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Comments: Vice-a-Verdict: Legally Inconsistent Jury Verdicts Should Not Stand in Maryland

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VICE-A-VERDICT: LEGALLY INCONSISTENT JURY VERDICTS SHOULD NOT STAND IN MARYLAND

I. INTRODUCTION

Consider this situation—Emily is charged with possession of a controlled dangerous substance (CDS) and possession of a CDS with intent to distribute. It intuitively follows that in order to be convicted of possession with intent to distribute, Emily must first be convicted of possession because *actual possession* is an integral element of the greater crime.[1] Common sense indicates that an acquittal for possession and a conviction for possession with intent to distribute would be reversed by the appellate courts, as the jury has essentially indicated that the crime has both been committed and not committed at the same time.[2]

Verdicts such as this are called inconsistent verdicts. Inconsistent verdicts defy more than logic—they run contrary to many principles of law. As mandated by the Supreme Court's interpretation of the Constitution, each element of a crime must be proven by the government beyond a reasonable doubt in order to convict the accused.[3] Therefore, if a jury acquits Emily of simple possession, but convicts her of possession with intent to distribute, then it follows that the government has not proven simple possession beyond a reasonable doubt. Without proving this element, the crime of possession with intent to distribute cannot logically have been proven beyond a reasonable doubt, as simple possession is an integral element of distribution. Furthermore, verdict inconsistencies such as this may signify that the jurors were not truly convinced of the defendant's guilt beyond a reasonable doubt.[4]

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1. In *People v. Tucker*, 431 N.E.2d 617, 619 n.2 (N.Y. 1981), the court provided an excellent example:

> [If] a defendant is charged with two crimes: charge 1 requires proof of elements A, B and C; charge 2 requires proof of elements A, B, C and D. A conviction on charge 2 would be repugnant to an acquittal on charge 1 as the latter verdict would necessarily involve a finding that at least one of the essential elements of charge 2 was not proven.

2. Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 773-74 (1998).

3. *In re* Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

4. Steven T. Wax, *Inconsistent and Repugnant Verdicts in Criminal Trials*, 24 N.Y.L. SCH. L. REV. 713, 739 (1979).

Alarmingly, verdicts like this are automatically affirmed by most appellate courts.[5] In fact, almost every state in the union has chosen to follow the Supreme Court's unanimous decision concerning inconsistent jury verdicts.[6] However, this is not necessarily evidence of the doctrine's efficiency or fairness. Rather, it speaks to the extent that this problem permeates our judicial system and the urgent need for reform.

This comment will first discuss what constitutes an inconsistent verdict, and the Supreme Court's rationale for allowing inconsistent verdicts to stand.[7] Secondly, it will examine the reasons why inconsistent verdicts occur and explain why these reasons are unworthy of protection.[8] Next it will detail Maryland's approach to inconsistent verdicts.[9] It will then focus upon Alaska, New York, and Florida—the only states which allow inconsistent verdicts to be reversed.[10] This comment will then explain each jurisdiction's approach to inconsistent verdicts and use lessons gathered from each jurisdiction's practices in formulating an approach for Maryland.[11] Next it will detail a more concrete definition to use in identifying inconsistent verdicts.[12] This comment will conclude by explaining possible alternatives to the Supreme Court's means of dealing with inconsistent verdicts, and it will propose the best course of action for Maryland.[13]

II. WHAT IS AN INCONSISTENT VERDICT AND WHY ARE THEY UPHELD?

A. What is an Inconsistent Verdict?

Inconsistency in the verdict is a fairly fluid concept, which has eluded specific and uniform definition.[14] Generally, it is "understood to mean some logical impossibility or improbability [that] is implicit in the jury's findings as to the various counts of the indictment or [the] information [presented at trial]."[15]

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5. Muller, *supra* note 2, at 774.
6. *See* W.E. Shipley, Annotation, *Inconsistency of Criminal Verdict as Between Different Counts of Indictment or Information*, 18 A.L.R.3d 259, 274-79 (1968). *See also Tucker*, 431 N.E.2d at 618.
7. *See infra* Part II.B-C.
8. *See infra* Part III.
9. *See infra* Part IV.
10. *See infra* Part V.
11. *See infra* Part V.
12. *See infra* Part VI.
13. *See infra* Parts VII-VIII.
14. *See* Wax, *supra* note 4, at 713.
15. People v. Frye, 898 P.2d 559, 566 n.9 (Colo. 1995) (quoting Shipley, *supra* note 6, at 287).

Consequently, inconsistent verdicts may arise from both factual[16] and legal considerations.[17] Generally, there are two forms of legally inconsistent verdicts—multiple count inconsistencies as to a single defendant and inconsistencies between multiple defendants.[18] Multiple defendant inconsistencies occur when the jury acquits all but one defendant for a crime, which by its very definition requires more than one actor.[19] While multiple defendant inconsistencies and factual inconsistencies present serious issues, this comment will focus only on multiple count inconsistencies.

Defining a multiple count inconsistency is fairly complicated.[20] Some identify multiple count inconsistencies as occurring where "an acquittal on one count negates a necessary element for conviction upon another count."[21] This, generally, is the simplest form of an inconsistent verdict and occurs when a defendant is convicted of a greater count and acquitted of a lesser-included offense,[22] which this comment will refer to as a "lesser-included inconsistency." Arguably, another type of multiple count inconsistency occurs when a defendant is convicted of a compound offense, but acquitted of the necessary predicate offense.[23] While

16. A factually inconsistent verdict occurs when juries render different verdicts on crimes with distinct elements when there was only one set of proof given at trial, which makes the verdicts illogical. Wax, *supra* note 4, at 740. For example, suppose John is charged with the rape and murder of Sue and that both crimes were committed against Sue on the same night by one person. Assuming that the state does not use the felony murder theory, the conviction of John for murder, but his acquittal for rape does not produce a legal inconsistency because the elements of the two crimes do not overlap. On the other hand, if the only evidence presented by the defense was an out-of-state alibi for John then the jury's only logical alternatives would have been to either convict for both offenses, if they did not believe his alibi, or to acquit on both offenses if they did believe his alibi. If, based on such an alibi, the jury still convicted John of murder and acquitted him of rape, the verdict would be considered factually inconsistent because it makes no sense in light of the facts raised at trial.
17. *Frye*, 898 P.2d at 566 n.9.
18. Muller, *supra* note 2, at 778.
19. *See id.* at 779. Crimes which require more than one actor include conspiracy, adultery, fornication, miscegenation, bigamy and dueling. *Id.* (citing Ianelli v. United States, 420 U.S. 770, 781 n.13, 782 (1975)). Probably the most commonly prosecuted example in today's society is the crime of conspiracy. Muller, *supra* note 2, at 779.
20. *See* Wax, *supra* note 4, at 713.
21. Gonzalez v. State, 440 So. 2d 514, 515 (Fla. Dist. Ct. App. 1983). *See also* Muller, *supra* note 2, at 778–79 (giving an example of a case of inconsistency occurring in a case with a compound charge).
22. Wax, *supra* note 4, at 728. *See, e.g.*, People v. Carbonell, 358 N.E.2d 1034 (N.Y. 1976) (convicting defendant of robbery but acquitting him of petit larceny). *See also supra* Part I. (fact hypothetical).
23. *See, e.g.*, Shell v. State, 307 Md. 46, 53, 512 A.2d 358, 361 (1986) (finding that if a jury acquits an accused of a felony or crime of violence, but convicts the accused of use of a handgun in the commission of such felony or crime of violence, the jury has rendered inconsistent verdicts).

some jurisdictions refer to this type of multiple count inconsistency as a "true" or "legal" inconsistency,[24] this comment will refer to it as a "compound inconsistency."

