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Bargaining Inside the Black Box

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ABSTRACT

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

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

The vast majority of criminal convictions are obtained by a negotiation and deal.¹ Scholars worry about the fairness of these plea bargains.² They fret over who is doing the negotiating and under what circumstances, and some question the very propriety of negotiating criminal convictions at all.³

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

And yet at least one form of bargaining is not antithetical to the criminal trial at all, but in fact takes place right at the heart of it. When criminal juries are presented with a menu of verdict options and compromise among them to reach a verdict in the

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¹ See William Stuntz, Of Seatbelts and Sentences, Supreme Court Justices and Spending Patterns – Understanding the Unraveling of American Criminal Justice, 119 Harv. L. Rev. 148 (2006) (“the guilty plea rate stands at 95% and is still rising.”) (citing the Bureau of Justice Statistics, US. Dep’t of Justice Source Book of Criminal Justice Statistics Online). Of course some pleas are not preceded by any negotiation, but it is safe to say the vast majority of convictions result from some sort of plea deal.


³ See Scott and Stuntz, supra note – at 1909.


⁵ While there are some who call for the abolition of plea bargaining entirely, see Stephen J. Schulhofer, Plea Bargaining as Disaster, 101 Yale L.J. 1979, 2009 (1992) (“Plea bargaining is a disaster [that] can be, and should be, abolished.”), most critics now focus on specific aspects of the process. See Bibas, supra note –; Wright and Miller, supra note --.

⁶ See supra note – at 1909.
middle, they engage in what I call “intrajury negotiation.”7 The proposition that jurors compromise is supported by empirical evidence, and is well-accepted by courts and commentators.8 It also should not be surprising; jurors, like any group decision maker, have strong incentives to reach consensus, and negotiation is a natural and efficient way to do so when multiple options are available and time is limited.

But negotiation is not a task typically associated with jurors. Conventional wisdom clings to the “12 Angry Men” vision of jury decision-making.9 Verdicts should result from a quest to discern truth.10 Either a defendant is guilty or he is not; either a prosecutor can prove his case or he cannot.

Indeed, terminology reflects this notion: jury discussions are called “deliberations,” not “negotiations.” Although the concepts are related, there is an important distinction: whether multiple minds are looking for factual consensus. In the traditional vision, twelve strangers discuss evidence until they are all convinced of the same story. We call this a deliberation. On the other end of the spectrum is a deal unconcerned with factual agreement. When a defense attorney and prosecutor negotiate a

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8 Muller, supra n. at 782; Daniel Farber, Toward a New Legal Realism, 68 U. Chi. L. Rev. 279, 287 (2001) (“Experiments confirm that the compromise bias may affect verdicts”); Erik Lillquist, The Puzzling Return of Jury Sentencing: Misgivings about Apprendi, 82 N.C. L. Rev. 621, 627 (2004) (“The compromise and decoy effects predict that when the jury is presented with more than one guilty option, the percentage of defendants found not guilty of both offenses will be lower than the percentage of defendants found not guilty when there is just one charge”); Michael Cahill, Punishment Decisions at Conviction: Recognizing the Jury as Fault-Finder, 2005 U. Chi. Legal F. 91, 125-26 (2005) (discussing common critiques of compromise verdicts). See also Beck v. Alabama, 447 U.S. 625 (1980) (discussing the potential for compromise verdicts in holding that a capital jury must be provided with “a third option” to convict on a lesser included offense); Johnson v. Louisiana, 406 U.S. 380 (1972) (Douglas, J. dissenting) (referring to the “many compromise verdicts on lesser-included offenses and lesser sentences” in the context of a debate over requiring unanimous juries).

9 Phoebe Elsworth, One Inspiring Jury, 101 Mich. L. Rev. 1387 (2003) (“The jury in Twelve Angry Men is the embodiment of this ideal, the jury at its finest.”).

10 Elsworth, supra note – at 1391.
plea, for example, they are not typically attempting to convince each other of the defendant’s guilt or innocence. A whole host of considerations comes into play – the defendant’s character, his criminal record, the consequences he will likely face – aside from the story of the crime. That is why most call this conversation a plea *negotiation*, and not a plea *deliberation*. A deliberation becomes a negotiation when a result is reached without regard for the participants’ subjective view on the facts.

But even though we don’t refer to jury discussions as negotiations, many of them turn into just that. The truth, as jury scholars have demonstrated, is that “juries are notoriously prone to compromise:” factions on a jury will split their differences to achieve “unanimous support for some negotiated mix of convictions and acquittals.” This means that many criminal verdicts do not result from a jury’s unanimous factual assessment but will instead reflect a negotiated settlement.

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

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14 See, e.g., Eric Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 783 (1998) (“By reaching a compromise verdict, the jury dishonors the reasonable doubt standard, because each faction on the jury surrenders its honestly held beliefs on the question of proof beyond a reasonable doubt. To be sure, compromise verdicts are undoubtedly quite common, and they help to resolve cases, avoid retrials, and clear crowded dockets. But useful as they may be, compromise verdicts are lawless verdicts.”); Ashlee Smith, *Vice–a-verbatim: Legally Inconsistent Jury Verdicts Should Not Stand*, 35 U. BALT. L. REV. 395 (2006) (“Compromise verdicts are perhaps the most troubling means of reaching an inconsistent verdict, as they constitute a willful and conscious disregard of the court’s instructions.”). Compromise verdicts are also used as part of the debate over jury sentencing reforms. See Michael Cahill, *Punishment Decisions at Conviction: Recognizing the Jury as Fault-Finder*, 2005 U. CHI. LEGAL F. 91 (2005); Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About Apprendi*, 82 N. CAR. L. REV. 621, 662 (2004); Chris Kemmitt, *Function Over Form: Reviving the Criminal Jury’s Historical Role as a Sentencing Body*,
Is this reaction justified? If jurors each view the case differently and nonetheless negotiate with each other to reach a compromise, why is that unquestionably wrong when 95% of criminal convictions are the result of a similar process?

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

Drawing this comparison leads to several observations that I will place in two broad categories. First, I will discuss the similarities between intrajury and plea negotiations. The analogy is closer than one might suspect. Besides the fact that both types of deals are secret and not reviewed, the negotiating actors are all highly motivated to make a deal and they are also afflicted with many of the same bargaining pitfalls. Plea bargaining scholars, for example, have pointed out that the way a prosecutor “frames” a plea in negotiations – comparing it to other (perhaps severe) options – can distort the defendant’s choice.\(^\text{15}\) I will argue that the same could be said of a jury trial where prosecutors, no doubt mindful of the likelihood of verdict negotiation among jurors, over-charge in anticipation of a compromise and thereby determine the boundaries and influence the result of the jury’s negotiation.

Second, I will distinguish the two. Certainly plea negotiations and intrajury negotiations are different in significant ways – the negotiators themselves are different, for one thing, and they negotiate under very different conditions. These differences are important, and our evaluation of intrajury negotiation is enhanced by the comparison. Sentence forecasts, for example, play an important role in plea negotiations, but jurors are not generally responsible for determining sentences, and hence engage in verdict negotiation somewhat in the dark, or at least with less information than do prosecutors and defense attorneys.\(^\text{16}\) If criminal verdicts are going to be negotiated in one form or another – either by jurors or by their professional counterparts – perhaps we should provide all negotiators with some of this valuable information.

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\(^{16}\) Michael Cahill, Punishment Decisions at Conviction: Recognizing the Jury as Fault-Finder, 2005 U. Chi. Legal F. 91 (2005) (making this observation and arguing that the jury should not be blind to the consequences of its conviction).
Ultimately, I conclude that while steps can and should be taken to improve intrajury negotiation, the common critiques of compromise verdicts – that they are lawless flaws in the jury system – do not have the force they might in a world without plea bargaining. I assume in this paper that juries are valuable: our system is enhanced by committing legal decisions to the hands of ordinary people with common sense who are sensitive to context and who can provide a check on overbroad criminal law. These assets of the jury are not lost just because a juror negotiates with his colleagues to find an acceptable result rather than deliberating until reaching a factual consensus. Negotiation is now a staple of criminal law and, in the context of plea bargaining, it is an aspect of criminal adjudication that has been thoroughly examined. Instead of quickly dismissing intrajury negotiation as an illegitimate process, I argue we should recognize it as a reality and seek to improve it with lessons we have learned from plea negotiations.

This Article proceeds in four parts. Part one presents empirical studies on jury behavior that demonstrate the likelihood of intrajury negotiation and compromise verdicts. Parts two and three then analyze intrajury negotiation by comparing the practice to plea bargaining. Part two will connect the two processes and discuss what can be learned from the similarities; part three will tackle how plea negotiation and intrajury negotiation are different and explore how those differences inform whether we think intrajury negotiation is legitimate. Finally part four will explore normative implications and will discuss possible reforms.

PART I. HOW DO WE KNOW JURORS NEGOTIATE?

Perhaps the defining feature of a jury’s deliberation is that it takes place in secret: a set of strangers are charged with assigning criminal liability to an individual, told that they can keep their discussions private, and are not required to provide reasons for their final judgment. Courts are adamant about protecting the mystery and secrecy of “the black box”; jury discussions are

17 For a discussion on the values of a jury generally, see HARRY KALVEN AND HANS ZEISEL, THE AMERICAN JURY, 3 (Little Brown & Co. 1966).

18 Scott & Stuntz, supra note – at 1912 (“plea bargaining is not some adjunct to the criminal justice system; it is the criminal justice system.”).

19 See sources cited in supra note 2.

among the most private and privileged in our legal system. Consequently, it is impossible to know what exactly takes place in a jury room.

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

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

On the other hand, some say it is the defendant who benefits from these instructions because they can lead to a compromise that reflects a jury’s mercy. Those who adopt this view (articulated by Justice Brennan) believe that when a jury

21 United States v. Olano, 607 U.S. 725, 737 (1993) (“the deliberations of the jury shall remain private and secret’’); see also United States v. Thomas, 116 F.3d 606, 619 (1997) (“The jury as we know it is supposed to reach its decisions in the mystery and security of secrecy: objections to the secrecy of jury deliberations are nothing less than objections to the jury system itself.’’)


