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**PRICE v. STATE: THE PRICE IS NOT RIGHT—MARYLAND’S  
SHOWCASE SHOWDOWN WITH INCONSISTENT  
CRIMINAL JURY VERDICTS**

BRYAN L. MOSCA\*

In *Price v. State*,<sup>1</sup> the Court of Appeals of Maryland re-examined Maryland’s common law principle allowing inconsistent jury verdicts<sup>2</sup> in criminal jury trials.<sup>3</sup> The court held that inconsistent criminal jury verdicts should no longer stand because recent exceptions to the general rule have undermined the justification for tolerating such verdicts.<sup>4</sup> In so holding, the court properly furthered Maryland’s long-standing policy of minimizing the occurrence of inconsistent verdicts, albeit through flawed reasoning.<sup>5</sup> By failing to limit the application of its holding to legally inconsistent verdicts, the court created a rule that has the potential to unnecessarily interfere with the jury’s role as the “final arbiter of the facts.”<sup>6</sup> Moreover, the court failed to provide sufficient direction for trial judges who face inconsistent jury verdicts.<sup>7</sup>

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1. 405 Md. 10, 949 A.2d 619 (2008).

2. An inconsistent verdict occurs when a jury renders a decision that no reasonable jury following the court’s instructions could have produced. Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 778 (1998). Inconsistent verdicts come in two general forms—multiple count inconsistencies and multiple defendant inconsistencies. *Id.* The former arises when a jury returns “inconsistent verdicts on multiple counts against a single defendant.” *Id.* The latter occurs where a single jury acquits all defendants but one of a crime that requires at least two participants. *Id.* at 779. This Note only focuses on inconsistent jury verdicts in a multi-count indictment against a single defendant.

3. *Price*, 405 Md. at 18, 949 A.2d at 624. In addition, the Maryland Court of Appeals addressed whether Criminal Law Article, section 5-905 authorizes trial courts to enhance sentences for “multiple counts arising from the same criminal transaction.” *Id.* at 12, 949 A.2d at 620. The court affirmed the lower appellate court’s holding that the trial court misapplied section 5-905, and reversed *Price*’s enhanced sentences. *Id.* at 29–34, 949 A.2d at 630–33. This Note does not discuss the court’s analysis of this issue.

4. *Id.* at 23, 949 A.2d at 627.

5. *See infra* Part IV.A.

6. *See infra* Part IV.B.1.

7. *See infra* Part IV.B.2.

## I. THE CASE

On November 20, 2002, Officer Richard Pollock and Sergeant William Harris (the “officers”) of the Baltimore City Police Department staked out a known drug trafficking area on Winchester Street in Baltimore City.<sup>8</sup> The officers were in an unmarked vehicle when they saw several people standing in the breezeway of an apartment building.<sup>9</sup> As the officers watched, at least fifteen people individually approached the group, handed over money, received small unknown objects, and then walked away.<sup>10</sup> After observing these transactions, the officers called for backup and then approached the group, which immediately fled.<sup>11</sup>

Officer Pollock chased Lawrence Price, the appellant, and Damien Tucker to a third-floor apartment.<sup>12</sup> The officers entered the apartment using a key from the rental office and apprehended Price, who threw a bag containing a handgun and cash to the ground.<sup>13</sup> Based on this evidence, the Maryland Attorney General’s Office indicted Price on eighteen counts, including three substantive drug trafficking charges,<sup>14</sup> nine conspiracy and distribution charges,<sup>15</sup> three firearms offenses,<sup>16</sup> and three simple possession charges.<sup>17</sup>

The trial judge instructed the jury that it could not find Price guilty of possessing a firearm during and in relation to a drug trafficking crime unless they also found him guilty of one of the drug trafficking crimes.<sup>18</sup> The jury acquitted Price of all nine drug trafficking charges and two of the firearm charges, but found him guilty of pos-

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8. *Price*, 405 Md. at 12, 949 A.2d at 620–21.

9. *Id.* at 12–13, 949 A.2d at 621.

10. *Id.* at 13, 949 A.2d at 621.

11. *Id.*

12. *Id.* While following Price and Tucker upstairs, Officer Pollock saw Tucker drop a bag containing suspected controlled dangerous substances. *Id.*

13. *Id.*

14. *Id.* at 13–14, 949 A.2d at 621. The three drug trafficking charges included possession of heroin, cocaine, and marijuana with intent to distribute them. *Id.* (citing Md. CODE ANN., CRIM. LAW § 5-621 (West 2002 & Supp. 2003)).

15. *Id.*, 949 A.2d at 621 (noting that nine counts charged that “Price engaged in conspiracies with Tucker to distribute, or to possess with intent to distribute, or to possess heroin, cocaine, and marijuana”).

16. *Id.*, 949 A.2d at 621–22. The three firearms charges included “(1) possessing a firearm during and in relation to a drug trafficking crime, under sufficient circumstances to constitute a nexus to the drug trafficking crime . . . , (2) possessing a regulated firearm having been convicted of a prior disqualifying felony, and (3) unlawfully carrying or transporting a handgun.” *Id.* (internal citation omitted).

17. *Id.* at 14, 949 A.2d at 622. The prosecutor charged Price with possession of heroin, cocaine, and marijuana. *Id.*

18. *Id.* at 14–15, 949 A.2d at 622 (stating the pertinent part of Judge Berger’s jury instructions).

sessing a firearm during and in relation to a drug trafficking crime and of simple possession of heroin, cocaine, and marijuana.<sup>19</sup>

Price's attorney moved to strike the guilty verdict on the firearm charge, arguing that the charge was inconsistent with the drug trafficking acquittals because commission of a drug trafficking crime is an essential element of the firearm offense.<sup>20</sup> The trial judge denied the motion to strike on the grounds that Maryland common law allowed inconsistent jury verdicts.<sup>21</sup> At sentencing, the trial judge doubled the sentences for Price's possession convictions.<sup>22</sup>

The Court of Special Appeals of Maryland affirmed Price's inconsistent verdicts, but vacated his enhanced sentences.<sup>23</sup> Although the court held that Maryland common law generally tolerates inconsistent verdicts,<sup>24</sup> it vacated Price's enhanced sentences because of the ambiguity surrounding Criminal Law Article, section 5-905.<sup>25</sup> Thus, the court concluded that the rule of lenity required the court to vacate Price's sentences.<sup>26</sup>

The Court of Appeals of Maryland granted Price's petition for certiorari to reexamine the Maryland common law that normally permits inconsistent jury verdicts in criminal jury trials.<sup>27</sup> The court also granted Maryland's petition for a writ of certiorari to decide whether section 5-905 of the Maryland Criminal Code authorizes trial courts to enhance sentences for multiple counts arising out of the same crime.<sup>28</sup>

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19. *Id.* at 15, 949 A.2d at 622.

20. *Id.*

21. *Id.*

22. *Id.* at 16, 949 A.2d at 622–23. The trial judge relied on Criminal Law Article, section 5-905(a), under which “[a] person convicted of a subsequent crime under this title is subject to . . . a term of imprisonment twice that otherwise authorized . . . .” *Id.* at 16, 949 A.2d at 623 (quoting Md. CODE ANN., CRIM. LAW § 5-905(a) (West 2002)). The trial judge originally sentenced Price to twelve years imprisonment for the firearms conviction, four years for both the possession of heroin and cocaine convictions, and one year for the marijuana convictions. *Id.* at 15–16, 949 A.2d at 622–23. Under section 5-905(a), the trial judge doubled Price's sentences for the three drug possession charges. *Id.* at 16, 949 A.2d at 623.

23. *Price v. State*, 172 Md. App. 363, 366–67, 915 A.2d 432, 434 (2007).

24. *Id.* at 388, 915 A.2d at 447 (citing *Stucky v. State*, 141 Md. App. 143, 157 n.3, 784 A.2d 652, 660 n.3 (2001)).

25. *Id.* at 382, 387–88, 915 A.2d at 443, 446 (recognizing that if an analysis of a statute creates an absurd result, Maryland courts apply the rule of lenity).

26. *Id.* at 387–88, 915 A.2d at 446 (commenting that the rule of lenity requires ambiguous penal statutes to “be strictly construed against the State and in favor of the defendant.” (citing *Scott v. State*, 351 Md. 667, 675, 720 A.2d 291, 295 (1998))).

27. *Price*, 405 Md. at 12, 949 A.2d at 620.

28. *Id.*

## II. LEGAL BACKGROUND

Most jurisdictions apply a general rule outlined by the Supreme Court of the United States to assess inconsistent verdicts in criminal jury trials.<sup>29</sup> The Supreme Court's rule prohibits appellate review of jury verdicts on the grounds of inconsistency.<sup>30</sup> Maryland originally adopted this general rule,<sup>31</sup> and has slowly developed a policy of minimizing inconsistent verdicts, leading to numerous exceptions.<sup>32</sup> Many other jurisdictions have also implemented stylized versions of the Supreme Court's rule—some courts follow the Supreme Court and allow inconsistent criminal jury verdicts,<sup>33</sup> while a minority of jurisdictions have either partially or fully abolished inconsistent criminal jury verdicts.<sup>34</sup>

### A. *Maryland Courts Have Adopted a Policy of Minimizing Inconsistent Verdicts*

Like most jurisdictions, Maryland courts have traditionally looked to Supreme Court cases such as *Dunn v. United States*<sup>35</sup> and *United States v. Powell*<sup>36</sup> for guidance on how to handle inconsistent verdicts.<sup>37</sup> Maryland, however, has distinguished itself from other jurisdictions by taking steps towards “minimiz[ing] the possibility of inconsistent verdicts that result in a conviction contrary to law.”<sup>38</sup>

#### 1. *The Federal Common Law Rule Allows Inconsistent Verdicts to Stand*

In *Dunn v. United States*, Justice Holmes announced that “[c]onsistency in the verdict is not necessary.”<sup>39</sup> There, the Court upheld James Dunn's conviction of “maintaining a common nuisance by keeping for sale at a specified place intoxicating liquor,” even though that conviction was inconsistent with his acquittals on charges for un-

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29. See *infra* Part II.A.1.

30. See *infra* Parts II.A.1 & II.B.1 (explaining the reasoning behind the general rule's acceptance).

31. The Maryland Court of Appeals first adopted the general rule in *Leet v. State*, 203 Md. 285, 293–94, 100 A.2d 789, 793–94 (1953).

32. See *infra* Part II.A.2.

33. See *infra* Part II.B.1.

34. See *infra* Part II.B.2.

35. 284 U.S. 390 (1932).

36. 496 U.S. 57 (1984).

37. See *infra* notes 54–55 (explaining Maryland's adoption of the *Dunn* and *Powell* rules); *infra* notes 104–120 (explaining how most states have adopted the *Dunn* and *Powell* rules).

38. *Mack v. State*, 300 Md. 583, 597, 479 A.2d 1344, 1351 (1984).

39. *Dunn*, 284 U.S. at 393.

lawful possession and unlawful sale of liquor.<sup>40</sup> While part of Justice Holmes's reasoning may no longer hold true,<sup>41</sup> many courts still cite his proposition that even if "the verdict may have been the result of compromise, or of a mistake on the part of the jury . . . verdicts cannot be upset by speculation or inquiry into such matters."<sup>42</sup> Instead, the Court interpreted the acquittal as the jury exercising its power of lenity,<sup>43</sup> and therefore, the jury's verdict did not necessarily "'show that they were not convinced of the defendant's guilt.'"<sup>44</sup>

Over the next half century, many federal circuit courts began recognizing exceptions to the *Dunn* rule.<sup>45</sup> In *United States v. Powell*, the Supreme Court responded to these exceptions by reaffirming that jury verdicts need not be consistent.<sup>46</sup> The Court noted that inconsistent verdicts—including those in *Powell* where the defendant was found guilty of the compound offense but acquitted of the underlying felony—do not necessarily harm a defendant.<sup>47</sup> Instead, the jury, convinced of the defendant's guilt, may have properly found the defendant guilty of the compound offense, but "through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the

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40. *Id.* at 391–94.

