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THE UNANIMOUS ACQUITTAL INSTRUCTION: 
A RATIONAL APPROACH TO INSTRUCTING 
JURORS ON LESSER INCLUDED OFFENSES

I. Introduction

Consider a criminal proceeding in which the state has charged a defendant with first degree murder. Before the jury begins its deliberations, the judge instructs the jurors to consider not only the charge of first degree murder, but also the lesser included offenses.

1. This hypothetical is based on the facts of Stone v. Superior Court, 31 Cal. 3d 503, 646 P.2d 809, 183 Cal. Rptr. 647 (1982) (en banc).
2. The California Penal Code defines first degree murder in the following manner:
All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem...
3. “Lesser included offenses,” as used in this Note, consist of fewer elements than the greater, or charged, offense; carry less severe penalties than the greater offense; and share such common elements with the greater offense that commission of the greater presupposes the simultaneous commission of the lesser. See 9 FED. PROC. L. ED. § 22:848 (1982 & Supp. 1987); see also State v. Lovelace, 212 Neb. 356, 359, 322 N.W.2d 673, 675 (1982) (impossible to commit greater without committing lesser); 4 C. TORCIA, WHARTON’S CRIMINAL PROCEDURE § 580 (12th ed. 1976 & Supp. 1981). Several examples follow:
[M]urder includes such lesser offenses as second-degree murder, manslaughter, and negligent homicide. Robbery necessarily includes larceny, and assault with intent to rob. Rape necessarily includes assault with intent to rape. Assault with a dangerous weapon includes simple assault. Theft of property in excess of $100 includes the lesser wrong of theft of property of value not exceeding $100.
Courts generally use the terms “lesser included offense” and “necessarily included offense” interchangeably, see, e.g., Olais-Castro v. United States, 416 F.2d 1155, 1157 (9th Cir. 1969), but distinctions have been made between the two. See McGill v. State, 465 N.E.2d 211 (Ind. App. 1984); Koenig, The Many-Headed Hydra of Lesser Included Offenses: A Herculean Task For the Michigan Courts, 1975 DET. C.L. REV. 41, 41-44 (lesser included offenses are closely related to charged offense, but determination of guilt on lesser offense may rest on specific facts in issue; necessarily included offense is always committed simultaneously with greater offense).
of second degree murder, voluntary manslaughter and involuntary manslaughter. This gives the jury three options: (1) declare the defendant guilty of murder in the first degree; (2) declare the defendant guilty of any of the three uncharged lesser included offenses; or (3) acquit the defendant. Traditionally, judges instruct juries to consider the charged offense first and to cease deliberations if a verdict of guilty is unanimously agreed upon. Courts disagree, however, on the proper procedure for instructing jurors to consider lesser offenses in the event that they cannot unanimously return a guilty verdict on the greater offense.


5. Voluntary manslaughter is "the unlawful killing of a human being without malice . . . upon a sudden quarrel or heat of passion." Id. § 192 (West 1970 & Supp. 1987).

6. Involuntary manslaughter constitutes "the unlawful killing of a human being without malice . . . in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." Id.

7. In this hypothetical, first degree murder is the "charged offense." Courts use the terms "charged offense" and "greater offense" interchangeably. See, e.g., United States v. Jackson, 726 F.2d 1466, 1469 (9th Cir. 1984); Pharr v. Israel, 629 F.2d 1278, 1281 (7th Cir. 1980), cert. denied, 449 U.S. 1088 (1981).

8. For the purposes of this Note, it is assumed that any final verdict rendered by the jury must be unanimous. Although the Supreme Court has held that non-unanimous verdicts are constitutional in state criminal trials, see Johnson v. Louisiana, 406 U.S. 356 (1972) (affirming 9-3 final verdict); Apodaca v. Oregon, 406 U.S. 404 (1972) (affirming 10-2 and 11-1 conviction), only five states allow less-than-unanimous final verdicts in such cases. See IDAHO CONST. art. I, § 7; LA. CONST. art. I, § 17; OKLA. CONST. art. II, § 19; OR. CONST. art. I, § 11; TEX. CONST. art. V, § 13. Non-unanimous verdicts rendered by six person juries are unconstitutional. See Burch v. Louisiana, 441 U.S. 130, 134 (1979).


10. See United States v. Cardinal, 782 F.2d 34, 36-37 (6th Cir.) (unanimous acquittal instruction), cert. denied, 476 U.S. 1161 (1986); United States v. Roland, 748 F.2d 1321, 1323-24 (2d Cir. 1984) (either unanimous acquittal or disagreement instruction); United States v. Jackson, 726 F.2d 1466, 1469 (9th Cir. 1984) (same); United States v. Moccia, 681 F.2d 61, 64 (1st Cir. 1982) (unanimous acquittal
Some courts require judges to instruct juries to return a unanimous verdict of not guilty on the charged offense prior to considering any lesser included offenses. This type of lesser included offense instruction is known as the "unanimous acquittal instruction." In the hypothetical above, such an instruction would require that the jury unanimously acquit the defendant of first degree murder before considering the charge of second degree murder. Similarly, a unanimous acquittal of the second degree murder charge would be a prerequisite to consideration of any of the manslaughter charges.

Courts favoring the unanimous acquittal rule contend that this instruction guarantees all jurors an opportunity to express fully their views on the evidence presented at trial because all jurors must agree to acquit the defendant of the charged offense before rendering a final verdict on any of the lesser included offenses.

Other courts, however, permit consideration of lesser included offenses when the jury cannot agree whether conviction of the greater
offense is appropriate.16 This type of instruction is known as the "disagreement instruction."17 Although this instruction makes jury deliberations more efficient18 and may reduce the number of hung juries, it also substantially increases the likelihood that the jury will ultimately return a "compromise verdict."19

16. Only a minority of courts have adopted this approach. See infra notes 75-76 and accompanying text.
17. The disagreement instruction obviates the need for protracted deliberations when the jury becomes deadlocked on the greater offense because the jury may immediately compromise on a lesser offense. See Boettcher, 69 N.Y.2d at 183, 505 N.E.2d at 597-98, 513 N.Y.S.2d at 87.
18. A hung jury is "a jury (1) which, in the judgment of the court, has deliberated for a proper period of time, and (2) which has been discharged by the court because there appears to be no reasonable probability that the jury can agree upon a verdict." Flynn, Does Justice Fail When the Jury is Deadlocked?, 61 JUDICATURE 129, 130 (1977-78) [hereinafter Flynn]. For a discussion of using lesser included offense instructions as a means of reducing the number of hung juries, see Improving Jury Deliberations, supra note 16.
19. A compromise verdict occurs when the jury exercises its mercy dispensing power and returns a verdict on the lesser offense even though the defendant is in fact guilty of the greater offense. Cf. United States v. Harary, 457 F.2d 471, 478-79 (2d Cir. 1972) (compromise verdict may occur as result of jury taking easier course when it cannot agree on basic issue of guilt and causing unjust conviction of defendant on lesser offense instead of acquittal). Although compromise verdicts are not automatic grounds for reversal, see Standefer v. United States, 447 U.S. 10, 22 (1980) (jury may acquit out of compassion or compromise); United States v. Campbell, 684 F.2d 141, 151 (D.C. Cir. 1982) (compromise verdicts are not unacceptable), judges strongly discourage them. See People v. Boettcher, 69 N.Y.2d 174, 183, 505 N.E.2d 594, 597-98, 513 N.Y.S.2d 83, 87 (1987); People v. Mussenden, 308 N.Y. 558, 563, 127 N.E.2d 551, 554 (1955); see also Fuller v. United States, 407 F.2d 1199, 1229 (D.C. Cir.) (en banc), cert. denied, 393 U.S. 1120 (1968) (jury not given absolute discretion to find defendant guilty of lesser offense when plainly guilty of greater offense).
This Note proposes that all courts embrace the unanimous acquittal instruction because it encourages the jury to engage in an effective and conscientious deliberative process.21 The disagreement instruction not only fosters imprudent decision making, but also invites the jury to abuse its power to render a compromise verdict and thus is a wholly inappropriate method for instructing jurors on their consideration of lesser included offenses.22 Part II of this Note explores the background of the lesser offense doctrine, the elements of each instruction and the rationale behind recent judicial precedent in this area. Part III sets forth empirical research on jury behavior and analyzes judicial authority illustrating that the unanimous acquittal instruction substantially increases the effectiveness of the jury's decision making process. The Note concludes that courts must uniformly adopt the unanimous acquittal rule in order to maintain the integrity of the deliberative process.