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


25 The Supreme Court has held that the Constitution requires the submission of lesser included offense instructions to a jury when the death penalty is an option. See Beck v. Alabama, 447 U.S. 625 (1980); see also Morris v. Mathews, 475 U.S. 237, 251-52 (1986) (Blackmun, J. concurring).
retains a reasonable doubt about the defendant’s guilt but still has a feeling he did something wrong, there is a “substantial risk” it will not return a verdict of acquittal as it should. On this theory, the defendant is better off if jurors are not forced to make an all or nothing choice between, for example, first degree murder and setting the defendant free.

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


27 Indeed, the vast majority of objections to lesser included offense instructions come from the prosecution side, which suggests that at least prosecutors see validity to this theory. See Ram Orzach and Stephen Spurr, Lesser-Included Offenses, 28 INT’L REV. L. ECON. 240 (2008).

28 By 1980 when the Supreme Court took up its seminal case on lesser-includeds, Beck v. Alabama, it had long been “beyond dispute” in federal courts that the defendant is entitled to an instruction on a lesser included offense if the evidence permits it, and even at that time every state court to address the issue concurred. 447 U.S. 625, 636 (1980).

29 Only North Carolina, Tennessee, and Oklahoma require that a jury be instructed on lesser-included offenses (meaning that the court must issue these instructions sua sponte); in the vast majority of jurisdictions one of the parties must request it. See Kelman, supra note – at 305, n. 26.

30 See FED. R. CRIM. P. 31(c); 3 Charles Alan Wright, et al., Federal Practice and Procedure §515, at 34 (3d ed. 2004); Hoffeimer, supra note at 590-91 (collecting state cases). Ram Orzach and Stephen Spurr, Lesser Included Offenses, INT’L REV. L. ECON. 239-245 (“Is there any justification for denying the defendant a jury instruction on a lesser-included offense? Almost all courts and commentators say no.”). The standards for submitting the instructions are generally permissive. So, for example, it is reversible error not to instruct on a less serious offense when a genuine dispute of fact exists about a state of mind that distinguishes one crime from another. And most courts agree that the instruction should be given if there is any evidence of a factual circumstance (say, self defense or provocation) that would justify conviction on the lesser charge. Id. See also State v. Givens, 917 S.W.2d 215, 219 (Mo. Ct. App. 1996) (“The trial court should resolve all doubts upon the evidence in favor of instructing on the lower degree of the crime, leaving it to the jury to decide of which of the two offenses, if any, the defendant is guilty.”); Tucker v. United States, 871 A.2d 453, 461 (D.C. 2005) (“Any evidence, however weak, is sufficient to support a lesser-included instruction so long as a jury could rationally convict . . . after crediting the evidence.” (quoting Woodard v. United States, 738 A.2d 254, 261 (D.C. 1999))); Louisy v. State, 667 So. 2d 972, 974 (Fla. Dist. Ct. App. 1996) (“Even if the weight of the evidence is overwhelmingly in favor of the state's charge, the defendant is entitled to an instruction on a lesser offense as to which there is any evidence.” (quoting Kolaric v. State, 616 So. 2d 117, 119 (Fla. Dist. Ct. App. 1993)).
The second relevant and certain observation is that those on the “front lines” of criminal litigation – judges, prosecutors, and defense attorneys – are keenly aware that juries compromise. Regardless of whether they think it appropriate or not, most attorneys agree that “jurors arguing and coming to some sort of compromise is just part of the system.”

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

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

Fortunately, modern jury scholars have developed techniques which enable us to come close. Recordings of actual jury deliberation are rare (and met with strong resistance) but the last fifty years have brought new enthusiasm and new methodologies to the study of jury decision-making. In the

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31 Hoffheimer, supra note – at 592-94.
32 John Hagan, Legal Experts Criticize Jurors Who Compromise, Plain Dealer Reporter (Aug. 23 1997 at p. 8A). For other newspaper reports presenting attorney views on compromise verdicts see Eddy McNeil, Penn Judge Lets Jurors Consider Two More Charges, The San Diego Union Tribune (June 4, 1987 at B-1) (“What happens when nobody gets up and argues a lesser-included offense is that it’s just sitting out there for a compromise”); Jason Riley, State Law Leaves Jurors Puzzled, (Feb. 26, 2006 The Courier-Journal at 1A) (“our juries are guessing at the proper results or more often convicting of a lesser included offense sometimes rightly sometimes wrongly simply as a compromise to confusion.”).
34 Id. (citing Sansone v. United States, 380 U.S. 343, 350, n.6 (1965)).
35 Scientific study of jury decision-making can be traced to 1953 and the Chicago Jury Project, a multi-year, multi-scientist endeavor from the University of Chicago with the then-novel objective of using social science methods to study legal phenomena. As part of that project, researchers secretly recorded the deliberations of several federal juries. This effort resulted in a public outcry, a congressional inquiry, and subsequent legislation prohibiting the practice. See Diamond and Vidmar, supra note – at 1857.
discussion that follows, I discuss two varieties of jury studies: (1) post-trial interviews of real jurors and (2) results of mock jury simulations. Together they reveal that when a jury is given multiple verdict options (more than just acquit or convict on one charge) it is “prone to pick the compromise judgment, even if that judgment would attract little support in a two-option set.”

A. JURY SURVEY DATA

One method of studying jury deliberation is through post-trial interviews with jurors. Several years ago the National Center for State Courts (NCSC) conducted a large project of this nature. With the goal of identifying factors that lead to hung juries, the NCSC gathered data from approximately 3500 jurors who sat in felony trials in four large urban areas. It recorded the final verdict for each jury (acquittal, conviction, or deadlock) and then asked the individual jurors, once their trial had concluded, “to report on their individual opinions, verdict preferences, and the dynamics of deliberations.” Several NCSC discoveries bear on the present discussion.

First, the study concluded that jury deliberation does in fact make a difference in the final verdict. This was an important finding because a different and common perception – attributed to jury scholar pioneers Kalven and Zeisel – is that jury deliberation does not really matter; jurors make up their minds during the trial, and although deliberation “brings out the picture, the outcome is pre-determined.” But this theory was not born out by the Hung Jury Project data. The majority of jurors interviewed – sixty two percent – reported that they changed their mind at least once during the trial. And almost half of those jurors – 24% – said that


37 Each method of studying jury decision-making comes with its own strengths and weaknesses. The advantage to jury survey data is that it comes from real jurors as opposed to participants in a study; the weakness is that these jurors can be unreliable indicators of how exactly a jury decision is made. Faulty recollection, hindsight, and other biases can color the way a jury recounts the deliberation.


their mind was changed during deliberation. This led Valerie Hans and Nicole Waters, two of the authors of the NCSC study, to conclude that in fact “deliberations play a vital role in generating juror consensus.”

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

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

Why would a person vote for a verdict when it does not reflect what he thinks is the “best” or “right” outcome? Of course, one possibility is a “12 Angry Men” success story: a change of opinion following collective examination of facts. A second possibility presumably is that jurors don’t care about getting it right in the first place and so change their votes on a whim. But assuming, as I do, that jurors generally take their civic duty seriously, perhaps the divergence between group outcomes and individual preferences simply means that a deal was made. This possibility is hardly remote. Indeed, studies on group decision-making reveal how prone jurors are to compromise.

**B. Mock Jury Simulations**

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41 Waters and Hans, supra note – at 522.
42 Id. at 513.
43 Id. at 520.
44 Id at 516.
45 Hannaford et al., supra note – at 25.
46 Id. at 523.
47 Id. at 537.
In a mock jury experiment, participants witness a simulated trial under various conditions and are asked to render a judgment.\footnote{Of course, simulated experiments suffer from the limitation that participants know their verdict is fictitious and without real world consequences. This limitation on mock jury simulation is well recognized. See, e.g., Erik Lillquest, *The Puzzling Return of Jury Sentencing: Misgivings About Apprendi*, 82 N. CAR. L. REV. 621, 662 (2004). But several studies suggest that mock jurors and real jurors do not reach decisions in dramatically different ways, and jury simulations have the added benefit of allowing scientists to manipulate conditions and focus on specific variables of interest. See MacCoun at 224, citing R.M. Bray and N. L. Kerr in *The Psychology of the Courtroom* (Academic Press, New York 1982) p. 287; E.A. LIND AND L. WALKER, *LAW AND HUMAN BEHAVIOR*, 3, 5 (1979). See also Reid Hastie, Steven Penrod, Nancy Pennington, *INSIDE THE JURY*, (Harv Univ Press 1983).} This field of study is vast indeed, and I will focus on only a few studies: (1) those that test an individual’s inclination to compromise in legal decision-making, (2) and those that show what happens when multiple verdict alternatives are given to a deliberating group.

1. **Effect of Multiple Options on Legal Decision Making**

Social scientists tell us that the framing of a choice matters: that is, a person’s decision-making behavior is altered by the presence or absence of additional options. A savvy salesperson knows, for example, that a customer can be induced to buy an intermediately expensive camera when he is first shown a bare bones one and then an expensive alternative.\footnote{Kelman, *supra* note -- at 287, citing Itamar Simonson & Amos Tversky, *Choice in Context: Tradeoff Contrast and Extremeness Aversion*, 29 J. Marketing Res. 281, 282 (1992).} This effect has been named “the compromise effect” by behavioral scientists, and it applies beyond marketing studies to the context of juror decision-making.

One of the more well-known empirical studies on this topic was conducted in the mid-nineties by Mark Kelman, Yuval Rottenstreich, and Amos Tversky.\footnote{Mark Kelman, Yuval Rottenstreich, Amos Tversky, *Context Dependence in Legal Decision Making*, 25 J. LEGAL STUD. 287 (1996).} Kelman and his colleagues enlisted randomly selected mock jurors to read and evaluate case summaries.\footnote{Kelman, *supra* note at 287.} One case involved a defendant who purposely shot and killed a security guard after an altercation in which the guard falsely accused the defendant of burglary and used a racial epithet. The subjects were all informed that the possible verdicts were special circumstances murder (the most serious offense), murder,
voluntary manslaughter, and involuntary manslaughter. They were also told that involuntary manslaughter was appropriate only if the defendant reasonably believed he was defending himself, and that special circumstances murder was appropriate only if the guard was acting in the line of duty.

