

COMMENT

Jury Deliberations and the Lesser Included Offense Rule: Getting the Courts Back in Step

INTRODUCTION

At common law a jury could convict a criminal defendant of the charged offense or of any lesser offense necessarily included within the charged offense.¹ Prosecutors initially considered the *lesser included offense rule*² to be an aid to the prosecution when the evidence failed to prove some element of the charged offense.³ The rule created more op-

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¹ Beck v. Alabama, 447 U.S. 625, 633 (1980) (citing 1 J. CHITTY, CRIMINAL LAW 250 (5th Am. ed. 1847); 2 M. HALE, PLEAS OF THE CROWN 301-02 (1736); 2 W. HAWKINS, PLEAS OF THE CROWN 623 (6th ed. 1787); T. STARKIE, TREATISE ON CRIMINAL PLEADING 351-52 (2d ed. 1822)).

² Courts interchangeably use the terms *lesser included offense* and *necessarily included offense*. See Olais-Castro v. United States, 416 F.2d 1155, 1157 (9th Cir. 1969).

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

³ C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 515, at 21-22 (2d ed. 1982) (footnotes omitted); see also *infra* note 14.

³ C. WRIGHT, *supra* note 2, at 20.

tions for juries to consider during deliberations.⁴

The consideration of a lesser included offense increases the complexity of jury deliberations. In a criminal trial on a charge with no lesser included offense, a jury necessarily deliberates on only the one charge.⁵ A jury then has two options when returning a verdict: acquittal or conviction.⁶ When a charged offense involves one or more lesser included offenses, however, a jury may deliberate on each offense.⁷ When returning a verdict, a jury not only has the options of acquittal or conviction of the charged offense, but also the options of acquittal or conviction of each lesser included offense.⁸

The lesser included offense rule requires a determination of the manner in which juries consider and resolve the charged offense and any lesser included offenses.⁹ Initially, courts followed a *step approach*¹⁰ to

⁴ See *Beck*, 447 U.S. at 634, 637, 645 (noting that lesser included offense instruction provides jury with "third option" in addition to acquittal or conviction of charged offense); see also *infra* note 8 and accompanying text.

⁵ See C. WRIGHT, *supra* note 2, § 512, at 7-8.

⁶ *Id.* The jury will hang if it cannot return a verdict because of juror disagreement. R. HASTIE, S. PENROD & N. PENNINGTON, *INSIDE THE JURY* 24-26 (1983). For a discussion of the frequency and effects of hung juries, see H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 453-63 (1966); Flynn, *Does Justice Fail When the Jury Is Deadlocked?*, 61 *JUDICATURE* 129, 130 (1977).

⁷ Under a step approach, see *infra* note 30 and accompanying text, the jury must deliberate on and acquit the defendant of each offense before it may convict the defendant of the next, less severe, lesser included offense. See Note, *State v. Wussler: An Unfortunate Change in Arizona's Lesser Included Offense Jury Instruction*, 27 *ARIZ. L. REV.* 515, 518 (1985).

Under a disagreement instruction, the jury might not deliberate on every offense because it can immediately compromise to a verdict on a lesser included offense. See Comment, *Improving Jury Deliberations: A Reconsideration of Lesser Included Offense Instructions*, 16 *U. MICH. J.L. REF.* 561, 574 (1983).

⁸ The jury cannot convict the defendant of both the greater and lesser included offenses. See *Milanovich v. United States*, 365 U.S. 551 (1961) (setting aside conviction when jury convicted defendant on charged offense of larceny and lesser included offense of receiving stolen property). When the jury convicts the defendant of both the charged offense and lesser included offense, courts vacate the conviction on the lesser included offense. See, e.g., *United States v. Crawford*, 576 F.2d 794 (9th Cir.), *cert. denied*, 439 U.S. 851 (1978); *United States v. Lodwick*, 410 F.2d 1202 (8th Cir. 1969).

⁹ See *State v. Ogden*, 35 Or. App. 91, 95, 580 P.2d 1049, 1052-53 (1978) (stating that court must structure jury deliberations in cases involving lesser included offenses to prevent chaotic deliberations).

¹⁰ See Note, *Criminal Procedure — Recognizing the Jury's Province to Consider the Lesser Included Offense: State v. Ogden*, 58 *OR. L. REV.* 572, 578 n.33 (1980) (stating that commentators commonly use the terms "step" and "graduated" to refer to instructions structuring the jury's mode of deliberation); see also *infra* text accompanying notes 30-31 & 35-40.

jury deliberations.¹¹ This approach required a jury first to consider the charged offense.¹² Then, if the jury acquitted the defendant of that offense, it considered lesser included offenses in descending order of severity.¹³

Although the lesser included offense rule¹⁴ originated as a prosecutorial tool,¹⁵ courts currently view the rule as beneficial to defendants.¹⁶ The lesser included offense rule provides the jury with alternatives to acquittal or conviction of the charged offense.¹⁷ A jury can more accurately determine the degree of a defendant's guilt, if any, with this additional option.¹⁸ As a result, the lesser included offense rule entitles criminal defendants to lesser included offense instructions as a matter of right.¹⁹

Recognition of the lesser included offense instruction as a quasi-constitutional right²⁰ prompted some state courts to move away from the

¹¹ See Comment, *supra* note 7, at 566 (stating that federal courts developed the step approach from the traditional requirement of jury unanimity).

¹² Note, *supra* note 7, at 518.

¹³ See *id.*

¹⁴ FED. R. CRIM. P. 31(c). This rule states: "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." *Id.*; see also *supra* note 2.

¹⁵ C. WRIGHT, *supra* note 2, at 20.

¹⁶ *Beck v. Alabama*, 447 U.S. 625, 633 (1980) (stating that courts have long considered lesser included offense rule as beneficial to defendant); *Keeble v. United States*, 412 U.S. 205, 212-13 (1973) (refuting argument that defendant may be better off without lesser included offense instruction); *United States v. Tsanas*, 572 F.2d 340, 346 (2d Cir.) (stating that lesser included offense rule has advantages and disadvantages to defendant and prosecutor), *cert. denied*, 435 U.S. 995 (1978).

¹⁷ *Beck*, 447 U.S. at 633 (stating that lesser included offense instruction "affords the jury a less drastic alternative" than acquittal-conviction dichotomy).

¹⁸ See Note, *supra* note 10, at 577; Comment, *The Lesser Included Offense Doctrine in Pennsylvania: Uncertainty in the Courts*, 84 DICK. L. REV. 125, 126 (1979).

¹⁹ *Beck*, 447 U.S. at 637 (recognizing courts' nearly universal acceptance of lesser included offense rule as valuable procedural safeguard for defendant); *Keeble*, 412 U.S. at 208 (stating that criminal defendants have undisputed rights to lesser included offense instructions).

²⁰ *Beck*, 447 U.S. at 637 (stating that "[w]hile we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule [establishes it as a valuable] procedural safeguard"); *Keeble*, 412 U.S. at 213 (stating that "while we have never explicitly held that the Due Process Clause of the Fifth Amendment guarantees the right of a defendant to have the jury instructed on a lesser included offense, it is nevertheless clear that [prohibition of] such an instruction would raise difficult constitutional questions").

For a proposal to include the lesser included offense instruction as a constitutional

step approach.²¹ These courts feared that structuring jury deliberations would invade the jury's province as ultimate fact-finder.²² These courts also feared that this invasion would deny a defendant the benefits of the right to an alternative less drastic²³ than acquittal or conviction of the charged offense.²⁴ This trend away from the step approach in jury deliberations has produced its own problems.²⁵ Two primary problems are compromise verdicts²⁶ and implied acquittals.²⁷

This Comment contends that the step approach to lesser included offense instructions provides the most effective method of organizing jury deliberations. Part I discusses the step approach and the current trend away from this approach. Part II analyzes the new problems that

element of procedural due process, see Mascolo, *Procedural Due Process and the Lesser-Included Offense Doctrine*, 50 ALB. L. REV. 263 (1986).

