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Compromise Verdicts In Criminal Cases

I. INTRODUCTION

"We find the defendant almost guilty." Thus was the reported rendition of a verdict by a jury in a criminal case,¹ and serves as an introduction to the subject of jury uncertainty resulting in compromise verdicts in criminal cases. "That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters."² This was the expression of the United States Supreme Court upon the question of irrational verdicts, and is given effect by most of the state courts today. It is the purpose here to examine the wisdom of such an attitude.

To reach a verdict in a criminal case, a jury is required to (1) determine the true facts from a consideration of the evidence presented, (2) ascertain and understand the principles of law as set forth in the trial court's instructions, and (3) apply these legal principles to the facts found.³ However, by means of the general verdict, a verdict may be rendered and given effect without any

¹ See Osborn, *The Mind of the Juror*, p. 30 (1937).

² *Dunn v. United States*, 284 U.S. 390, 394 (1932). But see many court expressions as to the undesirability of compromise verdicts. E.g., *Richardson v. Coleman*, 131 Ind. 210, 29 N.E. 909 (1892); *Randolph v. Lamphim*, 90 Ky. 551, 14 S.W. 538 (1890). And in *Stein v. New York*, Justice Jackson, by way of dictum, stated: "Courts uniformly disapprove compromise verdicts but are without other means than admonitions to ascertain or control the practice. Defendants, when two or more issues are submitted, are entitled to instructions appropriate to discountenance, discourage and forbid such practice. . . . In civil cases, certainty and exposure of the process is sometimes sought by the special verdict or by submission of interrogatories. E.g., 49 Fed. Rules Civ. Proc. But no general practice of these techniques has developed in American criminal procedure. Our own Rules of Criminal Procedure make no provision for anything but a general verdict. Indeed, departure from this has sometimes been resisted as an impairment of the right to trial by jury [Citations omitted] which usually implies one simple general verdict that convicts or frees the accused."

"Nor have the courts favored any public or private post-trial inquisition of jurors as to how they reasoned, lest it operate to intimidate, beset and harass them. This Court will not accept their own disclosure of forbidden quotient verdicts in damage cases [Citations omitted] nor of compromise in a criminal case whereby some jurors exchanged their convictions on one issue in return for concession by other jurors on another issue." *Id.* at 178, 179.

³ See Matzke, *Special Findings and Special Verdicts in Nebraska*, 35 Neb. L. Rev. 523 (1956).

of these requirements being met.⁴ "[B]ehind the facade of a general verdict can readily hide every evil which our legal tradition has sought to evade."⁵ This paper will examine specifically (1) Whether the rationality of a verdict in a criminal case is a proper subject of judicial inquiry? (2) Whether verdicts may show a lack of or an irrational consideration of one or more of the fundamental requirements necessary in a proper determination of a verdict, and what may lie behind some of these verdicts? (3) Whether compromise verdicts should be upset? and (4) The problems arising from a reversal of a compromise verdict.

II. JURY RATIONALITY

The precise question is not, as Justice Holmes contended in *Dunn v. United States*,⁶ whether we can make a post-trial inquiry into the methods the jury has used in reaching their verdict, but whether the ascertainment of jury irrationality is of any consequence?⁷ To state it in a different manner, is the jury's method of reaching a verdict their prerogative, or may we limit and control improper methods leading to irrational verdicts?

Wigmore has stated that the ability of juries to disregard the law is the primary reason for preserving juries in criminal cases.⁸ He states that this ability to disregard the law provides the necessary flexibility of legal rules to prevent injustice in certain prosecutions; that the injustice of a general rule applied to a specific case should be a matter for the cross-section of the community.⁹

⁴ In a reported New Jersey case, the jury disregarded the evidence, knelt in prayer, and then found a unanimous verdict for the defendant. Kirby, *Criminal Justice* (1926).

⁵ Matzke, *supra* note 3, at 523. And the late Judge Frank stated in *Courts on Trial*, 111 (1949), quoting from Clementson, "Nor can we cut away the mantle of mystery in which the general verdict is enveloped, to see how the principal facts were determined, and whether the law was applied under the judge's instructions. . . . It is a matter of common knowledge that the general verdict may be the result of anything but the calm deliberation, exchange of impressions and opinions, resolution of doubts, and final intelligent concurrence which, theoretically, produced it. It comes into court unexplained and impenetrable."

⁶ 284 U.S. 390 (1932).

⁷ A Nebraska jury verdict may not be impeached by the jurors. *Spreitzer v. State*, 155 Neb. 70, 50 N.W.2d 516 (1951). And see *State v. Corner*, 58 S.D. 579, 237 N.W. 912 (1931) where the court held a verdict to be unimpeachable by affidavits showing compromise in the reaching of the verdict.

⁸ Wigmore, *A Program for the Trial of Jury Trial*, 12 J. Am. Jud. Soc. 166 (1929).

