

2011

## Bargaining Inside the Black Box

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### Repository Citation

Larsen, Allison Orr, "Bargaining Inside the Black Box" (2011). *Faculty Publications*. 1177.  
<https://scholarship.law.wm.edu/facpubs/1177>

# Bargaining Inside the Black Box

ALLISON ORR LARSEN\*

*When jurors are presented with a menu of criminal verdict options and they cannot reach a consensus among them, what should they do? Available evidence suggests they are prone to compromise—that is, jurors will negotiate with each other and settle on a verdict in the middle, often on a lesser-included offense. The suggestion that jurors compromise is not new; it is supported by empirical evidence, well-accepted by courts and commentators, and unsurprising given the pressure jurors feel to reach agreement and the different individual views they likely hold. There are, however, some who say intrajury negotiation represents a failure of the jury process. Conventional wisdom clings to the notion that criminal verdicts reflect a jury’s unanimous factual assessment. That notion is thwarted when a juror votes for a verdict as a compromise, as a second choice to the one he thinks best reflects reality. To date, therefore, compromise verdicts are typically dismissed as examples of maverick jurors dishonoring their oath to apply the law and seek the truth.*

*This Article challenges that conventional wisdom by way of a new analogy. If jurors each view the case differently and nonetheless negotiate with each other to reach a deal, why is that wrong when 95% of criminal convictions are the result of a similar process? I seek a new understanding of compromise verdicts by making a novel comparison to plea bargaining. I argue that the former should be understood in the context of the latter and that the best way to evaluate intrajury negotiation is to juxtapose it with the negotiation that dominates our criminal justice system. Instead of dismissing intrajury negotiation as illegitimate, I argue that we should accept it as a reality and from there seek to improve it with lessons drawn from plea negotiations.*

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\* Assistant Professor of Law, The College of William and Mary School of Law. © 2011, Allison Orr Larsen. The author wishes to thank Josh Bowers, Mike Klarman, Bill Stuntz, Darryl Brown, Paul Marcus, Nancy Combs, Anne Coughlin, Caleb Nelson, Leslie Kendrick, Charles Barzun, Lillian BeVier, Pam Harris, Meaghan McLaine, Cara Drinan, and of course Drew Larsen for their valuable comments and insights on this project. Special thanks also to Liz Grofic and Brandon Waterman for excellent research assistance. The views expressed herein are solely those of the author.

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#### INTRODUCTION

The vast majority of criminal convictions are obtained by a negotiation and deal.<sup>1</sup> Scholars worry about the fairness of these plea bargains.<sup>2</sup> They fret over

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1. See William J. Stuntz, *Of Seatbelts and Sentences, Supreme Court Justices and Spending Patterns—Understanding the Unraveling of American Criminal Justice*, 119 HARV. L. REV. F. 148 (2006) (“[T]he guilty plea rate stands at 95% and is still rising.”). Of course some pleas are not preceded by any negotiation, but it is safe to say the vast majority of convictions result from some sort of plea deal.

2. See, e.g., Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2467–68 (2004); Sam W. Callan, *An Experience in Justice Without Plea Negotiation*, 13 LAW & SOC’Y REV. 327, 328 (1979); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1909 (1992); Ronald Wright & Marc Miller, Comment, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1410 (2003).

who is doing the negotiating and under what circumstances, and some question the very propriety of negotiating criminal convictions at all.<sup>3</sup>

Lurking behind many of these concerns is the belief that a verdict created by negotiation and compromise is inherently inferior to a verdict rendered by a jury. The idea is that a negotiated verdict, though practical, simply “contradicts the fundamental purpose of the criminal trial, which is to establish the ‘material truth.’”<sup>4</sup> And although people generally agree that plea bargaining is here to stay,<sup>5</sup> most retain a reluctant resignation to it: a sense that negotiated justice is simply at odds with the cornerstone of criminal law, the criminal trial.<sup>6</sup>

At least one form of bargaining, however, is not antithetical to the criminal trial, but in fact takes place right at the heart of it. When criminal juries are presented with a menu of verdict options and compromise among them to reach a verdict in the middle, they engage in what I call “intrajury negotiation.”<sup>7</sup> The proposition that jurors compromise is supported by empirical evidence and well-accepted by courts and commentators.<sup>8</sup> It also should not be surprising;

3. See Scott & Stuntz, *supra* note 2 (“Most legal scholars oppose plea bargaining, finding it both inefficient and unjust.”).

4. Anna Petrig, *Negotiated Justice and the Goals of International Criminal Tribunals*, 8 CHI.-KENT J. INT’L & COMP. L. 1, 7 (2008) (quoting Michael Bohlander, *Plea-Bargaining Before the ICTY*, in RICHARD MAY ET AL., *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD* 159 (2001)).

5. Although there are some who call for the abolition of plea bargaining entirely, see Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 2009 (1992) (“Plea bargaining is a disaster. It can be, and should be, abolished.”), most critics now accept plea bargaining and focus on improving specific aspects of the process, see, e.g., Bibas, *supra* note 2, at 2468–69; Wright & Miller, *supra* note 2, at 1417.

6. See, e.g., Scott & Stuntz, *supra* note 2.

7. See, e.g., Mark Kelman, Yuval Rottenstreich & Amos Tversky, *Context-Dependence in Legal Decision Making*, 25 J. LEGAL STUD. 287, 295 (1996); Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 782 (1998); see also Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL’Y & L. 622, 670–71 (2001) (noting that studies suggest that “allowing juries the opportunity to convict the defendant on a lesser charge has a substantial impact on their verdicts”); Robert J. MacCoun, *Experimental Research on Jury Decision-Making*, 30 JURIMETRICS J. 223, 230 (1990) (“Several studies suggest that the availability of multiple response options can fundamentally alter the jury’s decision.”). See discussion *infra* Part I for a detailed discussion of these jury studies.

8. See, e.g., Michael T. Cahill, *Punishment Decisions at Conviction: Recognizing the Jury as Fault-Finder*, 2005 U. CHI. LEGAL F. 91, 125–26 (discussing common critiques of compromise verdicts); Daniel A. Farber, *Toward a New Legal Realism*, 68 U. CHI. L. REV. 279, 287 (2001) (reviewing *BEHAVIORAL LAW AND ECONOMICS* (Cass R. Sunstein ed., 2000)) (“[E]xperiments confirm that the compromise bias may affect verdicts.”); Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About Apprendi*, 82 N.C. L. REV. 621, 627–28 (2004) (“The ‘compromise’ and ‘decoy’ effects predict that when the jury is presented with more than one guilty option, the percentage of defendants found not guilty of both offenses will be lower than the percentage of defendants found not guilty when there is just one charge.”); Muller, *supra* note 7 (listing jury compromise as a possible reason for inconsistent verdicts); see also *Beck v. Alabama*, 447 U.S. 625, 634–35 (1980) (suggesting the potential for compromise verdicts as a reason for holding that a capital jury must be provided with “a third option” to convict on a lesser-included offense); *Johnson v. Louisiana*, 406 U.S. 356, 390 (1972) (Douglas, J., dissenting) (referring to the “many compromise verdicts on lesser-included offenses and lesser sentences” in the context of a debate over requiring unanimous juries).

jurors, like any group decision maker, have strong incentives to reach consensus, and negotiation is a natural and efficient way to do so when multiple options are available and time is limited. A negotiated verdict, therefore, arises not only from the cases that plead out but also from many of the approximately 150,000 jury trials that take place in the United States every year.<sup>9</sup>

Negotiation, however, is not a task typically associated with jurors. Conventional wisdom clings to the *Twelve Angry Men* vision of jury decision making.<sup>10</sup> Verdicts should result from a quest to discern truth.<sup>11</sup> Either a defendant is guilty or he is not; either a prosecutor can prove his case or he cannot.

Indeed, terminology reflects this notion: jury discussions are called “deliberations,” not “negotiations.” Although the concepts are related, there is an important distinction: whether multiple minds are looking for factual consensus or just an acceptable middle ground. In the traditional vision, twelve strangers discuss evidence until they are all convinced of the same story. We call this a deliberation. On the other end of the spectrum is a deal unconcerned with factual agreement. When a defense attorney and prosecutor negotiate a plea, for example, they are not typically attempting to convince each other of the defendant’s guilt or innocence.<sup>12</sup> A whole host of considerations come into play—the defendant’s character, his criminal record, the consequences he will likely face—aside from the story of the crime. That is why most call this conversation a plea *negotiation*, not a plea *deliberation*. A deliberation becomes a negotiation when a result is reached without regard for the participants’ subjective views on the facts.

Even though we do not refer to jury discussions as negotiations, many of them turn into just that. The truth, as jury scholars have demonstrated, is that “[j]uries are notoriously prone to compromises”<sup>13</sup>: factions on a jury will split their differences to “achieve[] unanimous support for some negotiated mix of convictions and acquittals.”<sup>14</sup> This means that many criminal verdicts do not result from a jury’s unanimous factual assessment, but will instead reflect a negotiated settlement.

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9. See HON. GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, NAT’L CTR. FOR STATE COURTS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 7 (2007), [http://www.ncsconline.org/D\\_Research/cjs/pdf/SOSCompendiumFinal.pdf](http://www.ncsconline.org/D_Research/cjs/pdf/SOSCompendiumFinal.pdf).

10. Phoebe C. Ellsworth, *One Inspiring Jury*, 101 MICH. L. REV. 1387, 1388 (2003) (reviewing REGINALD ROSE, *TWELVE ANGRY MEN* (1955)) (“The jury in *Twelve Angry Men* is the embodiment of this ideal, the jury at its finest.”).

11. See *id.* at 1391.

12. See Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 YALE L.J. 1179, 1282–83 (1975); F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 193–97 (2002). But see Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1403–04 (2003).

13. Farber, *supra* note 8 (reviewing BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000)).

14. See, e.g., Muller, *supra* note 7.

To date, compromise verdicts are generally dismissed as flaws in the jury process—examples of maverick jurors dishonoring their oath to uphold the law and reasons why the jury should not be trusted with more power, for example, to participate in sentencing decisions.<sup>15</sup>

Is this reaction justified? If jurors each view the case differently and nonetheless negotiate with each other to reach a compromise, why is that unquestionably wrong when 95% of criminal convictions are the result of a similar process?

This Article seeks a new understanding of compromise verdicts by making a novel comparison to plea bargaining. I argue that the former should be understood in the context of the latter, and that the best way to evaluate intrajury negotiation is to juxtapose it with the negotiation that dominates our criminal justice system and has already been subject to detailed study.

Drawing this comparison leads to several observations that I will place in two broad categories. First, I will discuss the similarities between intrajury and plea negotiations. The analogy is closer than one might suspect. Both types of deals are secret and not reviewed, the negotiating actors are all highly motivated to make a deal, and both types of deals are also afflicted with many of the same bargaining pitfalls. Plea-bargaining scholars, for example, have pointed out that the way a prosecutor “frames” a plea in negotiations—comparing it to other (perhaps severe) options—can distort the defendant’s choice.<sup>16</sup> I will argue that the same could be said of a jury trial where prosecutors, no doubt mindful of the likelihood of verdict negotiation among jurors, overcharge in anticipation of a compromise and thereby determine the boundaries and influence the result of the jury’s negotiation.

Second, I will distinguish intrajury and plea negotiations. Certainly plea negotiations and intrajury negotiations are different in significant ways. The negotiators themselves are different, and they negotiate under very different conditions. These differences are important, and our evaluation of intrajury negotiation is enhanced by the comparison. Sentence forecasts, for example, play an important role in plea negotiations, but jurors are generally not respon-

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15. See, e.g., *id.* at 784 (“By reaching a compromise verdict, the jury dishonors the reasonable doubt standard, because each faction on the jury surrenders its honestly held beliefs on the question of proof beyond a reasonable doubt. To be sure, compromise verdicts are undoubtedly quite common, and they help to resolve cases, avoid retrials, and clear crowded dockets. But useful as they may be, compromise verdicts are lawless verdicts.”); Ashlee Smith, Comment, *Vice-A-Verdict: Legally Inconsistent Jury Verdicts Should Not Stand in Maryland*, 35 U. BALT. L. REV. 395, 403 (2006) (“Compromise verdicts are perhaps the most troubling means of reaching an inconsistent verdict, as they constitute a willful and conscious disregard of the court’s instructions.”). Compromise verdicts are also used as part of the debate over jury sentencing reforms. See Cahill, *supra* note 8, at 124–26; Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 989–90 (2003); Chris Kemmitt, *Function Over Form: Reviving the Criminal Jury’s Historical Role as a Sentencing Body*, 40 U. MICH. J.L. REFORM 93, 112 (2006); Lillquist, *supra* note 8, at 662.

16. See Bibas, *supra* note 2, at 2514–17; Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 864–66 (1995).

sible for determining sentences, and hence engage in verdict negotiation somewhat in the dark, or at least with less information than do prosecutors and defense attorneys.<sup>17</sup> If criminal verdicts are going to be negotiated in one form or another—either by jurors or by their professional counterparts—perhaps we should provide all negotiators with some of this valuable information.

Ultimately, I conclude that while steps can and should be taken to improve intrajury negotiation, the common critiques of compromise verdicts—that they are lawless flaws in the jury system—do not have the force they might have in a world without plea bargaining. I assume in this Article that juries are valuable: our system is enhanced by committing legal decisions to the hands of ordinary people who have common sense, who are sensitive to context, and who can provide a check on overbroad criminal law.<sup>18</sup> These assets of the jury are not lost just because a juror negotiates with his colleagues to find an acceptable result rather than deliberating until reaching a factual consensus. Negotiation is now a staple of American criminal law,<sup>19</sup> and in the context of plea bargaining, it is an aspect of criminal adjudication that has been thoroughly examined.<sup>20</sup> Instead of quickly dismissing intrajury negotiation as an illegitimate process, I argue we should recognize it as a reality and seek to improve it with lessons we have learned from plea negotiations.

This Article proceeds in four parts. Part I presents empirical studies on jury behavior that demonstrate the likelihood of intrajury negotiation and compromise verdicts. Parts II and III then analyze intrajury negotiation by comparing the practice to plea bargaining. Part II connects the two processes and discusses what can be learned from the similarities; Part III tackles how plea negotiation and intrajury negotiation are different and explores how those differences inform whether we think intrajury negotiation is legitimate. Finally, Part IV discusses the normative implications and payoffs of my analogy. I argue that when intrajury negotiations and plea negotiations are placed side by side, many common criticisms of compromise verdicts are undermined and possible reforms to intrajury negotiation are brought to light.

### I. HOW DO WE KNOW JURORS NEGOTIATE?

Perhaps the defining feature of a jury's deliberation is that it takes place in secret: a set of strangers are charged with assigning criminal liability to an individual, are told that they can keep their discussions private, and are not required to provide reasons for their final judgment.<sup>21</sup> Courts are adamant about

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17. Cahill, *supra* note 8, at 108–09 (making this observation and arguing that the jury should not be blind to the consequences of its conviction).

18. For a discussion on the values of a jury generally, see HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 3 (1966).

19. Scott & Stuntz, *supra* note 2, at 1912 (“[Plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice system.”).

20. See sources cited *supra* note 2.

21. See KALVEN & ZEISEL, *supra* note 18, at 3; MacCoun, *supra* note 7, at 223.

protecting the mystery and secrecy of “the black box”; jury discussions are among the most private and privileged in our legal system.<sup>22</sup> Consequently, it is impossible to know what exactly takes place in a jury room.