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

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

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

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52 The point of informing all participants of all four options was to control for the possibility that the differences across groups could be explained by additional information signaled by the additional options. Id. at 294.
53 Id. at 292.
54 Id. at 292-94
55 Id. at 295.
56 Id. at 295.
57 Id. at 293.
the case, confirming the tendency for compromise among verdict alternatives.\textsuperscript{58}

2. **THE EFFECT OF MULTIPLE VERDICT OPTIONS ON DELIBERATION**

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

One recent such study examined the “third verdict” option under Scottish law.\textsuperscript{59} For over three hundred years, Scottish jurors have been given three possible verdicts: guilty, not guilty, or “not proven.”\textsuperscript{60} The “not proven” verdict has the same legal effect as a not guilty verdict (meaning the accused cannot be retried); it is

\textsuperscript{58} Kelman’s study was not the first or the last empirical look into the compromise effect on legal-decision making. His results have been replicated by many other social scientists in several different contexts, and his work is often cited by legal scholars. *See, e.g.*, Neil Vidmar, *Effects of Decision Alternatives on the Verdicts and Social Perceptions of Simulated Jurors*, 22 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY, 211 (1972); Robert MacCoun, *Experimental Research on Jury Decision-Making*, supra note –. *See also* Cass Sunstein, *Trimming*, 122 HARV. L. REV. 1049, 1065, n.69 (2009) (citing Kelman as evidence that “jurors themselves have been found to trim, in the sense that they steer between the extremes; for this reason, the prosecutor's selection of criminal counts can greatly influence what the jury ends up doing.”); J.J. Prescott, Sonja Starr, *Improving Criminal Jury Decision Making After the Blakely Revolution*, 2006 U. ILL. L. REV. 301 (2006) (citing Kelman and Vidmar to show “individuals and groups, when presented with three or more options, tend to pick the middle option more than would be expected if they were acting rationally. Mock juries presented with the option of convicting on a lesser-included offense quite frequently take that option, generating a “compromise effect.”)

One area of the law where this “compromise effect” has been well-tested is in the controversial area of insanity verdicts. Critics say that giving a jury an additional option in cases where the defendant’s mental state is in question – an option sometimes called “diminished responsibility,” “diminished capacity” or “guilty but mentally ill” -- causes compromised and inconsistent verdicts. Norman Finkel, *The Insanity Defense: A Comparison of Verdict Schemas*, 15 LAW AND HUMAN BEHAV. 533 (1991); Bart Schwartz, *Should Juries be informed of the Consequences of the Insanity Verdict*, JOURNAL OF PSYCHIATRY AND LAW 167 (1980).


\textsuperscript{60} Hope et al, *supra* note – at 241.
reserved for situations where there is reasonable doubt about a person’s guilt, but there is still a sense the defendant did something wrong. Critics claim that the third verdict may be viewed by jurors as a compromise when the evidence is not sufficiently compelling, thus artificially decreasing the number of guilty verdicts that would result in a traditional binary system.\footnote{Id. at 243.}

Psychologist Lorraine Hope and several of her colleagues empirically tested this hypothesis, specifically noting the parallels with the common American practice of including charges on lesser included offenses.\footnote{Id.} They recruited about 150 jury-eligible community participants and placed them in small groups (4 to 8 members per set). The groups were randomly assigned to one of six experimental conditions: half were given two verdict options, half were given three verdicts (including “not proven”), and the conditions were further varied on the basis of strength of evidence of guilt (weak, moderate, or strong).\footnote{Id. at 248.} After reading a case study of a fictitious murder trial, the mock jurors were told to deliberate for at least twenty minutes. They were told that they should aim for a unanimous verdict, but to record the verdict of the majority of group members if unanimity was impossible.\footnote{Id.}

The results indicated that the availability of the third option significantly affected the decisions reached by the jurors. Seventy percent of juries given three verdict options reached the “not proven” verdict; only five percent in that set returned a not guilty verdict.\footnote{Id. ; Id. at 245.} This differed significantly from the 65% of juries who returned a not guilty option when given only two options. Interestingly, however, the effect of the third option was much weaker when the evidence of guilt was clear-cut one way or the other; it was only in the close cases (when the strength of evidence was “moderate”) where the availability of the third verdict made a real difference.\footnote{Id. at 251.}

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

At the outset, it should be noted that deliberation of any sort has been shown “to make group members more extreme in
their views than they were before they started to talk.\footnote{67} In Cass Sunstein’s principal article on the subject, groups from Boulder, Colorado met to discuss hot button political issues.\footnote{68} The major effect of the discussion, the researchers found, was to make liberal-minded people more liberal and conservative-minded people more conservative. Even when the subjects reported their post-deliberation opinions anonymously, their views were more extreme after deliberation than they were before discussion began. Sunstein focused on political discussions among strangers, but he points to evidence of group polarization in jury studies as well.\footnote{69}

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

One of the most comprehensive and well-regarded empirical studies of deliberation dynamics was conducted by Reid Hastie, Steven Penrod, and Nancy Pennington, and published in their book, Inside the Jury.\footnote{70} Hastie and his colleagues made their jury simulation experiments as realistic as possible: they recruited mock jurors from Superior Court jury pools in Massachusetts, they conducted a voir dire excluding those who may have had a pre-existing bias, and they hired professional actors and attorneys to re-enact a murder trial live in front of the participants.\footnote{71}

The jurors were given four verdict options: first degree murder, second degree murder, manslaughter and not guilty.\footnote{72} Some of Hastie’s mock jurors were instructed that their decision must be unanimous, and others were given a majority rule

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\footnote{67} Cass Sunstein, \textit{What Happened on Deliberation Day?}, 95 CAL. L. REV. 915 (2007); see also MacCoun, \textit{supra} note – at 228.

\footnote{68} Sunstein, \textit{supra} note -- at 927.

\footnote{69} He refers to a study by Martin Kaplan and David Myers, social scientists who were interested in group polarization among jurors in the 1970s. Kaplan and Myers divided mock jurors into groups and assigned each one a traffic case to read and evaluate. They found that “group discussion enhanced the dominant initial leanings of the group members.” Id. (citing and discussing David Myers and Martin Kaplan, \textit{Group Induced Polarization in Simulated Juries}, 2 PERSONALITY & SOC. PSYCHOL. BULL. 63 (1976). For a resource collecting several of the “hundreds of small group studies” documenting group polarization, see Robert MacCoun, \textit{supra} note – at 228

\footnote{70} Reid Hastie, Steven Penrod, Nancy Pennington, \textit{Inside the Jury}, (Harvard Univ. Press. 1983).

\footnote{71} Id. at 45-47.

\footnote{72} Id. at 50.
condition. All filled out a pre-deliberation questionnaire in which they were asked what they would choose if they had to decide the case on their own. The mock jurors were video-taped and observed during their deliberations.

Several of Hastie’s observations are relevant for the present discussion. First, he observed that the favorite pre-deliberation verdict of the jurors was manslaughter, but after deliberation there was a shift to the middle, making second degree murder the most popular verdict choice.\textsuperscript{73} He also noticed that although over 20\% of mock jurors in all conditions preferred a first degree murder verdict before deliberation, the only groups to return such a verdict were those that could decide the case by majority rule. None of the groups forced to reach a unanimous decision returned a guilty verdict on the most serious charge.

Certainly, as Hastie noted, this shift to the middle could simply indicate that second degree murder was the more accurate verdict.\textsuperscript{74} But Hastie thought instead that “the shift can best be understood as the natural resolution of social forces in the jury.”\textsuperscript{75} The social forces to which Hastie alludes are the development and movement of factions within the jury, what he called “the most visible” and most important of all deliberation dynamic events.\textsuperscript{76} Hastie defined factions based on common verdict preferences among the participants. The initial verdict preferences were based on the jurors’ pre-deliberation questionnaires; scientists then tracked how these preferences shifted during group discussion.

Hastie noticed a dramatic difference in faction movement depending on whether a unanimous verdict was required.\textsuperscript{77} Jurors in a unanimous “jurisdiction” who initially voted for the extreme verdict options of first degree murder or not guilty were much more likely to change their voting preference by the end of deliberation. And, in turn, jurors in these voting factions in the majority rule conditions were much more likely to hold out.\textsuperscript{78} This dynamic was almost universal – only one juror in the unanimous decision rule group failed to defect, but over fifty percent of those in favor of acquittal in the majority rule condition held out.\textsuperscript{79}

\textsuperscript{73} Id. at 59-60.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id. at 99.
\textsuperscript{77} Id. at 100.
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 102
Hastie also observed several other factors that influenced faction movement. The size of the faction mattered greatly.\textsuperscript{80} Jurors were far less likely to change their votes if they belonged to a larger faction, and jurors were more likely to defect from a small faction especially when their vote was required for unanimity.\textsuperscript{81} In addition, post-deliberation questionnaires revealed that those jurors who were in the minority factions were motivated to shift to the largest faction when their vote would put the jury over-the-top of the quorum requirement or when it meant they could avoid finishing as dissenters in a majority jurisdiction.\textsuperscript{82}

Finally, Hastie observed that the strength of the evidence in the case made a difference in whether a compromise was reached. When the evidence was clear-cut one way or the other, the shift to the middle verdict was weakened.\textsuperscript{83}

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It seems therefore that both the internal drive to compromise (illustrated by the camera salesman hypothetical) and the external pressure to reach a collective decision (illustrated in Hastie’s research) combine to produce compromise jury verdicts. In fact, the above research suggests a hypothesis for how this works: People form factions that track their verdict preferences, polarize after group discussion, and then negotiate with each other to ultimately compromise in the middle.

To be sure, juries will not negotiate in every case. But in the close cases – which, after all, amount to a large set of the cases that go to trial – the empirical evidence strongly suggests that jurors compromise when given verdict alternatives. At the very

\textsuperscript{80} Hastie and his colleagues observed that the size of the faction was in fact the most important determinant in the outcome of the deliberation. \textit{Id.} at 106.

\textsuperscript{81} \textit{Id.} at 106.

\textsuperscript{82} Hastie, \textit{supra} note -- at 119.