41. Justice Holmes stated that if the government had decided to prosecute the defendant separately for each count, "an acquittal on one could not be pleaded as *res judicata* of the other." *Id.* at 393. After 1970, however, the doctrine of collateral estoppel applied to separate indictments arising from the same issue of ultimate fact. *Powell*, 469 U.S. at 64 (citing *Ashe v. Swenson*, 397 U.S. 436, 443 (1970)).

42. *Dunn*, 284 U.S. at 394.

43. The jury's power of lenity is its power to exercise mercy towards a defendant instead of returning a verdict that speaks to the jury's real conclusions. *Id.* at 393 (quoting *Steckler v. United States*, 7 F.2d 59, 60 (2d Cir. 1925)). Lenity is usually exercised in two instances. Muller, *supra* note 2, at 784 (citing Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 297–98, 301–02 (1996)). The first occurs when a jury questions the fairness of the applicable criminal law because it "believes that the . . . law . . . punishes conduct that is not morally blameworthy." *Id.* In the second situation, the jury ignores the fairness of the law, and instead believes that the law is unfair as applied to this particular defendant. *Id.*

44. *Dunn*, 284 U.S. at 393 (quoting *Steckler*, 7 F.2d at 60).

45. *Powell*, 469 U.S. at 63–64. In 1982, the First Circuit overturned a conspiracy conviction where the jury had previously acquitted the defendant of "all the 'overt acts' charged in support of the conspiracy." *Id.* (citing *United States v. Morales*, 677 F.2d 1, 3 (1st Cir. 1982)); *see, e.g.*, *United States v. Brooks*, 703 F.2d 1273, 1278 (11th Cir. 1983) (overturning the defendant's conviction for using a telephone to facilitate a conspiracy when the jury had previously acquitted the defendant for the conspiracy); *United States v. Hannah*, 584 F.2d 27, 30 (3rd Cir. 1978) (noting that because a predicate felony count and the compound offense are not independent, an acquittal of the predicate requires an acquittal of the compound offense).

46. *Powell*, 469 U.S. at 69 (reiterating the *Dunn* rule because the "best course to take is simply to insulate jury verdicts from review" due to inconsistencies).

47. *Id.* at 65 (noting that, even where a jury does not follow the court's instructions, it is unclear which party received the benefit).

lesser offense.”<sup>48</sup> The Court recognized that it must protect the jury’s power to exercise lenity, and consequently rejected as “imprudent and unworkable” any rule that would allow a criminal defendant to claim that “the verdict was not the product of lenity, but of some error that worked against them.”<sup>49</sup> In addition, a rule that allows a defendant to assess the jury’s verdict for such errors would interfere with the jury’s power as the arbiter of the facts.<sup>50</sup>

The Court noted that review for sufficiency of the evidence still protects a criminal defendant against jury irrationality and error by allowing trial and appellate courts to assess whether the evidence presented at trial “could support any rational determination of guilt beyond a reasonable doubt.”<sup>51</sup> As a result, the government has the burden of proof and must also convince the reviewing court that its evidence could have rationally led the jury to reach a verdict of guilt beyond a reasonable doubt.<sup>52</sup>

## 2. *Maryland’s Policy of Reducing the Impact of Inconsistent Verdicts*

Similar to other jurisdictions,<sup>53</sup> Maryland courts have consistently held that “[c]onsistency in the verdict is not necessary.”<sup>54</sup> Although an inconsistent jury decision may result from compromise or mistake rather than lenity, the Court of Appeals has ruled that courts should not interfere in the province of the jury by speculating into such matters.<sup>55</sup> Maryland, however, has attempted to minimize the “deleterious result” of inconsistent verdicts<sup>56</sup> through two distinct methods: (1) by adopting several exceptions to the general rule on allowing incon-

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48. *Id.* In addition, the Supreme Court reasoned that because the government cannot appeal an inconsistent acquittal, a defendant should not be able to appeal an inconsistent conviction. *Id.*

49. *Id.* at 66.

50. *Id.* at 66–67 (“Such individualized assessment of the reason for the inconsistency would be based either on pure speculation, or would require inquiries into the jury’s deliberations that courts generally will not undertake.”).

51. *Id.* at 67 (citing FED. R. CRIM. P. 29(a); *Glasser v. United States*, 315 U.S. 60, 80 (1942)).

52. *Id.*

53. *See infra* Part II.B.1.

54. *See, e.g.*, *Mack v. State*, 300 Md. 583, 592, 594, 479 A.2d 1344, 1348–49 (1984) (quoting *Dunn v. United States*, 284 U.S. 390, 393–94 (1932)) (recognizing that the *Dunn* standard was incorporated into Maryland common law as early as 1975); *see also* *Ledbetter v. State*, 224 Md. 271, 273–74, 167 A.2d 596, 597–98 (1961) (applying the *Dunn* principle that “[c]onsistency in a verdict is not necessary” (quoting *Dunn*, 284 U.S. at 393)); *infra* Part II.A.1.

55. *Johnson v. State*, 238 Md. 528, 542, 209 A.2d 765, 771 (1965) (quoting *Dunn*, 284 U.S. at 394).

56. *Mack*, 300 Md. at 595, 479 A.2d at 1350.

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sistencies,<sup>57</sup> and (2) by promulgating procedural methods that would disfavor inconsistent verdicts.<sup>58</sup>

*a. Maryland's Common Law Exceptions to the General Rule  
Allowing Inconsistencies Has Led to Fewer Inconsistent  
Verdicts*

Since Maryland adopted the *Dunn* rule on inconsistent verdicts in *Leet v. State*,<sup>59</sup> Maryland has adopted a policy of limiting this rule.<sup>60</sup> Maryland prohibits inconsistent verdicts in nonjury trials,<sup>61</sup> between the jury and the trial judge,<sup>62</sup> and in civil cases.<sup>63</sup>

Even before Maryland adopted the *Dunn* rule, Maryland courts discouraged inconsistent guilty verdicts. In *Heinze v. State*,<sup>64</sup> the Court of Appeals of Maryland held that guilty verdicts on two counts are “inconsistent in law and consequently . . . inadequate to support a judgment” if the defendant could not have logically committed the separate offenses.<sup>65</sup> The *Heinze* court held that a trial judge could not convict a defendant for stealing money and for knowingly receiving stolen money in the same case; the defendant could have committed only one of the crimes.<sup>66</sup> The court noted that if a “verdict [wa]s ambiguous, inconsistent, unresponsive, or otherwise defective,” the trial judge must instruct the jury to correct it either in the presence of the court, or to return to the jury room for further deliberation.<sup>67</sup> In giving this instruction, the judge must not influence the jury by explicitly or implicitly suggesting an outcome.<sup>68</sup>

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57. See *infra* Part II.A.1.a.

58. See *infra* Part II.A.1.b.

59. 203 Md. 285, 294, 100 A.2d 789, 794 (1953).

60. See *infra* notes 74–96 and accompanying text.

61. See *Shell v. State*, 307 Md. 46, 55–56, 512 A.2d 358, 362–63 (1986) (holding that inconsistent verdicts by a trial judge cannot stand because the considerations justifying inconsistent jury verdicts do not apply to trial judges).

62. See *Galloway v. State*, 371 Md. 379, 400, 809 A.2d 653, 666 (2002) (holding that a judge’s inconsistent verdict that effectively nullified a jury’s interpretation of the facts was inappropriate under Maryland common law principles).

63. *S. Mgmt. Corp. v. Taha*, 378 Md. 461, 488, 495, 836 A.2d 627, 643, 647 (2003) (holding that the irreconcilably inconsistent jury verdicts must be set aside); see also *Price v. State*, 405 Md. 10, 26, 949 A.2d 619, 628–29 (2008) (recognizing that “the Court in *Taha* held that inconsistent jury verdicts in civil cases would not be allowed”); *State v. Williams*, 397 Md. 172, 189 n.5, 916 A.2d 294, 304 n.5 (2007) (recognizing that *Taha* held that “irreconcilably defective verdicts [in civil cases] cannot stand”).

64. 184 Md. 613, 42 A.2d 128 (1945).

65. *Id.* at 617, 42 A.2d at 130.

66. *Id.*

67. *Id.*

68. *Id.* at 618, 42 A.2d 131.

In *Leet v. State*, Maryland first cited to the *Dunn* rule when upholding a defendant's conviction for willfully failing to file his income tax return, despite the defendant's acquittal on the charge of failing to pay his income tax.<sup>69</sup> The court stated that even if it assumed the verdicts were inconsistent, it was not necessarily required to reverse the conviction.<sup>70</sup> For support, the court quoted Justice Holmes's rule from *Dunn*: "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment."<sup>71</sup> The court reconciled the inconsistent verdict as the jury's valid exercise of lenity, noting that even though the verdict may have been the result of a compromise or mistake, the court should not speculate into such matters.<sup>72</sup> After *Leet*, the Court of Appeals continued to follow the Supreme Court's *Dunn* rule, allowing inconsistent jury verdicts to stand, but not without establishing exceptions along the way.<sup>73</sup>

In *Shell v. State*,<sup>74</sup> the Court of Appeals abolished inconsistent verdicts rendered by a trial judge.<sup>75</sup> The court held that the reasons for allowing inconsistent verdicts in a jury trial are not applicable to a bench trial.<sup>76</sup> The court distinguished the role of a trial judge from that of the jury, noting that the judge is not the "voice of the country, even when he sits in the jury's place."<sup>77</sup> And unlike a jury, a trial judge need not "reach unanimity with himself" by providing inconsistent verdicts.<sup>78</sup> Thus, the *Shell* court determined, when a trial judge renders inconsistent verdicts, the appellate court must either reverse or vacate those verdicts unless the trial judge explains on the record the

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69. 203 Md. 285, 293–94, 100 A.2d 789, 793–94 (1953).

70. *Id.* at 293, 100 A.2d at 793.

71. *Id.* at 293–94, 100 A.2d at 793 (quoting *Dunn v. United States*, 284 U.S. 390, 393 (1932)).

72. *Id.* at 294, 100 A.2d at 793–94 (citing *Dunn*, 284 U.S. at 393–94).

73. *See infra* notes 74–91 and accompanying text.

74. 307 Md. 46, 512 A.2d 358 (1986).

75. *Id.* at 55, 512 A.2d at 362 (holding that the reasons for allowing inconsistent verdicts rendered by the jury to stand do not justify inconsistent verdicts from the trial judge); *see also* *State v. Williams*, 397 Md. 172, 189–90, 916 A.2d 294, 305 (2007) ("[I]t is also well settled in Maryland that inconsistent verdicts of guilty and not guilty, by a trial judge at a nonjury trial, are not ordinarily permitted." (citations and internal quotation marks omitted)).

76. *Shell*, 307 Md. at 55–58, 512 A.2d at 362–64 (citing *Johnson v. State*, 238 Md. 528, 543–44, 209 A.2d 765, 772 (1965); *United States v. Maybury*, 274 F.2d 899, 905 (2d Cir. 1960)).

77. *Id.* at 55, 512 A.2d at 362 (quoting *Johnson*, 238 Md. at 543, 209 A.2d at 772) (internal quotation marks omitted); *see also* *State v. Williams*, 397 Md. 172, 189–90, 916 A.2d 294, 305 (2007) (noting that Maryland law does not permit inconsistent verdicts by a trial judge).

78. *Williams*, 397 Md. at 190, 916 A.2d at 305 (citations and internal quotation marks omitted).

apparent inconsistency and the appellate court accepts this reasoning.<sup>79</sup>

In 2002, the Court of Appeals of Maryland prohibited inconsistent verdicts based on identical evidence in a criminal trial when a jury rules on some counts and the trial judge rules inconsistently on others.<sup>80</sup> In *Galloway v. State*,<sup>81</sup> the court precluded a trial judge from ruling inconsistently from the jury in a criminal trial and, in effect, nullifying the jury's verdicts.<sup>82</sup> The court reiterated that the reasons for allowing inconsistent verdicts in a jury trial are absent when a judge makes the ruling.<sup>83</sup> Because the trial judge had created the inconsistency<sup>84</sup> and both verdicts depended upon identical evidence, the appellate court could not justify the inconsistency and thus reversed the trial judge's guilty verdicts.<sup>85</sup>

Finally, in *Southern Management Corporation v. Taha*,<sup>86</sup> the court held in the context of a civil case that "irreconcilably inconsistent jury verdicts . . . cannot stand."<sup>87</sup> Here, the Court of Appeals ruled that a jury could not find a principal corporation liable under the doctrine of respondeat superior when the same jury had exonerated the co-defendant employees.<sup>88</sup> The court relied on its reasoning in *S & R*,

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79. *Id.* (quoting *State v. Anderson*, 320 Md. 17, 29–30, 575 A.2d 1227, 1233 (1990)). Under Maryland law, a jury may amend or change any verdict before the court has recorded the verdict. *Heinze v. State*, 184 Md. 613, 617, 42 A.2d 128, 130 (1945).