There are a few observations, however, which seem certain. First, we know it is common for criminal jurors to have a menu of options in front of them. Developed at common law and inherited from England, the lesser-included offense doctrine provides that “a criminal defendant may be convicted at trial of any crime supported by the evidence which is less than, but included within, the offense charged by the prosecution.”<sup>23</sup> Thanks to this doctrine, a criminal jury is not always given a binary choice (guilty or not guilty); instead, more and more frequently, juries are presented with a charge sheet that lists a variety of verdict options in varying degrees of seriousness.<sup>24</sup>

A debate exists about whether these options favor the prosecution or the defendant. On the one hand, some suggest that these instructions are pro-prosecutor because they increase the chances that the defendant will be convicted of *something*. Justice Thurgood Marshall subscribed to this view: he explained that “[t]he very fact that a defendant has been arrested, charged, and brought to trial on several charges may suggest to the jury that he must be guilty of at least one of those crimes.”<sup>25</sup>

On the other hand, some say it is the defendant who benefits from these instructions because they can lead to a compromise that reflects a jury’s mercy.<sup>26</sup> Those who adopt this view (articulated by Justice Brennan) believe that if a jury retains a reasonable doubt about the defendant’s guilt but still has a feeling he did something wrong, there is a “substantial risk” the jury will not return a verdict of acquittal as it should.<sup>27</sup> On this theory, the defendant is better off if jurors are not forced to make an all-or-nothing choice between, for

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22. See *United States v. Olano*, 507 U.S. 725, 737 (1993) (“[T]he deliberations of the jury shall remain private and secret . . .” (quoting FED. R. CRIM. P. 23(b) advisory committee’s note (1983)) (internal quotation marks omitted)); see also *United States v. Thomas*, 116 F.3d 606, 619 (2d Cir. 1997) (“The jury as we know it is *supposed* to reach its decisions in the mystery and security of secrecy; objections to the secrecy of jury deliberations are nothing less than objections to the jury system itself.”).

23. James A. Shellenberger & James A. Strazzella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 MARQ. L. REV. 1, 6 (1995).

24. There are many familiar examples of “lesser included” (as they are sometimes called). The obvious one is second-degree murder, a lesser-included offense of first-degree murder with the same elements as the more serious charge, minus premeditation and deliberation. Other common examples include possession of a controlled substance (a lesser-included offense of distribution of the substance), criminal trespass (a lesser-included offense of burglary), and driving to endanger a life (a lesser-included offense of vehicular homicide).

25. *Missouri v. Hunter*, 459 U.S. 359, 372 (1983) (Marshall, J., dissenting).

26. The Supreme Court has held that the Constitution requires the submission of lesser-included offense instructions to a jury when the death penalty is an option. See *Beck v. Alabama*, 447 U.S. 625, 627 (1980); see also *Morris v. Mathews*, 475 U.S. 237, 251–52 (1986) (Blackmun, J., concurring).

27. See *Keeble v. United States*, 412 U.S. 205, 212–13 (1973).

example, first-degree murder and setting the defendant free.<sup>28</sup>

In any event, jury instructions on lesser-included offenses are common nowadays.<sup>29</sup> Either party can request them, and more often than not, it is the defendant who does so.<sup>30</sup> The instructions are available in federal court and in all fifty states, and almost all courts agree there is very rarely a justification for not giving such instructions to the jury if they are requested by a party and supported by sufficient evidence.<sup>31</sup>

The second relevant and certain observation is that those on the “front lines” of criminal litigation—judges, prosecutors, and defense attorneys—are keenly aware that juries compromise.<sup>32</sup> Regardless of whether they think it appropriate or not, most attorneys agree that “[j]urors arguing and coming to some sort of compromise is just part of the system.”<sup>33</sup>

28. Indeed, the vast majority of objections to lesser-included offense instructions come from the prosecution side, which suggests that at least prosecutors see validity to this theory. See Ram Orzach & Stephen J. Spurr, *Lesser-Included Offenses*, 28 INT'L REV. L. & ECON. 239, 239–40 & n.3 (2008).

29. By 1980, when the Supreme Court took up its seminal case on lesser included, *Beck v. Alabama*, it had “long been ‘beyond dispute [in federal courts] that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit [it],’” and, even at that time, every state court to address the issue concurred. 447 U.S. at 635 (quoting *Keeble*, 412 U.S. at 208).

30. Orzach & Spurr, *supra* note 28. Only North Carolina, Tennessee, and Oklahoma require that a jury be instructed on lesser-included offenses (meaning that the court must issue these instructions *sua sponte*); in the vast majority of jurisdictions, one of the parties must request it, and the trial judge retains discretion whether to issue it. See Kelman, Rottenstreich & Tversky, *supra* note 7, at 305 n.26.

31. See FED. R. CRIM. P. 31(c); 3 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 515 (3d ed. 2004); Michael H. Hoffheimer, *The Future of Constitutionally Required Lesser Included Offenses*, 67 U. PITT. L. REV. 585, 590–91 (2006) (collecting state cases); Orzach & Spurr, *supra* note 28, at 243 (“Is there any justification for denying the defendant a jury instruction on a lesser-included offense? Almost all courts and commentators say no . . .”). The standards for submitting the instructions are generally permissive. So, for example, it is reversible error not to instruct on a less serious offense when a genuine dispute of fact exists about a state of mind that distinguishes one crime from another. And most courts agree that the instruction should be given if there is any evidence of a factual circumstance (say, self-defense or provocation) that would justify conviction on the lesser charge. Hoffheimer, *supra*, at 591; see also *Tucker v. United States*, 871 A.2d 453, 461 (D.C. 2005) (“Any evidence, however weak, is sufficient to support a lesser-included instruction so long as a jury could rationally convict . . . after crediting the evidence.” (quoting *Woodard v. United States*, 738 A.2d 254, 261 (D.C. 1999)) (internal quotation marks omitted)); *Louisy v. State*, 667 So. 2d 972, 974 (Fla. Dist. Ct. App. 1996) (“Even if the weight of the evidence is overwhelmingly in favor of the state’s charge, the defendant is entitled to an instruction on a lesser offense as to which there is *any* evidence.” (emphasis added) (quoting *Kolaric v. State*, 616 So. 2d 117, 119 (Fla. Dist. Ct. App. 1993)) (internal quotation marks omitted)); *State v. Givens*, 917 S.W.2d 215, 219 (Mo. Ct. App. 1996) (“The trial court should resolve all doubts upon the evidence in favor of instructing on the lower degree of the crime, leaving it to the jury to decide of which of the two offenses, if any, the defendant is guilty.” (citing *State v. Warrington*, 884 S.W.2d 711, 717 (Mo. Ct. App. 1994))).

32. See Hoffheimer, *supra* note 31, at 594.

33. John F. Hagan, *Legal Experts Criticize Jurors Who Compromised*, PLAIN DEALER (Cleveland), Aug. 23, 1997, at 8-A (quoting Case Western Reserve University Law Professor Paul Giannelli) (internal quotation marks omitted). For other newspaper reports presenting attorney and judge views on compromise verdicts, see Eddy McNeil, *Penn Judge Lets Jurors Consider 2 More Charges*, EVENING TRIBUNE (San Diego), June 4, 1987, at B-1 (“What happens when nobody gets up and argues a lesser-included offense is that it’s just sitting out there for a compromise . . .” (quoting defense attorney Milton Silverman) (internal quotation marks omitted)); Jason Riley, *State Law Leaves Jurors*

This impression is shared by the judiciary as well. As one judge explained, “[t]he jury, if it cannot agree on the basic issue of guilt, may seek the course of least resistance in the jury room and unjustly convict on the lesser offense instead of forthrightly acquitting.”<sup>34</sup> The judicial concern works the other way too: “[A]lthough the defendant is in fact guilty of the greater offense, [the jury] may take the easier course by exercising its mercy-dispensing power and return a guilty verdict on the lesser offense, thereby shirking its sworn duty.”<sup>35</sup>

We know, therefore, that juries are frequently presented with a menu of verdict options, and that—at least in the eyes of the judges who issue lesser-included offense instructions and the litigants who request or object to them—the threat of a compromise among them is very real indeed. We do not know, however, what exactly goes on in the jury room to produce those deals.

Fortunately, modern jury scholars have developed techniques that enable us to come close. Recordings of actual jury deliberation are rare (and are met with strong resistance), but the last fifty years have brought new enthusiasm and new methodologies to the study of jury decision making.<sup>36</sup> In the discussion that follows, I discuss two varieties of jury studies: (1) post-trial interviews of real jurors, and (2) results of mock jury simulations. Together, they reveal that when a jury is given multiple verdict options (more than just acquit or convict on one charge), it is “prone to pick the compromise judgment, even if that judgment would attract little support in a two-option set.”<sup>37</sup>

#### A. JURY SURVEY DATA

One method of studying jury deliberation is through post-trial interviews with jurors.<sup>38</sup> Several years ago the National Center for State Courts (NCSC) conducted a large project of this nature. With the goal of identifying factors that lead to hung juries, the NCSC gathered data from approximately 3500 jurors

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*Puzzled*, COURIER-JOURNAL (Louisville), Feb. 26, 2006, at A1 (“[O]ur juries are guessing at the proper results, or more often, convicting of a lesser-included offense, sometimes rightly sometimes wrongly simply as a compromise to confusion . . .” (quoting Justice Will Scott) (internal quotations marks omitted)).

34. *United States v. Waldron*, 9 M.J. 811, 816 (N.C.M.R. 1980) (construing FED. R. CRIM. P. 31(c)).

35. *Id.* (citing *Sansone v. United States*, 380 U.S. 343, 350 n.6 (1965)).

36. Scientific study of jury decision making can be traced to 1953 and the Chicago Jury Project, a multiyear, multidisciplinary endeavor from the University of Chicago with the then-novel objective of using social science methods to study legal phenomena. As part of that project, researchers secretly recorded the deliberations of several federal juries. This effort resulted in a public outcry, a congressional inquiry, and subsequent legislation prohibiting the practice. See Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1867–68 (2001).

37. Kelman, Rottenstreich & Tversky, *supra* note 7, at 306.

38. Each method of studying jury decision making comes with its own strengths and weaknesses. The advantage to jury survey data is that it comes from real jurors as opposed to participants in a study; the weakness is that these jurors can be unreliable indicators of how exactly a jury decision is made. Faulty recollection, hindsight, and other biases can color the way a jury recounts the deliberation. See Shari Seidman Diamond, Essay, *Beyond Fantasy and Nightmare: A Portrait of the Jury*, 54 BUFF. L. REV. 717, 727 (2006).

who sat in felony trials in four large urban areas.<sup>39</sup> It recorded the final verdict for each jury (acquittal, conviction, or deadlock) and then asked the individual jurors, once their trial had concluded, “to report on their individual opinions, verdict preferences, and the dynamics of deliberations.”<sup>40</sup> Several NCSC discoveries bear on the present discussion.

First, the study concluded that jury deliberation does in fact make a difference in the final verdict.<sup>41</sup> This was an important finding because a different and common perception—attributed to jury scholar pioneers Harry Kalven, Jr. and Hans Zeisel—is that jury deliberation does not really matter; jurors make up their minds during the trial, and although deliberation “brings out the picture, . . . the outcome is pre-determined.”<sup>42</sup> This theory was not born out by the hung jury project data. The majority of jurors interviewed—62%—reported that they changed their mind at least once during the trial. And almost half of those jurors—24%—said that their mind was changed during deliberation.<sup>43</sup> This led Valerie Hans and Nicole Waters, among the authors of the NCSC study, to conclude that “deliberations play a vital role in generating juror consensus.”<sup>44</sup>

The NCSC study also asked the jurors about their individual opinions: “If it were entirely up to you as a one-person jury, what would your verdict have been in this case?”<sup>45</sup> The researchers were then able to compare those answers to the actual verdicts returned and thus identify dissenting jurors—both those who held out and those who ultimately conformed.<sup>46</sup>

The results were surprising. Although it somewhat varied by jurisdiction, the average hung jury rate for the thirty jurisdictions studied by the project was only 6.2%.<sup>47</sup> In other words, slightly more than six out of every hundred juries reached a deadlock and could not agree on a verdict. But, even though relatively few juries hang, a remarkably high number—54%—of the jury verdicts were rendered with at least one juror whose “one-person” verdict diverged from the final verdict.<sup>48</sup> This means “a sizable proportion of jurors eventually voted in line with the group but at odds with their personal preferences.”<sup>49</sup>

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39. PAULA L. HANNAFORD-AGOR, VALERIE P. HANS, NICOLE L. MOTT & G. THOMAS MUNSTERMAN, NAT'L CTR. FOR STATE COURTS, ARE HUNG JURIES A PROBLEM?, 2–3, 33 tbl.3.1 (2002), [http://www.ncsonline.org/WC/Publications/Res\\_Juries\\_HungJuriesProblemPub.pdf](http://www.ncsonline.org/WC/Publications/Res_Juries_HungJuriesProblemPub.pdf).

40. Nicole L. Waters & Valerie P. Hans, *A Jury of One: Opinion Formation, Conformity, and Dissent on Juries*, 6 J. EMPIRICAL LEGAL STUD. 513, 514 (2009), available at [http://scholarship.law.cornell.edu/lrsp\\_papers/114/](http://scholarship.law.cornell.edu/lrsp_papers/114/).

41. HANNAFORD-AGOR, HANS, MOTT & MUNSTERMAN, *supra* note 39, at 73 (“[T]he process of jury deliberation is a critically important factor in the ultimate outcome of the trial.”).

42. KALVEN & ZEISEL, *supra* note 18, at 489.

43. Waters & Hans, *supra* note 40, at 522.

44. *Id.* at 539.

45. *Id.* at 520.

46. *Id.* at 516.

47. HANNAFORD-AGOR, HANS, MOTT & MUNSTERMAN, *supra* note 39, at 25.

48. Waters & Hans, *supra* note 40, at 523.

49. *Id.* at 537.

Why would a person vote for a verdict when it does not reflect what he thinks is the “best” or “right” outcome? Of course one possibility is that jurors do not care about getting it right in the first place and so they change their votes on a whim. But assuming, as I do, that jurors generally take their civic duty seriously, perhaps the divergence between group outcomes and individual preferences simply means that a deal was made that was “right enough” for everyone to accept. This possibility is hardly remote. Indeed, studies on group decision making reveal how prone jurors are to compromise.

#### B. MOCK JURY SIMULATIONS

In a mock jury experiment, participants witness a simulated trial under various conditions and are asked to render a judgment.<sup>50</sup> This field of study is vast indeed, and I will focus on only a few studies: (1) those that test an individual’s inclination to compromise in legal decision making, and (2) those that show what happens when multiple verdict alternatives are given to a deliberating group.

##### 1. Effect of Multiple Options on an Individual’s Legal Decision Making

Social scientists tell us that the framing of a choice matters; that is, a person’s decision-making behavior is altered by the presence or absence of additional options. A savvy salesperson knows, for example, that a customer can be induced to buy an intermediately expensive camera when he is first shown a bare-bones one and then an expensive alternative.<sup>51</sup> This effect has been named “the compromise effect” by behavioral scientists, and it applies beyond marketing studies to the context of juror decision making.

One of the more well-known empirical studies on this topic was conducted in the mid-nineties by Mark Kelman, Yuval Rottenstreich, and Amos Tversky.<sup>52</sup> Kelman and his colleagues enlisted randomly selected mock jurors to read and evaluate case summaries.<sup>53</sup> One case involved a defendant who purposely shot and killed a security guard after an altercation in which the guard falsely

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50. Of course, simulated experiments suffer from the limitation that participants know their verdict is fictitious and without real-world consequences. This limitation on mock jury simulation is well recognized. *See, e.g.*, Lillquist, *supra* note 8, at 662–63 (acknowledging the artificiality of mock jury scenarios). But several studies suggest that mock jurors and real jurors do not reach decisions in dramatically different ways, and jury simulations have the added benefit of allowing scientists to manipulate conditions and focus on specific variables of interest. *See* E. Allan Lind & Laurens Walker, *Theory Testing, Theory Development, and Laboratory Research on Legal Issues*, 3 *LAW & HUM. BEHAV.* 5, 6 (1979); MacCoun, *supra* note 7, at 224 (citing Robert M. Bray & Norbert L. Kerr, *Methodological Considerations in the Study of the Psychology of the Courtroom*, in *THE PSYCHOLOGY OF THE COURTROOM* 287 (Norbert L. Kerr & Robert M. Bray eds., 1982)); *see also* REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* (1983) (offering a detailed analysis of jury simulations).

51. Kelman, Rottenstreich & Tversky, *supra* note 7, at 287–88 (citing Itamar Simonson & Amos Tversky, *Choice in Context: Tradeoff Contrast and Extremeness Aversion*, 29 *J. MARKETING RES.* 281, 282 (1992)).

52. *Id.* at 287.