II. The Lesser Included Offense Doctrine

Lesser included offense instructions affect both the order in which the jury considers each offense and the manner in which the jury approaches the entire deliberative process.23 The lesser included offense doctrine ensures that a jury will accord a defendant the full benefit of his right to be presumed innocent24 and of the reasonable doubt standard.25 The most prominent of the approaches used to

21. See infra notes 89-137 and accompanying text.
23. See infra notes 26-82 and accompanying text.
25. See Beck v. Alabama, 447 U.S. 625, 634-35 (1980); Keeble v. United States, 412 U.S. 205, 212-13 (1973). The lesser included offense instruction provides a jury with the option of finding the defendant guilty of a lesser crime. See United States v. Forsythe, 594 F.2d 947, 952 (3d Cir. 1979); 3 WRIGHT, supra note 3, § 515, at 20. Without such an instruction, a jury faced with a reasonable doubt on some element of the prosecution's proof should return a verdict of acquittal. See Keeble, 412 U.S. at 212. By instructing on lesser offenses, however, courts avoid the risk that "practice will diverge from theory." Id. In other words, if the jury believes that a defendant is guilty of some offense, though perhaps not the one originally charged, the defendant may suffer an unjust punishment because the jury had no other option and simply resolved all of its doubts in favor of conviction. Id. at 212-13; United States v. Johnson, 637 F.2d 1224, 1233-34, 1238 (9th Cir. 1980) (defendant entitled to lesser offense instruction upon showing of (1) identifiable lesser offense and (2) rational basis for jury finding defendant guilty of lesser offense and innocent of greater offense).
instruct jurors on their consideration of lesser offenses are the unanimous acquittal instruction and the disagreement instruction.

A. Background

A lesser included offense is composed of some of the elements of the greater offense, so that commission of the greater offense presupposes the simultaneous commission of the lesser.26 Under the lesser included offense doctrine, the jury may convict a defendant of any lesser offense necessarily included in the charged offense, thus allowing the state to obtain a valid conviction for a crime not named in the indictment or information.27 At common law, the doctrine performed two functions. First, it facilitated a conviction when the state had overcharged the defendant or failed to establish all elements of the greater offense at trial.28 A jury, not convinced

26. See supra note 3; see also Sansone v. United States, 380 U.S. 343, 349-50 (1965) (instruction proper only when conviction of greater offense would require jury to find disputed factual element not required for conviction of lesser offense); Fed. R. Crim. P. 31(c).


29. See Keeble v. United States, 412 U.S. 205, 208 (1973); 3 Wright, supra note 3, § 515, at 20. The doctrine is now codified in the Federal Rules of Criminal Procedure: “The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.” Fed. R. Crim. P. 31(c).
beyond a reasonable doubt as to guilt on the charged offense, could
convict the defendant of a less severe offense on the basis of the
undisputed elements of the greater offense.\textsuperscript{30} As a procedural device,
this provided the jury with a third verdict option in addition to
conviction of the charged offense or outright acquittal.\textsuperscript{31} Second,
the doctrine protected a defendant against repeated attempts to
prosecute for the same offense.\textsuperscript{32} Modern practice now bars the
subsequent prosecution of a lesser included offense that could have
been tried with the greater offense following an acquittal of the
greater offense.\textsuperscript{33}

Typically the judge instructed the jury on lesser offenses only
after a request from one of the parties.\textsuperscript{34} Although prosecutors have

\textsuperscript{30} See, e.g., Tsanas, 572 F.2d at 346.

\textsuperscript{31} See Beck, 447 U.S. at 633; Keeble, 412 U.S. at 212-13; United States v.
Forysthe, 594 F.2d 947, 952 (3d Cir. 1979) (purpose of instruction is to give
defendant possibility that jury may find him guilty of offense with less severe
sentence); 3 WRIGHT, supra note 3, § 515, at 20.

\textsuperscript{32} See Recent Developments in the Criminal Law, The Included Offense Doc-
trine in California, 10 UCLA L. Rev. 870, 873 (1963). The same considerations
(1984) (double jeopardy clauses of fifth and fourteenth amendments protect accused
from subsequent prosecution for same offense after acquittal, and from multiple
prosecutions for same offense); Green v. United States, 355 U.S. 184, 190-91 (1957)
doctrine of implied acquittal protects against double jeopardy).

\textsuperscript{33} See United States v. Seijo, 537 F.2d 694, 698 (2d Cir. 1976), cert. denied,
429 U.S. 1043 (1977). Similarly, conviction on the greater charge prevents relitigation

In a similar situation, when the jury has deadlocked on a lesser offense, but
has unanimously agreed to acquit on a greater offense, courts should accept partial
verdicts before declaring a mistrial in order to avoid the costs of retrial on those
greater offenses. See Note, Acceptance of Partial Verdicts as a Safeguard Against
Verdicts).

\textsuperscript{34} See, e.g., United States v. Thompson, 492 F.2d 359, 362 (8th Cir. 1974);
State v. Jacobs, 194 Conn. 119, 127, 479 A.2d 226, 230-31 (1984), cert. denied,
469 U.S. 1190 (1985) (conviction for first degree murder proper despite absence
of lesser included offense instruction because no appropriate instruction requested).

A growing number of states now permit judges to give the lesser included offense
instruction regardless of any request by the parties. See Stone v. Superior Court,
31 Cal. 3d 503, 517, 646 P.2d 809, 819, 818 Cal. Rptr. 647, 657 (1982); State v.
Herron, 349 S.W.2d 936, 940 (Mo. 1961); State v. Hicks, 241 N.C. 156, 159-60,
App. 1976), aff'd, 565 P.2d 719 (Okla. 1977), cert. denied, 434 U.S. 1071 (1978);
Strader v. State, 210 Tenn. 669, 679, 362 S.W.2d 224, 228 (1962); see also United
States v. Singleton, 447 F. Supp. 852, 854 (S.D.N.Y. 1978) (conviction may be
reversed for failure of court to instruct \textit{sua sponte} on lesser offenses if it amounts
to plain error).

In giving a lesser offense instruction, a court may inform the jury that it can
convict on either the charged offense or the lesser included offense. See Tsanas
traditionally made such requests, defendants gradually began to request these instructions as the defense bar recognized their benefits.\textsuperscript{35} Such instructions provide the jury with an opportunity to "temper justice with mercy,"\textsuperscript{36} and provide the defendant with an extra measure of defense against the greater crime.\textsuperscript{37}

In the case of a defendant charged with a capital offense, the lesser included offense doctrine rises to the level of a constitutional right.\textsuperscript{38} Although no constitutional right to have the jury instructed on lesser offenses exists in non-capital cases,\textsuperscript{39} many lower courts require the instruction if the evidence would justify conviction of the lesser offense.\textsuperscript{40} Finally, a determination of guilt on the charged

\textsuperscript{v. United States, 572 F.2d 340 (2d Cir.), cert. denied, 435 U.S. 995 (1978). Furthermore, if the court finds insufficient evidence to establish an element of the greater offense beyond a reasonable doubt, it may submit only the lesser offense to the jury. See United States v. LoRusso, 695 F.2d 45, 52 n.3 (2d Cir. 1982), cert. denied, 460 U.S. 1070 (1983).}

\textsuperscript{35. See 3 WRIGHT, supra note 3, § 515, at 20.}

\textsuperscript{36. Id.; see People v. Clemente, 285 A.D. 258, 264, 136 N.Y.S.2d 202, 207 (1st Dep't 1954) (jury may indulge in tender mercies and acquit plainly guilty defendant).}

\textsuperscript{37. The defense may assert that the defendant did not commit the greater offense because he only committed the lesser offense. See Larson v. United States, 296 F.2d 80, 81 (10th Cir. 1961) (lesser included offense instruction provides "jury a measure of defense to which the defendant is entitled").}

\textsuperscript{38. See Beck v. Alabama, 447 U.S. 625, 637-38 (1980). The risk of an unwarranted conviction cannot be tolerated when the defendant's life is at stake and the death sentence may not be imposed in a capital case when the jury was prohibited from considering a lesser included offense. Id.}