\textsuperscript{83} Dennis Devine et al, \textit{Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups} \textit{7 PSYCH PUB POL \& L.} 622, 670-71 (2001) (summarizing relevant empirical work and concluding that “juries thus appear fairly responsive to verdict options, but the impact of verdict options is likely to interact with the strength of evidence against the defendant”). This observation is consistent with one made by two pioneers in jury research studies, Harry Kalven and Hans Zeisel. In their famous book, \textit{The American Jury}, Kalven and Zeisel theorize that when the evidence presented a trial clearly favors one side, juries will choose the corresponding verdict. But when the evidence is somewhat ambiguous, jurors are “liberated” from the constraints of the evidence and become influenced by other factors. See also Dennis Devine, Jennifer Buddenbaum, Stephanie Houp, Nathan Studebaker, Dennis P. Stolle, \textit{Strength of Evidence, Extravenditary Influence, and the Liberation Hypothesis}, \textit{LAW \& HUMAN BEHAVIOR} (2009) 136-148 (using post-trial questionnaire data collected from judges, attorneys, and jurors to support the liberation hypothesis).
least, the threat of a compromise is real enough to make judges cautious about it,\textsuperscript{84} to cause prosecutors to object to the inclusion of lesser includeds,\textsuperscript{85} and to even warrant the constitutionalization of the options for death penalty cases.\textsuperscript{86} It was even articulated by Chief Justice Burger thirty years ago. “Courts,” Chief Justice Burger wrote, “have long held that in the practical business of deciding cases, the fact finders, \textit{not unlike negotiators}, are permitted the luxury of verdicts reached by compromise.”\textsuperscript{87}

\textbf{PART II. AN ANALOGY TO PLEA BARGAINING}

Although the reality of juror negotiation is well-recognized, the question of whether it is a legitimate practice remains controversial. A juror’s job is simply to decide facts, the argument goes, and he has no place compromising his factual assessment in order to reach consensus on a verdict alternative.\textsuperscript{88}

Before rushing to judgment, however, it is worth remembering that negotiation among verdict options is not a process wholly foreign to criminal law. Plea bargains are struck by

\textsuperscript{84} Kelman, \textit{supra} note -- at 305 (“currently when judges instruct jurors to consider lesser included offenses, they indeed make some efforts to separate decisions to try to insure that jurors do not look at their actual menu of choices as an option set”). \textit{See}, \textit{e.g.}, \textit{Johnson v. Louisiana}, 406 U.S. 380 (1972) (Douglas, dissenting) (referring to “many compromise verdicts on lesserincluded offenses” as an argument for requiring a unanimous jury); \textit{Ball v. United States}, 470 U.S. 856 (1985) (Stevens, J., concurring) (expressing concern that a defendant could be prejudiced if a jury attempts to reach a compromise verdict when required to consider multiplicitous counts).

\textsuperscript{85} \textit{See} \textit{Ram Orzach and Stephen Spurr, Lesser Included Offenses, INT’L REV. L. & ECON} 239-45 (2008) (noting the common tendency for prosecutors to object to the inclusion of lesser included offenses based on a concern that the jury will arrive at a compromise verdict); \textit{Samuel Solomon, How Jurors Make Decisions, A.L.I.} (2005); Kelman, \textit{supra} note – at 305 (“compromise effects are well known to both district attorneys and defenders”).


\textsuperscript{87} \textit{Ulster County Court v. Allen}, 442 U.S. 140, 168 (1979) (Burger, C.J., concurring) (emphasis added).

\textsuperscript{88} For an example of such criticism, see \textit{Mark Brodin, Accuracy, Efficiency, And Accountability in the Litigation Process – The Case for the Fact Verdict}, 59 U. Cin. L. Rev. 15 (1990). Professor Brodin argues against a general verdict and in favor of a jury fact verdict – much like the findings of fact that a judge returns when she sits as fact-finder. As part of his argument, Brodin observes that “deliberations may sometimes resemble “horse trading” among the jurors resulting in a compromise verdicts.” \textit{See also} \textit{Chris Kemmitt, Function Over Form: Reviving the Criminal Jury’s Historical Role as a Sentencing Body}, 40 U. Mich. J. Legal Reform 93, 112 (2006).
criminal defendants all the time. And although the process has its critics, few still question the legitimacy of plea negotiations generally. Considering intrajury negotiation as a cousin to plea bargaining, therefore, might change the way we feel about it and (even better) reveal ways to improve it. Four aspects of the analogy are discussed below.

A. SIMILAR DEAL MAKING METHODS

The first and most obvious similarity is that intrajury negotiation and plea negotiation are both confidential enterprises: they both take place in secret, they are both largely unreviewable, and they are both hard to monitor by policy-makers. Indeed, the secrecy of plea bargaining and its inability to be regulated are two hallmarks of the practice. Plea bargaining practices are so elusive that even the Department of Justice finds them hard to

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

Although the basic practice is certainly familiar, there are actually several specific aspects of plea bargaining that have acquired their own names and definitions. Understanding these nuances will aid in the discussion that follows. “Sentence bargaining,” for instance, involves a guilty plea in exchange for expected leniency at sentencing. “Fact bargaining” is the more controversial practice of stipulating to certain facts (like, for example, a specific amount of narcotics) in order to secure a more forgiving charge or sentence. And – most relevant for present discussions – “charge bargaining” describes what happens when a defendant pleads guilty in exchange not only for the chance at a more lenient sentence, but also to a less serious charge altogether. See Nancy J. King, Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment, 58 STAN. L. REV. 293, 302 (2005) (calling for judicial oversight of sentence bargaining); Michael Simons, Prosecutors as Punishment Theorists, 16 GEO. MASON. L. REV. 303, (2009); Ronald Wright and Rodney Engen, Charge Movement and Theories of Prosecutors, 91 MARQ. L. REV. 9 (2007); Russell Covey, Fixed Justice: Reforming Plea Bargaining with Plea-based Ceilings, 82 TUL. L. REV. 1237, 1257 (2008).


In fact, Professor Rachel Barkow recently observed that, “[t]here are currently no effective legal checks in place to police the manner in which prosecutors exercise their discretion.”

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

There is more to the analogy than a shared secrecy, however. Indeed, the actual decision-making processes – how a deal is made in each context – are not all that different from one another. After observing simulated deliberating juries, Professor Hastie articulated two theories of deliberation style: verdict driven

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92 The Department of Justice’s formal policy is to prohibit fact bargaining and charge bargaining altogether. Despite this ban, however, observers claim that prosecutors continue to use fact bargaining and charge bargaining as important tools in their arsenal. See Simons, supra note –; Frank O. Bowman, III, Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker, 2005 U. CHI. LEGAL F. 149, 165, 193 (observing there are reasons to believe “the Justice Department cannot meaningfully restrain local United States Attorney’s Offices from adopting locally convenient plea bargaining practices”); see also United States v. Kandirakis, 441 F. Supp. 2d 282, 284-85 (D. Mass 2006) (stating that those who deny the “sweeping...plea bargaining culture today” are sophists); Stephen J. Schulhofer & Ilene H. Nagel, Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period, 91 NW. U. L. REV. 1284, 1311-12 (1997) (finding examples of evading the Guidelines through bargaining).


94 Indeed several scholars suggest that compromise verdicts date back to seventeenth century England. Chris Kemmitt, Function Over Form: Reviving the Criminal Jury’s Historical Role as a Sentencing Body, 40 U. MICH. J.L. REFORM 93 (2006). According to this scholar, although English juries were formally fact-finding bodies, they were functionally a quasi-sentencing body: “When faced with an unduly harsh sanction, the jury would act as a sentencing mitigator, either by entering a compromise verdict in which the defendant was convicted of a lesser charge or by acquitting the defendant outright.”

95 See, e.g. California v. Altus Finance S.A., 540 F.3d 992, n.17 (9th Cir. 2008) (acknowledging the possibility of a compromise verdict, but choosing instead to “presume that citizen jurors will properly perform the duties entrusted them.”)

and evidence driven. Evidence-driven deliberation ought to be familiar to criminal law movie-watchers: individual jurors focus on reconstructing the story of the crime, cite evidence or testimony in reference to several verdict options, and do not vote or take a poll until later in the deliberation. 

Equally likely to occur, however, is verdict-driven deliberation. Under this style, deliberation begins with a public ballot. Jurors then “align themselves in opposing factions by verdict preferences” and begin to “act[] as advocates for their positions.” Evidence is cited in support of a specific verdict position, individual jurors only speak on behalf of one verdict at a time, and polling / voting happens frequently.

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

B. SIMILAR DRIVES TO COMPROMISE

A second aspect of the analogy is that both jurors and plea negotiators share similar motivations to make a deal. Guilty pleas are typically justified by the limited budgets and resources facing

97 Hastie, supra note – at 163. For discussion of these styles in subsequent literature, see Kim Taylor Thompson, Empty Votes in Jury Deliberations, 113 HARV L. REV 1261, 1274-76 (2000).

98 Hastie, supra note – at 163.

99 Hastie and his colleagues found that approximately two thirds of juries engaged in some sort of verdict driven deliberation: 28% of juries engaged in pure verdict-driven deliberation (judging by how early in the process they took a vote), 35% engaged in evidence-driven deliberation, and 38% displayed a mixed style. Id. at 164. Subsequent researchers observed that the break down of verdict-driven and evidence-driven deliberation styles among mock jurors was an even 50-50. See Devine, et al., supra n. – 7 PSYCHOL. PUB. POL’Y & L. at 693-94. Not surprisingly, verdict-driven deliberation was more common when a unanimous verdict was not required, and the total deliberation time for juries undergoing verdict-driven deliberation was significantly shorter. Hastie, supra note – at 164-65.

100 Id. at 163.

101 Id.

102 See Sunstein, supra note –; Hastie, supra note – at 69.
prosecutors and public defenders. Professor George Fisher explains that plea bargaining was born as a “marvelously efficient relief from a suffocating workload.” Jurors, however, are also all individuals with jobs and responsibilities and constraints on their time. Negotiation and compromise – long thought of as efficient methods for dispute resolution among prosecutors and defense attorneys with crushing workloads – may be equally attractive to jurors who are in a hurry to return to their daily responsibilities and who have been encouraged by the judge not to return without a unanimous verdict.

Besides the common general incentives to compromise, the specific motivations of jurors who negotiate – what it is that drives them to make a deal – mirror the considerations which prompt plea deals.