53. *Id.* at 289.

accused the defendant of burglary and used a racial epithet. The subjects were all informed that the possible verdicts were special circumstances murder (the most serious offense), murder, voluntary manslaughter, and involuntary manslaughter.<sup>54</sup> They were also told that involuntary manslaughter was appropriate only if the defendant reasonably believed he was defending himself and that special circumstances murder was appropriate only if the guard was acting in the line of duty.<sup>55</sup>

The subjects were then divided into two groups. Group one was told that the judge had determined the guard was not on duty, taking special circumstances murder off the table. Group two was told that there was no evidence the defendant subjectively believed he was defending himself, taking involuntary manslaughter off the table. Kelman called the first group the “lower set” and the second group the “upper set” because the three available verdict options were collectively less serious in the first group and collectively more serious in the second.<sup>56</sup>

The results showed a compromise effect much like the one demonstrated by the camera salesperson hypothetical. In the lower set (in which jurors chose between involuntary manslaughter, voluntary manslaughter, and murder), 55% chose voluntary manslaughter, the middle choice, and 39% chose murder, the highest charge. In the second group, the upper set (in which jurors chose between murder with special circumstances, murder, and voluntary manslaughter), only 31% of subjects chose voluntary manslaughter, and 57% chose murder, the middle choice.<sup>57</sup>

Thus, Kelman concluded, “[a verdict] option does better by being intermediate in the choice set presented.”<sup>58</sup> This was true even though the jurors should have evaluated whether the defendant was guilty of murder or manslaughter independent from the question of whether the security guard was on duty. Indeed, Kelman chose this particular fact pattern precisely because the jurors were told that the difference between murder and voluntary manslaughter depended only on whether they thought the defendant was adequately provoked; it had nothing to do with the guard’s on-duty status.<sup>59</sup> Despite its irrelevance, however, the presence or absence of the higher charge affected how jurors saw the case, confirming the tendency for compromise among verdict alternatives.<sup>60</sup>

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54. *Id.* at 292. The point of informing all participants of all four options was to control for the possibility that the differences across groups could be explained by additional information signaled by the additional options. *Id.* at 294.

55. *Id.* at 292–93.

56. *Id.* at 293–94.

57. *Id.* at 294.

58. *Id.* at 295.

59. *Id.* at 293.

60. Kelman’s study was not the first or the last empirical look into the compromise effect on legal decision making. His results have been replicated by many other social scientists in several different contexts, and his work is often cited by legal scholars. *See, e.g.,* MacCoun, *supra* note 7, at 224; Neil

## 2. The Effect of Multiple Verdict Options on Group Deliberation

A second type of relevant research involves the dynamics of the deliberation process. These studies test not just an individual juror's decision making when multiple verdict options are present but also what happens when a set of these individuals are collectively charged with making the decision.

One recent study examined the "third verdict" option under Scottish law.<sup>61</sup> For over three hundred years, Scottish jurors have been given three possible verdicts: guilty, not guilty, or "not proven."<sup>62</sup> The "not proven" verdict "has the same legal effect as a [n]ot [g]uilty verdict" (meaning the accused cannot be retried); it is reserved for situations in which there is reasonable doubt about a person's guilt but there is still a sense the defendant did something wrong.<sup>63</sup> Critics claim that the third verdict may be viewed by jurors as a compromise when the evidence is not sufficiently compelling, thus artificially decreasing the number of guilty verdicts that would result in a traditional binary system.<sup>64</sup>

Psychologist Lorraine Hope and several of her colleagues empirically tested this hypothesis, specifically noting the parallels with the common American practice of including charges on lesser-included offenses.<sup>65</sup> They recruited about 150 jury-eligible community participants and placed them in small groups (four to eight members per set). The groups were randomly assigned to one of six experimental conditions: half were given two verdict options, half were given three verdict options (including "not proven"), and the conditions were further varied on the basis of strength of evidence of guilt (weak, moderate, or

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Vidmar, *Effects of Decision Alternatives on the Verdicts and Social Perceptions of Simulated Jurors*, 22 J. PERSONALITY & SOC. PSYCHOL. 211, 214–16 (1972); see also J.J. Prescott & Sonja Starr, *Improving Criminal Jury Decision Making After the Blakely Revolution*, 2006 U. ILL. L. REV. 301, 329 & n.147 (citing Kelman and Vidmar to show that "[m]ock juries presented with the option of convicting on a lesser-included offense quite frequently take that option, generating a 'compromise effect'"); Cass R. Sunstein, *Trimming*, 122 HARV. L. REV. 1049, 1065 & n.70 (2009) (citing Kelman as evidence that "jurors themselves have been found to trim, in the sense that they steer between the extremes; for this reason, the prosecutor's selection of criminal counts can greatly influence what the jury ends up doing").

One area of the law in which this "compromise effect" has been well tested is in the controversial area of insanity verdicts. Critics say that giving a jury an additional option in cases in which the defendant's mental state is in question—an option sometimes called "diminished responsibility," "diminished capacity," or "guilty but mentally ill"—causes compromised and inconsistent verdicts. See generally Norman J. Finkel, *The Insanity Defense: A Comparison of Verdict Schemas*, 15 LAW & HUM. BEHAV. 533 (1991); Bart R. Schwartz, *Should Juries Be Informed of the Consequences of the Insanity Verdict?*, 8 J. PSYCHIATRY & L. 167 (1980).

61. See Lorraine Hope, Edith Greene, Amina Memon, Melanie Gavisk & Kate Houston, *A Third Verdict Option: Exploring the Impact of the Not Proven Verdict on Mock Juror Decision Making*, 32 LAW & HUM. BEHAV. 241 (2008); see also Samuel Bray, Comment, *Not Proven: Introducing a Third Verdict*, 72 U. CHI. L. REV. 1299, 1304–05 (2005) (proposing the introduction of a third verdict option in American law).

62. Hope, Greene, Memon, Gavisk & Houston, *supra* note 61, at 242.

63. *Id.* at 241–42.

64. See *id.* at 243.

65. *Id.*

strong).<sup>66</sup> After reading a case study of a fictitious murder trial, the mock jurors were told to deliberate for at least twenty minutes. They were told that they should aim for a unanimous verdict, but to record the verdict of the majority of group members if unanimity was impossible.<sup>67</sup>

The results indicated that the availability of the third option significantly affected the decisions reached by the jurors. Seventy-six percent of juries given three verdict options reached the “not proven” verdict; only 5% in that set returned a not guilty verdict.<sup>68</sup> This differed significantly from the 65% of juries that returned a not guilty option when given only two options.<sup>69</sup> Interestingly, however, the effect of the third option was much weaker when the evidence of guilt was clear cut one way or the other; it was only in the close cases (when the strength of evidence was “moderate”) that the availability of the third verdict made a real difference.<sup>70</sup>

Hope’s experiment demonstrates that the compromise effect—illustrated above in Kelman’s experiments on individuals—applies to group decision making. But even more interesting for present purposes are the experiments that delve into what actually happens in these group deliberations to explain the compromise.

At the outset, it should be noted that deliberation of any sort has been shown “to make group members more extreme in their views than they were before they started to talk.”<sup>71</sup> In Cass Sunstein’s principal article on the subject, groups from Colorado met to discuss hot button political issues.<sup>72</sup> The major effect of the discussion, the researchers found, was to make liberal-minded people more liberal and conservative-minded people more conservative.<sup>73</sup> Even when the subjects reported their postdeliberation opinions anonymously, their views were more extreme after deliberation than they were before discussion began.<sup>74</sup>

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66. *Id.* at 247.

67. *Id.*

68. *Id.* at 248.

69. *Id.*

70. *Id.* Other research supports Hope’s observation that the strength of evidence in a case affects whether a jury will compromise. See Devine et al., *supra* note 7 (summarizing relevant empirical work and concluding that “[j]uries thus appear fairly responsive to verdict options, but the impact of verdict options is likely to interact with the strength of evidence against the defendant”). Additionally, in their famous book, *The American Jury*, Kalven and Zeisel theorize that when the evidence presented at trial clearly favors one side, juries will choose the corresponding verdict, but when the evidence is somewhat ambiguous, jurors are “liberated” from the constraints of the evidence and become influenced by other factors. KALVEN & ZEISEL, *supra* note 18, at 164–66; see also Dennis J. Devine, Jennifer Buddenbaum, Stephanie Houp, Nathan Studebaker & Dennis P. Stolle, *Strength of Evidence, Extraevidentiary Influence, and the Liberation Hypothesis: Data from the Field*, 33 LAW & HUM. BEHAV. 136, 136–148 (2009) (using post-trial questionnaire data collected from judges, attorneys, and jurors to support the liberation hypothesis).

71. David Schkade, Cass R. Sunstein & Reid Hastie, *What Happened on Deliberation Day?*, 95 CALIF. L. REV. 915, 915 (2007); see also MacCoun, *supra* note 7, at 228.

72. Schkade, Sunstein & Hastie, *supra* note 71, at 916–17.

73. *Id.* at 917.

74. *Id.*

Sunstein focused on political discussions among strangers, but he points to evidence of group polarization in jury studies as well.<sup>75</sup>

This leads to a potential contradiction: if deliberating jury members polarize in their individual views after discussion, what explains the seemingly inconsistent phenomenon of compromise verdicts? To answer this question, we need more information on the dynamics of deliberation.

One of the most comprehensive and well-regarded empirical studies of deliberation dynamics was conducted by Reid Hastie, Steven Penrod, and Nancy Pennington, and published in their book, *Inside the Jury*.<sup>76</sup> Hastie and colleagues made their jury simulation experiments as realistic as possible: they recruited mock jurors from Superior Court jury pools in Massachusetts, they conducted a voir dire excluding those who may have had a pre-existing bias, and they hired professional actors and attorneys to re-enact a murder trial live in front of the participants.<sup>77</sup>

The jurors were given four verdict options: first-degree murder, second-degree murder, manslaughter, and not guilty.<sup>78</sup> Some of Hastie's mock jurors were instructed that their decision must be unanimous, and others were given a majority-rule condition.<sup>79</sup> All filled out a predeliberation questionnaire in which they were asked what they would choose if they had to decide the case on their own.<sup>80</sup> The mock jurors were videotaped and observed during their deliberations.<sup>81</sup>

Several of Hastie's observations are relevant for the present discussion. First, he observed that the favorite predeliberation verdict of the jurors was manslaughter, but after deliberation there was a shift to the middle, making second-degree murder the most popular verdict choice.<sup>82</sup> He also noticed that although over 20% of mock jurors in all conditions preferred a first-degree murder verdict before deliberation, the only groups to return such a verdict were those that could decide the case by majority rule.<sup>83</sup> None of the groups forced to reach a unanimous decision returned a guilty verdict on the most serious charge.<sup>84</sup>

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75. *Id.* at 927 & n.40 (citing David G. Myers & Martin F. Kaplan, *Group-Induced Polarization in Simulated Juries*, 2 PERSONALITY & SOC. PSYCHOL. BULL. 63 (1976)). Sunstein and colleagues refer to a study by Martin Kaplan and David Myers, social scientists who were interested in group polarization among jurors in the 1970s. Myers & Kaplan, *supra*, at 63–64. Myers and Kaplan divided mock jurors into groups and assigned each one a traffic case to read and evaluate. They found that “group discussion . . . significantly enhanced the dominant initial leanings of the group members.” *Id.* at 65. For a resource collecting several of the “hundreds of . . . small group studies” documenting group polarization, see MacCoun, *supra* note 7, at 228.

76. HASTIE, PENROD, & PENNINGTON, *supra* note 50.

77. *Id.* at 45–47.

78. *Id.* at 50.

79. *Id.*

80. *Id.* at 51.

81. *Id.*

82. *Id.* at 59.

83. *Id.* at 60 tbl.4.1.

84. *Id.*

Certainly, as Hastie noted, this shift to the middle could simply indicate that second-degree murder was the more accurate verdict.<sup>85</sup> But Hastie thought instead that “the shift can be best understood as the natural resolution of social forces in the jury.”<sup>86</sup> The social forces to which Hastie alludes are the development and movement of factions within the jury, which he called “the most visible” and “most important” of all deliberation dynamic events.<sup>87</sup> Hastie defined factions based on common verdict preferences among the participants. The initial verdict preferences were based on the jurors’ pre-deliberation questionnaires; scientists then tracked how these preferences shifted during group discussion.<sup>88</sup>

Hastie noticed a dramatic difference in faction movement depending on whether a unanimous verdict was required.<sup>89</sup> Jurors in a unanimous “jurisdiction” who initially voted for the extreme verdict options of first-degree murder or not guilty were “much likelier” to change their voting preferences by the end of deliberation.<sup>90</sup> And, in turn, jurors in these voting factions in the majority-rule conditions were much more likely to hold out.<sup>91</sup> This dynamic was “almost universal”—only one juror in the unanimous-decision-rule group failed to defect, but over 50% of those in favor of acquittal in the majority rule condition held out.<sup>92</sup>

Hastie also observed several other factors that influenced faction movement. The size of the faction mattered greatly.<sup>93</sup> Jurors were far less likely to change their votes if they belonged to a larger faction, and jurors were more likely to defect from a small faction, especially when their votes were required for unanimity.<sup>94</sup> In addition, postdeliberation questionnaires revealed that those jurors who were in the minority factions were “motivated to shift to the largest faction” when their votes would “put the jury over-the-top of the quorum requirement” or when it meant they could “avoid finishing as dissenters” in a majority jurisdiction.<sup>95</sup>

It seems therefore that both the internal drive to compromise (illustrated by the Kelman study and the camera-salesman hypothetical) and the external pressure to reach a collective decision (illustrated in Hastie’s research) combine to produce compromise jury verdicts. In fact, the above research suggests a hypothesis for how this works: people form factions that track their verdict

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85. *Id.* at 59.

86. *Id.*

87. *Id.* at 99.

88. *Id.*

89. *Id.* at 100.

90. *Id.*

91. *Id.*

92. *Id.* at 102.

93. Hastie and his colleagues observed that the size of the faction was, in fact, the “most important determinant of the outcome of deliberation.” *Id.* at 106.

94. *Id.*

95. *Id.* at 119.

preferences, polarize after group discussion, and then negotiate with each other to ultimately compromise in the middle.

To be sure, jurors will not negotiate in every case. But in the close cases—which, after all, amount to a large set of the cases that go to trial—the empirical evidence strongly suggests that jurors compromise when given verdict alternatives.<sup>96</sup> At the very least, the threat of a compromise is real enough to make judges cautious,<sup>97</sup> to cause prosecutors to object to the inclusion of lesser included,<sup>98</sup> and to even warrant the constitutionalization of lesser-included options for death penalty cases.<sup>99</sup> This dynamic was even articulated by Chief Justice Burger thirty years ago. “Courts,” the Chief Justice wrote, “have long held that in the practical business of deciding cases the factfinders, *not unlike negotiators*, are permitted the luxury of verdicts reached by compromise.”<sup>100</sup>

## II. AN ANALOGY TO PLEA BARGAINING

Although the reality of juror negotiation is well recognized, the question of whether it is a legitimate practice remains controversial. A juror’s job is simply to decide facts, the argument goes, and he has no place compromising his factual assessment in order to reach consensus on a verdict alternative.<sup>101</sup>

Before rushing to judgment, however, it is worth remembering that negotiation among verdict options is not a process wholly foreign to criminal law. Plea bargains are struck by criminal defendants all the time.<sup>102</sup> And although the

96. See sources cited *supra* note 70.

97. See Kelman, Rottenstreich & Tversky, *supra* note 7, at 309 n.32 (“Currently, when judges instruct jurors to consider lesser included offenses, they indeed make some efforts to ‘separate’ decisions to try to [e]nsure that jurors do not look at their actual menu of choices as an option set.”); see also *Ball v. United States*, 470 U.S. 856, 867–68 (1985) (Stevens, J., concurring in judgment) (expressing concern that a defendant could be prejudiced if a jury attempts to reach a compromise verdict when required to consider multiple counts); *Johnson v. Louisiana*, 406 U.S. 356, 390 (1972) (Douglas, J., dissenting) (referring to “many compromise verdicts on lesser-included offenses” as an argument for requiring a unanimous jury).

98. See Kelman, *supra* note 7, at 305 (“‘Compromise’ effects are well known to both district attorneys and defenders . . .”); Orzach & Spurr, *supra* note 28, at 239–45 (noting the common tendency for prosecutors to object to the inclusion of lesser-included offenses based on a concern that the jury will arrive at a compromise verdict).