²¹ See, e.g., *Bragg v. State*, 453 So. 2d 756 (Ala. Ct. App. 1984) (holding step approach erroneous); *Dresnek v. State*, 697 P.2d 1059, 1064 (Alaska Ct. App. 1985) (preferring unstructured approach because it recognizes jury's right to deliberate on lesser included offenses), *aff'd per curiam*, 718 P.2d 156 (Alaska), *cert. denied sub nom.* *Spierings v. Alaska*, 479 U.S. 1021 (1986); *People v. Kurtzman*, 46 Cal. 3d 322, 758 P.2d 572, 250 Cal. Rptr. 244 (1988) (rejecting step approach because it improperly restricts jury's deliberations); *People v. McGregor*, 635 P.2d 912 (Colo. Ct. App. 1981) (rejecting step approach because it limits jury's deliberations); *Zackery v. State*, 257 Ga. 442, 360 S.E.2d 269 (1987) (holding step approach erroneous).

²² See *State v. Ogden*, 35 Or. App. 91, 94, 580 P.2d 1049, 1052 (1978) (holding that supplemental instruction requiring jury to acquit defendant of charged offense before considering lesser included offenses invaded jury's province); see also *State v. Wussler*, 139 Ariz. 428, 430, 679 P.2d 74, 78 (1984) (Feldman, J., specially concurring) (stating that step approach invades jury's province). See generally Comment, *The Lesser Included Offense Instruction — Problems With Its Use*, 3 LAND & WATER L. REV. 587, 594-97 (1968) (arguing that restrictions on deliberations invade jury's province as exclusive trier of fact); Note, *supra* note 7, at 523 & n.52 (arguing that disagreement instruction provides jury great flexibility in deliberations).

²³ *Beck v. Alabama*, 447 U.S. 625, 633 (1980) (stating that lesser included offense rule is beneficial to the defendant because it provides a "less drastic alternative" than acquittal or conviction on the charged offense).

²⁴ See, e.g., sources cited *supra* note 22; see also Comment, *supra* note 18, at 125-26 (stating that lesser included offense doctrine has evolved to benefit defendant by providing jury with alternative to acquittal or conviction of charged offense).

²⁵ See *infra* notes 136-43 and accompanying text.

²⁶ See *infra* notes 144-70 and accompanying text. See generally Comment, *Compromise Verdicts In Criminal Cases*, 37 NEB. L. REV. 802 (1958).

²⁷ See, e.g., *Price v. Georgia*, 398 U.S. 323 (1970) (holding conviction on lesser included offense of involuntary manslaughter constituted implied acquittal of murder charge); *Green v. United States*, 355 U.S. 184 (1957) (holding conviction on lesser included offense of second degree murder constituted implied acquittal of first degree murder charge). For a discussion of implied acquittal problems, see *infra* notes 181-89 and accompanying text.

this trend has produced. Finally, Part III discusses the advantages of the step approach and proposes that Congress and the states enact uniform legislation mandating a return to the step approach in all criminal courts.

I. THE DIVISION AMONG STATE COURTS

State courts currently disagree on the manner in which juries should consider and resolve lesser included offenses.²⁸ Some courts still follow the step approach, also called the *acquittal first rule*.²⁹ This approach requires a jury to acquit a defendant of the charged offense before considering lesser included offenses.³⁰ Other courts now give juries *disagreement instructions*.³¹ These instructions allow juries to consider lesser included offenses when they simply cannot agree on the charged offenses.³² Still other courts use an unstructured approach. This ap-

²⁸ See *infra* notes 30 & 34-52 and accompanying text. Federal courts have upheld each type of instruction, but require that the court give an alternate instruction if the defendant objects to the instruction given. See, e.g., *United States v. Jackson*, 726 F.2d 1466 (9th Cir. 1984) (holding step approach erroneous only because defendant objected); *Pharr v. Israel*, 629 F.2d 1278 (7th Cir. 1980) (upholding step approach), *cert. denied*, 449 U.S. 1088 (1981); *Catches v. United States*, 582 F.2d 453 (8th Cir. 1978) (upholding step approach); *United States v. Tsanas*, 572 F.2d 340, 346 (2d Cir.) (upholding step approach), *cert. denied*, 435 U.S. 995 (1978).

²⁹ This Comment refers to instructions requiring acquittal on the charged offense before considering lesser included offenses as *step instructions* or the *step approach*. See *supra* note 10 and accompanying text; see also Comment, *supra* note 7, at 566 (referring to this instruction as the "acquittal instruction"); Note, *supra* note 7, at 518 (referring to instruction as the "acquittal-first instruction").

³⁰ See, e.g., *State v. Wussler*, 139 Ariz. 428, 430, 679 P.2d 74, 76 (1984) (holding step approach provides for more logical and orderly deliberations); *Commonwealth v. Edgerly*, 13 Mass. App. Ct. 562, 582-83, 435 N.E.2d 641, 652-53 (1982) (upholding step approach in rape case); *People v. Boettcher*, 69 N.Y.2d 174, 182-83, 505 N.E.2d 594, 597-98, 513 N.Y.S.2d 83, 86-87 (1987) (rejecting disagreement instruction because it permits compromise verdicts); *State v. Wilkins*, 34 N.C. App. 392, 399-400, 238 S.E.2d 659, 664-65 (1977) (summarily upholding step approach); *State v. McNeal*, 95 Wis. 2d 63, 68-69, 288 N.W.2d 874, 876 (1980) (refuting contention that step approach coerces jurors); *Ballinger v. State*, 437 P.2d 305, 309-10 (Wyo. 1968) (holding step approach not prejudicial to defendant).

³¹ See Comment, *supra* note 7, at 573-74; Note, *supra* note 7, at 519.

³² See, e.g., *Bragg v. State*, 453 So. 2d 756, 759 (Ala. Ct. App. 1984) (holding step approach erroneous); *People v. McGregor*, 635 P.2d 912, 914 (Colo. Ct. App. 1981) (holding step approach erroneously limits deliberations); *Zackery v. State*, 257 Ga. 442, 443, 360 S.E.2d 269, 270-71 (1987) (upholding instruction that structured deliberations without requiring acquittal on the charged offense before jury could consider lesser included offenses); *State v. Korb*, 231 Kan. 657, 661-62, 647 P.2d 1301, 1305 (1982) (holding that jury can consider lesser included offense if it cannot agree on

proach does not require a particular sequence in jury deliberations.³³

A. Three Major Approaches to Lesser Included Offense Instructions

Courts in several states continue to require a step approach to jury deliberations involving lesser included offenses.³⁴ These courts instruct jurors to consider the charged offense until they unanimously³⁵ agree on a defendant's guilt or innocence.³⁶ If jurors find a defendant guilty of the charged offense, they fulfill their duty by returning a guilty verdict.³⁷ The jurors may not consider the defendant's guilt or innocence of a lesser included offense until the jurors find a defendant not guilty of the charged offense.³⁸ The jurors may deliberate similarly on all remaining lesser included offenses in descending order of severity.³⁹

Recognition of the lesser included offense instruction as a defendant's right⁴⁰ initiated a trend away from the step approach.⁴¹ Courts following the trend fear that the step approach's structure precludes juries from freely considering alternatives to verdicts of acquittal or conviction of the charged offense.⁴² Many courts adopted either a disagreement instruction or an unstructured approach to avoid invading the jury's

disposition regarding charged offense); *People v. Woods*, 416 Mich. 581, 609-10, 331 N.W.2d 707, 719-20 (1982) (upholding disagreement instruction), *cert. denied sub nom.* *Michigan v. Alexander*, 462 U.S. 1134 (1983); *State v. Muscatello*, 57 Ohio App. 2d 231, 251-52, 387 N.E.2d 627, 641-42 (1977) (rejecting step approach); *Tarwater v. Cupp*, 304 Or. 639, 645, 748 P.2d 125, 128 (1988) (rejecting step approach because it coerces jurors).

³³ See, e.g., *Dresnek v. State*, 697 P.2d 1059, 1060-64 (Alaska Ct. App. 1985), *aff'd per curiam*, 718 P.2d 156, *cert. denied sub nom.* *Spierings v. Alaska*, 479 U.S. 1021 (1986); *People v. Kurtzman*, 46 Cal. 3d 322, 326-34, 758 P.2d 572, 574-80, 250 Cal. Rptr. 244, 246-52 (1988). Courts in both states require the jury to acquit the defendant of the charged offense before returning a verdict on a lesser included offense, without otherwise structuring jury deliberations. *Dresnek*, 697 P.2d at 1064; *Kurtzman*, 46 Cal. 3d at 329-31, 758 P.2d at 576-77, 250 Cal. Rptr. at 248-50.

³⁴ See cases cited *supra* note 30.