80. *Galloway v. State*, 371 Md. 379, 401, 809 A.2d 653, 667 (2002).

81. 371 Md. 379, 809 A.2d 653.

82. *Id.* at 416–17, 809 A.2d at 675–76.

83. *Id.* at 408, 809 A.2d at 671.

84. The trial judge ruled after the jury had returned a final verdict. *Id.* at 416, 809 A.2d at 675.

85. *Id.*

86. 378 Md. 461, 836 A.2d 627 (2003).

87. *Id.* at 467, 836 A.2d at 630; *see also supra* note 63 (recognizing that subsequent cases have applied the *Taha* holding to all civil cases). The Court of Special Appeals first adopted the rule allowing inconsistent civil verdicts to stand in *Eagle-Picher Indus., Inc. v. Balbos*, 84 Md. App. 10, 35–36, 578 A.2d 228, 240 (1990) (noting that the rule allowing inconsistent verdicts to stand "has previously been applied by Maryland courts only in criminal cases"). The Court of Appeals, however, reversed part of that opinion and made no mention of inconsistent verdicts. *See Eagle-Picher Indus., Inc. v. Balbos*, 326 Md. 179, 236–37, 604 A.2d 445, 473 (1992) (reversing in part and affirming in part). Despite this fact, the Court of Special Appeals later adopted its *Balbos* rule that "[i]nconsistency in civil verdicts often is the result of compromise to reach unanimity or mistake; nevertheless, 'verdicts cannot be upset by speculation or inquiry as to such matters.'" *Davis v. Goodman*, 117 Md. App. 378, 423, 700 A.2d 798, 820 (1997) (quoting *Balbos*, 84 Md. App. at 35–36, 578 A.2d at 228).

88. *Taha*, 378 Md. at 486, 836 A.2d at 641. *But see* *United States v. Dotterweich*, 320 U.S. 277, 279 (1943) (invoking the *Dunn* rule in upholding the president of a corporation's conviction when the same jury had previously acquitted the corporation of the same charge).

*Inc. v. Nails*<sup>89</sup> to identify “a distinction between inconsistent verdicts in criminal cases and *irreconcilably inconsistent jury verdicts* in civil matters.”<sup>90</sup> The dissent criticized the majority’s reliance on *S & R, Inc.* because the *S & R, Inc.* jury used a special verdict form, while the *Taha* jury returned a general verdict.<sup>91</sup> Thus, following *Taha*, inconsistent criminal jury verdicts remained the sole surviving part of *Dunn* and *Powell*’s general rule in Maryland.

*b. Maryland’s Procedural Rules Reduce Inconsistent Verdicts in Criminal Cases*

To further minimize inconsistent verdicts, Maryland courts adopted procedural rules applicable at the trial and appellate levels. Despite these rules, Maryland courts generally hesitate “to interfere with the results of unknown jury interplay, at least without proof of actual irregularity.”<sup>92</sup>

In 1984, the Court of Appeals modified the general rule of allowing inconsistent verdicts in criminal cases to avoid their “deleterious result.”<sup>93</sup> Specifically, the court stated that when a defendant faces indictment for both use of a handgun in the commission of a crime and the underlying crime, the trial judge must instruct the jury that it may not find the defendant guilty of the handgun charge without first finding him guilty of the underlying crime.<sup>94</sup> In 1999, the Court of Special Appeals clarified that when a trial court fails to give such an instruction, the appellate court should overturn a defendant’s

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89. 85 Md. App. 570, 589–90, 584 A.2d 722, 731 (1991) (involving irreconcilably inconsistent verdicts awarding punitive damages on a fraud claim where the jury had determined that the defendant had acted only with implied rather than actual malice), *rev’d on other grounds*, 334 Md. 398, 639 A.2d 660 (1994).

90. *Taha*, 378 Md. at 488, 836 A.2d at 642–43 (citing *Nails*, 85 Md. App. at 590, 584 A.2d at 731) (emphasis added) (holding that a verdict is irreconcilably defective when an answer to one question in a special verdict required a verdict for the plaintiff, while an answer on another question required a verdict for the defendant). The *Taha* court noted that it would leave for another day the issue of inconsistent verdicts in criminal cases. *Id.* at 488 n.8, 836 A.2d at 642 n.8.

91. *Id.* at 503–04, 836 A.2d at 652 (Raker, J., dissenting) (noting that a general verdict does not require a specific finding of fact by the jury).

92. *Hoffert v. State*, 319 Md. 377, 384, 572 A.2d 536, 540 (1990) (quoting *Shell v. State*, 307 Md. 46, 54, 512 A.2d 358, 362 (1986)) (internal quotation marks omitted).

93. *Mack v. State*, 300 Md. 583, 595, 479 A.2d 1344, 1350 (1984).

94. *Id.* at 595–96, 479 A.2d at 1350. *See also Hoffert*, 319 Md. at 385, 572 A.2d at 540 (commenting that such an instruction “is beneficial because it minimizes the possibility of inconsistent verdicts that result in a conviction contrary to law” (quoting *Mack*, 300 Md. at 597 A.2d at 1344)). In addition, the instruction must meet the requirements of Maryland Rules, section 4-325(c), which requires a judge to give an instruction that correctly states the applicable law. *Id.* at 592, 479 A.2d at 1348.

conviction if the trial court could have avoided an inconsistent verdict by giving an appropriate instruction.<sup>95</sup>

In 2002, the Maryland Court of Appeals, however, recognized the possible double jeopardy implications of overturning an inconsistent verdict.<sup>96</sup> Specifically, in *Galloway v. State*, the court noted that it cannot retry a defendant on a count for which a jury had previously acquitted him.<sup>97</sup> While a new trial on a final inconsistent acquittal would violate the Fifth Amendment, a new trial on an inconsistent guilty verdict would not.<sup>98</sup> For the same reasons, the court in *Ferrell v. State*<sup>99</sup> held that an acquittal on the underlying offense in a previous trial precludes relitigation of a compound offense where a jury already found the defendant not guilty of an element of that compound offense.<sup>100</sup>

On review, a trial judge may set aside an inconsistent verdict that is contrary to the court's advisory instructions and may grant a new trial.<sup>101</sup> Although an appellate court can review the trial court's grant of a new trial,<sup>102</sup> it does not generally review a trial court's failure to offer relief for an inconsistent verdict.<sup>103</sup>

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95. *Bates v. State*, 127 Md. App. 678, 699–700, 736 A.2d 407, 418 (1999) (noting that the court will review inconsistent verdicts on appeal even if the defendant failed to properly object at trial). Despite this rule, the jury retains its right as the final arbiter in the determination of the defendant's guilt. See *Hoffert*, 319 Md. at 385, 572 A.2d at 540 (noting that such an instruction does not interfere with the jury's duty because “the jury retains its power to err, either fortuitously or deliberately, and to compromise or exercise lenity” (quoting *Mack*, 300 Md. at 597, 479 A.2d at 1351)).

96. See *Galloway v. State*, 371 Md. 379, 390–91, 809 A.2d 653, 660–61 (2002) (noting that the Fifth Amendment guarantee against double jeopardy “protects a man who has been acquitted from having to run the gantlet a second time” (quoting *Ashe v. Swenson*, 397 U.S. 436, 442–46 (1969) (internal quotation marks omitted)). In *Benton v. Maryland*, the Supreme Court made the Double Jeopardy Clause applicable to the states through the Fourteenth Amendment. 395 U.S. 784, 787 (1969).

97. See *Galloway*, 371 Md. at 392, 809 A.2d at 661 (acknowledging the collateral estoppel form of double jeopardy (citing *Butler v. State*, 335 Md. 238, 253, 643 A.2d 389, 396 (1994))).

98. See *id.* (quoting *Butler*, 335 Md. at 253–54, 643 A.2d at 396) (noting that the double jeopardy clause only precludes re-litigation of verdicts in the defendant's favor).

99. 318 Md. 235, 567 A.2d 937 (1990).

100. *Id.* at 248, 567 A.2d at 944 (holding that an earlier acquittal on the predicate handgun charge resolved the issue and precluded the State from relitigating the armed robbery charge).

101. *Mack v. State*, 300 Md. 583, 599–600, 479 A.2d 1344, 1352 (1984) (citing *Stevenson v. State*, 289 Md. 167, 179, 423 A.2d 558, 565 (1980)).

102. *Id.* at 600, 479 A.2d at 1352. The appellate court reviews trial court's discretion under an abuse of discretion standard. *Id.* (citing *Kirsner v. State*, 296 Md. 567, 570–71, 463 A.2d 865, 867 (1983)).

103. *Id.* (citing *Carlile v. Two Guys from Harrison, Glen Burnie, Inc.*, 264 Md. 475, 477, 287 A.2d 31, 33 (1972)).

### B. *Other Jurisdictions' Responses to Dunn and Powell*

Most jurisdictions have adopted *Powell* and *Dunn*'s general rules allowing inconsistent criminal jury verdicts.<sup>104</sup> A minority of jurisdictions, however, prohibit inconsistent verdicts in certain situations.<sup>105</sup>

#### 1. *The Majority Approach Allows Inconsistent Verdicts to Stand*

Most states have adopted a general policy allowing inconsistent verdicts to stand based on the Supreme Court's reasoning in *Powell* and *Dunn*.<sup>106</sup> This majority generally offers two reasons for upholding inconsistent verdicts. First, these courts note that lenity is an appropriate jury power, and while a verdict may result from compromise or mistake on the part of the jury, a judge should not upset the verdict by speculation into such matters.<sup>107</sup> Second, these courts agree with *Powell* that defendants receive adequate protection against jury irrationality or error by a sufficiency of the evidence review at the trial and appellate levels.<sup>108</sup>

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104. See *infra* Part II.B.1. For a list of states that follow the Supreme Court's general rule, see Muller, *supra* note 2, at 787 n.80. Since 1998, two additional states have decided to not allow legally inconsistent criminal jury verdicts. See *Priest v. State*, 879 A.2d 575, 587 (Del. 2005) (reasoning that, by statute, the *Powell* lenity rule could not save inconsistent verdicts when the jury refused to find the defendant guilty of the predicate felony); *State v. Arroyo*, 844 A.2d 163, 170–72 (R.I. 2004) (accepting the *Dunn* rule that as long as verdicts are “legally consistent,” even logically inconsistent jury verdicts will stand). In addition, one state at the intermediate appellate level has prohibited legally inconsistent verdicts. See *State v. Flemons*, 144 S.W.3d 877, 882 (Mo. Ct. App. 2004) (reversing the unlawful use of a weapon charge because it was dependent on a guilty finding on possession of marijuana with intent to distribute); see also *State v. Staten*, 478 S.W.2d 265, 266 (Mo. 1972) (vacating the defendant's burglarious stealing conviction because the jury failed to convict the defendant of burglary, a necessary element of the stealing charge). *But see State v. Clemons*, 643 S.W.2d 803, 805 (Mo. 1983) (en banc) (“An inconsistent verdict among several charges does not require a reversal provided there is sufficient evidence to support the jury's finding of guilt.”). In addition, Illinois allows inconsistent verdicts to stand. See *People v. Jones*, 797 N.E.2d 640, 649 (Ill. 2003) (restating conviction for mob action despite acquittal on battery charges).