⁹ *Ibid.*

Other commentators have answered that there is no reason for having legal rules if every twelve-man jury can individually legislate. They feel that juries merely abuse the general verdict. This important question—whether the jury should have the power to change the law¹⁰—is behind almost every problem arising from the use of the jury system, and cannot be resolved without further study of jury methods and motives. The use of the general verdict in criminal cases allows this prerogative, and whether it generally promotes or merely abuses justice cannot be categorically stated. However, it would seem that both results are occasioned from the use of the general verdict. The jury may disregard the law or the facts in furtherance of justice, and they may equally disregard the law to the detriment of the rights of the accused. If we are to maintain the jury system, and the jury's prerogative to change or disregard the law, then we should attempt to limit this prerogative to the extent that it provides flexibility of legal rules to prevent injustice, yet not allow the prerogative to be used to deny the accused certain of his legal rights and protective rules. Irrational verdicts, insofar as they are evidenced in the general verdict, which show prejudice to the rights of the accused should be material in any court, whether trial or appellate.

III. THE GENERAL VERDICT AND WHAT IT MAY SHOW

Whether the term "compromise" when referring to a verdict contemplates the method of reaching a verdict or the irrationality of the verdict itself is hard to ascertain, and it is probably used in both senses. "Compromise" is often used to denote the practice of "some jurors exchanging their convictions on one issue in return for concession by others jurors on another issue."¹¹ The result is most often a verdict of guilty to a lesser crime. This should be distinguished from inconsistent verdicts where the verdict on one count is inconsistent with a verdict on another count.¹² It is true

¹⁰ For an extensive discussion of the functions and powers of the jury, see *Sparf v. United States*, 156 U.S. 51 (1895).

¹¹ *Stein v. New York*, 346 U.S. 156, 179 (1953).

¹² The general rule applicable to inconsistent verdicts is that the inconsistency does not vitiate the verdict. *Dunn v. United States*, 284 U.S. 390 (1932). Before the *Dunn* case, the federal courts were split as to the effect of the inconsistency. See *Gozner v. United States*, 9 F.2d 603 (6th Cir. 1925) for summary of authority prior to *Dunn*. Many of the problems involved in compromise verdicts are factors in inconsistent verdicts. For a discussion of inconsistent verdicts, see Comment, 63 Harv. L. Rev. 649 (1950) which points out that the basis for decision in the *Dunn* case, *res judicata*, may have been overruled in *Sealfon v. United States*, 332 U.S. 575 (1948).

that the jury might reach an inconsistent verdict by the same method of "horse-trading" that results in a compromise verdict, but our discussion is limited to a compromise which results in a conviction of a lesser crime.¹³

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

1. The jury believes only part of the prosecution's evidence; and is convinced only of the perpetration of the lesser crime, included in both law and fact.¹⁴
2. Some jurors are convinced of the guilt of the accused as to the greater crime, and others are convinced of that amount of evidence only showing the commission of the lesser, and settlement is upon the lesser.¹⁵
3. All of the jurors are convinced of the full guilt of the accused, but for various mitigating reasons choose not to convict him of the greater crime.
4. Some of the jurors are convinced of the guilt of the accused on the full crime, while others are convinced of his innocence, and they compromise to reach a verdict of guilty upon the lesser crime.¹⁶
5. None of the jurors are convinced of the guilt of the accused as to the greater crime, but feeling that there is a

¹³ For two excellent articles on the subject of lesser included crimes, see Notes, 56 Col. L. Rev. 888 (1956) and 21 Bklyn L. Rev. 75 (1954). The power to convict on a lesser offense which is included in the greater is provided for in federal courts by Rule 31 (c) of the Fed. R. Crim. Proc., 62 Stat. 862 (1948): "The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense." In Nebraska, different degrees of the same offense may be joined in one information, Neb. Rev. Stat. § 29-1603 (Re-issue 1956), and a lesser included offense may be submitted to the jury *Jackson v. State*, 133 Neb. 766, 277 N.W. 92 (1938).

¹⁴ This would be the lesser crime, truly included. To be truly included, "the indictment, although charging the defendant only with the higher degree or grade of the crime, must set forth all of the acts necessary to constitute the lesser degree," and "the evidence must warrant the conviction of the lesser degree." Note, 21 Bklyn. L. Rev. 75, 75 (1954).

¹⁵ This is a compromise not disapproved by the courts, since it is not a compromise as to the guilt of the accused, but merely a permissible compromise as to the degree of guilt.

¹⁶ This is the commonly accepted method of compromise which results in a verdict which the courts denote as a compromise verdict.

good chance he has committed the crime, they settle upon a verdict as to the lesser.¹⁷

Obviously, it is impossible to ascertain from a general verdict of guilty to a lesser crime which of the above was the cause of the verdict. However, certain verdicts of guilty of a lesser crime may be irrational in that the lesser crime is *not* an included crime, either in law or fact. Let us examine some of these cases.

A. VERDICTS CONTRARY TO LAW

A verdict contrary to law in the area of compromise verdicts is one which finds the accused guilty of a lesser crime which is not legally includible in the greater. It occurs when the jury renders a verdict of guilty to a lesser crime, which lesser crime encompasses acts not necessarily included in those acts necessary to constitute the greater crime. The leading case is *Green v. United States*,¹⁸ which gave rise to problems just recently settled in the United States Supreme Court.¹⁹ Defendant was indicted for arson and felony murder—the death of a woman in the conflagration. By statute, the killing of another in the perpetration of arson is murder in the first degree. On the second count of murder, the judge instructed on both first and second degree murder. The jury returned a verdict of guilty on the arson count, and also found defendant guilty of *second degree murder*.²⁰ The verdict was contrary to law in that malice was not a necessary ingredient in the indictment of murder (arson and the resulting death being the only necessary acts to be proved), while malice would be a necessary ingredient in a finding of second degree murder.²¹ There

¹⁷ Such a method of compromise seems to have been overlooked by the courts.