³⁵ This Comment does not discuss jurisdictions that allow less than unanimous verdicts. See generally *Apodaca v. Oregon*, 406 U.S. 404, 411-14 (1972) (holding nonunanimous jury in state criminal trial constitutional).

³⁶ Note, *supra* note 7, at 518.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See *supra* notes 20-21 and accompanying text.

⁴¹ See *supra* notes 21-27 and accompanying text.

⁴² See *infra* note 103 and accompanying text.

province and impinging on defendants' rights.⁴³

An increasing number of state courts have adopted disagreement instructions.⁴⁴ These instructions, like the step approach, require juries to consider the charged offense first.⁴⁵ Disagreement instructions, however, do not require juries to reach a conclusion on the charged offenses before considering other offenses.⁴⁶ Jurors may consider lesser included offenses if they simply cannot agree on a defendant's guilt or innocence of the charged offense.⁴⁷

Courts in at least two states⁴⁸ have deviated even further from the step approach by adopting an unstructured approach.⁴⁹ Theoretically, this approach allows a jury to deliberate on the charged offense or lesser included offenses in whatever order the jury chooses.⁵⁰ The two courts adopting this rule have placed one condition on jury deliberations.⁵¹ These courts require a jury to acquit a defendant of all greater offenses before returning a verdict on a lesser included offense.⁵²

The disagreement instruction and unstructured approach to lesser included offense instructions represent a judicial trend away from the structured deliberations of the step approach.⁵³ These courts allege that

⁴³ See cases cited *supra* note 22.

⁴⁴ Since 1977, courts in at least seven states have adopted a disagreement instruction. See, e.g., cases cited *supra* note 32 (noting states that adopted disagreement instructions).

⁴⁵ Comment, *supra* note 7, at 574.

⁴⁶ *Id.*

⁴⁷ Note, *supra* note 7, at 519 (stating that disagreement instruction's distinctive feature allows jury to consider lesser included offenses without reaching agreement regarding charged offense).

⁴⁸ Some states fail to state precisely their position regarding jury instructions on lesser included offenses. See, e.g., *State v. Reyes*, 5 Haw. App. 651, 657-58, 706 P.2d 1326, 1330 & n.5 (1985) (refusing to structure jury's deliberations but recognizing futility in jury considering lesser included offenses once it finds defendant guilty of charged offense); *State v. Clayton*, 658 P.2d 624, 627 (Utah 1983) (requiring only that jury begin with consideration of charged offense).

⁴⁹ See cases cited *supra* note 33.

⁵⁰ See, e.g., *State v. Ogden*, 35 Or. App. 91, 580 P.2d 1049, 1055 (1978) (Johnson, J., concurring) (stating that jury should decide manner and order in which it considers offenses).

⁵¹ See *Dresnek v. State*, 697 P.2d 1059, 1064 (Alaska Ct. App. 1985), *aff'd per curiam*, 718 P.2d 156, *cert. denied sub nom. Spierings v. Alaska*, 479 U.S. 1021 (1986); *People v. Kurtzman*, 46 Cal. 3d 322, 331, 758 P.2d 572, 579, 250 Cal. Rptr. 244, 249 (1988).

⁵² See *supra* note 51.

⁵³ Since 1985, at least five states have followed the trend away from the step approach. See, e.g., cases cited *supra* note 21.

a number of reasons justify this trend. Courts following the trend argue that structured deliberations coerce jurors.⁵⁴ These courts believe that less structure avoids juror coercion⁵⁵ and increases judicial efficiency by reducing the number of hung juries.⁵⁶ These courts fear that structuring jury deliberations will invade the jury's province as ultimate fact-finder.⁵⁷ Finally, these courts fear that the step approach will impinge on defendants' quasi-constitutional rights to lesser included offense instructions.⁵⁸

B. Arguments in Favor of the Trend

1. Juror Coercion

Proponents of the trend away from the step approach claim that the step approach coerces jurors.⁵⁹ The step approach prevents a jury from considering lesser included offenses until it reaches a unanimous decision on the charged offense.⁶⁰ In the case of jury deadlock, minority jurors can either (1) convince the majority jurors to change their minds;

⁵⁴ See, e.g., *State v. Allen*, 301 Or. 35, 39-40, 717 P.2d 1178, 1180-81 (1986) (stating that step approach coerces jurors to accept majority view to avoid deadlock); *Tarwater v. Cupp*, 304 Or. 639, 645, 748 P.2d 125, 128 (1988) (holding that step approach coerces jurors).

⁵⁵ See Comment, *supra* note 7, at 573-74.

⁵⁶ See generally Comment, *supra* note 7, at 574 (arguing that disagreement instruction can reduce number of hung juries); Note, *supra* note 7, at 526 (concluding that acquittal-first instruction often causes hung juries). Commentators frequently cite a study by Vidmar to support this efficiency claim. See Vidmar, *Effects of Decision Alternatives on the Verdicts and Social Perceptions of Simulated Jurors*, 22 J. PERSONALITY & SOC. PSYCHOLOGY 211 (1972). Vidmar found that 46% of mock jury trials ended in conviction when the jury's only choice was first degree murder or not guilty. Comment, *supra* note 7, at 574 n.54; Note, *supra* note 7, at 526 n.70. When the jury had a choice of three offenses or not guilty, the conviction rate jumped to 92%. Comment, *supra* note 7, at 574-75; Note, *supra* note 7, at 526. These authors infer that increasing the number of options available for the jury fosters agreement, thus reducing the number of hung juries. Comment, *supra* note 7, at 574-75; Note, *supra* note 7, at 526.

Professor Flynn defines "hung jury" as a "jury (1) which, in the judgment of the court, has deliberated for a proper period of time, and (2) which has been discharged by the court because there appears to be no reasonable probability that the jury can agree upon a verdict." Flynn, *supra* note 6, at 130.

⁵⁷ See *supra* note 22 and accompanying text; see also *infra* notes 102-29 and accompanying text.

⁵⁸ See *supra* notes 22-24 and accompanying text; see also *infra* notes 102-29 and accompanying text.

⁵⁹ See *supra* note 54 and accompanying text.

⁶⁰ See *supra* notes 30 & 34-39 and accompanying text.

(2) hold out and cause a hung jury; or (3) accept the majority opinion.⁶¹ Commentators argue that minority jurors often relinquish their free will in the face of deadlock⁶² and accept the majority's view even though they disagree with that view.⁶³

Proponents of the trend claim that either a disagreement instruction or an unstructured approach would alleviate this coercion.⁶⁴ Under these approaches, a jury can consider lesser included offenses without first reaching a unanimous decision on the charged offense.⁶⁵ Thus, minority jurors in deadlocked deliberations need not forfeit their free will nor risk a hung jury.⁶⁶

The juror coercion argument fails. Jury deliberations by their very nature require jurors to change positions.⁶⁷ Unless all jurors enter the deliberation room in complete agreement, some jurors must change their views to reach a verdict.⁶⁸ The majority has not necessarily coerced minority jurors who accept the majority view.⁶⁹ A shift in the minority vote may have resulted from the majority persuading the dissenters on the merits of the case.⁷⁰

Specifically, courts typically have not considered acquittal instructions as excessively coercive.⁷¹ In a criminal trial with no lesser in-

⁶¹ Comment, *supra* note 7, at 571; Note, *supra* note 7, at 525.

⁶² Note, *supra* note 7, at 525 & n.68 (citing studies of mock jurors' interaction after reaching impasse).

⁶³ Comment, *supra* note 7, at 571 n.42 (inferring from mock juror studies that "many verdicts are the result of the minority accepting the majority's results for reasons other than a true belief in that position").

⁶⁴ See Note, *supra* note 7, at 526.

⁶⁵ See *id.*

⁶⁶ See *id.*

⁶⁷ See Flynn, *supra* note 6, at 132 (describing "give and take" of juror arguments). Flynn states: "Jury deliberation is a process which includes 'rational persuasion, sheer social pressure, and the psychological mechanism by which individual perceptions undergo change when exposed to [small] group discussion.'" *Id.* (quoting H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 489 (1966)).

⁶⁸ See *id.*

⁶⁹ See Comment, *supra* note 7, at 571. This author states that the minority shift results from the majority persuading the minority by "pointing out inconsistencies in testimony" or "attacking evidence." *Id.* However, this author also contends that many minority shifts result from coercion. *Id.* The author refers to three juror interviews after publicized trials and concludes that, "Although it is difficult to determine the precise content of jury deliberations, it is possible to infer that many verdicts are the result of [coercion]." *Id.* at 571 n.42 (emphasis added).