One can imagine a negotiation on a jury evolving in many ways. Consider, for example, a “mercy deal.” A juror may think the defendant committed the highest crime charged, but he may also be nervous about the consequences being too severe or he believes the defendant deserves leniency for some reason (his age, his background, his role in the offense), so that juror is willing to compromise on a lesser offense with his colleagues who in turn make a deal to avoid deadlock.

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

Or maybe the driving force of the compromise is a prediction of the future – a “preempting a second jury deal.”

103 Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2470-76 (2004) (“To put it bluntly, appointed or flat-fee defense lawyers can make more money with less time and effort by pushing clients to plead.”); Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. Rev. 1935, 1949 (2006) (“District Attorneys must economize, selecting their highest priority cases to receive the most time and resources from their limited budgets, while the bulk of cases must be resolved without the expense of a trial.”).


105 Hastie found that some jurors viewed deliberation as a “rough and occasionally punishing experience” that took a toll on their personal commitments outside the courtroom. Juror questionnaires revealed that escaping deliberation and returning to personal commitments motivated at least some of the jurors to shift their verdict preference from one faction to another and ultimate produce a compromise verdict. Hastie, supra note – at 173.
juror may strongly believe the defendant is innocent, but he is afraid that a hung jury will result in an eventual conviction, so he leverages his hold out vote to compromise and secure a more lenient verdict. And the eleven other jurors, in turn, vote to compromise on a more lenient charge because they want to ensure a second jury does not acquit.

A terrific example of these dynamics of jury compromise can be seen in the recent ABC documentary series, *In the Jury Room*. ABC filmmakers were permitted to videotape a trial and subsequent jury deliberation. Defendant Laura Trujillo was accused of child abuse resulting in the death of her child; her boyfriend had confessed and pled guilty to dealing the fatal blow, but under state law the mother could be held complicit if she knew of the risk and did nothing to prevent it. There were four possible verdicts given to the jury, reflecting lesser-included child abuse charges under Colorado law that ranged in sentence consequences (although the jury did not know) from 48 years in prison to probation.

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

Their debates involved some factual questions: one juror argued, for example, that the defendant must have known of the child’s prior broken ribs. But the discussion involved other considerations as well – factors apart from questions of what actually happened that night. In this vein, some jurors called for accountability: “when does Laura take responsibility for her child? Its too late now.” And some jurors called for mercy: “It is not fair to hold her accountable for the death of her child when she didn’t actually cause the death.”

Ultimately one juror in the Trujillo case called for a truce: “in order to avoid a hung jury,” he said, “both sides are going to have to give some concessions.” That juror then pointed to the four verdict options on the board in front of them and called for a

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107 *Id.*
108 *Id.*
109 *Id.*
110 *Id.*
compromise on a charge in the middle. His personal reason for reaching the deal was to ensure the defendant is punished somehow: “I am not getting what I want here but I cannot walk out of this room without holding her responsible for what she did somehow.” Others, perhaps, voted for the deal because they did not want a subsequent jury to convict on the highest charge. In the end, the compromise carries the day; for their various reasons, the jurors meet in the middle and convict Ms. Trujillo on a lesser included offense that is actually (unbeknownst to them) a misdemeanor.

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

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

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

C. SIMILAR BARGAINING PITFALLS

A jury’s negotiation also suffers from many of the same defects that plague the plea bargaining system. Scholars like Stephanos Bibas have explained that plea deals are skewed by

111 Id.

anchoring and framing tendencies. Assume, for example, that a prosecutor adds up every possible charge and enhancement to offer a defendant a deal that would result in twenty years in prison. Even if the defendant rejects this offer as unduly severe, it can still affect the ultimate outcome by playing on framing or anchoring tendencies. If the prosecutor next offers a deal resulting in fifteen years, this option may seem reasonable to the defendant in relation to the first offer, even if it would not have seemed so had it been offered in the first instance.

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

Another plea bargaining critique that can be applied to intrajury negotiation involves “charge bargains” – deals made when the defendant pleads guilty in exchange not only for the chance at a more lenient sentence, but also to a less serious charge altogether. In their recent article on the subject, Ronald Wright and Rodney Engen observe that “any quick review of court statistics or a single afternoon spent in the hallways of a criminal courthouse confirms that criminal charges move.” Wright and Engen were speaking about plea bargaining, but they could just as easily be speaking about compromise verdicts. Regardless of whether lawyers in search of a plea haggle back and forth over possible charges, or jurors in search of unanimity adjust their verdict preference to find a middle ground, in both scenarios a criminal verdict reflects a settlement.

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113 Bibas, supra note --
114 Id.
115 See Kelman supra note – and accompanying text.
117 Id.
The charge is not as tough as it could be, and it is not an acquittal; it falls in the middle, like the end result of many negotiations. Jurors too, in other words, participate in charge movement.

But if charge movement happens on a jury it is important to remember the controversy that surrounds it in its original context. Two central critiques emerge. Some are concerned that similarly situated offenders receive similar treatment. Great steps have been taken to ensure uniformity at sentencing, but these reforms are undermined if the real work is being done behind the scenes through a charge negotiation. The risk is that “unfettered charge bargaining could result in judicial sentencing discretion just being replaced by prosecutorial charging discretion,” which would circumvent efforts like the Sentencing Guidelines to guarantee uniformity across those who commit similar crimes.\textsuperscript{118}

The second concern is that charge bargaining naturally leads to “overcharging” by prosecutors who have an incentive to do so for leverage in plea negotiations.\textsuperscript{119} The fear here concerns inaccurate and excessive results.\textsuperscript{120} Innocent defendants, for example, tend to be risk averse, and very harsh charges may scare an innocent person into pleading to a lesser and more certain punishment.\textsuperscript{121}

These two common charge bargaining concerns apply equally to intrajury negotiation. First, if charge bargaining produces arbitrary and inconsistent results across defendants who commit similar crimes, that risk holds equally true for intrajury negotiation. Different juries compromise in different ways, making charge movement a matter of fortune for similarly situated defendants. Plus, a jury only sees one defendant and one crime;


\textsuperscript{120} This risk has led some scholars even to suggest that prosecutors receive financial bonuses for securing convictions on the charge filed, as a way to counteract the incentive to overcharge and engage in charge bargaining. Tracey L. Meares, \textit{Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives}, 64 FORDHAM L. REV. 851, 873-77 (1995).

jurors are unaware of the universe of crimes and the charges that typically attach to them. So when a jury decides to compromise and discount an aggravated assault charge to a plain assault charge, for example, it does so without regard to the sentencing consequences of that decision and without the knowledge of how “bad” this assault was compared to similar ones. This certainly can lead to inconsistent results across similarly situated defendants, perhaps even more so than with charge bargaining in the traditional sense.

Similarly, the “overcharging” problem also applies to intrajury negotiation. Once the jury has control of the case, the prosecutor is not likely to drop a charge that he knows was too high at the onset. The risk of arbitrary verdicts resulting from a gaming of the system, therefore, is even higher when the overcharged case goes to a jury.

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

D. INEVITABILITY

The final similarity between plea bargaining and compromise verdicts is that both seem largely inevitable. Whether you love plea bargaining or whether you, as George Fisher put it, resign to its dominance “though its victory merits no fanfare,” most people agree that plea bargaining is here to stay.122 That resignation has shaped the way people view plea bargaining and the way scholars critique it. There are certainly those who call for the abolition of plea bargaining altogether.123 Such calls claim that the compromise plea bargaining represents “is morally suspect,” because it occurs in secret and because a criminal sanction is imposed “without any public resolution of what really happened.”124 These voices are now in the minority, however. The vast majority of those that weigh in on the plea bargaining debate

122 Fisher, Plea Bargaining’s Triumph, (Stanford Press, 2003) at 1. See also Stephanos Bibas, 117 Harv. L. Rev. at 2527 (“I take it as a given that plea bargaining is here to stay.”).

123 Stephen J. Schulhofer, Plea Bargaining as Disaster, 101 Yale L.J. 1979, 2009 (1992) (“Plea bargaining is a disaster [that] can be, and should be, abolished.”)

acknowledge that “bargaining itself is too entrenched to abolish.”

In my view, this is the greatest lesson from plea bargaining to be applied towards an understanding of intrajury negotiation. As we have seen, bargaining and compromise are entrenched in criminal law significantly more deeply than traditionally believed. If jurors negotiate with each other in the jury room just as prosecutors and defense attorneys do in the back halls of the courthouse, then maybe we should treat compromise verdicts the way we treat plea bargains – not as a risk we do not know what to do with, but as a reality we must address, correcting as many injustices about the process as possible.

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

For the most part, modern plea bargaining scholars take the existence of negotiation in criminal law as a given. Should not jury scholars follow suit? Instead of comparing a jury trial to a bench trial (the classic technique for those who evaluate the jury), perhaps we should compare it to a different alternative: the plea bargaining process that largely controls criminal law. Recognizing this reality and viewing the jury as a negotiating body is an important first step toward evaluating jury negotiation and potentially reforming it.

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126 See, e.g., Kelman, supra note --, at 305 (“compromise effects are well known to both district attorneys and defenders”); Stein v. People of the State of New York, 346 U.S. 156 (1953) (“Courts uniformly disapprove compromise verdicts but are without other means than admonitions to ascertain or control the practice.”). Compromise verdicts have received more attention from legal scholars on the civil side, see e.g., Michael Abramowicz, A Compromise Approach to Compromise Verdicts, 89 CAL. L. REV. 231 (2001), but far less ink has been spilled on compromise criminal verdicts.