¹⁸ 218 F.2d 856 (D.C. Cir. 1955).

¹⁹ *Green v. United States*, 355 U.S. 184 (1957).

²⁰ *Supra*, note 15.

²¹ It must be noted that in the *Green* case the court talks in terms of the verdict being contrary to the evidence. Thus Justice Frankfurter, in his dissent to *Green v. United States*, 355 U.S. 184 (1957) stated: "Moreover, the error of the District Court, which was the basis for petitioner's appeal from his first conviction, was of a kind peculiarly likely to raise doubts that the jury on the first trial had made a considered determination of petitioner's innocence of first degree murder. By instructing on second degree murder when the evidence did not warrant a finding of such an offense, the court gave the jury an opportunity for compromise and lenity that should not have been available. The fact of the matter is that by finding petitioner guilty of arson under count one of the indictment, and of second degree murder under count two, the jury found him guilty of all the elements necessary to convict him of the first degree

are numerous cases similar to the *Green* case where a statute fixes the degree of homicide for a particular type of homicide, e.g., homicide by poison, from ambush, while committing a felony, etc., where a jury's verdict of guilty to a lesser offense than set by statute would be, and has been, contrary to law.²²

Similarly, when an accused is indicted as a principal in the second degree, a verdict of guilty as to a lesser crime included in the principal crime would be contrary to law. Thus, in a Washington case,²³ a verdict was held to be contrary to law where accused was indicted for murder as an accessory before the fact and was convicted of manslaughter. Accused was not present at the time of the killing; indeed, it was conceded that he was serving as a juror at the time of the killing. In a case arising in West Virginia,²⁴ the accused was indicted as being a principal in the second degree for the crime of forcible rape. The verdict brought in by the jury of guilty of attempted rape is a conviction of a lesser offense obviously not included in law in the greater offense charged. Two unusual cases arose in Ohio²⁵ and West Virginia.²⁶ A wife was jointly

felony murder with which he was charged, but the judge's erroneous instruction permitted the jury, for its own undisclosed reason, to render an irrational verdict." *Id.* at 214. However, it is more correct to speak in terms of law. It is true that in felony murder, second degree murder may be a lesser included crime, but this is only possible when there is an acquittal on the charge of the felony. Thus, in *Kitchen v. United States*, 221 F.2d 432 (D.C. Cir. 1955), the conviction of second degree murder was upheld where the accused was indicted for robbery and felony murder. The jury, however, had acquitted the accused of robbery. The Court of Appeals in the *Green* case discusses the evidence and concludes that the only evidence is that the deceased died in the fire. Such discussion and finding is unnecessary, as the verdict of second degree murder is contrary to law. Thus, in *People v. Hoffman*, 219 App. Div. 334, 220 N.Y.S. 249 (1927) the New York Court held that there can be no conviction for second degree murder when such murder is committed in the perpetration of a felony. Recognizing that there was no allegation of intent, they held that the jury is limited to a finding of not guilty or first degree murder.

²² *Thompson v. State*, 106 Neb. 395, 184 N.W. 68 (1921); Annotation, 21 A.L.R. 628 (1922).

²³ *State v. Robinson*, 12 Wash. 349, 41 Pac. 51 (1895).

²⁴ *State v. Franklin*, 139 W.Va. 43, 79 S.E.2d 692 (1953). It was so held that the verdict was contrary to law.

²⁵ *State v. Gordon*, 87 Ohio App. 8, 92 N.E.2d 305 (1948). The court rejected the defendant's appeal and affirmed the conviction, stating that the verdict was to the benefit of defendant and that the facts could be such that a conviction for second degree murder would be warranted.

²⁶ *Moore v. Lowe*, 116 W.Va. 165, 180 S.E. 1 (1935). The court here also rejected defendant's appeal.

indicted for murder along with her husband, who had done the actual killing. It was alleged that she had conspired and abetted with her husband in the perpetration of the murder. The jury found the husband guilty of first degree murder, and the wife guilty of second degree murder. Although the verdict here might properly be called inconsistent, it is legally irrational in that to find the wife guilty at all, it must be found that she conspired and abetted which would require a verdict of first degree murder.

The mere fact that a crime is a lesser crime than that for which the accused is indicted, and is a lesser crime bearing the same appellation as the greater, although a different degree, does not of itself render that lesser crime a legally included offense. Those verdicts which convict an accused of a lesser offense, not included in law, may be recognized as being contrary to law, and to that extent irrational.

B. VERDICTS CONTRARY TO FACT

A verdict contrary to fact is one which finds the accused guilty of a legally included offense when no facts exist either tending to disprove the greater crime, nor tending to prove the lesser. It is true that any offense includible in law may be said to be includible in fact, for to be included in law the greater crime must include all of the acts necessary to constitute the lesser offense. However, "the evidence must warrant the conviction of the lesser degree."²⁷ It is argued that the jury may have only believed part of the evidence presented by the prosecution as to the consummation of the greater crime, but this is but a superficial contention when the evidence does not place in issue the degree of completion of the crime. Thus, in *State v. Kruger*,²⁸ it was stated:

There is no evidence whatever of an assault in the 3d degree. Appellant was guilty as charged, or he was not guilty. The evidence leaves no zone of speculation, or room for compromise. . . . It is true that the greater includes the less, but the defendant is not guilty of either unless the testimony brings him within the definition of a crime. It was never the intent of the law to submit a possible verdict upon a so-called included crime because included in

²⁷ Supra, note 14.