⁷⁰ See *id.* at 571.

⁷¹ *Id.* at 573. Federal courts have upheld the step approach and the disagreement instruction. See 2 C. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* § 498, at 800

cluded offenses, a jury must agree unanimously on acquittal or conviction of only the charged offense.⁷² Unless all jurors immediately agree on a verdict, a jury *begins* deliberations deadlocked. With no lesser included offenses to consider, a jury must either reach agreement on the charged offense or become a hung jury.⁷³ The step approach merely strings together a series of deliberations. Each step contains only one offense for a jury to consider. Thus, arguing that the step approach coerces minority jurors condemns the entire jury deliberation process.⁷⁴

2. Hung Juries

Proponents of the trend also argue that the disagreement instruction and the unstructured approach promote judicial efficiency by reducing the number of hung juries.⁷⁵ These proponents view hung juries as unsatisfactory conclusions to criminal trials.⁷⁶ Following a hung jury, the state has three options: (1) re prosecute;⁷⁷ (2) plea bargain for a guilty plea;⁷⁸ or (3) dismiss the charges.⁷⁹ If the state re prosecutes, the state pays a substantial cost for a second trial.⁸⁰ Moreover, proponents of the trend argue that a *technically guilty*⁸¹ defendant escapes punishment if

n.11; *see also* United States v. Tsanas, 572 F.2d 340, 346 (2d Cir.) (stating that court may choose preferable instruction), *cert. denied*, 435 U.S. 995 (1978).

⁷² See C. WRIGHT, *supra* note 2, § 512, at 7-9.

⁷³ See *infra* notes 75-101 and accompanying text.

⁷⁴ See *generally* State v. Allen, 301 Or. 35, 38, 717 P.2d 1178, 1181 (1986) (stating that every jury deliberation presents risk of coerced jurors).

⁷⁵ See Comment, *supra* note 7 (proposing use of disagreement instruction to reduce number of hung juries).

⁷⁶ See *id.* at 563 (stating that hung juries produce unsatisfactory conclusions because they result in neither acquittals nor convictions); Note, *supra* note 7, at 526 (stating that hung juries have positive aspects but remain undesirable for criminal trials).

⁷⁷ According to a three-year study by Professor Flynn, re prosecution occurred in 26% of hung jury cases. Flynn, *supra* note 6, at 133.

⁷⁸ According to Professor Flynn's study, 34% of hung jury cases ended in guilty pleas after negotiation between prosecution and defense. *Id.*

⁷⁹ In Professor Flynn's study, the state dismissed 40% of cases ending in hung juries. *Id.*

⁸⁰ Professor Flynn estimated that hung juries cost about \$6,683,040 in a three year period and showed that they took about 10% more time than trials in which the jury returned a verdict. *Id.*

⁸¹ See Comment, *supra* note 7, at 563-64. One writer cited two studies showing that two-thirds of hung juries favored conviction by votes of 9-3, 10-2, or 11-1. *Id.* at 563 n.11. This writer added that, "It is . . . likely . . . that the defendant released following a hung jury did, in fact, commit some crime, though not necessarily the principal crime charged. For these technically 'guilty' but legally free defendants the hung jury provides an unwarranted exemption from the penal function of the criminal justice

the state dismisses the charges.⁸²

According to this argument, the step approach increases the possibility of a hung jury. The step approach prevents a jury from considering lesser included offenses before reaching a unanimous decision on the charged offense.⁸³ Under this approach, if minority jurors in deadlocked deliberations refuse to change their positions and if they cannot persuade the majority to change its view,⁸⁴ a jury will hang.⁸⁵ The disagreement instruction and the unstructured approach, however, foster agreement by offering juries more alternatives.⁸⁶ These approaches allow a jury to consider all the offenses simultaneously.⁸⁷ With more alternatives, jurors can arrive at a mutually agreeable verdict earlier in the deliberations.⁸⁸ Therefore, less structure in jury deliberations increases judicial efficiency and reduces the number of hung juries.⁸⁹

This argument also fails. Hung juries, on the whole, do not injure the judicial process.⁹⁰ Although the effect of hung juries can be costly and time consuming,⁹¹ hung juries safeguard the defendant from erroneous convictions.⁹² Careful and thorough deliberations that end in

system." *Id.* at 563-64 (footnote omitted).

⁸² *See id.*

⁸³ *See supra* notes 30 & 34-39 and accompanying text.

⁸⁴ In a study of mock jurors, one author found that, on average, a minority coalition convinced a majority of the jurors to accept the minority view in only one in ten cases. R. SIMON, *THE JURY: ITS ROLE IN AMERICAN SOCIETY* 64 (1980). This data correlated closely with interviews of real jurors which found that minority jurors persuaded the majority to change its mind during deliberations "only with extreme infrequency." *Id.* at 65 (quoting H. KALVEN & H. ZEISEL, *supra* note 6, at 488).

Simon's report concluded that "this is only to say that *with very few exceptions the first ballot decides the outcome of the verdict*. And if this is true, then *the real decision is often made before the deliberation begins*." *Id.* (quoting H. KALVEN & H. ZEISEL, *supra* note 6, at 488) (emphasis in original).

⁸⁵ Comment, *supra* note 7, at 571; Note, *supra* note 7, at 525.

⁸⁶ Comment, *supra* note 7, at 574-75. Studies of mock jurors infer that "the disagreement instruction [or nonstructured approach] can reduce hung juries. If mock jurors are choosing from a range of verdicts and reaching agreement, this indicates that more options change the substance of deliberations and that new discussion on the lesser offense can lead to an otherwise unobtainable unanimity." *Id.* at 575.

⁸⁷ *See supra* notes 44-47 & 48-52 and accompanying text.

⁸⁸ Comment, *supra* note 7, at 574.

⁸⁹ *See id.* (arguing that disagreement instruction can reduce number of hung juries).

⁹⁰ *See Flynn, supra* note 6, at 133. Flynn states: "[H]ung juries do not seem to represent a phenomenon which in any fundamental sense is rendering the felony trial court system . . . ineffective or inefficient nor is it frustrating the operations of other institutions in the criminal justice system." *Id.*

⁹¹ *See supra* note 80 and accompanying text.

⁹² *See Flynn, supra* note 6, at 129. According to Flynn, the hung jury reaffirms the

hung juries stem from two underlying criminal procedure premises⁹³ — the presumption of innocence⁹⁴ and the requirement of proof beyond a reasonable doubt.⁹⁵

In a criminal trial, a jury must presume a defendant's innocence until the prosecution proves the defendant's guilt.⁹⁶ A jury must acquit a defendant if the prosecutor fails to present sufficient evidence to overcome this presumption.⁹⁷ Moreover, a prosecutor must persuade each juror of a defendant's guilt beyond a reasonable doubt, the highest standard of proof.⁹⁸ If even one juror has a reasonable doubt regarding a defendant's guilt, that juror will preclude a conviction because of the unanimity requirement.⁹⁹ A minority juror who maintains a reasonable doubt regarding the defendant's guilt must presume that the defendant is innocent.¹⁰⁰ Thus, minority jurors with reasonable doubts thereby safeguard defendants by forcing hung juries.¹⁰¹

criminal justice system's integrity by protecting the minority juror's dissent. *Id.* Contrary to coercion fears expressed by step approach critics, the hung jury seems to be a valuable safeguard for a defendant.

⁹³ *Id.* Professor Flynn notes that hung juries represent "the subtle interplay of two vital concepts in the criminal law -- the presumption of innocence and the exercise of reasonable doubt." *Id.*

⁹⁴ See *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (holding that "[t]he presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice").

Dean McCormick defines presumption of innocence in this fashion: "The phrase is probably better called the 'assumption of innocence' in that it describes our assumption that, in the absence of contrary facts, it is to be assumed that any person's conduct upon a given occasion was lawful." MCCORMICK ON EVIDENCE § 342, at 967 (E. Cleary 3d ed. 1984).

⁹⁵ See *In re Winship*, 397 U.S. 358, 363 (1970) (stating that "[t]he reasonable-doubt standard plays a vital role in the American scheme of criminal procedure").

