JUSTICE IS NOT ALL OR NOTHING: PRESERVING THE INTEGRITY OF CRIMINAL TRIALS THROUGH THE STATUTORY ABOLITION OF THE ALL-OR-NOTHING DOCTRINE

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> The States, of course, do have a compelling interest in the integrity of their criminal trials that can justify regulating the length to which an attorney may go in seeking his client's acquittal.[1]

INTRODUCTION

The criminal trial is one of the most important processes in the government. It is the official means by which our society determines who has committed wrongdoings and punishes the perpetrators of those wrongdoings. Although the system might never be perfect, there is a value in ensuring that the trial assigns guilt to the proper person so that no one is wrongfully punished. The age-old principle that "it is better that ten guilty persons escape than that one innocent suffer" still has merit and legislators at all levels should be concerned about the integrity of the criminal trials in their jurisdiction.[2]

One practice within the current criminal trial procedure that has cast a shadow on the credibility and integrity of the legal process is the "All-or-Nothing Doctrine."[3] Under the All-or-Nothing Doctrine, as long as neither side objects, the prosecutor and defense attorney may convince a judge that the jury should choose between two verdicts: convicting the accused of

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1. Nix v. Whiteside, 475 U.S. 157, 189 (1986) (Blackmun, J., concurring).

2. WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 358 (George Sharswood ed., 1876); *see also* State v. Coffin, 156 U.S. 432, 456 (1895).

3. "All-or-Nothing" is a common term for the situation where a jury has a simple choice between guilty and not guilty. *See* Catherine L. Carpenter, *The All-or-Nothing Doctrine in Criminal Cases: Independent Trial Strategy or Gamesmanship Gone Awry?*, 26 AM. J. CRIM. L. 257, 258 (1999).

the charged offense or completely vindicating him.[4] The jury must choose one verdict or the other, without the option of considering other factually plausible offenses, namely, lesser-included offenses.[5]

The contours of the All-or-Nothing Doctrine are best portrayed in the following hypothetical. Imagine a criminal trial where the prosecutor has charged a defendant with second-degree murder, a non-capital offense under the state's criminal code. Under that criminal code, there are several lesser-included offenses for second-degree murder, including manslaughter and involuntary manslaughter. At the end of the trial, neither side requests a lesser-included offense jury instruction for manslaughter, although there is evidence of manslaughter as defined in the criminal code. Instead, each side wants the jury to choose simply between two verdicts: (1) guilty of second-degree murder, or (2) not guilty. The prosecutor has a difficult case, and although she may not have successfully proven second-degree murder beyond a reasonable doubt, she feels that she has indeed proven that the defendant killed the victim. Therefore, the prosecutor believes strongly that the jury will choose second-degree murder over a full acquittal. Conversely, the defense attorney, lacking any affirmative defenses, feels that he has shown the weakness of the prosecutor's case and thinks that the jury cannot possibly convict on second-degree murder. In the deliberation room, the jury is quite sure that the defendant killed the victim, but is not convinced that the crime is second-degree murder. Nevertheless, the jury feels that the defendant should be punished for the killing and therefore returns the only verdict available—guilty of second-degree murder.[6]

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4. *Id.* at 263.

5. Lesser-included offenses, generally, are offenses that, by either statute or judicial holding, may be included with the greater charged offense, even if not specifically charged. *See* discussion *infra* Part I.A.

6. Although the above scenario is simplified greatly, the basic facts have been present in an astounding number of recent cases. *See, e.g.*, Burgess v. Galaza, No. 99-15459, 1999 U.S. App. LEXIS 4082, at *4 (9th Cir. Mar. 13, 2000); Hogan v. Gibson, 197 F.3d 1297, 1303 (10th Cir. 1999); Stouffer v. Reynolds, 168 F.3d 1155, 1170 (10th Cir. 1999); Barnett v. Godinez, No. 93-2011, 1995 U.S. App. LEXIS 16614, at *5–17 (7th Cir. July 6, 1995); United States v. Chandler, 996 F.2d 1073, 1099 (11th Cir. 1993); Bashor v. Risley, 730 F.2d 1228, 1240 (9th Cir. 1984); United States *ex rel.* Kubat v. Thieret, 679 F. Supp. 788, 809–10 (N.D. Ill. 1988), *aff'd*, Kubat v. Thieret, 867 F.2d 351, 365–66 (7th Cir. 1989); Chao v. State, 604 A.2d 1351, 1357–60 (Del. 1992); Commonwealth v. Woodward, No. 97-0433,

In the above scenario, both the prosecution and defense applied the All-or-Nothing Doctrine as a trial strategy. There are two main problems with the All-or-Nothing Doctrine. The first, as illustrated by the above hypothetical, is that a jury may actually convict a defendant of a crime that was not proven beyond a reasonable doubt.[7] This is, in fact, a wrongful conviction. It is similar to jury nullification, where the jury ignores the instructions given and chooses a verdict that they believe to be just.[8] The second problem with the All-or-Nothing Doctrine relates directly to the defense's strategic use of the doctrine and has already been addressed in many jurisdictions. If the jury acquits the defendant, then he goes free. On the other hand, if convicted, the defendant has a valid ground in some jurisdictions for arguing on appeal that he was wrongfully convicted. Although this strategy may be very appealing to some, these two issues present an interesting question: should the criminal justice system allow the parties use such a problematic strategy?

An abundance of court opinions and legal scholarship support the lawyers' freedom to choose their own trial strategies.[9] As one court stated, "[U]nder our adversarial system of justice, the prosecution and defense must have the option of foregoing a lesser charge instruction for strategic reasons. Lawyers, not judges, should try cases."[10] Yet others question the propriety of the All-or-Nothing Doctrine because of the two inherent prob-

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1997 Mass. Super. LEXIS 213, at *15–19 (Mass. Super. Ct. 1997), *aff'd*, 694 N.E.2d 1277 (Mass. 1998); State v. Collins, 431 S.E.2d 188, 194–95 (N.C. 1993) (Meyer, J., dissenting); Pickens v. State, 885 P.2d 678, 682 (Okla. Crim. App. 1994) (approving death sentence in capital case despite use of All-or-Nothing strategy).

7. Carpenter, *supra* note 3, at 300.

8. Jury nullification is the term for the situation where the jury acquits a defendant, despite clear evidence of guilt, because it either disagrees with the law or the application of the law in a particular case. CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 4–6 (1998).

9. *See, e.g.*, *Barnett*, 1995 U.S. App. LEXIS 16614, at *10 ("Generally, decisions regarding trial tactics are accorded 'enormous deference' . . . .") (citing United States v. Hirschberg, 998 F.2d 1509, 1513 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 311 (1993)); *Collins*, 431 S.E.2d at 195 (Meyer, J., dissenting) ("It is familiar learning that trial counsel should be given wide latitude in matters of strategy."); Carpenter, *supra* note 3, at 260.

10. State v. Gunderson, 936 P.2d 804, 806 (Mont. 1997) (quoting State v. Sheppard, 832 P.2d 370, 373 (Mont. 1992)).

lems described above.[11] Nevertheless, the All-or-Nothing Doctrine exists in most jurisdictions today. It is permitted by legislatures and sanctioned by the courts, despite valid concerns about whether it produces just results in criminal trials and whether it has any place at all in our criminal trial system.

The first definitive pronouncement on the All-or-Nothing Doctrine from the United States Supreme Court came in *Beck v. Alabama*.[12] In that case, the Court held that the All-or-Nothing Doctrine is unconstitutional in capital cases.[13] However, in more than twenty years since the decision, the Supreme Court has not ruled as to whether *Beck* should apply in non-capital cases, and the circuits have continued to disagree over this question.[14] In fact, only the Third Circuit has expressly extended the *Beck* rationale to non-capital offenses.[15]

Because it has not ruled on this issue in over twenty years, it appears unlikely that the Supreme Court will extend the *Beck* rationale beyond the capital context and hold that there is a constitutional right to a lesser-included offense in non-capital cases.[16] Therefore, this Comment argues that state legislatures should adopt the reasoning in *Beck* and enact legislation eliminating the strategic use of the All-or-Nothing Doctrine in criminal trials. By requiring jury instructions on lesser-included offenses in all cases where the evidence supports such instructions, state legislatures can protect criminal defendants from the risk of wrongful conviction that is inherent in the strategic use of the All-or-Nothing Doctrine. In abolishing the strategic use of the All-or-Nothing Doctrine, state legislatures can ensure that those accused of crimes receive a fair and reliable trial, and can preserve the overall integrity of the trial result.

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11. For legal scholarship questioning the All-or-Nothing Doctrine directly, see Carpenter, *supra* note 3, at 282; Tracy L. Hamrick, Note, *Looking at Lesser Included Offenses on an "All or Nothing" Basis:* State v. Bullard *and the Sporting Approach to Criminal Justice*, 69 N.C. L. REV. 1470, 1479 (1990); Michael G. Pattillo, Note, *When "Lesser" Is More: The Case for Reviving the Constitutional Right to a Lesser Included Offense*, 77 TEX. L. REV. 429, 462 (1998).

12. 447 U.S. 625 (1980).

13. *Id.* at 627.

14. *See* Solis v. Garcia, 219 F.3d 922, 928–29 (9th Cir. 2000); Robertson v. Hanks, 140 F.3d 707, 710 (7th Cir. 1998); Lattimore v. Dubois, No. 97-11011, 2001 U.S. Dist. LEXIS 10144, at *58–61 (D. Mass July 13, 2001) (describing the split across the circuits).

15. Vujosevic v. Rafferty, 844 F.2d 1023, 1027 (3d Cir. 1988).

16. *See infra* Part II.A.

This Comment argues that the All-or-Nothing Doctrine, as a trial strategy, does not belong in our criminal trial system and that a legislative, rather than a judicial, solution is essential. Part I provides a background discussion of the All-or-Nothing Doctrine within the context of lesser-included offenses in criminal charges. Part I further describes the application of the All-or-Nothing Doctrine in a criminal trial and its impact on criminal defendants. Part II outlines the various rules governing the All-or-Nothing Doctrine. This section first summarizes the United States Supreme Court cases addressing the constitutionality of the All-or-Nothing Doctrine, and then describes the current federal circuit split regarding the All-or-Nothing Doctrine in non-capital cases. Next, Part II describes the federal rules and the various approaches applied by state statutes to address the All-or-Nothing Doctrine in criminal trials. These state approaches range from absolute acquiescence to the use of the All-or-Nothing Doctrine in the adversarial process, to the complete abolition of the doctrine. Part III advocates the statutory abolition of the All-or-Nothing Doctrine in the criminal trial in order to improve the integrity of the criminal trial process. Statutory abolition of the All-or-Nothing Doctrine would involve forcing the court to instruct the jury on at least one lesser-included offense, where it is supported by the evidence, when the parties have failed to request one. Part III concludes by providing a suggested model statute that a legislature in any given jurisdiction may adopt to eliminate the strategic use of the All-or-Nothing Doctrine.

I. THE NATURE OF THE PROBLEM: LESSER-INCLUDED OFFENSES AND THE ALL-OR-NOTHING DOCTRINE

Essentially, the All-or-Nothing Doctrine is a "sanctioned failure to instruct on non-charged but lesser-included offenses."[17] The term "lesser-included offense," however, has proven to be a slippery concept. The rules governing which offenses are considered lesser-included offenses, as well as the rules prescribing the amount of evidence needed to support a lesser-included offense instruction, vary across the many jurisdictions. As the definition of a lesser-included offense varies, so does the role of the All-or-Nothing Doctrine in the criminal

17. Carpenter, *supra* note 3, at 263.

trial. While an in-depth discussion of the lesser-included offense is outside the scope of this article, this part will briefly sketch an outline of the lesser-included offense rules, providing a context in which to analyze the All-or-Nothing Doctrine. It will then explain the function of the All-or-Nothing Doctrine in a criminal trial and describe the costs and benefits for an accused or a prosecutor who wishes to apply the All-or-Nothing Doctrine as a trial strategy.

A. Lesser-Included Offenses and Their Role in the Trial Process

As a prelude to a discussion of the effects of the All-or-Nothing Doctrine, it is important to understand the doctrine's existence within the larger sphere of lesser-included offenses. In order for the jury to have a choice besides mere guilt or innocence of the charged offense, a lesser-included offense for that charged offense must exist. Generally, a lesser-included offense is "a crime included within, but less than, the crime charged."[18] In other words, a lesser-included offense will have some of the elements of the greater offense, but not all of them, and may even have some wholly different elements. For example, under all state homicide statutes, there are various levels of homicide, such as murder, manslaughter, and criminally negligent homicide, based on differing circumstances of mens rea and actus reus.[19] Similarly, in sexual assault statutes, improper sexual contact may fall into one of several levels of culpability depending on the circumstances surrounding the sexual contact.[20] In both of these examples, the lesser offenses have some, but not all, of the elements of the greater offense. Although the lesser-included offense may not be charged explicitly, the jury may still consider and convict on a lesser-included offense without any Sixth Amendment "notice" concerns.[21]

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18. James A. Shellenberger & James A. Strazella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 MARQ. L. REV. 1, 7 (1995).

19. *See, e.g.*, COLO. REV. STAT. § 18-3-102 (2000) (Murder in the first degree); *id.* § 18-3-103 (Murder in the second degree); *id.* § 18-3-104 (Manslaughter); *id.* § 18-3-105 (Criminally negligent homicide).

20. *See, e.g.*, COLO. REV. STAT. § 18-3-402 (2000) (Sexual assault); *id.* § 18-3-404 (Unlawful sexual contact).

21. According to the Sixth Amendment, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the ac-

1. Approaches To Defining the Lesser-Included Offense

Jurisdictions in the United States generally follow one of five approaches to defining a lesser-included offense.[22] The first, and simplest, approach is the Statutory Elements approach.[23] Under this approach, a greater charged offense must contain every single one of the elements of a lesser offense.[24] In other words, under a state's criminal code, the lesser offense will have all but one or two of the elements of the greater offense. Lesser-included offenses within this definition are sometimes called "necessarily included offenses" because it is almost impossible to commit the greater offense without committing the lesser offense.[25] This approach is the one most firmly rooted in common law,[26] and the one adopted in the federal system in Federal Rule of Criminal Procedure 31(c).[27]

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cusation . . . ." U.S. CONST. amend VI. As long as an offense is characterized as a lesser-included offense, the defendant is deemed to be on notice of the offense. Schmuck v. United States, 489 U.S. 705, 717 (1989); *see also* Carpenter, *supra* note 3, at 264–65; Janis L. Ettinger, *In Search of a Reasoned Approach to the Lesser Included Offense*, 50 BROOK. L. REV. 191, 191–92 (1984).