²⁸ 60 Wash. 542, 111 Pac. 769 (1910). Defendant was indicted for assault in the second degree, which was defined as assault with intent to commit a felony. He was convicted of assault in the third degree, defined as every assault not in the first or second degree. All of the evidence showed a consummated crime of rape. The defense was an alibi. The Court reversed and discharged the accused.

law. It must be included in fact, and by the facts of the particular case.²⁹

Therefore, on an indictment for rape where the accused pleads consent as a defense, a verdict of assault with intent to commit rape would be contrary to the facts.³⁰ Similarly, a verdict of attempted arson would be contrary to fact if the evidence showed without question the burning of a dwelling, as would a verdict of burglary in the second degree if no issue was made as to the occupancy of the dwelling.³¹ The issue of factual inclusion often arises in homicide cases³² where the accused is found guilty of manslaughter when the evidence, without contradiction, shows a crime committed with malice,³³ or the defendant pleads self-defense.³⁴

Comparable to cases where the defense is consent or self-defense is the case where the evidence shows a consummated crime and the only defense set up is that of an alibi.³⁵ This is often an important factor in determining whether a lesser offense is included in fact, for the defense has not placed in issue the completion of the crime. It alone is not decisive so as to limit the verdict to the greater offense, but, again, it is an important factor to be considered. Similarly, when there is a complete denial or the accused stands mute, these are factors to be considered in determining whether a lesser offense is included in fact.³⁶

In summary, general verdicts standing alone may be shown to be contrary to the law or the evidence of that particular case. Standing alone, the general verdict may show that the jury violated one of its fundamental duties. A conviction for a lesser crime

²⁹ *Id.* at 770.

³⁰ *Terrell v. State*, 176 Ark. 1206, 2 S.W.2d 87 (1928). Although reversing on other grounds, the court did not accept petitioner's argument for reversal on the basis that his conviction was contrary to the facts.

³¹ *State v. Ratliff*, 199 N.C. 9, 153 S.E. 605 (1930).

³² Annotation, 21 A.L.R. 622 (1922).

³³ *Cupps v. State*, 120 Wis. 504, 97 N.W. 210 (1903); *Houston v. State*, 105 Miss. 413, 62 So. 421 (1913). And see *Jeffries v. State*, 126 So. 177 (Ct. App. Ala. 1930); *Champion v. State*, 44 So.2d 618 (Ala. App. 1949). And in *State v. Mahly*, 68 Mo. 315 (1878), a verdict of second degree murder was reversed when the only evidence of murder showed that the defendant had roasted his daughter over an open fire, starved, flogged, and kicked her.

³⁴ *Rester v. State*, 110 Miss. 689, 70 So. 881 (1916).

³⁵ *Edwards v. State*, 33 Ala. App. 386, 34 So.2d 173 (1948); *Kendrick v. State*, 113 Ga. 759, 39 S.E. 286 (1901); *People v. De Garmo* 76 N.Y.S. 477, 73 N.Y. 46 (1902); *State v. Kruger*, 60 Wash. 542, 111 Pac. 769 (1910).

³⁶ See Note, 56 Colum. L. Rev. 888 (1956).

not included in law or fact reveals that the jury either compromised its convictions or seized for itself a pardoning power. Such a conviction means the jury violated its fundamental duties and has brought in a verdict not rational in view of the law or the facts.

IV. REVERSAL OF COMPROMISE VERDICTS

Once a verdict has been established as being contrary to law or fact, we are faced with the problem of further disposal. Appellate courts have taken three different views toward such verdicts. These are as follows:

(1) *An undesirable verdict, but favorable to the defendant.* This was the attitude taken by the dissent in *Green v. United States*³⁷ and is based on the notion that any verdict, rational or otherwise, convicting the accused of a lesser offense than that charged can only benefit the accused. For example, in *State v. Stephens*,³⁸ the North Carolina court upheld a manslaughter conviction on circumstantial evidence showing that defendant purchased dynamite, placed it under the stove in his home, adjusted the fuses, and went out to feed the chickens. The court stated:

Evidence of manslaughter is lacking. The defendant, however, cannot complain that 'the jury, by an act of grace,' has found him guilty of a lesser offense. 'Such verdicts occur now and then, despite the efforts of the courts to discourage them. When they do, although illogical or even incongruous, since they are favorable to the accused, it is settled law that they will not be disturbed.'³⁹

Similarly, where the evidence showed that defendant forcibly raped the prosecutrix if he touched her at all, a conviction of assault with intent to rape was affirmed, for defendant "cannot complain at this leniency."⁴⁰

(2) *An undesirable verdict, but outside of the court's corrective power.* Many courts state that it is outside of their scope of review to examine the rationality of a verdict, and furthermore that

³⁷ 218 F.2d 856, 859 (D.C. Cir. 1955). "[E]ven if the instruction [for second degree murder] was in error the trial judge in giving it 'treated Green more favorably than he deserved. . . .'"