105. See *infra* Part II.B.2; see also Muller, *supra* note 2, at 787 n.79 (listing the states that prohibit inconsistent verdicts to stand). Despite the fact that Indiana has never reversed a case due to inconsistent verdicts, Indiana courts must still analyze verdicts for consistency. *Owsley v. State*, 769 N.E.2d 181, 183–84 (Ind. Ct. App. 2002).

106. See, e.g., *State v. McClary*, 679 N.W.2d 455, 459 (N.D. 2004) (noting that state courts and the vast majority of federal courts have adopted *Powell*); see also *supra* Part II.A.1. For a list of the states that have adopted the Supreme Court's rule, see *supra* note 104.

107. See, e.g., *Fisher v. United States*, 749 A.2d 710, 713 (D.C. 2000) (interpreting an inconsistent acquittal as the jury's exercise of lenity); *Bollinger v. State*, 901 P.2d 671, 675–76 (Nev. 1995) (accepting a jury's inconsistent verdicts on the basis that the jury could have possibly exercised lenity).

108. See, e.g., *People v. Jones*, 797 N.E.2d 640, 644–45 (Ill. 2003) (citing *United States v. Powell*, 469 U.S. 57, 67 (1984)) (noting that “a defendant is still protected from jury irrationality because the defendant can always challenge his or her conviction on sufficiency of

In general, the majority of state courts do not interpret an inconsistent verdict as a windfall for the government at the defendant's expense.<sup>109</sup> Instead, the jury could have properly reached its conclusion on the first count, but then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the predicate offense.<sup>110</sup> In these instances, it is impossible for the defendant to determine that his or her verdict was not the product of lenity without an assessment based on pure speculation or an inquiry into the jury deliberations that courts will not undertake.<sup>111</sup> These courts find that the defendant received the benefit of an acquittal, and it is not unjust to require the defendant to accept the jury's conviction on the second related count.<sup>112</sup> Moreover, the Fifth Amendment prohibition against double jeopardy prevents the government from objecting to any such acquittal<sup>113</sup> and as a result, courts agree that it would be unfair for the defendant to have this option when the government does not.<sup>114</sup>

The jury has an "unreviewable power . . . to return a verdict of not guilty for impermissible reasons."<sup>115</sup> Many jurisdictions hold that

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the evidence grounds"); *State v. Goins*, 92 P.3d 181, 185–86 (Wash. 2004) (noting that the irreconcilably inconsistent verdicts can stand if supported by sufficient evidence).

109. *See, e.g.*, *State v. Brown*, 565 A.2d 1035, 1039–40 (N.H. 1989) ("[E]ven if inconsistent verdicts reflect jury error, it should not be assumed that they necessarily aid the government.").

110. *See, e.g.*, *People v. Frye*, 898 P.2d 559, 569–70 (Colo. 1995) (citing *Powell*, 469 U.S. at 65) (adopting the Supreme Court rule in holding that the defendant cannot "attack his conviction for menacing with a deadly weapon on the ground that it is inconsistent with his acquittal of first degree sexual assault"); *Brown*, 565 A.2d. at 1039 (positing that a jury could "reach[ ] the guilty verdict on one count, and through leniency or mistake arrived at the not guilty verdict on a different count of the same offense").

111. *See, e.g.*, *State v. Beach*, 67 P.3d 121, 132, 134–35 (Kan. 2003) (quoting *Steckler v. United States*, 7 F.2d 59, 60 (2d Cir. 1925)) (recognizing the sole inquiry as whether after reviewing all the evidence a rational factfinder could have found the defendant guilty beyond a reasonable doubt).

112. *See, e.g.*, *State v. Juelfs*, 270 N.W.2d 873, 873–74 (1978) (finding that logically inconsistent verdicts do not warrant a dismissal); *accord Powell*, 469 U.S. at 69 ("Respondent is given the benefit of her acquittal on the counts on which she was acquitted, and it is neither irrational nor illogical to require her to accept the burden of conviction on the counts on which the jury convicted.").

113. *Green v. United States*, 355 U.S. 184, 188 (1957) (citing *United States v. Ball*, 163 U.S. 662, 671 (1896)) (noting that the government cannot appeal an acquittal even if it appears erroneous).

114. *See, e.g.*, *Ward v. State*, 653 So. 2d 1003, 1005 (Ala. Crim. App. 1994) (acknowledging that under the Double Jeopardy Clause because the government has no recourse to correct jury error, the defendant should not have that option either); *Commonwealth v. Campbell*, 651 A.2d 1096, 1100 (Pa. 1994) (recognizing that the Constitution's Due Process Clause precludes the government from challenging an acquittal).

115. *See, e.g.*, *Hammond v. State*, 497 So. 2d 558, 563 (Ala. Crim. App. 1986) (quoting *Harris v. Rivera*, 454 U.S. 339, 346 (1981)) (noting that Alabama courts have adopted the *Dunn* rule).

courts should not correct jury verdict inconsistencies, “so long as the evidence is sufficient . . . to support the guilty verdicts.”<sup>116</sup> Under the sufficiency of the evidence standard promulgated in *Jackson v. Virginia*,<sup>117</sup> a reviewing court must “determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.”<sup>118</sup> Such a standard sufficiently protects the defendant from jury irrationality or error.<sup>119</sup> The sole question under such a review is whether the prosecutor has provided adequate evidence to convict the defendant of the charged offense; if yes, the conviction must stand.<sup>120</sup>

## 2. *The Minority Approach Limits or Rejects Inconsistent Verdicts in Criminal Cases*

A few states prohibit inconsistent verdicts in criminal jury trials at least to some extent.<sup>121</sup> Most prohibit only legally inconsistent verdicts,<sup>122</sup> while Alaska prohibits both legally and factually inconsistent verdicts.<sup>123</sup> A factually or logically inconsistent verdict occurs if a jury returns verdicts that both acquit and convict a defendant of crimes composed of different elements, but that arise out of the same set of facts.<sup>124</sup> A legally inconsistent verdict occurs when “the essential elements of the count[s] of which the defendant is acquitted are identical and necessary to prove the count of which the defendant is

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116. See, e.g., *State v. Sampson*, 656 So. 2d 1085, 1088–89 (La. Ct. App. 1995) (citing *Powell*, 469 U.S. at 67) (noting that the proper inquiry is whether there was sufficient evidence for a rational trier of fact to find a defendant guilty).

117. 443 U.S. 307 (1979).

118. *Id.* at 318.

119. See, e.g., *State v. Bartlett*, 355 S.E.2d 913, 920 (W. Va. 1987) (quoting *Powell*, 469 U.S. at 67) (“[A] criminal defendant is already afforded protection . . . [by] the sufficiency of the evidence review undertaken by the trial and appellate courts.”).

120. See *Powell*, 469 U.S. at 67 (reasoning that the government with its evidence must convince the jury, and must convince the court that given the evidence “the jury could rationally have reached a verdict of guilty beyond a reasonable doubt”).

121. See *supra* notes 104–105.

122. See *infra* notes 128–140 and accompanying text.

123. See *infra* notes 141–148 and accompanying text.

124. See, e.g., *State v. Arroyo*, 844 A.2d 163, 171 (R.I. 2004). In other words, a factual inconsistency occurs if a jury renders different verdicts on two crimes with distinct elements when there was only one set of proof given at trial. Steven T. Wax, *Inconsistent and Repugnant Verdicts in Criminal Trials*, 24 N.Y.L. SCH. L. REV. 713, 740 (1979). For example, this occurs when a jury convicts a defendant of manslaughter as to the driver of a car, but acquits the defendant as to the passenger of the same car, even though the deaths of both the driver and passenger resulted from the same action. See *Naumowicz v. State*, 562 So. 2d 710, 713 (Fla. Dist. Ct. App. 1990) (noting that a jury does not necessarily return a flawed verdict when its verdict is inconsistent with a verdict on another count).

convicted,<sup>125</sup> and a jury implicitly finds that a defendant has both met and not met the same essential elements of two different crimes.<sup>126</sup> The courts that strike down legal inconsistencies reason that such verdicts are “inescapably inconsistent” because courts cannot convict a person of an offense unless the prosecutor proves each element beyond a reasonable doubt.<sup>127</sup>

Most courts that set aside inconsistent criminal jury verdicts restrict their review to instances of legally inconsistent verdicts.<sup>128</sup> These courts believe that by restricting their review they still can follow the principles of *Powell*.<sup>129</sup>

New York and Florida courts have the most evolved jurisprudence on how to handle inconsistent verdicts. In *People v. Tucker*,<sup>130</sup> the New York Court of Appeals assessed the permissibility of inconsistent criminal jury verdicts.<sup>131</sup> The court noted that even though most jurisdictions accept inconsistent verdicts, allowing legally inconsistent verdicts to stand “is not merely inconsistent with justice, but is repugnant to

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125. *Arroyo*, 844 A.2d at 171 (citation and internal quotation marks omitted). The Illinois Supreme Court defined a legally inconsistent verdict as when the jury returns “[v]erdicts of guilty of crime A but not guilty of crime B, where both crimes arise out of the same set of facts,” and the verdicts “necessarily involve the conclusion that the same essential element or elements of each crime were found both to exist and not to exist.” *People v. Frias*, 457 N.E.2d 1233, 1235 (Ill. 1983) (citation and internal quotation marks omitted). For example, a jury returns a legally inconsistent verdict when it acquits a defendant of an underlying felony, but still finds the defendant guilty of a compound offense. *Naumowicz*, 562 So. 2d at 713.

126. *See* *People v. Tucker*, 431 N.E.2d 617, 618 (N.Y. 1981) (noting that such verdicts are not merely inconsistent with justice, but also repugnant).

127. *See, e.g.,* *Priest v. State*, 879 A.2d 575, 581 (Del. 2005) (recognizing the “fundamental tenet of [Delaware] criminal law” under which “[n]o person may be convicted of an offense unless each element of the offense is proven beyond a reasonable doubt”).

128. *See, e.g.,* *Brown v. State*, 959 So. 2d 218, 220 (Fla. 2007) (recognizing that the only exception to the general rule allowing inconsistent verdicts is those verdicts in which an acquittal on one count negates a necessary element for a conviction on another count); *Tucker*, 431 N.E.2d at 619 (noting that courts should only reverse a jury verdict where an acquittal on one crime is conclusive as to a necessary element of the a second crime for which the guilty verdict was rendered).

129. *Compare supra* Part II.A.1 (describing the majority policy in allowing inconsistent verdicts to stand), *with* *Brown*, 959 So. 2d at 220 (citing *Eaton v. State*, 438 So. 2d 822, 823 (Fla. 1983)) (noting that certain “[i]nconsistent verdicts are allowed because jury verdicts can be the result of lenity and therefore do not always speak to the guilt or innocence of the defendant”), *Arroyo*, 844 A.2d at 172 (noting that, so long as the verdicts are legally consistent, the court will not speculate as to what the jury may have believed), *and* *State v. Eckhart*, 367 A.2d 1073, 1077 (R.I. 1977) (upholding verdicts that are logically inconsistent, but not legally inconsistent because the former does not interfere with the province of the jury).

130. 431 N.E.2d 617 (N.Y. 1981).

131. *Id.* at 618–20.

it.”<sup>132</sup> Next, the court deliberated between two approaches for determining whether a jury verdict is repugnant.<sup>133</sup> The court adopted an approach that avoided speculation into the jury’s considerations and instead only uncovered legal inconsistencies on the face of the verdicts.<sup>134</sup> In an effort to limit appeals, New York courts also require a defendant to assert any claims of inconsistency prior to a jury’s discharge, when the trial court is still able to remedy the defect.<sup>135</sup>

Similarly, Florida allows inconsistent verdicts unless “an acquittal on one count negates a necessary element for conviction on another count.”<sup>136</sup> For example, in *Naumowicz v. State*,<sup>137</sup> a Florida court expressly refused to extend the preceding exception to factually inconsistent verdicts.<sup>138</sup> Here, the court reconciled the defendant’s conviction for the death of his passenger and acquittal for the death of the other driver as not necessarily inconsistent, even though both deaths resulted from the same act of the defendant.<sup>139</sup> The court rationalized the apparent inconsistency as the result of the jury’s right to pardon the defendant.<sup>140</sup>

Alaska is the only jurisdiction that forbids both legally and factually inconsistent verdicts.<sup>141</sup> In *DeSacia v. State*,<sup>142</sup> the court addressed a situation similar to *Naumowicz*. Instead of reconciling the verdicts as the *Naumowicz* court did, however, the Supreme Court of Alaska found that the jury could not convict DeSacia of manslaughter as to

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132. *Id.* at 618–19 (noting that legally inconsistent verdicts arise when a jury finds the essential elements of one crime, but fails to find one or more of the same elements in a second crime).