22. *See generally* Carpenter, *supra* note 3, at 262–73; Ettinger, *supra* note 21, at 191; Schellenberger & Strazella, *supra* note 18, at 7–13. These three articles provide thorough discussions of the various approaches to the lesser-included offense instruction and are excellent sources for more in-depth discussions of the various approaches. I have merely summarized and narrowed their explanations in this section in an effort to provide a broad foundation for my thesis that a legislative solution is most proper for the All-or-Nothing Doctrine.

23. Carpenter, *supra* note 3, at 265; *see also* Schellenberger & Strazella, *supra* note 18, at 8.

24. Carpenter, *supra* note 3, at 265; Ettinger, *supra* note 21, at 198–99. The Supreme Court adopted this approach as the appropriate test in *Schmuck*, 489 U.S. at 716–17 ("We now adopt the elements approach to Federal Rule of Criminal Procedure 31(c)."). The Statutory Elements approach has also been described as a "bright line" test, necessary to put criminals on "notice" as required by the Due Process Clause. Carpenter, *supra* note 3, at 265.

25. *See, e.g.*, Lisby v. State, 414 P.2d 592, 594 (Nev. 1966) ("[T]o determine whether an offense is necessarily included in the offense charged, the test is whether the offense charged cannot be committed without committing the lesser offense."); People v. Kerrick, 77 P. 711, 712 (Cal. 1904) ("To be 'necessarily included' in the offense charged, the lesser offense must not only be part of the greater in fact, but it must be embraced within the legal definition of the greater as a part thereof."); Carpenter, *supra* note 3, at 301 & n.20.

26. Carpenter, *supra* note 3, at 265 n.20 (citing 4 WHARTON'S CRIMINAL LAW AND PROCEDURE § 1799 (12th ed. 1932)).

27. FED. R. CRIM. P. 31(c) (stating, in relevant part, "[t]he defendant may be found guilty of an offense necessarily included in the offense charged . . . ."); *see*

The Pleadings approach is a second approach to lesser-included offenses.[28] Under this approach, the basis for a lesser offense extends beyond the confines of the statutory language and into the actual theory of the case as charged by the prosecutor.[29] Instead of looking solely at the statute to see if a lesser-included offense exists, the court looks at the facts as alleged in the pleadings to see if those alleged facts support any lesser-included offenses.[30] Academics have sharply criticized this approach because it allows the prosecutor to control the proceedings of the trial unfairly through the charges filed against the defendant.[31] For instance, on a charge sheet, a prosecutor might only allege facts that support first-degree murder, as opposed to alleging facts that support first- and second-degree murder, as well as manslaughter. Despite these concerns, this approach has been adopted by several jurisdictions, both state and federal.[32]

The third approach to determining whether a lesser-included offense exists for a particular charge is the Evidence approach.[33] In applying this approach, a court considers all of the evidence presented at trial to see if that evidence supports any lesser-included offense charges.[34] The evidence must be such that a jury can convict a defendant on the included offense, and the evidence must also provide a rational basis for the jury to acquit the defendant on the charged offense.[35] This

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also Schmuck, 489 U.S. at 716; Ettinger, *supra* note 21, at 200–01; Schellenberger & Strazella, *supra* note 18, at 8–9.

28. Carpenter, *supra* note 3, at 266; Ettinger, *supra* note 21, at 203–04; Schellenberger & Strazella, *supra* note 18, at 11.

29. Carpenter, *supra* note 3, at 266–67; Schellenberger & Strazella, *supra* note 18, at 11.

30. Carpenter, *supra* note 3, at 266–67; Ettinger, *supra* note 21, at 204.

31. *See* Carpenter, *supra* note 3, at 267–68; *see also* Ettinger, *supra* note 21, at 206; Schellenberger & Strazella, *supra* note 18, at 11–12. Because the pleadings determine whether any lesser-included offenses exist, a prosecutor may control the presence of lesser-included offenses by defining the offense narrowly or broadly in the wording of the pleadings.

32. Schellenberger & Strazella, *supra* note 18, at 12 n.21 (citing several state and federal cases applying the Pleadings approach).

33. Carpenter, *supra* note 3, at 266–67; Schellenberger & Strazella, *supra* note 18, at 12.

34. Carpenter, *supra* note 3, at 266–67; Ettinger, *supra* note 21, at 205; Schellenberger & Strazella, *supra* note 18, at 12.

35. Carpenter, *supra* note 3, at 268 (citing various state court decisions, most notably, State v. Brent, 644 A.2d 583, 586 (N.J. 1994), State v. Keffer, 860 P.2d 1118, 1129 (Wyo. 1993), and Moore v. State, 969 S.W.2d 4, 8 (Tex. Crim. App. 1998)).

approach is the most flexible of the five and is the approach that most closely matches the actual criminal conduct of the defendant.[36] The Evidence approach also allows parties to control the inclusion of lesser-included offenses through their presentation of evidence at trial. The Evidence approach provides limited precedent though, because the existence of a lesser-included offense within the greater offense depends solely on the evidence adduced at each trial. It also gives the trial judge a tremendous amount of discretion and covers so many possible offenses that there may be a problem in guaranteeing proper Sixth Amendment notice to the accused.[37] The Model Penal Code endorses this approach,[38] but it has only been adopted in Montana, New Jersey, and Texas.[39]

A fourth approach, usually referred to as a "cognate test," identifies lesser-*related* offenses (as opposed to lesser-*included* offenses), using the Evidence approach or the Pleadings approach.[40] Lesser-related offenses have some elements that the greater offense does not have, whereas lesser-included offenses have all of the elements that the greater offense has.[41] Therefore, while the lesser offense is related to the greater offense, it is "not necessarily included within" the greater offense. The distinction between lesser-included offenses and lesser-related offenses is important because although some jurisdictions allow juries to consider lesser-related offenses, most require the offense to be a lesser-included offense.[42] Using this test, a trial court can identify a lesser-related offense either by the pleadings or by the evidence at trial.[43]

The final approach, adopted by Michigan and Florida, is a two-tiered approach combining aspects of the four approaches

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36. Schellenberger & Strazella, *supra* note 18, at 12–13; *see also* Ettinger, *supra* note 21, at 208 ("[T]he results of the application of this standard are entirely grounded in, and unique to, the case before the court.").

37. Ettinger, *supra* note 21, at 208.

38. Carpenter, *supra* note 3, at 268 (citing MODEL PENAL CODE § 1.07(4) (1985)).

39. *Id.* at 268 n.32 (citing MONT. CODE ANN. § 46-16-607 (1999), N.J. STAT. ANN. § 2C: 1-8(d) (West 1995), and TEX. CODE CRIM. PROC. ANN. art. 37.09 (Vernon 1998)).

40. Carpenter, *supra* note 3, at 266; Schellenberger & Strazella, *supra* note 18, at 13 & n.25 (citing United States v. Schmuck, 489 U.S. 705 (1989)).

41. Schellenberger & Strazella, *supra* note 18, at 13.

42. *Id.*

43. Carpenter, *supra* note 3, at 266–67.

previously discussed.[44] The first tier requires courts to instruct on "necessarily-included lesser offenses that have been properly requested."[45] A trial judge must give a statutorily defined "necessarily-included offense" instruction if the parties properly request it.[46] While the first tier is mandatory, the second tier is permissive. This second tier of offenses consists of those lesser-related cognate offenses "that bear a sufficient relationship to the principal charge in that 'they are in the same class or category, protect the same societal interests as that offense, and are supported by the evidence adduced at trial.'"[47] A trial court may also instruct the jury on these related offenses. Such lesser-related offenses, however, must have support in the evidence and be consistent with the defendant's theory of the case.[48]

2. The Evidence Prerequisite

Notwithstanding the approach used to define lesser-included offenses, there is a very important caveat to their inclusion in the jury instructions. A judge may not give an instruction on a lesser-included offense to the jury unless the evidence at trial is sufficient to support the instruction.[49] In *Hopper v. Evans*,[50] discussed in more detail below, the Supreme Court held that "due process requires that a lesser-included offense instruction be given *only* when the evidence warrants such an instruction."[51] In other words, if the charged offense is first-degree murder, and there is no evidence of manslaughter, then a judge cannot instruct the jury on the lesser-included offense of manslaughter. Academics and courts alike describe this requirement as an "independent prerequisite" for an instruction on a lesser-included offense.[52] In *Keeble v. United*

44. *Id.* at 269.

45. *Id.* at 270 (citing People v. Henry, 236 N.W.2d 489, 490 (Mich. 1975)).

46. *Id.* at 269–70 (citing Wimberly v. State, 697 So. 2d 1272, 1273 (Fla. Dist. Ct. App. 1997)).

47. *Id.* at 270–71 (quoting People v. Hendricks, 521 N.W.2d 546, 552 (Mich. 1994)).

48. *Id.* at 270 (citing *Hendricks*, 521 N.W.2d at 550).

49. *Id.* at 271; Ettinger, *supra* note 21, at 210; Schellenberger & Strazella, *supra* note 18, at 6–7.

50. 456 U.S. 605 (1982).

51. *Id.* at 611.

52. Carpenter, *supra* note 3, at 271 (citing Keeble v. United States, 412 U.S. 205, 208 (1973)).

States,[53] the United States Supreme Court outlined the specifics of this requirement, saying, "the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater."[54]

Not all jurisdictions agree about what type of evidence is sufficient to support a lesser-included offense instruction.[55] Some hold that a lesser-included offense instruction must be given whenever there is any evidence of a lesser-included offense presented, no matter how tenuous.[56] Others hold that the evidence supporting a lesser-included offense must be substantial.[57] As a result, depending on the jurisdiction, the nature of the evidence will determine whether a lesser-included offense instruction will go to the jury.[58] The upshot of this evidence requirement is that in some cases, where there is no evidence of any lesser-included offenses, the jury will, by default, have an All-or-Nothing choice. This manifestation of the All-or-Nothing Doctrine is unassailable, however, without overruling *Hopper*.

As long as a lesser-included offense exists for a particular crime, depending on the test used in the jurisdiction, both parties can attempt to strategically employ the All-or-Nothing Doctrine. By failing to request an instruction on a lesser-included offense, the parties present the jury with a simple choice between guilt and innocence of the charged offense. The next section addresses how the employment of this strategy by either side might affect the criminal defendant.

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53. 412 U.S. 205 (1973).

54. *Id.* at 208. This language is very similar to that used in the Evidence approach. The evidence prerequisite to a lesser-included offense charge should not be confused with the Evidence approach used to decide which offenses will be considered lesser-included offenses.

55. *See* Carpenter, *supra* note 3, at 271.

56. *Id.* (citing Weber v. State, 933 S.W.2d 370, 374 (Ark. 1996); Rouse v. United States, 402 A.2d 1218, 1220 (D.C. 1979); People v. Novak, 643 N.E.2d 762, 770 (Ill. 1994); State v. Palmer, 687 N.E.2d 685, 702 (Ohio 1997); State v. Wright, 618 S.W.2d 310, 314–15 (Tenn. Crim. App. 1981)).

57. *Id.* (citing People v. Flannel, 603 P.2d 1, 10–11 (Cal. 1979); Wright v. State, 658 N.E.2d 563, 567 (Ind. 1995); State v. Jeffries, 430 N.W.2d 728, 737 (Iowa 1988)).

58. *Id.* at 272 ("In jurisdictions that prohibit the use of the All-or-Nothing Doctrine, the test employed to determine the sufficiency of the evidence can meaningfully alter the mandatory nature of the duty to instruct.").

B. The All-or-Nothing Doctrine and the Criminal Defendant

The All-or-Nothing Doctrine is a trial strategy. Therefore, it has both potential risks and potential rewards. Parties contemplating using the All-or-Nothing Doctrine must weigh these risks and rewards in deciding whether to employ the strategy. If this strategy fails, however, the defense seems to have a lot more to lose than the prosecution.

1. Strategic Use of the All-or-Nothing Doctrine in a Criminal Trial

The rules in a particular jurisdiction regarding the All-or-Nothing Doctrine and lesser-included offenses, as well as the amount of evidence needed to support a lesser-included offense instruction, significantly affect the lawyers' trial strategies. As long as a lesser-included offense is available, it can operate to benefit either the prosecution or the defense. The use of the lesser-included offense first emerged as a tool for the prosecutor in cases where the evidence was particularly strong on most elements of an offense charged against a defendant, yet weak on another one or two.[59] In such a situation, a full conviction might be hard to get, but because a jury could then convict on a lesser-included offense, the prosecutor would still have a good chance of getting a conviction.[60]

The accused and the defense attorney can also use lesser-included offenses as a part of their trial strategy. A lesser-included offense instruction aids the defendant because it "affords the jury a less drastic alternative than the choice between conviction of the offense charged and an acquittal."[61] Therefore, a defense attorney can use the lesser-included offense in a situation where the jury may not want to convict the defendant of the greater offense, but refuses to set the defendant free entirely.

In contrast to the use of the lesser-included offense as a strategic tool, the All-or-Nothing Doctrine is the strategy where the parties intentionally omit any requests for available lesser-

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59. Beck v. Alabama, 447 U.S. 625, 633 (1980) (citing 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 515 & n.54 (1969)).

60. *Id.*

61. *Id.*

included offenses. Both parties forego the protections offered by the lesser-included offense, opting instead to gamble with the jury's application of the "beyond a reasonable doubt" standard. If a particular jurisdiction allows the use of the All-or-Nothing Doctrine, the strategy can still benefit both the prosecution and the defense. If a prosecutor has particularly strong evidence that the accused actually committed some offense, he might use an All-or-Nothing instruction to put the jury in a position where it would rather convict the defendant than let him go free.[62]

The defense can utilize the converse with equal success. A jury must acquit if the prosecutor does not prove the charged offense beyond a reasonable doubt. By requesting an All-or-Nothing jury instruction, the defense can exploit a case where the evidence of guilt is particularly weak by directly attacking the prosecution's theory and injecting reasonable doubt. Theoretically, the jury, in applying the "beyond a reasonable doubt" standard, would then have to acquit the defendant. Thus, the All-or-Nothing Doctrine can be an extremely effective strategy for an accused in a trial where the prosecution might have difficulty in proving the accused's guilt beyond a reasonable doubt.