B. *The United States Supreme Court's Stand on Inconsistent Verdicts*

In 1932 the Supreme Court held in *Dunn v. United States*,[25] that criminal defendants who were convicted by a jury on one count could not attack that conviction on the basis of the jury's rendering an acquittal on another count.[26] The Court further held that consistency in the verdict was not necessary and that each count of an indictment should be treated as if it were in a separate indictment.[27] The Court noted that these verdicts could be the result of compromise, mistake, or lenity but that these "verdicts cannot be upset by speculation or inquiry into such matters."[28]

Fifty-two years later the Supreme Court noted in *United States v. Powell*[29] that its decision in *Dunn* could be explained as "a recognition of the jury's historic function . . . [to act] as a check against arbitrary or oppressive exercises of power by the Executive Branch."[30] In *Powell*, the Court recognized that inconsistent verdicts are a clear indication that the jury has disobeyed the court's instructions.[31] However, as "it is unclear whose ox has been gored" by this disobedience, the Court chose to allow inconsistent verdicts to stand.[32] Essentially, the Court argued that since the mistake could have occurred to the detriment of either the defendant or the state, the defendant should not be allowed to challenge a conviction as the state may not challenge an acquittal.[33] Furthermore, the Court rejected the possibility of

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24. *Gonzalez*, 440 So. 2d. at 515.
25. 284 U.S. 390 (1932).
26. *Id.* at 393-94. Justice Butler, however, disagreed with the court's holding stating in his dissent, "[o]ne accused in different counts of an indictment of the same crime, there being no difference in the means alleged to have been employed, may not be adjudged guilty on a verdict of conviction on one count and of acquittal on the other." *Id.* at 402 (Butler, J., dissenting).
27. *Id.* at 393.
28. *Id.* at 393–94.
29. 469 U.S. 57 (1984) (upholding Dunn v. United States, 284 U.S. 390 (1932)). Defendant, Betty Lou Powell, was convicted of the compound offense of using a telephone to facilitate other felonies. *Id.* at 59-60. The jury acquitted her of all the charged underlying felonies. *Id.* Powell argued, and the government conceded, that these verdicts were inconsistent as it is necessary to prove at least one underlying felony beyond a reasonable doubt in order to convict the accused for the compound offense of telephone facilitation. *Id.* at 60-61 n.5.
30. *Id.* at 65.
31. *Id.*
32. *Id.* at 65-66.
33. *Id.* at 65. The Government may not appeal a judgment of not guilty against a criminal defendant. United States v. Halper, 490 U.S. 435, 440 (1989),

individual assessments of inconsistent verdicts because this would require speculation as to the jury's deliberations.[34] Finally, the Court held that criminal defendants receive sufficient protection against jury irrationality and error by the sufficiency of the evidence review which is conducted at the trial and appellate level.[35] Additionally, the Court explicitly found that there was no exception to this rule when a criminal defendant is acquitted of the predicate felony, but convicted of the compound felony.[36] The Court argues that reversing convictions of this nature would require the assumption that the acquittal on the predicate felony was the one that the jury "really meant," when all the court truly knows is that the verdict is inconsistent.[37] The Court ultimately concluded that "the Government's inability to invoke review, the general reluctance to inquire into the workings of the jury, and the possible exercise of lenity—suggest that the best course to take is simply to insulate jury verdicts from review on this ground."[38]

C. *The Supreme Court's Reasoning—faulty or formidable?*

Essentially, the Supreme Court's reasoning in *Powell* consists of three major points: (1) because there is no way to determine

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abrogated on other grounds by Hudson v. United States, 522 U.S. 93 (1997). *See also* U.S. CONST. amend. V (providing that "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb").

34. *Powell*, 469 U.S. at 66. Federal courts have resisted the urge to inquire into jury deliberations in order to preserve an element of finality. *Id.* at 67. To enforce this policy decision, the Federal Rules of Evidence state that jurors are generally incompetent to testify about jury proceedings. FED. R. EVID. 606(b). In *McDonald v. Pless*, the Court explained the importance of such a prohibition:

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation. . . .

238 U.S. 264, 267-68 (1915).

35. *Powell*, 469 U.S. at 67. This review determines whether the evidence presented at trial was sufficient to support a rational determination of guilt. *Id. See also infra* Part II.C.3.

36. *Powell*, 469 U.S. at 67–68 (stating that such an exception would "threaten[] to swallow the rule"). The Court explicitly noted, however, that its opinion on inconsistent verdicts did not apply to cases where a defendant is convicted of two crimes in a situation where a finding of guilt on one count excludes a finding of guilt on another count. *Id.* at 69 n.8 (citing United States v. Daigle, 149 F. Supp. 409 (D.D.C. 1957) (holding that finding a defendant guilty of larceny and embezzlement for the same act cannot stand so the court could direct an acquittal of the larceny count), *aff'd per curiam*, 248 F.2d 608 (U.S. App. D.C. 1957)).

37. *Powell*, 469 U.S. at 68.

38. *Id.* at 68-69.

why a jury rendered an inconsistent verdict, such verdicts should be upheld in the interest of protecting lenity;[39] (2) because the government may not appeal inconsistent acquittals, it is only fair to prevent defendants from appealing inconsistent convictions;[40] and (3) any harm that could result from an inconsistent verdict is prevented by sufficiency of the evidence review.[41]

1. Inconsistent Verdicts Should Be Upheld in Order to Protect Lenity

The Supreme Court's first argument is perhaps its weakest, as it overstates the value of lenity[42] and underestimates the price of allowing inconsistent verdicts rendered by mistake or compromise to stand.[43] Essentially, the Court refuses to reverse inconsistent verdicts under the rather hypocritical argument that it is for the defendant's own good as reversal would endanger jury lenity.[44] But if jury lenity results only in acquittals, as the Court assumes it does,[45] how would appellate reversal of inconsistent convictions endanger the concept of lenity?[46] Rationally, it appears that the only action which could truly endanger a defendant's chance for lenity would be appellate reversal of inconsistent acquittals, which is not a real threat as it is precluded by the Double Jeopardy Clause.[47]

Perhaps most damaging is what the Court is willing to accept and impose upon criminal defendants in order to protect lenity.[48] While lenity is a plausible explanation for inconsistent verdicts, these verdicts may also be explained by confusion, mistake or compromise.[49] Because the Court has no way of knowing how often verdicts are the result of lenity, the Court gambles with possibly remote odds to protect lenity at the cost of establishing the same protections for jury confusion, mistake, and compromise as well.[50]

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39. *Id.* at 65-67. Muller refers to this as the argument from uncertainty. Muller, *supra* note 2, at 794.
40. *Powell*, 469 U.S. at 65. Muller refers to this as the Court's argument from equity. Muller, *supra* note 2, at 806.
41. *Powell*, 469 U.S. at 67. Muller calls this the Court's argument from remedy. Muller, *supra* note 2, at 812.
42. *See infra* Part III.C. (discussing reasons why jury lenity is not necessarily worth protecting).
43. *See* Muller, *supra* note 2, at 794-806.
44. *Id.* at 795.
45. *See Powell*, 469 U.S. at 66.
46. Muller, *supra* note 2, at 794-95.
47. *Id.* at 795.
48. *Id.* at 798.
49. *Powell*, 469 at 65. *See infra* Part III.A-B. (discussing why verdicts rendered through compromise or mistake are unworthy of protecting).
50. Muller, *supra* note 2, at 795.