\textsuperscript{39. See Keeble v. United States, 412 U.S. 205, 213 (1973). The Court has never explicitly held that the due process clause of the fifth amendment guarantees a defendant the right to have the jury instructed on a lesser included offense. Id. But see generally Mascolo, supra note 24 (lesser included offense doctrine should qualify for constitutional status in both capital and non-capital cases as element of procedural due process because it reduces risk of erroneous decisions).}

offense generally precludes any deliberation on the lesser offense. 41

B. The Unanimous Acquittal Instruction

The unanimous acquittal instruction requires that the jury "unanimously find the accused 'not guilty' of the crime charged in the indictment (information) ... [before proceeding] to determine the guilt or innocence of the accused as to any lesser offense . . . ." 42 This instruction arose from the traditional requirement of jury unanimity 43 and was later embodied in federal pattern jury instructions. 44

The propriety of this instruction was first addressed in United States v. Tsanas. 45 On appeal of his conviction for tax evasion, Tsanas argued that the trial court erred in requiring the jury to unanimously acquit him on the greater offense of evading income taxes before considering the lesser charge of willfully filing a false tax return. 46 Tsanas contended that the trial court should have charged the jury under the disagreement instruction. 47

41. See supra note 9 and accompanying text. A defendant cannot be found guilty of both the greater offense and the lesser included offense. See Milanovich v. United States, 365 U.S. 551, 553-54 (1961) (when defendant convicted of both greater and lesser offense, conviction of lesser vacated); see, e.g., United States v. Crawford, 576 F.2d 794, 800 (9th Cir.), cert. denied, 439 U.S. 851 (1978); United States v. Dixon, 507 F.2d 683, 684 (8th Cir. 1974), cert. denied, 424 U.S. 976 (1976); United States v. Lodwick, 410 F.2d 1202, 1205-06 (8th Cir.), cert. denied, 396 U.S. 841 (1969); State v. McNeal, 95 Wis. 2d 63, 68, 288 N.W.2d 874, 876 (1980).

42. E. Devitt & C. Blackmar, Federal Jury Practice And Instructions § 18.05, at 582 (3d ed. 1977) [hereinafter Devitt & Blackmar].


44. See Devitt & Blackmar, supra note 42, § 18.05, at 582.


46. The trial court, without objection, charged the jury as follows:

The law permits the jury to find the accused guilty of any lesser offense which is necessarily included in the crime charged in the indictment whenever such a course is consistent with the facts found by the jury . . . . If the jury should unanimously find the accused not guilty of the crime charged in the indictment, then the jury must proceed to determine the guilt or innocence of the accused as to the lesser offense which is necessarily included in the crime charged.

Id. at 344.

47. Id.
The United States Court of Appeals for the Second Circuit noted the advantages and disadvantages to both the prosecution and the defendant of each method of instruction.\(^4\) According to the court, the unanimous acquittal instruction promotes full deliberation on the greater offense but increases the chances of acquittal or mistrial resulting from a hung jury.\(^4\) From the defendant's standpoint, this instruction increases the risk of a more severe conviction than would have been rendered had the jury been provided with other verdict options.\(^5\) The disagreement instruction increases the likelihood of obtaining a conviction, but not necessarily for the offense with which the defendant is charged.\(^5\) This instruction decreases the possibility that the jury will deadlock\(^5\) or acquit, but increases the defendant's chances of receiving some less severe conviction.\(^5\)

The court in \textit{Tsanas} held that these factors balance each other out and that neither instruction is "wrong as a matter of law."\(^5\) The court concluded that a trial judge could properly give either instruction, provided that the defendant does not make a timely request for the instruction he prefers.\(^5\)

Many courts have criticized the reasoning behind the decision in \textit{Tsanas}.\(^5\) Most recently, the New York Court of Appeals, in \textit{People

\begin{itemize}
\item [4.\] \textit{Id.} at 345-46.
\item [49.\] \textit{Id.} at 346.
\item [50.\] \textit{See id.}\n\item [51.\] \textit{See id.}\n\item [52.\] Jury deadlock occurs when there appears to be no reasonable probability of agreement among the jurors. \textit{See Standards for Criminal Justice} § 15-4.4(c), at 144 (2d ed. 1980) [hereinafter \textit{STANDARDS FOR CRIMINAL JUSTICE}]. Relevant factors include the length of deliberation, see \textit{People v. Caradine}, 235 Cal. App. 2d 45, 47, 44 Cal. Rptr. 875, 877 (1965), the length of the trial, see \textit{United States v. Fitzgerald}, 205 F. Supp. 515, 517-18 (N.D. Ill. 1962), and the nature or complexity of the case. \textit{See Standards for Criminal Justice, supra}, § 15-4.4(c), at 144.
\item [53.\] \textit{See Tsanas}, 572 F.2d at 345-46.
\item [54.\] \textit{Id.} at 346.
\item [55.\] The defendant's request for a specific form of the instruction must be timely. \textit{Id.} In this case, the court properly rejected the request because the defendant first made it on appeal. \textit{Id.}; \textit{see also United States v. Cardinal}, 782 F.2d 34, 37 (6th Cir.) (no error when defendant failed to object to form of instruction at trial), \textit{cert. denied}, 476 U.S. 1161 (1986); \textit{United States v. Roland}, 748 F.2d 1321, 1325 (2d Cir. 1984) (same).
\item [56.\] Some courts have held that even the rejection of such a request fails to elevate the error to constitutional magnitude. \textit{See United States v. Moccia}, 681 F.2d 61, 64 (1st Cir. 1982); \textit{Catches v. United States}, 582 F.2d 453, 459 (8th Cir. 1978).
Boettcher was charged with driving while intoxicated. The trial court rejected Boettcher's request that the jury be instructed to consider the lesser included offense of driving while impaired if it found the defendant not guilty of the greater offense or if it could not reach agreement on the greater offense. To justify use of the more stringent unanimous acquittal rule, the court relied on prevailing public policy and a New York state statute authorizing the submission to the jury of lesser included offenses. Under the New York statute, "[a] verdict of guilty of one or more offenses is not deemed an acquittal of any lesser offense submitted, but is deemed an acquittal of every greater offense submitted." Had the court adopted either the Tsanas approach or the disagreement rule, a conviction of a lesser offense would automatically be deemed an acquittal of the greater offense "regardless of the jury's actual findings or lack of findings regarding the greater offense . . . ."

The court concluded that a defendant should not be acquitted on the greater offense unless a jury clearly finds him innocent of that charge.

The Boettcher court reiterated the principle that a jury should not reach a compromise verdict—whether to pacify a stubborn juror or out of sympathy for the defendant. The court noted that while compromise may be an inevitable factor in deliberations, the jury's ultimate function is simply "to render a just verdict by applying

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58. See id. at 182, 505 N.E.2d at 597, 513 N.Y.S.2d at 86.
59. See id. at 178, 505 N.E.2d at 594-95, 513 N.Y.S.2d at 84.
60. See id.

61. The policy suggests that a defendant should not be protected from subsequent prosecutions for the same offense unless a jury acquits him of that charge. See id. at 183, 505 N.E.2d at 597, 513 N.Y.S.2d at 86; see also People v. Murch, 263 N.Y. 285, 291, 189 N.E. 220, 222 (1934) (lesser included offense doctrine created to prevent prosecution from failing when some element of crime charged not proven).

62. See Boettcher, 69 N.Y.2d at 181-82, 505 N.E.2d at 596, 513 N.Y.S.2d at 86; N.Y. CRIM. PROC. LAW § 300.50(4) (McKinney 1982).
63. N.Y. CRIM. PROC. LAW § 300.50(4) (McKinney 1982).
64. Boettcher, 69 N.Y.2d at 182, 505 N.E.2d at 597, 513 N.Y.S.2d at 86.
65. See id. at 182, 505 N.E.2d at 597, 513 N.Y.S.2d at 86.
66. See id. at 183, 505 N.E.2d at 597-98, 513 N.Y.S.2d at 87.
the facts it finds to the law it is charged." Accordingly, while the
disagreement instruction may reduce the number of hung juries by
providing a lesser included offense upon which a compromise can
be reached, courts should not encourage jury compromise for its
own sake.69

Few courts have followed the Boettcher approach of sanctioning
only the unanimous acquittal rule60 despite findings that such a rule
provides the jury with a more logical and orderly process for its
deliberations.71 Rather, most courts have adopted the reasoning set
forth in Tsanas—that either instruction is proper as a matter of
law.72

C. The Disagreement Instruction

The disagreement instruction directs the jury to "consider the
charge in the accusatory instrument and if it cannot agree on a
verdict on that charge it should then consider the lesser included
offenses . . . ."73 Unlike the unanimous acquittal rule, this instruction

