (emphasis in original).

The possibility of erroneous results is an important concern when the issue is reducing the size of the jury, *see* Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 644, 668-84 (1975), or reducing the decision rule to allow nonunanimous verdicts, *see* M. SAKS, *supra* note 57, at 24-31. By changing the agenda of the jury through lesser included offense instructions which promote compromise, defendants found innocent might now be found guilty of lesser offenses. *See, e.g.*, Vidmar, *supra* note 54, at 215 (finding that mock jurors with a choice of guilt of first-degree murder or not guilty convicted in 46% of the trials and acquitted in 54%; mock jurors given a choice of guilty of first-degree murder, second-degree murder, manslaughter, and not guilty, acquitted in only 8% of the cases).

Even if juror compromise is conviction prone, the fairness of the outcome is not compromised. Jurors generally decide cases on the merits and take their duties seriously, so a different agenda should not cause them to evaluate the substantive issues differently. *See infra* notes 71-84 and accompanying text.

The reasons for increased error under altered decision rules are not created by giving the jury more options during deadlocks. In cases with six-person juries, the possibility for error exists because minority views may not be represented, and because dissent by only one juror is more frequent. Sole dissenters may acquiesce faster than groups of dissenters. With a quorum decision rule, the minority is overridden even if it does not choose to acquiesce. Opening discussion to several different offenses should increase the fairness of the deliberation process by assuring that the jury has the opportunity to match the defendant's conviction with actual culpability. *See* 8A J. MOORE, *supra* note 19, ¶ 31.03[1]; Koenig, *The Many-Headed Hydra of Lesser Included Offenses: A Herculean Task for Michigan Courts*, 1975 DET. C.L. REV. 41, 52.

59. The persuasive techniques used by jurors to reach a consensus on a verdict differ from when the result sought is a damage award. A verdict decision is a dichotomy; jurors can acquit or convict. A damage amount, however, is a continuum; jurors can favor any figure ranging from zero dollars to the maximum amount. In arriving at a damage award, there are more options to choose from and more techniques of persuasion may be employed to reach a result. As part of the Chicago Jury Project, *see supra* note 9, Hawkins studied the deliberations of 46 mock juries made up from jury pools, who listened to a tape-recorded personal injury trial. "When jurors differed in their opinions on damages, they could settle their differences by bargaining. On liability, on the other hand, if they once became openly aligned on the issue, differences of opinion could be settled only by a complete capitulation of one side." C. Hawkins, Interaction and Coalition Realignments in Consensus-Seeking Groups: A Study of Experimental Jury Deliberations (Aug. 17, 1960) (unpublished thesis). "A continuum may develop (i.e., $5,000; $10,000; $15,000) in deciding damages for the plaintiff, and bargaining and compromise may take place within the deliberations to arrive at an equitable settlement." Kessler, *The Social Psychology of Jury Deliberations*, in THE JURY SYSTEM IN AMERICAN 67, 86 (R. Simon ed. 1975) (citing C. Hawkins, *supra*, at 58-59). The ability of jurors to resolve their differences by compromise relies on having a range of decisions to choose from. This analysis was developed in cases involving money damages, "but it might also apply where a jury must resolve multiple counts or choose the appropriate level of an offense." Lempert, *supra* note 58, at 680.

2. The potential for reducing hung juries— An instruction promoting compromise on lesser included offenses has the potential to reduce significantly the number of hung juries. Several factors indicate that most hung juries occur in cases where discussion of lesser included offenses may be available but is prohibited by restrictive judicial instructions. First, most criminal codes are composed of relatively few offense categories but many of these contain several grades of an offense based on the seriousness of conduct.[60] When the prosecutor charges the defendant with a serious grade of offense, the lower grades often constitute lesser included offenses and could easily become a part of jury deliberations.[61]

Second, most defendants are initially charged with the most serious offense within an offense category that the prosecutor feels can be found on the evidence to be presented at trial.[62] Consequently, charge reduction is often used when prosecutors are overzealous; the same outcome can result if the jury can have this option available in deliberations.

Third, those few defendants brought to trial are charged with relatively serious offenses.[63] When they arrive at trial, they may be convicted of

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60. *See, e.g.*, ARK. STAT. ANN. § 43-2150 (1977); DEL. CODE ANN. tit. 11, § 4201 (1979); KAN. STAT. ANN. § 21-4501 (1981); VA. CODE § 18.2-9 (1982); *see also* J. LEVINE, M. MUSHEMO & D. PALUMBO, CRIMINAL JUSTICE: A PUBLIC POLICY APPROACH 206-07 (1980) (giving the hypothetical example of how a drunk who mugs someone on a subway with a gun may be charged with as many as seven different crimes).