In attempting to define the reasonable doubt standard, Dean McCormick states: "Reasonable doubt is a term in common use almost as familiar to jurors as to lawyers. . . . [I]t needs a skillful definer to make it plainer by multiplication of words. . . . [T]he explanations themselves often need more explanation than the term explained." MCCORMICK, *supra* note 94, at 963.

⁹⁶ See MCCORMICK, *supra* note 94, at 967-68; Mascolo, *supra* note 20, at 269.

⁹⁷ See MCCORMICK, *supra* note 94, at 962.

⁹⁸ Flynn, *supra* note 6, at 132.

⁹⁹ C. WRIGHT, *supra* note 2, § 511, at 3-5; see *supra* notes 35-36 and accompanying text.

¹⁰⁰ MCCORMICK, *supra* note 94, at 962.

¹⁰¹ Note, *supra* note 7, at 526. See *Huffman v. United States*, 297 F.2d 754, 759 (5th Cir. 1962) (Brown, J., concurring in part and dissenting in part). "A mistrial from a hung jury is a safeguard to liberty. In many areas it is the sole means by which one or a few may stand out against an overwhelming contemporary public sentiment.

3. Invasion of a Jury's Province and a Defendant's Quasi-Constitutional Right to a Lesser Included Offense Instruction

Proponents of the trend away from the step approach argue that the step approach invades the jury's province as ultimate fact-finder.¹⁰² These proponents argue that the step approach's structured deliberations restrict a jury's ability to determine the degree of a defendant's guilt.¹⁰³ The step approach precludes a jury from considering lesser included offenses until the jurors unanimously agree on a defendant's guilt or innocence of the charged offense.¹⁰⁴ Consequently, jurors cannot consider freely the alternatives to acquittal or conviction on the charged offense.¹⁰⁵ Thus, these proponents argue that this structure impinges on defendants' rights to lesser included offense instructions.¹⁰⁶

The step approach, however, does not invade the jury's province as

Nothing should interfere with its exercise." *Id.*

¹⁰² See Comment, *supra* note 22, at 591-92 (stating that step approach's structure invades jury's province by removing jury's nullification power); Note, *supra* note 10, at 579 (stating step approach's structure invades jury's province by coercing jurors); see also Note, *supra* note 7, at 523 & n.52.

¹⁰³ See Comment, *supra* note 22, at 594-95. One writer analogizes the step approach's restriction on jury deliberations to a situation in which someone hands a person a peg and shows the peg holder three holes. *Id.* at 595. None of the three holes fits the peg perfectly. *Id.* The peg holder inserts the peg into the first hole and must decide whether this hole best fits the peg. *Id.* The peg holder must decide on the first hole's fit before considering the fit of the other holes. *Id.* This writer concludes that the process will bias the peg holder toward the first hole. *Id.*

This analogy, however, fails to parallel accurately the step approach. In jury deliberations following the step approach, the court instructs the jurors to examine first the evidence regarding the charged offense. See *supra* text accompanying notes 35-36. The court then asks the jury if the evidence proves all the elements of the charged offense. See *supra* text accompanying note 37. The jury must conclusively decide this issue. See *supra* text accompanying notes 37-38. The evidence presented either satisfies all the elements and the jury convicts the defendant, or the evidence fails in some respect and the jury acquits. See *supra* text accompanying notes 38-39. The jury then considers lesser included offenses. *Id.*

The peg analogy assumes that the peg only fits one hole. Under the step approach, however, if the peg fits the first hole (the charged offense), the peg must necessarily fit all other holes (the lesser included offenses). See *supra* note 2 (explaining requirement that lesser included offense be one that defendant must have committed to have committed greater offense). The step approach merely requires that the peg holder conclusively state that the peg does not fit the first hole before determining whether the peg fits the next hole. See *supra* text accompanying note 37.

¹⁰⁴ See *supra* note 30 and accompanying text.

¹⁰⁵ See Comment, *supra* note 22, at 594-95.

¹⁰⁶ *Id.*

ultimate fact-finder.¹⁰⁷ While a jury maintains exclusive power to determine the truth regarding issues of fact, courts can restrict *how* a jury determines the truth.¹⁰⁸ Even the disagreement instruction orders deliberations by requiring that a jury first consider the charged offense.¹⁰⁹

Courts place several restrictions on the jury deliberation process.¹¹⁰ For example, the jury's province does not extend to making judgments based on possible punishment.¹¹¹ In reaching their verdict, courts uniformly prohibit juries from disregarding jury instructions and from exercising their *jury nullification power*.¹¹² Courts also prohibit juries from compromising to reach verdicts.¹¹³ Furthermore, in civil trials, courts strictly prohibit juries from reaching *quotient verdicts*.¹¹⁴ These restrictions on the process of jury deliberations do not invade the jury's province as ultimate fact-finder.¹¹⁵ Similarly, courts can instruct the jury on the order that the jurors should deliberate over the charged offense and any lesser included offenses.

More importantly, the step approach does not violate a defendant's right to a lesser included offense instruction.¹¹⁶ Courts universally recognize a defendant's right to jury instructions *explaining* lesser in-

¹⁰⁷ See *infra* notes 108-15 and accompanying text.

¹⁰⁸ See *infra* notes 111-15 and accompanying text.

¹⁰⁹ *State v. Ogden*, 35 Or. App. 91, 95, 580 P.2d 1049, 1053 (1978) (holding that instruction requiring jury to consider charged offense first does not invade jury's province).

¹¹⁰ See *infra* notes 111-15 and accompanying text.

¹¹¹ Ettinger, *In Search of a Reasoned Approach to the Lesser Included Offense*, 50 BROOKLYN L. REV. 191, 223 (1984) (stating that jury's province does not extend to reaching a verdict based on punishment at stake for defendant).

¹¹² Note, *supra* note 7, at 521-23. Courts universally recognize jury nullification, the power of the jury to disregard the judge's instructions. *Id.* at 521 n.45. Courts, however, consistently discourage the exercise of this power. See Comment, *supra* note 26, at 805-06 & nn.16-17; see also *infra* notes 155-57 and accompanying text. The United States Supreme Court stated that, "Public and private safety alike would be in peril, if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court and become a law unto themselves." *Sparf v. United States*, 156 U.S. 51, 101 (1985).

¹¹³ *People v. Boettcher*, 69 N.Y.2d 174, 183, 505 N.E.2d 594, 597, 513 N.Y.S.2d 83, 87 (1987) (opting for step approach because disagreement instructions "give insufficient weight to the principle that it is the duty of the jury not to reach compromise verdicts"); see *infra* notes 158-70 and accompanying text.

¹¹⁴ See *United States v. Grant Parish*, 143 F.2d 127, 128 (5th Cir. 1944) (naming quotient verdict a "gambling verdict" and reversing when jurors wrote down what each thought the judgment should be and divided by twelve).

¹¹⁵ See text accompanying *supra* notes 108-09 & 111-14.

¹¹⁶ See *infra* notes 117-29 and accompanying text.

cluded offenses¹¹⁷ when the evidence warrants such instructions.¹¹⁸ Courts, however, disagree over the approach judges should use in giving these instructions.¹¹⁹

The lesser included offense instruction benefits defendants by informing juries of the alternatives to verdicts of acquittal or conviction on the charged offense.¹²⁰ The step approach, disagreement instruction, and unstructured approach all equally apprise juries of their verdict options. A court's act of giving the instruction benefits a defendant regardless of the type of instruction that the court gives.¹²¹ Accordingly, federal courts have upheld both the disagreement instruction and the step approach as proper jury instructions.¹²²

Finally, the disagreement instruction and unstructured approaches have produced their own problems in criminal trials.¹²³ Primarily, these approaches allow juries to reach compromise verdicts.¹²⁴ Compromise verdicts impinge on defendants' constitutional rights to the presumption of innocence¹²⁵ and the requirement of proving guilt beyond a reasonable doubt.¹²⁶ Courts view defendants' rights to lesser included offense instructions as merely quasi-constitutional rights.¹²⁷ While protecting defendants' quasi-constitutional rights to lesser included offense instructions,¹²⁸ courts following the trend impinge on these defendants' consti-

¹¹⁷ C. WRIGHT, *supra* note 71, at 795. See *Beck v. Alabama*, 447 U.S. 625, 637 (1980) (recognizing courts' nearly universal acceptance of lesser included offense rule as valuable procedural safeguard for defendant); *Keeble v. United States*, 412 U.S. 205, 208 (1973) (stating that criminal defendants have undisputed rights to lesser included offense instructions).