Even in a jurisdiction where the All-or-Nothing Doctrine has been abolished, an All-or-Nothing instruction can still go to the jury, but both the prosecution and the defense must plan their trial strategy thoroughly. A party desiring an All-or-Nothing instruction must show that the evidence *only* supports the charged offense and there is no evidence *at all* supporting an instruction on any other offenses.[63] If evidence of a lesser-included offense exists, either party can veto the opposing party's use of the All-or-Nothing Doctrine by simply requesting a lesser-included offense instruction. This is true because in most, if not all, jurisdictions, if one party wants a lesser-included offense instruction and the evidence supports the instruction, a trial judge must give the lesser-included offense in-

62. Incidentally, this is precisely the use of the All-or-Nothing Doctrine that the Supreme Court feared and was not willing to allow in the prosecution of capital cases. *See id.* at 637.

63. If the evidence supports only one charge, the Supreme Court's holding in *Hopper v. Evans*, 456 U.S. 605, 611 (1982), allows an All-or-Nothing instruction to go to the jury.

struction to the jury.[64] Of course, if the evidence supports no lesser-included offenses, the jury will have an All-or-Nothing choice simply because there are only two options available—guilty of the sole charged offense or not guilty.

2. Risks for the Criminal Defendant In Using the All-or-Nothing Doctrine

Employing the All-or-Nothing Doctrine in a criminal trial poses significant risks for the criminal defendant. Obviously, if the All-or-Nothing Doctrine backfires, the end result is that the defendant is convicted of a crime. Also, in several jurisdictions, a failure to request lesser-included offense instructions results in a waiver of the defendant's right on appeal to claim reversible error resulting from the lack of lesser-included offense instructions.[65] In short, the All-or-Nothing Doctrine is a "gamble" between an acquittal and a conviction, with no intermediate possibility.[66]

Considering these two risks, the defense must use extreme care in making the decision to use the All-or-Nothing Doctrine. The decision is the client's to make. The defense attorney must apprise his client of the risks and potential rewards so that the defendant can contribute to his own defense and decide if he wants to employ the All-or-Nothing Doctrine.[67] But that is eas-

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64. Carpenter, *supra* note 3, at 277. This principle is called "mutuality of right" and has been explained by several courts as the principle that the prosecution and defense each have an "equivalent" right to an instruction on a lesser-included offense. Therefore, a party can only use an All-or-Nothing strategy if the other party agrees, or at least does not object, to the other's use of the strategy. *Id.* (citing State v. Keffer, 860 P.2d 1118, 1125 (Wyo. 1993) (saying that "[n]either side in a criminal case has a unilateral right to go to the jury on an all-or-nothing approach."); State v. Selig, 635 P.2d 786 (Wyo. 1981)).

65. *See, e.g.*, United States v. Meyers, 443 F.2d 913, 914 (9th Cir. 1971); Higgins v. Wainwright, 424 F.2d 177, 178 (5th Cir. 1970).

66. Carpenter, *supra* note 3, at 261 (referring to the All-or-Nothing strategy as a "high stakes gamble").

67. STANDARDS FOR CRIMINAL JUSTICE § 4-5.2 cmt. (1988)

> It is . . . important in a jury trial for the defense lawyer to consult fully with the accused about any lesser included offenses the trial court may be willing to submit to the jury. Indeed, because this decision is so important . . . the defendant should be the one to decide whether to seek submission to the jury of lesser included offenses.

Id.; Strickland v. Washington, 466 U.S. 668, 688 (1983) (holding that counsel has a "dut[y] to consult with the defendant on important decisions."); Barnett v. Godinez, No. 93-2011, 1995 U.S. App. LEXIS 16614, at *13 (7th Cir. July 6, 1995) ("Barnett's attorneys did not have the authority to adopt this [All-or-Nothing]

ier said than done. A criminal defendant may not fully understand or appreciate the ramifications of making such a choice. For example, in *Barnett v. Godinez*, after foregoing a lesser-included offense instruction for robbery, the defendant claimed on appeal that he "did not understand the significance of a lesser-included instruction" and that "he did not make an informed decision to forego the robbery instruction."[68] Similarly, in the widely-covered "Nanny Murder Trial,"[69] defendant Louise Woodward used the All-or-Nothing Doctrine by refusing an instruction on manslaughter and requesting instructions only on first and second degree murder.[70] Massachusetts allowed (and still does allow) the strategic use of the All-or-Nothing Doctrine.[71] Judge Zobel, the trial judge, brought in an additional lawyer specifically to make sure that Ms. Woodward understood the weight of her choice.[72] The judge also asked her personally, on the record, about her choice of an All-or-Nothing strategy. Despite all of these procedural safeguards, Judge Zobel still entered a new verdict of manslaughter after the jury

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strategy alone. Although an attorney possesses great latitude to shape trial strategy, the client must participate in the decisionmaking process when important decisions are concerned or fundamental rights are at issue.") (citing Underwood v. Clark, 939 F.2d 473, 474 (7th Cir. 1991); Johnson v. Duckworth, 793 F.2d 898, 900 (7th Cir. 1986)); Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 KAN. L. REV. 1 (1998) (discussing the allocation of decisionmaking between attorney and client in a criminal defense).

68. *Barnett*, 1995 U.S. App. LEXIS 16614, at *15. Barnett was convicted of armed robbery. *See id.* at *1.

69. Commonwealth v. Woodward, 1997 Mass. Super. LEXIS 213 (Mass. Super. Ct. 1997), *aff'd*, 694 N.E.2d 1277 (Mass. 1998); *see* Carpenter, *supra* note 3, at 261 (citing Court TV Online, Massachusetts v. Woodward: "The Nanny Murder Trial" *at* http://www.courttv.com/trials/woodward (last visited Sept. 5, 2001)). Remarkably, the *Woodward* Trial is still listed among Court TV's eight most famous cases. Court TV Online, Famous Cases *at* http://www.courttv.com/trials/famous (last visited Sept. 5, 2001).

70. *Woodward*, 1997 Mass. Super. LEXIS 213, at *16. The *Woodward* case has been widely covered not only in the news media, but in the legal journals as well. In fact, this case has become a poster child of sorts for the questioning of the integrity of criminal trials and the propriety of the All-or-Nothing Doctrine. Therefore, discussion of the case in this Comment will only illustrate the point that the defense must be careful in its use of the All-or-Nothing Doctrine. For further discussion of the case, see WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH 150 (1999); Carpenter, *supra* note 3, at 261–62, 291–99; Pattillo, *supra* note 11, at 429; Uphoff & Wood, *supra* note 67, at 1.

71. *See Woodward*, 694 N.E.2d at 1282 n.7.

72. PIZZI, *supra* note 70, at 150.

convicted her of second-degree murder, even though the jury never heard instructions on manslaughter.[73]

In *Commonwealth v. Woodward*, Ms. Woodward was saved from the consequences of her All-or-Nothing strategy by a trial judge seeking to undo what he perceived as an injustice. However, this case highlights a major problem with the All-or-Nothing Doctrine. Had the jury found Louise Woodward not guilty, the defense strategy would have paid off and the defense attorneys' fees would have been well earned. But the strategy backfired and the jury found her guilty of second-degree murder. The trial judge then bent over backwards to remedy this perceived miscarriage of justice,[74] sparking cross-appeals from the prosecution and defense over whether his actions were proper.[75] The fact is, the All-or-Nothing Doctrine is a great strategy for defendants, but only if it works. The strategy sometimes fails, however, and courts, defendants, and others are not willing to swallow the bitter pill that is the "all" in the All-or-Nothing Doctrine—a conviction. It is that threat of failure, and its attendant possibility of a wrongful conviction, that necessitates the abolition of this doctrine from our criminal justice system.

As *Barnett* and *Woodward* demonstrate, the risks in using the All-or-Nothing Doctrine are real. Nevertheless, the All-or-Nothing Doctrine offers distinct advantages to both sides of the adversarial process that might ultimately outweigh these risks. Choosing a particular course of action, after weighing the advantages and disadvantages of the available alternatives, is the very expression of the term "trial strategy." Allowing the parties make choices and plot their own trial strategy, while taking full advantage of the inherent uncertainty involved in the jury process, is important in the adversarial process of justice. As the next section will demonstrate, however, allowing either the defendant or the prosecutor to gamble with verdicts, with the attendant risk of wrongful conviction, has given rise to nu-

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73. *Id.* at 151.

74. *See Woodward*, 1997 Mass. Super. LEXIS 213, at *19 (In Judge Zobel's words, "[a]fter intensive, cool, calm reflection, I am morally certain that allowing *this* defendant on *this* evidence to remain convicted of second-degree *murder* would be a miscarriage of justice.").

75. *See Woodward*, 694 N.E.2d at 1298 (affirming trial court reduction of sentence to manslaughter).

merous challenges in the courts and resulted in a broad spectrum of holdings.

II. COMMON LAW AND STATUTORY RULES REGARDING THE ALL-OR-NOTHING DOCTRINE AND LESSER-INCLUDED OFFENSES

Although some state legislatures have wrestled with the All-or-Nothing Doctrine, most of the rules governing its use have come from the courts. In 1980, in *Beck v. Alabama*, the Supreme Court held that the All-or-Nothing Doctrine is unconstitutional in capital cases. Since then, the courts have had numerous opportunities to examine the All-or-Nothing Doctrine's constitutionality in non-capital cases. Yet, aside from one federal circuit court of appeals and several state courts, there has been no solid extension of the *Beck* rationale to non-capital offenses.

A. Supreme Court Cases Involving Constitutional Issues Surrounding Lesser-Included Offenses

1. *Beck v. Alabama* (1980)

The clearest rule on the All-or-Nothing Doctrine came in 1980 with *Beck v. Alabama*.[76] In that case, a jury convicted the defendant of committing an intentional killing in the course of robbery, a capital offense.[77] Under Alabama law at the time, in a capital case, the judge was expressly prohibited from giving the jury an instruction on a lesser-included offense.[78] The jury had to either convict the defendant of the capital offense, or acquit the defendant entirely. The jury chose the former and Beck was sentenced to death. The Supreme Court held that

76. 447 U.S. 625 (1980).

77. *See id.* at 627 (quoting ALA. CODE § 13-11-2(a)(1)–(14) (1975), where "[r]obbery or attempts thereof when the victim is intentionally killed by the defendant" is listed as a capital offense).

78. *Id.* at 628 (describing ALA. CODE § 13-11-2(a) (1975)). The reasoning behind this rule was that by presenting the jury with a choice between guilt where the death penalty was certain and an acquittal, the jury would be more likely to acquit where guilt was doubtful. Alabama also argued that by prohibiting lesser-included offense instructions in capital cases, the state could assure that the death penalty would not be "imposed . . . as a result of compromise verdicts." *Id.* at 633.

Alabama may not impose the death penalty in these circumstances.[79] If the "unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [the court] is constitutionally prohibited from withdrawing that option from the jury in a capital case."[80] The Court stated that where the evidence "leaves some doubt with respect to an element that would justify conviction of a capital offense—the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction."[81]

The Court seemed most concerned with two aspects of the Alabama law mandating the All-or-Nothing jury instruction. First, "[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction."[82] Although in theory the jury is supposed to return a verdict of not guilty in the presence of reasonable doubt concerning an element of the charged offense, the Court felt that the defendant "should not be exposed to the substantial risk that the jury's practice will diverge from [that] theory."[83] Second, the Court reiterated its position in *Gardner v. Florida,*[84] that "death is a different kind of punishment . . . in both its severity and finality. . . . [T]he action of the sovereign in taking the life of one of its citizens . . . differs dramatically from any other legitimate state action."[85] Based on these two key concerns, the Court declared Alabama's law unconstitutional.[86]

Unfortunately, the Court did not clearly state what constitutional grounds it used to strike down the law.[87] Beck argued that the Alabama statute violated the Eighth Amendment as applied to the states through the Fourteenth Amendment, and the Due Process Clause of the Fourteenth Amendment.[88] The Court held in Beck's favor, but it never expressly stated that it relied on either the Eighth Amendment or the Fourteenth

79. *Id.* at 627.
80. *Id.* at 638.
81. *Id.* at 637.
82. *Id.* at 634 (citing Keeble v. United States, 412 U.S. 205, 208 (1973)).
83. *Id.*
84. 430 U.S. 349 (1977).
85. *Beck*, 447 U.S. at 637–38 (citing *Gardner*, 430 U.S. at 357–58).
86. *Id.* at 637.
87. Pattillo, *supra* note 11, at 441.
88. *Id.* at 440.

Amendment in holding the Alabama law unconstitutional. In fact, the only specific constitutional reference appears in a footnote, where the Court said that it would not "decide whether the Due Process Clause would require the giving of such instructions in a noncapital case."[89] As a result, the holding in *Beck* clearly applies to all capital cases, but the opinion seems deliberately unclear about how it should apply in noncapital cases.

2. *Hopper v. Evans* (1982) and *Spaziano v. Florida* (1984)

Two years after *Beck v. Alabama*, the Supreme Court ruled again on lesser-included offenses in *Hopper v. Evans*.[90] Coincidentally, Hopper was convicted under the same Alabama statute that the Supreme Court held unconstitutional in *Beck*.[91] The judge did not instruct the jury on any lesser-included offenses because Hopper's own testimony negated any inference that the crime was anything but capital murder.[92] Therefore, the holding in *Beck* did not apply. An Alabama jury convicted Hopper of capital murder and the Supreme Court affirmed the conviction, holding that "due process requires that a lesser-included offense instruction be given *only* when the evidence warrants such an instruction."[93] Because the evidence did not warrant such an instruction in *Hopper*, it was proper for the trial judge to deny a lesser-included offense instruction. Although the Alabama statute forbidding lesser-included offenses in capital cases was now unconstitutional under *Beck*, the concern about an unwarranted conviction did not exist in this case. The Court affirmed Hopper's conviction because the evidence only supported first-degree murder and not any lesser offenses.[94]

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89. *See Beck*, 447 U.S. at 638 n.14.

90. 456 U.S. 605 (1982).

91. Pattillo, *supra* note 11, at 443.

92. *See id.*; *see also Hopper*, 456 U.S. at 606, 607 ("[Hopper] told the grand jury that [the victim] was not the only person he had ever killed, that he felt no remorse because of that murder, that he would kill again in similar circumstances, and that he intended to return to a life of crime if he was ever freed.").

93. *Hopper*, 456 U.S. at 611.