99. *Beck v. Alabama*, 447 U.S. 625, 645–46 (1980).

100. *Cnty. Court v. Allen*, 442 U.S. 140, 168 (1979) (Burger, C.J., concurring) (emphasis added).

101. For an example of such criticism, see generally Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15 (1990). Brodin argues against a general verdict and in favor of a jury fact verdict—much like the findings of fact that a judge returns when she sits as fact-finder. As part of his argument, Brodin observes that “deliberations may sometimes resemble ‘horse trading’ among the jurors resulting in a compromise verdict.” *Id.* at 43; see also Kemmitt, *supra* note 15 (noting the traditional idea that “the jury exists merely to find facts”).

102. See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 1 (1979) (“One statistic dominates any realistic discussion of criminal justice in America today: roughly ninety percent of the criminal defendants convicted in state and federal courts plead guilty rather than exercise their right to stand trial before a court or jury.”).

Although the basic practice is certainly familiar, there are actually several specific aspects of plea

process has its critics, few still question the legitimacy of plea negotiations generally.<sup>103</sup> Considering intrajury negotiation as a cousin to plea bargaining, therefore, might change the way we feel about it and (even better) reveal ways to improve it. Four aspects of the analogy are discussed below: (a) similar deal-making methods, (b) similar drives to compromise, (c) similar bargaining pitfalls, and (d) similar practical realities.

#### A. SIMILAR DEAL-MAKING METHODS

The first and most obvious similarity is that intrajury negotiation and plea negotiation are both confidential enterprises: they both take place in secret, they both are largely unreviewable, and they both are hard to monitor by policymakers. Indeed, the secrecy of plea bargaining and its inability to be regulated are two hallmarks of the practice.<sup>104</sup> Plea-bargaining practices are so elusive that even the Department of Justice finds them hard to control.<sup>105</sup> In fact, Rachel Barkow recently observed that “there are currently no effective legal checks in

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bargaining that have acquired their own names and definitions. Understanding these nuances will aid in the discussion that follows. “Sentence bargaining,” for instance, involves a guilty plea in exchange for expected leniency at sentencing. See Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293, 302 (2005) (calling for judicial oversight of sentence bargaining). “Fact bargaining” is the more controversial practice of stipulating to certain facts (for example, a specific amount of narcotics) in order to secure a more forgiving charge or sentence. See Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 GEO. MASON L. REV. 303, 323 (2009). And—most relevant for present discussions—“charge bargaining” describes what happens when a defendant pleads guilty in exchange not only for the chance at a more lenient sentence but also to face a less serious charge altogether. See Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1260–64 (2008); Ronald F. Wright & Rodney L. Engen, *Charge Movement and Theories of Prosecutors*, 91 MARQ. L. REV. 9, 9 (2007).

103. But see Schulhofer, *supra* note 5, at 2009 (arguing for the abolition of plea bargaining).

104. See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009); Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1936 (2006) (“[F]or the most part, prosecutorial discretion in charging and plea bargaining is unreviewable . . .”); Wright & Miller, *supra* note 2.

105. The Department of Justice’s formal policy is to prohibit fact bargaining and charge bargaining altogether. See Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1077 (2006) (citing the Ashcroft Memo prohibiting fact bargaining and charge bargaining by federal prosecutors); Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1288 (1997) (noting that “the federal guidelines system includes a unique package of rules and practices intended to address the problem of prosecutorial discretion” (footnote omitted)). Despite this ban, however, observers claim that prosecutors continue to use fact bargaining and charge bargaining as important tools in their arsenal. See Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. CHI. LEGAL F. 149, 165, 193 (observing there are reasons to believe “the Justice Department cannot meaningfully restrain local United States Attorney’s Offices from adopting locally convenient plea bargaining practices”); Schulhofer & Nagel, *supra*, at 1311–12 (finding examples of evading the Guidelines through bargaining); Simons, *supra* note 102; see also *United States v. Kandirakis*, 441 F. Supp. 2d 282, 284–85 (D. Mass. 2006) (stating that those who deny the “sweeping . . . plea bargaining culture today” are “sophists”).

place to police the manner in which prosecutors exercise their discretion.”<sup>106</sup>

For better or for worse, the same observation can be made about jurors who negotiate. Compromise verdicts have been recognized for some time.<sup>107</sup> Courts are aware that jurors negotiate, and many judges condemn compromise verdicts as the work product of a jury that has abandoned its proper role.<sup>108</sup> But the common judicial sentiment also seems to be that there is little that can be done about this. Indeed, the Supreme Court observed over fifty years ago that “[c]ourts uniformly disapprove compromise verdicts but are without other means than admonitions to ascertain or control the practice.”<sup>109</sup>

There is more to the analogy than a shared secrecy and elusive nature, however. Indeed, the actual decision-making processes—how deals are made in each context—do not differ all that much. After observing simulated deliberating juries, Reid Hastie articulated two theories of deliberation style: evidence-driven and verdict-driven.<sup>110</sup> Evidence-driven deliberation ought to be familiar to criminal-law movie watchers: individual jurors focus on reconstructing the story of the crime, cite evidence in reference to several verdict options, and do not vote or take a poll until later in the deliberation.<sup>111</sup>

At least equally likely to occur, however, is verdict-driven deliberation.<sup>112</sup> Under this style, deliberation begins with a public ballot.<sup>113</sup> Jurors then “align[] [themselves] in opposing factions by verdict preferences” and begin to “act[] as advocates for their positions.”<sup>114</sup> “Evidence is cited in support of a specific

106. Barkow, *supra* note 104, at 871.

107. Indeed, several scholars suggest that compromise verdicts date back to seventeenth- and eighteenth-century England. *See, e.g.*, Kemmitt, *supra* note 15, at 93. According to this scholar, although English juries were “[f]ormally . . . fact-finding bodies,” they were “functionally . . . a quasi-sentencing body”: “When faced with an unduly harsh sanction, the jury would act as a sentencing mitigator, either by entering a compromise verdict in which the defendant was convicted of a lesser charge or by acquitting the defendant outright.” *Id.* at 94–95.

108. *See, e.g.*, Duk v. MGM Grand Hotel, Inc., 320 F.3d 1052, 1058 (9th Cir. 2003) (acknowledging the possibility of a compromise verdict, but choosing instead to “presume that citizen jurors will properly perform the duties entrusted them”).

109. Stein v. New York, 346 U.S. 156, 178 (1953), *overruled in part by* Jackson v. Denno, 378 U.S. 368 (1964).

110. HASTIE, PENROD & PENNINGTON, *supra* note 50, at 163. For discussion of these styles in subsequent literature, see Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1274–76 (2000).

111. HASTIE, PENROD & PENNINGTON, *supra* note 50, at 163.

112. Hastie and colleagues found that approximately two-thirds of juries engaged in some sort of verdict-driven deliberation: 28% of juries engaged in pure verdict-driven deliberation (judging by how early in the process they took a vote), 35% engaged in evidence-driven deliberation, and 38% displayed a mixed style. *See id.* at 164. Subsequent researchers observed that the breakdown of verdict-driven and evidence-driven deliberation styles among mock jurors was an even 50–50. *See* Devine et al., *supra* note 7, at 693 (citing Claudia L. Cowan et al., *The Effects of Death Qualification on Jurors' Predisposition To Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53 (1984)). Not surprisingly, verdict-driven deliberation was more common when a unanimous verdict was not required and the total deliberation time for juries undergoing verdict-driven deliberation was shorter. HASTIE, PENROD & PENNINGTON, *supra* note 50, at 165.

113. HASTIE, PENROD & PENNINGTON, *supra* note 50, at 163.

114. *Id.*

verdict position,” “[i]ndividual jurors advocate only one verdict position at a time,” and polling or voting happens frequently.<sup>115</sup>

This verdict-driven description of a negotiation—the kind perhaps most likely to produce compromise verdicts—should start to sound familiar. The jury factions that form and advocate for verdict preferences are analogous to the roles filled by prosecutors and defense attorneys in plea-bargained cases. This is particularly true in light of the group polarization effect.<sup>116</sup> Recall that individual judgments become more extreme through discussion. In effect, some jurors become quasi-prosecutors in jury discussions while others become quasi-defense attorneys. These juror-advocates then engage in a give and take—using the verdict alternatives as steps in their negotiation—until a compromise is reached.

#### B. SIMILAR DRIVES TO COMPROMISE

A second aspect of the analogy is that both jurors and plea negotiators are motivated to make a deal. Guilty pleas are typically justified by the limited budgets and resources facing prosecutors and public defenders.<sup>117</sup> George Fisher explains that plea bargaining was born as a “marvelously efficient relief from a suffocating workload.”<sup>118</sup> Jurors, however, are also individuals with jobs and responsibilities and constraints on their time.<sup>119</sup> Negotiation and compromise—long thought of as efficient methods for dispute resolution among prosecutors and defense attorneys—may be equally attractive to jurors who are in a hurry to return to their daily responsibilities and who have been encouraged by the judge not to return without a unanimous verdict.

The connection between the negotiations goes further, however. Besides the common general incentives to compromise, the specific motivations of jurors who negotiate—what it is that drives them to make a deal—mirror the considerations that prompt plea deals.

One can imagine a negotiation within a jury evolving in many ways. Consider, for example, a “mercy” deal. A juror may think the defendant committed the highest crime charged, but he may also be nervous about the consequences

115. *Id.*

116. See HASTIE, PENROD & PENNINGTON, *supra* note 50, at 69–70; Schade, Sunstein, & Hastie, *supra* note 71.

117. See Bibas, *supra* note 2, at 2477 (“To put it bluntly, appointed or flat-fee defense lawyers can make more money with less time and effort by pushing clients to plead.”); Wright & Engen, *supra* note 104, at 1949 (“District Attorneys must economize, selecting their highest priority cases to receive the most time and resources from their limited budgets, while the bulk of cases must be resolved without the expense of a trial.”).

118. George Fisher, *Plea Bargaining’s Triumph*, 109 YALE L.J. 857, 867 (2000), reprinted in GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003).

119. Hastie and colleagues found that some jurors viewed deliberation as a “rough and occasionally punishing experience” that took a toll on their personal commitments outside the courtroom. HASTIE, PENROD & PENNINGTON, *supra* note 50, at 173. Juror questionnaires revealed that escaping deliberation and returning to personal commitments motivated at least some of the jurors to shift their verdict preference from one faction to another and ultimately produce a compromise verdict. *See id.*

being too severe, or he may believe that the defendant deserves leniency for some reason (his age, his background, his role in the offense). As a result, that juror is willing to compromise on a lesser offense with his colleagues, who in turn make a deal to avoid deadlock.

On the other end of the spectrum is the “hold him accountable for something” deal. A juror could retain reasonable doubt about the defendant’s guilt on the charged crimes but think that the defendant did something wrong and is a threat to public safety. He wants to ensure the defendant is held accountable—or at least not released—so he is willing to compromise the reasonable doubt standard and convict on a lesser-included offense.

Or maybe the driving force of the compromise is a prediction of the future—a “preempting a second jury” deal. A juror may strongly believe the defendant is innocent, but he is afraid that a hung jury will result in an eventual conviction down the road. Thus, he leverages his holdout vote to compromise and secure a more lenient verdict than what might otherwise be reached. And the eleven other jurors, in turn, vote to compromise on a more lenient charge because they want to ensure a second jury does not acquit.

A terrific example of these various dynamics of jury compromise can be seen in the ABC documentary series, *In the Jury Room*.<sup>120</sup> ABC filmmakers were permitted to videotape a trial and subsequent jury deliberation. Defendant Laura Trujillo was accused of child abuse resulting in the death of her child; her boyfriend had confessed and pled guilty to dealing the fatal blow, but under state law the mother could be held complicit if she knew of the risk and did nothing to prevent it.<sup>121</sup> There were five possible verdicts given to the jury, reflecting lesser-included child-abuse charges under Colorado law. These options ranged in sentence consequences (although the jury did not know) from forty-eight years in prison to probation.<sup>122</sup>

After agreeing that Ms. Trujillo was not guilty of the most serious charge, the jury quickly split into two camps. Half of them wanted to convict Ms. Trujillo of the charge accompanied by a reckless *mens rea*: she should have foreseen the risk of serious harm given the history of abuse to the child. The other half thought the death was not foreseeable and wanted to convict on the lowest possible negligence charge.<sup>123</sup>

Their debates involved some factual questions: one juror argued, for example, that the defendant must have known of the child’s prior broken ribs.<sup>124</sup> But the discussion involved other considerations as well—factors apart from questions of what actually happened that night. In this vein, some jurors called for accountability: “When does Laura take responsibility for this child? When?

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120. *In the Jury Room: Colorado v. Laura Trujillo* (ABC television broadcast Aug. 17, 2004).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

It's too late now."<sup>125</sup> And some jurors called for mercy, arguing that it was not fair to hold the defendant accountable for the death of her child when "her actions did not cause it."<sup>126</sup>

Ultimately one juror in the Trujillo case called for a truce: "In order to avoid a hung jury," he said, "both sides are going to have to give some concessions."<sup>127</sup> That juror then pointed to the four remaining verdict options on the board in front of them and called for a compromise on a charge in the middle.<sup>128</sup> His personal reason for reaching the deal was to ensure the defendant was somehow punished: "I'm not getting what I want here. But I cannot walk out of this room [without] holding her responsible for what she did [somehow]."<sup>129</sup> Others, perhaps, voted for the deal because they did not want a subsequent jury to convict on the highest charge. In the end, the compromise carried the day; for their various reasons, the jurors met in the middle and convicted Ms. Trujillo on a lesser-included offense that was actually (unbeknownst to them) a misdemeanor.<sup>130</sup>

These different motivations for compromise verdicts will likely prompt a variety of reactions depending on one's normative positions. But what is important for present purposes is that all three brands of jury compromises—a mercy deal, an accountability deal, a "preempting a second jury" deal—reflect the same considerations that play a vital part in plea bargain discussions every day.

The U.S. Attorney's manual, for instance, lists several factors prosecutors should weigh when deciding whether to enter a plea agreement, including: "[t]he defendant's remorse or contrition" (mercy), the nature of the offense and the defendant's history (accountability or public safety), and "the likelihood of obtaining a conviction at trial" (prediction).<sup>131</sup> To be sure, there are other factors a prosecutor accounts for that a juror does not consider—whether the defendant cooperates in another case, for example. But the overlap in the reasons for making a deal—which notably, in both instances, include a forecast of the expected sentence—is larger than one might initially suspect.

As the ABC documentary demonstrates, and the jury studies confirm, it is simply unrealistic to assume that jurors deliberate over facts and prosecutors negotiate over sentence implications. It is more accurate to recognize that both types of actors negotiate and make deals for a whole host of reasons—reasons that, interestingly enough, are not all that different from one another.

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125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. Brown & Bunnell, *supra* note 105, at 1076 (citing U.S. DEP'T OF JUST., UNITED STATES ATTORNEYS' MANUAL § 9-27.420 (2002), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcrn.htm#9-27.420](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrn.htm#9-27.420)).

## C. SIMILAR BARGAINING PITFALLS

A jury's negotiation also suffers from many of the same defects that plague the plea-bargaining system. Scholars like Stephanos Bibas have explained that plea deals are skewed by anchoring and framing tendencies.<sup>132</sup> Assume, for example, that a prosecutor adds up every possible charge and enhancement to offer a defendant a deal that would result in twenty years in prison. Even if the defendant rejects this offer as unduly severe, it can still affect the ultimate outcome by playing on framing or anchoring tendencies. If the prosecutor next offers a deal resulting in fifteen years, this option may seem reasonable to the defendant in relation to the first offer, even if it would not have seemed so had it been offered in the first instance.<sup>133</sup>

The same phenomenon can be seen with jury decisions. We have seen that when a jury considers multiple verdict options, the framing of the choice makes a difference. When (as in Mark Kelman's experiment) a special circumstances murder verdict option represents the high end of the available options, the compromise middle choice is raised as well.<sup>134</sup> And, as in plea bargaining, anchoring and framing in intrajury negotiation give rise to Bibas's same concerns. Prosecutors—aware of jury compromise—may well charge in anticipation of that reality and select a crime that carries more severe consequences than what they think is just. This “overcharge” sets an artificially high anchor, which in turn elevates whatever option will appear to the jury as the middle compromise, skewing the final result.