¹¹⁸ C. WRIGHT, *supra* note 71, at 795.

¹¹⁹ See *supra* notes 30 & 34-39 and accompanying text (explaining step approach and courts that follow it); *supra* notes 44-47 and accompanying text (explaining disagreement instruction and courts that follow it).

¹²⁰ See *United States v. Forsythe*, 594 F.2d 947, 952 (3d Cir. 1979) (stating that lesser included offense instruction gives defendant benefit of possibility that jury may convict defendant of lesser crime); see also *supra* note 17 and accompanying text.

¹²¹ See *United States v. Tsanas*, 572 F.2d 340 (2d Cir.) (recognizing benefits of both step approach and disagreement instruction, and requiring court to give instruction defendant chooses because of tactical advantages), *cert. denied*, 435 U.S. 995 (1978).

¹²² See cases cited *supra* note 28.

¹²³ See *infra* notes 136-37 and accompanying text.

¹²⁴ See *infra* note 136.

¹²⁵ See *infra* notes 163-67 and accompanying text.

¹²⁶ See *infra* notes 163-67 and accompanying text.

¹²⁷ See *supra* note 20 and accompanying text.

¹²⁸ See *infra* note 159 (stating violation of defendant's rights ingrained in compromise verdicts); see also *supra* note 20 (noting establishment of defendant's right to lesser included offense instruction as quasi-constitutional right).

tutional rights. When balanced, these constitutional rights must outweigh the quasi-constitutional rights to lesser included offense instructions.¹²⁹

II. PROBLEMS WITH THE TREND

Proponents of the trend away from the step approach base this shift on the need for judicial efficiency¹³⁰ as well as on the fear of invading the jury's province.¹³¹ Both the disagreement instruction and the unstructured approach to jury instructions facilitate this efficiency goal.¹³² These approaches allow juries greater freedom in deciding how to deliberate and on what offenses, if any, to convict defendants.¹³³ The lack of structure also allows a jury to reach a verdict on a lesser included offense without first agreeing on the charged offense.¹³⁴ Both of these advantages purportedly reduce the number of costly hung juries. Proponents of the trend favor these approaches because of this efficiency.¹³⁵

Despite some increased efficiency resulting from the reduced risk of hung juries, the trend away from the step approach has produced two new problems in criminal trials: *compromise verdicts*¹³⁶ and *implied ac-*

¹²⁹ Courts often use balancing tests to decide between competing rights or interests. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564, 570 (1972) (stating that weighing process "has long been a part of any determination of the *form* of hearing required" by procedural due process) (emphasis in original); *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940) (balancing state interest against defendant's right to free exercise of religion); see also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2, at 791-94 (2d ed. 1988) (referring to courts' balancing defendant's right to freedom of expression and state's regulatory interests); *id.* at 1037-39 (recognizing implicit balancing of interests in determining statutory overbreadth).

¹³⁰ See Comment, *supra* note 7, at 574; Note, *supra* note 7, at 526; see also *supra* note 88 and accompanying text.

¹³¹ Note, *supra* note 7, at 523 & n.52; Comment, *supra* note 7, at 594-97.

¹³² See Note, *supra* note 7, at 526.

¹³³ *Id.* at 523.

¹³⁴ *Id.* at 525.

¹³⁵ Comment, *supra* note 7, at 574; Note, *supra* note 7, at 526.

¹³⁶ For a discussion of various types of compromise verdicts, see Comment, *supra* note 26, at 804-10. The author states that:

A jury can reach a verdict of guilty to a lesser crime in five separate ways:

1. The jury believes only part of the prosecution's evidence; and is convinced only of the perpetration of the lesser crime, included in both law and fact.

2. Some jurors are convinced of the guilt of the accused as to the greater crime, and others are convinced of that amount of evidence only showing the commission of the lesser, and settlement is upon the lesser.

3. All of the jurors are convinced of the full guilt of the accused, but for

quittals.¹³⁷ The disagreement instruction and the unstructured approach permit juries to reach compromise verdicts by giving juries the freedom to consider lesser included offenses without first agreeing on the charged offenses.¹³⁸ Juries might compromise quickly on lesser included offenses without thoroughly deliberating on the charged offenses.¹³⁹ These two approaches also produce implied acquittals by allowing juries to consider lesser included offenses without conclusively agreeing on the charged offenses.¹⁴⁰ The Supreme Court has held that convictions on lesser included offenses constitute implied acquittals of

various mitigating reasons choose not to convict him of the greater crime.

4. Some of the jurors are convinced of the guilt of the accused on the full crime, while others are convinced of his innocence, and they compromise to reach a verdict of guilty upon the lesser crime.

5. None of the jurors are convinced of the guilt of the accused as to the greater crime, but feeling that there is a good chance that he has committed the crime, they settle upon a verdict as to the lesser.

Id. at 805-06 (footnotes omitted).

Method 1 embodies the position taken by the common law and Federal Rule of Criminal Procedure 31(c). *Id.* at 805 n.14. Method 2 explains a compromise verdict as to the degree of guilt. *Id.* at 805 n.15. Method 3 illustrates the *jury nullification power*. See *Sparf v. United States*, 156 U.S. 51, 101 (1895). Although the jury has the *power* to return a verdict of not guilty when the facts prove the contrary, the Supreme Court has consistently stated that the jury does not have the *right* to disregard the law. Note, *supra* note 7, at 521-22 & n.45; *Sparf*, 156 U.S. at 101.

Methods 4 and 5 illustrate the types of jury compromise that courts commonly term *compromise verdicts*. The disagreement instruction and unstructured approach allow these two methods of compromise to occur unchecked. Comment, *supra* note 7, at 579. *Compromise verdicts* as used in this Comment refer primarily to these two methods of jury compromise. See also *infra* notes 144-70 and accompanying text.

¹³⁷ See *State v. Steeves*, 29 Or. 85, 43 P. 947 (1896). The court defined implied acquittal as follows: "If one is tried upon an indictment which either expressly charges or impliedly includes different degrees of the same crime . . . a conviction of one degree is an implied acquittal of all higher degrees, and bars their prosecution upon a new trial." *Id.* at 111, 43 P. at 953 (quoting 2 VANFLEET, FORMER ADJUDICATION § 606 (1895)).

¹³⁸ See Comment, *supra* note 7, at 579; Note, *supra* note 7, at 519.

¹³⁹ Note, *supra* note 7, at 523; see *United States v. Tsanas*, 572 F.2d 340, 346 (2d Cir.) (stating that jury will disregard its duty to deliberate thoroughly on charged offense and move too quickly to consideration of lesser included offenses if court does not use step approach), *cert. denied*, 435 U.S. 995 (1978).

¹⁴⁰ Note, *supra* note 7, at 525. Under the unstructured approach, as used by Alaska and California courts, before actually returning a verdict on a lesser included offense, the jury would have to decide conclusively on the charged offense. *Dresnek v. State*, 697 P.2d 1059, 1061-64 (Alaska Ct. App. 1986), *aff'd per curiam*, 718 P.2d 156, *cert. denied sub nom.* *Spierings v. Alaska*, 479 U.S. 1021 (1985); *People v. Kurtzman*, 46 Cal. 3d 322, 331, 758 P.2d 572, 577, 250 Cal. Rptr. 244, 249 (1988).

all greater offenses.¹⁴¹ Thus, if an appellate court overturned a defendant's lesser included offense conviction,¹⁴² the constitutional protection against double jeopardy¹⁴³ would bar reprosecution of the charged offense.

A. *Compromise Verdicts*

The disagreement instruction and unstructured approach encourage¹⁴⁴ compromise verdicts by eliminating the structure of jury deliberations.¹⁴⁵ Proponents of the trend view jury compromise as essential to the legal system.¹⁴⁶ Compromise allows a jury to use its *nullification power*.¹⁴⁷ As discussed, compromise verdicts also promote efficiency by avoiding hung juries.¹⁴⁸

Allowing jurors to compromise, however, presents two problems that warrant concern.¹⁴⁹ First, jurors might compromise to facilitate agreement and to end deliberations.¹⁵⁰ These jurors might render a guilty verdict on a lesser included offense if some jurors believe the defendant is guilty of the charged crime and other jurors believe that the defendant is innocent of all crimes.¹⁵¹ Second, jurors might compromise merely because they believe that the defendant *may have* committed the charged crime.¹⁵² These jurors might render a guilty verdict on a lesser included offense despite being unconvinced of a defendant's guilt of any

¹⁴¹ *Price v. Georgia*, 398 U.S. 323 (1970); *Green v. United States*, 355 U.S. 184 (1957).