94. *Id.* at 613. Because the Alabama statute was now unconstitutional, many cases had been reversed and remanded for new trials. In *Hopper*, the Court clarified that only the cases where there was evidence of possible lesser-included

Two years after *Hopper*, the Supreme Court applied *Beck* again in *Spaziano v. Florida*.[95] In that case, the defendant had been charged with first-degree murder, but the statute of limitations had run on all of the lesser-included offenses available under Florida law.[96] The trial judge offered to instruct the jury on several lesser-included offenses, namely, attempted first-degree murder, second-degree murder, third-degree murder, and manslaughter, as long as Spaziano waived the statute of limitations on them.[97] He refused, the jury convicted him of first-degree murder, and he was sentenced to death.[98] Spaziano then appealed, arguing that the Supreme Court should reverse his conviction because *Beck* required the trial judge to instruct on the lesser-included offenses.[99] The Supreme Court held that it was not a violation of *Beck* to submit only the charged capital offense to the jury when the statute of limitations had run on the lesser-included offenses and the defendant had refused to waive the statute of limitations on those offenses.[100]

3. *Schad v. Arizona* (1991)

In *Schad v. Arizona*,[101] the United States Supreme Court once again limited the scope of *Beck* in the lesser-included offense instruction. At the conclusion of his trial for murder during the course of a robbery, the trial judge refused the defendant's request for a lesser-included offense instruction for robbery, and instead instructed the jury on first and second-degree murder.[102] The jury convicted Schad of first-degree murder and the judge sentenced him to death.[103] On appeal, the Supreme Court held that Schad's lesser-included offense instruction on second-degree murder was sufficient to "ensure the verdict's reliability."[104] Therefore, the lesser-included of-

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offenses should be re-tried. *See* Bryars v. State, 456 So. 2d 1122, 1125 n.1 (Ala. Crim. App. 1983) (explaining this point from *Hopper*).

95. 468 U.S. 447 (1984).
96. *Id.* at 450; *see* Pattillo, *supra* note 11, at 444.
97. *Spaziano*, 468 U.S. at 450.
98. *Id.* at 450–52.
99. *Id.* at 452.
100. *Id.* at 456–57; *see also* Pattillo, *supra* note 11, at 445.
101. 501 U.S. 624 (1991).
102. *Id.* at 629.
103. *Id.*
104. *Id.* at 648.

fense instruction on robbery was unnecessary. The Court emphasized that the main concern in *Beck* was that a jury might be convinced that the defendant had committed some violent crime, but not convinced that he was guilty of the charged capital crime,[105] yet still find the defendant guilty of the capital conviction if the only other alternative was to let the defendant go free with no punishment at all.[106] As the Court stated, "The goal of the *Beck* rule . . . is to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence."[107] In *Schad*, the jury was not faced with that choice because they considered the second-degree murder charge as well. The Supreme Court also emphasized that instructing the jury on a random offense "without any support in the evidence" would not necessarily satisfy *Beck*.[108]

4. *Hopkins v. Reeves* (1998)

After *Schad*, the Supreme Court addressed lesser-included offenses again in *Hopkins v. Reeves*.[109] In *Hopkins*, a jury convicted the defendant of felony murder under Nebraska law.[110] During the trial, the defendant requested lesser-included offense instructions on both second-degree murder and manslaughter. The trial judge, however, refused to instruct the jury on those two offenses because the Nebraska Supreme Court had consistently held that second-degree murder and manslaughter were not lesser-included offenses of felony murder, but completely separates offenses.[111] The United States Supreme Court upheld the conviction, holding that *Beck* does not require state trial courts to instruct juries on offenses,

105. *Id.* at 646.
106. *Id.*
107. *Id.* at 646–47 (citing Spaziano v. Florida, 468 U.S. 447, 455 (1984)).
108. *Id.* at 648.
109. 524 U.S. 88 (1998).
110. *Id.* at 91 ("Under Nebraska law, felony murder is a form of first-degree murder and is defined as murder committed 'in the perpetration of or attempt to perpetrate' certain enumerated felonies . . . ." (citing NEB. REV. STAT. § 28-303 (1995)).
111. *Id.* at 95 (citing State v. Price, 562 N.W.2d 340, 346 (Neb. 1997); State v. Masters, 524 N.W.2d 342, 348 (Neb. 1994); State v. Ruyle, 452 N.W.2d 734, 742–43 (Neb. 1990); State v. McDonald, 240 N.W.2d 8, 15 (Neb. 1976); Thompson v. State, 184 N.W. 68 (Neb. 1921); Morgan v. State, 71 N.W. 788, 794–95 (Neb. 1897)).

which, under state law, are not lesser-included offenses of the charged crime.[112]

The Court clarified the holding in *Beck* and distinguished it from *Hopkins*. In *Beck*, the Alabama statute recognized the existence of lesser-included offenses for felony murder and expressly prohibited a trial court from giving instructions on lesser-included offenses in capital crimes.[113] In Nebraska, manslaughter and second-degree murder were not lesser-included offenses of felony murder.[114] Also, a trial judge could give lesser-included offense instructions in capital cases as long as the parties requested them. The statute merely prohibited the trial court from giving instructions on crimes that were not defined as lesser-included offenses in the criminal code.[115] Furthermore, the Nebraska law did not distinguish between capital and non-capital cases in its requirements for providing a lesser-included offense instruction.[116] Lastly, in *Beck*, under the Alabama statute, the death penalty was automatically tied to conviction of a capital offense.[117] Therefore, the jury knew that it was ruling on a capital offense and knew that a guilty verdict would mean that Beck would get the death penalty. In *Hopkins*, however, under Nebraska sentencing law, a finding of guilt would not necessarily result in the death penalty. In fact, the jury "was specifically instructed that it 'had no right to take into consideration what punishment [the defendant] may or may not receive in the event of his conviction or . . . acquittal . . . .'"[118] The Court limited this final distinction in a footnote, reserving judgment on "whether that difference alone would render *Beck* inapplicable."[119]

From these five Supreme Court cases, one can discern several important points about lesser-included offenses and the All-or-Nothing Doctrine. First, the Court's main concern in mandating lesser-included offenses in death penalty cases is to protect an accused from the risk that the jury might ignore the "beyond a reasonable doubt" standard in cases where they only

112. *See id.* at 96.
113. Beck v. Alabama, 447 U.S. 625, 629 n.3 (1980).
114. *Hopkins*, 524 U.S. at 96.
115. *Id.*
116. *Id.*
117. *See Beck*, 447 U.S. at 639 n.15.
118. *Hopkins*, 524 U.S. at 98 (citing the instruction given to the jury at trial).
119. *Id.* at 99 n.7.

have two options.[120] Second, if there is no evidence of a lesser-included offense, there need not be a "third option" given to the jury.[121] Third, there is no requirement for a court to instruct on any offenses that are not as a matter of law, lesser-included offenses of the charged offense.[122] Fourth, a court need only provide a third non-capital option, not every lesser-included offense that exists under the law and has support in the evidence.[123] Lastly, it is still unclear whether, under the Constitution, a defendant must get a lesser-included offense instruction in a non-capital case. As discussed below, the federal courts of appeals have split in their application of *Beck* in the non-capital context.

B. The Current Circuit Split and Holdings in Non-Capital Criminal Cases

In *Beck v. Alabama*, the United States Supreme Court reserved judgment as to whether there was a due process right to a lesser-included offense instruction in a non-capital context.[124] In the federal circuit courts of appeals, three approaches have unfolded since *Beck* in deciding whether there is actually a constitutional due process requirement of a lesser-included offense instruction in a non-capital case.[125] In the first approach, the courts refuse to extend *Beck* to non-capital cases. The Fifth, Ninth, Tenth, and Eleventh Circuits have held that a state court's failure to instruct on a lesser-included offense in a non-capital case never amounts to a constitutional violation because there is not a "federal constitutional question cognizable under habeas corpus law."[126] In other words, such a failure to

120. *Beck*, 447 U.S. at 637.

121. Hopper v. Evans, 456 U.S. 605, 611 (1982).

122. *Hopkins*, 524 U.S. at 96.

123. Schad v. Arizona, 501 U.S. 624, 648 (1991).

124. *See Beck*, 447 U.S. at 638 n.14.

125. Robertson v. Hanks, 140 F.3d 707, 710 (7th Cir. 1998); Lattimore v. Dubois, 152 F. Supp. 2d 67, 90 (D. Mass. 2001) (outlining tests used in other circuits).

126. *Robertson*, 140 F.3d at 710 (citing Chavez v. Kerby, 848 F.2d 1101, 1103 (10th Cir. 1988)). For other cases stating that there is no constitutional right to a lesser-included offense instruction under the Due Process Clause, see Valles v. Lynaugh, 835 F.2d 126, 127 (5th Cir. 1988); Perry v. Smith, 810 F.2d 1078, 1080 (11th Cir. 1987); Bashor v. Risley, 730 F.2d 1228, 1240 (9th Cir. 1984). *See also* Solis v. Garcia, 219 F.3d 922, 929 (9th Cir. 2000); Windham v. Merckle,

instruct will not constitute a ground for appeal to the federal courts. The Second and Fourth Circuits also follow the first approach, but have applied a different reasoning. Under the view of these two circuits, requiring lesser-included offense instructions, under *Beck*, in a non-capital case would require announcing a new, retroactive, constitutional rule of criminal procedure, which is precluded in cases under collateral review that have reached finality in a state court, under the holding in *Teague v. Lane*.[127]

A second approach, followed by the First, Sixth, Seventh, and Eighth Circuits, provides that the failure to instruct the jury on a lesser-included offense in a non-capital case does not violate the Constitution unless the failure to do so amounts to a "fundamental miscarriage of justice."[128] The courts, in establishing this as a very high standard, have defined the term "fundamental miscarriage of justice" as "a fundamental defect [that] inherently results in a miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure."[129]

The Third Circuit, in *Vujosevic v. Rafferty*,[130] is the only circuit to apply the reasoning in *Beck* to cases where the defendant was not facing the death penalty. In that case, Vujosevic did not use the All-or-Nothing Doctrine. Instead, he merely re-

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163 F.3d 1092, 1105–06 (9th Cir. 1998); Trujillo v. Sullivan, 815 F.2d 597, 604 (10th Cir. 1987).

127. 489 U.S. 288 (1989) (holding that new constitutional rules of criminal procedure in cases on collateral review will not be applicable to those cases which have become final before the new rules are announced, therefore preserving some finality in criminal prosecutions); *see* Jones v. Hoffman, 86 F.3d 46, 47 (2d Cir. 1996); Robinson v. North Carolina Attorney Gen., No. 99-7530, 2000 U.S. App. LEXIS 31291, at *2 (4th Cir. Dec. 7, 2000). The Ninth and Tenth Circuits have also used this reasoning as a basis for refusing to extend *Beck* to non-capital cases. *See Windham*, 163 F.3d at 1105–06; Turner v. Marshall, 63 F.3d 807, 819 (9th Cir. 1995); Andrews v. Deland, 943 F.2d 1162, 1186–87 (10th Cir. 1991).

128. *Robertson*, 140 F.3d at 710 (citing Nichols v. Gagnon, 710 F.2d 1267, 1269 (7th Cir. 1983) (quoting United States *ex rel.* Peery v. Sielaff, 615 F.2d 402, 404 (7th Cir. 1979)); *see, e.g.*, Sloan v. Gramley, No. 98-1011, 2000 U.S. App. LEXIS 8815, at *15 (7th Cir. May 1, 2000); Tata v. Carver, 917 F.2d 670, 671 (1st Cir. 1990); Bagby v. Sowders, 894 F.2d 792, 797 (6th Cir. 1990); Pitts v. Lockhart, 911 F.2d 109, 112 (8th Cir. 1990) ("Fail[ing] to give a lesser-included offense instruction rarely, if ever, presents a constitutional question."); Nichols v. Gagnon, 710 F.2d 1267, 1269 (7th Cir. 1983); DeBerry v. Wolff, 513 F.2d 1336, 1338 (8th Cir. 1975).

129. *Bagby*, 894 F.2d at 797 (citing Hill v. United States, 368 U.S. 424, 428 (1962)); *see also Tata*, 917 F.2d at 671.

130. 844 F.2d 1023, 1027 (3d Cir. 1988).

quested that another lesser-included offense instruction for aggravated assault be given along with the other instructions for murder, aggravated murder, and manslaughter.[131] The judge refused to give the aggravated assault instruction because Vujosevic was clearly involved in the victim's death. A jury convicted the defendant of aggravated murder and sentenced him to twenty years in jail.[132] When the case reached the Third Circuit, the court specifically stated that it would apply *Beck* and require lesser-included offense instructions in non-capital cases.[133] The court reasoned that *Beck* was "based on the risk that a defendant might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because the jury wishes to avoid setting him free."[134] Because that risk was present (despite the presence of two other options besides murder and not guilty), and the evidence supported such an instruction, the Third Circuit held that it was error for the trial judge to refuse the lesser-included offense instruction for aggravated assault.[135] Despite some subsequent questioning of the validity of this reasoning in light of the Supreme Court's later holding in *Schad v. Arizona*, *Vujosevic* has not been overruled.[136]

The D.C. Circuit has not yet heard a case involving the All-or-Nothing Doctrine in a non-capital context. Thus, aside from the Third Circuit, it appears that the remaining federal circuits agree that *Beck* should not apply in the non-capital context, but disagree as to why this should be the case. The Third Circuit's rule, although far more restrictive than the rules in *Beck* and *Schad*, provides the most protection for criminal defendants and also protects the integrity of the jury's fact-finding process. Although the Supreme Court has not addressed this circuit split yet and may well agree with the Third Circuit, the case for a constitutional due process right to a lesser-included offense in

131. *Id.* at 1026.
132. *Id.*
133. *Id.* at 1027.
134. *Id.*
135. *Id.*
136. The Third Circuit, in *Geschwendt v. Ryan*, 967 F.2d 877, 884 n.13 (3d Cir. 1992), questioned whether *Vujosevic* was still good law in light of *Schad v. Arizona*, 501 U.S 624 (1991), but declined to rule definitively. *See also* Kontakis v. Beyer, 19 F.3d 110, 119 n.14 (3d Cir. 1994) (also questioning the validity of *Vujosevic* in light of *Schad*, but declining to decide because there was no evidence of the lesser-included offense).

a non-capital trial is precarious at best. Because it appears unlikely that the federal courts aside from the Third Circuit will abolish the All-or-Nothing Doctrine in criminal trials using the Constitution itself, state legislatures desiring to preserve the integrity of criminal trials in their state will need to pursue a statutory solution where their courts have also refused to extend the *Beck* rationale to non-capital cases.