2. Defendants May Not Appeal Inconsistent Convictions Because the State May Not Appeal Acquittals

The Court's second argument is, on its face, only an attempt to make the playing field between the individual and the state more even. In actuality, this argument goes against constitutional principles and alters the balance between the individual and the state in an unfair manner.[51] The Bill of Rights provides criminal defendants with many constitutional rights that protect them from the state.[52] However, instead of honoring the defendant's advantage as a constitutional mandate to protect individuals from a powerful state, the Court shields the state from the full weight of the Bill of Rights' guarantees and strips defendants of a ground for appeal.[53] The Court's decision, instead of preventing the defendant from gaining an undue advantage, allows the state to shirk its burden that is imposed by the Bill of Rights.[54]

3. Defendants Receive Sufficient Protection from "Sufficiency of the Evidence" Review

The Court's third argument, that defendants already receive sufficient protection from jury irrationality[55] is also misplaced as "sufficiency review is simply too toothless and too deferential to the jury and its irrational verdict."[56] In *Jackson v. Virginia*,[57] the court held that in order to ensure a jury's compliance with the reasonable doubt standard, appellate courts should determine whether there was sufficient evidence to reasonably warrant a finding of guilt beyond a reasonable doubt.[58] This test requires judges to view the evidence in a light *most favorable to the state* and to ask whether a rational trier of fact could have found all of the essential elements beyond a reasonable doubt.[59] The court noted that this test infringed upon jury discretion only to the extent needed to ensure "the fundamental protection of due process of

51. *Id.* at 806.
52. *Id. See* U.S. CONST. amend. V (including the right to indictment by a grand jury, the right against self-incrimination, the right to due process of law, and the right to be protected from double jeopardy); U.S. CONST. amend. VI (including the right to counsel, the right to a speedy trial, the right to subpoena witnesses, the right to confront witnesses, and the right to an impartial jury).
53. Muller, *supra* note 2, at 806-07.
54. *Id.*
55. *Powell*, 469 U.S. at 67.
56. Muller, *supra* note 2, at 824.
57. 443 U.S. 307 (1979).
58. *Id.* at 317-18.
59. *Id.* at 319. *See also* Hodge v. United States, 13 F.2d 596 (6th Cir. 1926) (viewing evidence in favor of government to see if testimony is sufficient to warrant conviction in appeal of conviction); Fitzgerald v. United States, 29 F.2d 881 (6th Cir. 1929) (viewing evidence in favor of government to see if sufficient evidence warrants conviction in appeal of conviction).

law."[60] While this test does not advocate blind trust of jury verdicts, it still shows substantial deference to the jury's determination[61] and is rarely used to overturn convictions.[62]

III. THE INSUFFICIENCY OF THE EXPLANATIONS PROVIDED BY THE SUPREME COURT

It would appear that juries can reach inconsistent verdicts in innumerable ways, but in fact, there are only a few, and each constitutes a violation of the court's instructions.[63] Juries deliver inconsistent verdicts based on three general reasons: mistake, compromise, or lenity.[64] These three reasons, however, are unworthy of protection by the Supreme Court. The following section will explain how each may arise and discuss the problems associated with protecting mistake, compromise, and lenity.

A. Mistake

The most obvious reason for a jury to render an inconsistent verdict is through simple mistake. The jury may misunderstand the court's instructions on the law or improperly apply the facts to the law.[65] For example, a jury might mistakenly believe that it is not necessary to convict on the predicate felony in order to find the defendant guilty of a compound crime.[66] While errors of this sort are unintentional and presumably not committed in bad faith, they still amount to a failure to follow the court's instructions and undeniably hurt defendants.[67]

Furthermore, the Supreme Court has never insinuated that one of the benefits of our jury system is that juries are allowed to make mistakes and apply the law incorrectly without disruption.[68] In fact, the Supreme Court has taken pains to carefully examine jury instructions, which implies that confusion or error that could arise from those instructions is of great concern.[69]

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60. *Jackson*, 443 U.S. at 319.
61. Muller, *supra* note 2, at 823. The Court noted, "the relevant question is whether . . . *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319.
62. Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. REV. 979, 989 (1993) (stating that courts "occasionally" find that the evidence was insufficient, but that the test is usually used "to overturn a conviction on a particular count of a multi-count indictment, rather than to exonerate a defendant entirely").
63. Muller, *supra* note 2, at 781-85.
64. Powell v. United States, 469 U.S. 57, 65 (1984).
65. Muller, *supra* note 2, at 782.
66. *Id.*
67. *Id.* at 782, 796.
68. *Id.* at 795.
69. *Id.*; Sandstrom v. Montana, 442 U.S. 510, 523 (1979) (holding that jury instructions violate due process if they fail to give effect to the requirement that the state must prove every element of an offense). *See also* Wax, *supra* note 4, at

B. Compromise

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.[70] Compromise verdicts arise when, in an attempt to reach a verdict after being unable to achieve unanimity, the jury essentially splits the difference and negotiates a verdict.[71] In civil cases, compromise verdicts manifest themselves in damage awards,[72] and in criminal cases, compromise verdicts "relate[] to [the] number[] of counts and the lesser included offenses."[73]

On its face, jury compromise does not appear *that* harmful—it resolves cases, clears dockets, and prevents mistrials.[74] Compromise verdicts, however, are contrary to the court's instructions and demean the reasonable doubt standard.[75] In Maryland, juries are required to render unanimous verdicts,[76] but are specifically warned "not [to] surrender your honest belief as to the weight or effect of the evidence only because of the opinion of your fellow jurors or for the mere *purpose of reaching a verdict.*"[77] Compromise verdicts also dishonor the requirement of true unanimity because each member has essentially surrendered his or her honestly held belief as to whether the defendant is guilty beyond a reasonable doubt in the name of expediency and false unanimity.[78]

Furthermore, when a compromise verdict is rendered, the criminal defendant is always harmed by this sacrifice of the reasonable doubt standard due to a violation of his or her constitutionally protected rights.[79] Ironically, this harm is unnecessary as a mistrial does not automatically allow defendants to "get off"—if the jury followed the courts instructions and a

741 (stating that the importance of jury instructions stems from "the fact that the judge's charge . . . is often the controlling factor in jury deliberations").

70. Muller, *supra* note 2, at 784.
71. *Id.* at 782.
72. *See, e.g.*, McDonald v. Pless, 238 U.S. 264, 265-66 (1915) (The jury reached a damage award by averaging the sum of what each juror believed the plaintiff was entitled to receive).
73. Ballew v. Georgia, 435 U.S. 223, 235 (1978).
74. Muller, *supra* note 2, at 784, 796.
75. *Id.*
76. MARYLAND CRIMINAL PATTERN JURY INSTRUCTIONS § 2.03 (2005) ("Your verdict must represent the considered judgment of each juror and must be unanimous.").
77. *Id.* § 2.01 (emphasis added). Therefore, when a jury renders a verdict via compromise, they are in direct violation of the court's instructions. *See id.*
78. Muller, *supra* note 2, at 784.
79. *Id.* at 796.

hung jury resulted, the government is not precluded from retrying the defendant on those charges.[80]

C. Lenity

The final way inconsistent verdicts may be rendered is through an exercise of what the Supreme Court refers to as "lenity."[81] Lenity occurs when a jury acquits a defendant even though it is convinced beyond a reasonable doubt of the defendant's guilt.[82] There are generally two instances in which lenity is exercised—when the jury believes that the law punishes conduct which is not morally blameworthy[83] or when the jury believes that this particular defendant should not be punished for violating the law.[84]

The Supreme Court, however, makes a critical assumption, presumably due to the ambiguity of the general verdict, that inconsistent verdicts are, in fact, the result of lenity.[85] The Court's

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80. *See* Arizona v. Washington, 434 U.S. 497, 509 (1978) (stating that mistrials based upon a jury's inability to reach a unanimous verdict is the "classic basis" for declaring a mistrial); Oregon v. Kennedy, 456 U.S. 667, 672 (1982) (stating that mistrials based upon hung juries are "prototypical example[s]" of the "manifest necessity" which is generally required to overcome the double jeopardy bar to a second trial).