¹⁴² *See Price*, 398 U.S. at 327 (holding that double jeopardy bars reprosecution on charged offense when jury initially convicted defendant of lesser included offense, thereby impliedly acquitting defendant of charged offense); *Green*, 355 U.S. at 188, 191 (stating that courts must treat identically implied and express acquittals; thus, implied acquittals also must bar subsequent prosecutions for same offenses).

¹⁴³ *See* U.S. Const. amend. V. "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." *Id.*

¹⁴⁴ *See* Note, *supra* note 7, at 527 (stating that judiciary should promote compromise in jury deliberations).

¹⁴⁵ Note, *supra* note 7, at 525; Comment, *supra* note 7, at 579.

¹⁴⁶ Note, *supra* note 7, at 527.

¹⁴⁷ *Id.* at 521-23; *see supra* note 112.

¹⁴⁸ Comment, *supra* note 7, at 577; *see supra* notes 75-101 and accompanying text.

¹⁴⁹ *See* Comment, *supra* note 26, at 805-06 & nn.16-17.

¹⁵⁰ *See* Comment, *supra* note 7, at 579 (stating that "[s]ome unmerited compromise will invariably occur; jurors sometimes do make quick compromises for reasons unrelated to the merits. . . . [J]uries sometimes compromise for the wrong reasons").

¹⁵¹ *See id.* at 805 & n.16.

¹⁵² *Id.*

offense,¹⁵³ yet also being unconvinced of a defendant's innocence. Consequently, these jurors might convict a defendant while still having a reasonable doubt regarding that defendant's guilt.¹⁵⁴

Courts vehemently discourage juries from nullifying the law.¹⁵⁵ Judicial abhorrence of the nullification power weakens the argument that courts should encourage jury compromise to increase efficiency and to avoid hung juries. Moreover, this nullification power exists regardless of the instruction given by the judge because jury nullification, by definition, results from a jury disregarding the judge's instructions.¹⁵⁶ Thus, even if jury nullification were desirable, it would not support adoption of the disagreement instruction or unstructured approach.¹⁵⁷

Courts also disapprove of compromise verdicts.¹⁵⁸ Jury instructions that promote compromise verdicts to reduce the number of hung juries actually remove procedural safeguards that protect defendants.¹⁵⁹ The disagreement instruction and the unstructured approach permit compromise verdicts to reduce the number of hung juries.¹⁶⁰ Compromise verdicts, however, convict the innocent.¹⁶¹ When jurors compromise to convict a defendant of a lesser included offense, they ignore their re-

¹⁵³ Comment, *supra* note 27, at 805-06 & n.17.

¹⁵⁴ See Flynn, *supra* note 6, at 132; see also *supra* note 94.

¹⁵⁵ See Note, *supra* note 7, at 521-22 & nn.45-46.

¹⁵⁶ See *id.*

¹⁵⁷ Cf. *Stein v. New York*, 346 U.S. 156, 178-79 (1953) (stating that courts cannot control juries' actions in reaching compromise verdicts other than through jury instructions).

¹⁵⁸ See *id.* (stating that courts disapprove of compromise verdicts but cannot control their occurrence other than through jury instructions).

¹⁵⁹ See Comment, *supra* note 7, at 575-76 & n.58 (stating that "[s]ome commentators have suggested that 'lowering the barriers' to consensus infringes on protections of the accused, either by effectively lowering the standard for guilt beyond a reasonable doubt or by providing prosecutors with a conviction when they did not meet their burdens").

Analogizing compromise verdicts with efforts of nonunanimous juries, one writer cites a jury study which states:

Quorum juries are more likely to produce verdicts as opposed to hanging; this is accomplished by reaching decisions on the basis of weaker evidence; and this means that more errors of both types will occur: convictions when the correct decision is acquittal; acquittals when the correct decision is conviction. Increased efficiency is purchased at some cost in accuracy [resulting in] increased error.

Id. (quoting M. SAKS & R. HASTIE, *SOCIAL PSYCHOLOGY IN COURT* 84-85 (1978)).

¹⁶⁰ See Comment, *supra* note 7, at 577.

¹⁶¹ *Id.*

sponsibility.¹⁶² Compromising jurors disregard the two basic premises that underlie every criminal trial: the presumption of innocence¹⁶³ and the requirement of proving guilt beyond a reasonable doubt.¹⁶⁴ By compromising to a guilty verdict on a lesser included offense, some jurors convict a defendant without evidence sufficient to prove the defendant's guilt.¹⁶⁵ These jurors fail to presume the defendant innocent until the evidence *proves* the defendant's guilt.¹⁶⁶ Concurrently, some jurors convict the defendant while still entertaining reasonable doubts regarding the defendant's guilt.¹⁶⁷

Compromise verdicts also fail adequately to punish the guilty.¹⁶⁸ Assume a defendant actually committed the charged crime of first degree murder. Jurors may agree that the defendant committed a crime, yet disagree on the degree of crime that the defendant committed. Some jurors may think the defendant is guilty of first degree murder. Other jurors may think the defendant is guilty of manslaughter. In such a case, the jurors might compromise to a guilty verdict on the lesser included offense of second degree murder to end deliberations.¹⁶⁹ Since that defendant actually committed first degree murder, the defendant receives less punishment than if the jury had considered adequately the charged offense. Together, these problems of compromise verdicts violate both prongs of the "twofold aim [of the law] . . . that guilt shall not escape or innocence suffer."¹⁷⁰

B. Implied Acquittals

The disagreement instruction and unstructured approach to jury instructions also produce implied acquittals.¹⁷¹ An established line of authority recognizes convictions on lesser included offenses as implied ac-

¹⁶² Comment, *supra* note 26, at 809-10 (stating that, "A conviction for a lesser crime [contrary to proven] fact reveals that the jury either compromised its convictions or seized for itself a pardoning power. Such a conviction means the jury violated its fundamental duties.").

¹⁶³ See *supra* note 94.

¹⁶⁴ See *supra* note 95.

¹⁶⁵ See MCCORMICK, *supra* note 94, at 962.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ See Comment, *supra* note 26, at 810 (stating that some courts recognize convictions on lesser included offenses as "favorable to the defendant" and find that these verdicts "can only benefit the accused").

¹⁶⁹ See *id.* at 813.

¹⁷⁰ Berger v. United States, 295 U.S. 78, 88 (1935).

¹⁷¹ See *supra* notes 136-37 and accompanying text.

quittals of all greater offenses.¹⁷² Under the disagreement instruction, a jury can convict a defendant without ever having reached a conclusion regarding the charged offense.¹⁷³ The prosecution, however, cannot re-prosecute a defendant on the charged offense if an appellate court overturns the conviction.¹⁷⁴ Double jeopardy bars re-prosecution because the defendant's conviction on the lesser included offense acts as an implied acquittal of the charged offense.¹⁷⁵

Additionally, under the unstructured approach, a jury can consider lesser included offenses without conclusively agreeing on, or even considering, the charged offense.¹⁷⁶ Again, conviction on the lesser included offense results in an implied acquittal of the charged offense.¹⁷⁷ Even instructions requiring a jury to acquit a defendant of the charged offense before returning a verdict on a lesser included offense can be problematic. A jury might vote ministerially to acquit a defendant of the charged offense after compromising to a guilty verdict on a lesser included offense.¹⁷⁸ The prosecution can never retry such a defendant on the charged offense, even though the jury never thoroughly deliberated on that offense.¹⁷⁹

III. PROPOSING A RETURN TO THE STEP APPROACH

A. *Need for a Statutory Solution*

Common law development of the lesser included offense rule prevented the formation of a uniform approach to lesser included offense

¹⁷² See *Green v. United States*, 355 U.S. 184, 191 (1957). “[I]t seems clear, under established principles of former jeopardy, that . . . this case can be treated no differently . . . than if the jury had returned a verdict which expressly read: ‘we find the defendant not guilty of murder in the first degree but guilty of murder in the second degree.’ *Id.*

“[I]t has long been settled . . . that a verdict of acquittal is final, ending a defendant’s jeopardy, and even when ‘not followed by any judgment, is a bar to a subsequent prosecution for the same offense.’” *Id.* at 188 (quoting *United States v. Ball*, 163 U.S. 662, 671 (1895)).