C. *Federal Rules of Criminal Procedure and the Model Penal Code*

In the federal system, there is no statutory restriction on the use of the All-or-Nothing Doctrine. Under the Federal Rules of Criminal Procedure, Rules 30 and 31 cover the use of lesser-included offenses. Rule 30, which covers jury instructions, does not specifically mention lesser-included offenses.[137] However, several cases interpreting Rule 30 have held that in order to get a jury instruction on a lesser-included offense, the requesting party must show two things. First, the party must show that the greater offense includes all of the elements needed for the lesser offense.[138] This is the Statutory Elements test.[139] Second, the requesting party must show that there is enough evidence for a rational trier of fact to convict on the lesser-included offense and acquit on the greater offense.[140] Under the second applicable rule, Rule 31(c), there is also no bar on the use of the All-or-Nothing Doctrine.[141] This rule merely states that a defendant may be found guilty of any offense "necessarily included in the offense charged . . . ."[142]

The Model Penal Code (M.P.C.) is largely accommodating of the All-or-Nothing Doctrine. Section 1.07(4) of the M.P.C. utilizes the Evidence approach to determine the existence of

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137. FED. R. CRIM. P. 30.

138. United States v. Nichols, 9 F.3d 1420, 1421–22 (9th Cir. 1993) (applying the elements test to FED. R. CRIM. P. 30, where the lesser offense instruction is not given if the lesser offense requires an element not required for the greater offense).

139. Carpenter, *supra* note 3, at 265; Ettinger, *supra* note 21, at 198–203; *see also* discussion *supra* Part I.A.

140. For cases applying the *Keeble* test for FED. R. CRIM. P. 31(c) to FED. R. CRIM. P. 30, see United States v. Bobadilla-Lopez, 954 F.2d 519, 523 (9th Cir. 1992); United States v. Elk, 658 F.2d 644, 648 (8th Cir. 1981); United States v. Busic, 592 F.2d 13, 23 (2d Cir. 1978).

141. FED. R. CRIM. P. 31(c).

142. *Id.*

lesser-included offenses.[143] In addition, if a party requests a lesser-included offense instruction, there is no requirement for the judge to submit the instruction to the jury "unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense."[144] The M.P.C. contains no other language that applies to the All-or-Nothing Doctrine.

As these rules demonstrate, the federal system allows the All-or-Nothing Doctrine within the constraints established in the *Beck* line of cases. The states, however, have taken several different approaches to the All-or-Nothing Doctrine. The next section summarizes the main approaches that state legislatures have taken in dealing with lesser-included offenses and trial strategy.

D. Current State Models for Lesser-Included Offenses

State legislatures have approached the issue of lesser-included offenses and the All-or-Nothing Doctrine in several different ways. Legal scholars have classified and defined these various approaches, which, by their nature, also characterize the range of state legislatures' views about the All-or-Nothing Doctrine—from complete abhorrence to absolute acceptance.[145] This part summarizes the major legislative approaches as a background for a proposed model for the statutory abolition of the All-or-Nothing Doctrine.

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143. *See* MODEL PENAL CODE § 1.07(4) ("An offense is so included when: (a) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged . . . .").

144. MODEL PENAL CODE § 1.07(5).

145. *See generally* Carpenter, *supra* note 3, at 278–91, 306–16. In her article, Professor Carpenter provides a comprehensive discussion of the various models of state approaches to All-or-Nothing in the realm of lesser-included offenses. Her article provides a detailed chart explaining the approach, the states that apply it, and various state statutes and case law cites explaining the rule. My discussion here is an attempt to summarize her definitions of these models to provide a background for selecting a model that state legislatures should follow in remedying the dilemma of the All-or-Nothing Doctrine. I have also adopted Professor Carpenter's naming convention for the various models.

1. The Trial Integrity Approach

The Trial Integrity approach is the complete abolition of the All-or-Nothing Doctrine.[146] In adopting this approach, legislators put the highest value on the trial as a fact-finding process.[147] If the evidence presented at trial warrants a lesser-included offense instruction and if both parties fail to request such an instruction, then the judge must instruct the jury, *sua sponte*, on the lesser-included offenses.[148] By mandating the inclusion of available lesser-included offenses, the legislature wants the jury to choose the verdict that most closely matches the facts of the case.

In jurisdictions adopting the Trial Integrity approach, the main dispute arises over what evidence is sufficient to support an instruction on a lesser-included offense.[149] Some jurisdictions require minimal proof of the existence of a lesser-included offense, while others require substantial proof.[150] Nine states have adopted this approach, though only two, California[151] and Tennessee,[152] have adopted statutes that abolish the All-or-Nothing Doctrine by requiring a lesser-included offense instruction. In the other seven states, the legislatures have not acted, but the state courts have promulgated common law rules to accomplish the same end.[153]

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146. Carpenter, *supra* note 3, at 278.

147. *Id.*

148. *Id.*

149. *Id.* at 279.

150. *Id.* at 280 n.75 (comparing People v. Williams, 940 P.2d 710, 760 (Cal. 1997) ("substantial") with People v. Lemons, 562 N.W.2d 447, 457 (Mich. 1997) ("[R]egardless of degree . . . the court must instruct on 'necessarily included' offenses.")).

151. CAL. PENAL CODE § 1159 (West 1985) ("The jury, or the judge . . . may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged . . . ."); Carpenter, *supra* note 3, at 306.

152. The Tennessee statute states:

> It is the duty of all judges charging juries . . . wherein two (2) or more grades . . . of offenses may be included in the indictment, to charge the jury as to all of the law of each offense included in the indictment, without any request on the part of the defendant to do so.

TENN. CODE ANN. § 40-18-110(a) (1997); *see also* Carpenter, *supra* note 3, at 314.

153. Carpenter, *supra* note 3, at 311–14. The seven common law trial integrity states are: Minnesota, Nevada, New Jersey, North Carolina, Ohio, Oklahoma, and South Carolina. *See* State v. Hoffman, No. 97-721, 1997 Minn. App. LEXIS 1403, at *5–6 (Minn. Ct. App. Dec. 30, 1997); Peck v. State, 7 P.3d 470, 472–73 (Nev. 2000); State v. Rose, 568 A.2d 545, 547 (N.J. 1990); State v. Brantley, 501 S.E.2d 676, 679–80 (N.C. Ct. App. 1998); State v. Raglin, 699 N.E.2d 482, 487–88

2. The Party Autonomy Approach

The majority of states use the Party Autonomy approach.[154] Under this model, the All-or-Nothing Doctrine is an accepted part of the adversarial process.[155] These states place the highest premium on the parties' freedom to pursue their own trial strategies. Because the lesser-included offense doctrine benefits only the parties, only the parties may determine when it should be used.[156] As one court reasoned, "When [both parties] consider it to be in the best interests of their clients not to have an instruction, the court should not override their judgment and instruct on the lesser-included offense."[157]

Under this approach, the burden is on the parties to request a lesser-included offense instruction, so the court has no duty to do so, *sua sponte*, if the parties fail to request one.[158] Also, a defendant who fails to request an instruction on a lesser-included offense may not appeal a trial judge's failure to so instruct.[159] If either party wants a lesser-included offense instruction, the trial judge must give the instruction as long as the evidence exists to support it.[160]

(Ohio 1998); Williams v. State, 22 P.3d 702, 712–13 (Okla. Crim. App. 2001); Cheney v. State, 909 P.2d 74, 90 (Okla. Crim. App. 1995); Brightman v. State, 520 S.E.2d 614, 615 (S.C. 1999). For more detailed discussion of each state's common law treatment of the All-or-Nothing Doctrine, see *infra* notes 215–21.

154. Twenty-five states use the Party Autonomy approach. *See* Carpenter, *supra* note 3, at 306–16.

155. *Id.* at 283.

156. *Id.* at 283–84.

157. *Id.* at 284 (quoting Hagans v. State, 559 A.2d 792, 804 (Md. 1989)); *see also* Skrivanek v. State, 739 A.2d 12, 18 (Md. 1999).

158. Carpenter, *supra* note 3, at 285 (citing State v. Sotelo, 248 N.W.2d 767, 772 (Neb. 1977)); *see also Skrivanek*, 739 A.2d at 19; State v. Gunderson, 936 P.2d 804, 806 (Mont. 1997); *Hagans*, 559 A.2d at 804 ("The better view, we believe, is that the trial court ordinarily should not give a jury an instruction on an uncharged lesser included offense where neither side requests or affirmatively agrees to such instruction."); People v. Aalbu, 696 P.2d 796, 810 (Colo. 1985); State v. Maxwell, 229 N.W.2d 195, 196 (Neb. 1975); State v. Bell, 233 N.W.2d 920, 921 (Neb. 1975).

159. Carpenter, *supra* note 3, at 285 (citing *Hagans*, 559 A.2d at 804).

160. *See, e.g., Hagans*, 559 A.2d at 804; People v. Romero, 694 P.2d 1256, 1269 (Colo. 1985) ("[A] court is not obligated to instruct on a lesser offense unless *either* the prosecution or the defense requests such instruction.") (emphasis added). This is a restatement of the mutuality of right principle. *See supra* note 64; Carpenter, *supra* note 3, at 277.

3. The Hybrid Approach

The Hybrid approach is a combination of the Trial Integrity approach and the Party Autonomy approach.[161] This approach allows the parties to request or refuse lesser-included offense instructions, but also provides a procedural safeguard that gives the trial judge discretion to instruct the jury, *sua sponte*, if the evidence supports such an instruction.[162] An important issue in this model is when a judge's discretion is appropriate in providing a *sua sponte* instruction.[163] As a result, there is significant conflict in Hybrid jurisdictions as to whether an appeal should be successful when a judge has, or has not, intervened and provided an unrequested instruction.[164] Based on these issues, the propriety and the future of the All-or-Nothing Doctrine in these jurisdictions is unclear.[165] Twenty-one states have adopted this approach.[166]

4. Michigan and Nebraska's Combination Approach

Michigan and Nebraska's combination approach allows the All-or-Nothing Doctrine in some criminal charges and not in others. In Michigan, All-or-Nothing is prohibited in first-degree murder cases.[167] For all other crimes, however, Michigan adopts the Hybrid approach.[168] In Nebraska, All-or-Nothing is prohibited in murder and attempted murder charges, but is allowed in all non-murder cases.[169] This dual

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161. Carpenter, *supra* note 3, at 288.

162. *Id.*

163. *Id.* at 289.

164. For a thorough discussion of the problems that have surfaced in Hybrid jurisdictions, see Carpenter, *supra* note 3, at 289–90.

165. *See id.* at 289.

166. *Id.* at 306–16 (providing a roster of the twenty-one states that have adopted this approach).

167. *Id.* at 311 n.183 (citing People v. Jenkins, 236 N.W.2d 503, 504 (Mich. 1975)).

168. *Id.* (citing People v. Chamblis, 236 N.W.2d 473, 477 (Mich. 1975)); *see also* People v. Henry, 236 N.W.2d 489, 492 (Mich. 1975) ("We hold that with the sole exception of first-degree murder cases, failure of the trial court to instruct on lesser included offenses will not be regarded as reversible error, absent requests for such instructions . . . .").

169. Carpenter, *supra* note 3, at 312 n.188 (citing State v. Bock, 512 N.W.2d 389, 392 (Neb. 1994), for allowing All-or-Nothing in non-murder charges and NEB. REV. STAT. § 29-2027 (1995), for the prohibition of All-or-Nothing in murder charges).

system accommodates the holding in *Beck* with respect to capital cases, yet still allows a party to choose an All-or-Nothing Doctrine instruction in cases where the defendant's life is not at stake.

The above five approaches described in this section constitute the range of state laws concerning the All-or-Nothing Doctrine and lesser-included offenses. Part of the beauty of federalism is the broad spectrum of state responses to a particular problem. State legislatures can experiment with different statutory models and apply the principles that are important to their individual constituents. In the case of lesser-included offenses, however, only one approach, the Trial Integrity approach, clearly establishes the standard for those state legislatures that have an interest in preserving the integrity of the outcomes of their criminal trials. Interestingly enough, the states that apply the Trial Integrity approach are diminishing in number.[170]

III. THE "TRIAL INTEGRITY APPROACH": A MODEL FOR STATE LEGISLATION LIMITING THE ALL-OR-NOTHING DOCTRINE

As described in the previous part, the Trial Integrity approach is the legislative abolition of the All-or-Nothing Doctrine for the purpose of preserving the integrity of the trial's outcome. In the Trial Integrity approach, the state legislature has placed a premium on the trial as a search for truth, as opposed to a venue for unabashed pursuit of trial strategy to achieve the ends of the respective parties. The Trial Integrity model is the most appropriate because it ensures that the trial produces the most just result by applying the facts of the case to the appropriate charges, as opposed to letting the All-or-Nothing Doctrine skew the jury's deliberation process. Two states, Tennessee and California, have statutes that achieve this end. These states' statutes provide a helpful model for other jurisdictions to do the same. This part first addresses the reasons why a state legislature should adopt the Trial Integrity approach. Then, this part provides a model statute, based on the Tennessee and California statutes, for other state legisla-

170. Carpenter, *supra* note 3, at 283 n.88 (documenting the shift away from the trial integrity model in Idaho and Kansas).

tures desiring to abolish the All-or-Nothing Doctrine in their jurisdictions.

A. Justifications for the Trial Integrity Approach

For centuries, legal theorists have expounded on the justifications for punishing criminals. These theorists have developed four major theories, namely, retribution, deterrence, rehabilitation, and incapacitation, to explain what society intends to accomplish through punishment.[171] In order for such theories to have any real significance, however, the trial must assign guilt to the proper person, and that guilty person must be punished for the crime that he actually committed. Otherwise, a citizen may be wrongfully punished and then the goals of punishment—retribution, deterrence, rehabilitation, and incapacitation—are meaningless. In addition, the credibility of the state, in its role as enforcer, diminishes with each person wrongfully convicted. Therefore, states must adopt procedures to ensure the integrity of the jury's fact-finding process and the reliability of the trial result. By providing the jury with a third verdict option, the Trial Integrity approach avoids any possible compromise verdicts, thus ensuring the integrity and the reliability of the criminal trial.

Notwithstanding the pursuit of the lofty goal of preserving a trial's integrity, why should a state legislature remove autonomy and discretion from the attorneys and judges who conduct the actual trials? After all, the All-or-Nothing Doctrine has proven to be an effective strategy for both prosecutors and defense attorneys. There are four major reasons why state legislatures should intervene in this area and remove some discretion from the trial attorneys. First, the constitutional question as to whether there is a due process right to a lesser-included offense in a non-capital criminal trial is still unresolved by the courts. The Supreme Court and the federal circuits have been

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171. *See generally* CRIME AND PUNISHMENT: PHILOSOPHIC EXPLORATIONS 312, 317, 356, 418 (Michael J. Gorr & Sterling Harwood eds., 1995); MICHAEL DAVIS, JUSTICE IN THE SHADOW OF DEATH: RETHINKING CAPITAL AND LESSER PUNISHMENTS (1996) (discussing deterrence and prevention as theories of punishment involved in the application of the death penalty); SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 137–65 (5th ed., 1989); C. L. TEN, CRIME, GUILT, AND PUNISHMENT: A PHILOSOPHICAL INTRODUCTION (1987) (discussing utilitarian and retributive theories of punishment and their roles in modern society).

reluctant to say that the answer lies directly in the Constitution. For over twenty years, the courts have struggled with the problem of the All-or-Nothing Doctrine and produced no coherent solution in non-capital cases. Therefore, it is the duty of the state legislatures, not the courts, to establish a public policy and the corresponding rules to preserve the integrity of the criminal trial in their state.