81. Powell v. United States, 469 U.S. 57, 65 (1984); Muller, *supra* note 2, at 784. In his article in support of upholding inconsistent verdicts, Alexander Bickel explained the importance of permitting juries to render inconsistent verdicts due to the value of lenity:

> The law states duties and liabilities in black and white terms. Human actions are frequently not as clean-cut. Judges themselves sometimes undertake, in sentencing, the search for a middle ground between the absolutes of conviction and acquittal. To deny the jury a share in this endeavor is to deny the essence of the jury's function, in which "law and justice do not coincide."

Alexander M. Bickel, Comment, *Judge and Jury — Inconsistent Verdicts in the Federal Courts*, 63 HARV. L. REV. 649, 651-52 (1950) (footnotes omitted).

82. Muller, *supra* note 2, at 784. *See* Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 253-54 (1996) (calling this phenomenon "nullification" and describing it as a jury's power to "acquit against the evidence").

83. Muller, *supra* note 2, at 784; Leipold, *supra* note 82, at 297-98.

84. Muller, *supra* note 2, at 784; Leipold, *supra* note 82, at 301-02 (explaining that jury nullification occurs "when the harm caused by the defendant is *de minimis*, when the victim's conduct contributed to the harm, when jurors believe the defendant already has suffered enough, and when the government appears to have acted improperly").

85. Muller, *supra* note 2, at 805; Wax, *supra* note 4, at 739. In *Steckler v. United States*, the court said, "[w]e interpret the acquittal as no more than [the jury's] assumption of a power which they had no right to exercise, but to which they were disposed through lenity. That the conviction may have been the result of some compromise is, of course, possible . . ." 7 F.2d 59, 60 (2d Cir. 1925). *Contra* Chad W. Coulter, Comment, *The Unnecessary Rule of Consistency in Conspiracy Trials*, 135 U. PA. L. REV. 223, 241 (1986) (stating that relying on the Supreme Court's assumption "does not reflect a wholesale rejection of defendants' rights, but a prudent balancing of the role of the jury and the need to ensure the accuracy of criminal convictions").

reliance on this assumption, in the words of one commentator, "is a serious breach of the systemic protections designed to ensure a sound basis for conviction for criminal defendants."[86]

Additionally, the true value of lenity has been greatly exaggerated by the Supreme Court through its willingness to accept compromise and mistake verdicts in order to protect lenity.[87] Perhaps most importantly, the Court wrongly assumes that the exercise of lenity only burdens the government.[88] The Court fails to recognize that the power to exercise lenity inherently includes the power to render verdicts out of hostility or prejudice as they are "opposite faces of the coin of jury discretion."[89]

Another important consideration is that jury lenity is not constitutional in nature[90] and the Court has previously held that defendants are not entitled to a jury which will set aside the law.[91] Moreover, inconsistent verdicts based on lenity are a disregard of the court's instructions.[92] Jury instructions require that if guilt is proven beyond a reasonable doubt, the defendant should be convicted.[93] While a jury's exercise of lenity cannot be

86. Wax, *supra* note 4, at 739.

87. *See* Powell v. United States, 469 U.S. 57, 65 (1984) (discussing why verdicts based on lenity should be protected). *See supra* Part III.A-B. (discussing why mistake and compromise are not worthy of protection by the Court).

88. *Powell*, 469 U.S. at 66; Muller, *supra* note 2, at 794.

89. Muller, *supra* note 2, at 803-05; Leipold, *supra* note 82, at 304 ("For every case where the jury extends mercy to a deserving defendant, there may well be another (or two, or five others) where the verdict is based on improper considerations."). *See, e.g.*, Reed v. State, 103 So. 97 (Ala. Ct. App. 1925) (reversing the conviction of a black man for violating miscegenation statute since his white wife was acquitted and Alabama law held it was a crime that could not be committed by one person).

90. Muller, *supra* note 2, at 797.

91. *Id.* In *Sparf v. United States*, the Court said,

> Public and private safety alike would be in peril if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court, and become a law unto themselves. Under such a system . . . jurymen, untrained in the law, would determine questions affecting life, liberty, or property according to such legal principles as, in their judgment, were applicable to the particular case being tried.

156 U.S. 51, 101 (1895). The Court pointed out that "the result would be that the enforcement of the law against criminals[,] and the protection of citizens against unjust and groundless prosecutions, would depend entirely upon juries uncontrolled by any settled, fixed, legal principles." *Id.* at 101-02.

92. *See* United States v. Thomas, 116 F.3d 606, 614 (2d Cir. 1997) (stating that "nullification is, by definition, a violation of a juror's oath to apply the law as instructed by the court").

93. Muller, *supra* note 2, at 785.

prevented,[94] this does not necessarily make its exercise lawful or desirable.[95]

Considering these many issues—namely, the exaggerated value of lenity and the under appreciated cost of compromise and mistake—the Court's decision to protect lenity appears incongruous.

IV. MARYLAND HAS ADOPTED THE HOLDING OF *POWELL*

This comment will now discuss Maryland's approach to inconsistent verdicts in both criminal and civil cases. It will also explain Maryland's policy on jury instructions regarding consistency in the verdict.

A. Inconsistent Verdicts in Criminal Cases

The Supreme Court's ruling in *Powell* was not based on constitutional considerations and, therefore, the states are not bound by the Court's decision.[96] Despite its freedom to hold otherwise, the Court of Appeals of Maryland adopted the holding in *Powell*[97] and has consistently rejected inconsistent verdicts as a sufficient reason to void convictions.[98] The court has continued to uphold these verdicts due to the "unique role of the jury" in our justice system.[99] The court has further held that such verdicts will be accepted without proof of an actual irregularity.[100] However, inconsistent verdicts in Maryland will not be upheld if there was insufficient evidence or if it is apparent from the record that the

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94. *Id.* at 785-86. *See* Green v. United States, 355 U.S. 184, 188 (1957) (stating that a verdict of acquittal is final and that the state may not obtain a new trial through an appeal even if the verdict appears erroneous).

95. Muller, *supra* note 2, at 786; United States v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983) (per curiam). The *Washington* court stated,

> A jury has no more "right" to find a "guilty" defendant "not guilty" than it has to find a "not guilty" defendant "guilty," and the fact that the former cannot be corrected by a court, while the latter can be, does not create a right out of the power to misapply the law.

Id. at 494.

96. United States v. Powell, 469 U.S. 57, 65 (1984) ("[N]othing in the Constitution would require such a protection, and we therefore address the problem only under our supervisory powers over the federal criminal process[.]"); Wilson v. Turpin, 5 Gill 56, 58 (Md. 1847) (holding that the decisions of the Supreme Court construing the federal constitution and acts of Congress are conclusive and binding upon the states).

97. Shell v. State, 307 Md. 46, 54, 512 A.2d 358, 362 (1986).

98. Ford v. State, 274 Md. 546, 552, 337 A.2d 81, 85 (1975). *See* Wright v. State, 307 Md. 552, 576, 515 A.2d 1157, 1169 (1986).