61. For example, a defendant accused of rape under such a statute may be charged with one or more degrees of criminal sexual conduct. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 750.520(a)-(e) (Supp. 1981) (creating four degrees of criminal sexual conduct). A defendant charged with one degree of criminal sexual conduct may necessarily be guilty of some lesser degrees. *See, e.g.*, People v. Thompson, 76 Mich. App. 705, 257 N.W.2d 268 (1977); *see also* People v. Gorney, 99 Mich. App. 199, 297 N.W.2d 648 (1980). *But see, e.g.*, People v. Green, 86 Mich. App. 142, 272 N.W.2d 216 (1978) (second degree conduct is a necessarily included offense of first degree conduct, but neither third nor fourth degree conduct constitutes a necessarily included offense of first or second degree conduct).

62. Concerning the decision whether to charge, Professors Michael and Don Gottfredson cite among the goals of the prosecutor's charging decisions, utilization of resources and "the desire to support the police informant network or to accomodate the prosecution of more significant 'higher ups' in a criminal conspiracy." M. GOTTFREDSON & D. GOTTFREDSON, DECISION-MAKING IN CRIMINAL JUSTICE 150 (1980). They also cite a U.S. Department of Justice study of charge dismissal in Los Angeles County where, based on 78,000 arrests, "most of the rejected felony arrests were based on a lack of evidence and the district attorney's belief that the case was not serious enough to warrant felony processing." *Id.* at 158 (citing P. GREENWOOD, S. WILDHORN, E. POGGIN, M. STRUMWASSER & P. DELEON, PROSECUTION OF ADULT FELONY DEFENDANTS IN LOS ANGELES COUNTY: A POLICY PERSPECTIVE (1973)).

Prosecutors have little to lose during the decision of *what* to charge by overcharging. Prosecutors always have the option of reducing charges on their own initiative if they erred in their judgments and cannot prove guilt. *See* J. LEVINE, M. MUSHENO & D. PALUMBO, *supra* note 60, at 207. Empirical studies indicate the prevalence of charging serious offenses. *See* Forst & Brosi, *A Theoretical and Empirical Analysis of the Prosecutor*, 6 J. LEGAL STUD. 177 (1977) (finding that prosecutors attached the most importance, during the charging decision, to the strength of the evidence and the seriousness of the case).

63. *See* M. HEUMANN, PLEA BARGAINING 102-10 (1978); Katz, *Legality and Equality: Plea Bargaining in the Prosecution of White-Collar and Common Crimes*, 13 LAW & SOC'Y REV.

many possible crimes: the charged offense or the less serious included offenses.

Fourth, after a hung jury the prosecutor often chooses to pursue a retrial on a lesser offense.[64] The disagreement instruction would allow jurors to make that same decision, but in the course of the first trial.[65]

3. When compromise should be a concern— Not withstanding the advantages of reducing hung juries without coercive procedures the increased opportunity to compromise offered by the disagreement instruction may result in verdicts motivated by concerns unrelated to the merits of the case. While studying the Oregon rule allowing ten-two jury verdicts, Professors Kalven and Zeisel found that juries returned nonunanimous verdicts in twenty-five percent of the cases, compared with the five percent national hung jury rate. They attributed this to the practice of stopping deliberations after reaching the requisite majority.[66] Courts and social scientists assert that such results may mark the existence of unmerited compromise or a tendency to ignore the minority in the jury.[67] In *People v. Clemente*,[68] for instance, the New York Court of Appeals complained that "[the jury] may, on almost any excuse, convict of a lower degree of crime although conviction of a higher degree is clearly warranted."[69] Jurors occasionally confirm these fears in post-trial interviews with reporters, sometimes indicating that their decision was motivated more by a desire to be finished with the trial than with the proofs offered by each side.[70]

431, 443-44 (1979). Heumann and Katz both suggest that time pressures on prosecutors at the state level require that minor cases be disposed of quickly, either through dismissals or guilty pleas. State prosecutors are organized to respond to the police, who in turn respond to the citizenry.

Federal prosecutors have greater potential for determining the composition and size of their caseloads. *See* Hogan & Bernstein, *The Sentence Bargaining of Upperworld and Underworld Crime in Ten Federal District Courts*, 13 LAW & SOC'Y REV. 467, 467-70 (1979). Even at the federal level, however, prosecutors select the serious cases to bring to trial. *See* Frase, *The Decision to File Federal Criminal Charges: A Qualitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246 (1980).