Second, the Supreme Court has said on numerous occasions that death is different and used that difference to provide more procedural safeguards for defendants in capital cases.[172] However, the reasons for requiring lesser-included offense instructions in capital cases, where the evidence exists, also justify an instruction in non-capital cases. While few will disagree that death is, in fact, different than a fine or a prison sentence and therefore justifies more due process safeguards, protecting the reliability of the criminal trial to ensure that the proper person is punished for the proper crime is a just rule regardless of the charge.

Third, state legislatures should adopt the Trial Integrity approach because it provides maximum protection for the criminal defendant in an adversarial system of justice. When the All-or-Nothing Doctrine is at work in the criminal trial, the defendant is always subject to the risk that the jury will forsake the "beyond a reasonable doubt" standard. Therefore, allowing lawyers to gamble with the fate of an accused, under the guise of the adversarial process, is simply inappropriate and unjust.

Fourth, a legislature can preserve the integrity of the trial by making sure that a jury hears all of the charges available, so that it can assign guilt as it sees fit. Juries perform an important role in the trial system and should be able to deliberate fully and assign guilt based on as much information as possible. Abolishing the All-or-Nothing Doctrine allows the jury to perform its duty in the fullest and fairest manner by giving the jury more options than the simple choice between guilty and not guilty. Based on these four justifications, placing a premium on trial integrity over trial strategy and abolishing the All-or-Nothing Doctrine in all criminal cases seems to be a worthy aspiration for legislatures across the country.

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172. *See* Beck v. Alabama, 447 U.S. 625, 637 (1980).

1. The Constitutional Question Is Presently Unresolved By Courts

The Supreme Court has expressly declined to rule on whether *Beck* should apply in a non-capital context, despite the numerous opportunities that have arisen in several federal circuits over the past twenty-one years.[173] The circuits themselves have yet to arrive at a consensus on whether due process requires that *Beck* apply in the non-capital context. With the Third Circuit being the only court to expressly apply *Beck* to non-capital cases,[174] the position that there is a constitutional right to a lesser-included offense instruction in non-capital cases, as advocated by the Third Circuit and other legal scholars, is tenuous.[175]

Although the rule is well established that the All-or-Nothing Doctrine is unconstitutional in capital cases, no clear rule has emerged in the non-capital context. Therefore, it is the duty of the state legislatures to establish a clear rule to allow for predictability and certainty in the trial process. The legislature is arguably the best place for the promulgation of such a rule because the legislators are elected by the people of the state and should be the source of state public policy. Rules preserving the integrity of the trial should be an integral part of that state public policy. Therefore, where the courts have failed to justify the abolition of the All-or-Nothing Doctrine from the existing laws,[176] it is proper for a state legislature to establish a new public policy interest in preserving the integ-

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173. *See, e.g.*, Robertson v. Hanks, 140 F.3d 707, 710 (7th Cir. 1998), *cert. denied,* 525 U.S. 881 (1998); Turner v. Marshall, 63 F.3d 807, 819 (9th Cir. 1995), *cert. denied,* 522 U.S. 1153 (1998); Bagby v. Sowders, 894 F.2d 792, 797 (6th Cir. 1990), *cert. denied*, 496 U.S. 929 (1990); Pitts v. Lockhart, 911 F.2d 109, 112 (8th Cir. 1990), *cert. denied*, 519 U.S. 972 (1996); Trujillo v. Sullivan, 815 F.2d 597, 604 (10th Cir. 1987), *cert. denied,* 484 U.S. 929 (1987); Nichols v. Gagnon, 710 F.2d 1267, 1269 (7th Cir. 1983), *cert. denied,* 466 U.S. 940 (1984).

174. *See* Vujosevic v. Rafferty, 844 F.2d 1023, 1027 (3d Cir. 1988).

175. *See id.*; Pattillo, *supra* note 11, at 432. But see Chao v. State, 604 A.2d 1351, 1359–60 (Del. 1992):

> Beck . . . does not stand for the proposition that the jury in a capital case must as a matter of constitutional law be instructed as to every non-capital lesser included offense that is supported in the evidence. Rather, [Beck] simply mandates that juries be furnished with a "third option" so as to safeguard the reliability of the fact finding process.

176. For a roster of state courts that have found a right to a lesser-included offense and have abolished the All-or-Nothing Doctrine by judicial fiat, see Carpenter, *supra* note 3, at 311–14.

rity of state criminal trials by mandating the inclusion of lesser-included offenses in cases where the evidence supports such instructions.[177] Although several state legislatures have rejected the Trial Integrity approach "out of hand,"[178] state legislatures can remove a major factor contributing to the uncertainty of guilty verdicts in their state's judicial processes by insisting that lesser-included offense instructions be given when supported by the evidence.

2. Is Death Really "Different?"

As the United States Supreme Court said clearly in *Beck*, a failure to give the jury the "third option of convicting on a lesser-included offense would seem inevitably to enhance the risk of an unwarranted conviction. Such a risk cannot be tolerated in a case in which the defendant's life is at stake."[179] Justice Stevens, writing for the majority in *Beck*, justified this conclusion by stating, "[D]eath is a different kind of punishment from any other which may be imposed in this country."[180]

The Court outlined two major reasons why death is, in fact, different from other types of punishment. First, the death penalty "is different in both its severity and its finality."[181] In any other punishment, like fines or confinement, an error, procedural or otherwise, does not involve a "life or death" situation. Second, the government's "action . . . in taking the life of one of its citizens . . . differs dramatically from any other legitimate state action."[182] Therefore, as the Court stated in both *Beck* and *Gardner*, a court's decision to impose the death penalty must be "based on reason rather than caprice or emotion."[183] This philosophy has led the Court to invalidate procedural rules that reduce the reliability of a court's sentencing decision or create a "risk that the death penalty [might] be im-

177. Others have reached the opposite conclusion, arguing that because there is still some judicial debate, the Supreme Court should make a definitive ruling. *See* Hamrick, *supra* note 11, at 1483; Pattillo, *supra* note 11, at 463 (both advocating a judicial remedy).

178. Carpenter, *supra* note 3, at 303.

179. Beck v. Alabama, 447 U.S. 625, 637 (1980).

180. *Id.* (quoting Gardner v. Florida, 430 U.S. 349, 357 (1977)). Presumably, Justice Stevens was referring to fines, confinement, probation, and other common forms of punishment.

181. *Id.* (quoting *Gardner*, 430 U.S. at 357).

182. *Id.* (quoting *Gardner*, 430 U.S. at 357).

183. *Id.* at 637–38 (quoting *Gardner*, 430 U.S. at 357–58).

posed in spite of factors which may call for a less severe penalty."[184] The Court had previously invalidated other procedural rules because they "diminish the reliability of the sentencing determination" and it applied "the same reasoning . . . to rules that diminish the reliability of the guilt determination."[185] The majority in *Beck* concluded that the procedural rules preventing the instructing of a lesser-included offense in a capital case created this risk of a death sentence in spite of facts calling for a less severe penalty. The Court also concluded, however, that it "need not and do[es] not decide whether the Due Process Clause would require the giving of [lesser-included offense] instructions in a noncapital case."[186]

The United States Supreme Court has expressed its opinion that the death penalty is the "ultimate punishment," along with concerns about its application, in numerous other holdings.[187] Indeed, no other criminal penalty is as final as death. Yet the concerns that Justice Stevens expressed in *Beck* are the same kinds of concerns that all governments should have in deciding how to punish any criminal. Specifically, that means imposing a punishment based on reason, not "caprice or emotion,"[188] and imposing a punishment that is not more strict than absolutely necessary. For example, the Federal Rules of

184. *Id.* at 638 n.13 (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)).

185. *Id.* at 638.

186. *Id.* at 638 n.14.

187. *See, e.g.*, Penry v. Johnson, 532 U.S. 782 (2001) (holding that jury instructions that did not allow jurors to properly consider and give effect to mitigating circumstances, such as mental retardation and physical abuse during childhood, in deciding whether a defendant deserved a death sentence, were a violation of the defendant's Eighth and Fourteenth Amendment rights); Morgan v. Illinois, 504 U.S. 719, 729 (1992) (holding that the Fourteenth Amendment requires the exclusion of a sentencing juror who would always impose the death penalty upon proof of defendant's guilt of a capital offense); McCleskey v. Kemp, 481 U.S. 279 (1987) (holding that statistical evidence of racially disproportionate application of the death penalty is not sufficient to overturn a death sentence when the lower court properly applied Georgia law); Gregg v. Georgia, 428 U.S. 153 (1976) (holding that the death penalty is constitutional as long as there are separate trial and sentencing phases, aggravating circumstances justifying imposition of the death penalty are found by the sentencing court, and the state supreme court has reviewed the sentence and determined that it is not arbitrary or disproportionate); Woodson v. North Carolina, 428 U.S. 280 (1976) (holding that mandatory imposition of the death penalty for certain crimes under North Carolina law is a violation of the prohibition of cruel and unusual punishment in the Eighth and Fourteenth Amendments); Furman v. Georgia, 408 U.S. 238 (1972) (holding that the death penalty, as applied, violates the Eighth and Fourteenth Amendments because it is cruel and unusual punishment).

188. *See Beck*, 447 U.S. at 638.

Evidence protect a criminal defendant from an emotional verdict by prohibiting any evidence that might inflame the jury.[189] In *Beck*, the Court reasoned that rules diminishing the reliability of a guilt determination should be invalidated. This reasoning applies with equal force to both capital and non-capital cases. The procedural requirements protecting criminals from wrongfully imposed death penalties should also be applied to protect criminals in non-capital cases from wrongful, though less severe, punishment resulting from the strategic use of the All-or-Nothing Doctrine. The Supreme Court has failed to do so thus far. Therefore, in order to preserve the integrity of all criminal trials and ensure that all punishment is imposed based on reason, state legislatures should adopt the *Beck* reasoning and invalidate another rule that produces the opportunity for wrongful guilt determinations. By abandoning the strategic use of the All-or-Nothing Doctrine, state legislatures can ensure that more criminal trials, not just those involving the death penalty, are free from the risk of wrongful conviction.

3. The Trial Integrity Approach Provides Maximum Protection for the Criminal Defendant Under the Adversarial System

As described above, lesser-included offenses evolved through the common law as an aid to the prosecution. If a prosecutor could not convince the judge or jury of all of the elements of one particular offense, the criminal would not simply walk away, but would be convicted of a lesser offense.[190] By using the All-or-Nothing Doctrine, though, a prosecutor has the advantage of showing that the defendant did some wrongful act, even if not the charged offense, thereby giving a jury the opportunity to bypass the reasonable doubt standard. The defense also has a strong motive to use the All-or-Nothing Doctrine. Giving the jury an All-or-Nothing choice provides the defense with its own opportunity for an acquittal using the jury's same subjective application of the "beyond a reasonable doubt"

189. FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . .").

190. 3 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 515 n.5 (2d ed., 1982); *see also* Commonwealth v. Woodward, 694 N.E.2d 1277, 1283 n.8 (Mass. 1998).

standard.[191] So, when the law allows the parties to choose whether or not to use the All-or-Nothing Doctrine, each side has something appealing to gain. Not every aspect of the adversarial process is necessarily just, however.

Courts have long recognized the problems resulting from the withholding of a "third option" of a lesser-included offense from the jury.[192] By forcing the jury to choose simply between guilt and innocence, the jury may not accord the defendant the full reasonable doubt standard.[193] Where the jury may have doubts about guilt of the charged offense, "but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction."[194] The Supreme Court, in *Beck*, held that the mere possibility of such a short-circuiting of the reasonable doubt standard made the All-or-Nothing Doctrine unacceptable in death penalty cases.[195]

In non-capital cases, most states and the federal system allow the defendant to use the All-or-Nothing Doctrine as a trial strategy. If the accused chooses to use this strategy, and it backfires, resulting in a conviction of a crime, he is often out of luck. Convicted defendants are usually unsuccessful when they try to appeal a conviction resulting from the strategic use of the All-or-Nothing Doctrine.[196] Most courts, both state and federal, view the risk of conviction for the charged offense as the risk that the defense takes when it uses the All-or-Nothing Doctrine.[197] In *Look v. Amaral*, for example, the First Circuit

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191. *See Woodward*, 694 N.E.2d at 1281.

192. *See, e.g., Beck*, 447 U.S. at 634; Keeble v. United States, 412 U.S. 205, 213 (1973).

193. Of course, if the jury cannot find that the defendant committed any crime "beyond a reasonable doubt," it is just and proper that it return a verdict of "not guilty."

194. *Keeble*, 412 U.S. at 213; *see also Beck*, 447 U.S. at 634 ("[P]roviding the jury with the 'third option' of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard . . . .").

195. *See Beck*, 447 U.S. at 637 ("[F]ailure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.").

196. Carpenter, *supra* note 3, at 285.

197. *See, e.g.*, Hooks v. Ward, 184 F.3d 1206, 1234 (10th Cir. 1999); Look v. Amaral, 725 F.2d 4, 9 (1st Cir. 1984); Chao v. State, 604 A.2d 1351, 1358 (Del. 1992); Hagans v. State, 559 A.2d 792, 804 (Md. 1989); State v. Liner, 391 S.E.2d 820, 825 (N.C. Ct. App. 1990) ("[A] defendant who knowingly, intelligently, and voluntarily waives his right to have the trial judge submit to the jury possible verdicts of lesser included offenses and instructions thereon may not thereafter

stated, "Having gambled and lost [the defendant] may not now complain."[198] Some courts, however, are not so callous. The *Woodward* case demonstrates the problem with the All-or-Nothing Doctrine in many modern criminal trials: "we prefer to let lawyers 'try their cases,' except when we don't like the result . . . ."[199] Ms. Woodward was free to use the All-or-Nothing Doctrine as her trial strategy, but when it backfired on her and her attorneys, the judge stepped in to cure the result. Most criminal defendants are not so lucky.