³⁸ 244 N.C. 380, 93 S.E.2d 431 (1956).

³⁹ *Id.* at 434.

⁴⁰ *Sexton v. State*, 91 Ark. 589, 121 S.W. 1075, 1075 (1909). For other cases applying the "favorable to defendant" rationale, see *People v. Muhlner*, 115 Cal. 303, 47 Pac. 128 (1896) followed in *People v. Coulter*, 145 Cal. 66, 78 Pac. 348 (1904). See also *State v. Burns*, 263 Mo. 593, 173 S.W. 1070 (1915).

they are powerless to reverse a verdict determined irrational. Illustrative of this attitude is an Arkansas case⁴¹ which stated:

The evidence showed an atrocious murder, and if the jury believed that it was perpetrated by appellant, as, from their verdict they did, they should have found him guilty of murder in the first degree. They had the power, however, to return a verdict for murder in the second degree; and, for some reason not declared, they did it. But that was no legal cause for discharging appellant.⁴²

Oftentimes, when a court holds itself powerless to correct the verdict, it is faced with a statute similar to the following:

Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty.⁴³

Thus, in *Walters v. State*,⁴⁴ the court held that "the verdict will not be disturbed on the ground the jury found defendant guilty of a lower degree of the crime charged than that established by the evidence,"⁴⁵ basing its holding squarely on the statute. Similarly, in *State v. Phinney*,⁴⁶ it was said, with the preceding statute as a basis:

We therefore conclude that, although the defendant was charged with the crime of murder perpetrated by means of poison, and that it was the duty of the court to instruct the jury as to the law in such cases, and the grade of the offense that they might find defendant guilty of, still it was within the province of the jury to find the degree of the offense, and that, even though the evidence might fully disclose that the defendant was guilty of a higher degree than that found against him, still the verdict could not be disturbed for that reason. It is not an uncommon thing for a jury, out of sympathy, or what they conceive to be extenuating circumstances, to find a defendant guilty of a lower degree or grade of offense than that of which the evidence clearly convicts him; but the fact that they do so is not a ground of reversal of the verdict and judgment.⁴⁷

(3) *An undesirable verdict, and prejudicial to the rights of the accused.* A minority of courts which reverse a conviction on this view base their holdings on the reasoning that it is prejudicial to

⁴¹ *Green v. State*, 38 Ark. 304 (1881).

⁴² *Id.* at 310. It is interesting to note that the jury in addition to finding for a lesser offense recommended defendant to the mercy of the court, giving strong indications of doubt as to his guilt or compromise. See also *Fagg v. State*, 50 Ark. 508, 8 S.W. 829 (1888).

⁴³ 22 Okla. Stat. Ann. § 916 (1937).

⁴⁴ 57 Okla. Cr. 424, 48 P.2d 875 (1935).

⁴⁵ *Id.* at 876.

⁴⁶ 13 Idaho 307, 89 Pac. 634 (1907).

⁴⁷ *Id.* at 636. See also *State v. Dowd*, 19 Conn. 387 (1859); *State v. Underwood*, 35 Wash. 568, 77 Pac. 863 (1904).

the accused to permit a conviction which has no basis in the evidence or is not included in the charge to stand. As stated in *Jeffries v. State*:⁴⁸

[T]o allow the judgment of conviction of the offense of manslaughter in the second degree . . . to stand, would be making a farce of the law. Under the undisputed evidence in the case, appellant was guilty of the offense of murder, or manslaughter in the first degree, or nothing. There is no phase of the evidence that supports the verdict of the jury finding appellant guilty of manslaughter in the second degree. Appellant's motion to set aside the verdict of the jury . . . on the ground that said verdict was contrary to the evidence, should have been granted. . . .⁴⁹

In *Edwards v. State*,⁵⁰ defendant, charged with robbery, set up an alibi. The court, in reversing a conviction for *assault* with intent to rob, stated:

Said evidence tended to show that the crime of robbery itself was completed, that is to say under said evidence the crime was fully consummated. However the verdict of the jury acquitted the defendant of the offense of robbery, and, as noted, found defendant guilty of an assault with intent to rob. Said verdict was unsupported by the evidence and was manifestly a compromise verdict which the law does not approve or contemplate. It also shows the exercise of a discretion by the jury not based upon the law or facts; hence in law, was contrary to the law and the evidence. . . .⁵¹

And in the previously mentioned *Green* case, the court stated that had the instruction on second degree murder not been given, "Green might have been found not guilty under the second count."⁵²

⁴⁸ 23 Ala. App. 401, 126 So. 177 (1930).

⁴⁹ Id. at 178.

⁵⁰ 33 Ala. App. 386, 34 So.2d 173 (1948).