133. *Id.* at 619. Under the first approach, review of the record to “discover the underlying basis of the jury’s determination,” the court must “intrude into the jury’s deliberative process by speculating on how the jury perceived and weighed the evidence,” which courts are reluctant to do. *Id.* In addition, this approach would undermine the jury’s ability to show lenity to the defendant. *Id.* Under the second approach, review of the jury charge for its findings on essential elements, the court will only reverse a conviction “where acquittal on one crime . . . is conclusive as to a necessary element of the other crime . . . for which the guilty verdict was rendered.” *Id.* (citing Wax, *supra* note 124, at 740–42).

134. *Id.* at 619–20.

135. *People v. Satloff*, 437 N.E.2d 271, 272 (N.Y. 1982) (citing *People v. Stahl*, 425 N.E.2d 876, 877 (N.Y. 1981)) (requiring that a defendant must assert his claims of inconsistency “prior to the discharge of the jury properly to preserve the issue for review”).

136. *Brown v. State*, 959 So. 2d 218, 220 (Fla. 2007).

137. 562 So. 2d 710 (Fla. Dist. Ct. App. 1990).

138. *Id.* at 713 (citing *Gonzalez v. State*, 449 So. 2d 882, 887–88 (Fla. Dist. Ct. App.), *cert. denied*, 458 So. 2d 274 (Fla. 1984)).

139. *Id.*

140. *Id.*

141. *See DeSacia v. State*, 469 P.2d 369, 378 (Alaska 1970) (holding that courts must prevent only “strictly inconsistent” jury’s verdict).

142. 469 P.2d 369.

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the passenger and acquit as to the driver because both deaths stemmed from DeSacia's alleged negligence toward the vehicle in which both victims were occupants.<sup>143</sup> The court held that "the two verdicts are, in fact, irreconcilably in conflict."<sup>144</sup> In reaching its decision, the court reviewed *Dunn* and determined that allowing such verdicts creates the risk that verdicts may result from compromise or confusion.<sup>145</sup> Thus, the court vacated DeSacia's guilty verdict.<sup>146</sup> The court decided that the Double Jeopardy Clause barred it from retrying the defendant for his prior acquittal on the death of the driver,<sup>147</sup> but determined that the defendant could not prevent a new trial on his overturned conviction for manslaughter of the passenger by making a collateral estoppel claim.<sup>148</sup>

### III. THE COURT'S REASONING

In *Price v. State*,<sup>149</sup> the Court of Appeals of Maryland affirmed in part and reversed in part the holding of the Court of Special Appeals of Maryland.<sup>150</sup> The Court of Appeals first affirmed that, under Criminal Law Article, section 5-905, Price's enhanced sentences could not stand.<sup>151</sup> The Court of Appeals continued its precedential trend of customizing the Supreme Court's general rules for inconsistent jury verdicts and reversed part of the decision of the Court of Special Appeals by abolishing inconsistent jury verdicts in criminal cases.<sup>152</sup>

In overturning the lower court's holding and reversing the defendant's conviction, the Court of Appeals reconciled the "confusing and somewhat inconsistent" common law principles governing inconsistent verdicts by explaining that Maryland courts have traditionally permitted inconsistent jury verdicts in part because of the historic fact-finding function of the jury and because most inconsistent jury verdicts resulted from "lenity, mistake, or a compromise to reach unanimity."<sup>153</sup> While a jury's fact-finding role is similar in both criminal

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143. *Id.* at 374.

144. *Id.* at 373.

145. *Id.* at 377.

146. *Id.* at 378.

147. *Id.* at 380.

148. *Id.* at 380–81.

149. 405 Md. 10, 949 A.2d 619 (2008).

150. *Id.* at 34, 949 A.2d at 633–34.

151. *Id.* at 29, 949 A.2d at 630–31. This Note does not address this part of the court's opinion.

152. *See id.* at 18–23, 949 A.2d at 624–627 (noting Maryland's evolving position on inconsistent verdicts).

153. *Id.* at 24, 949 A.2d at 627.

and civil trials,<sup>154</sup> Judge Eldridge recognized that Maryland common law no longer accepts inconsistent verdicts outside the narrow scope of criminal jury trials.<sup>155</sup> Therefore, the court held that because there is no longer a reasonable basis for allowing inconsistent verdicts of “liability” in civil cases, Maryland courts must no longer recognize inconsistent verdicts of “guilty” in criminal cases either.<sup>156</sup>

The Court of Appeals relied on “[t]he numerous exceptions to the principle tolerating inconsistent verdicts,”<sup>157</sup> and on the recent cases *Southern Management v. Taha*<sup>158</sup> and *Galloway v. State*,<sup>159</sup> to support its holding.<sup>160</sup> The court recognized that most jurisdictions still allowed inconsistent jury verdicts in criminal cases, but decided that the distinction between civil and criminal juries was illogical because “[t]here is no reasonable basis for reversing the inconsistent verdict of ‘liability’ but not reversing the inconsistent verdict of ‘guilty.’”<sup>161</sup>

Judge Harrell filed a concurring opinion, joined by Judge Battaglia, to clarify the scope of the court’s holding and the proper procedure a defendant and trial judge must follow to remedy inconsistent verdicts.<sup>162</sup> First, Judge Harrell distinguished a factual inconsistency from a legal one, arguing that the majority’s holding should apply only to the latter.<sup>163</sup> Judge Harrell noted that the verdicts in this case also contained a factual inconsistency because the jury acquitted Price of being a felon in possession of a handgun, but convicted him of possessing a handgun in the course of drug trafficking.<sup>164</sup>

Next, Judge Harrell analogized the rule against legally inconsistent verdicts with the “rule of consistency,” applicable in conspiracy cases.<sup>165</sup> While one person alone cannot commit conspiracy, the State

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154. *Id.* at 24–26, 949 A.2d at 627–29.

155. *Id.* at 23, 949 A.2d at 627.

156. *Id.* at 29, 949 A.2d at 630.

157. *Id.* at 23, 949 A.2d at 627.

158. *Id.* at 26, 949 A.2d at 628–29 (citing *S. Mgmt. Corp. v. Taha*, 378 Md. 461, 488, 836 A.2d 627, 642 (2003)).

159. *Id.* (citing *Galloway v. State*, 371 Md. 379, 400, 809 A.2d 653, 666 (2002)).

160. *Id.* at 26–27, 949 A.2d at 628–29.

161. *Id.* at 29, 949 A.2d at 630.

162. *Id.* at 34–35, 949 A.2d at 634 (Harrell, J., concurring). Judge Wilner also joined Judge Harrell’s discussion of the procedure required for a defendant to preserve for appellate review a challenge to a legally inconsistent verdict. *Id.*

163. *Id.* at 35, 949 A.2d at 634.

164. *Id.* at 37, 949 A.2d at 635. Neither party had contested Price’s felon status. *Id.* Under Judge Harrell’s concurrence, the jury would have the power to reach this illogically inconsistent verdict because, for example, it could have thought that the State had not met its burden of establishing Price’s felon status even though neither party contested it. *Id.*

165. *Id.* at 38, 949 A.2d at 636.

need not try more than one conspirator.<sup>166</sup> Judge Harrell proposed that this rule should extend to allow the jury to convict Price of possessing a handgun with a nexus to drug trafficking even in the absence of an underlying charge of drug trafficking.<sup>167</sup>

Finally, Judge Harrell described how a defendant should be able to preserve an issue for appellate review.<sup>168</sup> Judge Harrell stated that the court should not prevent a defendant from accepting the jury's lenity and more importantly, a defendant should not be able to accept the jury's verdict at trial but then argue differently on appeal.<sup>169</sup> First, a defendant must properly note his or her objections to alleged inconsistent verdicts before the verdicts become final and the court discharges the jury.<sup>170</sup> Second, upon a defendant's timely objection, the trial court should instruct the jury on the need for consistency and the range of permissible verdicts.<sup>171</sup> Under Judge Harrell's approach, the jury must deliberate until it returns a verdict in the defendant's favor, convicts the defendant, or returns deadlocked.<sup>172</sup>

#### IV. ANALYSIS

In *Price v. State*, despite flawed reasoning, the Court of Appeals of Maryland properly advanced Maryland's policy of minimizing inconsistent verdicts by holding that Price's conviction for possession of a firearm during and in relation to a drug trafficking crime could not stand due to his acquittal of all drug trafficking charges.<sup>173</sup> The court's rule, however, will unnecessarily interfere with the jury's role as the final arbiter of the facts because the court did not limit its holding to legally inconsistent verdicts.<sup>174</sup> Moreover, the court failed to give trial judges sufficient procedural direction regarding inconsistent criminal jury verdicts.<sup>175</sup> The Maryland Court of Appeals should have remedied these concerns by adopting a rule similar to that proposed

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166. *Id.* (citing *Gardner v. State*, 286 Md. 520, 524–25, 408 A.2d 1317, 1320 (1979)).

167. *Id.* at 38–39, 949 A.2d at 636. According to Judge Harrell, the new rule for inconsistent verdicts should apply only to single trials and outright acquittals, and should not apply when a jury deadlocks on one count but convicts on a compound offense of which the former count is a necessary element. *Id.* at 39–40, 949 A.2d at 637.

168. *Id.* at 40–42, 949 A.2d at 637–38.

169. *Id.* at 40, 949 A.2d at 637.

170. *Id.* at 40–41, 949 A.2d 637–38 (quoting *State v. Flemons*, 144 S.W.3d 877, 881 (Mo. Ct. App. 2004); citing *State v. Pelz*, 845 S.W.2d 561, 565 (Mo. Ct. App. 1992)).

171. *Id.* at 41–42, 949 A.2d at 638.

172. *Id.* at 42, 949 A.2d at 638.

173. *See infra* Part IV.A.

174. *See infra* Part IV.B.1.

175. *See infra* Part IV.B.2.

by Judge Harrell's concurrence and established in the New York Court of Appeals.<sup>176</sup>

A. *The Price Court Properly Followed Maryland's Trend Toward Minimizing Inconsistent Verdicts, but Mistepped in its Reasoning*

In reaching its conclusion, the *Price* court properly recognized that "Maryland's traditional toleration of inconsistent verdicts has undermined the intellectual justification for continuing to permit such verdicts."<sup>177</sup> In coming to this determination, however, the court too quickly dismissed the traditional reasons for tolerating inconsistent verdicts<sup>178</sup> and relied too heavily on the recent decision of *Southern Management Corporation v. Taha*, which narrowly rejected irreconcilably inconsistent verdicts in a civil case.<sup>179</sup> The court depended excessively on the similarities between civil and criminal trials by arguing that, because Maryland no longer allows inconsistent verdicts in the context of civil trials, it should also no longer allow them in criminal trials.<sup>180</sup> Still, the court properly held that in the present situation—when a jury convicts the defendant for a compound felony, but acquits on the predicate offense—the defendant's conviction cannot stand.<sup>181</sup>

The *Price* majority correctly discussed each of the exceptions to Maryland's long history of minimizing the "deleterious result" of inconsistent verdicts.<sup>182</sup> As the court noted, these exceptions have reduced the general rule to "one remaining situation where inconsistent verdicts are tolerated, namely" inconsistent criminal jury verdicts.<sup>183</sup> To adopt a well-informed policy for the future, however, the court

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176. See *infra* notes 257–267 and accompanying text.

177. *Price*, 405 Md. at 34–35, 949 A.2d at 634 (Harrell, J., concurring); see also *id.* at 23–24, 949 A.2d at 627 (majority opinion) (noting that the numerous exceptions to the principle tolerating inconsistent verdicts fully warrant a change in the common law policy towards inconsistent verdicts).