Another plea-bargaining critique that can be applied to intrajury negotiation involves “charge bargains”—deals made when the defendant pleads guilty in exchange not only for the chance at a more lenient sentence but also to a less serious charge altogether. In fact, Ronald Wright and Rodney Engen have observed that

[a]ny quick review of court statistics—or a single afternoon spent in the hallways of a criminal courthouse—will confirm that criminal charges move. The more serious charges filed at the start of the case often move down to less serious charges that form the basis for a guilty plea and conviction.<sup>135</sup>

Wright and Engen were speaking about plea bargaining, but they could just as easily be speaking about compromise verdicts. Regardless of whether lawyers in search of a plea haggle back and forth over possible charges, or jurors in search of unanimity adjust their verdict preference to find a middle ground, in both scenarios, a criminal verdict reflects a settlement. The charge is not as tough as it could be, and it is not an acquittal; it falls in the middle, like the end result of

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132. Bibas, *supra* note 2, at 2514–19.

133. *Id.* at 2517–18.

134. See Kelman, Rottenstreich & Tversky, *supra* note 7; *supra* text accompanying note 7.

135. Wright & Engen, *supra* note 102, at 9.

many negotiations. Jurors too, in other words, participate in charge movement.

If charge movement happens on a jury, however, it is important to remember the controversy that surrounds it in its original plea-bargaining context.<sup>136</sup> Two central critiques emerge. Some are concerned that similarly situated offenders receive similar treatment. Great steps have been taken to ensure uniformity at sentencing, and these reforms are undermined if the real work is being done behind the scenes through a charge negotiation. The risk is that “[u]nfettered charge bargaining could result in judicial sentencing discretion just being replaced by prosecutorial charging discretion,” which would circumvent efforts, like the Federal Sentencing Guidelines, to guarantee uniformity of sentences for those who commit similar crimes.<sup>137</sup>

The second concern is that charge bargaining naturally leads to “overcharging” by prosecutors who have an incentive to do so for leverage in plea negotiations.<sup>138</sup> The fear here concerns inaccurate and excessive results.<sup>139</sup> Innocent defendants, for example, tend to be risk averse, and very harsh charges may scare an innocent person into pleading to a lesser and more certain punishment.<sup>140</sup>

These two common charge-bargaining concerns apply equally to intrajury negotiation. First, if charge bargaining produces arbitrary and inconsistent results across defendants who commit similar crimes, that risk holds equally true for intrajury negotiation. Different juries compromise in different ways, making charge movement a matter of fortune for similarly situated defendants. Plus, a jury only sees one defendant and one crime; jurors are unaware of the universe of crimes and the charges that typically attach to them. So when a jury decides to compromise and discount an aggravated assault charge to a plain assault charge, for example, it does so without regard to the sentencing consequences of that decision and without the knowledge of how “bad” this assault was compared to similar ones. This certainly can lead to inconsistent results across similarly situated defendants, perhaps even more so than with charge bargaining in the traditional sense.

Similarly, the “overcharging” problem also applies to intrajury negotiation. Once the jury has control of the case, the prosecutor is not likely to drop a charge that he knows was too high at the outset. The risk of arbitrary verdicts resulting

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136. It is presumably recognition of these criticisms that led the DOJ to prohibit charge bargaining by federal prosecutors (a prohibition observed formally, if not in practice). See Bowman, *supra* note 105, at 193.

137. Ahmed E. Taha, *The Equilibrium Effect of Legal Rule Changes: Are the Federal Sentencing Guidelines Being Circumvented?*, 21 INT’L REV. L. & ECON. 251, 251 (2001).

138. Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. J. CRIM. L. 441, 449 (2009); Meares, *supra* note 16, at 863 (“The prosecutor can, and regularly does, use discretion in charging to influence greatly a defendant’s decision to plead guilty in any particular case.”).

139. This risk has led at least one scholar to suggest that prosecutors receive financial bonuses for securing convictions on the charge filed, as a way to counteract the incentive to overcharge and engage in charge bargaining. Meares, *supra* note 16, at 873–77.

140. Schulhofer, *supra* note 5, at 194–85; Scott & Stuntz, *supra* note 2, at 1947–48.

from a gaming of the system, therefore, is even higher when the prosecutor relinquishes control over the charges, and the overcharged case goes to a jury.

To date, the dangers of overcharging, charge bargaining, and framing deals have been discussed only with respect to plea bargaining. But the recognition that jurors negotiate means that if one is worried about negotiation problems in the context of plea bargaining, those concerns should carry over to jury trials as well.

#### D. SIMILAR PRACTICAL REALITIES

The final similarity between plea bargaining and compromise verdicts is that both seem largely unavoidable as a practical matter. Whether you love plea bargaining or whether you, as George Fisher put it, resign to its dominance “though its victory merits no fanfare,” most people agree that plea bargaining is here to stay.<sup>141</sup> To be sure, some scholars have argued that plea bargaining is *not* inevitable and should be abolished;<sup>142</sup> that argument is certainly bolstered by the fact that many other countries do not dispose of criminal cases through plea deals.<sup>143</sup> I make no claim on the wisdom or costs of those reform suggestions. I merely concur with those who have made the descriptive claim that—for the foreseeable future at least—there seems to be no political will to reform American procedures in such a way that would eliminate plea bargaining.<sup>144</sup> This resignation has shaped the way people view plea bargaining and the way scholars critique it. The vast majority of those who weigh in on the plea-bargaining debate in America now acknowledge that “bargaining itself is too entrenched to abolish.”<sup>145</sup>

Negotiation among jurors is perhaps more entrenched than is negotiation for pleas, albeit for different reasons.<sup>146</sup> As one might intuitively expect, any time a group of people is asked to unanimously decide an issue when multiple alternatives are available—a city council passing an ordinance, stockholders electing a chairman of the board, Congress passing an appropriations bill—compromise and negotiation follow as a matter of course. This phenomenon has been confirmed by social scientists, both within the context of the jury and in more

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141. Fisher, *supra* note 118, at 859; *see also* Bibas, *supra* note 2, at 2527–28 (“I take it as a given that plea bargaining is here to stay.”).

142. Albert W. Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 1048–49 (1983) (“I confess to some bafflement concerning the insistence of most lawyers and judges that plea bargaining is inevitable and desirable.”); Schulhofer, *supra* note 5.

143. Alschuler, *supra* note 142, at 976–77 (observing that “[t]he criminal procedures of continental Europe . . . provide the principal illustration of the ability of advanced legal systems to avoid reliance on plea bargaining”).

144. Bibas, *supra* note 2, at 2527–28; *see also* Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 409 (2008) (noting that “plea bargaining seems to be growing only more entrenched over time”).

145. Bibas, *supra* note 2, at 2528; *see also* O’Hear, *supra* note 144; Wright & Miller, *supra* note 2, at 1417.

146. *See* discussion *supra* Part I.

general group decision settings.<sup>147</sup> It seems the very nature of group decision making almost inevitably leads to some sort of negotiation and concession.

Acknowledging this practical reality of compromise in group decision making requires a shift in jury reform strategy, much like the shift that has occurred among those who wish to reform plea bargaining.<sup>148</sup> Most plea bargaining reformists now seek modifications in the process, rather than outright abolition of the practice.<sup>149</sup> This strategic shift is, in my view, the greatest lesson from plea bargaining to be applied towards an understanding of intrajury negotiation. If jurors negotiate with each other in the jury room just as prosecutors and defense attorneys do in the back halls of the courthouse, then maybe we should treat compromise verdicts the way we treat plea bargains—not as a risk with which we do not know what to do, but as a reality we must address, correcting as many injustices about the process as possible.

To date, intrajury negotiation and compromise criminal verdicts are treated like old family secrets: we know they happen, but we do not really talk about them and we do not think anything can be done about them anyway.<sup>150</sup> This is the wrong approach. Negotiation and compromise are not hidden aspects of criminal adjudication. Indeed, they are now dominant in our criminal law—together they represent the manner in which the vast majority of cases are decided. Why do we acknowledge this reality and yet ignore that the same negotiation can take place in a jury room?

For the most part, modern American plea-bargaining scholars take the existence of negotiation in criminal law as a given.<sup>151</sup> Should not jury scholars

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147. See discussion *supra* Part I; see also James D. Laing & Benjamin Slotznick, *When Anyone Can Veto: A Laboratory Study of Committees Governed by Unanimous Rule*, 36 BEHAV. SCI. 179, 185–86, 192 (1991); Charles E. Miller & Rick Crandall, *Experimental Research on the Social Psychology of Bargaining and Coalition Formation*, in PSYCHOLOGY OF GROUP INFLUENCE 333, 334 (Paul B. Paulus ed., 1980). Psychologist Charles Miller, to take one example, conducted a study using three-person groups in which the members were induced to have preferences using monetary payoffs. Miller designed the study so that two of the members held preferences that were somewhat similar—close together on a spectrum—but the third member’s position was extreme relative to the other two. See Charles E. Miller, *Group Decision Making Under Majority and Unanimity Decision Rules*, 48 SOC. PSYCHOL. Q. 51, 54–59 & fig. 2 (1985).

148. To be clear, I do not claim that the same social pressures that lead to jury compromise also lead to plea bargaining. The origin and causes of plea bargaining are topics beyond the scope of this Article. My claim is only that because of the practical reality that compromise verdicts are likely to occur, jury scholars should alter their strategies for reform, much like the approach adopted by most modern plea bargaining scholars.

149. See Bibas, *supra* note 2, at 2527–28; Wright & Miller, *supra* note 2, at 1417–18. But see Schulhofer, *supra* note 5.

150. See, e.g., *Stein v. New York*, 346 U.S. 156, 178 (1953), *overruled in part by Jackson v. Denno*, 378 U.S. 368 (1964) (“Courts uniformly disapprove compromise verdicts but are without other means than admonitions to ascertain or control the practice.”); Kelman, Rottenstreich & Tversky, *supra* note 7, at 305 (“‘Compromise’ effects are well known to both district attorneys and defenders . . .”). Compromise verdicts have received more attention from legal scholars on the civil side. See, e.g., Michael Abramowicz, *A Compromise Approach to Compromise Verdicts*, 89 CALIF. L. REV. 231 (2001), but far less ink has been spilled on compromise criminal verdicts.

151. See, e.g., Bibas, *supra* note 2, at 2527–28; O’Hear, *supra* note 144.

follow suit? Instead of comparing a jury trial to a bench trial (the classic technique for those who evaluate the jury),<sup>152</sup> perhaps we should compare it to a different alternative: the plea-bargaining process that largely controls criminal law. Recognizing the practical reality and viewing the jury as a negotiating body is an important first step toward evaluating jury negotiation and potentially reforming it.

### III. THE DIFFERENCES

At this stage, it is probably hard to deny the impulse to point out all the differences between intrajury and plea negotiations. Much in fact can be learned from the important differences between the two. If we accept that jurors negotiate in ways that look like plea bargaining, and that a jury verdict—like a plea—can represent a compromise, then our evaluation of intrajury negotiation is informed by whether that bargaining process is more fair or less fair than the one with which we are most familiar. This evaluation is aided by an understanding of several important differences between the two negotiating contexts: (a) different negotiators, (b) different negotiating conditions, and (c) different interaction with substantive law.

#### A. DIFFERENT NEGOTIATORS

The first and most obvious difference between intrajury and plea negotiations is that the negotiating actors are not the same. Plea negotiations are handled by professionals—prosecutors and defense attorneys—whereas jury negotiations are handled by local citizens. Furthermore, the criminal defendant (at least in theory) is a participant in one negotiation but is absent from the other. These distinctions carry significant implications.

First, prosecutors and defense attorneys—unlike jurors off the street—are “repeat players” who regularly work closely with each other.<sup>153</sup> This can make a difference in bargaining.<sup>154</sup> A prosecutor who knows he will work with a defense attorney again may be more prone to compromise than would two jurors who disagree and have little chance of interacting in the future. To the extent one thinks “holdout” jurors should stick to their guns and not yield to compromise pressure, they are perhaps more likely to do so than are actors who see each other regularly and want to develop a reputation as cooperative.

More importantly, prosecutors and defense lawyers, because they are repeat players, know the relevant local history; they know what charges and what

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152. KALVEN & ZEISEL, *supra* note 18, at 9 (“[M]ost praise or blame of the jury can come only by way of the comparison of trial by jury with trial by a judge, the one serious and significant alternative to it.”).

153. Bibas, *supra* note 2, at 2481.

154. *Id.* at 2480.

punishments are usually visited on people who do what the defendant did.<sup>155</sup> They “understand the intricate, technical rules that regulate arrests, searches and seizures, interrogations, discovery, evidence, and sentencing, as well as the going rates in plea bargaining.”<sup>156</sup> They know whether the crime in front of them is particularly egregious compared to others like it, and they know the sort of “market price” or typical punishment that accompanies it.<sup>157</sup>

This is all valuable information that jurors do not have. When jurors negotiate between possible charges, they do so blindly. Not only are they in the dark about the local custom or “going rate” for criminal charges, but jurors are also generally not told about any of the sentence implications—even the mandatory minimums—that attach to each charge.<sup>158</sup> In federal court and in most state courts, the “party line,” as one scholar put it, “is that the jury exists merely to find facts: juries make factual determinations and judges sentence, end of story.”<sup>159</sup>

Just because jurors are not given information about punishments, however, does not mean that they do not make their own assumptions on that score, even if erroneous.<sup>160</sup> Indeed, empirical evidence suggests that juries routinely anticipate punishments and that verdicts are significantly affected by what jurors predict will happen to the defendant upon conviction—regardless of the accuracy of those predictions.<sup>161</sup> For example, the mandatory minimum in New

155. See Stephanos Bibas, Essay, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 912 (2006).

156. *Id.*

157. Consider, for example, Milton Heumann’s description of typical negotiation practices in one state court:

Typically, in the circuit court, a line forms outside the prosecutor’s office the morning before court is convened. Defense attorneys shuffle into the prosecutor’s office and, in a matter of two or three minutes, dispose of the one or more cases ‘set down’ that day. Generally, only a few words have to be exchanged before agreement is reached. The defense attorney mutters something about the defendant, the prosecutor reads the police report, and concurrence on ‘what to do’ generally, but not always, emerges.

MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* 35 (1978); see also DOUGLAS W. MAYNARD, *INSIDE PLEA BARGAINING: THE LANGUAGE OF NEGOTIATION* 103–18 (1984) (discussing both “routine processing” and adversarial negotiations in the context of plea bargaining).

158. Kristen K. Sauer, Note, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232, 1242 (1995) (“The general rule in federal and most state judicial systems is that neither the judge nor advocates should inform the jury of the sentencing consequences of a guilty verdict. Depending on the circumstances of the case, the court may even specifically instruct the jury not to consider punishment in reaching its verdict.” (footnotes omitted)).

159. Kemmitt, *supra* note 15. This view has, in fact, been endorsed by the U.S. Supreme Court. See *Shannon v. United States*, 512 U.S. 573, 579 (1994) (“It is well established that when a jury has no sentencing function, it should be admonished to ‘reach its verdict without regard to what sentence might be imposed.’” (footnote omitted) (quoting *Rogers v. United States*, 422 U.S. 35, 40 (1975))).

160. See Lillquist, *supra* note 8, at 670.

161. Kalven and Zeisel found that jurors “anticipate[] punishment” and are prone to nullify when they think it will be too harsh. KALVEN & ZEISEL, *supra* note 18, at 306 (discussing cases in which juries considered a conviction’s consequences on the defendant’s job prospects). Several psychology experi-

York for a conviction of first-degree assault is the same as the mandatory minimum sentence for attempted murder.<sup>162</sup> Defense lawyers and prosecutors are aware of this facet of the New York penal code, but the typical juror is probably not. It is not hard to imagine a juror negotiating with his fellow jurors, falsely assuming that attempted murder carries more significant consequences than does the assault charge and adjusting his vote to compromise accordingly.