⁵¹ Id. at 174. For other cases reversing compromise verdicts, see the Alabama cases *DeGraaf v. State*, 34 Ala. App. 137, 37 So.2d 130 (1948); *Edwards v. State*, 33 Ala. App. 386, 34 So.2d 173 (1948); *Hill v. State*, 27 Ala. App. 160, 167 So. 606 (1936); *Broadhead v. State*, 24 Ala. App. 576, 139 So. 115 (1932); *Jeffries v. State*, 23 Ala. App. 401, 126 So. 177 (1930). These cases were strictly limited to the situation where there is no basis for a lesser crime, and the evidence clearly establishes a consummated crime, for which the defendant has set up an alibi. *Roberts v. State*, 59 So.2d 821 (Ct. App. Ala. 1952); *Champion v. State*, 35 Ala. App. 7, 44 So.2d 616 (1949). See also reversing, *Jordan v. Georgia*, 22 Ga. 545 (1857); *Thompson v. State*, 106 Neb. 395, 184 N.W. 68 (1921); *State v. Cooley*, 138 Ore. 393, 5 P.2d 100 (1931); *State v. Ash*, 68 Wash. 194, 122 Pac. 995 (1912); *State v. Kruger*, 60 Wash. 542, 111 Pac. 769 (1910); *State v. Robinson*, 12 Wash. 349, 41 Pac. 51 (1895); *State v. Franklin*, 139 W.Va. 43, 79 S.E.2d 692 (1953). In Nebraska, the court, by way of dictum, hinted that they might reverse a quotient verdict in a criminal case. *Spreitzer v. State*, 155 Neb. 70, 50 N.W.2d 516 (1951).

⁵² 218 F.2d 856, 859 (D.C. Cir. 1955).

Briefly to sum up, the three views are that the verdict is (1) favorable to defendant, (2) without the scope of review of the court, and (3) prejudicial to the accused. Implicit in the "favorable to defendant" view is the fallacious assumption that the defendant is guilty of the higher crime, an assumption the jury theoretically was unable to make.⁵³ This assumption, as we have seen, was expressly rejected in *Green* as the Court recognized that defendant might have been acquitted had there been no instruction on second degree murder. It is possible that the verdict was favorable to the defendant—that the defendant *was* guilty of the higher crime and the jury found for the lesser in the face of mitigating circumstances. However, without means of ascertainment, and in view of the fact that the defendant is now alleging the verdict to be unfavorable, the proper inference should be that the jury did not use the lesser conviction as a vehicle for mercy.⁵⁴ Therefore, it would seem to be impossible for an appellate court to find a verdict of a non-included lesser crime to be favorable to the accused without first making unjustified assumptions.

Judicial refusal to upset compromise verdicts can be variously explained. Much of the hesitancy displayed by the courts which find irrational verdicts outside of their power to reverse is based on their uncertainty as to the outcome of the case if they do so reverse. There is the fear, not without basis, that the defendant cannot be retried. A further cause of concern is the court's attitude towards the power of the jury, and the court's uncertainty as to the basis for the verdict in the particular case. As will be seen, none of these uncertainties should be controlling. A statute permitting the jury to fix the degree of the crime has furthered many courts' reluctance to correct a verdict which has fixed the degree lower than required by the evidence or the law. However, such a statute should not be construed to permit a jury the power to bring a conviction for a crime unsupportable in the evidence or

⁵³ See Note, 42 W. Va. L. Q. 67 (1935) where it was said that the "favorable to defendant" rationale "involves . . . the assumption, in direct contradiction to the verdict, that the defendant is guilty of the crime alleged in the indictment, thus constituting the appellate court the final arbiter of evidentiary facts which a jury has previously found insufficient."

⁵⁴ Justice Butler, dissenting in *Dunn v. United States*, 284 U.S. 390, 407 (1932), stated: "There are stronger reasons against speculating whether, or assuming that, the jury through tenderness of disposition, mercy or forbearance acquitted while knowing that its duty was to convict the accused. Conflict between the findings may not be explained. The inference that the jury, seeking rightly to discharge its duty, made a mistake, is to be preferred over the suggestion that it found for defendant upon an assumption of power it might not lawfully exert."

the charge. Indeed, the statute was most likely designed to benefit the accused. As stated in *Edwards v. State*:⁵⁵

Neither of said sections, however, can be construed to vest in the jury a pardoning power. Said sections properly construed mean where the evidence fails, under the required rule as to measure of proof, to show that the actual offense charged in the indictment has been committed as charged, then, *if the evidence warrants it*, the provisions of such sections may be applied and a conviction had for a lesser offense which is necessarily included in the offense with which he is charged. [Emphasis supplied.]

It is submitted that those cases finding that an instruction or a verdict on a lesser crime not included is prejudicial and a basis for reversal are correct. To reach a verdict of guilty of a lesser crime, not included in law or fact, the jury may have acted in three separate ways:⁵⁶

1. They exercised their power, though not their right, to extend mercy;
2. Some of the jurors compromised their convictions in return for certain compromises by other jurors; or
3. All of the jurors possessed a reasonable doubt as to the defendant's guilt, but were loathe to set him free.

The second and third types of action are obviously prejudicial to defendant. However, we again face the perplexing problem of the jury's power (or prerogative) to disregard the law and to use the general verdict as a partial pardoning power. As previously discussed, the solution should lie with the accused. If the accused attacks the verdict as prejudicial, the court would be justified in assuming, to the benefit of the accused, that the verdict was not the result of an exercise of mercy. It must be recognized that the court has a choice between only two assumptions, both of which assume unlawful conduct by the jury.⁵⁷ The basis for not assuming that the jury exercised a pardoning power is strengthened by the fact that the defendant is now asserting prejudice. Although various new problems are raised, it is submitted that the solution to the disposition of the verdict, once it is established as irrational, should lie with the accused. The possibility that the jury either compromised their convictions or allayed their reasonable doubts by means of a verdict convicting for a lesser crime, as weighed

⁵⁵ 23 Ala. App. 386, 34 So.2d 173, 174 (1948).