178. See *id.* at 26, 949 A.2d at 629 (majority opinion) ("If the traditional reasons for tolerating inconsistent jury verdicts are not sufficient in civil cases, those reasons are clearly not sufficient in criminal cases.").

179. See *S. Mgmt. Corp. v. Taha*, 378 Md. 461, 467, 836 A.2d 627, 630 (2003) (holding that "irreconcilably inconsistent jury verdicts cannot stand under the theory of respondeat superior liability").

180. See *infra* notes 185–199 and accompanying text.

181. *Price*, 405 Md. at 34, 949 A.2d at 633.

182. See *id.* at 19–22, 949 A.2d at 624–26 (explaining the exceptions that Maryland courts have recognized over the years); *Mack v. State*, 300 Md. 583, 595, 479 A.2d 1344, 1350 (1983) ("In order to avoid this deleterious result, the possibility of inconsistent verdicts must be minimized."); see also *supra* Part II.A.2.

183. *Price*, 405 Md. at 23, 949 A.2d at 627.

should have analyzed why Maryland has upheld inconsistent verdicts for the past fifty-five years and whether these reasons still applied.<sup>184</sup>

The Court of Appeals of Maryland failed to conduct a well-informed analysis because the majority improperly analogized the *Taha* court's abolition of inconsistent verdicts by a civil jury to those made by a criminal jury in dismissing the traditional reasons for upholding inconsistent verdicts.<sup>185</sup> In so doing, the court failed to recognize that Maryland originally adopted the Supreme Court's rule on allowing inconsistent verdicts to stand in the context of a criminal case, not a civil case.<sup>186</sup> In fact, the idea of applying the *Dunn* rule to civil jury trials is relatively new<sup>187</sup> and had not been adopted by the Court of Appeals until *Taha*.<sup>188</sup> Therefore, in illogically analogizing inconsistent criminal verdicts to inconsistent civil verdicts—a situation to which the Court of Appeals never originally intended the *Dunn* rule apply—the *Price* court missed the true issue: whether the traditional reasons for allowing inconsistent criminal verdicts still apply.<sup>189</sup>

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184. Maryland adopted the *Dunn* rule in 1953. See *Leet v. State*, 203 Md. 285, 293–94, 100 A.2d 789, 793–94 (1953). The two traditional reasons for upholding inconsistent verdicts include the jury's historic or singular role in our justice system, and the fact that inconsistencies “may be the product of lenity, mistake, or a compromise to reach unanimity.” *Price*, 405 Md. at 19, 949 A.2d at 624 (quoting *Galloway v. State*, 371 Md. 379, 408, 809 A.2d 653, 671 (2002)).

185. *Price*, 405 Md. at 26, 949 A.2d at 628–29 (citing *S. Mgmt. Corp. v. Taha*, 378 Md. 461, 487, 836 A.2d 627, 642 (2003)). The majority appears to have overlooked that the *Taha* court recognized the special importance of the *Dunn* rule as applied to criminal cases, and that the treatment of irreconcilably inconsistent verdicts in the civil context may differ from the treatment in criminal trials. *Taha*, 378 Md. at 486–87, 836 A.2d at 641–42.

186. See *Leet*, 203 Md. at 288, 294, 100 A.2d at 790, 794 (adopting the *Dunn* rule while convicting the defendant of willfully failing to file a state income tax return). While Maryland courts are not required to follow Supreme Court policy, interestingly, the Supreme Court has never applied their rule for inconsistent verdicts to a civil jury trial. See, e.g., *Bradshaw v. Stumpf*, 545 U.S. 175, 189–90 (2005) (Souter, J., concurring) (discussing the *Powell* and *Dunn* rules in the context of a capital murder case); *Harris v. Rivera*, 454 U.S. 339, 341–43 & n.7 (1981) (discussing the *Dunn* rule in the context of a state prisoner's habeas corpus challenge).

187. The Court of Special Appeals originally extended the *Dunn* rule to civil jury verdicts in *Eagle-Picher Indus., Inc. v. Balbos*, 84 Md. App. 10, 35–36, 578 A.2d 228, 240, *rev'd in part*, 326 Md. 179, 604 A.2d 445 (1992). Even though the Court of Appeals reversed the lower court's discussion of inconsistent civil verdicts, the Court of Special Appeals later reiterated the principle to allow inconsistent civil verdicts to stand. See *Davis v. Goodman*, 117 Md. App. 378, 423, 700 A.2d 798, 820 (1997) (citing *Balbos*, 84 Md. App. at 35–36, 578 A.2d at 240) (noting that inconsistencies in civil verdicts often are the result of compromise to reach unanimity or mistake).

188. See *Taha*, 378 Md. at 486–88, 836 A.2d at 641–43. The *Taha* court both extended the rule to civil jury trials and held that the rule no longer applies. *Id.*

189. See *Price*, 405 Md. at 18–19, 949 A.2d at 624 (noting the traditional reasons for allowing inconsistent verdicts in criminal jury cases to stand); *Taha*, 378 Md. at 488, 386 A.2d at 642 (discussing inconsistent civil and criminal verdicts and concluding that “there remains a distinction between inconsistent verdicts in criminal cases and *irreconcilably incon-*

Moreover, in abolishing civil inconsistent verdicts, even the *Taha* court did not analyze whether the historic role of the jury, or more importantly, the jury's right to exercise lenity, should still allow such verdicts to stand.<sup>190</sup> Instead, the *Taha* court solely analogized its case to a case involving a special verdict form.<sup>191</sup> In both *Taha* and *Price*, however, the jury issued a general verdict.<sup>192</sup> Moreover, unlike the jury in a civil trial, the jury in a criminal trial generally does not have the option of issuing a special verdict.<sup>193</sup> The *Taha* court also made no judgment as to the value of lenity in a civil trial, but held that civil cases involved the same potential for jury compromises and mistakes as criminal cases.<sup>194</sup> Courts on both sides of the inconsistent verdicts discussion have cited lenity as an important power of the jury.<sup>195</sup> As Judge Harrell noted in his concurring opinion in *Price*, "[t]he defendant should not be foreclosed from accepting the jury's lenity."<sup>196</sup> When the court interferes with the jury's power to exercise lenity, it also interferes with the jury's role as the fair arbiter to assess moral blameworthiness.<sup>197</sup> Distinct from a guilty verdict based on lenity, a guilty verdict founded on a mistake or compromise violates a defendant's right to a verdict by the reasonable doubt standard.<sup>198</sup> There-

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sistent jury verdicts in civil matters"). Had the court intended the rule to apply to civil cases, it would not have taken until 1990 to first do so. *Cf. Balbos*, 84 Md. App. at 36, 478 A.2d at 240 ("[W]e realize that this precedent has previously been applied by Maryland courts only in criminal cases.").

190. *Taha*, 378 Md. at 487–88, 836 A.2d at 642–43.

191. *Id.* at 488, 836 A.2d at 642–43 (quoting *S & R, Inc. v. Nails*, 85 Md. App. 570, 590, 584 A.2d 722, 731 (1991)).

192. *See Price*, 405 Md. at 15, 949 A.2d at 622 (noting the jury's guilty and not guilty verdicts at the trial level); *Taha*, 378 Md. at 503–04, 836 A.2d at 651–52 (Raker, J., dissenting) (noting that the rule on which the *Taha* majority relied cannot apply where the jury uses a general verdict rather than a special verdict).

193. *See* Kate H. Nepveu, *Beyond "Guilty" or "Not Guilty": Giving Special Verdicts in Criminal Jury Trials*, 21 *YALE L. & POL'Y REV.* 263, 263 (2003) (recognizing that "[s]pecial verdicts are generally disfavored in criminal trials"); *see also* FED. R. Civ. P. 49(a) (discussing the use of a special verdict in the context of a civil jury trial); *Price*, 405 Md. at 36 n.3, 949 A.2d at 635 n.3 (acknowledging that, while a special verdict may illuminate the factual basis for a jury's verdict in a civil trial, such an inquiry is inappropriate in criminal cases).

194. *Taha*, 378 Md. at 487, 836 A.2d at 642 (majority opinion).

195. *Compare* *United States v. Powell*, 469 U.S. 57, 68–69 (1984) (recognizing the importance of the jury's exercise of lenity), *with* *People v. Tucker*, 431 N.E.2d 617, 619 (N.Y. 1981) (noting that the court should not undermine the jury's accepted power of lenity).

196. *Price*, 405 Md. at 40, 949 A.2d at 637 (Harrell, J., concurring).

197. *See infra* notes 225–230 and accompanying text.

198. *Compare* *Brown v. State*, 959 So. 2d 218, 220 (Fla. 2007) ("As a general rule . . . [i]nconsistent verdicts are allowed because jury verdicts can be the result of lenity and therefore do not speak to the guilt or innocence of the defendant."), *and Powell*, 469 U.S. at 66–67 (noting that jury lenity, unlike jury compromise or mistake, works in favor of the defendant), *with Muller*, *supra* note 2, at 796 (commenting that, in practice, when a jury returns a compromised verdict in a criminal trial, the jury has failed to convict the defen-

fore, lenity—unlike compromise and mistake—is a jury power worth protecting.<sup>199</sup>

Instead of improperly relying on *Taha*,<sup>200</sup> the court should have instead independently analyzed whether the traditional reasons for allowing inconsistent verdicts to stand remained valid, and if so, whether the court could uphold these traditional reasons by abolishing inconsistent criminal verdicts.<sup>201</sup> If the court had conducted such an analysis, it would have likely reached a conclusion similar to Judge Harrell's: abolishing legally inconsistent verdicts while still recognizing the importance of the traditional reasons.<sup>202</sup> Therefore, while the *Price* court correctly reversed the defendant's inconsistent conviction, its analysis led the court to adopt a policy that has the potential to cause problems for future courts dealing with inconsistent verdicts.<sup>203</sup>

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dant at the required threshold of guilty beyond a reasonable doubt). While a compromised verdict may decrease hung juries, the verdict violates the defendant's constitutional right to a unanimous jury decision beyond a reasonable doubt. See MD. CONST. art. 21 (stating "[t]hat in all criminal prosecutions, every man hath a right . . . to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty"); *In re Winship*, 397 U.S. 358, 364 (1970) (holding that the Due Process Clause of the Fifth and Fourteenth Amendments requires a finding of guilt beyond a reasonable doubt).

199. See *Powell*, 469 U.S. at 66 (recognizing that the jury's lenity power indicated that the inconsistent verdict may in fact favor the criminal defendant over the government); see also Muller, *supra* note 2, at 795 (noting that lenity is the primary reason for accepting inconsistent verdicts, but arguing instead that *Powell* protects mistake and compromise, both of which are not worth protecting).

200. See *supra* Part II.A.2; *supra* notes 185–198 and accompanying text.

201. See *infra* Part IV.B.1.

202. See *Price v. State*, 405 Md. 10, 36 n.3, 949 A.2d 619, 635 n.3 (2008) (Harrell, J., concurring) (noting that Maryland should have adopted the "majority of the minority" position because appellate courts are ill-equipped to interfere with the traditional role of the jury as the fact-finder). In conducting this analysis, the court would have found significant precedential support for the traditional reasons for allowing inconsistent verdicts to stand. First, a criminal jury has a singular role as the arbiter of the facts. See, e.g., *Shell v. State*, 307 Md. 46, 54, 512 A.2d 358, 362 (1986) (citing *Powell*, 469 U.S. at 65–66) (cautioning that the court must take care to not review inconsistencies for fear of undermining the historic role of the jury); *Ford v. State*, 274 Md. 546, 553, 337 A.2d 81, 85–86 (1975) (rejecting reversal of inconsistent criminal verdicts because the court must protect the singular role of a criminal jury). And, second, the court must protect the jury's power to assess the defendant's moral blameworthiness. See, e.g., *Carter v. State*, 374 Md. 693, 711, 824 A.2d 123, 134 (2003) (recognizing the jury's role as representatives of the community's conscience); *Galloway v. State*, 371 Md. 379, 408–09, 809 A.2d 653, 671 (2002) (noting ample support for the jury's power to insure lenity as the voice of the country). Such an analysis would have allowed for a bright-line rule, which would better guide the lower courts on how to define an inconsistent verdict. See *infra* notes 220–224 and accompanying text.