67. Id.
68. See Tsanas, 572 F.2d at 346.
69. See Stein v. New York, 346 U.S. 156, 178 (courts uniformly disapprove of
compromise verdicts but are without means to control occurrence); Boettcher, 69
N.Y.2d at 183, 505 N.E.2d at 597-98, 513 N.Y.S.2d at 87; People v. DeLucia, 20
70. In addition to the New York Court of Appeals, only the Arizona state
courts approve instructions requiring the jury to acquit a defendant of the greater
offense before starting to consider lesser offenses. See State v. Wussler, 139 Ariz.
permit consideration of lesser offenses along with the greater offense but require
a unanimous acquittal of the greater offense prior to the jury’s rendering of any
verdict on a lesser offense. See Dresnek v. State, 697 P.2d 1059, 1061-62 (Alaska
71. See, e.g., Wussler, 139 Ariz. at 430, 679 P.2d at 76.
72. See, e.g., United States v. Cardinal, 782 F.2d 34, 37 (6th Cir.), cert. denied,
476 U.S. 1161 (1986); United States v. Roland, 748 F.2d 1321, 1325 (2d Cir. 1984);
United States v. Jackson, 726 F.2d 1466, 1469 (9th Cir. 1984); United States v.
Moccia, 681 F.2d 61, 64 (1st Cir. 1982); Pharr v. Israel, 629 F.2d 1278, 1282 (7th
Cir. 1980), cert. denied, 449 U.S. 1088 (1981); United States v. Hanson, 618 F.2d
1261, 1265-66 (8th Cir. 1980), cert. denied, 449 U.S. 854 (1980); Lindsey v. State,
456 So. 2d 383, 388 (Ala. Crim. App. 1983), aff’d sub. nom Ex parte Lindsey,
456 So. 2d 393 (Ala. 1984), cert. denied, 470 U.S. 1023 (1985); People v. Padilla,
73. State v. Ogden, 35 Or. App. 91, 98, 580 P.2d 1049, 1053 (1978). The
Michigan courts instruct the jury to direct their attention first to the charged
offense, but "[u]nless all . . . agree to find the defendant guilty of (the charged
offense), [it] may consider the other offenses . . . ." People v. Mays, 407 Mich.
allows the jury to consider lesser included offenses without first agreeing upon the defendant's guilt or innocence under the charged offense. Only a minority of jurisdictions explicitly employ this approach. Other jurisdictions, however, tacitly accept its use to secure a verdict when the jury deadlocks.

The Supreme Court of Oregon is representative of courts that have adopted the disagreement instruction. In State v. Allen, the court found that employing the unanimous acquittal instruction forces a juror voting in the minority to choose among three options when

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Some studies indicate that, regardless of which instruction is given, requiring the jury to consider the greater charge before addressing any lesser offenses may result in a prosecutorial bias and in the imposition of harsher verdicts. See Greenberg, Considering the Harshest Verdict First: Biasing Effects on Mock Juror Verdicts, 12 PERSONALITY & SOC. PSYCHOLOGY BULL. 41, 48 (1986).

[1] Instructing jurors to consider the harshest possible verdict first results in a harsher final verdict than would normally occur if the jury were told to] consider the most lenient verdict ('not guilty') first. This research suggests that the policy of instructing jurors to consider the harshest verdict first ... biases jurors in favor of conviction.

Id.

Other commentators have argued that this requirement impermissibly structures jury deliberations. See, e.g., Improving Jury Deliberations, supra note 16, at 579. Judge Johnson's concurrence in Ogden supports this view:

The premise underlying the lesser-included offense doctrine is that the jury will reach a verdict on one of the offenses submitted and that the selection of the appropriate offense is wholly within its province. The manner and order in which the offenses are considered by the jury is for it to decide.

35 Or. App. at 102, 580 P.2d at 1055. But see Mays, 407 Mich. at 623, 288 N.W.2d at 208 (no error to suggest order in which jurors should consider charges).


Some courts have held that the defendant may choose the form of instruction. See United States v. Cardinal, 782 F.2d 34, 37 (6th Cir.), cert. denied, 476 U.S. 1161 (1986); United States v. Roland, 748 F.2d 1321, 1323-24 (2d Cir. 1984); United States v. Jackson, 726 F.2d 1466, 1469 (9th Cir. 1984); Catches v. United States, 582 F.2d 453, 459 (8th Cir. 1978); United States v. Tsanas, 572 F.2d 340, 346 (2d Cir.), cert. denied, 435 U.S. 995 (1978).


77. See infra notes 78-82 and accompanying text.

78. 301 Or. 35, 717 P.2d 1178 (1986) (en banc).
the jury deadlocks: (1) persuading the majority to change its opinion; (2) changing his own opinion; or (3) holding out and causing the jury to hang.\textsuperscript{79} The Allen court concluded that because these conditions exacerbate "the risk of coerced decisions"\textsuperscript{80} the unanimous acquittal instruction is improper.\textsuperscript{81} Michigan courts have adopted this reasoning as well, holding that a unanimous acquittal instruction improperly interferes with the jury's deliberations.\textsuperscript{82}

III. The Unanimous Acquittal Rule Best Serves the Jury System

The function of a jury in a criminal proceeding is to place the common-sense judgment of an impartial group of laymen between the government and the accused and to determine, by group deliberation, the guilt or innocence of that individual.\textsuperscript{83} The unanimous acquittal rule furthers this function because it promotes full deliberation on each offense, reduces compromise verdicts and ensures that a jury will render a clear verdict on each of the charges.\textsuperscript{84}

A. The Unanimous Acquittal Rule Promotes Full Deliberation

To reach unanimity, each juror scrutinizes the evidence presented at trial,\textsuperscript{85} and individual impressions are expressed and analyzed until

\textsuperscript{79} Id. at 39, 717 P.2d at 1180. The court also noted that the unanimous acquittal instruction had been the standard instruction in that state for over 75 years. Id. at 38, 717 P.2d at 1180.
\textsuperscript{80} Id. at 40, 717 P.2d at 1181.
\textsuperscript{81} Id.
\textsuperscript{83} See Apodaca v. Oregon, 406 U.S. 404, 410 (1972); 5 J. Moore, Moore's Federal Practice § 38.02, at 14 (2d ed. 1985) (jury stands as protector of weak against powerful) [hereinafter Moore].
\textsuperscript{85} A unanimity requirement forces the jury to deliberate fully before reaching a verdict and tends to ensure reliability in the final result:

[In the deliberation process, the] irrelevancies that creep into decision-making will be exposed and rejected. Any one [member of the jury] may become a teacher, and at times different jurors will teach. They call to the attention of other jurors items of evidence that have been forgotten or processes of decision-making that have not yet been thought of by the others. Although all of the jurors are exposed to the same evidence, argument, and instructions, persons with different backgrounds will see and hear differently. When the jury is deliberating, they are teaching each other. They teach about the facts, the rationale of the case, and even the law. This helps prevent error in the final decision. The result
a common interpretation is reached. This process elicits the strengths of each juror’s viewpoint and eliminates erroneous views of law and individual biases. Because use of the unanimous acquittal rule necessarily requires this process, it promotes full and careful consideration of each offense and reduces the likelihood that a jury will move too quickly to consider a lesser included offense.

1. The Unanimous Acquittal Rule and Unanimous Final Verdicts

In many ways, the unanimous acquittal rule is analogous to the rule requiring the jury’s final verdict in a case to be unanimous. Both rules encourage the jury to undertake a thorough examination of all evidence presented at trial before rendering a verdict. Under each rule the jury’s deliberative process is complete and allows for the full expression of different viewpoints. Finally, each rule fosters a reliable verdict.