64. *See* Fried, Kaplan & Klein, *Juror Selection: An Analysis of Voir Dire*, in THE JURY SYSTEM IN AMERICA 54 (R. Simon ed. 1975) (noting that the prosecutor "will typically drastically reduce the charges after a single hung jury outcome").

65. *See generally* Comment, *supra* note 19, at 588.

66. Kalven & Zeisel, *The American Jury: Notes for an English Controversy*, 48 CHI. B. REC. 195, 201 (1967).

67. *See, e.g.*, M. SAKS, *supra* note 57, at 20-24 (suggesting that communication to and from minority jurors decreases when their views cannot affect the final decision); Nemeth, *supra* note 56 (finding that, in three studies of unanimous versus quorum verdicts, verdicts did not change but the unanimous juries reported reaching a full consensus, more confidence in the verdict, and a feeling that justice had been administered).

68. 285 A.D. 258, 136 N.Y.S.2d 202 (1954).

69. *Id.* at 264, 136 N.Y.S.2d at 207.

70. Anecdotal evidence in the form of juror interviews after publicized trials provide examples of how juror votes may be cast without regard to guilt or innocence. During deliberations in the murder trial of Juan Corona, a holdout juror for acquittal at one time in the deliberations said: "Please, I'll change my vote. Just don't hate me. I'll change my vote so you can go home to your wife." Wrightsman, *The American Trial Jury on Trial: Empirical Evidence and*

If juror compromise unrelated to the merits of the case occurs when judges offer juries the extensive deliberative discretion provided by the disagreement instruction, most courts are correct in refusing to give it. Nevertheless, a close examination of the existence and effects of the sort of compromise promoted by the disagreement instruction indicates that compromise verdicts should not compel rejection of the disagreement instruction.

C. *Avoiding Unmerited Compromise*

The disagreement instruction offers a method for preventing hung juries and juror coercion, but at the risk of unmerited compromise. Close examination, however, indicates that unmerited compromise rarely arises and even when it does, it may be desirable for equitable reasons. On balance, the benefits of promoting this kind of compromise outweigh the coercion inherent in other instructions as well as the minimal risk of unmerited compromise.

1. The occurrence of compromise— The process of jury deliberations has received extensive attention. Although many studies of jury deliberations do not specifically consider the effects of different lesser included offense instructions, their results are relevant in determining whether jurors will overcome the temptation to compromise too quickly and render a verdict that adequately considers the charged offense.

Some unmerited compromise will invariably occur; jurors sometimes do make quick compromises for reasons unrelated to the merits. Interviews with jurors after controversial trials demonstrate that juries sometimes compromise for the wrong reasons.[71] Some experimental studies with mock juries indicate that the examples may not be atypical and that certain factors unrelated to the issues preoccupy some jurors.[72] The number of trials in which unmerited compromise will determine the

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Procedural Modifications, 34 J. SOC. ISSUES 137, 157 (1978) (citing V. VILLASENOR, JURY: THE PEOPLE VS. JUAN CORONA (1977)).

During the trial of the Harrisburg Seven, some jurors characterized the deliberations as " 'blurred, quarreling, timeless periods of irrational arguments,' during which two jurors nearly came to blows and another kept referring to himself as 'serving God's will.' " J. LEVINE, M. MUSHENO & D. PALUMBO, *supra* note 60, at 290-91 (citing Village Voice, Feb. 8, 1973, at 9). *See also* H. ABRAHAM, *supra* note 8, at 136 (offering the example of a young mother on a jury who voted to convict the defendant of rape against her better judgment: "I knew I had those children at home and we would never get out of there if we tried to argue it out with the others."). *See also* M. SAKS, *supra* note 57, at 3.

71. *See supra* note 70.

72. *See, e.g.*, Padawer-Singer & Barton, *The Impact of Pretrial Publicity on Jurors' Verdicts*, in THE JURY SYSTEM IN AMERICA 123 (R. Simon ed. 1975) (using real jurors and a videotaped trial, the authors in this simulated jury study found that juries exposed to pretrial publicity, in the form of the defendant's prior criminal record and alleged repudiated confession, were more likely to convict than unexposed jurors); James, *Status and Competence of Jurors*, 64

verdict, however, is probably insignificant, according to experimental studies, studies of actual jury behavior, and case examples.