128 KALVEN AND ZEISEL, THE AMERICAN JURY, supra note – at 9 (“Most praise or blame of the jury can come only by way of the comparison of trial by jury with trial by a judge, the one serious and significant alternative to it.”).
PART III.   THE DIFFERENCES

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

A.   DIFFERENT NEGOTIATORS

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

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

More importantly, prosecutors and defense lawyers, because they are repeat players, know the relevant local history; they know what charges and what punishments are usually visited on people who do what the defendant did. They “understand the intricate, technical rules that regulate arrests, searches and seizures, interrogations, discovery, evidence, and sentencing, as well as the going rates in plea bargaining.” They know whether the crime in front of them is particularly egregious compared to others like it,

\[129\] Bibas, supra note – at 2480.


\[131\] Id. at 912.
and they know the sort of “market price” or typical punishment that accompanies it.\footnote{Consider, for example, Milton Heumann’s description of typical negotiation practices in one state court: “Typically, in the circuit court, a line forms outside the prosecutor’s office the morning before court is convened. Defense attorneys shuffle into the prosecutor’s office and, in a matter of two or three minutes, dispose of the one or more cases “set down” that day. Generally, only a few words have to be exchanged before agreement is reached. The defense attorney mutters something about the defendant, the prosecutor reads the police report, and concurrence on “what to do” generally, but not always, emerges.” See \textsc{Douglas W. Maynard, Inside Plea Bargaining: The Language of Negotiation} 103-18 (1984).}

This is all valuable information, and jurors do not have it. When jurors negotiate between possible charges, they do so blindly. Not only are they in the dark about the local custom or “going rate” for criminal charges, but jurors are generally not told about any of the sentence implications – even the mandatory minimums – that attach to each charge.\footnote{Kristen K. Sauer, Note, \textit{Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences}, 95 COLUM. L. REV. 1232, 1242 (1995) (“The general rule in federal and most state judicial systems is that neither the judge nor advocates should inform the jury of the sentencing consequences of a guilty verdict. Depending on the circumstances of the case, the court may even specifically instruct the jury not to consider punishment in reaching its verdict.”)} In federal court and most state courts, the “party line,” as one scholar put it, is that “the jury exists merely to find facts: juries make factual determinations and judges sentence, end of story.”\footnote{Chris Kemmitt, \textit{Function Over Form: Reviving the Criminal Jury’s Historical Role as a Sentencing Body}, 40 U. MICH. J. LEGAL REFORM 93, 112 (2006). This view has in fact been endorsed by the U.S. Supreme Court. Shannon v. United States, 512 U.S. 573, 579 (1994) (“It is well established that when a jury has no sentencing function, it should be admonished to reach its verdict without regard to what sentence might be imposed.”).}

Just because jurors are not given information about punishments, however, does not mean that they do not make their own assumptions on that score, even if erroneous.\footnote{Erik Lillquist, \textit{The Puzzling Return of Jury Sentencing: Misgivings about Apprendi}, 82 N. C. LAW. REV. 621, 670 (2004)} Indeed, empirical evidence suggests that juries routinely anticipate punishment and that verdicts are significantly affected by what jurors predict will happen to the defendant upon conviction – regardless of the accuracy of those predictions.\footnote{Harry Kalven and Hans Zeisel, two pioneers of jury research, found that jurors “anticipate punishment” and are prone to nullify when they think it will be too harsh. \textsc{Kalven & Zeisel, supra} n. – at 306. Several psychology experiments also show that verdicts are dramatically affected by what jurors think will happen to the defendant at sentencing. \textsc{Saul Kassin & Lawrence Wrightsman, The American Jury on Trial: Psychological Perspectives} 159, 166 (1988).} So, for example,
the mandatory minimum in New York for a conviction of first
degree assault is the same as the mandatory minimum sentence for
attempted murder. Defense lawyers and prosecutors are aware
of this facet of the New York penal code, but the typical juror is
not. It is not hard to imagine a juror negotiating with his fellow
jurors, falsely assuming that attempted murder carries more
significant consequences than does the assault charge, and
adjusting his vote to “compromise” accordingly.

Along with those disadvantages, jurors have several
advantages relative to the negotiating lawyers. First, precisely
because they have not seen many cases in the past, jurors approach
each trial without the cynical baggage that may accompany
prosecutors and defense attorneys. As G.K. Chesterton put it,
“the horrible thing about all legal officials ... is simply that they
have got used to it. Strictly they do not see the prisoner in the
dock; all they see is the usual man in the usual place. They do not
see the awful court of judgment; they only see their own
workshop.” Juries are likely to be less cynical. That is a useful
sensibility: when we convict innocents, we probably do so in part
through excessive cynicism. There is something powerful and
important about a fresh set of eyes assessing the merits of each
criminal case. If the fate of a criminal defendant is to be
negotiated in any event, perhaps it is preferable to have bargainers
who do not come to the table jaded by a life’s work surrounded by
crimes and criminals.

Relatedly, jurors negotiate without being encumbered by
another criticism often launched at prosecutors and defense

\[137 \text{ See N.Y. Penal Law § 70.02 Attempted murder and assault in the first degree are both classified as class B felony offenses with mandatory minimums of five years imprisonment.}


\[139 \text{ G.K. Chesterton, The Twelve Men, in Tremendous Trifles 80, 85-86 (1909).}

\[140 \text{ Kenneth J. Melilli, Prosecutorial Discretion in an Adversary System, 1992 BYU L. Rev. 669, 689-90 (noting that “conviction psychology” makes it harder for prosecutors to protect innocent defendants).} \]
attorneys: agency failure. In plea bargaining, as Professor Stephen Schulhofer has explained, “the real parties in interest (the public and the defendant) are represented by agents (the prosecutor and the defense attorney) whose goals are far from congruent with those of their principals.”

Prosecutors, for example, have many reasons to plea bargain independent of the public’s interest: they may pursue pleas to get a high conviction rate in order to build reputation or political standing, they may plea bargain to avoid high-profile losses at trial for the same reasons, they may reach a deal to build good will with a defense attorney they work with a lot, or they may plea bargain simply to avoid lengthy trials for personal reasons.

Agency costs exist on the defense side as well. Criminal defense attorneys are almost never paid by the hour; many criminal defendants are not paying clients, and those that are generally pay a flat fee up front. Moreover, appointed attorneys are typically paid the same fee for guilty pleas and for cases that go to trial. There are thus “powerful financial incentives for the attorney to settle as promptly as possible” even if a trial would be in the client’s best interest. And while public defenders have no immediate financial incentive to avoid trial, these service organizations have their own institutional pressures, which include an overwhelming caseload and strong incentives to move cases along.

When jurors negotiate with each other, by contrast, they are not acting as agents of anyone. On the one hand, the fact that a defendant does not participate in a jury negotiation is quite troubling. The lack of agency means there is no guarantee that the classic prosecutor / defense roles will map on to a jury; there may be twelve “quasi prosecutors,” for example, and no defense

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143 Id. at 1988.

144 Id.

145 Id. and id. note 35, citing data from 1986 that compensation caps were as low as $500 a case for felonies and only $1000 in capital cases.

146 Id. at 1989.

147 Id.
representative at all. It also leaves open the possibility that no juror is acting in the public interest – that each juror is out for himself, motivated by private biases and personal incentives.

On the other hand, however, it is important to remember that there are strong reasons to doubt the adequacy of a defendant’s participation in plea bargaining anyway.\(^{148}\) And to the extent one trusts the jury as a fair and impartial decision-making body representing a cross-section of the defendant’s peers and driven by a sense of moral or civic duty, there is little reason to assume the conflicts of interest or incentive problems well-recognized in plea bargaining will hold true for negotiating jurors as well. Perhaps jurors are influenced by improper factors external to the case -- such as a selfish desire to end the deliberation quickly -- but at the very least they negotiate without the systemic financial incentives or reputation interests that are often attributed to their professional counterparts.\(^{149}\)

### B. **DIFFERENT NEGOTIATING CONDITIONS**

Another way in which intrajury and plea negotiations are significantly different is that the bargainers negotiate under different conditions. To begin with, prosecutors are commonly thought of as being in the position of power in negotiations: they can stack charges, set deadlines, limit and control discovery, and of course they have the discretion to choose what charges are brought in the first place.\(^{150}\) Jurors, by contrast, are relative equals in the jury room: they all have the same access to information, they all have the same verdict options in front of them, and they all have one vote.

This contrast is a bit of an over-simplification. The prosecutor is not always in the position of power. Sometimes

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\(^{148}\) See Shulhofer, supra n --

\(^{149}\) The extent to which jurors are influenced by factors external to the evidence in the case they must decide has drawn a lot of attention from jury research scholars, but is largely beyond the scope of this article. For a good discussion on the subject see Dennis Devine, Jennifer Buddenbaum, Stephanie Houp, Nathan Studebaker, Dennis Stolle, *Strength of Evidence, Extraevidentiary Influence and the Liberation Hypothesis: Data from the Field*, 33 LAW AND HUM BEHAVIOR 136-148 (2009). For further discussion of some of this literature see, e.g. MacCoun, supra note -- at 224.

defendants have the upper hand because they hold leverage in being able to cooperate against other defendants or see significant weaknesses in the government’s case. At the same time, jurors are not always on equal footing. When a unanimous verdict is required, jurors in minority factions – potential hold-out jurors – may face tremendous pressure to back down or may hold tremendous power to get what they want. Generally speaking, however, if for no other reason than that the prosecutor gets to select the charge options while all jurors are constrained by them, the balance of power among negotiators is very different for intrajury negotiation then from what it is for plea negotiations.

How does this impact our impression of intrajury negotiation? In my view, it tells us that there are at least some ways in which intrajury negotiation is preferable to plea bargaining. Lay negotiators – unlike professional ones – are not only isolated from political and financial incentives, but they are also equals and do not face the power imbalance that is the target of so many plea bargaining critiques. To the extent one values the egalitarian nature of a jury or its ability to deliver “common sense justice,” one will likewise value that feature of intrajury negotiation.

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

One of the most familiar arguments against plea bargaining is that it invites innocent people to plead guilty because prosecutors and defense lawyers have so little information at the time of bargaining. The information vacuum, in other words, invites risk adverse people to cut a deal regardless of the merits of their case. This criticism does not apply to intrajury negotiation

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

152 See Hastie supra note – at 99-102; MacCoun, supra note – at 228

153 Laura Appleman, The Lost Meaning of the Jury Trial Right, 84 INDIANA L. J. 397 (2009) (attributing this “communitarian view” of the jury right to the Supreme Court’s Apprendi line of cases).

154 Russell Covey, Signaling and Plea Bargaining’s Innocence Problem, 66 WASH. & LEE L. REV. 73, 89-91 (2009); David Bjerk, Guilt Shall Not Escape or Innocence Suffer? The Limits of Plea Bargaining When Defendant Guilt is
since that negotiation occurs after all of the admissible evidence has been aired at trial. In this way, intrajury negotiation is preferable to plea bargaining because at least we know that a jury’s compromise is informed by evidence.