Despite those disadvantages, jurors have several advantages relative to negotiating lawyers. First, precisely because they have not seen many cases in the past, jurors approach each trial without the cynical baggage that may accompany prosecutors and defense attorneys.<sup>163</sup> As G. K. Chesterton put it,

the horrible thing about all legal officials . . . is simply that they have got used to it.

Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop.<sup>164</sup>

Jurors are likely to be less cynical. That is a useful sensibility: when we convict innocents, we probably do so in part through excessive cynicism.<sup>165</sup> There is something powerful and important about a fresh set of eyes assessing the merits of each criminal case. If the fate of a criminal defendant is to be negotiated in any event, perhaps it is preferable to have bargainers who do not come to the table jaded by a life's work surrounded by crimes and criminals.

Relatedly, jurors negotiate without being encumbered by another criticism often launched at prosecutors and defense attorneys: agency failure.<sup>166</sup> In plea

ments also show that verdicts are dramatically affected by what jurors think will happen to the defendant at sentencing. SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 159, 166 n.69 (1988).

162. See N.Y. PENAL LAW § 70.02 (Consol. Supp. 2010). Attempted murder and assault in the first degree are both classified as class B felony offenses with mandatory minimums of five years imprisonment. *Id.*

163. See Dr. George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 110–19 (1975) (detailing empirical evidence that experienced prosecutors manifest “conviction psychology”— “[t]he set of attitudes held by the prosecutor tending to buttress his emphasis on convictions”—and presume guilt); Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 206 (1988) (describing “conviction psychology” as a powerful force on career prosecutors). This cynicism extends beyond prosecutors to the repeat players on the defense end as well. Alan Dershowitz, who is known to be pro-defense, has said “almost all criminal defendants are, in fact guilty,” and that “all criminal defense lawyers, prosecutors and judges understand and believe that.” Joshua Dressler, *The Wisdom and Morality of Present-Day Criminal Sentencing*, 38 AKRON L. REV. 853, 865 (2005) (quoting ALAN M. DERSHOWITZ, *THE BEST DEFENSE* xxi (1982) (internal quotation marks omitted)).

164. G.K. CHESTERTON, *TREMENDOUS TRIFLES* 85–86 (1925).

165. See Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 689–90 (“[T]he assimilation of a conviction psychology . . . makes it difficult, if not impossible, for the prosecutor to protect the innocently accused.”).

166. Alschuler, *supra* note 12, at 1306–13; Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52, 105–12 (1968); Schulhofer, *supra* note 5, at 1987–91; see also

bargaining, as Stephen Schulhofer has explained, “[t]he real parties in interest (the public and the defendant) are represented by agents (the prosecutor and the defense attorney [respectively]) whose goals are far from congruent with those of their principals.”<sup>167</sup> Prosecutors, for example, have many reasons to plea bargain independent of the public’s interest: they may pursue pleas to get a high conviction rate in order to build reputation or political standing, they may plea bargain to avoid high-profile losses at trial for the same reasons, they may reach a deal to build goodwill with a defense attorney they work with often, or they may plea bargain simply to avoid lengthy trials for personal reasons.<sup>168</sup>

Agency costs exist on the defense side as well. Criminal defense attorneys are almost never paid by the hour; many criminal defendants are not paying clients, and those who are generally pay a flat fee up front.<sup>169</sup> Moreover, appointed attorneys are typically paid the same fee for guilty pleas and for cases that go to trial.<sup>170</sup> Not only are these fees notoriously low,<sup>171</sup> but in most states there is no additional payment for co-counsel even in a serious or complex case, and, in any event, payment is not remitted until the charges are fully concluded.<sup>172</sup> Thus, there are “powerful financial incentives for the attorney to settle as promptly as possible” even if a trial would be in the client’s best interest.<sup>173</sup> And while public defenders “have no immediate financial incentive to avoid trial,” their organizations have their own institutional pressures, which include an overwhelming caseload and strong incentives to move cases along.<sup>174</sup>

When jurors negotiate with each other, by contrast, they are not acting as agents of anyone. On the one hand, this is quite troubling. The lack of agency means there is no guarantee that the classic prosecutor and defense roles will map on to a jury; there may be twelve “quasi-prosecutors,” for example, and no defense representative at all. It also leaves open the possibility that no juror is acting in the public interest—that each juror is out for himself, motivated by private biases and personal incentives. And, perhaps most concerning, the lack of agency in the jury room means that a defendant will not participate in a

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Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 979 (2009) (suggesting that the problem of prosecutorial discretion should be approached as a problem of agency costs); Keith N. Hylton & Vikramaditya Khanna, *A Public Choice Theory of Criminal Procedure*, 15 SUP. CT. ECON. REV. 61, 72–74 (2007) (noting that the prosecutor may have “incentives that diverge from those of the social ideal”).

167. Schulhofer, *supra* note 5, at 1987.

168. *Id.* at 1987–88.

169. *Id.* at 1988.

170. *Id.* at 1989.

171. *Id.* (citing data from a 1986 survey that found that compensation caps were as low as \$500 a case for felonies and sometimes only \$1000 in capital cases).

172. *See, e.g.*, VA. CODE ANN. § 19.2-163 (West 2007) (providing that attorneys can only file for compensation within thirty days of the completion of the case); TENN. SUPR. CT. R. 13(2)(b) (“Co-counsel or associate attorneys in non-capital cases shall not be compensated.”); *cf.* TENN. CODE ANN. § 40-14-206 (West 2006) (delegating to the Tennessee Supreme Court the authority to decide what can and cannot be compensated).

173. Schulhofer, *supra* note 5, at 1989.

174. *Id.* at 1989–90.

negotiation that decides his fate.

On the other hand, because the vast majority of criminal defendants are indigent and the hard reality is that public defenders are overworked and underfunded, there are strong reasons to doubt the adequacy of the average defendant's participation in plea bargaining anyway.<sup>175</sup> Moreover, to the extent one trusts the jury as a fair and impartial decision-making body representing a cross section of the defendant's peers and driven by a sense of moral or civic duty, there is little reason to assume that the conflicts of interest or incentive problems well recognized in plea bargaining will hold true for negotiating jurors as well. Perhaps jurors are influenced by improper factors external to the case—such as a selfish desire to end the deliberation quickly—but at the very least they negotiate without the systemic financial incentives or reputation interests that are often attributed to their professional counterparts.<sup>176</sup>

The lack of agency points to a further distinction between the two negotiating contexts: different starting points. In plea bargaining, each party *sets out* to bargain—each agent seeks from the start to get the best deal for his client. In jury negotiation, by contrast, the starting goal is consensus, and the deal comes because agreement on one verdict is too difficult to reach. Compare, by analogy, negotiations between an individual buyer and seller over the price of a used car, and negotiations between Bluebook executives trying to determine a fair price about the same used car.<sup>177</sup> The first set of deal makers are negotiating from the get-go and their goal is to achieve the best result for themselves, whereas the second set of decision makers reach a compromise (if at all) as a second-best solution because they do not view the relevant data the same way and just cannot otherwise agree.<sup>178</sup>

In the criminal context, the prevailing view is that deals between prosecutor and defense attorney (the individual car buyer and seller) are acceptable, but deals between jurors (the Bluebook executives) are not. This intuition seems misguided. In terms of reaching more accurate results (or, if you prefer, the “fairest” price), does it really matter that the first pair of negotiators sought a deal all along, while the second set compromised only after consensus was not possible? It is quite plausible, in my view, that the fairest price of a 2006 Honda

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175. See Schulhofer, *supra* note 5, 1988 (“On the defense side, agency problems are similar, though possibly more acute.”). This troubling aspect of the criminal justice system has been well-documented. See Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1034 (2006); Cara H. Drinan, *The National Right to Counsel Act: A Congressional Solution to the Nation's Indigent Defense Crisis*, 47 HARV. J. ON LEGIS. 487, 488–89 (2010); Adam M. Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85, 93 (2007).

176. The extent to which jurors are influenced by factors external to the evidence in the case they must decide has drawn a lot of attention from jury research scholars, but is largely beyond the scope of this Article. For a good discussion on the subject, see Devine, Buddenbaum, Houpp, Studebaker & Stolle, *supra* note 70, at 136–48. For further discussion of some of this literature, see MacCoun, *supra* note 7, at 224.

177. I am indebted to Nancy Combs for this useful analogy.

178. To be sure, this car analogy is not perfect because the prosecutor—unlike the car seller—is supposed to be searching for a just outcome and not just for the best outcome he can get.

Accord is better set by disinterested evaluators who compromise not to reach the best deal for themselves (as would be the case for the actors who set out to bargain), but instead as a settlement that reflects the group's judgment upon assessing all of the relevant data. Likewise, it is odd to distrust jury compromises—deals made by neutral people who have heard all the admissible evidence—when we find acceptable plea deals that are made quickly, without all the information, and by agents who may not adequately represent the affected parties.

#### B. DIFFERENT NEGOTIATING CONDITIONS

Another way in which intrajury and plea negotiations are significantly different is that the bargainers negotiate under different conditions. To begin with, prosecutors are commonly thought of as being in the position of power in negotiations: they can stack charges, set deadlines, limit and control discovery, force the waiver of appellate review, and of course they have the discretion to choose what charges are brought in the first place.<sup>179</sup> Jurors, by contrast, are relative equals in the jury room: they all have the same access to information, they all have the same verdict options in front of them, and they each have one vote.

This contrast is a bit of an oversimplification. The prosecutor is not always in the position of power. Sometimes defendants have the upper hand because they hold leverage in being able to cooperate against other defendants or see significant weaknesses in the government's case.<sup>180</sup> At the same time, jurors are not always on equal footing. When a unanimous verdict is required, jurors in minority factions—potential holdout jurors—may face tremendous pressure to back down or may hold tremendous power to get what they want.<sup>181</sup> Generally speaking, however, if for no other reason than that the prosecutor gets to select the charge options while all jurors are constrained by them, the balance of power among negotiators is very different for intrajury negotiations than it is for plea negotiations.

How does this affect our impression of intrajury negotiation? In my view, it tells us that there are at least some ways in which intrajury negotiation is preferable to plea bargaining. Lay negotiators—unlike professional ones—are isolated from political and financial incentives, and they are equals who do not face the power imbalance that is the target of so many plea-bargaining critiques.

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179. O'Hear, *supra* note 144, at 425 (pointing out the "massive power imbalances between prosecutors and defendants" in plea bargaining); Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1252 (2004) ("The overwhelming and dominant fact of the federal sentencing system . . . is the virtually absolute power the system has given prosecutors over federal prosecution and sentencing.").

180. R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice,"* 82 NOTRE DAME L. REV. 635, 664 (2006) (explaining the "cooperation paradox": that is, defendants who are more deeply enmeshed in the criminal milieu may be better able to leverage leniency for themselves than lower-level players").

181. See HASTIE, PENROD & PENNINGTON, *supra* note 50, at 99–102; MacCoun, *supra* note 7, at 228.

To the extent one values the egalitarian nature of a jury or its ability to deliver “common sense justice,” one will likewise value that feature of intrajury negotiation.<sup>182</sup>

Moreover, in terms of decision-making competence, a jury brings more to the table than just common sense. Unlike the prosecutor and defense attorney, a jury has seen all the evidence in a case, and only the admissible evidence at that. In a way, therefore, jurors negotiate and reach compromises with more information than do their professional counterparts—or at least with “purer,” only legally admissible information.

One of the most familiar arguments against plea bargaining is that it invites innocent people to plead guilty because prosecutors and defense lawyers have so little information at the time of bargaining. The information vacuum, in other words, invites risk-averse people to cut a deal regardless of the merits of their cases.<sup>183</sup> This criticism does not apply to intrajury negotiation since that negotiation occurs after all of the admissible evidence has been aired at trial. In this way, intrajury negotiation is preferable to plea bargaining because at least we know that a jury’s compromise is informed by evidence.

### C. DIFFERENT INTERACTION WITH SUBSTANTIVE LAW

Finally, as we ponder the important differences between intrajury and plea negotiations, it is worth asking how each affects and is affected by substantive criminal law.

Bill Stuntz has argued that legislators tend to overcriminalize (creating new crimes and attaching harsh consequences to criminal behavior) to gain political favor while depending on prosecutors to dial it down to the appropriate level with their charging decisions.<sup>184</sup> Legislators are rational actors, and they will almost always vote to authorize “a level of punishment that is appropriate in a

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182. Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 402–03 (2009) (attributing this “communitarian view” of the jury right to the Supreme Court’s *Apprendi* line of cases).

183. Russell D. Covey, *Signaling and Plea Bargaining’s Innocence Problem*, 66 WASH. & LEE L. REV. 73, 89–91 (2009); see also David Bjerck, *Guilt Shall Not Escape or Innocence Suffer? The Limits of Plea Bargaining When Defendant Guilt is Uncertain*, 9 AM. L. & ECON. REV. 305, 306 (2007) (“[A]ny new evidence that arises in the time leading up to trial generally strengthens the case against a guilty defendant, but generally weakens the case against an innocent defendant.”); Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 YALE L.J. 2011, 2012 (1992) (“[I]t is likely that [that] innocent defendants as a class are significantly more risk averse than guilty defendants as a class, [so] a prosecutor’s failure to internalize a defendant’s private information will cost the prosecutor nothing because the defendant, even if innocent, will take the deal anyway.”).

184. William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2558 (2004). Bill Stuntz is not the only one to tell this story of overcriminalization. For other similar accounts, see generally Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005); Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633 (2005); Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879 (2005). *But see* Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 234–49 (2007) (arguing that the overcriminalization story is more accurate about the federal system than state systems).

few very bad cases but excessive in a great many other[s]” when they know it will be popular with their constituents and can be checked by prosecutorial discretion later on.<sup>185</sup> “It sounds odd,” Stuntz tells us, “but legislators’ incentive is to vote for rules that even the legislators themselves think are too harsh.”<sup>186</sup>

The result is that criminal law has become very broad and very severe; we have criminalized the removal of tags from mattresses, for example, and we attach mandatory and perhaps “extraordinarily harsh penalties” for a variety of common drug offenses.<sup>187</sup> The interaction of this expansive criminal code with the dominance of plea bargaining creates a system in which prosecutors are afforded tremendous power, and their choices become more important than the words on the pages of the criminal code. This is so because the “menu” of criminal law from which prosecutors “order” is so large that the legislature can dramatically change the definition of a relevant crime or the applicable sentence, and plea bargains will not be affected.<sup>188</sup> The irony, according to Stuntz, is that “the more [criminal law] expands, the less it matters.”<sup>189</sup>

As we have just learned, however, not all bargained cases involve a prosecutor. Sometimes—for a variety of reasons—the prosecutor delegates his ultimate charging discretion to a jury. When this happens, a set of laypeople are given a modified and truncated version of the prosecutor’s menu and then negotiate with each other to find a verdict in the middle. Common citizens, in other words, charge bargain with criminal law that was written on the understanding that it would be toned down by an agent of the state. Is this a problem?

To answer this question, let us take the case of Cheryl Hunte.<sup>190</sup> Ms. Hunte accompanied her boyfriend on a road trip in which he bought and sold marijuana.<sup>191</sup> She did not plan the trip, she did not purchase or handle the drugs, and she did not profit from the sale.<sup>192</sup> Because there was “some nexus between [Ms. Hunte] and the drugs,” her actions technically met the relevant statutory definitions, and the prosecutor charged her with conspiracy and possession with intent to distribute narcotics.<sup>193</sup>

It is possible that the prosecutor did not believe Ms. Hunte deserved the harsh consequences that attach to drug conspiracy convictions. Perhaps he brought the

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185. Stuntz, *supra* note 184, at 2557–58.

186. *Id.* at 2558.

187. Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 195 (2008); see generally Kyron Huigens, *What Is and Is Not Pathological in Criminal Law*, 101 MICH. L. REV. 811 (2002).

188. Stuntz, *supra* note 184, at 2549; see also William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510–11 (2001) (arguing that the relationship between prosecutors and legislators tends to lead to broader criminal codes).

189. Stuntz, *supra* note 184, at 2550.

190. *United States v. Hunte*, 196 F.3d 687 (7th Cir. 1999). For a discussion of this case, see William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2037–38 (2008).