99. Mack v. State, 300 Md. 583, 594-95, 479 A.2d 1344, 1349 (1984).

100. Hoffert v. State, 319 Md. 377, 389, 572 A.2d 536, 542 (1990) (Chasanow, J., dissenting). *See also* Ledbetter v. State, 224 Md. 271, 273-74, 167 A.2d 596, 597-98 (1961).

jury was misled by the court's instructions and that the error did not result from lenity, compromise, or mistake.[101] While an inconsistent acquittal on one count does not prevent a conviction upon another count from standing,[102] Maryland recognizes the exception noted by the Supreme Court and requires that a finding of guilt on two incompatible counts will be declared invalid.[103]

Interestingly, inconsistent verdicts which are rendered by the court and not by the jury are considered reversible error in Maryland.[104] The court explained this policy by pointing out that it would make no sense to require judges to give instructions to juries which explain the law and then give the judges license to ignore those rules.[105]

B. Inconsistent Verdicts in Civil Cases

It is also interesting to consider Maryland's approach to inconsistent verdicts in civil cases. In the recent case of *Southern Management Corporation v. Taha*,[106] the Court of Appeals held it was error for the trial court to allow irreconcilably inconsistent verdicts to stand in civil cases.[107] However, the court pointed out the irrationality of this holding by noting that the same jury interplay occurs when rendering a civil verdict as when a criminal verdict is rendered and that this interplay allows for the same opportunities for mistake, compromise, or lenity.[108] Furthermore, the court specifically added, in a footnote, that "[w]e leave for

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101. Bates v. State, 127 Md. App. 678, 695-96, 736 A.2d 407, 416 (1999).
102. Leet v. State, 203 Md. 285, 293, 100 A.2d 789, 793 (1953).
103. *See supra* note 36 and accompanying text for Supreme Court's exception. *See also* Heinze v. State, 184 Md. 613, 617, 42 A.2d 128, 130 (1945). In *Heinze*, the defendants were charged with stealing twenty dollars and with receiving twenty dollars they knew to be stolen and were convicted of both. *Id.* at 615, 42 A.2d at 129. The court held that a thief cannot be guilty of the crime of receiving stolen goods which he himself has stolen, and a guilty receiver of those stolen goods. *Id.* at 617, 42 A.2d at 130. Therefore, the court held the verdict "inconsistent in law." *Id. But see* State v. Jenkins, 307 Md. 501, 516-17, 515 A.2d 465, 472-73 (1986) (holding that the elements for the crimes of assault with intent to murder and assault with intent to maim, disfigure, or disable are mutually exclusive or inconsistent and that the conviction for assault with intent to maim, disfigure, or disable should be merged into the conviction for assault with intent to murder).
104. Shell v. State, 307 Md. 46, 57-58, 512 A.2d 358, 363-64 (1986).
105. *Id.* at 57, 512 A.2d at 363.
106. 378 Md. 461, 836 A.2d 627 (2003).
107. *Id.* at 495, 836 A.2d at 647. Taha sued Southern Management Corporation (SMC) and two individual employees of SMC for malicious prosecution. *Id.* at 469-70, 836 A.2d at 632. The jury rendered a verdict in favor of the individual employees, but found the employer liable for damages. *Id.* at 473-75, 836 A.2d at 634-35. The Court of Appeals held that these verdicts were irreconcilably inconsistent under the doctrine of respondeat superior. *Id.* at 467, 836 A.2d at 630. In fact, several other states have adopted policies similar to Taha in regard to inconsistent civil verdicts. *Id.* at 488-89, 836 A.2d at 643.
108. *Id.* at 487, 836 A.2d at 642.

another day the issue of whether this Court should reconsider its decision in criminal matters in which inconsistent verdicts have been rendered."[109] This could be interpreted to imply a willingness on the part of the Court of Appeals to reexamine its position on inconsistent verdicts.

C. *Jury Instructions Regarding Inconsistent Verdicts*

Maryland courts have recognized, however, that inconsistent verdicts are not desirable and that an instruction from the presiding judge to render only consistent verdicts is beneficial in order to avoid convictions which are contrary to law.[110] According to the court, such an instruction is justified because "the jury retains its power to err, either fortuitously or deliberately, and to compromise or exercise lenity. It, therefore, retains the power to be the final arbiter in the determination of which, if any, of the crimes charged the accused is guilty."[111]

V. OTHER JURISDICTIONS' APPROACHES TO INCONSISTENT VERDICTS

In determining how Maryland should approach inconsistent verdicts, it is helpful to analyze other jurisdictions' approaches to the same issue. The vast majority of jurisdictions in the United States have followed the holding laid out by the Supreme Court in *Powell v. United States*.[112] This comment will focus on Alaska, Florida, and New York as they are the only jurisdictions that do not automatically affirm inconsistent verdicts.[113] These jurisdictions each take unique approaches to dealing with inconsistent verdicts. While Alaska has taken a more liberal approach by not requiring strict consistency,[114] Florida and New York attempt to differentiate between types of inconsistent verdicts[115] and in doing so raise questions of policy and practicality.

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109. *Id.* at 488 n.8, 836 A.2d at 642 n.8.
110. Mack v. State, 300 Md. 583, 597, 479 A.2d 1344, 1351 (1984).
111. *Id.* at 597, 479 A.2d at 1351. This justification is incongruous, as verdicts that are rendered through compromise, mistake, or lenity are not actually in accordance with the law. *See supra* Part III.A–C.
112. *See supra* note 6 and accompanying text.
113. *See infra* Part V.A-B. Until fairly recently the minority of jurisdictions that rejected the holdings of *Powell* and *Dunn* was more substantial. *See, e.g.*, People v. Jones, 797 N.E.2d 640, 644-47 (Ill. 2003) (overruling People v. Klingenberg, 665 N.E.2d 1370 (Ill. 1996) (declining to follow *Powell*)); State v. Ng, 750 P.2d 632, 639-40 (Wash. 1988) (overruling State v. O'Neil, 167 P.2d 471 (Wash. 1946) (holding that inconsistent verdicts must be reversed)).
114. *See infra* Part V.A.
115. *See infra* Part V.B.

A. Alaska

In 1970, the Supreme Court of Alaska held in *DeSacia v. State*[116] that juries may not render strictly inconsistent verdicts.[117] DeSacia was convicted of the manslaughter of Evangelista and acquitted of the manslaughter of Hogan.[118] Both men were occupants of the same pickup truck which was traveling ahead of DeSacia's vehicle.[119] While driving at night on a gravel road at high speeds, DeSacia moved into the left lane and attempted to pass the pickup truck occupied by Evangelista and Hogan.[120] As a result, Hogan lost control of the car and drove off the road and into the bordering river—killing both men.[121] Based on the circumstances, the court found that the two verdicts were "irreconcilably in conflict"[122] as there was no conceivable way DeSacia's actions toward Evangelista were in any way different from his conduct toward Hogan.[123]

The court could not find any basis on which to assume that inconsistent verdicts are the result of lenity or that there was only an occasional risk of compromise verdicts.[124] The court concluded "[t]he truth is simply that we do not know, nor do we have any way of telling, how many inconsistent verdicts are attributable to feelings of leniency, to compromise, or, for that matter, to outright confusion on the part of the jury."[125]

The court held that DeSacia's acquittal had to stand as the Double Jeopardy Clause prevents retrial on that count, but ordered a retrial on the conviction as collateral estoppel did not apply.[126]

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116. 469 P.2d 369 (Alaska 1970).
117. *Id.* at 378.
118. *Id.* at 370.
119. *Id.*
120. *Id.*
121. *Id.* at 370-71.
122. *Id.* at 373. The court never specifically used the terms "factual inconsistency." *See generally DeSacia*, 469 P.2d 369. However, the *DeSacia* verdict is a classic example of a factually inconsistent verdict. *See supra* note 16 and accompanying text.
123. *DeSacia*, 469 P.2d at 373-74. It should be noted that the crime charged in both indictments stemmed from the same alleged misconduct of DeSacia, specifically "his criminally negligent operation of a motor vehicle." *Id.* at 373. Furthermore, the court noted, "it is virtually impossible to maintain that DeSacia was more negligent toward one or the other of the victims." *Id.* at 374.
124. *Id.* at 377.
125. *Id.*
126. *Id.* at 381. The court reasoned it was unfair to allow the appellant to successfully argue that the inconsistency renders his conviction meaningless and to also maintain there was sufficient certainty to preclude retrial due to collateral estoppel. *Id.* The court believed that allowing the appellant to invoke collateral estoppel would "convert the guarantee of double jeopardy from a shield into a sword." *Id.* (quoting United States v. Maybury, 274 F.2d 899, 905 (2d Cir. 1960)).