Professor William T. Pizzi, in his book, *Trials Without Truth*, identifies one of the most essential elements in effective criminal trial reform when he says that "[t]he starting point has to be a trial system that puts far more emphasis on truth, and far less on gambling and winning and losing."[200] The All-or-Nothing Doctrine is a perfect example of a current court gamble, which is inappropriate in a modern democratic justice system because of the chance that the jury might not accord the defendant the full "guilt beyond a reasonable doubt" standard. Such a gamble does not seem problematic when viewed from the prosecution's end: "winning" means getting a conviction and "losing" means not getting that conviction.[201]

When viewed from the other side, however, this gamble strikes at the very heart of a credible and fair justice system. Winning is a clean acquittal. But a "loss" means that the defendant is convicted, and possibly wrongfully so. Defendants

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assign as error on appeal the judge's failure to submit such possible verdicts of lesser included offenses . . . .").

198. *Look*, 725 F.2d at 9.

199. PIZZI, *supra* note 70, at 152.

200. *Id.* at 153.

201. Merely getting a conviction has its problems though. The prosecutor has a duty, not just to get convictions, but to see that justice is done. So, the prosecutor cannot overcharge because this is a violation of his duty as an officer of the court to see that justice is done. *See* STANDARDS FOR CRIMINAL JUSTICE § 3-1.1(c) (1980) ("The duty of the prosecutor is to seek justice, not merely to convict."); STANDARDS FOR CRIMINAL JUSTICE § 3-3.9(a) (1980) ("It is unprofessional conduct for a prosecutor to institute . . . or to permit the continued pendency of criminal charges when it is known that the charges are not supported by probable cause."); STANDARDS FOR CRIMINAL JUSTICE § 3-3.9(e) (1980) ("The prosecutor should not bring or seek charges greater in number or degree than can reasonably be supported with evidence at trial."); *see also* Berger v. United States, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.").

trust their lawyers to make decisions that will help them navigate the justice system, but lawyers simply cannot always predict how the jury will think. Scholars and jurists alike have described the jury as a "black box,"[202] as well as "unpredictable, quixotic, and little better than a roll of dice."[203] Despite the fact that jurors endeavor to do the right thing, their personal values and sentiments sometimes lead them to depart from the rules and instructions governing their behavior in the deliberation room.[204] In using the All-or-Nothing Doctrine, a defense attorney literally throws the outcome of the trial into the jury's hands, trusting that the jurors will conclude that the defendant should be found not guilty of the charge.

The defense attorney employing the All-or-Nothing Doctrine fails to acknowledge several important truths: (1) the jurors rarely have any legal training; (2) the jurors attempt to apply the law, in theory, strictly in accordance with the judge's instructions; and (3) the jurors bring their own individual biases, feelings, and hunches into the jury deliberation room.[205] The All-or-Nothing Doctrine is truly a gamble, with the result resting solely on the impressions of the jury. As the Court in *Beck* stated, "a defendant is entitled to a lesser offense instruction . . . precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory."[206] Theory is precisely what lawyers rely on when making the decision to forego a lesser-included offense instruction. As

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202. Numerous courts and scholars have referred to the jury as a "black box," because in our modern system, no party can watch the jury deliberate. Therefore, no one quite knows how juries come to their decisions. *See, e.g.*, Kevin F. McCarthy, *Foreword* to ROBERT J. MACCOUN, THE INSTITUTE FOR CIVIL JUSTICE, GETTING INSIDE THE BLACK BOX: TOWARD A BETTER UNDERSTANDING OF CIVIL JURY BEHAVIOR, at iii (1987) ("[T]he jury deliberation process remains hidden in a black box, producing outcomes that we can count or classify but tell us virtually nothing about how juries [operate].").

203. Duncan v. Louisiana, 391 U.S. 145, 157 (1968).

204. *See* IN THE JURY BOX: CONTROVERSIES IN THE COURTROOM 96–97 (Lawrence S. Wrightsman et al. eds., 1987); HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 8–9 (1966) ("[C]ritics complain that the jury will not follow the law, either because it does not understand it or because it does not like it, and that thus only a very uneven and unequal administration of justice can result from reliance on the jury . . . .").

205. *See* Penry v. Johnson, 121 S.Ct. 1910, 1922 (2001) ("We generally presume that jurors follow their instructions."); KALVEN & ZEISEL, *supra* note 204, at 5, 8; IN THE JURY BOX: CONTROVERSIES IN THE COURTROOM, *supra* note 204, at 81, 96.

206. Beck v. Alabama, 447 U.S. 625, 634 (1980).

Robert Lee Barnett, Louise Woodward, and many other criminal defendants have found out, jurors' practices will, at times, diverge from theory.[207]

The All-or-Nothing Doctrine is an effective strategy for defendants and their attorneys if they win. But when they lose, defendants will likely appeal what they perceive to be a "wrongful conviction." While their conviction may actually be "wrongful" depending on the facts, every appeal referring to the failure of a court to provide a lesser-included offense comes from a defendant who feels that the system was wrong in allowing the use of the All-or-Nothing strategy.[208] Most of these appeals, however, are unsuccessful "ineffective assistance of counsel" claims.[209]

Lesser-included offenses benefit all of the parties and can protect a defendant from the risks inherent in the All-or-

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207. *See* Barnett v. Godinez, No. 93-2011, 1995 U.S. App. LEXIS 16614, at *13 (7th Cir. July 6, 1995); Commonwealth v. Woodward, 694 N.E.2d 1277, 1281 (Mass. 1998); *see also* KALVEN & ZEISEL, *supra* note 204, ch. 5 (describing studies demonstrating the magnitude of difference in verdicts between judge and jury trials).

208. Due to the concept of "double jeopardy," a prosecutor cannot bring an appeal from an acquittal. Therefore, any appeal that concerns a lesser-included offense issue would have to come from a defendant who was convicted. There are numerous cases that appeal, in some form, the failure to provide a lesser-included offense instruction. *See, e.g.*, Bryson v. Ward, 187 F.3d 1193 (10th Cir. 1999), *cert. denied*, 598 U.S. 1058 (2000); Tata v. Carver, 917 F.2d 670 (1st Cir. 1990); Gilson v. State, 8 P.3d 883 (Okla. Crim. App. 2000).

209. The strategic use of the All-or-Nothing Doctrine will generally not provide grounds for an ineffective assistance of counsel claim. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (establishing the standard for an ineffective assistance of counsel claim by saying, "[f]irst, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense."); Cooper v. Calderon, 255 F.3d 1104, 1108 (9th Cir. 2001) ("A petitioner seeking habeas relief based on the ineffective assistance of counsel must show (1) that the counsel's representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability . . . that but for the counsel's unprofessional errors the result of the proceeding would have been different.") (citing *Strickland*, 466 U.S. at 688, 694); *see, e.g., Barnett*, 1995 LEXIS 16614, at *5–13; Kubat v. Thieret, 867 F.2d 351, 364–65 (7th Cir. 1989) ("The decision not to request a lesser included offense instruction falls within the wide range of reasonable professional representation.") (quoting Woratzeck v. Ricketts, 820 F.2d 1450, 1455 (9th Cir. 1987)); *see also* Carpenter, *supra* note 3, at 286–87 (citing several cases describing ineffective assistance of counsel versus trial strategy). *But see* United States *ex rel.* Barnard v. Lane, 819 F.2d 798, 804–05 (7th Cir. 1987) ("The spectrum of counsel's legitimate tactical choices does not include abandoning a client's only defense in the hope that a jury's sympathy will cause them to misapply or ignore the law they have sworn to follow.").

Nothing gamble. As the Maryland Supreme Court observed in *State v. Bowers*:

> The [lesser-included offense] doctrine is a valuable tool for defendant, prosecutor and society. From a defendant's point of view, it provides the jury with an alternative to a guilty verdict on the greater offense. From the prosecutor's viewpoint, a defendant may not go free if the evidence fails to prove an element essential to a finding of guilt on the greater offense. Society may receive a benefit because, in the latter situation, courts may release fewer defendants acquitted of the greater offense. In addition, the punishment society inflicts on a criminal may conform more accurately to the crime actually committed if a verdict on a lesser included offense is permissible.[210]

As a matter of public policy, legislatures should require that a defendant be given a lesser-included offense instruction that the evidence supports, and take the All-or-Nothing choice away from the jury. By allowing the jury to fit the evidence into a set of charges using the "beyond a reasonable doubt" standard, a legislature can force lawyers and judges to preserve the integrity of the modern criminal trial and provide the maximum amount of protection to criminal defendants in the adversarial system.

4. In Order To Perform Their Assigned Role in the Judicial System, Juries Should Make Their Decision Based On All Charges Available

Juries perform an essential function in our current trial system. Made up of members of the community, juries provide a sense of security to the community at large and also add credibility to the justice system.[211] Many jurists and legal scholars have extolled the institution of the jury, as well as the jurors' competence in assigning culpability.[212] Juries have also

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210. State v. Bowers, 709 A.2d 1255, 1260 (Md. 1998) (quoting Hagans v. State, 559 A.2d 792, 801 (Md. 1989)).

211. "[T]he function of the jury is not only to protect the individual rights of the accused, but to secure community confidence in the judicial system." PRACTISING LAW INSTITUTE, THE JURY: TECHNIQUES FOR THE TRIAL LAWYER 56 (1983) (citing *In re* Murchison, 349 U.S. 133, 136 (1955); Warren Burger, *The State of the Judiciary*, 56 A.B.A. J. 929, 934 (1970)).

212. As the Supreme Court stated in one case:

faced intense criticism and some citizens fear the trial by jury, preferring instead the trained, accountable, and unbiased trial judge.[213] Nevertheless, the right to trial by jury is a fixture in the criminal justice system in the United States, and courts and legislatures should not tie the hands of the jurors.

In an All-or-Nothing scenario, where the evidence suggests neither complete guilt nor complete innocence, the jurors are not allowed to apply the law to the facts as they see them. Instead, they must choose the lesser of two evils—one of two verdicts, neither of which truly fits. In some cases, the jury will know that the crime committed by the defendant does not meet all of the elements of a charged offense, yet convict anyway because it fears setting the defendant free entirely. This is precisely the fear that Justice Stevens expressed in *Beck* when he speculated that a jury might resolve its doubts in favor of a conviction.[214] This problem still exists in every jurisdiction that allows the All-or-Nothing Doctrine as a trial strategy. There are extensive procedures, including the voir dire process and rules prohibiting inflammatory evidence, to ensure that juries will be fair and impartial. The system should also provide the jury with at least one lesser-included offense, where the evidence supports it, to allow the jury to fairly apply the law to the facts without having to choose the lesser of two evils.

> [Juries provide a] safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge . . . . [J]uries do understand the evidence and come to sound conclusions . . . serving some of the very purposes for which they were created and for which they are now employed.

Duncan v. Louisiana, 391 U.S. 145, 156–57 (1968); *see also* SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE COMMON LAW (1765), *quoted in* MORRIS J. BLOOMSTEIN, VERDICT: THE JURY SYSTEM 24 (1972) ("[A] competent number of sensible and upright jurymen . . . will be found . . . the surest guardians of public justice. [The jury system] preserves in the hands of the people that share which they ought to have in the administration of public justice . . . .").

213. *See, e.g.*, RICHARD B. MORRIS, FAIR TRIAL, at xi (1953) ("Once hailed as a palladium of personal liberty, the jury is now feared as an irresponsible group who give no reasons for their verdict. Significantly, in those states where waiver of jury trial is permitted, the accused eagerly grasp at the opportunity of not being tried by their peers.").

214. Beck v. Alabama, 447 U.S. 625, 637 (1980).

B. Current Statutory Models for "Trial Integrity" Legislation

Several states prohibit the All-or-Nothing Doctrine in their court systems. Most of these states rely on their state common law, where the highest court in the state has announced a rule prohibiting the practice. This is the case in Minnesota,[215] Nevada,[216] New Jersey,[217] North Carolina,[218] Ohio,[219] Oklahoma,[220] and South Carolina.[221] Two states, however, have directly abolished the All-or-Nothing Doctrine through legislation. California Penal Code section 1159 states that "The jury, or the judge . . . may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged."[222] The California courts have interpreted this language to prohibit the All-or-Nothing Doctrine.[223] The Ten-

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215. *See* State v. Malzac, 244 N.W.2d 258, 260 (Minn. 1976); State v. Hoffman, No. 97-721, 1997 Minn. App. LEXIS 1403, at *5–6 (Minn. Ct. App. Dec. 30, 1997); State v. Kobow, 466 N.W.2d 747 (Minn. Ct. App. 1991); *see also* Carpenter, *supra* note 3, at 311.

216. *See* Peck v. State, 7 P.3d 470, 472–73 (Nev. 2000) (overruling the Moore v. State, 776 P.2d 1235, 1238 (Nev. 1989), line of cases and requiring only necessarily-included offense instructions and not instructions on lesser-related offenses); *see also* Lisby v. State, 414 P.2d 592, 594 (Nev. 1966) ("[T]o determine whether an offense is necessarily included in the offense charged, the test is whether the offense charged cannot be committed without committing the lesser offense."); Carpenter, *supra* note 3, at 312.

217. State v. Rose, 568 A.2d 545, 546 (N.J. Super. Court. App. Div. 1990); State v. Choice, 486 A.2d 833, 834–35 (N.J. 1985); *see also* Carpenter, *supra* note 3, at 312.

218. State v. Brantley, 501 S.E.2d 676, 679 (N.C. Ct. App. 1998); State v. Ward, 455 S.E.2d 666, 671 (N.C. Ct. App. 1995); State v. Bullard, 389 S.E.2d 123, 124 (N.C. Ct. App. 1990); State v. Chambers, 280 S.E.2d 636, 639 (N.C. Ct. App. 1981); *see also* Carpenter, *supra* note 3, at 313; Hamrick, *supra* note 11, at 1470.

219. State v. Raglin, 699 N.E.2d 482, 487–88 (Ohio 1998); State v. Williams, 660 N.E.2d 724, 730 (Ohio 1996); *see also* Carpenter, *supra* note 3, at 313.

220. Williams v. State, 22 P.3d 702, 712–13 (Okla. Crim. App. 2001); Cheney v. State, 909 P.2d 74, 90 (Okla. Crim. App. 1995); Pickens v. State, 885 P.2d 678, 682 (Okla. Crim. App. 1994), *rev'd on other grounds,* 19 P.3d 866 (Okla. Crim. App. 2001), *petition for cert. filed*; Boyd v. State, 839 P.2d 1363, 1367 (Okla. Crim. App. 1992); Hubbard v. State, 817 P.2d 262, 263 (Okla. Crim. App. 1991); *see also* Carpenter, *supra* note 3, at 313.