The Supreme Court has long assumed that a unanimity requirement for final jury verdicts is inherent in a federal criminal defendant’s
sixth amendment93 right to a trial by jury.94 Only recently, in Johnson v. Louisiana95, did the Court hold that the sixth amendment, as applied to the states through the fourteenth amendment, does not impose a similar requirement on state criminal proceedings.96 Over

93. The sixth amendment states:
   In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the [s]tate and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining [w]itnesses in his favor, and to have the [a]ssistance of [c]ounsel for his defense.
U.S. CONST. amend. VI.
95. 406 U.S. 356 (1972). In Johnson, the Court upheld state provisions allowing less than unanimous final verdicts in certain criminal cases. See id. at 363. At that time, the Louisiana provision in question permitted such verdicts:
   Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.
See id. at 357-58 n.1. Justice White, writing the plurality opinion of the Court, found that jurors operating under a majority rule would not act irresponsibly or ignore minority viewpoints. See id. at 361. The dissent, however, asserted that juries can act unreasonably and even improperly and that by removing the unanimity requirement, the Court in fact encouraged such behavior. Id. at 388-91 (Douglas, J., dissenting).
   The Louisiana Code of Criminal Procedure now contains the following provision:
   Cases in which punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Cases in which the punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, all of whom must concur to render a verdict.
LA. CODE CRIM. PROC. ANN. art. 782(A) (West 1981).
   The proposition that unanimous juries render more reliable verdicts than non-unanimous juries seems implicit in the Louisiana law, for a unanimous verdict by 12 is required before a person can be convicted of a capital offense. See id. "Apparently the people . . . want to be as certain as possible of guilt before convicting a defendant of [a capital offense], but do not feel it is necessary to be quite so certain of guilt before convicting him of any other crime." Comment, Should Jury Verdicts Be Unanimous in Criminal Cases?, 47 OR. L. REV. 417, 424 (1968).
   Some jurisdictions regard the unanimity requirement so highly that even voluntary waiver of it is prohibited. See, e.g., Hibdon v. United States, 204 F.2d 834, 838-39 (6th Cir. 1953).
96. See Johnson, 406 U.S. at 362-63; see also Apodaca v. Oregon, 406 U.S.
a strong dissent, the Court in Johnson upheld the defendant's conviction by a less than unanimous jury and concluded that majority-imposed decisions did not taint the deliberative process.97

Writing for the dissent, Justice Douglas argued that a unanimity requirement forces jurors to defend conflicting recollections and "flushes out many nuances which otherwise would go overlooked."98 Absent such a requirement, the reliability of the final verdict is diminished because the jury will not debate and deliberate as fully.99 Thus, according to the dissent, majority-imposed decisions remove an "automatic check against hasty fact-finding by relieving jurors of the duty to hear out fully the dissenters."100

2. Unanimity and Majority Decision Rules

The Johnson decision sparked a great deal of research into the deliberative processes of juries and whether unanimity or majority decision rules101 have any effect on final verdicts. These studies show that decision rules do in fact have a demonstrable effect on jury deliberations.102 Studies of group behavior patterns, particularly the interactions between jurors operating under different decision rules, concluded overwhelmingly that such rules have an impact on the entire deliberative process.103

404, 406 (1972). The Johnson decision resulted from a split in the Court. Four Justices joined the Court's plurality opinion, concluding that unanimity was not an essential feature of the sixth amendment right to a jury trial. See Johnson, 406 U.S. at 357-65. Four Justices dissented, finding no distinction between federal and state criminal trials on the theory that the entire scope of sixth amendment rights was applicable to the states. See id. at 380-403 (Douglas, Stewart, Brennan, Marshall, J.J., dissenting). Justice Powell cast the swing vote with the plurality opinion to the extent he found unanimity not essential in state criminal proceedings and with the dissenters to the extent that he found unanimity still required in federal trials. See id. at 369. Powell rejected the view that the Court's prior holding in Duncan v. Louisiana, 391 U.S. 145 (1968), incorporated all sixth amendment rights into the fourteenth amendment due process clause. See Johnson, 406 U.S. at 373.

97. See id. at 363.
98. Id. at 389 (Douglas, J., dissenting).
99. See id. at 388 (Douglas, J., dissenting).
100. Id. at 389 (Douglas, J., dissenting).
101. The term "decision rule" is used in this Note to describe a rule that guides a jury's deliberations. Under a unanimity rule, the jury must deliberate until all members concur on a verdict. Under a majority rule, the jury must deliberate until a specified number of jurors, for example 9 or 10 out of 12, concur on a verdict.
102. See generally infra notes 104-52 and accompanying text.
103. See id.
Although juries deliberating under a unanimity requirement generally take longer to reach a decision, deliberations under a unanimity rule are not simply longer versions of majority rule deliberations. Important changes occur in unanimity rule juries after a substantial majority is reached but prior to total agreement. During this period, considerable portions of the case are discussed, the jury may request further instructions from the trial judge and verdict choices of individual jurors may be changed.

Majority rule juries, however, tend to stop deliberating upon reaching the requisite majority. Jurors under a majority rule take

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104. As a general rule, smaller groups complete their tasks faster and more efficiently than larger groups because the latter inhibit the amount of discussion and the expression of disagreement. See M. Saks, JURY VERDICTS 12 (1977) [hereinafter Saks]. In essence, a jury operating under a majority rule is a smaller group than one required to deliberate until unanimity. Id.

Shorter deliberation time may reflect haste and promote oversight. See Davis, Kerr, Atkin, Holt & Meek, The Decision Processes of 6- and 12-Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules, 32 J. PERSONALITY & SOC. PSYCHOLOGY 1, 12 (1975) [hereinafter Davis & Kerr].

Jurors operating under a majority rule exhibit less respect for the deliberative process. See Hastie, supra note 85, at 79. Consequently, jurors have less motivation to review thoroughly all of the information available before deciding on a verdict. See id.

Experimental studies also show that polling methods can affect the speed of deliberations. See V. HANS & N. VIDMAR, JUDGING THE JURY 104 (1986) [hereinafter HANS & VIDMAR]. In one study, juries that frequently used secret ballots were more likely to deadlock, while juries that frequently took polls before beginning to deliberate reached a verdict quickly. Id. Juries that delayed voting until unanimity was reached were the slowest to return verdicts. Id. at 104.

105. See infra notes 106-37 and accompanying text.

106. See Hastie, supra note 85, at 228-29.

107. The results of one experiment indicated that in unanimity rule juries, a large proportion of the discussion took place between the period when the largest faction reached 10 and the time when the final verdict was rendered. See id. at 229. The content of these discussions included several error corrections and references to the standard of proof. Id.

108. See id. Studies have reached different conclusions regarding the probability that a minority faction will successfully convince the majority to change its verdict. Id. One scholar concluded that "[i]n groups that reached consensus, in only about one in ten times did a minority coalition succeed in convincing a majority of the jurors to accept its point of view. Among that 10 percent, the size of the minority was most often five." R. Simon, The Jury: Its Role In American Society 64 (1980) [hereinafter Simon]. Other studies found that minority jurors arguing for acquittal are more often successful at swaying the majority than minority jurors pressing for conviction. See HANS & VIDMAR, supra note 104, at 110; Nemeth, supra note 85, at 54 (fairly high proportion of minority arguing for acquittal prevail). "[I]t is easier to raise a 'reasonable doubt' than to convince a person beyond such a doubt." Id.

109. See Kerr, Atkin, Strasser, Meek, Holt & Davis, Guilt Beyond A Reasonable
a subtle message from an instruction that they need not be unanimous
that causes them to be less thorough in their evaluation of both
the law and the evidence presented at trial. One study of mock
juries observed that more than a third of the verdicts rendered
by majority rule juries were "improper" under the circumstances
presented to the group. This study also found that under a una-

nimity rule, the moderating influence of longer, more thorough
deliberations tended to eradicate errors that frequently occurred in
the other groups.

Since majority rule juries rarely deliberate past reaching the re-
quisite majority, minority factions seldom have an opportunity to
express fully their arguments. Thus, by systematically excluding
or ignoring these dissenting views, majority rule juries also render
verdicts that are a product of a more homogenous, less representativ-

e portion of the community.

Under a unanimity rule, members of minority factions are en-
couraged to express their opinions about the case and participate
actively in the deliberations. Because each juror must agree before

Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments
Kerr & Atkin]; Nemeth, supra note 85, at 53. According to Kerr's study, most
majority rule groups stopped deliberating after the required majority had been
reached; half of the majority rule groups ceased deliberating altogether after
the first deciding ballot. See Kerr & Atkin, supra, at 292.

110. See HANS & VIDMAR, supra note 104, at 175. Under a majority rule, the
influence of jurors trying to argue a minority position is diluted. Id. This fear
was articulated by the dissenting Justices in Johnson. See Johnson, 406 U.S. at
388, 396 (Douglas, Brennan, JJ., dissenting, respectively).

111. The availability of information that researchers may obtain from actual
jury deliberations is restricted by law. See 18 U.S.C. § 1508 (recording, listen-
ting to or observing proceedings of grand or petit juries while deliberating is unlawful);
See also Mattox v. United States, 146 U.S. 140, 149 (1982) (jury should deliberate
free from external influences that disturb exercise of unbiased judgment). Mock
experiments cannot replicate the exact conditions of actual jury deliberations, how-
ever, they provide invaluable insight that assists researchers in analyzing general
behavioral patterns.