⁵⁶ Compare with text at notes 14, 15, 16, and 17, *supra*.

⁵⁷ *Supra*, note 54.

against the possibility that they were being merciful, is of too great a force to categorically deny that the defendant has any basis for finding the verdict prejudicial to himself. Compromise verdicts should be reversed at the defendant's instance.

V. PROBLEMS IN REVERSAL

As noted above, judicial hesitancy to upset compromise verdicts arises in large part from uncertainty as to the effect of a reversal. There are three possibilities:

1. The defendant will be released, and no further prosecution is possible;
2. The defendant will be retried for the higher offense; or
3. The defendant will be retried, but cannot be convicted for a greater offense than that found in the prior verdict.

The third possibility will seldom materialize, for if no new evidence is available tending to show the commission of the lesser offense, then a retrial could only end in a verdict of not guilty or another verdict unsupportable in law or evidence. In most cases, therefore, the court would be faced with only two alternatives: retrial for the greater offense or discharge of the appellant.

If we are to reverse compromise verdicts, then it is necessary that the defendant be retried. The basis for reversal—the assumption of prejudice made at defendant's instance—would be without foundation and of no value if a retrial was not required. The risk of retrial would probably be too great for one who was in reality guilty, but received the benefit of the verdict,⁵⁸ yet he would surely not hesitate to appeal if it meant almost certain release. However, an innocent man could run that risk and hope to establish his innocence in the second trial.

The required new trial encounters two problems before it may be ordered: the contentions of double jeopardy and of previous acquittal. Was the jury's silence as to the greater offense an acquittal of such? Further, was the mere fact that the jury had the opportunity to convict for the higher offense such peril that a retrial would be placing the defendant twice in jeopardy? The de-

⁵⁸ In the *Green* case, the court which originally reversed the conviction of second degree murder stated: "In seeking a new trial at which—if the evidence is substantially as before—the jury will have no choice except to find him guilty of first degree murder or to acquit him, Green is manifestly taking a desperate chance." 218 F.2d 856, 859 (D.C. Cir. 1955).

cisions are as diverse as the possibilities. The United States Supreme Court held, by a five to four decision in the *Green* case, that retrial on the higher offense would be in violation of the Fifth Amendment.⁵⁹ Nebraska, holding to the contrary, permits retrial for the higher offense.⁶⁰ The other states are about equally divided.⁶¹ Herein, it will not be attempted to solve these difficult problems,⁶² but the relationship of compromise verdicts and these holdings will be pointed out.

The effect of *Green*, and those decisions barring retrial for the greater offense, is that a verdict of guilty to a non-includible lesser offense works an automatic acquittal of the greater and the lesser offenses and effects a release, except in a case where new evidence may become available showing the commission of the lesser. This is obviously undesirable, although in those cases of *included* offenses (which the decision presumably encompasses) where the defendant may be retried for the lesser offense, the result may be justified.⁶³ Moreover, *Green* will probably tend to inhibit the federal courts from upsetting compromise verdicts.

The view taken in Nebraska and other jurisdictions which permit retrial of the accused for the greater offense is much to be preferred. It provides a valid basis for assumption of prejudice, and eradicates the hesitations of the courts to reverse by furnishing the opportunity to meet the issue of irrational verdicts by providing a desirable result. As stated in *State v. Ash*:⁶⁴

It is to be deplored that juries will sometimes so forget their sworn duty as to refuse to hold up violators of the law to the full measure of their misdeeds. Courts should not aid in this miscarriage of justice by creating technical and subtle distinctions in the law and

⁵⁹ *Green v. United States*, 355 U.S. 184 (1957).

⁶⁰ *Macomber v. State*, 137 Neb. 882, 291 N.W. 674 (1940); *Pembroke v. State*, 119 Neb. 417, 229 N.W. 271 (1930); *Clarence v. State*, 89 Neb. 417, 132 N.W. 395 (1911); *Bohanan v. State*, 18 Neb. 57, 24 N.W. 390 (1885).

⁶¹ See *Green v. United States*, 355 U.S. 184, note 4 of Justice Frankfurter's dissent, 216 (1957). See also 71 U.S.L. Rev. 421 (1937) and Annotation, 59 A.L.R. 1160 (1929).

⁶² For a discussion of these problems, see Comment, 24 Minn. L. Rev. 522, especially at 534 (1939); 71 U.S.L. Rev. 421 (1937); Note, 14 Wash. & Lee L. Rev. 228 (1957); 1 Bishop, Criminal Law § 998 (9th ed. 1923).

⁶³ Although the differing results obtained from barring retrial on the greater offense may be a basis for distinguishing between verdicts convicting for a non-includable offense and verdicts convicting on an included offense, the reasoning of the *Green* case seems equally forceful for either type of verdict.

⁶⁴ 68 Wash. 194, 122 Pac. 995, 998 (1912).

thus enable the guilty to altogether escape. We cannot control the verdicts of juries in their failure to make true deliverance between the state and the criminal, but we can refuse to extend the farce so as to make it operate as an absolute discharge. Believing that a new trial to one found guilty of a lesser offense should on his appeal be held a new trial upon all offenses included within the charge that find sustaining facts in the evidence, we so hold, and adopt such rule for future guidance.