191. Stuntz, *supra* note 190, at 2037.

192. *Id.*

193. *Hunte*, 196 F.3d at 692.

elevated charge because office policy required him to do so, because he hoped to use it as leverage to gain a quick plea, or maybe to secure testimony against the boyfriend. In any event, Ms. Hunte's case went to a jury. And a juror—unaware of the “going rate” for cases like this one—does not know that the charged crime is “too serious” and does not even know what consequences will attach to it. Once the charge goes to the jury, the prosecutor's charge bargaining power is relinquished and new negotiators take over.

What effect does the substantive drug law have now? A juror could easily read the broad definition of conspiracy and decide that the defendant's behavior meets it, even if the legislature did not actually intend to cover her actions with its proscription. Now, the substance of the criminal law—which Stuntz tells us was of minimum significance in plea bargaining—matters again.

A juror's interpretation of a criminal law—different from that of a prosecutor's in large part because of a lack of information about the local history and universe of crimes—may influence the negotiation that follows by elevating what is to become the midpoint compromise. Once the prosecutor has delegated his charge-bargaining power to the jury, it is out of his hands to take the high charge off the table, despite the expectation of the legislators that the prosecutor remains in control. The result is that broad statutory language meant to give prosecutors hammers for plea bargaining may have unintended consequences in the subset of cases that actually go to trial.

At least two counterpoints come to mind to alleviate this concern. First, if we assume that the legislature has enough confidence in the prosecutor to justify the authorization of overly harsh crimes, then maybe we should also assume it has faith in the prosecutor to know when to go to trial and when to drop charges before a trial. The legislature's grant of power to the prosecution, in other words, could include the ability to delegate charge-bargaining discretion to a jury in the right case.

Second, on a more fundamental level, there may be a good reason to entrust the jury with the discretion to rein in the prosecutor and the legislature—to decide that Ms. Hunte's actions did not really amount to a drug conspiracy even if they fell under the technical prohibition. Maybe we want a group of local citizens to make that call.

Cheryl Hunte faced what many refer to as a “trial tax”—an increased penalty incurred by a defendant who elects trial over a plea.<sup>194</sup> Trial taxes are aggravated by overcriminalization and overcharging because the prosecutor does not act as the safety valve the legislature counts on him to be. Perhaps giving the jury an abbreviated menu of charging options—allowing jurors to charge bargain with each other—serves to prevent excessive punishment technically

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194. See, e.g., Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1158 (2008); John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 223 (1979) (describing “that terrible attribute that defines our plea bargaining and makes it coercive and unjust: the sentencing differential by which the accused is threatened with an increased sanction for conviction after trial by comparison with that which is offered for confession and waiver of trial”).

authorized by the words of the statutes from actually being imposed on those whose behavior does not warrant it. Intrajury negotiation, in other words, can mitigate concerns about overcriminalization: juries who compromise may soften the “trial tax” that comes from defendants turning down pleas and facing overcharges at trial.<sup>195</sup>

#### IV. NORMATIVE IMPLICATIONS: ARE COMPROMISE VERDICTS COMPROMISED?

Compromise verdicts in criminal cases are almost universally criticized.<sup>196</sup> They have been called “improper,”<sup>197</sup> “lawless,”<sup>198</sup> and demeaning to fundamental principles of criminal law.<sup>199</sup> Some have even blamed them for undermining public confidence in the entire criminal justice system since they demonstrate that the system is incapable of “uncovering the truth.”<sup>200</sup>

Are these critics correct? Do compromise verdicts result in compromised justice? Or has the modern American approach to criminal adjudication so embraced negotiation that we should not be disturbed that a jury engages in it too?

Whatever one thinks of plea bargaining generally—and I assume that plea bargaining is here to stay as a practical matter—the normative question at hand is whether intrajury negotiation’s resemblance to plea bargaining changes our evaluation of compromise verdicts. To tackle this question, I will identify the principal objections that have and can be made about compromise verdicts, and then ask how the analogy made in this Article affects those objections. I argue that when intrajury negotiation and plea negotiations are juxtaposed, many objections to the former lose their force, and—perhaps more importantly—the analogy sheds light on important potential jury reforms.

##### A. INSTITUTIONAL LIMITATIONS

One objection to compromise verdicts is that juries are simply not designed to produce good negotiations. As we have established, unlike prosecutors and

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195. Stuntz argues for the reintroduction of vague elements to criminal statutes—mushy elements like “wrongful[ly]” or with a “guilty mind”—in order to encourage jury verdicts that could hold the line against over-criminalization without the stigma of jury nullification. See Stuntz, *supra* note 190, at 2039. Intrajury negotiation could accomplish the same objective.

196. See, e.g., Muller, *supra* note 7, at 784 (“[U]seful as they may be, compromise verdicts are lawless verdicts.”).

197. Michael H. Hoffheimer, *The Rise and Fall of Lesser Included Offenses*, 36 RUTGERS L.J. 351, 358 n.13 (2005).

198. Muller, *supra* note 7, at 784.

199. See Smith, *supra* note 15.

200. Talia Fisher & Issachar Rosen-Zvi, *The Confessional Penalty*, 30 CARDOZO L. REV. 871, 908 (2008) (citing Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1358–59 (1985)). Charles Nesson argues that public trust in the criminal justice system depends on a perception that verdicts are “statement[s] about what happened.” Nesson, *supra*, at 1358. Justice Shaw, of the Florida Supreme Court, espoused one version of this view. In a debate over Florida’s rule requiring the instruction on lesser-included offenses if requested, Justice Shaw claimed it “sacrifices the truth-finding process on the altar of the ‘jury pardon’ by injecting unnecessary confusion into a criminal prosecution.” *State v. Wimberly*, 498 So. 2d 929, 932 (1986) (Shaw, J., dissenting).

defense attorneys, jurors are kept ignorant of the consequences of the deals they make, and they are not acting as agents for the parties in interest (the public and the defendant).

Recall that both institutional limitations can make for troubling negotiations. Ill-informed deals yield a high risk of bad bargains: unjust results in individual cases and inconsistent results across similarly situated defendants. Plus, even though the agency relationship in traditional plea negotiations is far from perfect, at the very least the defendant theoretically has a lawyer fighting for him at the plea negotiating table. There is no guarantee that he has a champion in the jury room. And it is somewhat disturbing that a defendant's fate can be the subject of a deal without his consent.

But the above objections paint an incomplete picture of the jury. The jury has, in fact, other institutional features that make the jury room a good spot for negotiating criminal verdicts—better in some ways than the back room of a prosecutor's office. Negotiation decisions—like other decisions—are influenced by the nature of the decision maker. And for centuries, the jury has been heralded because jurors have a special type of decision-making competence.<sup>201</sup> This praise has multiple features: that jurors are equals in the jury room, that “twelve heads are inevitably better than one,” and that the jurors’ “inexperience” and “lack in professional training” actually serve as assets “because [they] secure[] a fresh perception of each trial.”<sup>202</sup>

If one generally values a jury's unsullied and egalitarian approach to criminal adjudication, that appreciation will apply to intrajury negotiation just as it does to the *Twelve Angry Men* version of jury deliberation. Whether they are negotiating with each other or not, jurors are still isolated from money and reputational interests, from politics and prestige; they are still relative equals, and their discussion benefits from the addition of different points of view. This purity is retained even if they are making their decisions in ways we have not always contemplated. There are, in other words, institutional features of a jury that may foster good deals—deals struck by independent, equal peers of the defendant searching to do the right thing.<sup>203</sup>

Moreover, the institutional objections can be answered, at least in part, through potential reforms that are informed by the comparison to plea bargaining.

One possibility is to inform juries of at least some of the sentence implications that arise from the different offenses on their verdict forms. This suggestion is not new and is not without controversy.<sup>204</sup> The traditional practice is to protect the jury from learning the punishment to which the defendant is exposed, ensuring that the jurors' job is limited to determining guilt or innocence

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201. KALVEN & ZEISEL, *supra* note 18, at 3–4.

202. *Id.* at 8.

203. Recall that I assume a belief in the value of juries generally.

204. See Cahill, *supra* note 8; Kemmitt, *supra* note 15; Sauer, *supra* note 158, at 1233.

regardless of the consequences of their decision.<sup>205</sup> Courts justify this rule as necessary to protect the jury's role as fact finder and to prevent "open[ing] the door to compromise verdicts."<sup>206</sup>

But if compromise verdicts and intrajury negotiation are inevitable or at least probable, are we not causing more harm than good by withholding this sentencing information from the jury? What can possibly justify keeping jurors in the dark about sentencing information if they are already bargaining over the severity of the crime of which to find the defendant guilty?<sup>207</sup>

To be sure, there are good reasons not to inform a jury of all the information the prosecutor and defense attorney have at their disposal. A defendant's criminal history, for example, has much to do with his sentence, but giving this information to a jury would likely create more problems than it solves (like permitting the inference that if the defendant has done one bad thing he will do another).

There are, however, more modest ways to inform jury deals. J.J. Prescott and Sonja Starr, for example, have suggested providing a jury with, "short descriptions of fictional cases that exemplify the relative degree of culpability for different members of a drug conspiracy."<sup>208</sup> Another possibility would be to give the jurors a sentencing range that reflects the "going rate" for charges in plea bargains, or at least inform the jurors of the mandatory minimum sentence a crime carries.<sup>209</sup> Whatever form the additional sentencing information takes,

205. The following is a representative instruction: "The punishment provided by law for the offense[s] charged in the indictment is a matter exclusively within the province of the Court and should never be considered by the jury in any way in arriving at an impartial verdict as to the offense[s] charged." 1 HON. EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS: CIVIL AND CRIMINAL § 20.01 (4th ed. 1992). Most courts share a belief that this instruction is necessary to protect the jury's role as fact-finder. *See, e.g.,* Shannon v. United States, 512 U.S. 573, 579 (1994) ("[P]roviding jurors sentencing information invites them [inter alia] to ponder matters that are not within their province . . ."); United States v. Patrick, 494 F.2d 1150, 1153 (D.C. Cir. 1974) ("[T]he jury's only function is to assess guilt or innocence on the basis of [its] view of the evidence. Sentencing decisions . . . are within the exclusive province of court . . ."); *see also* 3 A.B.A. STANDARDS FOR CRIMINAL JUSTICE § 18-1.1, commentary & n.4 (2d ed. 1986) (recommending abolition of jury sentencing because, inter alia, it may "undercut the integrity of its determination of the defendant's guilt," and because it may prevent appropriate findings of guilt when jurors cannot agree on a sentence).

206. Pope v. United States, 298 F.2d 507, 508 (5th Cir. 1962) ("To inform the jury that the court may impose minimum or maximum sentence, will or will not grant probation, when a defendant will be eligible for a parole, or other matters relating to disposition of the defendant, tend to draw the attention of the jury away from their chief function as sole judges of the facts, open the door to compromise verdicts and to confuse the issue or issues to be decided.")

207. *See supra* note 161 (research indicating that verdicts are dramatically affected by what jurors think will happen to the defendant at sentencing).

208. Prescott & Starr, *supra* note 60, at 328–29. They make this recommendation based on evidence indicating juries are not good at making decisions when given a range but no basis for comparison. *Id.*

209. Some argue that, particularly with respect to mandatory sentencing laws, "denying defendants the right to inform juries of the sentencing consequences of conviction dilutes the historically and constitutionally intended function of the criminal jury." *See, e.g.,* Sauer, *supra* note 158, at 1233; *see also* Milton Heumann & Lance Cassak, *Not-So-Blissful Ignorance: Informing Jurors About Punishment in Mandatory Sentencing Cases*, 20 AM. CRIM. L. REV. 343 (1983) (arguing that the defendant has a constitutional right to inform the jury of the sentencing consequences of mandatory sentences).

the bottom line is that legal decision makers should possess some information about the consequences of their decisions. This would ensure that if jurors do negotiate—which seems difficult to prevent—they do so with accurate information. A fear that jurors will use this information to negotiate with each other—something they seem to be doing anyway—is an inadequate reason to keep it from them.

As for the objection that the defendant has no agent at work when a jury negotiates, that, too, can be addressed by a fairly modest reform. It is impossible, of course, to give a defendant an agent inside the jury room. But jurors cannot compromise unless they have options before them. And, in most jurisdictions, the defendant is the one with the choice to request an instruction on lesser-included offenses.<sup>210</sup> It would be relatively easy to require that a judge issue an instruction to the defendant—at the point at which the defendant elects the lesser-included offense instruction—that warns him of the risks of compromise when a case with multiple verdict options goes to the jury.

Admittedly, this suggested reform seems like a very small check on the possibility that a defendant's fate will be determined by a negotiation he is powerless to stop. But it is not that far off from the humble check we require in the plea bargaining context. The validity of a plea deal turns on one factor: whether the defendant's decision was knowing and voluntary.<sup>211</sup> Barring the extreme cases, there is no digging into the fairness of the bargain, the negotiating power of the bargainers, or whether the plea complies with the "market price" for pleas in similar cases.<sup>212</sup> All that matters is that the defendant could assure the court in a short boilerplate colloquy that he entered the deal knowingly and voluntarily. For the most part we are comfortable with that process in the 95% of all criminal cases that plead out.<sup>213</sup>

If it is enough to ensure the voluntariness of a plea deal, a short discussion with the judge at the point of requesting the lesser-included offense should also be enough to guarantee that the defendant *knowingly* took on the risk of a compromise verdict. This change would make his lack of an agent in those jury

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210. See Orzach & Spurr, *supra* note 28, at 239–40.

211. Hill v. Lockhart, 474 U.S. 52, 56 (1985) (noting that "[t]he longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice'" (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970))); see also Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1026 (2006) ("[W]hile judges oversee prosecutors to make sure that pleas are knowing and voluntary and have a factual basis, these inquiries are cursory." (footnotes omitted)); Fisher & Rosen-Zvi, *supra* note 200, at 881–85 (discussing the "voluntariness rule" of confessions).

212. James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1538–39 & n.67 (1981) ("The Court has repeatedly held that a knowing, intelligent, and voluntary plea entered with the assistance of competent counsel is immune from attack no matter what other defects it may have.").

213. To be sure, there are many who are not comfortable with the limited review of plea bargains. See, e.g., Barkow, *supra* note 104, at 907 (describing various arguments in favor of heightened judicial review). I do not disagree. My point here is, given the limited check on a defendant's participation in plea bargains, we should not be so concerned with the absence of his participation in intrajury negotiation.

discussions less of a concern. It would not eliminate all of the risks associated with intrajury negotiation, but it would be a step in the right direction. In any event, because the vast majority of criminal defendants agree to a plea deal with minimal confirmation that they meaningfully participated in forming it, the objection that compromise verdicts are illegitimate without the defendant's consent is less persuasive.

#### B. DILUTING REASONABLE DOUBT

A second objection to intrajury negotiation is that when juries disagree and split the difference to reach a consensus they, in effect, “compromise . . . the reasonable doubt standard.”<sup>214</sup> The idea here is that when a jury reaches a compromise, “each faction on the jury surrenders its honestly held beliefs on the question of proof beyond a reasonable doubt.”<sup>215</sup>

This dilution of the standard of proof creates two distinct problems: a mercy problem and an innocence problem. If all jurors believe beyond a reasonable doubt that the defendant committed the most serious crime, but they compromise because at least one faction of the jury thinks the crime charged is too severe given the circumstances, this is a mercy problem. The compromise verdict has robbed the prosecution of its rightly earned conviction.

Perhaps more troubling, however, is the innocence problem. If not all jurors believe beyond a reasonable doubt that the defendant committed any of the charged crimes—if a holdout juror, for example, thinks it is possible another person was the culprit—then a compromise on a lesser charge to end deliberation may result in conviction of the wrong person. At the very least, this compromise erodes the protection the heightened standard of proof in criminal cases was designed to provide. Perhaps that reason alone is enough to condemn compromise verdicts.

But of course the innocence and mercy problems are familiar to students of criminal law: they are the exact objections that have been launched at the plea bargain for years. Like compromise verdicts, plea bargains reflect a discounted standard of proof.<sup>216</sup> Prosecutors have incentives to reduce plea prices to save resources regardless of a defendant's guilt or innocence, and even innocent defendants are motivated to take the cheap deals and avoid a longer ordeal at trial. As a result, “non-frivolous accusation—not proof beyond a reasonable doubt—is all that is necessary to establish legal guilt” in the vast majority of cases.<sup>217</sup>

This phenomenon drives what is perhaps the chief objection to plea bargaining: innocent people do—and indeed have incentives to—plead guilty to crimes

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214. Muller, *supra* note 7, at 796.