Experimental studies do not provide a sufficient basis for demonstrating that unmerited compromise is significant. First, the results of the studies are at best divided. Indeed, in contrast to some earlier, less elaborate studies,[73] recent mock jury studies have found that jurors base their decisions on the evidence and the facts of the case.[74] Second, experimental studies cannot duplicate the experience of serving on a jury. The common caution with experimental studies applies; experiments cannot replicate actual involvement in the situation.[75] Indeed, real jurors may perform better than mock jurors because of the seriousness and responsibility that accompany a real trial.[76]

Studies of actual jury behavior, drawn from real cases, provide the best support that the jury makes its decisions based on the evidence.

AM. J. SOC. 563 (1959) (This often-cited experimental study found that about 50% of the comments made during deliberations were expressions of opinions or recountings of personal experiences. Only 15% of the time was spent on testimony; 25% was spent discussing procedural issues and 8% was spent on judge's instructions.).

A review of mock jury studies concluded: "[S]ome degree of generalizability seems cautiously appropriate. It appears that extraevidential factors, such as defendant, victim, and juror characteristics, trial procedures, and so forth, can influence the severity of verdicts rendered by individual jurors." Gerbasi, Zuckerman & Reis, *Justice Needs a New Blindfold: A Review of Mock Jury Research*, 84 PSYCHOLOGICAL BULL. 323, 343 (1977); *see also* Wrightsman, *supra* note 70, at 152 (drawing the conclusion that "the consistency of findings [in studies on the effects of litigant characteristics on jurors] should question the assumption that jurors process information in a rational, objective manner, uninfluenced by characteristics of the defendant, witnesses, or attorneys") (summarizing the conclusion of Stephan, *Selection Characteristics of Jurors and Litigants: Their Influences on Juries' Verdicts*, in THE JURY SYSTEM IN AMERICA 97 (R. Simon ed. 1975)).

73. The best example of this is contained in the research of Professor Rita James Simon. Her 1959 mock jury study, *see supra* note 72, is often offered as evidence that juries do not base their decisions on the issues, *See, e.g.*, Kessler, *supra* note 59, at 84; Wrightsman, *supra* note 70, at 154. Professor Simon recanted this belief in her 1967 study of jury deliberations on the insanity defense. *See* R. SIMON, THE JURY AND THE DEFENSE OF INSANITY 175 (1967).

74. Some reviews of experimental jury studies conclude that "for the most part juries are able and willing to put aside extraneous information and base their decisions on the evidence. The results show that when ordinary citizens become jurors, they assume a special role in which they apply different standards of proof, more vigorous reasoning and greater detachment." Simon, *Does the Court's Decision in* Nebraska Press Association *Fit the Research Evidence on the Impact on Jurors of News Coverage?*, 29 STAN. L. REV. 515, 528 (1977). From their review of the experimental research, Professors Saks and Hastie conclude: "The studies are unanimous in showing that evidence is a substantially more potent determinant of jurors' verdicts than the individual characteristics of jurors." M. SAKS & R. HASTIE, *supra* note 12, at 68. Professor Simon also performed a study on the jury's ability to understand and apply the insanity defense. Based on the results of actual trials, she concluded that "[t]he jurors relied very heavily on the record. They reviewed every piece of evidence presented during the trial." R. SIMON, *supra* note 33, at 175.

75. *See, e.g.*, Lempert, *supra* note 58, at 802-03; Simon, *supra* note 74, at 520.

76. Professor Simon explains one of the conclusions of the Chicago Jury Project:

> Jurors take their responsibility seriously; they check prejudices at the door of the jury room and recognize their special role as temporary members of the judiciary bound

Although data of this sort is difficult to obtain,[77] the Chicago Jury Project provides enough of a research effort to determine what the American jury does in a real criminal trial.[78] The Project found that the jury's verdict agreed with how the judge would have decided the case in eighty percent of the cases.[79] Based on the high percentage of agreements and on the reasons for the twenty percent disagreement — sentiments on the law, sentiments on the defendant, issues concerning evidence[80]— the study's directors claimed that the results were "a stunning refutation of the hypothesis that the jury does not understand [the case]."[81] On the strength of these findings, the Supreme Court required that states uphold the right to a jury trial in criminal cases and affirmed its confidence in the jury's ability to decide cases accurately and rationally.[82]