112. Under this particular study, a verdict of first degree murder was treated
as error because it "required a truly exceptional interpretation of the evidence
presented at trial." See HASTIE, supra note 85, at 228. Nevertheless, four out of
11 juries operating under a majority rule rendered such a verdict. Id. Systematic
patterns of errors were also associated with such verdicts. Id. None of the five
unanimity rule juries returned a verdict of first degree murder. Id.

113. See id. at 228-29.
115. See id. at 396 (Brennan, J., dissenting); HANS & VIDMAR, supra note 104,
at 172-75.
116. See HANS & VIDMAR, supra note 104, at 174. Participation by members of
a verdict is rendered, small factions are significantly more influential in unanimity rule juries than in majority rule juries. Regardless of whether they eventually conform to the majority viewpoint, minority jurors retain a considerable amount of influence over the final outcome. As a result, unanimity rule jurors tend to be more confident with the final verdict than their majority rule counterparts.

The size of the minority faction may also determine the probability that an individual juror will participate actively. One study indicated that "a person in the minority may be less likely to express his views when in a larger group as the number of unanimous majority members is greater . . . . However, a minority member is more likely to express his views if he has an ally . . . ." Kessler, The Social Psychology of Jury Deliberations, in The Jury System in America 69, 83-84 (R. Simon ed. 1975) (citations omitted) [hereinafter Kessler].

The size of the minority faction may also determine the probability that an individual juror will participate actively. See Hastie, supra note 85, at 119. Generally, in larger factions, individual members are less likely to speak. Id. Decision rules have an interesting effect on this principle—one study found that "[t]he tendency for members of very small factions to speak with a relatively high probability reached its extreme in [unanimity rule juries] and diminished in majority rule juries." Id.

117. See Hastie, supra note 85, at 112.

118. One study of group member participation as a function of group size and various personality types arrived at the following conclusion:

When there is a deviant group member, such as a minority jury member, group research indicates that there will be more initial communication toward the deviate, especially if he greatly deviates from the group, or there seems to be a chance of changing his mind. If the group is unable to bring the deviate into the fold, he may be totally excluded from the group by decreasing the amount of communication toward him . . . .

Kessler, supra note 116, at 84 (citation omitted). In Kessler's studies, majority factions in some majority rule juries questioned the minority on their reasons for deviating and sought to have them conform, despite the fact that the group had a sufficient number of jurors to render a verdict. Id. Kessler noted that this aspect of minority participation is important when juries operate under a majority rule. Id. But see supra note 110 and accompanying text (other studies indicate that juries may often cease deliberating immediately upon reaching the requisite majority).

119. In unanimity rule juries, dissenting or unformed opinions tend to create "pressures." See Hans & Vidmar, supra note 104, at 110. These pressures will often lead to spirited discussion among jurors with conflicting viewpoints in order to forge common ground upon which they can all agree. Id. at 111.

120. Jurors in unanimity rule juries perceive the group decision making process as more difficult, but more thorough and serious than the process under a majority decision rule. See Hastie, supra note 85, at 79. Consequently, minority jurors under a unanimity rule were especially likely to believe that they had had the opportunity to express all of their arguments concerning the case. Id. Although deliberations tended to be dominated by majority influence, unanimity rule juries expressed more confidence in the final verdict. Id. at 30; see also Kerr & Atkin, supra note 109, at 290-91 (dissatisfaction of majority rule jurors with final verdict attributable to inability to express all their views fully); Nemeth, supra note 85, at 55-56. In three studies of unanimous versus quorum verdicts, actual verdicts
because their decision reflects a more complex analysis, evaluation and application of all relevant information.\textsuperscript{121}

One final rationale for maintaining the use of a jury is the assumption that jury duty fosters a citizen's respect for the fairness of the criminal justice system.\textsuperscript{122} Studies of group behavior in majority rule juries suggest, however, that this assumption is less valid when unanimity is not required.\textsuperscript{123} In fact, the hasty deliberative process and frequency of compromise verdicts resulting from majority decision rules causes jurors to become disenchanted with the entire jury system.\textsuperscript{124}

were not significantly altered but the unanimous juries reported reaching full consensus, confidence in the final verdict and a belief that justice had been administered. \textit{Id}. at 53.

121. See \textsc{Hastie}, supra note 85, at 228-29.

In general, effective group decision making involves considering possible alternatives and choosing one. See Smith, Petersen, Johnson & Johnson, \textit{The Effects of Controversy and Concurrence Seeking on Effective Decision Making}, 126 J. SOC. PSYCHOLOGY 237 (1986) [hereinafter Smith & Petersen]. To achieve this goal, the group must (1) search for all relevant information on the issue under discussion; (2) exchange all relevant information, critically evaluate it and maintain effective working procedures within the group; (3) make a decision that reflects a complex analysis, synthesis, evaluation and application of all relevant information; (4) promote a sense of personal commitment through the perception of having personally influenced the group's decision; and (5) promote satisfaction with the final decision. \textit{See id}. at 238. Effective jury performance, however, requires more: representation by a cross-section of the community; the full expression of all viewpoints; accurate and thorough fact-finding and the ability to render accurate verdicts by applying the judge's instructions on law to the evidence adduced at trial. \textit{See \textsc{Hastie}, supra} note 85, at 227.

Controversy, like that created under any type of unanimity rule, promotes higher quality decision making by stimulating interest in the problem being discussed and greater personal interest in, and satisfaction with, the final decision. \textit{See Smith & Petersen}, supra, at 246. The belief that controversy creates feelings of alienation or inhibits influence is unfounded. \textit{Id}. at 247:

122. See United States v. Edwards, 823 F.2d 111, 117 (5th Cir. 1987) (jury's role as impartial, functioning, deliberative body is \textit{sine qua non} of criminal justice system); Kerr & Atkin, supra note 109, at 292-93. The importance of the symbolic function of the jury should not be overlooked:

[R]ules of trial procedure \ldots serve a vital role as \ldots a reminder to the community of the principles it holds important. The presumption of innocence, the rights to counsel \ldots matter not only as devices for achieving or avoiding certain kinds of trial outcomes, but also as affirmations of respect for the accused as a human being—affirmations that remind him and the public about the sort of society we want to become and, indeed, about the sort of society we are.

\textsc{Tribe}, \textit{Trial By Mathematics: Precision and Ritual In the Legal Process}, 84 \textsc{Harv. L. Rev.} 1329, 1391-92 (1971).

123. See Kerr & Atkin, supra note 109, at 292-93.

124. \textit{See id}.
The logic derived from the results of these studies directly applies to the pivotal problems addressed in the dispute over the proper lesser included offense instruction. Just as unanimity in the final verdict promotes thorough deliberations and the full expression of all viewpoints, the unanimous acquittal rule encourages jurors to thoroughly review the evidence and then apply the facts to the applicable law to reach a clear verdict on each charge.

Majority decision rules invite hasty decision-making and discourage prolonged effort to achieve a mutually acceptable result. Similarly, the disagreement rule not only discourages prolonged discussion among jurors but also allows concerns unrelated to the case to dominate the deliberations. Thus, under the disagreement rule, the jury may eventually reach a final verdict based not on the merits of the case, but on sympathy for the defendant or on an attempt to appease a holdout juror.

Courts that adopt the disagreement instruction criticize unanimity rules, including the unanimous acquittal instruction, for the potentially coercive effect they have on jurors. A common assumption of these courts is that when deliberations deadlock, jurors in the majority will try to engender feelings of inferiority or unreasonableness among the minority jurors in order to pressure them into conforming with the majority's verdict choice. The results of many

125. See infra notes 126-37 and accompanying text.
126. See supra notes 104-21 and accompanying text.
128. See supra notes 109-21 and accompanying text.
129. Cf. Boettcher, 69 N.Y.2d at 183, 505 N.E.2d at 597-98, 513 N.Y.S.2d at 87 (disagreement rule promotes compromise based upon sympathy for defendant or desire to appease stubborn jurors).
130. See id.
131. See People v. Mays, 407 Mich. 619, 622-23, 288 N.W.2d 207, 208 (1980); State v. Ogden, 35 Or. App. 91, 98, 580 P.2d 1049, 1053 (1978). See generally Improving Jury Deliberations, supra note 16. However, some judges have commented that requiring a unanimous acquittal of the greater crime before permitting consideration of lesser offenses is no more coercive than requiring the same number to find the defendant guilty of the lesser offense. See Ogden, 35 Or. App. at 103, 580 P.2d at 1055 (Thornton, J., dissenting).
132. One commentator provided some anecdotal evidence demonstrating how votes may be cast without regard to guilt or innocence:

A Southern California woman juror, while deliberating on a drug case, prayed to God that a hold-out juror would change his vote to guilty. If her prayers were answered, according to an affidavit filed by another juror, the hold-out juror would wear his blue blazer as a sign from God. The hold-out wore his blue blazer, and on that day the juror...
studies suggest, however, that the contrary is true—when jurors must deliberate until unanimity, those who change their verdict tend to have been less certain of their initial decision than the other jurors.133 The change occurs not because of undue coercion,134 but rather because the minority is persuaded by the merits of the majority’s position.135 The risk of coerced decisions is further reduced by the fact that jurors operating under a unanimity rule approach the deliberations more seriously than do majority rule jurors.136 Jurors who change their previously held individual verdicts to conform to the majority position do so based on a true change of belief and not merely as a response to group pressure.137

134. The question of whether a juror was unduly coerced often arises when the trial judge administers an “Allen” instruction, or “dynamite charge,” to the jury. The instruction originated in Allen v. United States, 164 U.S. 492 (1896), and was commonly used to break deadlocks. The Supreme Court summarized the trial court’s instruction:

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

Id. at 501. The instruction is effective at producing verdicts. Although the Court has upheld its use, the Allen instruction has aroused much criticism and comment. See generally Improving Jury Deliberations, supra note 16, at 571-73. Some researchers have advocated the use of these coercive instructions to eliminate stubborn jurors and encourage interaction among the group. See Hastie, supra note 85, at 167. A fuller analysis of the appropriateness of an “Allen” type instruction exceeds the scope of this Note.

136. See Hastie, supra note 85, at 79.
137. See Simon, supra note 108, at 63. When jurors were given an opportunity to state privately what their verdicts were, they reported the same opinion as that rendered by the group. Id. For many of these jurors, the group discussion was the significant factor in changing their individual verdicts to make them consistent with the majority. Id.
B. Compromise Verdicts

To a certain degree, compromise is both an inevitable and desirable factor in jury deliberations. Courts recognize the jury's right to render compromise verdicts, although judges strongly discourage them. Inherent in the jury's power to compromise, however, exists a risk that the power will be abused. The unanimous acquittal instruction acts as a curb on this power by striking a balance between society's interest in punishing offenders and administering justice and the jury's right to return a compromise verdict. The instruction reduces the likelihood that a jury's verdict will be the product of undesirable compromise or based on concerns unrelated to the merits of the case. Nevertheless, the instruction does not prevent the jury from dispensing mercy should it find that the prosecution has failed to prove some element of its case beyond a reasonable doubt.

By promoting full consideration of each offense and by reducing the opportunity for unmerited compromise, the unanimous acquittal instruction encourages the jury to exercise its historical duty as the

138. Studies indicate that juries often compromise on a lesser offense when they have the option of convicting on a lesser included offense. See Vidmar, Effects of Decision Alternatives on the Verdicts and Social Perceptions of Simulated Jurors, 22 J. Personality & Soc. Psychology 211, 214-16 (1972). When given a choice between a verdict of first degree murder or not guilty, 54% of the mock juries acquitted. Id. at 214. When given a choice of four options, the juries returned verdicts of first degree murder in 8% of the cases, second degree murder in 63%, manslaughter in 21%, and not guilty in 8%. Id. at 215.

139. Commentators assert that desirable compromise is motivated by "the merits of the case or a desire to seek justice through the proper channels." Improving Jury Deliberations, supra note 16, at 568 n.32 (compromise verdict resulting from jury's concern that prosecutor overcharged is desirable).

140. See Dunn v. United States, 284 U.S. 390, 394 (1932).


143. Cf. Boettcher, 69 N.Y.2d at 183, 505 N.E.2d at 597-98, 513 N.Y.S.2d at 87 (while courts may acknowledge existence of compromise they should not create environment conducive to such behavior).

144. See generally id.

145. See id. at 182, 505 N.E.2d at 597, 513 N.Y.S.2d at 86.
The disagreement instruction, on the other hand, circumvents this fact-finding duty by providing the jury with the means to avoid complete debate on the greater crime by simply rendering a verdict on an offense consisting of fewer elements. Though this approach may be more practical in that it obviates the need for lengthy deliberations, it also allows individual biases to dominate the jury's fact-finding obligations. Moreover, because the votes of minority jurors deliberating on the greater offense are not needed in order to consider lesser offenses, there is no incentive for these jurors to fully present and defend their views in an effort to persuade the majority on the merit of their position.

Concern over unmerited compromise has led many courts to restrict the scope of the lesser included offense doctrine by requiring that one party affirmatively request that the judge instruct on all lesser offenses. Restricting the jury's verdict choices, however, is not the answer. If complete deliberation on each offense is assured, a verdict on an offense other than the one originally charged is a perfectly acceptable final outcome.

C. The Unanimous Acquittal Rule Protects Against Double Jeopardy

Commentators object that the unanimous acquittal instruction prejudices the defendant because the benefits of thorough deliberation on the charged offense accrue only to the state. This objection, however, fails to recognize that courts have not addressed the question of whether the doctrine of implied acquittal would protect a
defendant from subsequent reprosecution of the greater offense after
a jury deliberates under the disagreement rule and convicts the
defendant of a lesser offense.

The implied acquittal doctrine, as set forth by the Supreme Court,\textsuperscript{154} states that when a jury is silent on the greater offense, but returns
a verdict on a lesser offense, the jury is deemed to have impliedly
acquitted the defendant of the greater charge.\textsuperscript{155} At this point, double
jeopardy protection attaches and forbids a second prosecution on
the greater charge.\textsuperscript{156} As the court noted in \textit{Boettcher}, however,
there is a strong policy against protecting a defendant from multiple
prosecutions for the same offense unless a jury actually finds the
accused not guilty of that charge.\textsuperscript{157} In formulating the implied
acquittal doctrine, the Supreme Court acknowledged the validity of
such a policy by assuming that a jury's silence on the greater offense
only follows a full and final determination of the defendant's guilt
on that charge—as if the jury had returned a verdict that expressly
read: “We find the defendant not guilty of murder in the first
degree but guilty of murder in the second degree.”\textsuperscript{158} Thus, a careful
reading of this doctrine would call into question the scope of double
jeopardy protection under the disagreement rule.\textsuperscript{159} In choosing the
disagreement rule, a defendant might unknowingly subject himself
to the possibility of a second prosecution on the charged offense
should a jury convict him of some lesser crime.\textsuperscript{160}

\textsuperscript{154} In \textit{Green v. United States}, 355 U.S. 184 (1957), the Court held that a jury's
silence on the greater charge after returning a verdict on the lesser charge barred
subsequent retrial on the greater charge under the doctrine of “implied acquittal.”
\textit{See id.} at 190; \textit{see also} 8A \textit{MOORE, supra} note 83, § 31.03(4).

\textsuperscript{155} \textit{See supra} note 154.

\textsuperscript{156} \textit{See id.}

\textsuperscript{157} \textit{See People v. Boettcher}, 69 N.Y.2d 174, 182, 505 N.E.2d 594, 597, 513

\textsuperscript{158} \textit{See Green}, 355 U.S. at 191.

\textsuperscript{159} Any other conclusion would fail to comport with the Court's subsequent
decisions holding that society has the right to punish offenders and administer

\textsuperscript{160} The Federal Rules of Criminal Procedure provide that “'[t]he defendant
may be found guilty of an offense necessarily included in the offense charged or
of an attempt to commit either the offense charged or an offense necessarily
included therein if the attempt is an offense.' \textit{FED. R. CRIM. P.} 31(c). This rule,
upon which \textit{Tsanas} and its progeny are based, does not automatically deem a
conviction of a lesser offense an acquittal of the greater offense for double jeopardy
purposes. \textit{See Boettcher}, 69 N.Y.2d at 182-83, 505 N.E.2d at 597, 513 N.Y.S.2d
at 86-87.
The Tsanas and Boettcher courts also recognized this problem, but each court was conspicuously hesitant to address the issue directly. The unanimous acquittal rule would avoid this problem as well as benefit the defendant. By having the jury conclusively determine, after thorough deliberation, guilt or innocence as to each charge, the defendant clearly would be protected against retrial on the greater offense should the jury render a verdict solely on the lesser included offense.

D. Hung Juries

The unanimous acquittal instruction may cause the jury to deadlock because it requires that all jurors concur before considering any lesser included offense. Proponents of the disagreement instruction argue that allowing the jury to consider more options would decrease the frequency of hung juries by compensating for one or two irrational jurors whose stubbornness would otherwise hang the jury.