¹⁷³ Note, *supra* note 7, at 525.

¹⁷⁴ See *Green*, 355 U.S. at 191.

¹⁷⁵ *Id.* The implied acquittal doctrine arose out of cases in which conviction on a lesser included offense forced the defendant to choose between accepting the punishment for the lesser included offense of which the jury convicted the defendant, or chancing a retrial on the more severe charged offense. *Id.* at 189 & n.9.

¹⁷⁶ See *supra* notes 48-52 and accompanying text.

¹⁷⁷ *Green v. United States*, 355 U.S. 184, 188, 191 (1957).

¹⁷⁸ See *supra* notes 48-52 and accompanying text.

¹⁷⁹ See *Green*, 355 U.S. at 188, 191.

instructions.¹⁸⁰ While courts initially adopted the step approach, many courts have adopted disagreement instructions or unstructured approaches because they believe that these approaches provide more benefits for defendants.¹⁸¹ The disagreement instruction and the unstructured approach to lesser included offense instructions, however, produce compromise verdicts and implied acquittal problems.¹⁸² Compromise verdicts impinge on defendants' constitutional rights.¹⁸³ Implied acquittals produce procedural problems in retrials after appeals.¹⁸⁴ Courts need a uniform approach to protect defendants' constitutional rights and to preclude procedural problems after appeals.

B. Legislative Solution

A statute that mandates a step approach to jury instructions involving lesser included offenses will alleviate problems of compromise verdicts and implied acquittals.¹⁸⁵ This Comment proposes that Congress and the states enact the following statute:

In criminal trials, when a court instructs the jury on lesser included offenses,

(a) the court shall initially instruct the jury:

(1) to first determine the defendant's guilt or innocence regarding the charged offense;

(2) to determine the defendant's guilt or innocence regarding the next, less severe, lesser included offense only if the jury unanimously finds the defendant not guilty of the charged offense; and

(3) to continue to determine the defendant's guilt or innocence regarding lesser included offenses in descending order of severity, but only if the jury unanimously finds the defendant not guilty of the immediately preceding greater offense;

(b) the court shall also instruct the jury:

(1) that the prosecution has the burden of proving the defendant guilty beyond a reasonable doubt; and

(2) that the jury must presume the defendant innocent unless and until the evidence proves the defendant guilty beyond a reasonable doubt.

This proposed statute disposes of disagreement instructions and the unstructured approach to lesser included offenses and instead mandates a return to the step approach.

¹⁸⁰ See *supra* notes 1-4 and accompanying text.

¹⁸¹ See *supra* notes 9-24 and accompanying text.

¹⁸² See *supra* notes 136-37 and accompanying text.

¹⁸³ See *supra* notes 123-26 and accompanying text.

¹⁸⁴ See *supra* notes 171-75 and accompanying text.

¹⁸⁵ See *infra* notes 188-202 and accompanying text.

C. Advantages of the Step Approach

The disagreement instruction and the unstructured approach to lesser included offense instructions produce compromise verdicts and implied acquittal problems.¹⁸⁶ These approaches allow juries to consider lesser included offenses without thoroughly deliberating and reaching a conclusion on the charged offenses.¹⁸⁷

In contrast, the step approach alleviates these problems and serves several important purposes.¹⁸⁸ The step approach (1) insures that a jury deliberates thoroughly on each offense;¹⁸⁹ (2) produces a conclusive decision on each offense considered;¹⁹⁰ and (3) guards against compromise verdicts.¹⁹¹

The step approach requires a jury to deliberate thoroughly on each offense by requiring unanimous agreement on the charged offense before jurors may consider lesser included offenses.¹⁹² Under this approach, a jury's decision must be unanimous whether proceeding to consider lesser included offenses or returning a verdict.¹⁹³ Thus, a jury must consider all minority viewpoints.¹⁹⁴ Without this unanimity requirement, the majority would not give full attention to minority jurors' opinions.¹⁹⁵

Secondly, the step approach produces a conclusive decision on each offense considered.¹⁹⁶ Under the step approach, a jury must *expressly* acquit a defendant of each greater offense before considering lesser included offenses.¹⁹⁷ Requiring a jury to conclusively decide each offense

¹⁸⁶ See *supra* Part II.

¹⁸⁷ Note, *supra* note 7, at 523, 525 & n.59.

¹⁸⁸ Comment, *supra* note 7, at 567.

¹⁸⁹ Note, *supra* note 7, at 523; see *infra* notes 192-95 and accompanying text.

¹⁹⁰ Note, *supra* note 7, at 525; see *infra* notes 196-98 and accompanying text.

¹⁹¹ See Note, *supra* note 7, at 525; see also *infra* notes 199-202 and accompanying text.

¹⁹² Note, *supra* note 7, at 523.

¹⁹³ See *supra* notes 34-39 and accompanying text.

¹⁹⁴ See Note, *supra* note 7, at 523.

¹⁹⁵ *Id.* Professor Michael Saks conducted a study of jury verdicts using juries required to reach unanimous verdicts and juries required only to reach majority verdicts. M. SAKS, JURY VERDICTS 105 (1977). Professor Saks noted that, "Unanimous juries, in comparison to quorum juries, deliberate longer, are more likely to hang, divide the communication more equally and when convicting are more certain of the defendant's guilt." *Id.* (emphasis added). Saks concluded that "only in unanimous juries could the minority effectively alter the course set by the majority." *Id.* at 106.

¹⁹⁶ Note, *supra* note 7, at 525.

¹⁹⁷ *Id.*

in descending order of severity eliminates implied acquittal problems.¹⁹⁸

Finally, the step approach guards against compromise verdicts.¹⁹⁹ This approach precludes jurors from immediately considering lesser included offenses on which they can easily agree to convict the defendant.²⁰⁰ Rather, the step approach requires a jury to reach unanimous agreement on each offense before considering lesser included offenses.²⁰¹ The step approach encourages juries to consider seriously their duties: presuming the defendant innocent and requiring proof beyond a reasonable doubt. By eliminating compromise verdicts the step approach protects against the dual problems of convicting the innocent and inadequately punishing the guilty.²⁰²

CONCLUSION

The step approach began merely as a logical order for juries to consider lesser included offenses. This approach, however, also promotes important goals²⁰³ by encouraging thorough deliberations and conclusive results.²⁰⁴ Moreover, the step approach maintains safeguards built into criminal procedure: the presumption of innocence, the requirement of proof beyond a reasonable doubt, and the requirement of a unanimous conviction.²⁰⁵

Courts following the trend away from the step approach have adopted problematic instructions.²⁰⁶ These courts fear that the step approach invades the jury's province and infringes on defendants' rights to lesser included offense instructions.²⁰⁷ In an attempt to correct these perceived injustices, the alternative approaches allow compromise verdicts and implied acquittals.²⁰⁸ Under the guise of protection, these courts strip defendants of the criminal law's procedural safeguards.²⁰⁹

¹⁹⁸ See *id.*

¹⁹⁹ Comment, *supra* note 7, at 567.

²⁰⁰ Note, *supra* note 7, at 523. The disagreement instruction allows a jury to "make too little effort toward achieving unanimity on the greater offense and move too readily to the lesser one." *United States v. Tsanas*, 572 F.2d 340, 345 (2d Cir.), *cert. denied*, 435 U.S. 995 (1978).

²⁰¹ See *supra* notes 30 & 34-39 and accompanying text.

²⁰² Comment, *supra* note 7, at 575-76 & n.58; see *supra* note 159.

²⁰³ See *supra* notes 40 & 188 and accompanying text.

²⁰⁴ See *supra* notes 192-98 and accompanying text.

²⁰⁵ See *supra* notes 94-95 & 99 and accompanying text.

²⁰⁶ See *supra* notes 136-37 and accompanying text.

²⁰⁷ See *supra* note 22 and accompanying text.

²⁰⁸ See *supra* notes 136-37 and accompanying text.

²⁰⁹ See *supra* notes 93-95 & 159 and accompanying text.

Accordingly, Congress and the states should enact uniform legislation to redirect these straying courts. This Comment proposes a statute that will remedy these courts' digression. The proposed statute disposes of disagreement instructions and the unstructured approach to lesser included offenses and instead mandates a return to the step approach in all criminal courts.

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