Three years later the court noted that the level of inconsistency required by *DeSacia* to merit reversal is quite high.[127] Also, Alaskan courts have held that if a party or defendant wishes to challenge a jury's verdict on the basis that it is inconsistent, the challenge must be made prior to the jury's dismissal.[128]

B. Florida and New York

While Alaska treats all forms of inconsistent verdicts as an error to be cured at the trial level,[129] Florida and New York take a different approach in that both states differentiate between different types of inconsistencies when determining whether a reversible error has occurred.[130] New York reverses both compound and lesser-included inconsistencies based on a fairly concrete definition, but recognizes an exception to this rule and refuses to reverse compound inconsistencies involving felony murder.[131] However, even though Florida relies on essentially the same definition for identifying impermissible inconsistency as New York,[132] Florida jurisprudence only calls for the reversal of compound inconsistencies and not lesser included inconsistencies.[133]

1. New York

New York draws a distinction between types of inconsistent verdicts—those verdicts that are merely inconsistent and those that are "repugnant."[134] Merely inconsistent verdicts may stand in New

127. Daygee v. State, 514 P.2d 1159, 1168 (Alaska 1973) (affirming defendant's conviction and finding the facts of the case did not meet "the high level of inconsistency" required by *DeSacia* to merit reversal). *See also* Roberts v. State, 680 P.2d 503, 506 (Alaska Ct. App. 1984) (noting that the inconsistency present in *DeSacia* was "obvious and unmistakable").

128. *See Roberts*, 680 P.2d at 507 (holding "that claims of inconsistent jury verdicts in criminal cases will not be considered on appeal unless an objection" is made to the trial court prior to the jury's dismissal); City of Homer v. Land's End Marine, 459 P.2d 475, 480 (Alaska 1969) ("The rule that objection on the grounds of inconsistency is waived by failure to move for resubmission promotes the fair and expeditious correction of error." (quoting Cundiff v. Washburn, 393 F.2d 505, 507 (7th Cir. 1968))).

129. *See supra* note 128 and accompanying text.

130. *See infra* Part V.B.1-2. Some commentators believe, however, that there is no real basis for treating these "types" of inconsistent verdicts differently as both results are illogical and both have the possibility of wrongful convictions. Kimberly Nolen Hopkins, Criminal Law, *When Is an Inconsistent Verdict Not Inconsistent?*, 74 FLA. BAR J. 42, 44 (2000) (stating that "only legal minds would be able to see a difference where none 'truly' exists").

131. *See infra* Part V.B.1.

132. *See infra* notes 135, 146 and accompanying text.

133. *See infra* notes 147-49 and accompanying text.

134. Wax, *supra* note 4, at 714-16. The term "repugnant" has been used interchangeably with the term inconsistent in New York. People v. Hodge, 802 N.Y.S.2d 613, 615 (N.Y. Sup. Ct. 2005).

York, while verdicts that are considered "repugnant" will be reversed.[135]

In *People v. Tucker*[136] the Court of Appeals of New York defined a repugnant verdict as one "where acquittal on one crime as charged to the jury is conclusive as to a necessary element of the other crime, as charged, for which the guilty verdict was rendered."[137] Additionally, the court held that in order to determine whether a verdict is repugnant, the appellate courts must only examine the instructions given to the jury, regardless of the accuracy of the instruction.[138] The court must then determine whether the jury, based upon the instructions that it received, "must have reached an inherently self-contradictory verdict."[139] Furthermore, New York case law requires that defendants register a protest on the issue of repugnancy prior to the discharge of the jury when any inconsistencies could be remedied by resubmission to the jury.[140]

Applying the definition laid out in *Tucker*, New York allows both compound and lesser included inconsistencies to be reversed. However, in the context of felony murder, a traditionally compound offense, New York law makes a substantial deviation. In New York if a defendant is acquitted of the underlying felony but convicted of felony murder, the conviction will not be vacated.[141] This is based on the finding that the completion of the underlying felony is not an essential element of felony murder.[142] In fact, the Court of Appeals of New York described them as "substantively and generically entirely separate and disconnected offenses."[143] Justifying this statement, the court explained that the underlying felony "functions as a replacement for the mens rea . . . necessary [to commit] common-law murder" and not an actual element of the crime.[144]

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135. People v. Tucker, 431 N.E.2d 617, 619 (N.Y. 1981) ("Allowing such a verdict to stand is not merely inconsistent with justice, but is repugnant to it.").

136. 431 N.E.2d 617.

137. *Id.* at 619. The court adopted the definition proposed by Steven T. Wax in his 1979 law review article on inconsistent verdicts. *See* Wax, *supra* note 4, at 740-42.

138. *Tucker*, 431 N.E.2d at 619-20.

139. *Id.* at 620.

140. People v. Satloff, 437 N.E.2d 271, 272 (N.Y. 1982) (mem.). *See also* People v. Hines, 502 N.Y.S.2d 271, 272 (N.Y. App. Div. 1986) (finding that defendant waived his right to challenge the verdict based on repugnancy by not raising the issue when the trial court had the opportunity to resubmit the case to the jury).

141. *See* People v. Murray, 459 N.Y.S.2d 810, 812 (N.Y. App. Div. 1983).

142. People v. Ponder, 433 N.Y.S.2d 288, 293 (N.Y. App. Div. 1980), *aff'd*, 429 N.E.2d 735 (N.Y. 1981).

143. People v. Berzups, 402 N.E.2d 1155, 1160 (N.Y. 1980) (quoting People v. Nichols, 129 N.E. 883, 884 (N.Y. 1921)).

144. *Id.* The court explained that "[t]his view accords with the historical development of the felony murder doctrine and the legislative policy reflected in its current

2. Florida

It is perhaps an understatement to call Florida's approach to inconsistent verdicts puzzling.[145] Initially, the Supreme Court of Florida adopted the *Dunn* holding in 1946.[146] But then in 1979 the court, apparently, but not explicitly reversing itself, recognized an exception to the general rule for "true" inconsistencies.[147] According to this rule, Florida courts will not uphold truly inconsistent verdicts, which the court defines as those verdicts where an acquittal on one count negates an element necessary to sustain a conviction on a separate count.[148] While Florida has allowed an exception for "truly" inconsistent verdicts, it has specifically refused to extend the exception to what it refers to as factually inconsistent verdicts.[149]

This distinction between a factual inconsistency and true inconsistency is actually quite blurry based on Florida's jurisprudence.[150] Florida defines a factual inconsistency as one which, while defying logic, can still legally stand because one acquittal does not preclude a conviction upon another count.[151] Using this definition, those inconsistencies that arise in the context

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statutory descendant, both of which underscore the fact that the corpus of the crime is the killing of another." *Id.*

145. *See* Hopkins, *supra* note 130, at 42 (referring to Florida's jurisprudence on the matter of inconsistent verdicts as an "enigma wrapped around [a] riddle").

146. Goodwin v. State, 26 So. 2d 898, 899 (Fla. 1946).

147. Mahaun v. State, 377 So. 2d 1158, 1160-61 (Fla. 1979) (holding that a conviction for felony murder must be vacated if the jury acquits the defendant of the underlying felony charge because the acquittal constitutes a specific finding of the non-existence of that felony).

148. Hopkins, *supra* note 130, at 44; Gonzalez v. State, 440 So. 2d 514, 515 (Fla. Dist. Ct. App. 1983). *See also* Eaton v. State, 438 So. 2d 822, 823 (Fla. 1983) ("[Juries are] required to return consistent verdicts as to the guilt of an individual on interlocking charges.").