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161. See United States v. Tsanas, 572 F.2d 340, 346 n.7 (2d Cir.) (retrial "apparently" barred) (emphasis added), cert. denied, 435 U.S. 995 (1978); Boettcher, 69 N.Y.2d at 182-83, 505 N.E.2d at 597, 513 N.Y.S.2d at 86-87 (federal rule does not automatically deem conviction for lesser offense an acquittal of greater, but that is "usually" result) (emphasis added).

162. See supra notes 154-58 and accompanying text.

163. Most social science research indicates that juries that operate under any type of unanimity requirement are more likely to deadlock. See, e.g., Kerr & Atkin, supra note 109, at 285 (hung juries are most likely to result when initial disagreement is maximal, i.e. when there is nearly an even split between those who favor conviction and those who favor acquittal); Nemeth, supra note 85, at 53 (same). An estimated five to 12% of the criminal trials in the United States each year end in hung juries. See Kalven & Zeisel, supra note 142, at 57; Flynn, supra note 19, at 130. The "Chicago Jury Project," conducted by Kalven and Zeisel, based its findings on court records, post-deliberation interviews, experimental cases before mock juries and the observation of a limited number of actual jury deliberations. Their results showed that hung juries occurred in 5.6% of cases in which unanimity was required and 3.1% of majority rule cases. See Kalven & Zeisel, supra note 142, at 461. The second study was performed by Professor Leo Flynn. His results were based on studies of felony trials, over a three year period, in California's 10 most populated counties. See Flynn, supra note 19, at 130. He found that hung juries occurred in 12.2% of the cases (978 cases). Id.

The difference between the percentages of hung juries may arise from Kalven & Zeisel's methodology. See Kalven & Zeisel, supra note 142, at 57. They suspected that imprecise instructions regarding what constituted a reportable jury trial may have caused some judges not to report mistrials. Id. at 57 n.2.

164. There are other methods to avoid this problem. The voir dire examination and the availability of peremptory challenges and challenges for cause provide a procedure for eliminating obstinate jurors from the jury panel. For an overview of the voir dire process, see Babcock, Voir Dire: Preserving "It's Wonderful Power", 27 Stan. L. Rev. 545 (1975).
The evidence, however, suggests that hung juries are generally not the result of one obstinate juror, but rather are a response to genuine difficulties with the case.\textsuperscript{165} In fact, one frequently cited study, the Chicago Jury Project, indicated that the unreasonable obstinacy of one juror is a rare event and that hung juries occur only in cases with an initially large minority faction.\textsuperscript{166}

Some commentators contend that a hung jury results in a "wholly unsatisfactory conclusion to the criminal trial for it is neither an acquittal nor a conviction."\textsuperscript{167} They claim that because a mistrial from a hung jury does not bar the state from prosecuting the defendant again, the prosecution gains two unfair advantages: the ability to remedy any tactical problem encountered in the first trial and valuable insight into the defense strategy.\textsuperscript{168} Meanwhile, the

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  \item 165. See Kalven & Zeisel, The American Jury: Notes for an English Controversy, 48 CHI. BAR RECORD 195, 201 (1967). A hung jury may also result from the lack of clarity with which the presiding judge charges the jury on the relevant issues of fact and law. See Note, Non-Unanimous Verdicts By Jury, 22 CORNELL L.Q. 415, 417 (1937).
  \item 166. See Kalven & Zeisel, supra note 142, at 462-63.
  \item 167. Improving Jury Deliberations, supra note 16, at 563.
  \item 168. See Burks v. United States, 437 U.S. 1, 11 (1978); Green v. United States, 355 U.S. 184, 187-88 (1957) (repeated attempts to convict subject individual to embarrassment, expense and enhance possibility that innocent person may be found guilty); Partial Verdicts, supra note 33, at 893 (prosecution witnesses will be better prepared and arguments that appeared weak at first trial will be strengthened); Findlater, Retrial After A Hung Jury: The Double Jeopardy Problem, 129 U. PA. L. REV. 701, 713 (1981) (risk of conviction increases on retrial because defendant's resources diminish and it becomes more difficult to present adequate defense) [hereinafter Findlater].

The prospect of a hung jury is damaging for the prosecution as well. See Fried, Kaplan & Klein, Juror Selection: An Analysis of Voir Dire, in THE JURY SYSTEM IN AMERICA 54 (R. Simon ed. 1975). In practice, a prosecutor will usually reduce the charges against a defendant after the first trial results in a hung jury and will rarely push a case beyond two hung juries. See id.

A court might employ several means to avoid a hung jury and the necessity of a second prosecution. One method would require that the jury return a "special verdict"—precise findings on each issue of fact—instead of a general verdict of guilty or not guilty. See Fed. R. Civ. P. 49(a) (court may require special findings upon each factual issue). From these special verdicts, a judge would simply extrapolate the defendant's guilt on either the charged offense or the lesser included offenses based on the jury's findings. Although some commentators contend that special verdicts take the actual determination of the case away from the jury and give it to the judge, see Trubitt, Patchwork Verdicts, Different-Jurors Verdicts, And American Jury Theory: Whether Verdicts Are Invalidated By Juror Disagreement On Issues, 36 OKLA. L. REV. 473, 494 (1983), their use in criminal cases has been upheld. See United States v. Coonan, No. 88-3007, slip op. at 1626 (2d Cir. Feb. 11, 1988). There is, however, a historical preference for general verdicts that stems from the unique nature of the rights accorded to criminal defendants.
defendant's limited resources are depleted, thereby making it more difficult to present a decent defense and thus increasing the likelihood of eventual conviction.169

Conversely, a hung jury is also considered by many to be a "safeguard to liberty" and "the sole means by which one or a few may stand out against an overwhelming contemporary public sentiment."170 Scholars note that "the hung jury is a treasured ... phenomenon ... because it symbolizes our legal system's respect for the minority view that is held strongly enough to thwart the will of the majority."171 Several courts have also echoed this sentiment.172

Whether one believes that a hung jury should be cherished or avoided, the need to expedite the judicial process simply does not outweigh the defendant's right to a trial by jury.173 More important than increasing the potential for jury deadlock, the unanimous acquittal rule establishes guidelines for orderly and complete jury deliberations.174 Moreover, it is a fundamental principle of consti-


Another method would require that the jury deliberate under the unanimous acquittal rule. Should the jury deadlock on the charged offense, however, the prosecutor and defense attorney could agree to have the judge declare the jury hung on that offense and permit deliberation on the lesser included offenses. In exchange for the possibility of a present conviction on a lesser offense, the prosecutor would agree to forego any subsequent litigation on the greater offense. The defendant benefits by gaining protection against double jeopardy and avoiding the burdens of reprosecution on the entire indictment.

169. See Green, 355 U.S. at 187-88; Findlater, supra note 168, at 713.

170. Huffman v. United States, 297 F.2d 754, 759 (5th Cir.) (Brown, J., concurring in part and dissenting in part) (nothing should interfere with the exercise of a hung jury), cert. denied, 370 U.S. 955 (1962).

171. HANS & VIDMAR, supra note 104, at 111-12. The hung jury is also a paradox—it can only exist in moderation because too many would unacceptably disrupt the court system. Id. But see Flynn, supra note 19, at 133 (hung juries do not render court system ineffective or inefficient nor do they frustrate operations of other aspects of criminal justice system).

In Flynn's study, 40% of the cases that resulted in hung juries were dismissed, 34% were resolved by guilty pleas and 26% were retried. See id. Of the hung juries, 62.6% favored conviction and 42.1% of those favored conviction by 9-3 or more. Id. at 131-32. Kalven and Zeisel reported similar results. See KALVEN & ZEISEL, supra note 142, at 460.


tutional law that administrative efficiency may never justify in-
fringement of a constitutional right.175

IV. Conclusion

Unwarranted compromise and hasty deliberations are detrimental
to all parties in a criminal proceeding. They damage the credibility
of the judicial system by producing unreliable and incomplete verdicts
and engender a feeling among jurors that justice has not been done.
The unanimous acquittal instruction curbs these abuses by achieving
a balance that protects the competing interests of the state and the
defendant but also allows the jury to function as the trier of fact.
Further, the unanimous acquittal instruction achieves such a balance
in a manner that is not unduly coercive nor overly disruptive to
the deliberative process.

David Y. Atlas

175. See O'Clair v. United States, 470 F.2d 1199, 1204 (1st Cir. 1972), cert.