221. *See* Brightman v. State, 520 S.E.2d 614, 615 (S.C. 1999); State v. Drafts, 340 S.E.2d 784, 785 (S.C. 1986); *see also* Carpenter, *supra* note 3, at 314.

222. CAL. PENAL CODE § 1159 (West 1985).

223. As the California Supreme Court stated:

> "[A] defendant has no legitimate interest in compelling the jury to adopt an all or nothing approach to the issue of guilt." . . . Instructions that fail to inform the jury of its option to convict the defendant of a lesser in-

nessee law is more explicit, stating that "It is the *duty* of all judges charging juries in cases of criminal prosecutions for any felony wherein two . . . or more grades . . . of offense may be included in the indictment, to charge the jury as to all of the law of each offense included in the indictment, without any request on the part of the defendant to do so."[224]

The Tennessee model is an excellent prototype for similar legislation in other states for two major reasons. First, the statute declares that it is a duty of the court to ensure that the All-or-Nothing choice is not given to the jury. By providing that the judge has a duty to keep the All-or-Nothing Doctrine out of the courtroom, the statute emphasizes that the judge has a calling to preserve the integrity of the trial, above and beyond what counsel perceives as being the best strategy. The jury's role is to apply the charges to the facts. If a charge, supported by the evidence, is kept from the jury, jurors are forced to apply charges that may or may not fit the actual crime. The citizens of each state have an interest in ensuring that their trials assign guilt to the proper people for the proper crimes. Those citizens may become frustrated and disillusioned if criminals are continually set free by juries that refuse to convict in the face of overwhelming evidence, or if criminals are wrongfully punished for an offense that does not fit the evidence.[225]

Second, the Tennessee statute expressly defines the lesser-included offenses that are concerned. It only governs in crimes defined as "felon[ies with] two . . . or more grades or classes of offense."[226] The court, therefore, should not be concerned with

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cluded offense shown by the evidence are necessarily incomplete. "Trial courts have a sua sponte duty to instruct regarding lesser included offenses because neither the defendant nor the People have a right to incomplete instructions."

People v. Barton, 906 P.2d 531, 541 (Calif. 1995); *see also* People v. St. Martin, 463 P.2d 390, 394 (Cal. 1970) ("The general rule is that a defendant is entitled upon request to instructions on necessarily included offenses which the evidence tends to prove."); People v. Miller, 117 Cal. Rptr. 491, 494 (Cal. Ct. App. 1974) ("The jury should be instructed upon any lesser included offense shown by the evidence because a defendant . . . has no right to gamble for an acquittal by forcing the jury to take an all or nothing approach."); People v. Blythe, 36 Cal. Rptr. 606, 607 (Cal. Ct. App. 1964) ("There is no doubt that it's the court's duty to instruct on any included offense on which there is evidence . . . .").

224. TENN. CODE ANN. § 40-18-110(a) (1997) (emphasis added).

225. *See* PIZZI, *supra* note 70, at 200–02 (describing America's "crisis of confidence" in the jury system using several well known trials, including those of O.J. Simpson and the Menendez brothers).

226. TENN. CODE ANN. § 40-18-110(a) (1997).

finding all crimes that might fit the evidence. Instead, the trial judge should only consider those offenses with specified statutory classes, like murder, sexual assault, or robbery, which are supported by the evidence. These two features, unique to the Tennessee statute, make it an excellent model for other state legislatures seeking to eliminate the All-or-Nothing Doctrine in their jurisdictions.

C. A Proposed Model for Legislation

Based on the reasoning set out above for adoption of the Trial Integrity model and on the considerations found in the Tennessee lesser-included offense statute, several important elements should be included in a statute that eliminates the All-or-Nothing Doctrine. Legislators considering a statute for their own jurisdiction should consider the features of the following model[227] when drafting legislation that embraces the Trial Integrity approach to lesser-included offenses:

> Where the applicable criminal law statutes provide one or more lesser-included offenses for a particular crime,[228] where the evidence supports conviction on one or more lesser-included offenses,[229] and where both sides fail to re-

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227. The author of this Comment, embracing the most effective aspects of existing codes, drafted this model statute.

228. *See, e.g., id.* ("wherein two . . . or more grades or classes of offense may be included in the indictment"); CAL. PENAL CODE § 1159 (West 1985) ("any offense, the commission of which is necessarily included in that with which he is charged").

229. *See* Schad v. Arizona, 501 U.S. 624, 648 (1991) ("[We do not] suggest that *Beck* would be satisfied by instructing the jury on just any lesser included offense, even one without any support in the evidence."); Hopper v. Evans, 456 U.S. 605, 611 (1982) ("[D]ue process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction."); Campbell v. Coyle, No. 99-3775, 2001 U.S. App. LEXIS 17071, at *20 (6th Cir. Aug. 1, 2001) ("[A] lesser-included offense instruction is therefore not required when the evidence does not support it."); Stouffer v. Reynolds, 168 F.3d 1155, 1171 (10th Cir. 1999); *see also St. Martin*, 463 P.2d at 394; People v. Haney, 58 Cal. Rptr. 36, 42 (Cal. Ct. App. 1967) ("The court is obligated to instruct the jury on every offense included in the charge which the evidence tends to prove."); *Blythe*, 36 Cal. Rptr. at 607; Baker v. State, 315 S.W.2d 5 (Tenn. 1958) ("[W]here there is no evidence to support a lesser included offense and that, therefore, the accused can be guilty only of the greater offense or no offense at all, it is not error to refuse to instruct on the lesser included offenses."); Good v. State, 69 Tenn. 293, 294–95 (1878); Patterson v. State, 400 S.W.2d 743, 746 (Tenn. 1966) ("[A] failure to charge as to all degrees of offenses included in the offense charged in the indictment is not error, where the facts proved clearly do not require it.").

> quest a jury instruction on at least one of the available lesser-included offenses, it is the duty of the trial judge to provide, *sua sponte*, at least one lesser-included offense instruction. Failure to provide at least one lesser-included offense instruction, where the evidence supports its existence, constitutes prejudicial error.

The above language would efficiently and effectively eliminate the strategic use of the All-or-Nothing Doctrine in a particular jurisdiction. Each of the key elements is explained in the following sections.

1. Where the Applicable Law Provides Lesser-Included Offenses for a Particular Crime

The first element of any legislative action abolishing the All-or-Nothing Doctrine should identify exactly what constitutes a "lesser-included offense" so that the statute clearly establishes when it would apply in a criminal trial. This language in the model statute employs the Statutory Elements approach, where the greater charged offense must contain every single one of the elements of a lesser offense, because that approach appears to be the clearest, most direct, and easiest to apply.[230] Lesser-included offenses within this definition are called "necessarily-included" offenses.[231] A state can define its lesser-included offenses however it chooses, and the Statutory Elements test is used here only for simplicity. Although there are very few crimes in the entire state and federal statutory scheme that fit this strict definition, this language clearly avoids Sixth Amendment notice issues, as well as fairness issues, in mandating lesser-related offense instructions.[232] Some

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230. *See* Carpenter, *supra* note 3, at 265; Ettinger, *supra* note 21, at 198–99.

231. *See* CAL. PENAL CODE § 1159 (West 1985); People v. Breverman, 960 P.2d 1094, 1110 (Cal. 1998); People v. Birks, 960 P.2d 1073, 1078 (Cal. 1998) ("[A] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser."); Ettinger, *supra* note 21, at 195–96; *see also* Carpenter, *supra* note 3, at 270. Professor Carpenter advocates prohibiting the All-or-Nothing Doctrine as it relates to necessarily included offenses and allowing the All-or-Nothing Doctrine as it applies to lesser-related offenses. *See id.*

232. *See* Carpenter, *supra* note 3, at 265 (discussing the notice aspects of the Statutory Elements approach); *see also* Peck v. State, 7 P.3d 470, 473 (Nev. 2000)

notable crimes with various grades include homicide, sexual assault, robbery, and some drug offenses.

2. Where the Evidence Supports Such Lesser-Included Offenses

A lesser-included offense should only be required if there is sufficient evidence of the offense to put the issue to the jury. The holding of *Hopper v. Evans* establishes this rule.[233] Therefore, a statute should embody this common law requirement with a clear statement, such as, "where the evidence supports such lesser-included offenses." For example, in a second-degree murder trial, if no evidence supports a finding of manslaughter or criminally negligent homicide, the judge should give only the second-degree murder instruction to the jury. In such cases, the evidence does not support a lesser-included offense charge and the jury must simply decide if the defendant committed second-degree murder under the state definition. In most of these cases, the elements of the crime are clear and the jury must simply decide if the defendant is, in fact, the culprit.[234]

By requiring that evidence of a lesser-included offense be present, the model statute makes the rule unambiguous: if there is no evidence of a lesser-included offense, the judge need not provide a lesser-included offense instruction.[235] In a surprising number of cases, defendants want a lesser-included offense instruction, but do not get it simply because the evidence is not there.[236] Such an instruction is not mandatory under the well-settled law as announced in both *Hopper* and *Schad*.[237] In

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(discussing fairness and reliability problems in mandating lesser-related instructions).

233. 456 U.S. at 605.

234. *See* Carpenter, *supra* note 3, at 292 (describing the "you've got the wrong person" defense).

235. This is well-settled law in both state and federal courts and may not need to be expressly stated. *See, e.g., Schad*, 501 U.S. at 648; *Hopper*, 456 U.S. at 611; *Campbell*, 2001 LEXIS 17071 at *20; *Stouffer*, 168 F.3d at 1171; *St. Martin*, 463 P.2d at 394; *Haney*, 58 Cal. Rptr. at 42; *Blythe*, 36 Cal. Rptr. at 607; *Baker*, 315 S.W.2d 5; *Good*, 69 Tenn. at 293.

236. For examples of appeals that have failed due to lack of evidence of a lesser-included offense, see Solis v. Garcia, 219 F.3d 922, 930 (9th Cir. 2000); Pickens v. State, 19 P.3d 866, 878 (Okla. Crim. App. 2001); Young v. State, 12 P.3d 20, 35–36 (Okla. Crim. App. 2000); Murphy v. State, 26 S.W.3d 502, 505–06 (Tex. Ct. App. 2000).

237. *Schad*, 501 U.S. at 648; *Hopper*, 456 U.S. at 613.

these types of cases, there is no evidence of a lesser-included offense, so it is reasonable to allow the presence of the All-or-Nothing Doctrine.

3. Where Both Sides Fail to Request a Lesser-Included Offense Instruction

Nearly all jurisdictions require that the lesser-included offense instruction be given if either side requests it,[238] but only the Tennessee statute requires that the judge provide the instruction, *sua sponte*, where neither side requests one.[239] The statute should use language, such as, "where both sides fail to request a lesser-included offense instruction," to trigger the trial judge's duties under the law. When neither side requests a lesser-included offense instruction, it becomes plain that their use of the All-or-Nothing Doctrine is either accidental or strategic. In either case, it is at this point in the trial where the judge's duty to preserve the trial's integrity arises. When both sides fail to request a lesser-included offense instruction where the evidence supports one, it is the judge's duty to interject in order to save the integrity of the trial by instructing the jury on a lesser-included offense.

4. Failure to Provide an Instruction Should Be Prejudicial Error

If the above conditions exist and the judge fails to provide a *sua sponte* instruction to the jury on a lesser-included offense, it should be a reversible error. This language in the model statute firmly enforces the duty of the trial judge to give a lesser-included offense instruction, *sua sponte*, where the parties have failed to do it themselves. The result of a trial judge's failure to provide an instruction is unambiguous—that failure constitutes reversible error. Reviewing courts that find that

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238. *See* discussion *supra* Part I.B.1; *see also* Carpenter, *supra* note 3, at 277–78 (citing State v. Keffer, 860 P.2d 1118, 1125 (Wyo. 1993) (mutuality of right doctrine); State v. Selig, 635 P.2d 786 (Wyo. 1981)).

239. *See* People v. Barton, 906 P.2d 531, 532 (Cal. 1995) ("[A] defendant may not invoke tactical considerations to deprive the jury of the opportunity to consider whether the defendant is guilty of a lesser offense included within the crime charged."); TENN. CODE ANN. § 40-18-110(a) (1997) ("It is the duty of all judges charging juries . . . to charge the jury as to all of the law of each offense included in the indictment, without any request on the part of the defendant to do so.").

the jury had an All-or-Nothing choice, when other evidence clearly shows the existence of a lesser-included offense, must reverse the trial court's judgment. This element is not intended to be a trap for the unwary trial judge, but is instead intended to send an unequivocal message to all trial judges that the state legislature is truly concerned about the risk of wrongful conviction when the All-or-Nothing Doctrine is at work. Therefore, the trial judge has a duty to provide an instruction, *sua sponte*, where the evidence exists and the parties fail to request such an instruction.

CONCLUSION

The All-or-Nothing Doctrine is alive and well in America. Despite numerous opportunities since its ruling in *Beck* in 1980, the Supreme Court has not yet ruled on whether *Beck* applies to non-capital cases. Only the Third Circuit and nine other states require that a trial judge provide lesser-included offense instructions, where supported by the evidence, in non-capital cases to protect the defendant from the risk of wrongful conviction.

There are plenty of circumstances where an All-or-Nothing instruction has backfired on the defendant and the jury has returned a conviction that did not fit the crime based on the evidence presented. Although juries are made up of real people who listen to the evidence as presented by both the prosecutor and the defender alike, there is a real risk that they might bypass the "beyond a reasonable doubt" standard and return a guilty verdict in order to keep a defendant, guilty of *some* crime, off of the streets. The *Woodward* and *Barnett* cases are fine examples of the fact that a jury is indeed a black box that can sometimes return unpredictable verdicts.

The trial is an important enforcement mechanism for our society. Citizens, through their legislators, should place a premium on the integrity of that system and the reliability of its outcomes. Convictions, whether they result in death or a small fine, should rest on evidence supporting a particular charge of a violation of a specific statute. To forsake that ideal, in the name of the adversarial process and the freedom of attorneys to choose their trial strategy, is a disservice both to defendants who rely on the All-or-Nothing Doctrine as a trial strategy and to the community relying on the outcomes of their

criminal justice system. Legislatures on the state and federal level should intervene and take this issue away from the courts, where it has not been resolved in a clear and coherent manner. Legislators should enact statutes requiring that the trial judge instruct the jury, *sua sponte*, on lesser-included offenses, where the evidence supports them, if the counsel for both sides fail to request such an instruction. This solution preserves the desired integrity of the trial and the reliability of its outcome. As the model for freedom and democracy in the world, the citizens of the United States should accept nothing less.