C. **DIFFERENT INTERACTION WITH SUBSTANTIVE LAW**

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

Professor Bill Stuntz has argued that legislators tend to over-criminalize (creating new crimes and attaching harsh consequences to criminal behavior) to gain political favor while depending on prosecutors to dial it down to the appropriate level with their charging decisions.155 Legislators are rational actors, and they will almost always vote “to authorize a level of punishment that is appropriate in a few very bad cases but excessive in a great many others” when they know it will be popular with their constituents and can be checked by prosecutorial discretion later on.156 “It sounds odd,” Stuntz tells us, “but a “legislator’s incentive is to vote for rules that even the legislators themselves think are too harsh.”157

The result is that criminal law has become very broad and very severe; we have criminalized the removal of tags from mattresses, for example, and we attach mandatory and perhaps “extraordinarily harsh penalties” for a variety of common drug

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156 Stuntz, supra note -- at 2557-58.

157 *Id.* at 2558.
offenses. The interaction of this expansive criminal code with the dominance of plea bargaining creates a system where prosecutors are afforded tremendous power, and their choices become more important than the words on the pages of the criminal code. This is so because the “menu” of criminal law from which prosecutors “order” is so large that the legislature can dramatically change the definition of a relevant crime or the applicable sentence, and plea bargains will not be affected. The irony, according to Professor Stuntz, is “the more [criminal law] expands, the less it matters.”

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

To answer this question, let us take the case of Cheryl Hunte. Ms. Hunte accompanied her boyfriend on a road-trip in which he bought and sold marijuana. She did not plan the trip, she did not purchase or handle the drugs, she did not profit from the sale, and she did not know where they were going until she got in the car. Because there was “some nexus between the defendant and the drugs,” the defendant’s actions technically met the relevant statutory definitions, and the prosecutor charged her with conspiracy and possession with intent to distribute narcotics.

It is possible that the prosecutor did not believe Ms. Hunte deserved the harsh consequences which attach to drug conspiracy convictions. Perhaps he brought the elevated charge because office policy required him to do so, because he hoped to use it as leverage to gain a quick plea, or maybe to secure testimony against the boyfriend. In any event, for whatever reason, Ms. Hunte’s case went to a jury. And a juror – unaware of the “going rate” for cases like this one – does not know that the charged crime is “too

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159 Id. at 2549. See also William J. Stuntz, The Pathological Politics of Criminal Law, 100 MICH. L. REV. 505 (2001).

160 Stuntz, supra note --, HARV. L. REV. at 2550.

161 United States v. Hunte, 196 F.3d 687 (7th Cir. 1999).

162 Id.
serious,” and does not even know what consequences will attach to it. Once the charge goes to the jury, the prosecutor’s charge bargaining power is relinquished and new negotiators take over.

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

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

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

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

Cheryl Hunte faced what many refer to as a “trial tax” – an increased penalty incurred by a defendant who elects trial over a plea. Trial taxes are aggravated by over-criminalization and over-charging because the prosecutor does not act as the safety

163 Josh Bowers, *Punishing the Innocent*, U. PA. L. REV. 1117 (2008); John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 223 (1979) (describing “that terrible attribute that defines our plea bargaining and makes it coercive and unjust: the sentencing differential by which the accused is threatened with an increased sanction for conviction after trial by comparison with that which is offered for confession and waiver of trial”).
valve the legislature counts on him to be. Perhaps giving the jury an abbreviated menu of charging options – allowing jurors to “charge bargain” with each other – serves to prevent excessive punishment technically authorized by the words of the statutes from actually being imposed on those whose behavior does not warrant it. Intrajury negotiation, in other words, can mitigate concerns about over-criminalization because juries who compromise may be able to soften the “trial tax” that comes from defendants turning down pleas and facing overcharges at trial.  

PART IV. NORMATIVE IMPLICATIONS: ARE COMPROMISE VERDICTS COMPROMISED?

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

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

Whatever one thinks of plea bargaining generally – and I am going to assume in this paper that plea bargaining is necessary

164 Professor Stuntz argues for the re-introduction of vague elements to criminal statutes – mushy elements like “wrongfully” or “with a criminal mind” – in order to encourage jury verdicts that could hold the line against over-criminalization without the stigma of jury nullification. See William Stuntz, Unequal Justice, 121 HARV. L. REV. 1969, 2039 (2008). Intrajury negotiation could accomplish the same objective.

165 See, e.g. Eric Muller, supra note – at 784-85.


167 Muller, supra note – at 784.

168 Ashlee Smith, supra note – at 403.

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

A. INSTITUTIONAL LIMITATIONS

One objection to compromise verdicts is that juries are simply not designed to produce good negotiations. As we have established, unlike prosecutors and defense attorneys, jurors are kept ignorant to the consequences of the deals they make, and they are not acting as agents for the parties in interest (the public and the defendant).

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

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

If one generally values a jury’s unsullied and egalitarian approach to criminal adjudication, that appreciation will apply to intrajury negotiation just as it does to “the Twelve Angry Men”

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171 Id. at 8.
version of jury deliberation. Whether they are negotiating with each other or not, jurors are still isolated from money and reputational interests, from politics and prestige; they are still relative equals, and their discussion benefits from the addition of different points of view. This purity is retained even if they are making their decisions in ways we haven’t always contemplated. There are, in other words, institutional features of a jury that may foster good deals – deals struck by independent, equal, peers of the defendant searching to do the right thing.\(^\text{172}\)

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

One possibility is to inform juries of at least some of the sentence implications that arise from the different offenses on their verdict forms. This suggestion is not new and is not without controversy.\(^\text{173}\) The traditional practice is to “protect” the jury from learning the punishment to which the defendant is exposed, ensuring that the jurors’ job is limited to determining guilt or innocence regardless of the consequences of their decision.\(^\text{174}\) Courts justify this rule as necessary to protect the jury’s role as

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\(^{172}\)Recall that I assume a belief in the value of juries generally.


\(^{174}\) The following is a representative instruction: “The punishment provided by law for the offense[s] charged in the indictment is a matter exclusively within the province of the Court and should never be considered by the jury in any way in arriving at an impartial verdict as to the offense[s] charged.” 1 Edward J. Devitt et al., Federal Jury Practice and Instructions s 20.01, at 822 (4th ed. 1992). Most courts share a belief that this instruction is necessary to protect the jury’s role as fact-finder. See, e.g. United States v. Patrick, 494 F.2d 1150, 1153 (D.C. Cir. 1974) (opining that jury's only function is to assess guilt or innocence on basis of its view of evidence; sentencing decisions are within exclusive province of court). See Shannon v. United States, 512 U.S. 573, 579 (1994) (“providing jurors sentencing information invites them [inter alia] to ponder matters that are not within their province”); see also 3 A.B.A. Standards for Criminal Justice 18.16 & n.4 (2d ed. 1986) (recommending abolition of jury sentencing because inter alia, it may “undercut the integrity of its determination of defendant's guilt,” and because it may prevent appropriate findings of guilt because jury cannot agree on a sentence).
fact-finder and to prevent “opening the door to compromise verdicts.”175

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

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

There are, however, more modest ways to inform jury deals. Professors J.J Prescott and Sonja Starr, for example, have suggested providing a jury with, “short descriptions of fictional cases that exemplify the relative degree of culpability for different members of a drug conspiracy.”176 Another possibility would be to give the jurors a sentencing range which reflects the “going rate” for charges in plea bargains, or at least informing jurors of the mandatory minimum sentence a crime carries.177Whatever form the additional sentencing information takes, the bottom line is that legal decision-makers should possess some information about the consequences of their decisions. This would ensure that if jurors do negotiate – which seems difficult to prevent – they do so with accurate information. A fear that jurors will use this information to

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

176 J.J. Prescott, Sonja Starr, Improving Criminal Jury Decision Making After the Blakely Revolution, 2006 U. ILL. L. REV. 301 (2006). They make this recommendation based on evidence indicating juries are not good at making decisions when given a range but no basis for comparison.

177 Some argue that, particularly with respect to mandatory sentencing laws, “denying defendants the right to inform juries of the sentencing consequences of conviction dilutes the historically and constitutionally intended function of the criminal jury.” Sauer, supra note – at 1233. See also Milton Heumann & Lance Cassak, Not-So-Blissful Ignorance: Informing Jurors About Punishment in Mandatory Sentencing Cases, 20 AM. CRIM. L. REV. 343 (1983) (arguing that the defendant has a constitutional right to inform the jury of the sentencing consequences of mandatory sentences).
negotiate with each other – something they seem to be doing anyway – is an inadequate reason to keep them from it.

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

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

If it is enough to ensure the voluntariness of a plea deal, a short discussion with the judge at the point of requesting the lesser-included offense should also be enough to guarantee that the defendant knowingly took on the risk of a compromise verdict. This change would make his lack of an agent in those jury discussions less of a concern. It would not eliminate all of the risks associated with intrajury negotiation, but it would be a step in

178 See Orzach, supra note – 28 INT’L REV. L. & ECON at 239-40


180 James Vorenburg, Decent Restraint on Prosecutorial Power, 94 HARV. L. REV. 1521, 1539 n. 67 (1981) (“The Court has repeatedly held that a knowing, intelligent, and voluntary plea entered with the assistance of competent counsel is immune from attack no matter what other defects it may have.”)

181 To be sure there are many who are not comfortable with the limited review of plea bargains. See e.g., Barkow, supra note – at 1034. I do not disagree. My point here is given the limited check on a defendant’s participation in plea bargains, why should we be so concerned with the absence of his participation in intrajury negotiation.
the right direction. In any event, because the vast majority of criminal defendants plea to a deal with minimal confirmation they meaningfully participated in it, the objection that compromise verdicts are illegitimate without the defendant’s consent is less persuasive.

B. **Diluting Reasonable Doubt**

A second objection to intrajury negotiation is that when juries disagree and split the difference to reach a consensus they, in effect, “compromise the reasonable doubt standard.”\(^{182}\) The idea here is that when a jury reaches a compromise, “each faction on the jury surrenders its honestly held beliefs on the question of proof beyond a reasonable doubt.”\(^{183}\)

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

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

But of course the innocence and mercy problems are familiar to students of criminal law: they are the exact objections that have been launched at the plea bargain for years. Like compromise verdicts, plea bargains reflect a discounted standard of proof.\(^{184}\) Prosecutors have incentives to reduce plea prices to save resources regardless of a defendant’s guilt or innocence, and even innocent defendants are motivated to take the cheap deals and avoid a longer ordeal at trial. As a result, “non-frivolous

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\(^{182}\) Mueller, *supra* note – at 796.