203. See *People v. Tucker*, 431 N.E.2d 617, 619 (N.Y. 1981) (implying that a court must exercise care when adopting a new policy for handling inconsistent verdicts because the court could easily intrude on the jury's deliberative process); *infra* Part IV.B; see also *Price*,

B. *The Majority's Holding May Lead to an Influx of Inconsistency Claims*

Although the *Price* court correctly reversed the jury's inconsistent verdicts, the Court of Appeals of Maryland failed to sufficiently limit the scope of its holding by restricting its review to only legally inconsistent verdicts.<sup>204</sup> The majority also failed to instruct future trial courts on how to handle potentially inconsistent verdicts.<sup>205</sup> These two errors led to an inappropriately broad holding that may initiate an influx of appeals.

1. *The Majority Failed to Limit the Breadth of its Holding to Legally Inconsistent Verdicts*

In *Price v. State*, even though the Court of Appeals of Maryland properly reversed the defendant's conviction, the court took a seldom-traveled path by forbidding all inconsistent verdicts.<sup>206</sup> *Price* has the potential to interfere with the jury's decision-making power, something the court must not do lightly.<sup>207</sup> Instead, the *Price* majority should have adopted Judge Harrell's concurrence which would have limited the court's review to legally inconsistent verdicts.<sup>208</sup>

A court faced with the inquiry of how to respond to inconsistent verdicts can forbid both factually and legally inconsistent verdicts,<sup>209</sup> or can prohibit only factual inconsistencies.<sup>210</sup> The majority improperly chose the first approach, which requires an appellate court to analyze a jury's fact-finding by speculating how the jury perceived and

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405 Md. at 36 n.3, 949 A.2d at 635 n.3 (noting that courts are ill-equipped to interfere with the singular role of the jury as the fact-finder).

204. See *infra* Part IV.B.1.

205. See *infra* Part IV.B.2.

206. *Price*, 405 Md. at 29, 949 A.2d 630 (majority opinion). Only Alaska has abolished all types of inconsistent verdicts. *DeSacia v. State*, 469 P.2d 369, 373-74 (Alaska 1970).

207. See *infra* notes 225-230 and accompanying text. In conducting any review of a jury verdict, the court must tread lightly to avoid interfere with the province of the jury because the "nullification of [a] jury verdict is the denial of a person's constitutional and common law right to be tried by a jury of his or her peers." *Galloway*, 371 Md. at 400-01, 809 A.2d at 666.

208. *Price*, 405 Md. at 35, 949 A.2d at 634 (Harrell, J., concurring).

209. See *supra* note 124 and accompanying text. This approach requires an appellate court to review the record in its entirety to ascertain the underlying basis of the jury's determination. *People v. Tucker*, 431 N.E.2d 617, 619 (N.Y. 1981).

210. See *supra* note 125 and accompanying text. For this approach, the trial or appellate court would reverse a conviction only after looking at the face of the jury's conviction and determining that the acquittal on one crime is conclusive as to a necessary element of the conviction on the other crime. *Tucker*, 431 N.E.2d at 619-20.

weighed the evidence.<sup>211</sup> An appellate court, however, is ill-equipped to analyze the fact-finding of a criminal jury in particular<sup>212</sup> because judges are prohibited from inquiring into the jury's mental process or into their statements made during deliberation.<sup>213</sup> Allowing such speculation would likely cause a judge to substitute his or her own analysis for the jury's.<sup>214</sup> In addition, the court can easily perceive the jury's valid exercise of lenity toward the defendant as an irrational act.<sup>215</sup> As Judge Harrell noted in his concurrence, allowing review for factual inconsistencies might "confuse a [jury's] curious verdict with an inconsistent verdict."<sup>216</sup>

Moreover, prohibiting factually inconsistent verdicts would create a rule more inconsistent than the inconsistent verdict itself. Just as a judge and a jury may perceive evidence differently, so can two similarly situated judges.<sup>217</sup> Because different people place different weight on the evidence based on their past education and exper-

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211. See *Tucker*, 431 N.E.2d at 619 (noting that this approach requires the appellate court to ascertain the underlying basis of the jury's determination).

212. *Price*, 405 Md. at 36 n.3, 949 A.2d at 635 n.3. An appellate court may be better able to make a factual inquiry into a jury's verdict in the civil context if the court uses a special verdict form. *Id.* In the criminal context, however, the court does not have the luxury of a special verdict form. *Id.*

213. See *Stokes v. State*, 379 Md. 618, 637–38, 843 A.2d 64, 75 (2004) ("Such evidence is forbidden by public policy since it would disclose the secrets of the jury room and afford an opportunity for fraud or perjury."). Although a judge has the power to determine whether the record contains sufficient evidence to reasonably warrant a finding of guilty beyond a reasonable doubt, *Jackson v. Virginia*, 443 U.S. 307, 318 (1979), this "sufficiency review is simply too toothless and too deferential to the jury and its irrational verdict." Muller, *supra* note 2, at 824.

214. Jurors weigh evidence based on their past education and personal experiences while judges are trained to view evidence through the prism of laws. Compare Sharon Blanchard Hawk, *State v. Mann: Extraneous Prejudicial Information in the Jury Room: Beautiful Minds Allowed*, 34 N.M. L. REV. 149, 161–62 (2004) (noting that "jurors may properly rely on their background, including professional and educational experience"), with Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1793–94 (2004) (noting that judges generally ground their decisions in existing legal materials). Unlike a judge, a jury is better able to draw on their everyday practical experiences as an ordinary member of the community. Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 484–85 (1997). As a result, a jury may perceive and weigh a witness's credibility differently than an educated judge. *Id.*

215. See *United States v. Powell*, 469 U.S. 57, 66 (1984) (noting "as imprudent and unworkable," a rule allowing judges to inquire into the underlying basis of a jury's verdict).

216. *Price*, 405 Md. at 36 n.3, 949 A.2d at 635 n.3 (quoting *Hudson v. State*, 152 Md. App. 488, 515, 832 A.2d 834, 850 (2003)).

217. Compare *DeSacia v. State*, 469 P.2d 369, 373–74 (Alaska 1970) (holding that a jury's verdicts were inconsistent because the verdicts differentiated between the defendant's conduct towards two different victims), with *Naumowicz v. State*, 562 So. 2d 710, 713 (Fla. 1990) (holding that the jury's verdicts were not necessarily inconsistent when the jury differentiated between the defendant's conduct as to two different victims).

iences, one judge may rationalize a verdict as inconsistent while another may not.<sup>218</sup> As a result, the *Price* holding exposes appellate courts to a potential flood of inconsistency claims with little guidance on how they should rule.<sup>219</sup>

The court should have instead adopted the approach of Judge Harrell and the New York Court of Appeals that prohibits only legally inconsistent verdicts.<sup>220</sup> Under this approach, a trial or appellate court would reverse a conviction only after looking at the face of a jury's conviction and determining that the acquittal on one crime is conclusive as to a necessary element of the conviction on the other crime.<sup>221</sup> This bright-line rule would provide predictability for the parties and guidance for the lower courts.<sup>222</sup> The rule would not require a judge to infer a jury's motives, intent, or understanding.<sup>223</sup> Instead, under this rule, although the jury is free to consider each element of a crime separately, it must decide identical elements consistently.<sup>224</sup>

The Court of Appeals also erred by not considering the importance of the jury's role as the voice of the country and arbiter of the facts.<sup>225</sup> The primary justification behind the right to a jury trial is the jury's role as a "fair arbiter of a criminal defendant's moral blameworthiness."<sup>226</sup> This justification is exemplified in the jury's valid power of lenity toward the defendant.<sup>227</sup> Jury lenity can occur in two in-

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218. See *supra* note 217 and accompanying text.

219. See *Price*, 405 Md. at 35, 949 A.2d at 634 (noting that a proper procedure is necessary to give guidance and spare the appellate court unnecessary appeals).

220. See *id.* at 35–36, 949 A.2d at 634 (stating that "a legally inconsistent verdict occurs where a jury acts contrary to a trial judge's proper instructions regarding the law"); *People v. Tucker*, 431 N.E.2d 617, 619 (1981) (noting that the court should review the jury charge to ascertain whether an acquittal on one crime as charged is conclusive as to a necessary element of the other crime, for which the guilty verdict was rendered).

221. *Tucker*, 431 N.E.2d at 619–20. For example, if crime 1 included element *A*, and crime 2 included elements *A* and *B*, a guilty verdict on crime 2 would be inconsistent with an acquittal on crime 1.

222. See *Price*, 405 Md. at 34–35, 949 A.2d at 634 (noting that narrowing scope of the majority's holding and delineating the proper procedure for future trial courts will give guidance and spare appellate courts from unnecessary appeals).

223. See, e.g., Ashlee Smith, *Vice-A-Verdict: Legally Inconsistent Jury Verdicts Should Not Stand in Maryland*, 35 U. BALT. L. REV. 395, 414 (2006) (arguing that Maryland should still allow factually inconsistent verdicts).

224. See *Tucker*, 431 N.E.2d at 619–20 (explaining the application of this rule).

225. See *State v. Williams*, 397 Md. 172, 189–90, 916 A.2d 294, 305 (2007) (citing *Galloway v. State*, 371 Md. 379, 408–09, 809 A.2d 653, 671 (2002)) (recognizing the "unique role of the jury" as "voice of the country" and arbiter of the facts).

226. Michael T. Cahill, *Punishment Decisions at Conviction: Recognizing the Jury as Fault-Finder*, 2005 U. CHI. LEGAL F. 91, 95–99.

227. See, e.g., *United States v. Powell*, 469 U.S. 57, 65–66 (1984) (noting the importance of the jury's right to exercise lenity).

stances: first, the jury may exercise lenity where it believes that a criminal law is unjust because it punishes conduct that is not morally blameworthy; or second, the jury may exercise lenity where it believes it is unfair to apply a particular criminal law to a defendant's conduct.<sup>228</sup> Unlike a jury, however, a judge is not in a position to measure the community conscience.<sup>229</sup> As a result, by prohibiting factual inconsistencies, the jury loses its safeguard against oppressive judges who would overturn an inconsistent verdict even if it results from the jury's mercy.<sup>230</sup>

The *Price* majority should have adopted the "majority of the minority"<sup>231</sup> position by narrowly defining an inconsistent verdict as one that contains a legal inconsistency.<sup>232</sup> Instead, the Maryland Court of Appeals overextended precedent by establishing a rule that may interfere with the province of the jury as the voice of the country and the arbiter of the facts.

2. *The Price Majority Failed to Adopt a Constitutionally Acceptable Procedure to Guide Trial Courts on How to Handle Legally Inconsistent Verdicts*

Unlike the majority, which neglected to provide any procedure for future courts on how to handle inconsistent verdicts,<sup>233</sup> Judge Harrell's concurring opinion "highlight[ed] the procedure required in order for a defendant to preserve for appellate review a challenge to a legally inconsistent verdict."<sup>234</sup> The majority should have similarly provided guidance for the lower courts to avoid an overflow of appeals due to apparent inconsistencies.

In adopting a procedure for future decisions, the majority should have evaluated different approaches to determine the one best-suited for Maryland common law. Maryland has a unique common law and,

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228. See Smith, *supra* note 223, at 404 (citing Muller, *supra* note 2, at 784) (noting the two ways a jury can exercise lenity).

229. See *Shell v. State*, 307 Md. 46, 55, 512 A.2d 358, 362 (1986) (noting that unlike a jury, the "judge is hardly the 'voice of the country,' even when he sits in the jury's place").

230. George C. Harris, *The Communitarian Function of the Criminal Jury Trial and the Rights of the Accused*, 74 NEB. L. REV. 804, 807 (1995) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)).

231. *Price v. State*, 405 Md. 10, 36 n.3, 949 A.2d 619, 635 n.3 (2008) (Harrell, J., concurring).

232. *Id.*

233. The court simply held that "inconsistent verdicts shall no longer be allowed," and then ended its opinion. *Id.* at 29, 949 A.2d at 630 (majority opinion).