215. *Id.* at 784.

216. See Bowers, *supra* note 194, at 1152–53; Talia Fisher, *The Boundaries of Plea Bargaining: Negotiating the Standard of Proof*, 97 J. CRIM. L. & CRIMINOLOGY 943, 973–74 (2007).

217. Covey, *supra* note 183, at 80.

they did not commit.<sup>218</sup> And although academics worry about the innocence problem, it is the leniency problem—and the concern that defendants get off too easily under plea bargaining because the convictions are all discounted from what they should be—that dominates public opinion.<sup>219</sup>

It simply cannot be said, therefore, that because compromise verdicts dilute the standard of proof in criminal cases, they are *a fortiori* unacceptable. If that were the case, then there would be no tolerance for plea bargaining at all. Instead, the two problematic consequences of a diluted standard of review are already a risk (and presumably an acceptable risk) inherent in the way 95% of criminal convictions are obtained.

Perhaps, therefore, a more specific objection is that *jurors*—as opposed to prosecutors and defense attorneys—should not be permitted to compromise the reasonable doubt standard when making their decisions. Regardless of what professionals do, this argument goes, a criminal juror is defined by his duty to evaluate a case beyond a reasonable doubt. Betraying that almost sacred responsibility is a betrayal of what it means to serve as a juror in the first place.

This argument certainly appeals to the romantic *Twelve Angry Men* conception of juries. But, upon further reflection, one is left to ponder an important foundational question: *what exactly is reasonable doubt?* The concept anchors our criminal justice system, but its precise definition is illusive. The Supreme Court has held that trial courts are free to choose whether, and how, to define reasonable doubt.<sup>220</sup> And lower courts typically punt the question as well, relying on the jury to figure it out.<sup>221</sup> As one court explained, “The purposes of having juries may be best served if juries, in the first instance, bear the responsibility for defining reasonable doubt. Experience has shown that attempts to define reasonable doubt add little in the way of clarity and often add much in the way of confusion and controversy.”<sup>222</sup>

The question of how much doubt is reasonable is not one that is generally answered uniformly. Several years ago, one researcher asked sitting U.S. district judges to quantify the degree of certainty they felt constituted “beyond a

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218. *But see* Bowers, *supra* note 194 (arguing that the innocence problem is not really a problem at all because the costs of proceeding to trial often outweigh the costs of increasingly more lenient bargains).

219. Opposition to plea bargaining is not limited to academics; much of the public (both in the United States and elsewhere) disapproves of the practice as well. But there is a major difference between popular and academic attitudes: whereas the academics tend to dislike plea bargaining because it treats defendants unfairly, the public tends to see the practice as treating defendants too leniently. Scott & Stuntz, *supra* note 2, at 1909 n.4 (citations omitted).

220. *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (“The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course.”).

221. *See* *United States v. Taylor*, 997 F.2d 1551, 1556–57 (D.C. Cir. 1993); *U.S. v. Nolasco*, 926 F.2d 869, 872–73 (9th Cir. 1991) (placing authority to define reasonable doubt within the sound discretion of the trial court).

222. *Taylor*, 997 F.2d at 1558.

reasonable doubt.”<sup>223</sup> Their answers varied widely. Almost a third of the judges placed beyond a reasonable doubt at 100%, a third put it at 90%, and most of the remaining judges put it around 80%.<sup>224</sup> Other studies indicate that perceptions of reasonable doubt among potential jurors are likewise varied, and can also be disturbingly low—reflecting a level of certainty as low as 56% in some instances.<sup>225</sup>

With a concept open to this much interpretation—even among federal judges—how confident can we be that negotiating erodes reasonable doubt? Maybe twelve jurors can negotiate to a deal that is consistent with a communal understanding of reasonable doubt. If one juror is 90% sure a defendant is guilty of first-degree murder, but another juror is 90% sure he acted without purpose and deserves only manslaughter, a conviction in the middle does not have to indicate that each one betrayed the reasonable doubt standard individually. Given the confusion around the concept, it could mean that they instead *applied* the standard collectively by catering to the 10% doubt and splitting the difference between them. If one person’s reasonable doubt is not the same as another person’s reasonable doubt, then maybe a deal between them reflects the joint application of the standard rather than its abandonment—even if they never change their individual perceptions of the facts. If so, intrajury negotiation does not dishonor the reasonable doubt standard—it is just another way of employing it.

Moreover, even to the extent one retains this objection, it is another one that can be mollified by potential reforms inspired by the plea bargaining analogy. A hallmark of any “good” negotiation is the chance to exit.<sup>226</sup> In plea bargaining, a defendant and a prosecutor have this option: they can always cease negotiating and go to trial. This exit is important; it serves to prevent “bad bargains” and unjust results. But in a jury room, there is often no real exit if the parties cannot agree. The only potential option—a hung jury—is typically discouraged by the judge through an *Allen* charge (sometimes also called a “dynamite charge”), which exerts pressure on jurors to reach consensus.<sup>227</sup>

In the jury deliberation recorded and published by ABC, for example, the hung jury option was seen as unavailable. After recognizing that their discus-

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223. Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1311 (1977) (citing Rita James Simon, *Judges’ Translations of Burdens of Proof into Statements of Probability*, in TRIAL LAWYER’S GUIDE 103 (1969)).

224. *Id.* Experiments on variance in conceptions of reasonable doubt has been replicated outside the context of the federal judiciary. See Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85, 114–15 (2002); Rita James Simon, “Beyond a Reasonable Doubt”—An Experimental Attempt at Quantification, 6 J. APPLIED BEHAV. SCI. 203, 207 (1970).

225. Lillquist, *supra* note 224, at 115.

226. See Trevor C. W. Farrow, *Negotiation, Mediation, Globalization Protests and Police: Right Processes; Wrong System, Issues, Parties and Time*, 28 QUEEN’S L.J. 665, 689 (2003); Andrew E. Taslitz, *Judging Jena’s D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.-C.L. L. REV. 393, 428–29 (2009).

227. Sarah Thimsen, Brian H. Bornstein & Monica K. Miller, *The Dynamite Charge: Too Explosive for Its Own Good?*, 44 VAL. U. L. REV. 93, 95 (2009).

sion had reached an impasse, one juror asks, “Do you want to quit?” To which a second juror replies, “They won’t let us quit. . . . [T]hey’ll say keep working on it. Keep working on it.”<sup>228</sup>

The recognition that juries negotiate means that we should improve the process to make the best negotiation possible. That may mean creating—or at least not discouraging—a way out of the negotiation so the outcome is not a forced one with which jurors are not all comfortable.

Steps are already being taken in this direction. Responding to criticisms that the *Allen* instruction unduly coerces jurors in the minority to change their mind, the ABA has recommended a modified instruction that does not single out the minority but instructs all jurors to “reexamine” their views. The ABA also suggests issuing the instruction at the beginning of deliberation, rather than waiting until the jury has trouble reaching a decision. And the revised instruction emphasizes that the jury need not necessarily return a verdict.<sup>229</sup>

Future reforms could go further in this direction. In recognition of intrajury negotiation, an instruction could even partially embrace the reality of compromise while making it clear that some deals are off the table. For example, jurors could be instructed at the beginning of deliberation to seek unanimity and look for ways to build consensus. But they could also be instructed never to compromise their views if they believe the defendant is innocent, or that the wrong person is accused, or whatever deals we want to exclude from their purview.

### C. LAWLESSNESS

A third objection is that jury compromises are lawless. This argument proceeds as follows: Jurors are instructed not to surrender their views on whether the government has proved its case beyond a reasonable doubt; a compromise means some jurors have done just that, and therefore, “compromise verdicts are lawless verdicts.”<sup>230</sup> Put differently, Eric Muller has argued that a compromise verdict “is the quintessential coin toss.”<sup>231</sup> Therefore, he says, acceptance of these verdicts is too great a “sacrifice . . . that cuts to the heart of the rule of law.”<sup>232</sup>

We have a name for lawless jury verdicts: nullification. Perhaps the ultimate question is whether intrajury negotiation is equivalent to jury nullification. When we speak of nullification, we generally mean “a jury’s ability to acquit a criminal defendant despite finding facts that leave no reasonable doubt about

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228. See *In the Jury Room: Colorado v. Laura Trujillo*, *supra* note 120.

229. Thimsen, Bornstein & Miller, *supra* note 227, at 119–20 (citing AMERICAN BAR ASSOCIATION, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE 5 (1968)).

230. Muller, *supra* note 7, at 784.

231. *Id.* at 801.

232. *Id.*

violation of a criminal statute.”<sup>233</sup> A jury also nullifies when it convicts despite retaining reasonable doubt (exemplified by several famous civil rights cases in the South).<sup>234</sup> Whatever the result, this power is widely criticized as undermining the rule of law: subjecting everyone in the criminal justice system to the subjective preferences of twelve individuals.

To be sure, intrajury negotiation can evoke the same concerns. If a juror is convinced a defendant’s conduct meets the elements of first-degree murder but compromises on manslaughter for some other reason—fear of overly harsh consequences, as a concession to a holdout juror, or simply to end deliberation and go home—this is a deliberate choice of outcome inconsistent with jury instructions and, perhaps, incompatible with the rule of law.

And yet intrajury negotiation seems to offer a more palatable result than outright nullification. If there is a space between a jury’s common sense appreciation of context—which many applaud—and jury nullification—which many condemn—I believe intrajury negotiation falls within it. In our criminal justice system we need protection from overinclusive or overrigid laws that criminalize benign behavior. As others have persuasively argued, the legislature cannot be counted on to provide that protection. A second layer of defense, if the system worked perfectly, would mean the prosecutor is the one to protect against overcriminalization; for he is a public servant sensitive to context—both aggravating and mitigating factors—who, with assistance from a defense advocate, can strike a balance and arrive at a fair plea deal. But, as we have seen, there are significant reasons to distrust that story.

If those two levels of negotiation—within the legislature and between the prosecutor and defense attorney—fail to protect against overpunishing behavior in contradiction of common sense, the jury provides a third level of negotiation that becomes the ultimate backstop. As discussed above, a defendant at trial faces the brunt of overcriminalization because the charges against him have been elevated in anticipation of a negotiation that failed. Allowing jurors to choose among verdict options knowing they will compromise among the choices presents a final negotiation that takes account of context and holds the line against overcriminalization, thus mitigating the trial tax paid by defendants who elect to go to trial.

Yes, jurors violate their instructions when they negotiate with one another, and thus intrajury negotiation is technically an example of nullification. But I submit it is a sort of “nullification light” and should not bear the stigma that outright nullification carries. By negotiating, jurors are only performing a task undertaken every day by other members of the criminal justice system. And if they do it with the goal of arriving at the outcome that seems most fair to all of them, I submit that it is not truly an abdication of their role as jurors.

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233. Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1150 (1997).

234. *Id.* at 1191–94.

## D. ABANDONING THE QUEST FOR TRUTH

Finally, perhaps the quintessential objection to compromise verdicts is that, by striking a compromise, jurors desert their chief task: to discover the truth. A version of this objection was articulated in Charles Nesson's "much-cited, if not universally celebrated"<sup>235</sup> article, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*.<sup>236</sup> Nesson argues that a central goal of any legal system is to produce "acceptable verdicts"—or "verdicts that the public will view as statements about what actually happened."<sup>237</sup> According to Nesson, a compromise verdict (in either the civil or criminal context) undermines that objective.

To be sure, a hallmark of intrajury negotiation is that jurors stop seeking a consensus on the facts. A compromise verdict is thus not likely to reflect a record of what happened on the night in question. Indeed, many compromise verdicts are inconsistent: an acquittal on one count and a conviction on another that together do not make sense in the real world because either both events happened or neither did.<sup>238</sup> If part of a criminal verdict's function is to inform the public what actually happened and confirm "that the system is capable of uncovering the truth,"<sup>239</sup> then Nesson would say intrajury negotiation undercuts that purpose and is unacceptable.

Even assuming that public trust in the criminal justice system should be a normative goal of the system itself (an assumption that not all agree with by any means), why must it be true that this trust is eroded when criminal law shifts focus from truth seeking? There are many instances in which the criminal system has abandoned the search for absolute truth in favor of other considerations. In the law surrounding habeas corpus, for example, many ascribe to the basic premise that the "truth" is "ultimately unknowable" due to the limits of human intelligence, and thus, collateral review should be restricted to instances of defective process.<sup>240</sup> And the exclusionary rule, to take another example, is now an entrenched part of American criminal adjudication despite the fact that its very purpose restricts information and takes a toll on truth seeking.<sup>241</sup>

Plea bargaining is perhaps the most prominent example of the criminal justice system operating collateral to a quest for truth. In a plea negotiation, neither party is primarily concerned with what story the plea deal reflects and whether it provides an accurate historical record; the defense attorney wants the most

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235. Abramowicz, *supra* note 150, at 255.

236. Nesson, *supra* note 200, at 1358.

237. *Id.*

238. *See* Muller, *supra* note 7, at 773.

239. Fisher & Rosen-Zvi, *supra* note 200, at 908.

240. Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 CORNELL L. REV. 329, 358 (2010) (discussing views expressed by Paul Bator).

241. This is not to say, of course, that the exclusionary rule is without controversy. *See generally* Ronald J. Rychlak, *Replacing the Exclusionary Rule: Fourth Amendment Violations as Direct Criminal Contempt*, 85 CHI.-KENT L. REV. 241 (2010).

lenient deal for his client and the prosecutor typically wants the toughest conviction he can secure quickly.<sup>242</sup> Indeed, Josh Bowers has questioned whether even false pleas (made by innocent defendants to avoid the ordeal of trial) are problematic. He argues that the rise of plea bargaining means “the criminal justice system no longer has much to do with transparent adversarial truth-seeking.”<sup>243</sup> “Guilty pleas,” he tells us, “are thus no more than sterile administrative procedures, and plea bargaining is merely the mechanism that ensures that these procedures are carried out efficiently.”<sup>244</sup>

The bottom line is that guilty pleas proceed from a familiar premise in criminal procedure. Either truth seeking is too expensive or too elusive or both, but, for whatever reason, this country has long crossed over into a criminal justice system that treats the “truth” as a version of the facts that is acceptable to all.<sup>245</sup> If this is the case, why are we bothered by a jury discerning “truth” in the same way? In terms of our commitment to discovering absolute truth, what difference does it make if plea negotiators abandon it or a jury does? If all that remains is adherence to our romantic idea of a jury discussion, that is perhaps insufficient.

#### CONCLUSION

Negotiation and compromise are now the name of the game in criminal adjudication. It is a mistake to think negotiated justice does stop or should stop with plea bargaining. Just like prosecutors and defense attorneys, jurors have incentives to make a deal, options to create a deal, and certainly a variety of views to accommodate before finishing their job.

We should not treat their compromises as flukes or flaws. Given our general acceptance of negotiation to resolve criminal cases, the rejection of jury negotiations does not make sense. To be sure, intrajury negotiation can be improved, but it is not illegitimate just because it results in a deal. Deals are rampant in our criminal justice system, and by and large, we accept them as inevitable and seek to improve them. The same strategic shift should be made for compromise verdicts. Rather than dismissing intrajury negotiation as illegitimate, we should acknowledge it as a reality, recognize its resemblance to plea bargaining, and then seek to improve it in light of that analogy.

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242. The motivations of a prosecutor, to be sure, vary by prosecutor and by case. Some seek to maximize sentences; others to maximize number of convictions; others to ensure that the charge brought is the most just. *See* Bowers, *supra* note 194, at 1139. My point is only that rarely are prosecutors concerned with whether the plea deal accurately reflects the crime story. *See* Stephanos Bibas & William K. Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, 59 DUKE L.J. 637, 687 (2010) (arguing that charge bargaining is the worst form of plea bargaining precisely because it “distorts the historical record and lies to the public about what actually happened”).

243. Bowers, *supra* note 194, at 1173.

244. *Id.*

245. Thomas Weigend, *Is the Criminal Process About Truth?: A German Perspective*, 26 HARV. J.L. & PUB. POL'Y 157, 158–60 (2003).