149. State v. Connelly, 748 So. 2d 248, 252 (Fla. 1999). The Florida Supreme Court held that such an extension would be contrary to precedent. *Id.* In *Reid v. State*, the court said it had "recognized only one exception to the general rule allowing inconsistent verdicts." 799 So. 2d 394, 399 (Fla. Dist. Ct. App. 2001). In *Gonzalez*, the court held that convicting defendant of robbery with a firearm while acquitting defendant of possession of a firearm during commission of felony did not require reversal as the latter is not a necessary element of the former. 440 So. 2d at 516. The court justified its holding stating, "[w]hile it may be true that one cannot be convicted of possession of a firearm during the commission of a felony if it has been legally established that no felony took place, the converse is not true, at least in our view." *Id.*

150. *See* Hopkins, *supra* note 130, at 44-46. Much of the confusion likely arises based on the terminology used by Florida courts. The situation this comment calls a lesser included inconsistency, Florida courts refer to as a factual inconsistency. *See infra* note 151 and accompanying text. Furthermore, what this comment identifies as a compound inconsistency is referred to by Florida courts as a "legal" or "true" inconsistency. *See* Hopkins, *supra* note 130, at 44.

151. In other words, one count is not the predicate count to the compound offense, but rather is a lesser included offense. *See, e.g.*, Fayson v. State, 698 So. 2d 825, 826-27 (Fla. 1997).

of lesser-included offenses would be considered permissible inconsistency while compound inconsistencies would not be considered permissible.

The case of *Redondo v. State*[152] provides an excellent example. In *Redondo*, the court held that the verdict was truly inconsistent.[153] In this case the defendant was found guilty of possession of a firearm during the commission of a felony, but was acquitted of the underlying felony of aggravated assault.[154] The count of aggravated assault was the predicate felony that was needed to support his conviction on the compound offense of possession.[155] The court held that such a finding by the jury could not stand as the conviction on the compound offense "must stand or fall in conjunction with the underlying felony."[156]

While both Alaska and Florida consider inconsistent verdicts reversible error, their reasoning and methods of dealing with such verdicts could not be more different.[157] The Florida case of *Naumowicz v. State*[158] is illustrative as it stands in stark contrast to Alaska's holding in *DeSacia*. In *Naumowicz*, a Florida appellate court found it was not impermissibly inconsistent to acquit the defendant of DUI manslaughter for the death of the driver of another car and to convict the defendant of DUI manslaughter for the death of the passenger of the defendant's car.[159] The cases of *DeSacia* and *Naumowicz* are highly analogous—both cases involved two deaths which resulted from the same negligent act of one culpable defendant.[160]

Interestingly, *DeSacia* and *Naumowicz* resulted in polar opposite resolutions.[161] Alaska makes no such distinction between types of inconsistent verdicts and considers cases like *Naumowicz*

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152. 403 So. 2d 954 (Fla. 1981).
153. *Id.* at 956.
154. *Id.* at 955 (the jury only convicted him of the lesser included offense of simple battery on the aggravated battery count).
155. *Id.* at 955-56.
156. *Id.* at 956. *See also* Mahaun v. State, 377 So. 2d 1158 (Fla. 1979) (holding that a conviction for felony murder must be set aside when the jury has not convicted the defendant of the underlying felony).
157. *See supra* Part V.A-B.
158. 562 So. 2d 710 (Fla. Dist. Ct. App. 1990).
159. *Id.* at 713.
160. *See supra* notes 116-23, 158-59 and accompanying text. In both cases it could not plausibly be argued that the defendant was more negligent toward one victim than towards another and yet the defendant was only found guilty in the death of one victim. *See supra* notes 122-23, 158-59 and accompanying text.
161. DeSacia v. State, 469 P.2d 396, 381 (Alaska 1970) (ordering a new trial for conviction that had been reversed due to inconsistency); *Naumowicz*, 562 So. 2d at 713 (affirming jury's inconsistent acquittal).

and *DeSacia* reversible error,[162] whereas Florida only allows for the reversal of compound inconsistencies.[163]

VI. DEFINING AN INCONSISTENT VERDICT FOR USE IN MARYLAND

Florida's treatment of inconsistent verdicts provides the classic cautionary tale—what cannot be identified accurately cannot be prevented with any consistency. In order to prevent confusion, trial courts must be given concrete standards that can be used to identify those inconsistencies that are factual and those that are legal. This section will explain why only legally inconsistent verdicts should be prevented and it will then propose a specific definition for adoption in Maryland.

A. Which Type of Inconsistency Should Be Forbidden: Factual, Legal or Both?

Maryland should forbid both forms of legally inconsistent verdicts, while factually inconsistent verdicts, those aberrations resulting from a lay body's irrational behavior, should be permitted to stand.[164] By permitting factually inconsistent verdicts to stand, the jury is permitted to perform its traditional function of determining facts and assessing credibility.[165] Allowing these types of inconsistencies is also beneficial because it is consistent with the concept that a jury is "an arbiter for the community" and because it ensures the sanctity of the jury's verdict.[166] This also avoids inquiries into juror's motives, intent, and understanding which can only be based on speculation.[167] Moreover, permitting reversals based upon the factual/legal distinction allows juries to retain the power to act irrationally so long as it is done in accordance with the criminal law and the requirements of due process.

B. How to Define a "Legally Inconsistent" Verdict

In order to ensure uniformity, Maryland should adopt an explicit definition of what constitutes a legally inconsistent verdict. The definition proposed by Steven T. Wax would be ideal for Maryland: "[w]hen acquittal on one charge is conclusive as to an

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162. *DeSacia*, 469 P.2d at 378 (stating that creating a distinction "tends to confuse substance with semantics").
163. *See supra* notes 145-48 and accompanying text.
164. Wax, *supra* note 4, at 741. Illogical or inconsistent applications of the facts would not merit reversal. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*

element which is *necessary to* and inherent in a charge on which a conviction has occurred, the conviction should be reversed."[168] Using this definition, any factual aberrations would be permitted by trial courts so long as the verdicts did not create a statutory contradiction.[169] Perhaps most importantly, this definition would require Maryland courts to construe inconsistencies strictly in terms of the criminal law and without speculating into the jury's deliberations, motives or intent.[170] This definition is also beneficial because it would require the reversal of both lesser-included and compound inconsistencies.[171]

VII. HOW TO DEAL WITH INCONSISTENT VERDICTS IN MARYLAND

This comment proposed a definition for Maryland to adopt in order to help identify legally inconsistent verdicts. However, the inevitable next question is what to do with such a verdict once it has been identified.

Eric Muller suggests three possible alternatives to the Supreme Court's treatment of inconsistent verdicts in *Powell*: harmless error review, refusing to accept such verdicts, and mistrial at the defendant's option.[172] This comment will explain these alternatives in greater depth and then determine which alternative would be best for Maryland to adopt.[173]

A. Harmless Error Review

In his article, Muller claims the best possible solution would be to treat inconsistent jury verdicts as a variety of trial error, in which the conviction will be reversed unless the error was harmless to the defendant.[174] Commonly, when a defendant shows an error has occurred at the trial level, the appellate court will be compelled to reverse the conviction if the error was not harmless.[175] Harmless error review requires federal appellate

168. *Id.* at 740 (emphasis in original).
169. *Id.*
170. *See id.* at 740-41.
171. *See supra* Part II.A. (discussing compound and lesser-included inconsistencies).
172. Muller, *supra* note 2, at 821-22.
173. This determination will be made under the assumption that the proposed definition in Part VI. will be adopted in conjunction with the proposed procedure.
174. Muller, *supra* note 2, at 821-22.
175. *Id.* at 822. *See* O'Neal v. McAninch, 513 U.S. 432, 435-42 (1995) (vacating defendant's conviction and holding that if the court reviewing a habeas corpus petition had grave doubts about whether an error in state court was harmless—it was required to treat it as not being harmless error); Chapman v. California, 386 U.S. 18, 24 (1967) (reversing defendant's murder conviction and holding it was not harmless error for prosecutor to imply guilt from defendant's refusal to testify).

courts to find that the error did not have "substantial and injurious effect or influence in determining the jury's verdict."[176]

Muller favors this approach because it has more "teeth" than sufficiency of the evidence review, the method relied upon by the Supreme Court, because harmless error review does not consider the evidence in a light most favorable to the state.[177] Essentially, Muller believes that harmless error review, by invoking a higher standard, will provide greater protection to criminal defendants than a review of the sufficiency of the evidence.[178]

Muller, however, admits to the greatest flaw of this proposed solution.[179] Usually when harmless error review is employed, appellate courts know that error has occurred and that this error has harmed the defendant.[180] It is then the court's duty to determine whether this error resulted in the defendant's conviction.[181] This form of analysis allows reviewing judges to make a "tolerably educated guess" as to whether or not the defendant was harmed by the jury's improper actions.[182]

Ultimately, this solution is less than ideal as it would require judges to make case-by-case assessments and to rely on pure conjecture as to the jury's true reasons for rendering an inconsistent verdict. Furthermore, this system only allows reversal of inconsistent verdicts the court deems "harmful," which could presumably result in unequal treatment of similarly situated defendants. This system would also ignore one of the main points of this comment, which is that inconsistent verdicts in and of themselves are harmful and should not be accepted regardless of an appellate judge's subjective determination of harm to an individual defendant.