234. *Id.* at 40-42, 949 A.2d at 637-39 (Harrell, J., concurring).

as a result, a thorough analysis of the different options is necessary.<sup>235</sup> The different options include the New York Court of Appeals' concrete procedure for inconsistent verdicts<sup>236</sup> and Professor Eric Muller's three different approaches for handling inconsistent verdicts.<sup>237</sup> When analyzed under the Maryland Court of Appeals' precedent and procedural rules, each approach has its own virtues and shortcomings.

Professor Muller's first proposed approach is the "harmless error review," whereby an appellate court must reverse an inconsistent conviction unless the government can prove the error is harmless.<sup>238</sup> The harmless error review standard has a higher threshold burden than a sufficiency of the evidence review.<sup>239</sup> Under this approach, an appellate court does not consider evidence in the light most favorable to the state, but instead looks for overwhelming evidence to support the defendant's conviction.<sup>240</sup> The harmless error review standard is insufficient under Maryland law because the rule does not limit inconsistent verdicts.<sup>241</sup> Rather, it requires a reviewing court to speculate on how the jury perceived and weighed the evidence, which intrudes on the jury's deliberative process as the arbiter of the facts, an approach that courts have uniformly rejected.<sup>242</sup>

Professor Muller's second method requires a trial judge to reject any inconsistent verdict and send the jury back for further deliberation before the court finalizes the verdict.<sup>243</sup> Professor Muller dislikes this option because it would either prevent the jury from exercising lenity or generate discussion between the jury and the trial judge

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235. In particular, the court must take care to avoid any double jeopardy consequences. See *supra* notes 96–100 and accompanying text. In Maryland, until the announcement that the clerk has recorded the verdict, the jury has a right to amend its verdict without any double jeopardy consequences. *Price*, 405 Md. at 42 & n.11, 949 A.2d at 638 & n.11 (citing *Heinze v. State*, 184 Md. 613, 617, 42 A.2d 128, 130 (1945)).

236. See *People v. Satloff*, 437 N.E.2d 271, 272 (N.Y. 1982) (noting the court's procedure for handling inconsistent verdicts).

237. *Id.* at 821–34 (explaining three proposed methods, each based in existing court rules, to deal with inconsistent verdicts).

238. Muller, *supra* note 2, at 822–26.

239. *Id.* at 824.

240. *Id.*

241. See *supra* Part II.A.2 (explaining Maryland's policy of minimizing the occurrence of inconsistent verdicts).

242. *Galloway v. State*, 371 Md. 379, 406, 809 A.2d 653, 670 (2002); *People v. Tucker*, 431 N.E.2d 617, 619 (N.Y. 1981); see also *United States v. Powell*, 469 U.S. 57, 66 (1984) (noting that courts generally will avoid inquiring into the jury deliberations); *supra* notes 194–199 and accompanying text.

243. See Muller, *supra* note 2, at 826–28 (explaining the "refusal to accept inconsistent verdicts test").

about the actual basis of the jury's verdict.<sup>244</sup> Maryland law seems to support this method if limited to a review for legal inconsistency.<sup>245</sup> For example, Maryland rules permit a judge to instruct a jury to retire for further deliberations.<sup>246</sup> In addition, Maryland courts allow trial judges to refuse verdicts which are defective in form or substance.<sup>247</sup> The court in *Heinze v. State* specifically declared it "essential for the prompt and efficient administration of justice . . . to ascertain the real intention of the jury in their finding."<sup>248</sup> A court accomplishes this goal by explaining to the jury the defect in its verdict and providing the jury an opportunity to correct this defect. However, when instructing the jury, the trial judge must take care not to improperly influence the jury.<sup>249</sup> As long as the trial judge refuses to accept inconsistent verdicts before they are final, the jury's further deliberations do not violate the Double Jeopardy Clause.<sup>250</sup> This method, however, requires a trial judge to reject inconsistent verdicts. Consequently, the approach would prevent a defendant from accepting a jury's lenity, instead giving the court too much discretion to force a review. A defendant must remain free to accept a verdict in his favor without any potential influence by the trial judge.<sup>251</sup>

Professor Muller's third method of handling inconsistent verdicts requires a defendant either to accept both the guilty and not guilty verdicts or reject them by moving for a mistrial before the court records the verdicts and makes them final.<sup>252</sup> If a defendant accepts the verdicts, the defendant would be foreclosed from objecting to the

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244. *Id.* at 827.

245. See Smith, *supra* note 223, at 418 (noting that when a jury returns an inconsistent verdict, Maryland law allows the court to direct the jury to retire for further deliberations); see also Tucker, 431 N.E.2d at 619-620 (noting that a look at the jury instructions does not require any speculation into the deliberative process of the jury and allows the jury to leniency).

246. Md. R. § 4-327(e) (permitting the judge to send the jury back to the deliberation room, or to declare a hung jury).

247. See Mack v. State, 300 Md. 583, 599-600, 479 A.2d 1344, 1352 (1984) (recognizing that the trial court has the power to set aside a verdict when the jury misapplies the law).

248. *Heinze v. State*, 184 Md. 613, 617, 42 A.2d 128, 130 (1945).

249. *Id.* at 618, 42 A.2d at 131.

250. Muller, *supra* note 2, at 829.

251. Price v. State, 405 Md. 10, 40 n.9, 949 A.2d 619, 637 n.9 (2008) (Harrell, J., concurring). Failure to do so is the "denial of a person's constitutional and common law right to be tried by a jury of his or her peers." Galloway v. State, 371 Md. 379, 400-01, 809 A.2d 653, 666 (2002) (reasoning in the context of inconsistent verdicts between a trial judge and a jury).

252. Muller, *supra* note 2, at 832. Muller argues that this approach is fair to defendants because the defendant is in a far better position than appellate courts to know whether the jury punished the defendant with a groundless conviction. *Id.*

inconsistent verdicts on appeal.<sup>253</sup> Alternatively, if a defendant moves for a mistrial, then the defendant would give up any chance to accept the inconsistent verdicts and risk losing all verdicts not in his or her favor.<sup>254</sup> This method prevents the jury from resolving inconsistent verdicts on its own after further deliberation.<sup>255</sup> In addition, this approach places too much strain on the prosecutor and the court system by requiring a new trial at the defendant's request.<sup>256</sup>

Instead of any of these approaches, none of which considered the particular constraints of Maryland law, the Maryland Court of Appeals should have adopted a procedure similar to that proposed in Judge Harrell's concurring opinion and to the procedure used by the New York Court of Appeals.<sup>257</sup> This procedure is a combination of Professor Muller's second and third methods. Under this approach, after the court announces the jury's verdict, "a defendant must note his or her objection to allegedly [legally] inconsistent verdicts prior to the verdicts becoming final and the discharge of the jury."<sup>258</sup> Upon a timely objection, the trial court should reinstruct the jury on the need for consistency and the range of permissible verdicts.<sup>259</sup> The judge should then permit the jurors to resume deliberations outside the presence of the court.<sup>260</sup> At this point, the jury may resolve the legal inconsistency in one of three ways: (1) return the verdict in the defendant's favor; (2) convict the defendant on all counts; or (3) deadlock and have the judge declare a mistrial.<sup>261</sup>

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253. *Id.*

254. *Id.*

255. *See* *Heinze v. State*, 184 Md. 613, 617, 42 A.2d 128, 130 (1945) (noting that before the recording of the verdict, the jury has the right to amend or change any verdict). Any amendment of a verdict prior to its recording would not cause any double jeopardy consequences. *See supra* note 250 and accompanying text; *infra* note 266 and accompanying text.

256. Muller, *supra* note 2, at 832 (noting that this approach requires the prosecutor to bring the defendant to trial again at the government's expense).

257. *See infra* notes 263–266 and accompanying text. *Compare* *Price v. State*, 405 Md. 10, 41–42, 949 A.2d 619, 638–39 (2008) (Harrell, J., concurring) (explaining his procedure for inconsistent verdicts), *and* *People v. Satloff*, 437 N.E.2d 271, 272 (N.Y. 1982) (noting that the defendant must object to an inconsistent verdict prior to the discharge of the jury), *with* Muller, *supra* note 2, at 831–32 (explaining the "mistrial at the defendant's option" approach). *See also* *State v. Flemons*, 144 S.W.3d 877, 881 (Mo. Ct. App. 2004) (noting that the defendant must present to the trial court his claim that the verdict is inconsistent before the jury is discharged).

258. *Price*, 405 Md. at 40, 949 A.2d at 637.

259. *Id.* at 41–42, 949 A.2d at 638.

260. *Id.* at 42, 949 A.2d at 638.

261. *Id.*

Although a defendant has little time to decide whether to accept or reject the legally inconsistent verdict,<sup>262</sup> this approach provides substantial benefits for the court system. First, this method spares appellate courts from an influx of unnecessary appeals.<sup>263</sup> Second, by reinstructing the jurors, the court assures that the jury understood the jury instructions and did not render a mistaken verdict,<sup>264</sup> and that the verdict was not due to the jury's failure to convict the defendant beyond a reasonable doubt.<sup>265</sup> Finally, the jury's resumed deliberation does not violate the Fifth Amendment's Double Jeopardy Clause because the jury will have not yet returned a final verdict.<sup>266</sup> For these reasons, the majority should have adopted Judge Harrell and the New York Court of Appeals' procedure describing the method in which a defendant can preserve for appellate review a challenge to a legally inconsistent verdict.<sup>267</sup>

## V. CONCLUSION

In *Price v. State*, despite inconsistent reasoning, the Court of Appeals of Maryland properly followed Maryland's long-standing policy of minimizing inconsistent verdicts in holding that Price's conviction for possession of a firearm during and in relation to a drug trafficking crime could not stand due to his acquittal of all drug trafficking charges.<sup>268</sup> In so holding, however, the court adopted a rule that will unnecessarily interfere with the jury's role as the final arbiter of the facts because the court failed to limit its holding to legally inconsistent

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262. *Id.* at 41, 949 A.2d at 637–38 (recognizing the rule from the Court of Appeals of New York); *Satloff*, 437 N.E.2d at 272 (noting that the defendant must note his objection prior to the discharge of the jury or the claim is waived).

263. *Price*, 405 Md. at 35, 949 A.2d at 634; *see also Satloff*, 437 N.E.2d at 272 (citing *People v. Stahl*, 425 N.E.2d 876, 877 (N.Y. 1981)) (noting that New York requires the defendant to raise the inconsistency issue at the trial level in order to minimize the burden on the appeals system).

264. *See Price*, 405 Md. at 41–42, 949 A.2d at 638 (noting that the trial court should instruct the jury on the need for consistency and the range of permissible verdicts). By reinstructing the jury, the judge can call attention to any defect without improperly influencing the jury. *Heinze v. State*, 184 Md. 613, 617, 42 A.2d 128, 130 (1945).

265. *See DeSacia v. State*, 469 P.2d 369, 377–78 (Alaska 1970) (noting that the possibility of a compromise verdict, one that does not reach the standard of a reasonable doubt, has led the court to no longer allow inconsistent verdicts); *Wax*, *supra* note 124, at 738 (noting that rejecting inconsistent verdicts helps ensure that the defendant's guilt is proven beyond a reasonable doubt).

266. *See Price*, 405 Md. at 42 n.11, 949 A.2d at 638 n.11 (recognizing that the double jeopardy prohibition “prevents further deliberation on an acquittal only after that verdict is final”).

267. *Id.* at 40–42, 949 A.2d at 637.

268. *See supra* Part IV.A.

verdicts.<sup>269</sup> Moreover, the court neglected to give future trial courts sufficient procedural direction regarding inconsistent criminal jury verdicts.<sup>270</sup> Instead, the Maryland Court of Appeals should have adopted a rule similar to those adhered to by Judge Harrell's concurrence and the New York Court of Appeals.<sup>271</sup> By limiting its holding to a review of legally inconsistent verdicts—where an acquittal on one count negates a necessary element for a conviction on another count—the court could have adopted a procedure that adheres to the constraints of Maryland law to provide guidance for future trial courts.

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269. *See supra* Part IV.B.1.

270. *See supra* Part IV.B.2.

271. *See supra* notes 257–267 and accompanying text.