A further problem arising on appeal is whether a defendant may obtain a reversal when he failed to object to a compromise verdict or to an instruction on a non-included offense. The general rule is that an error not preserved below is waived.⁶⁵ However, there are many exceptions, such as jurisdiction, constitutionality of the statute violated, failure of the indictment to charge an offense, and others.⁶⁶ Several jurisdictions permit reversal "in the interests of justice."⁶⁷

A compromise verdict should be a basis for reversal on appeal whether or not the verdict was objected to in the trial court. A compromise verdict will often take defendant by surprise, and requiring an immediate objection would be unjust. Further, such a verdict impugns the essential integrity of the proceedings and as such should be reviewable on appeal even though not objected to below.⁶⁸

When, in addition to failure to object to the verdict, the court has instructed on the non-includable lesser crime and the defendant had also failed to object to such instruction, the right to review the compromise verdict is rendered less justifiable.⁶⁹ However, the genuineness of the jury deliberation is still in question, and, at the time of the instruction, the prejudicial effect that the instruction might have is easily overlooked. The basis for review should not depend on defendant's actions, but on the compromise verdict itself.⁷⁰

⁶⁵ See Campbell, *Extent to which Courts of Review Will Consider Questions Not Properly Raised and Preserved*, 7 Wis. L. Rev. 91, 160 (1933); Note, 54 Harv. L. Rev. 1204 (1941).

⁶⁶ Note, 54 Harv. L. Rev. 1204 (1941).

⁶⁷ Id. at 1213.

⁶⁸ *United States v. Atkinson*, 217 U.S. 157 (1936).

⁶⁹ For review of convictions on basis of error in the instructions not raised below, see 54 Harv. L. Rev. 1204, 1211 (1941).

⁷⁰ *Contra* in *Hinson v. State*, 29 Ore. Cr. 210, 232 Pac. 955 (1925), where the evidence could only justify first degree rape, and the court instructed on second degree rape, which instruction was not objected to, and thereafter the jury brought in a verdict for second degree rape.

VI. CONCLUSION

Because of the use of the general verdict in criminal cases, the problem of compromise can only be met when a verdict is irrational to the extent that it is not included in law or fact. However, undesirable compromise may be the motivation for a verdict of guilty to an *included* offense. Indeed, the majority of jury compromises most likely result in a verdict that cannot be held to be contrary to fact or law. The fact of inclusion does not, however, justify the jury compromise. The right of the defendant to be discharged if the jury possesses a reasonable doubt and the right to a verdict based on honest convictions still exist. With no means to ascertain the compromise, the problem must be met before the jury retires to deliberate.

The problem of jury compromise is also not confined to cases of included offenses. In thirteen states, statutes provide that the jury has complete discretion in fixing the punishment, within statutory limits.⁷¹ In these states, juries have the opportunity to compromise by reducing the sentence instead of the crime.⁷²

The unbounded use of multiple indictments, the lack of peremptory instructions, and providing to the jury the right to fix the punishment all enhance the probability of compromise verdicts. Trial judges should not hesitate to refuse instructions on lesser offenses not included.⁷³ Indeed, more peremptory instructions lim-

⁷¹ Comment, 17 U. Chi. L. Rev. 400, 405, note 21 (1950).

⁷² "The ability to impose a light sentence obviously makes it less difficult for a reluctant jury to concur in a verdict of guilty where the evidence is not thoroughly convincing, and these statutes are therefore contrary to the whole idea underlying the doctrine of reasonable doubt." Comment, 17 U. Chi. L. Rev. 400, 405 (1950).

⁷³ Refusal to instruct on manslaughter in Nebraska is not error when the facts and circumstances show an intentional murder. *Fields v. State*, 125 Neb. 290, 250 N.W. 63 (1933); *Davis v. State*, 116 Neb. 90, 215 N.W. 785 (1927). And in *Thompson v. State*, 106 Neb. 395, 184 N.W. 68 (1921) it was held reversible error to instruct on manslaughter where the indictment only charged murder committed in the perpetration of a robbery. See also *Clark v. State*, 131 Neb. 370, 268 N.W. 87 (1936) where defendant's manslaughter conviction was reversed because the trial judge instructed on first and second degree murder when there was no evidence tending to show defendant guilty of such offenses. The court stated at 373: "Such instructions had a tendency to mislead and confuse the jurors. It may be conceived, also, that it may have been an inducement to the jury to find the defendant guilty on the least of the three charges when, if that were the only charge submitted, they might have found him not guilty." And see *Whitehead v. State*, 115 Neb. 143, 212 N.W. 35 (1927).

iting the scope of the jury's discretion would be desirable. Information should include only those lesser crimes supportable in law and the evidence.

These reforms can, of course, only provide a partial solution to the problem of jury compromise. No practical total solution can be recommended. But recognition that jury compromise comprises a major weakness in our judicial system, and the reversal of compromise verdicts at the defendant's instance would militate to provide a more just and genuine trial by jury.⁷⁴

Philip C. Sorensen, '59

⁷⁴ The fact that the issue of compromise verdicts has only arisen in a few jurisdictions does not indicate that the problem is not often present. It is not mere chance that those few jurisdictions where the issue has been litigated are those jurisdictions recognizing the possible prejudicial effect of jury compromise.