\(^{183}\) *Id.* at 784.

\(^{184}\) Gerald Lynch, *supra* note -- at 1399 (observing that plea bargaining lowers the standard of proof in criminal cases).
accusation – not proof beyond a reasonable doubt – is all that is necessary to establish legal guilt” in the vast majority of cases.

This phenomenon drives what is perhaps the chief objection to plea bargaining: the fact that innocent people do – and indeed have incentives to – plead guilty to crimes they did not commit. And while academics worry about the innocence problem, it is the leniency problem – and the concern that defendants get off too easily under plea bargaining because the convictions are all discounted from what they should be -- that dominates public opinion.

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

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

This argument certainly appeals to the romantic “12 Angry Men” conception of juries. But upon further reflection one is left to ponder an important foundational question: what exactly is reasonable doubt? The concept anchors our criminal justice system, but its precise definition is illusive. The Supreme Court has held that trial courts are free to choose whether and how to define reasonable doubt.

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186 But see Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008) (arguing that the innocence problem is not really a problem at all because the costs of proceeding to trial often outweigh the costs of increasingly more lenient bargains).

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

188 Victor v. Nebraska, 511 U.S. 1 (1994) (“The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits
question as well, relying on the jury to figure it out.\textsuperscript{189} As one court explained, “The purposes of having juries may be best served if juries, in the first instance, bear the responsibility for defining reasonable doubt. Experience has shown that attempts to define reasonable doubt add little in the way of clarity and often add much in the way of confusion and controversy.”\textsuperscript{190}

The question of how much doubt is reasonable is not one that is generally answered uniformly. Several years ago, Professor Barbara Underwood asked sitting United States district judges to quantify the degree of certainty they felt constituted “beyond a reasonable doubt.”\textsuperscript{191} Their answers varied widely. Almost a third of the judges placed beyond a reasonable doubt at 100%; another third put it at 90% and still another third put it around 80%.\textsuperscript{192}

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

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Moreover, even to the extent one retains this objection, it is another one that can be mollified by potential reforms inspired by

\textsuperscript{189} United States v. Taylor, 997 F.2d 1551 (D.C. Cir. 1993); U.S. v. Nolasco, 926 F.2d 869, 872 (9th Cir. 1991) (placing authority to define reasonable doubt within sound discretion of trial court);

\textsuperscript{190} United States v. Taylor, 997 F.2d 1551, 1558 (D.C. Cir. 1993).


\textsuperscript{192} \textit{Id.} at 1311.
the plea bargaining analogy. A hallmark of any “good” negotiation is the chance to exit.\textsuperscript{193} In plea bargaining, a defendant and a prosecutor have this option: they can always cease negotiating and go to trial. This exit is important; it serves to prevent “bad bargains” and unjust results. But in a jury room, there is often no real exit if the parties cannot agree. The only potential option – a hung jury – is typically discouraged by the judge through an \textit{Allen} charge (sometimes also called a “dynamite charge”) which exerts pressure on jurors to reach consensus.\textsuperscript{194}

In the jury deliberation recorded and published by ABC news, for example, the hung jury option was seen as unavailable. After recognizing that their discussion had reached an impasse, one juror suggests “we can quit?” To which a second juror replies “they won’t let us quit, they will just say keep working on it.”\textsuperscript{195}

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

Steps are already being taken in this direction. Responding to criticisms that the \textit{Allen} instruction unduly coerces jurors in the minority to change their mind, the ABA has recommended a modified instruction that does not single out the minority but instructs all jurors to “reexamine” their views. The ABA also suggests issuing the instruction at the beginning of deliberation, rather than waiting until the jury has trouble reaching a decision. And, the revised instruction emphasizes that the jury need not necessarily return a verdict.\textsuperscript{196}

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


\textsuperscript{194} Sarah Thimsen, Brian H. Bornstein, Monica K. Miller, \textit{The Dynamite Charge: too Explosive for its Own Good?} 44 VAL. U. L. REV. 93 (2009).

\textsuperscript{195} See supra note --, ABC News documentary at part 2.

\textsuperscript{196} Thimsen, \textit{supra} note -- at 119, citing ABA standards.
defendant is innocent, or that the wrong person is accused, or whatever deals we want to exclude from their purview.

C. LAWLESSNESS

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

We have a name for lawless jury verdicts: nullification. Perhaps the ultimate question is whether intrajury negotiation is another way to say jury nullification. When we speak of nullification, we generally mean “a jury's ability to acquit a criminal defendant despite finding facts that leave no reasonable doubt about violation of a criminal statute.” A jury also nullifies when it convicts despite retaining reasonable doubt (exemplified by several famous civil rights cases in the South). Whatever the result, this power is widely criticized as undermining the rule of law: subjecting everyone in the criminal justice system to the subjective preferences of twelve individuals.

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

And yet intrajury negotiation seems to offer a more palatable result than outright nullification. If there is a space between a jury’s common sense appreciation of context – which many applaud – and jury nullification – which many condemn – I believe intrajury negotiation falls within it. In our criminal justice system we need protection from over-inclusive or over-rigid laws that criminalize benign behavior. As others have persuasively

197 Muller supra note – at 783.
198 Id. at 801
199 Darryl K. Brown, Jury Nullification Within the Rule of Law, 81 Minn. L. Rev. 1149, 1150 (1997).
200 Id.
argued, the legislature cannot be counted on to provide that protection. A second layer of defense, if the system worked perfectly, would mean the prosecutor is the one to protect against over-criminalization; for he is a public servant sensitive to context – both aggravating and mitigating factors – who, with assistance from a defense advocate, can strike a balance and arrive at a fair plea deal. But, as we have seen, there are significant reasons to distrust that story.

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

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

D. ABANDONING THE QUEST FOR TRUTH

Finally, perhaps the quintessential objection to compromise verdicts is that by striking a compromise jurors desert their chief task: to discover the truth. A version of this objection was articulated in Professor Charles Nesson’s “much-cited if not universally celebrated” article, The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts. Professor Nesson argues that a central goal of any legal system is to produce “acceptable verdicts” – or “verdicts that the public will view as statements about what actually happened.” According to Professor

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Nesson, a compromise verdict (in either the civil or criminal context), undermines that objective.

To be sure, a hallmark of intrajury negotiation is that jurors stop seeking a consensus on the facts. A compromise verdict is thus not likely to reflect a record of what happened on the night in question. Indeed, many compromise verdicts are inconsistent: an acquittal on one count and a conviction on another that together do not make sense in the real world because either both events happened or neither did.\(^{203}\) If part of a criminal verdict’s function is to inform the public what actually happened and confirm “that the system is capable of uncovering the truth,”\(^{204}\) then Professor Nesson would say intrajury negotiation undercuts that purpose and is unacceptable.

Even assuming that public trust in the criminal justice system should be a normative goal of the system itself (an assumption that not all agree with by any means), why must it be true that this trust is eroded when criminal law shifts focus from truth seeking? There are many instances where the criminal system has abandoned the search for absolute truth in favor of other considerations. In the law surrounding habeas corpus, for example, many ascribe to the basic premise that the “truth” is “ultimately unknowable” due to the limits of human intelligence, and so collateral review should be restricted to instances of defective process.\(^{205}\) And the exclusionary rule, to take another example, is now an entrenched part of American criminal adjudication despite the fact that its very purpose restricts information and takes a toll on truth-seeking.\(^{206}\)

Plea bargaining is perhaps the most prominent example of the criminal justice system operating collateral to a quest for truth. In a plea negotiation, neither party is primarily concerned with what story the plea deal reflects and whether it provides an accurate historical record; the defense attorney wants the most lenient deal for his client and the prosecutor typically wants the toughest conviction he can secure quickly.\(^{207}\) Indeed, Professor

\(^{203}\) Muller, supra note – at 773.


\(^{206}\) This is not to say, of course, that the exclusionary rule is without controversy. See generally Ronald Rychiak, Replacing the Exclusionary Rule, 85 CHI.-KENT L. REV. 241 (2010).

\(^{207}\) The motivations of a prosecutor, to be sure, vary by prosecutor and vary by case. Some seek to maximize sentences; others to maximize number of convictions; others to ensure that the charge brought is the most just. See
Josh Bowers has questioned whether even false pleas (made by innocent defendants to avoid the ordeal of trial) are problematic. He argues that the rise of plea bargaining means “the criminal justice system no longer has much to do with transparent truth seeking.”\textsuperscript{208} Guilty pleas, he tells us, “are no more than sterile administrative procedures, and plea bargaining is merely the mechanism that ensures these procedures are carried out efficiently.”\textsuperscript{209} 

The bottom line is that guilty pleas proceed from a familiar premise in criminal procedure. Either truth seeking is too expensive or too elusive or both, but for whatever reason we have long crossed over into a criminal justice system that treats the “truth” as a version of the facts that is acceptable to all.\textsuperscript{210} If this is the case, why are we bothered by a jury discerning “truth” in the same way? In terms of our commitment to discovering absolute truth, what difference does it make if plea negotiators abandon it or a jury does? If all that remains is adherence to our romantic idea of a jury discussion, that is perhaps insufficient.

\textit{CONCLUSION}

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

We should not treat their compromises as flukes or flaws. Given our general acceptance of negotiation to resolve criminal cases, the rejection of jury negotiations does not make sense. To be sure, intrajury negotiation can be improved, but it is not illegitimate just because it results in a deal. Deals are rampant in our criminal justice system, and by and large we accept them as inevitable and seek to improve them. The same shift should be made for compromise verdicts. Rather than dismissing intrajury negotiation,\textsuperscript{211} we accept them as inevitable and seek to improve them.

\textsuperscript{208} Josh Bowers, \textit{Punishing the Innocent}, 156 U. PA. L. REV, supra note --.

\textsuperscript{209} \textit{Id}.

negotiation as illegitimate, we should acknowledge it as a reality, recognize its resemblance to plea bargaining, and then seek to improve it in light of that analogy.