176. Kotteakos v. United States, 328 U.S. 750, 776 (1946) (reversing defendant's conviction for conspiracy where trial court committed error by improperly combining trials of multiple defendants). In *Dorsey v. State*, the Court of Appeals of Maryland concluded that when an error has been proven the court must be able to conclude, beyond a reasonable doubt, that the error in no way influenced the verdict and was harmless, otherwise the verdict must be reversed. 276 Md. 638, 659, 350 A.2d 665, 678 (1976).

177. Muller, *supra* note 2, at 824.

178. *Id.*

179. *Id.* at 824-25.

180. *Id.* at 825.

181. *Id.*

182. *Id.* at 825-26. Muller argues that this is similar to the court's function in determining whether erroneously admitted evidence prejudiced the outcome. *Id.* The court can never know what weight the jury afforded to that particular piece of evidence and so is required to make a reasonable guess. *Id.*

B. Mistrial at the Defendant's Option

Muller's second proposed solution is to allow individual defendants to declare a mistrial at their own option.[183] This would allow defendants to determine whether their interests are best served by accepting or rejecting the inconsistent verdict.[184] Using this option, defendants would be required to either accept the entire verdict, presumably including an inconsistent acquittal and conviction, or reject the entire verdict.[185] If the defendant elected to reject the entire verdict, he or she would then move for a mistrial and be subject to retrial on all counts at the discretion of the state.[186] Muller argues that this solution is fair to defendants because the defendant is in a far better position than the appellate courts to know whether the jury "punished her with a groundless conviction or pardoned her with an unwarranted acquittal."[187]

On its face, this proposal would seem to violate the Double Jeopardy Clause since the government would be allowed to retry a case after the jury has already announced a verdict of acquittal.[188] Generally, however, when a defendant successfully moves for a mistrial, the Double Jeopardy Clause will not bar the state from retrying the case.[189] The Supreme Court noted that the important factor is that it is the defendant who "retain[s] primary control over the course to be followed in the event of . . . error."[190]

The solution proposed by Muller leaves the defendant with the ultimate choice of action, thereby not depriving him of his Double Jeopardy right.[191] While this solution is feasible and certainly fair

183. *Id.* at 822, 831-32.
184. *Id.* at 822, 832.
185. *Id.* at 832.
186. *Id.*
187. *Id.*
188. *Id.* at 833. The Double Jeopardy Clause has been held to apply to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 794 (1969). While the Maryland Constitution does not specifically provide Double Jeopardy protection, its common law does. State v. Woodson, 338 Md. 322, 327-28, 658 A.2d 272, 275 (1995).
189. United States v. Dinitz, 424 U.S. 600, 607, 608-12 (1976) ("A motion by the defendant for mistrial is ordinarily assumed to remove any barrier to re-prosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.").
190. *Id.* at 609. Furthermore, the Double Jeopardy Clause only prevents retrial on an acquittal after that verdict is final. Muller, *supra* note 2, at 829. *See also* Heinze v. State, 184 Md. 613, 616, 42 A.2d 128, 130 (1945) ("It is a fundamental principle that the verdict of a jury in a criminal case has no effect in law until it is recorded and finally accepted by the court."). Furthermore, in Maryland, a verdict does not become final until after the jury has been polled and its verdict is accepted by the court. Smith v. State, 299 Md. 158, 168, 472 A.2d 988, 993 (1984).
191. Muller, *supra* note 2, at 833.

to defendants, it is not ideal because it lacks the simplicity of other alternatives.

C. *Refusal by Trial Court to Accept Inconsistent Verdicts*

Another alternative proposed by Muller requires trial judges to refuse to accept inconsistent verdicts and to require juries to cure their error.[192] This approach would be best for Maryland to adopt as its case law has already demonstrated a tendency to favor this approach to jury verdicts.[193] The Maryland Rules already permit judges to discharge the jury or require further deliberation if the verdict is not unanimous upon polling.[194] Additionally, it is generally accepted in Maryland that verdicts which are defective in form or substance should not be accepted by the trial court.[195]

In *Heinze*, the Court of Appeals declared, "[i]t is essential for the prompt and efficient administration of justice to prevent defective verdicts from being entered upon the records of the court as well as to ascertain the real intention of the jury in their finding."[196] The court said it was, therefore, the judge's responsibility to explain the defect in the verdict to the jury and to allow them the option to remedy it by returning to deliberations or by clarifying their verdict in the presence of the court.[197]

In addition to Maryland's openness to this procedure, this option presents the simplest and the most efficient means of preventing inconsistent verdicts as it minimizes the role of appellate courts. Requiring defendants to raise objections to inconsistent verdicts at the trial level will help ensure that juries are given the opportunity to correct inconsistencies prior to their polling and dismissal.[198]

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192. Muller, *supra* note 2, at 827. *See also* FED. R. CIV. P. 49(b) ("When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial."). In order for judges to identify which verdicts are unacceptably inconsistent the previously proposed definition should be employed. *See supra* Part VI.B.

193. *See infra* notes 194-97 and accompanying text.

194. MD. RULE § 4-327(c) ("If the jurors do not unanimously concur in the verdict, the court may direct the jury to retire for further deliberation, or may discharge the jury if satisfied that a unanimous verdict cannot be reached.").

195. *Heinze*, 184 Md. at 617, 42 A.2d at 130.

196. *Id.*

197. *Id.* at 617-18, 42 A.2d at 130. The court noted it would be "safer" to send the jury back to the deliberation room with instructions concerning necessary corrections, so that further consideration could be conducted without outside influences. *Id.* at 618, 42 A.2d at 130-31.

198. *See supra* note 140 and accompanying text.

VIII. CONCLUSION

The reasons cited by the Supreme Court to protect inconsistent verdicts—mistake, compromise, and lenity—do not prove worthy of protection in the face of the harm posed to defendants by inconsistent jury verdicts. In formulating an approach for Maryland, it would be prudent to borrow concepts from each of the states which currently allow reversal of inconsistent verdicts.

New York and Florida provide helpful guidance when formulating an approach for Maryland by showing the importance of providing a concrete definition when drawing distinctions between forms of inconsistent verdicts. Following their lead, but embellishing upon it slightly, Maryland should refuse to accept only legally inconsistent verdicts, including both compound and lesser included inconsistencies, in accordance with the proposed definition that would rely primarily on statutory analysis. Meanwhile, Alaska and New York demonstrate an efficient means of dealing with legally inconsistent verdicts by requiring those inconsistencies to be cured at the trial level as the court will refuse to accept compound and lesser-included inconsistencies in the verdict. This two-pronged approach will work together to ensure that inconsistent verdicts are uniformly recognized and not entered as judgment.

In summation, Maryland should break ranks with the majority of its sister states and declare legally inconsistent jury verdicts invalid as they are fundamentally unfair to defendants, go against major principles of law, and defy logic.

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