Examples of celebrated case results in recent years substantiate the conclusions of the researchers. Although the correctness of the results in these individual cases cannot be systematically analyzed, extensive media coverage offers much data by which to evaluate those cases. Since the late 1960's, most controversial trials have been jury trials, including the trials of the Chicago Seven, Huey Newton, Angela Davis, the Harrisburg Thirteen, Mitchell-Stans, and John Ehrlichman. Regardless of the political popularity of each decision, the public and the press, as well as the bench and bar, generally accepted the correctness and legitimacy of the jury decisions.[83] In addition, a survey by the Law Reform Commission of Canada indicated that ninety-six percent of jurors surveyed held a favorable view of the jury system.[84]

These measures of jury performance show that juries are capable of handling discretion. Nevertheless, the existence of unmerited compromise in some cases requires an evaluation of whether these cases, though infrequent, may still be unacceptable.

2. *The desirability of compromise*— Enhancing the jury's ability to compromise, even in cases where the compromise is inconsistent with

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by rules of law and procedures not present in their business transactions or informal conversations. Ordinary citizens are willing to accept these legal trappings and work within them. The fears voiced by critics that jurors make capricious decisions because of bias, incompetence and irrelevent factors have not been substantiated.

Simon, *supra* note 74, at 520.

77. *See* D. GILLMOR, *supra* note 9, at 195-208 (describing difficulties that legal and social science researchers have encountered in attempting to determine the content of jury deliberations).

78. For a description of the Project's methodology, see *supra* note 9. The main findings are reported in H. KALVEN & H. ZEISEL, *supra* note 7.

79. H. KALVEN & H. ZEISEL, *supra* note 7, at 56.

80. *See infra* notes 85-88 and accompanying text.

81. H. KALVEN & H. ZEISEL, *supra* note 7, at 157.

82. *See* Duncan v. Louisiana, 391 U.S. 145, 157 (1968).

83. R. SIMON, *Introduction* to THE JURY SYSTEM IN AMERICAN 13 (R. Simon ed. 1975).

84. LAW REFORM COMM'N OF CANADA, *supra* note 12, at 2.

the evidence, can serve important functions. The Chicago Jury Project found that in the twenty percent of the cases in which the jury and the judge disagreed,[85] the jury based its decision on the equities of the case.[86] In most instances, the jury acquitted defendants that the judge would have convicted.[87] The jury acquitted defendants in these cases for a variety of equitable reasons: the defendant was the subject of unfairness due to mistreatment by the police or prosecutorial vindictiveness; the defendant had already suffered enough; little blameworthiness was attached to the conduct charged because the victim contributed to the offense or the act was out of character for the defendant; or the harm caused by the defendant was small.[88]

Giving the jury the right to administer the conscience of the community should not be discouraged. This view was echoed by the Supreme Court in *Duncan v. Louisiana*[89] where it held that the sixth amendment right to a jury trial applied to state criminal trials. In reflecting on the history of the right to a jury trial, the Court envisioned the jury as doing more than finding facts: "[a] right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . [The jury trial is] an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge."[90]

Although jury compromises unrelated to the merits of the case do occur, they are far more often based on principles of fairness and equity than on irresponsibility. As the Law Reform Commission of Canada concluded, it is impossible to qualify the nonevidentiary compromises motivated by equity from those motivated by prejudice, but jury deviations from the law most often occur because of equitable concerns.[91]

CONCLUSION

Hung juries damage the credibility of the criminal justice system. They leave society frustrated with the trial process, increase anxiety among defendants, and waste resources. The threat of a hung jury mandates action by juries and judges that is often neither desirable nor effective. Instructions to break deadlocks may threaten the autonomy and confidence of minority jurors and interfere with the deliberative process.

With proper lesser included offense instructions, however, judges can foster a sense of cooperation and compromise that can lead to procedural-

85. *See supra* notes 86-88.
86. H. KALVEN & H. ZEISEL, *supra* note 7, at 286-87, 492, 498-99.
87. *Id.* at 58-59.
88. *See supra* note 86. *See also* LAW REFORM COMM'N OF CANADA, *supra* note 12, at 9-10.
89. 391 U.S. 145 (1968).
90. *Id.* at 155-56.
91. LAW REFORM COMM'N OF CANADA, *supra* note 12, at 11.

ly and substantively fair verdicts. It is not risky to give jurors this power to compromise. The adversary system has assumed that the jury is capable of handling such power and modern investigations have supported this assumption. Judges should not continue to neglect opportunities like lesser included offense instructions to aid the jury's deliberative process. The jury can use the "disagreement" lesser included offense instruction to reach a compromise without caprice, and a consensus without coercion.

—Michael D. Craig